

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001219-MR

CHRIS LAMB;
JODY WILKINS; AND
JUBILEE COMMUNICATIONS,
D/B/A JUBILEE PROPERTIES

APPELLANTS

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
CIVIL ACTION NO. 02-CI-01410

DOBSON CELLULAR SYSTEMS, INC.
AND ACC OF KENTUCKY LLC,
D/B/A CELLULAR ONE AND AMERICAN CELLULAR

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: Chris Lamb, Jody Wilkins, and Jubilee Communi-
cations appeal from an order of the Madison Circuit Court that
denied their motion to amend their counterclaim and granted
Dobson Cellular System's motion for judgment on the pleadings.
We affirm.

Dobson filed a suit against Appellants in the Madison Circuit Court alleging, among other things, causes of action for breach of contract and tortious interference with business relationships. The gist of Dobson's complaint was that Lamb's and Wilkins's employment by Jubilee Communications violated a non-compete agreement Lamb and Wilkins made while they worked for Dobson. Appellants responded with a counterclaim consisting of three allegations: first, that the non-compete contracts were unenforceable; second, that they were entitled to attorney's fees because Dobson's actions were contrary to the "Uniform Trade Secrets Act";¹ and, third, that Dobson's complaint contained false statements, which further entitled them to attorney's fees under Kentucky Rules of Civil Procedure (CR) 11.

The circuit court issued a detailed order granting Dobson's motion for a temporary injunction, making the specific finding that Appellants "have used information obtained while in employ with the plaintiff [Dobson] to identify favorable markets and have already shown a willingness to avoid the prohibitions contained within the [non-compete] agreement by contacting a customer of the plaintiff." Thus, though the trial court suggested that portions of the non-compete contract were too broadly written to be enforceable, the trial court enjoined Appellants from disclosing or using any confidential information

¹ See Kentucky Revised Statutes (KRS) 365.880, et seq.

they discovered while employed by Dobson and, furthermore, from actively soliciting anyone who was a Dobson customer at the time Lamb and Wilkins were employed by Dobson. The trial court later issued a second temporary injunction reaffirming its original findings while denying Dobson's request to order Jubilee Communications to close two of its stores.

Pretrial discovery in the case degenerated as disputes arose followed by contempt motions. At one hearing, counsel behaved so unprofessionally that the bailiff was required to remove counsel from the judge's chambers, which prompted the judge to record on the docket sheet that she "will not rule on any other matters, unless and until counsel is able to conform to civil and professional conduct required by the Court."

Eventually, Dobson moved to dismiss its claims voluntarily. The order granting this motion to dismiss, however, improperly included dismissal of the counterclaim. To correct the record, the trial court vacated the dismissal of the counterclaim. Dobson then moved for judgment on the pleadings as to the counterclaims. Appellants then filed a motion for leave to amend their counterclaim, seeking to add claims for abuse of process, tortious interference with existing business relationships, and tortious interference with prospective business advantage.

A copy of the proposed amended counterclaim that might have been tendered for filing does not appear in the official record as certified by the circuit clerk. Appellants attached to the prehearing statement filed in this Court what purports to be a copy of the proposed counterclaim. Since Dobson has not objected, we will accept that this is the tendered counterclaim for purposes of our discussion. The proposed counterclaim does not appear to incorporate claims contained in the original counterclaim.

The trial court then issued an order granting Dobson's motion for judgment on the pleadings. The trial court found that the counterclaims did not constitute a separate cause of action that remained viable after the dismissal of Dobson's complaint. The trial court later denied Appellants' motion to set aside the order granting Dobson's motion for judgment on the pleadings. Dissatisfied, Appellants filed this appeal.

Before we address Appellants' arguments, we note with disapproval that Appellants' brief is deficient because it does not contain an appendix with a copy of the orders from which this appeal is taken. This is required by CR 76.12(4)(c)(vii). Since the clerk's record of the proceedings in the circuit court contains over 1,000 pages, our review of Appellants' arguments would have been greatly aided had the Appellants followed the civil rules. We have chosen not to impose sanctions, but we

urge Appellants' counsel scrupulously to obey the applicable civil rules in future cases.

Appellants contend that the trial court erred in granting the motion for judgment on the pleadings. Unfortunately, Appellants' brief mainly consists of complaints that Dobson was uncooperative in discovery. Although we do not condone discovery violations, this appeal is not taken from any discovery-related orders. Rather, the sole issue in this appeal is whether the trial court properly granted judgment to Dobson on Appellants' original counterclaim and, further, whether the trial court properly denied Appellants' motion to amend their counterclaim. Thus, any alleged deficiencies in the discovery furnished by Dobson are largely irrelevant.

Appellants argue, correctly, that the trial court's order should have been styled summary judgment instead of judgment on the pleadings because CR 12.03 provides that if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56" It appears that the trial court conducted at least two evidentiary hearings, which the court referenced in her orders granting judgment to Dobson; and, furthermore, the record contains several other matters outside the pleadings, which were not specifically excluded by the trial court, including an affidavit

referenced in the order denying Appellants' motion to set aside the judgment on the pleadings. So we will treat the trial court's dismissal of the claims contained in Appellants' original counterclaim as a summary judgment. And because a court may not issue any type of judgment, either summary or on the pleadings, as to a pleading that was never actually filed, we separately review for abuse of discretion the trial court's decision to deny Appellants' motion to amend their counterclaim.²

In assessing the propriety of the trial court's grant of summary judgment to Dobson, we are mindful of the fact that summary judgment was appropriate only if Dobson showed that Appellants "could not prevail under any circumstances."³ In ruling on a motion for summary judgment, we must view the evidence in the light most favorable to the non-movant.⁴ When we review a trial court's decision to grant summary judgment, we must determine whether the trial court correctly found that there were no genuine issues of material fact.⁵ Since findings

² See, e.g., Graves v. Winer, 351 S.W.2d 193, 197 (Ky. 1961) ("[t]hough CR 15.01 provides that leave to amend 'shall be freely given when justice so requires,' it is still discretionary with the trial court, whose ruling will not be disturbed unless it is clearly an abuse.").

³ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

⁴ *Id.*

⁵ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

of fact are not at issue, the trial court's decision is entitled to no deference.⁶

We will examine each of the three original claims in the Appellants' counterclaim to determine if the trial court properly granted summary judgment as to each. Appellants' first claim was that the non-compete contracts were unenforceable. After conducting hearings on Dobson's two temporary injunction motions, the trial court found that portions of the non-compete contract were enforceable and other portions were not. Appellants have not attacked the propriety of those findings. So those findings are conclusive. Instead, Appellants argue that the temporary injunction findings are irrelevant when considering the merits of a case. Indeed, it is well settled that temporary injunctions are not a proper mechanism to decide the merits of the case.⁷ But the trial court did not decide the ultimate merits of the case when it issued the temporary injunctions. Rather, the trial court chose to enforce portions of the non-compete contract. Since it had already been enforced, Appellants simply could not prove that the non-compete contract was unenforceable. Accordingly, the trial court acted properly in granting summary judgment on Appellants' claims to the contrary.

⁶ *Id.*

⁷ Maupin v. Stansbury, 575 S.W.2d 695, 699 (Ky.App. 1978).

The second claim to be considered is whether the trial court properly granted summary judgment on Appellants' claim that they were entitled to attorney's fees under the Kentucky Uniform Trade Secrets Act. Attorney's fees under that act are governed by KRS 365.886, which states that "[i]f a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party."

Appellants' claim for relief under that statute is riddled with insurmountable obstacles. First, we observe that this section of Appellants' counterclaim is so vague as to be virtually indecipherable.⁸ Second, we seriously question whether

⁸ The entirety of this section of the counterclaim is as follows:

4. That the action filed herein by the plaintiffs [Dobson] and the relief sought herein by the plaintiffs against these defendants [Appellants], is contrary to the "Uniform Trade Secret[s] Act."
5. The plaintiffs[,] in filing this action and seeking the relief against these defendants, are thereby in substantial violation of said "Uniform Trade Secret[s] Act."
6. That because of the blatant violation of the "Uniform Trade Secret[s] Act[,] the plaintiffs are thereby liable to these defendants for damages suffered by these defendants as a result of the aforesaid actions of the plaintiffs under the terms and provisions of the said "Uniform Trade Secret[s] Act[.]"

WHEREFORE, it is requested that the Court enter judgment against the plaintiffs in favor of these defendants awarding damages including attorney fees on account of the plaintiffs' violation of said "Uniform Trade Secret[s] Act."

the Uniform Trade Secrets Act provides a separate cause of action for attorney's fees. In our view, the proper procedure is for a successful party to move for attorney's fees after receiving a favorable judgment on a Uniform Trade Secrets Act claim. But even assuming solely for purposes of discussion that a claim for attorney's fees under the Uniform Trade Secrets Act can stand alone as a separate cause of action, Appellants would not be entitled to attorney's fees unless they were the prevailing parties, which they are not.

The term "prevailing party" is not defined in the Uniform Trade Secrets Act, nor have the appellate courts of this state had occasion to define it in relation to that Act. But BLACK'S LAW DICTIONARY defines a prevailing party as "[a] party in whose favor a judgment is rendered Also termed *successful party*."⁹ Similarly, in construing a federal statute governing the awarding of attorney's fees to a prevailing party, we held that a prevailing party is one who "prevailed on a significant issue involved in the litigation."¹⁰ In the case at hand, the trial court granted judgment to Dobson, not Appellants. And the trial court granted, at least in part, Dobson's motion for a temporary injunction. So it appears to us that Dobson, not Appellants, was a prevailing party.

⁹ BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁰ Walters v. Moore, 121 S.W.3d 210, 215 (Ky.App. 2003).

Consequently, the trial court properly granted summary judgment on Appellants' claims for attorney's fees under the Uniform Trade Secrets Act.

Appellants fare no better under their third cause of action: their claim that they are entitled to be awarded attorney's fees under CR 11. Under CR 11, the court has the authority to sanction any party who files a frivolous, legally unsound pleading. But as with the Uniform Trade Secrets Act claim, CR 11 matters are to be resolved at the close of the litigation by way of a motion, because that rule does not serve as a proper basis for a separate cause of action. In fact, CR 11 specifically provides that "[t]he Court shall postpone ruling on any CR 11 motions filed in the litigation until after entry of a final judgment." Furthermore, Appellants have not shown anything specific in the record which would lead to a conclusion that Dobson's filing of this lawsuit was so legally unsound as to warrant CR 11 sanctions. Indeed, while we express no definitive opinion on the merits of Dobson's voluntarily dismissed claims, the trial court's grant of a temporary injunction to Dobson shows that Dobson's complaint presented at least a colorable claim for relief. Thus, the trial court acted properly in granting summary judgment to Dobson on Appellants' CR 11 claim.

Having determined that the trial court properly granted summary judgment on Appellants' counterclaims, we now turn our attention to whether the trial court abused its discretion when it denied Appellants' motion to amend their counterclaim. Neither the Appellants nor Dobson address this issue in their briefs.

Although couched in terms such as abuse of process and tortious interference with business relationships, an examination of the proposed amended counterclaim reveals that it is, at its core, another claim by Appellants that Dobson's complaint was filed in bad faith and contains material misrepresentations. So for the same reasons discussed earlier, such claims cannot properly lie. And, as noted by the trial court, the case had been pending for over two years at the time the amended counterclaim was tendered and there is no indication that any newly discovered evidence had recently been unearthed which would have excused Appellants' belated motion to amend. So we agree with the trial court's conclusion that "[t]o allow the defendants to amend their counterclaim at this point would be counterproductive and would be unfair to the plaintiffs. The proposed amended counterclaims attack the plaintiffs in several areas in which they have dismissed their own causes of action. This would essentially require them to start the litigation over from the beginning, rehashing issues that they have voluntarily

chosen not to pursue after years of litigation." Accordingly, we find that the trial court did not abuse her discretion when she denied Appellants' belated motion to amend their counterclaim.

For the foregoing reasons, the judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

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