

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000630-MR

LINDA S. PRATHER

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 02-CI-00391

PROVIDIAN NATIONAL BANK
n/k/a WASHINGTON MUTUAL BANK

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

COMBS, CHIEF JUDGE: Linda S. Prather appeals from a judgment of the Madison Circuit Court in favor of Providian National Bank, n/k/a Washington Mutual Bank, in an action for breach of contract. Prather presents numerous issues for our review: the trial court's exclusion of testimony, its rejection of proposed jury instructions, and the denial of several pre-trial motions. After our review, we affirm.

The procedural history of this case is rather complicated. The matters litigated by the parties entail three related actions addressed to four different courts. A summary of the first stages of the proceedings was included in a decision rendered in July 2006 by another panel of this court. We borrow from that opinion as follows:

On May 18, 1999, Providian filed a civil action in the Madison District Court, seeking to recover a credit-card debt which it alleged that Prather owed. [Action No. 99-C-00323] Prather disputed the debt alleging that the credit-card statements were withheld and, when they were provided, were fraudulently altered and did not reflect accurate information, and that the interest charges and fees were improperly calculated. In November 2001, Prather filed counterclaims against Providian and its attorneys, Weltman [Weinberg & Reis Co., LPA], alleging fraud and breach of contract. Following filing of Prather's counterclaims, the matter was transferred to Madison Circuit Court. [Action No. 02-CI-00391]. During the course of the litigation, a discovery dispute arose between the parties concerning proof of Providian's ownership of the credit-card account. Providian failed to provide such proof as ordered by the court, and on August 25, 2003, the trial court entered an order dismissing with prejudice Providian's claim against Prather.

Around the same time, Prather attempted to file an amended counterclaim against Providian and Weltman, asserting additional claims for fraud, wrongful use of civil proceedings, defamation, and unlawful debt collection practices. The trial court denied the motion to amend, taking the position that the additional claims were more appropriately addressed in a separate action. Thereafter, in August of 2005, Prather filed a new complaint against Providian and Weltman and the several individually named attorneys in the Weltman firm, reasserting her prior causes of action and adding additional counts alleging violation of the Kentucky Consumer Protection Act, malicious prosecution, abuse of process, wrongful use of civil proceedings, defamation, and intentional infliction of emotional distress. [Action No. 04-CI-00995]. Later in 2004, Providian and Weltman had the 2004 action

removed to the United State District Court of the Eastern District of Kentucky. [Civil Action No. 04-432-JBC]. However, the federal court determined that removal of Prather's state-law claims was not warranted, and the court ordered those claims remanded back to the Madison Circuit Court. Upon remand, the trial court ordered the 2004 action consolidated with Prather's 2002 counterclaims.

In an order entered on April 14, 2005, the trial court dismissed the individually named attorneys, and noting the agreement of the parties, also dismissed Prather's Consumer Protection Act claim. On May 18, 2005, the trial court dismissed all of Prather's claims against Providian and Weltman except the [2002] breach of contract claim.

Prather v. Providian National Bank, 2005-CA-001254 (rendered July 7, 2006). The trial court designated its order as final and appealable on June 6, 2005, and Prather appealed to this court. In that first appeal, we reversed the trial court's order dismissing Prather's claims against Providian for wrongful use of civil proceedings and remanded for additional proceedings on the merits of that claim. We affirmed the trial court's order dismissing the remaining claims against Providian and Weltman.

The appeal presently before us concerns the proceedings involving Prather's breach of contract claims against Providian. These proceedings were ongoing at the time of our disposition of the first appeal – as was her claim for wrongful use of civil proceedings (which we presume is still pending before the trial court).

As to the claims for breach of contract, the trial court granted Providian's pre-trial motion and dismissed Prather's claim for damages for the emotional distress that she claimed to have suffered as a result of Providian's alleged breach of contract. Discovery continued until the parties were ready to proceed to trial.

At trial, Prather called as a witness her accounting expert, James Roller. Roller indicated that according to the data and assumptions provided to him by Prather, she had lost in excess of \$1,500.00 as a result of Providian's actions. On cross-examination, Roller freely admitted that he had little or no independent knowledge regarding the underlying facts. He based his computations on Prather's contention that certain charges and payment credits to her account were inaccurate. Roller was not able to verify the underlying information provided by Prather regarding any disputed charges.

Prather also testified. She indicated that she had given unrestricted access to her account to her son in college. She told the jury that she had suffered from memory problems between 1993 and 1995.

Following Providian's presentation of evidence and closing statements, the jury retired to deliberate and quickly returned a verdict in favor of Providian. The jury rejected Prather's contention that Providian had failed to credit her account when payments were made, had permitted unauthorized charges to be billed to her account, had altered statements, and/or had failed to honor her wishes with respect to an insurance product sold with the account. This appeal followed.

Prather argues first that the trial court erred by dismissing her claim for emotional damages resulting from the alleged breach of contract. She contends that the trial court's failure to permit the claim to proceed violates Section 14 of the Kentucky Constitution.

We have consistently held that parties are not entitled to recover damages for mental anguish or annoyance suffered due to a breach of contract. *Robinson v. Western Union Tel.Co.*, 24 Ky.L.Rptr. 452, 68 S.W.656 (1902). “[T]he declared object of awarding [contract] damages is to give compensation for *pecuniary* loss *Id.* at 658. (Emphasis added).

While Section 14 of the Kentucky Constitution guarantees that individuals “shall have remedy by due course of law,” it is construed to provide that a court will be accessible for claims arising from recognized legal injuries and remedies – not that Kentucky courts are required to provide or fashion a remedy for every alleged injury or element of damages. *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). Prather cannot recover contract damages for her alleged emotional distress pursuant to long-established precedent, and the trial court did not err by dismissing that portion of her claim against Providian.

Next, Prather argues that the trial court erred by ignoring the choice-of-law provision included in Providian’s contract. Providian concedes that the agreement provided that New Hampshire law would govern the parties’ disputes.

Under New Hampshire law, Prather contends that every contract contains an implied covenant of good faith and fair dealing. Two days before trial, she sought leave to amend her complaint in order to add a separate claim based on Providian’s “bad faith.” Since we are not persuaded that Prather has been prejudiced by the court’s application of Kentucky law in this proceeding, reversal of the judgment is not justified.

In *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 190 – 193

(N.H.1989), the Supreme Court of New Hampshire summarized the state's rule of implied good faith as follows:

[W]e have relied on such an implied duty in three distinct categories of contract cases: those dealing with standards of conduct in contract formation, with termination of at-will employment contracts, and with limits on discretion in contractual performance.

* * * * *

In our decision setting standards of conduct in contract formation, the implied good faith obligations of a contracting party are tantamount to the traditional duties of care to refrain from misrepresentation and to correct subsequently discovered error, insofar as any representation is intended to induce, and is material to, another party's decision to enter into a contract in justifiable reliance upon it.

* * * * *

[T]he good faith enforced in the second category of our cases is an obligation implied in the contract itself, where it fulfills the distinctly different function of limiting the power of an employer to terminate a wage contract by discharging an at-will employee.

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[The third category of cases are] those governing discretion in contractual performance. . . .

* * * * *

[U]nder an agreement that appears by work or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an

enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion. . . .

The facts and circumstances underlying Prather's action do not fall under any of these enumerated categories. Thus, none of New Hampshire's common law good faith doctrines is implicated.

Prather has not suggested or demonstrated that New Hampshire contract law differs substantively from Kentucky law in any other way. Kentucky law provides that "[i]n every contract, there is an implied covenant of good faith and fair dealing." *Ranier v. Mount Sterling National Bank*, 812 S.W.2d 154 156 (Ky. 1991). That covenant imposes a duty upon the parties to do everything necessary to carry out the purposes and provisions of the contract. *Id.*, citing *Beech Creek Coal Co. v. Jones*, 262 S.W.2d 174 (Ky. 1953). The trial court did not err in refusing to permit Prather to amend her complaint to include any additional cause of action specifically provided under New Hampshire law as it had no meaningful relevance to her claims.

Prather contends that the court erred in omitting and declining to utilize three of her tendered jury instructions. She had asked the court to instruct: (1) that the law does not require mathematical certainty in computing damages; (2) that the jury be apprised of how to determine damages to place her in the same position as if Providian had fully performed the terms of the contract; and (3) that damages be awarded to the extent that Providian had reason to foresee them as a probable result of its breach of the agreement.

The purpose of instructions to a jury is to submit disputed issues of fact for determination. *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979). In this case, there was no uncertainty as to the amount of damages. There was no legitimate issue regarding Providian's ability to foresee damages as a likely consequence of a breach of its agreement. Prather's proposed instructions simply did not relate to any fact at issue in the matter. Prather's accountant had summarized the extent of the damages resulting from the alleged improper charges, incorrect accounting of interest, and failure to apply payments. There was no dispute about whether these damages would have flowed from a breach of the agreement. The trial court did not err by rejecting the tendered instructions.

Prather also argues that the trial court erred by failing to give a missing evidence instruction. She focuses on Providian's inability to produce microfiche from which her statements were produced. She contends that the jury should have been instructed that it could infer fraudulent alteration of her statements as a result of Providian's lack of microfiche evidence. Therefore, she contends that that inability indicated that her statements had been fraudulently altered.

Prather did not raise any issue regarding a fraudulent alteration of her monthly statements through her evidence at trial. As a result, there was no evidentiary dispute which required the trial court to instruct the jury as to permissible inferences from any missing evidence. Thus, there was no error.

Prather next argues that the trial court erred by refusing to permit her to read the deposition testimony of three witnesses. However, the disputed testimony was

not read into the record by way of avowal, and by order of this court entered July 5, 2006, the disputed depositions were excluded from the record on appeal. Given the state of the record, we are precluded from reviewing this alleged error.

Next, Prather contends that the trial court erred by permitting Becky Cull, a manager of the consumer credit division at Providian, to testify as an expert witness. We disagree. Providian properly identified Cull as a potential trial witness and disclosed in timely fashion its expectation that she would provide relevant expert testimony. At trial, Cull identified archival copies of account statements that were sent by Providian to Prather from 1992 through 1998. She explained in detail the process by which credit card transactions initiated by a merchant were handled by Visa and then forwarded to the consumer's bank for processing. She discussed how consumer statements were prepared and why they were provided to consumers.

Cull's specialized knowledge appeared to be based upon her training and experience. Her opinions were relevant and helpful to the jury in evaluating the evidence before it and in determining the facts in issue. Consequently, the trial court did not err by permitting the testimony pursuant to the provisions of Kentucky Rule of Evidence (KRE) 702.

Next, Prather contends that the jury's verdict was contrary to the manifest weight of the evidence and that, therefore, it should be set aside. We disagree. We have carefully reviewed the trial proceedings. While the evidence presented to the jury was conflicting, its verdict in favor of Providian was clearly supported by competent

evidence. *See Burgess v. Taylor*, 44 S.W.3d 806 (Ky.App. 2001). Therefore, it cannot be set aside.

Finally, Prather argues that the trial court erred by excluding certain business records from the evidence. We disagree. Our review of the proceedings indicates that the court instructed Prather to lay a proper foundation for the contested documents before tendering them for admission. As the proponent of the records, Prather was required to comply with the particularized requirements of KRE 902. Since the documents were not properly identified and authenticated pursuant to the rules of evidence, the trial court did not err by excluding them.

The judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

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BRIEF FOR APPELLEE:

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