

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002125-MR

DAVID COBB

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE SAM G. MCNAMARA , JUDGE  
ACTION NO. 05-CI-00813

LYLE D. COBB

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY<sup>1</sup>, SENIOR JUDGES.

HENRY, SENIOR JUDGE: David Cobb appeals from orders of the Franklin Circuit Court which granted summary judgment to his brother, Lyle Cobb, in a dispute over a settlement agreement, and assessed damages in the amount of \$44,508.35 against David. Because we agree with the circuit court that there are no genuine issues of material fact, and that Lyle is entitled to judgment as a matter of law, we affirm.

---

<sup>1</sup> Senior Judges David C. Buckingham and Michael L. Henry sitting as special judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

The agreement was intended to resolve the brothers' lengthy conflict over the administration and settlement of the estates of their late parents, Wandell H. Cobb and Pansy M. Cobb. The agreement, which is dated February 5, 2005, provided that David would pay to Lyle the sum of \$325,000.00 by transferring to him a number of shares of stock. The parties agreed that the payment would take the form of a stock transfer in order to avoid the capital gains tax. The agreement was prepared and tendered to David on February 4, 2005, at the office of his attorney. Also present at the meeting were Lyle's attorney and William G. Johnson, a certified public accountant. Lyle was not present. David signed the agreement on the following day. The provision of the settlement agreement which led to the dispute states as follows:

David L. Cobb shall initiate the transfer to Lyle D. Cobb of various shares of common stock heretofore previously identified to the parties in a number and value equivalent to the sum of Three [sic] the sum of Three Hundred Twenty-Five Thousand Dollars (\$325,000.00) on or before Feb. 7, 2005. Said shares have been valued by various stock agents as of Feb. 4, 2005. The transfer shall be completed within 3 days thereafter, but not later than February 10, 2005.

According to David, the last sentence of the provision specifying that the transfer was to be completed by February 10, 2005, was added by Lyle's attorney, but was never initialed by David.

A large portion of the stock that David agreed to transfer to Lyle was Republic Bank stock. Although the agreement specified that the stock transfer was to be initiated on or before February 7, 2005, and the interlined last sentence specified that the

transfer was to be completed by February 10, 2005, the transfer of the Republic Bank stock did not occur until about two months later, with one block of stock transferred on March 1, 2005, and the second on April 22, 2005. David claimed that the delay was due to “technical requirements” and also to his reluctance to transfer the stock until he received the original of the settlement agreement executed by Lyle. The original agreement was eventually sent to his attorney on March 5, 2005.

During the period between February 7, 2005, the date on which the agreement specified that David was to initiate the transfer of the stock, and the dates when the transfer actually occurred, the price of Republic Bank shares declined due to a stock split.

On June 13, 2005, Lyle filed a complaint against David in Circuit Court, alleging that David had breached the terms of the settlement agreement by failing to make the stock transfers in a timely fashion. Although David presumably filed an answer to the complaint, it is not in the record before the Court. Lyle thereafter made a motion for summary judgment.<sup>2</sup> Attached to his supporting memorandum was an affidavit from William G. Johnson, the accountant who had been present at the meeting where the agreement was prepared. It stated in pertinent part as follows (the numbering of the paragraphs has been omitted):

It is undisputed that David L. Cobb identified stock and other assets to be transferred to Lyle Cobb. A majority of this

---

<sup>2</sup> David claims that Lyle filed a motion for summary judgment simultaneously with his complaint. The record indicates, however, that Lyle filed the motion for summary judgment on October 26, 2005, some four months after the filing of the complaint.

transfer was comprised of Republic Bank Stock. David Cobb determined the number of Republic Bank shares to be transferred based on the February 4, 2005 open price value of \$26.84 per share, and as described below, ultimately transferred 10,071 shares of Republic Bank stock to Lyle Cobb.

That subsequent to February 4, 2005, but prior to the transfer to Lyle Cobb of the Republic Bank stock, a 21 for 20 stock split of the Republic Bank stock occurred.

...

That on March 1, 2005, David Cobb transferred to Lyle Cobb 4,071 shares of Republic Bank stock at a split adjusted value of \$24.79 per share. The value of this transfer was \$100,920.09 (4,071 shares at a split adjusted value of \$24.79 a share).

That on April 22, 2005, David Cobb transferred to Lyle Cobb 6,000 shares of Republic Bank stock at a closing value of \$21.14 per share. Please note that on March 22, 2005, the Republic Bank stock was no longer valued by its split adjusted value. The value of this transfer was \$126,840.00 (6000 shares at a closing value of \$21.14 per share).

That to equal the \$325,000.00 transfer required by the settlement agreement, David Cobb needs to transfer an additional \$44,508.35 worth of stock or other assets to Lyle Cobb.

A hearing on Lyle's summary judgment motion was held on November 15, 2005. The circuit court thereafter entered a partial summary judgment in his favor. (The issue on which the court declined to grant summary judgment concerned some dividends which were paid during the period between the signing of the settlement agreement and

the transfer of the stock. This matter has not been raised in this appeal.) In granting the summary judgment, the circuit court reasoned as follows:

First, it is undisputed that David owes Lyle a total of \$325,000. Second, it is undisputed that the stocks were not transferred in a timely manner. [The first transfer occurred almost three weeks after the agreed upon date. The last transfer occurred approximately ten weeks late.]<sup>FN</sup> In the time between the agreed upon transfer date and the actual transfer date, the value of the stock declined. David cannot now profit from his own delay and must assume the risk of loss in value of the stock after February 7, 2005.

As a matter of law, David is required to convey to Lyle stock and/or cash in the total amount of \$325,000. This means that any reduction in the value of the stock after the February 7, 2005 deadline falls to David. The stock which has been belatedly transferred to Lyle does not total that amount. Lyle is entitled to the difference.

Shortly after the entry of this opinion and order, the presiding judge retired.

David filed a motion to alter, amend or vacate the judgment and another hearing was held before a different judge. The court denied David's motion, and entered an order amending the prior order to the extent that it related to the disputed stock dividends. As to the issue which concerns us in this appeal, it stated:

the Plaintiff is entitled to the difference between the total amount of funds transferred by the Defendant as valued on the *dates of receipt of funds by the Plaintiff* and the \$325,000.00 agreed upon settlement amount, totaling \$44,508.35. Postjudgment interest shall accrue on the \$44,508.35 from the date of this order at the statutory rate of 12%[.]

David filed another motion to alter, amend or vacate, which was also denied. This appeal followed.

In reviewing a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Our courts have also stressed, however, that

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).

On appeal, David argues that the circuit court erred in holding that it was undisputed that the stocks were not transferred to Lyle in a timely manner. He contends that the settlement agreement was ambiguous, and that therefore the court should have looked to parol evidence to determine the intent of the parties regarding the timing of the transfer. David claims that any delay in the transfer was due to the fact that the shares of Republic Bank stock in his mother’s estate had to be valued first, and that he then had to calculate how much to transfer from his personal holdings to make up the necessary

amount. He also attributes the delay to his unwillingness to transfer the stocks until he had received the original settlement agreement executed by Lyle.

The purported ambiguity of the settlement agreement was never expressly raised before the circuit court, although David did present various explanations for his delay in transferring the stock. It is well-established principle that “[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court.” *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky.1989). We may not, therefore, address David’s arguments regarding this issue. We may, however, review whether the circuit court properly held that it was undisputed that the stocks were not transferred in a timely manner.

We have already noted in our recitation of the factual background of the case David’s contention that the last sentence of the disputed provision, which specifies that the transfer is to be completed by February 10, 2005, was added by Lyle and never consented to by David. Nonetheless, David himself admits that he agreed to the provision requiring him to initiate the transfer by February 7, 2005. He argues that what he did, if anything, to initiate the transfer of shares to Lyle between February 5, 2005, and March 1, 2005, is not part of the record in the case, and that therefore there was no factual basis for the court's ruling. But if he had indeed made some efforts to initiate the transfer during this period, it was his responsibility to enter evidence of such an effort into the record.

The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, 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 party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment.

*Hallahan v. The Courier Journal* , 138 S.W.3d 699, 705 (Ky.App. 2004) (citations omitted). David provided no evidence to the court to rebut Lyle’s claims. Furthermore, there is no evidence that David notified Lyle or Lyle’s attorney that he would be unable to comply with the terms of the settlement agreement, either for reasons relating to the alleged technical difficulties of the transfer or because he wanted to receive the original executed agreement from Lyle as a precondition to performance.

Next, David argues that the circuit court erred in relying on the affidavit of the accountant, Johnson, to arrive at the conclusion that Lyle did not receive the amounts to which he was entitled under the settlement agreement. He contends that Johnson’s assignment of a “split adjusted value” to the stocks in his calculation of the shortfall was improper because it was a method of valuation outside the four corners of the settlement agreement. He contends that because there was no discovery in this case, he had no opportunity to develop any of the issues regarding valuation that he had raised.

Yet again, however, David was free to enter into the record any evidence disputing the contents of Johnson’s affidavit. There is no indication in the record that he

was denied an opportunity to do so, or that he sought additional time from the court to conduct discovery after entry of the first opinion and order. *See Rich for Rich v.*

*Kentucky Country Day, Inc.*, 793 S.W.2d 832, 838 (Ky.App. 1990).

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).

For the foregoing reasons, the opinion and order of June 29, 2006, and the order of August 28, 2006, are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven G. Bolton  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Robert C. Moore  
Frankfort, Kentucky