

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001793-MR

SALLY MILLS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 02-CI-03946

VICLEN, INC., D/B/A NR RESPIRATORY
AND HME; AND LENNIE G. HOUSE

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

MOORE, JUDGE: Sally Mills filed a lawsuit, in Fayette Circuit Court, against her former employer, Viclen, Incorporated, claiming breach of her employment contract and wrongful discharge. She also filed a claim against Lennie G. House, Viclen's Chief Executive Officer, claiming he tortiously interfered with the employment contract that

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

existed between Viclen and Mills. Prior to trial, the Fayette Circuit Court granted summary judgment to House regarding the tortious interference claim. At trial, the court granted a directed verdict in Viclen's favor regarding the wrongful discharge claim. Finally, the court allowed the breach of contract claim to go to the jury. The jury found that Viclen had not violated the employment contract when it fired Mills, returning a verdict in Viclen's favor.

On appeal, Mills argues that the trial court erred regarding its interpretation of the contract. She argues that the trial court erred when it refused to instruct the jury on the implied duty of good faith and fair dealing. She also claims that the trial court erred in granting summary judgment in House's favor regarding the tortious interference claim and in directing a verdict for Viclen regarding the wrongful discharge claim. Finding no error, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Sally Mills began working for Viclen in 2002. Viclen (hereinafter referred to as “Viclen” or “the corporation”) owned and did business as NR Respiratory and HME, acting as a supplier of durable medical equipment. As such, Viclen billed Medicare for reimbursement for equipment it supplied to patients. Lennie G. House and his wife owned Viclen, and House acted as the corporation's Chief Executive Officer (CEO). William A. Bausch was House's attorney and, in 2002, he acted as the Chief Operating Officer (COO) for Viclen; thus, he was Mills's immediate supervisor.

Viclen hired Mills as an independent contractor to audit the corporation's billing records based on her experience and knowledge regarding Medicare billing. Eventually, Viclen hired her as an at-will employee working as the corporation's director. Mills continued to work for Viclen as an at-will employee until August 22, 2002. Viclen claims that Mills was not performing the duties of her job. Rather than summarily terminate her employment, they set forth her employment duties in the contract at issue, executed on August 22, 2002, in an attempt to work with her. The contract set forth Mills's duties as the corporation's director and a list of circumstances that would automatically terminate the contract. However, the written contract did not improve Mills's work habits, according to Viclen. Twenty-six days later, House terminated Mills.

Mills thereafter filed suit against Viclen, House and Bausch. Eventually, Mills filed two amended complaints, refining her claims. In her second amended complaint, Mills claimed her employment contract had been breached, entitling her to the entire salary for the term of the contract including benefits and bonuses. She also claimed that she was wrongfully discharged “because she refused to violate the law by filing false and improper Medicare claims for the Defendants.” Finally, Mills claimed that House and Bausch, as individuals, tortiously interfered with a known contractual right because she refused to violate the Medicare billing laws.

Appellees responded to Mills's lawsuit with a counter claim against Mills. They averred Mills breached a non-competition and non-disclosure agreement she signed and that she had breached the employment contract as well.

After the parties filed their amended pleadings, each filed multiple motions for summary judgment. Eventually, Mills and Bausch reached a settlement, and Bausch was dismissed.

Prior to trial in this case, the trial court reexamined House's motion for summary judgment regarding Mills's claim for tortious interference with a known contractual right. Relying on *McCarthy v. KFC Corp.*, 607 F. Supp. 343 (W.D. Ky. 1985), the trial court noted that Mills acknowledged that, as CEO, House had the authority to terminate her employment. The trial court concluded that when House fired Mills, he was acting as Viclen's CEO. In other words, House was acting as Viclen's agent; therefore, a third party was not involved in Mills's termination, preventing Mills from establishing a necessary element of tortious interference with a known contractual right. The trial court granted summary judgment in House's favor, dismissing the tortious interference claim against him, and dismissing House, as an individual, from the case.

The case proceeded to jury trial only on the issue of whether the contract was breached and if so, what damages should be awarded. After the close of all of the evidence, Mills moved the trial court to reform the contract. Mills argued that paragraph five of the employment contract was illusory.² According to Mills, the contract imposed a year-long duty on her to work for Viclen without imposing any duty on Viclen. However,

² Paragraph five of the employment contract reads, “**Compensation Upon Termination.** Upon the termination of this Agreement for any reason, including the foregoing events, Employee shall only be entitled to receive the salary accrued as of the date of termination or the date that Employee ceases to perform under this Agreement, whichever occurs first.”

Mills argued that the severability clause contained in the contract saved the contract from being declared void. According to her, the severability clause allowed the trial court to excise paragraph five from the contract while leaving the remainder valid and enforceable. The trial court disagreed, denied Mills's motion to reform the employment contract, and found the contract to be valid.

After refusing to reform the contract, the trial court considered Mills's motion for directed verdict regarding Viclen's counterclaims. The trial court construed Viclen's counterclaims as an affirmative defense addressing whether the corporation had appropriate grounds to terminate Mills. The trial court noted that paragraph four, subsection d, set forth a series of individual events that would automatically terminate the contract.³ The trial court decided that the events in paragraph four were not exclusive and

³ Paragraph four, subsection d, of the employment contract reads:

- Termination.** This Agreement shall automatically terminate upon the happening of any one of the following events:
- a. Revocation, Withdraw [sic] or Suspension of Employees [sic] right to act as a biller of either Medicare or Medicaid services.
 - b. Any act of fraud, misappropriation, misrepresentation, embezzlement, slander, liable [sic] or other act of misconduct detrimental to the interests of Employer or any of its affiliates;
 - c. Employee being found to be in violation of rules or regulations governing professional conduct by any professional licensing or certifying body or specialized board having jurisdiction over the Employee;
 - d. Continuing inattention to or neglect of the duties to be performed by Employee, which in attention [sic] is not the result of illness or accident, which causes a material adverse impact on Employer;
 - e. The death of Employee;
 - f. Employee being found guilty of any fraud, misappropriation, embezzlement, theft or other criminal offense, dishonesty or act of misconduct in the rendering of services on behalf of the Employer under this Agreement; and

that, under Kentucky law, an employment contract could be terminated for cause. Mills made no objection to this ruling. After this ruling, the court granted a directed verdict in Mills's favor regarding Viclen's counterclaims, and it concluded that the germane question was whether Viclen was justified under the terms of the contract when it terminated Mills.

After addressing Viclen's counterclaims, the trial court reviewed Mills's wrongful discharge claim. Regarding this, Mills had testified about a controversy over Medicare billing codes, which identify services or products provided to patients. Mills testified that House wanted Viclen's employees to include Medicare billing codes in cover letters Viclen sent to physicians. Mills objected and showed House in the appropriate Medicare billing manual that the use of such codes by a non-physician was prohibited. Mills testified that House had spoken to the Medicare ombudsman who confirmed Mills's opinion that Viclen could not use the codes. Mills testified that House relented in his insistence on using the codes and stated that no cover letters were sent with codes. Given Mills's testimony, the trial court reasoned that the Medicare billing code controversy could not form the basis of Mills's wrongful discharge claim because House agreed with Mills after he conferred with the Medicare ombudsman on the issue.

g. Upon the giving of the 90-day notice of non-renewal of this Agreement prior to the expiration of the Term or any Additional Term, as required pursuant to Section 1 of this Agreement.

Mills also testified and alleged that House told her to bill Medicare even if it was illegal or improper. According to Mills, she refused to submit the alleged illegal billing, and House fired her. Mills further testified that when Violen billed Medicare, the proper billing documents had not been placed in the proper files. She testified that, when Medicare paid Violen as a result of these billings, Violen should have immediately sent the money back to Medicare. According to Mills, the proper documents had to be placed in the proper files before Violen could bill Medicare and, once that was done, Violen should have resubmitted the bills to Medicare. Mills claimed as a basis of her wrongful discharge claim that House's decision to send bills to Medicare while the documents were not in the files was a violation of Medicare billing laws.

Notwithstanding the above testimony, Mills acknowledged that House's actions were in accordance with the Medicare manual; furthermore, it was House's decision when to send Medicare reimbursements back to Medicare. Mills also testified that House had contacted the Medicare ombudsman about billing Medicare while the documents were not in the files, and the ombudsman advised House that the procedure was acceptable. Mills testified that it was proper for House to follow the ombudsman's advice. After analyzing the code controversy and the billing controversy, the trial court concluded that, based on Mills's testimony, there had been no violation of any public policy or statutory scheme; thus, the court granted a directed verdict in Violen's favor regarding wrongful discharge.

The remaining claim from Mills's complaint was the allegation that Viclen had breached the employment contract by terminating her. This claim was submitted to the jury, and the jury found that Viclen had not breached the employment contract, thus returning a verdict in Viclen's favor. This appeal followed.

II. ANALYSIS

It is well-established in the Commonwealth that the construction and interpretation of contracts involve questions of law. *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835-836 (Ky. App. 2000). We review questions of law *de novo* and are not bound to defer to the lower court's interpretation. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

Although Mills presents numerous assignment of error concerning the trial court's interpretation of the contract, upon review we find no error.⁴ The agreement was a valid and binding contract, placing mutual obligations on the parties.

Regarding Mills's claims that the trial court's alleged errors resulted in a limitation of damages available to her, this argument lacks all merit. First, we have already found the contract to be valid. But, second, the jury, as trier of fact, decided that Viclen did not breach the contract. Thus, Mills's arguments regarding damages are wholly moot. Moreover, nowhere in Mills's brief does she challenge the jury's verdict

⁴ Mills claims that the trial court erred when it instructed the jury that the employment contract was valid. However, she never objected to this. Because Mills failed to object, she failed to preserve this issue for appeal and cannot now raise it before us. *See Commonwealth v. Duke*, 750 S.W.2d 432, 433 (Ky. 1988).

regarding the breach of contract claim or challenge the trial court's denial of her motion for a directed verdict regarding that claim.

In her second assignment of error, Mills argues that the contract purported to employ her for one year, but that the corporation could terminate the contract for any reason, either legal or illegal and would only be required to pay Mills as if she were an at-will employee under paragraph five of the contract. According to Mills, this rendered the one-year provision unenforceable. Mills insists that Vielen could either perform or not perform the contract without any legal repercussions which rendered paragraph five of the contract illusory because it lacked mutuality of obligation. Mills insists that because paragraph five is illusory, the entire contract would be void if it were not for the severability clause. According to Mills, the severability clause saves the remaining terms of the contract.

Mills insists that the trial court should have excised paragraph five which would have allowed her to collect wages until Vielen gave her ninety days' written notice that it intended to terminate the contract. Because Vielen never gave such notice, she argues that she was entitled to contract damages from September 17, 2002, until such time that Vielen gave her notice of termination.

Regarding illusory promises, the *Restatement of Contracts 2d* § 77 (2007) states “[a] promise or apparent promise is not consideration if by its terms the promisor . . . reserves a choice of alternative performances” Mills insists that Vielen, as the promisor, had a choice of alternative performances, that is, to perform or not to perform

the contract, because it could terminate the contract at any time. However, this argument ignores paragraph 4, subsection d. Paragraph four sets forth specific events, the occurrence of which would automatically terminate the contract; thus, paragraph four limited Viclen's right to terminate Mills. Thus, contrary to Mills's assertions, Viclen did not reserve the right to either perform or not perform the contract.

Mills argues that the trial court's interpretation of paragraph five allowed Viclen to dismiss her for cause. But, in order to preserve an error for appeal, a party must have objected and have given the trial court the opportunity to rule on the issue. *See Farmer v. Commonwealth*, 6 S.W.3d 144, 147 (Ky. App. 1999). Mills never objected to this ruling so she failed to preserve it for our review.

Additionally, even if she had objected, she was not prejudiced by the trial court's ruling. The trial court made the ruling outside the presence of the jury, and it never instructed the jury that Viclen could have terminated her for cause. Therefore, the jury did not know that it could consider cause as a valid reason for terminating the contract. Moreover, in Viclen's closing argument, it never mentioned termination for cause. It argued that it terminated Mills under the factors set forth in paragraph four, subsection d. Even if Mills had preserved this issue for appeal, it would not have availed her on appeal.

Regarding Mills's jury instruction claims, in the Commonwealth, trial courts are required to instruct the jury on the whole law of the case including “instructions applicable to every state of the case deducible or supported to any extent by the

[evidence].” *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). Additionally, we consider any alleged errors regarding jury instructions to be questions of law; thus, we review such assignments of error *de novo*. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006).

Mills argues that the trial court should have instructed the jury on the implied duty of good faith and fair dealing. To support this proposition, Mills cites *Shreve v. Biggerstaff*, 777 S.W.2d 616 (Ky. App. 1989). Relying on *Shreve*, Mills claims that the trial court was obligated to instruct the jury on good faith.

This assignment of error is without merit. Prior to trial, Mills never asserted in any of her amended complaints that Viclen violated the implied duty of good faith and fair dealing. Additionally, when she asked the trial court to so instruct, she did not point to any evidence adduced at trial that would justify a good faith instruction. In fact, she does not argue before us that the evidence adduced at trial supported such an instruction. Mills's sole support is *Shreve*; however, *Shreve* does not mention the implied duty of good faith and fair dealing. Thus, it does not apply to this case. Because neither the law nor the facts support an instruction on good faith, we conclude that the trial court acted correctly when it refused to instruct the jury on good faith and fair dealing.

As to the trial court's directed verdict decision, we follow the Supreme Court's holding in *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988). When resolving a motion for directed verdict, the trial court must consider all the evidence that is favorable to the non-moving party as true. *Id.* Furthermore, the trial court must consider

neither the credibility nor the weight of the evidence since those functions are reserved for the jury, as the trier of fact. *Id.* In addition, the trial court must consider all inferences that may be reasonably drawn from the evidence in the favor of the non-moving party. *Id.* If a directed verdict would be palpably or flagrantly against the evidence that is favorable to the non-moving party, then the trial court is prohibited from granting a directed verdict. *Id.*

Mills argues that the trial court erred when it granted Viclen's motion for directed verdict regarding her claim of wrongful discharge. Citing *Firestone Textile Company v. Meadows*, 666 S.W.2d 730 (1983), *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985), and *Boykin v. Housing Authority of Louisville*, 842 S.W.2d 527 (Ky. 1992), Mills avers that an employee may sue an employer for wrongful termination if the termination was contrary to a fundamental and well-defined public policy that is “evidenced by a constitutional or statutory provision.” Citing and relying on her own testimony, Mills contends that House ordered her to engage in Medicare fraud based on the codes controversy and the billing controversy. According to Mills, because she refused to violate the law regarding Medicare, House terminated her. Mills argues that the various Medicare statutes regarding billing constitute a clear expression of public policy. Furthermore, she claims that she established the elements of wrongful termination at trial; thus, the trial court should not have directed a verdict on that claim.

The Supreme Court of Kentucky set forth the elements of wrongful discharge in *Grzyb*, 700 S.W.2d at 401,⁵

- 1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
- 2) That policy must be evidenced by a constitutional or statutory provision.
- 3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.

(Citations omitted.) Furthermore, the high Court adopted two exceptions to the need for an employee's discharge to be prohibited by an existing constitutional or statutory provision. *Id.* at 402. First, if the employer's alleged reason for firing the employee was because the employee failed or refused to violate a law during the course of employment, then the employee may maintain a wrongful discharge claim. *Id.* Second, if the employer's alleged reason for firing the employee was because the employee had exercised a right conferred by a well-established legislative enactment, then a wrongful discharge claim may be asserted. *Id.*

Based on Mills's assertions, her claim for wrongful discharge would fall under the first exception because she claimed that House terminated her due to her refusal to illegally bill Medicare. However, at trial, Mills grudgingly admitted that House never

⁵ We pause to note that *Grzyb* dealt with the terminable at will doctrine and was not in the context of an employment contract, such as the case at hand. Nevertheless, because the issue under review deals with allegations that Mills's termination was premised on her refusal to violate the law, we find *Grzyb* highly instructive on the issue at hand. Accordingly, we rely upon it to inform our decision.

ordered her to violate any laws regarding Medicare. She claimed that he fired her due to the Medicare billing code controversy but, as the trial court noted, she testified that after House had consulted with the Medicare ombudsman, House agreed that Viclen could not include the the codes in its cover letters. Additionally, Mills admitted that, after consulting with the ombudsman, House did not order Viclen's employees to use the codes and, in fact, the codes were never used after that. Thus, regarding the code controversy, Mills's own testimony demonstrated that House did not order her to violate the law.

Mills also claimed that House fired her because he allegedly ordered her to illegally bill Medicare. According to Mills, when Viclen billed Medicare without having the proper documents in the proper files, this constituted illegal billing. However, at trial, the trial court noted that Mills had testified that it was House's decision when and how Viclen should bill Medicare. Further, she admitted that House had consulted the Medicare ombudsman about billing Medicare when the proper documents were not in the proper files and the ombudsman advised House that such a billing procedure was not in violation of Medicare law. Finally, Mills testified that it was appropriate for House to rely upon and follow the ombudsman's advice. From Mills's testimony, we can glean that she strenuously objected to House's decision to bill Medicare when the proper documents were not in the files and that she felt such a procedure violated Medicare billing laws. However, she ultimately admitted at trial that such a practice is not illegal. Thus, when House ordered her to bill Medicare in such a fashion, he was not ordering her to violate

the law, regardless of her own beliefs. The evidence supports the trial court's decision that Mills was not terminated for refusing to violate the law.

As to the trial court's decision on summary judgment,

[w]e begin with a general review of the standards for summary judgment. The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” The trial court “must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” While the Court in *Steelvest* used the word “impossible” in describing the strict standard for summary judgment, the Supreme Court later stated that that word was “used in a practical sense, not in an absolute sense.” Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.

Lewis v. B & R Corporation, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted).

Mills argues that the trial court erred when it granted summary judgment in House's favor regarding her claim that he, as an individual, tortiously interfered with a known contractual right. Mills asserts that House tortiously interfered with her employment contract when he fired her. Although her trial testimony is to the contrary,

Mills alleges that House directed her to bill Medicare illegally, demonstrating his “evil intent.” According to Mills, the trial court relied on *McCarthy*, 607 F. Supp. 343, to support its decision that House was acting as Viclen's agent when he fired her; thus, there was no third-party interference, which is one of the elements of tortious interference with a known contractual right. On appeal, Mills insists that House was not acting as the corporation's agent when he fired her. To support this proposition, Mills argues,

[t]he law concerning this matter is broadly accumulated at 72 ALR4th 481. We can glean from that accumulation of cases the rule that an agent of a corporation who causes a contract with another to be terminated by the corporation is acting for the corporation and therefore has not tortiously interfered unless the agent is acting for his own personal interests and not for the benefit for the corporation. (Attached is a list of these cases from 72 ALR 481 fn8.) The rule is if a corporate director, officer or employee who is acting to serve his own interests causes the wrongful termination of a contract by a corporation for whom he or she works then a case of tortious interference may lie.

Mills's brief at 24-25. Mills insists that when House fired her he was acting in his own interests to make more money for himself at the expense of the corporation which was at risk of being convicted for Medicare fraud.

In *Carmichael-Lynch-Nolan Advertising Agency, Inc. v. Bennett & Associates, Inc.*, 561 S.W.2d 99, 102 (Ky. App. 1977), this Court adopted the *Restatement of Torts 2d* § 766 in establishing the elements of tortious interference of a known contractual right. Section 766 reads

Intentional Interference with Performance of Contract by
Third Person

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

A cursory reading of the *Restatement* reveals that to have a successful claim for tortious interference of a known contractual right, three parties must be involved: the one who improperly interfered, in this case, allegedly, House; a third person induced into not performing the contract, in this case, allegedly, Viclen; and the other who suffered loss as a result of the third person's failure to perform the contract, in this case, allegedly, Mills. However, as the United States District Court for the Western District of Kentucky elucidated in *McCarthy*, a corporation can only act through its agents. 607 F. Supp. at 345. The District Court noted that the acts of a corporation's agents constitute the acts of the corporation. *Id.* Thus, when a plaintiff alleges that the agents of a corporation tortiously interfered with a contractual right that existed between the plaintiff and a corporation, no third party was involved because the agents' actions were the corporation's actions. *Id.*

In this case, it is undisputed that House was the CEO for Viclen. Thus, he was Viclen's agent and, as Viclen's agent, his actions were on behalf of the corporation. When House fired Mills, he was acting as Viclen's agent; thus, for all intents and purposes, Viclen, not House, fired Mills. As in *McCarthy*, House cannot be considered a

third party who intentionally interfered with the contractual right that existed between Mills and Viclen.

Mills failed to produce any affirmative evidence to support her theory that House was not acting as Viclen's agent. Absent such evidence, the trial court correctly determined that House had acted as Viclen's agent, and the trial court correctly granted summary judgment in House's favor because Mills could not establish the elements of tortious interference with a known contractual right.

III. CONCLUSION

For the foregoing reasons, we find no error in the trial court's decisions regarding Mills's claims for wrongful discharge and tortious interference of a known contractual right, nor do we find any error regarding Mills's claim for breach of contract. Thus, the judgment entered against Mills is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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