

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001777-MR

BONITA HARDIN

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN R. BERTRAM, JUDGE
ACTION NO. 00-CI-00270

JOHNNIE BURKHOLDER AND OMNI TRAVEL, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: This case is before us for a second time after having been remanded to the Taylor Circuit Court. In our earlier opinion,² we reversed a grant of summary judgment to John Burkholder and Omni Travel Inc. (hereinafter “Burkholder”) on one issue only: whether he had committed the tort of intentional interference with business relationships against his former employee, Bonita Hardin. On remand, the

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Hardin v. Burkholder, 2003-CA-002168 (September 24, 2004).

Taylor Circuit Court again awarded summary judgment to Burkholder on the basis of an affidavit that he submitted. Hardin has appealed, arguing that a genuine issue of material fact remains regarding this claim, and that the circuit court failed to follow the doctrine of the law of the case.

Burkholder is president of Omni Travel, Inc., where Bonita Hardin was employed as a travel agent beginning in September 1998. In the course of her employment she signed an Independent Contractor Agreement, which stated as follows:

Agent will keep any and all client information private and confidential as well as information related to specific sales methods, providers, and techniques used by OmniTravel, Inc. Agent will not contact, for the purposes of soliciting or discussing business, any customers or potential clients of OmniTravel, Inc. All lists, databases, books, records are and shall remain the exclusive property of OmniTravel, Inc.

Hardin's employment at Omni Travel was terminated on March 13, 1999, but she almost immediately found another job as a travel agent at Professional Travel.³

Burkholder subsequently sued Hardin in Taylor District Court, alleging that she had breached the terms of the Independent Contractor Agreement when, as an employee of Professional Travel, she arranged a trip for a former client of Omni Travel. Hardin failed to respond to the complaint, and Omni Travel was awarded a default judgment by the district court in the amount of \$4,000.00.

³ Hardin's brief, and our earlier opinion, use the name Professional Travel. Burkholder's affidavit and brief refer to the agency as Travel Professionals International. For the sake of consistency, we have continued to use Professional Travel to refer to Hardin's subsequent employer.

Hardin then filed a civil complaint in Taylor Circuit Court, essentially alleging that Burkholder had instituted the district court action to punish her. She raised claims of abuse of process, negligent misrepresentation and intentional interference with business relationships. Burkholder was granted summary judgment on all the claims and Hardin appealed. On appeal, we held that the circuit court improperly granted summary judgment to Burkholder on the claim of intentional interference with business relationships, because Hardin's deposition testimony had raised a genuine issue of material fact as to this claim. Hardin testified that Burkholder had called her new employer, Professional Travel, and threatened to sue the company if it hired Hardin. She stated:

[Burkholder] called them [Professional Travel] or sent them a letter stating that, threatening to sue them if they hired me, and I believe she [the owner or manager of Professional Travel] also, now I wouldn't swear to this either, but I believe she said she got a phone call [from Burkholder].

Although Professional Travel did not terminate her employment as a result of Burkholder's alleged communications, Hardin testified that she resigned voluntarily because she felt "embarrassed and humiliated," and she "did not want any more trouble."

Our opinion stated in relevant part as follows:

Omni Travel and Burkholder argued to the circuit court in their summary judgment motion that it had the right to protect its customer list and that the enforcement of the agreement could not be construed as improper interference with business relationships. Further, they argued in their motion that "there is no evidence that Omni Travel, Inc. was acting in anything other than good faith in protecting its

interests under the agreement.” The circuit court accepted this argument.

We conclude that the circuit court erred in accepting Omni Travel’s arguments at face value. The burden was not on Hardin to prove her claim. Rather, the burden was on Omni Travel and Burkholder to show that there was no fact issue in this regard. *See* CR 56.03. Perhaps, a deposition from Burkholder or from the owner or an employee of Professional Travel would have shifted the burden to Hardin. However, the record consisted only of Hardin’s deposition, and her testimony therein was that Burkholder called and /or wrote a letter to Professional Travel threatening to sue it if it hired Hardin. We may not speculate whether Burkholder qualified his alleged threats to Professional Travel to circumstances involving her employment in such a manner as to be in violation of the Independent Contractor Agreement. In short, there remains a fact issue on this claim, at least in the absence of any other evidence except Hardin’s deposition.

The Supreme Court denied discretionary review of the decision. On remand, Burkholder moved that Hardin’s remaining claim be dismissed as a matter of law, or that summary judgment be granted on that remaining claim. In support of his motion, Burkholder attached an affidavit detailing the nature of his contacts with Professional Travel. According to the affidavit, Burkholder’s only contact with Professional Travel occurred after he had received the default judgment of \$4,000.00 against Hardin in Taylor District Court, when he directed counsel for Omni Travel to send an order of wage garnishment to Professional Travel on September 15, 1999. In response he received a letter from Kathy Shaffrick at Professional Travel indicating that Hardin was no longer employed there. Burkholder also admitted in the affidavit that on two occasions, while Hardin was still employed at Travel Professionals, he directed his

counsel to send her letters relating to the Independent Contractor Agreement. The first letter notified her that it was a violation of the agreement to utilize any confidential information and demanded that she cease violating the agreement and threatened suit if any violation was discovered. The second letter related to his allegation that a violation of the agreement occurred when Hardin arranged a trip for a former client of Omni Travel.⁴

The trial court granted summary judgment to Burkholder, explaining that the affidavit had had the effect of shifting the burden of proof to Hardin to present some evidence that Burkholder or a representative had made some contact with Professional Travel which could potentially constitute the basis of a claim of intentional interference with prospective contractual relations. The trial court concluded that “[t]he Plaintiff has failed to come forward with any evidence such as a deposition from a representative of Professional Travel establishing any communication which could be actionable.”

On appeal, Hardin raises two arguments: first, that in granting the second summary judgment, the circuit court had misconstrued the ruling by the Court of Appeals, and thereby violated the doctrine of the law of the case; and second, that Burkholder’s affidavit was an inadequate basis upon which to grant the summary judgment.

⁴ The affidavit states that copies of the letters are attached as exhibits; however, they are not in the record on appeal. “It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

Hardin argues that Burkholder's affidavit ignored the clear directive of the appellate opinion to present some proof of the nature of his contact with Professional Travel. She contends that the affidavit completely ignored this directive because it denies any contact with Professional Travel whatsoever. She claims that the affidavit directly contradicts admissions made by Burkholder prior to the grant of the first summary judgment that he had indeed contacted Professional Travel, but had not committed a tortious act because he was merely attempting to enforce the terms of the Independent Contractor Agreement. She maintains that the trial court's acceptance of the affidavit violates the "law of the case" because our opinion had established that Burkholder had contacted Professional Travel. We disagree with this characterization of the evidence.

There is a distinction, which was clearly drawn by this Court in its first opinion, between Burkholder's attempts to enforce the Independent Contractor Agreement, and Hardin's allegations that he threatened to sue her prospective employer for hiring her. In his earlier pleadings in the case, Burkholder never stated that he had made direct contact with Professional Travel, or what the nature of that contact might be. He did make general admissions that he had attempted to enforce the Independent Contractor Agreement, but he did not specify the means that he used. Nor did we establish as the law of the case that Burkholder had made such contact. As our opinion stated:

the record consisted only of Hardin's deposition, and her testimony therein was that Burkholder called and /or wrote a letter to Professional Travel threatening to sue it if it hired Hardin. We may not speculate whether Burkholder qualified

his **alleged threats** to Professional Travel to circumstances involving her employment in such a manner as to be in violation of the Independent Contractor Agreement.

Moreover, Burkholder's affidavit does not deny that he contacted Professional Travel. It acknowledges that counsel for Omni Travel contacted Professional Travel at Burkholder's behest regarding the garnishment of Hardin's wages, but that this contact occurred **after** she had resigned her position there. It further admits that he directed his enforcement efforts at Hardin herself, again through letters from the company attorney. The trial court's acceptance of the affidavit did not violate the law of the case established by our earlier opinion.

Hardin's second argument is that Burkholder's affidavit simply contradicts Hardin's deposition statements and that therefore a genuine issue of material fact remains as to whether he made any tortious contact with her former employer. Her argument appears to be that each party has now offered countervailing contentions of a purely testimonial nature that should carry equal weight. We disagree. Burkholder's affidavit provided the trial court with additional evidence regarding the specific nature of his contacts with Professional Travel. This evidence shifted the burden to Hardin to produce some affirmative evidence that Burkholder had made general threats, unrelated to the Independent Contractor Agreement, to sue the agency if it hired her.

It has long been recognized that a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.

Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky. 1992) citing *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

The trial court did not, therefore, impermissibly shift the burden of proof onto Hardin as the opponent of the summary judgment motion.

Our earlier opinion suggested that “[p]erhaps, a deposition from Burkholder or from the owner or an employee of Professional Travel would have shifted the burden to Hardin.” On remand, Burkholder provided an appropriate affidavit detailing his actions. Thereafter, the burden shifted to Hardin to provide some further evidence (such as a deposition from an employee of Professional Travel) to support the statements made in her deposition, which were extremely vague.

Although Hardin was given ample opportunity to discover and present such evidence, she has failed to explain why such evidence was not presented, nor did she request a continuance from the trial court in order to obtain such evidence. See *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 631 (Ky.App. 1979). “It is our opinion that it was incumbent upon the plaintiff to make some showing in response to the affidavit that she could produce proof, on the trial, in support of her allegations In order to resist successfully the defendant’s motion and affidavit, the plaintiff was required to show in some way that there would be evidence upon the trial to create a genuine issue of fact[.]” *Tarter v. Arnold*, 343 S.W.2d 377, 379 (Ky. 1961).

An opinion from the old Court of Appeals expressed very clearly the reasons underlying this rule:

The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since “hope springs eternal in the human breast.” The hope or bare belief, like Mr. Micawber’s, that something will “turn up,” cannot be made basis for showing that a genuine issue as to a material fact exists.

Neal v. Welker, 426 S.W.2d 476, 480-81 (Ky. 1968).

The summary judgment granted by the Taylor Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Jonathan R. Spalding
Lebanon, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

John C. Miller
Campbellsville, Kentucky