

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000047-MR

GRW KENTUCKY, INC.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-01084

DJSJ, INC., F/K/A WISE INDUSTRIES, INC.;
DOUGLAS WISE; JERI M. WISE;
STEPHANIE WISE; THE JERI M. WISE
IRREVOCABLE TRUST AGREEMENT NO. 1;
JERI M. WISE 1998 QUALIFIED ANNUITY
TRUST AGREEMENT, INC.

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

KNOPF, JUDGE: GRW Kentucky, Inc. (GRW) appeals from a summary judgment by the Franklin Circuit Court dismissing its claims against DJSJ, Inc. GRW contends that the trial court erred by finding that its claims against DJSJ were barred by the doctrine of *res judicata*. We agree with the trial court that GRW's

current claims arise from the same indivisible contract as was litigated in GRW's prior action against DJSJ. Hence, we affirm.

On September 16, 1997, GRW entered into a written agreement with Wise Industries, Inc. Under the terms of the contract, GRW would serve as a representative to certain of Wise's customers, including the Budd Company and Dana Corporation. In exchange, Wise would pay GRW a four-percent commission on all parts which Wise sold to the named companies, for as long as the contracted parts were sold to those companies. In addition, the contract also provided that Wise would pay GRW \$10,000.00 per month for consulting services provided by Grant Wilson of GRW.

Within a short time, Wise began to fall behind on its payments under the contract and a dispute arose concerning Wilson's performance of the consulting services. GRW filed suit to enforce the contract.¹ The matter came to a jury trial in January of 2000. At the conclusion of the trial, the jury returned a verdict in favor of GRW, awarding GRW \$950,000.00 in sales commissions due under the contract. However, the jury also found that Wise had properly discharged Wilson on the consulting agreement, and awarded GRW no damages for that claim. In its judgment confirming the jury verdict, the trial court

¹ GRW Kentucky, Inc., et al. v. Douglas Wise, et al., No. 97-CI-01830 (Franklin Circuit Court).

awarded pre-judgment interest to GRW on the sales commissions, calculating interest as follows:

The full amount of the judgment, nine hundred fifty thousand dollars (\$950,000.00) is to be divided by twenty-seven (27) months, being the number of months from and including October 1997 through and including December, 1999, which was the period of time about which the jury heard evidence and upon which the damage award was made. The quotient, thirty five thousand one hundred and eighty-five dollars (\$35,185.00) shall be considered the amount of the monthly commission, said amount first becoming due on November 15, 1997, with the last monthly amount being due on January 15, 2000. The amount of each monthly commission shall bear pre-judgement [sic] interest at the legal rate of (8%) percent compounded annually from the date each payment was due.

Subsequently, GRW filed a motion for additur judgment, seeking to recover additional commissions earned for the months of January and February 2000. The trial court denied the motion and designated its prior judgment as final and appealable and this Court later affirmed the judgment on appeal.² Following the first judgment, GRW filed this action seeking to recover commissions which it claimed were earned after January of 2000. Wise, now DJSJ, filed a motion for summary judgment, arguing that GRW's claims are barred by the doctrine of *res judicata*.

² Wise Industries, Inc., et al. v. GRW Kentucky, Inc., et al., NOS. 2000-CA-001080-MR & 2000-CA-001177-MR (Not-to-be-published opinion rendered October 5, 2001).

The trial court agreed and dismissed GRW's complaint. This appeal followed.

The parties agree on the applicable law. The doctrine of *res judicata* precludes further litigation of issues that were decided on the merits in a prior final judgment. In order for the doctrine to apply, there must be identity of the parties, identity of the causes of action, and the prior action must have been resolved on the merits.³ Furthermore, *res judicata* applies not only to claims which were litigated in the prior action, but also to claims that properly belonged in the subject matter of the prior litigation.⁴

The parties agree that the current action and the prior action share the same parties, involve the same contract and that the prior action was resolved on the merits. But GRW argues that *res judicata* does not apply because the sales representation and commission contract is divisible. Where the contract is one calling for continuous or successive promises by the promisor, all breaches to the date of suit must be included; but those thereafter occurring may be claimed in a later suit.⁵

³ Slone v. R & S Mining, Inc., 74 S.W.3d 259, 261 (Ky. 2002); See also Newman v. Newman, 451 S.W.2d 417, 419 (Ky. 1970).

⁴ Yeoman v. Commonwealth, Health Policy Board, 983 S.W.2d 459, 465 (Ky. 1998); Combs v. Prestonsburg Water Co., 260 Ky. 169, 84 S.W.2d 15 (1935).

⁵ Overstreet v. Greenwell, 441 S.W.2d 443, 446 (Ky. 1969).

GRW asserts that DJSJ is liable for payment of commissions for each month it sells parts to the named companies. Consequently, GRW contends that it could not have brought claims for the commissions earned after January 2000 in the prior action because those claims had not yet accrued.

By contrast, DJSJ argues that the commission contract is indivisible. DJSJ asserts that its obligation to pay commissions is not severable from the consulting provisions of the contract. Since the jury in the prior action determined that Wise properly terminated the consulting contract, DJSJ contends that GRW is barred from raising any claims for future commissions.

The trial court took the position that the contract was to be regarded as a single transaction for purposes of claim preclusion. We agree. In support of its position, GRW relies heavily on the language of the judgment in the prior action, in which the trial court apportioned the \$950,000.00 over the twenty-seven months between the date of the contract and the date of the trial. GRW argues that the judgment demonstrates that each month's commissions were separate and distinct obligations.

However, the trial court used this method to facilitate its calculation of pre-judgment interest. Indeed, the court did not calculate interest based upon the actual

commissions earned for each month, but upon the average of the entire judgment divided over the twenty-seven month term. The prior judgment does not compel a conclusion that the contract's obligations were distinct for each month.

In fact, the language used in the jury instruction in the prior action leads to the opposite conclusion. The jury concluded that under the September 16, 1997, contract, GRW would serve as sales representative and that Wise would pay GRW "a four (4%) percent sales commission on all sales contracts with Dana Corporation and with the Budd Company *for as long as the contracted parts are sold to those companies*" (*Emphasis added*). The instruction does not characterize the sales representation and commissions as a series of discrete transactions, but as a single transaction. The instruction is consistent with the language of the agreement, which provides for an indefinite, rather than a fixed term. Consequently, we agree with the trial court that the prior action determined Wise's liability for the entire sales and representation contract. Therefore, GRW was required to bring its claim for loss of future commissions in that action, and it is barred from doing so now.

Accordingly, the summary judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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