

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000491-MR

RAY PENNINGTON, AS TRUSTEE
OF THE R.P. FAMILY TRUST

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 05-CI-00447

R.L. CAUDILL CONSTRUCTION, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: □ FORMTEXT □ □ LAMBERT AND TAYLOR □, JUDGES;
BUCKINGHAM, □ SENIOR JUDGE.

TAYLOR, JUDGE: Ray Pennington, as trustee of the R.P. Family Trust,
(Pennington) brings this appeal from a February 5, 2007, judgment of the Johnson
Circuit Court upon a bench trial. We affirm.

Pennington and R.L. Caudill Construction, Inc. (Caudill Construction)
entered into an oral contract for the drilling, shooting, and movement of dirt upon

Pennington's property. Before the oral contract was fully performed, a dispute arose between the parties concerning the terms of the contract. Pennington claimed that the contract required Caudill Construction to prepare the site to finished grade. Caudill Construction refused to do so because it claimed that a finished grade was not part of the oral contract.

In any event, Caudill Construction stopped work on the site but left a Case 1450 bulldozer and a Terex articulated truck (equipment) on Pennington's property. Sometime later, Pennington sent Caudill Construction a bill in the amount of \$11,400, representing storage fees for the equipment. However, Pennington had blocked Caudill Construction's access to the equipment and would not allow the equipment to be removed. In the end, Pennington refused to pay Caudill Construction for the work performed on his property, and Caudill Construction refused to pay any storage fees. During the course of litigation, Pennington retained possession of the equipment.

Caudill Construction filed a complaint against Pennington alleging breach of contract and seeking damages of \$30,000. Subsequently, Caudill Construction filed a Motion To Require Access To Plaintiff's Equipment. Therein, Caudill Construction cited a "great need for its equipment" and that Pennington had blocked its access to the equipment. Caudill Construction sought an order from the court requiring Pennington to grant Caudill Construction access to the equipment for the purpose of removing same from the property. Caudill

Construction then filed a Proffer of Evidence of Ownership. In this “proffer,” Caudill Construction provided the serial numbers of the equipment.

By order entered March 1, 2006, the court ordered that Pennington allow Caudill Construction access to his property for the purpose of removing the equipment. On March 7, 2006, Pennington filed a motion to vacate the March 1, 2006, order. Pennington argued that Caudill Construction failed to prove ownership of the equipment and failed to post a “pre-judgment bond.” The motion to vacate was never ruled on, and Pennington retained possession of the equipment until trial.

A bench trial was set for November 30, 2006. Pennington filed a motion for continuance of the trial because counsel for Pennington had a conflict due to a planned vacation. By order entered December 5, 2006, the court granted the motion to continue and rescheduled the bench trial for February 2, 2007. The court also held:

IT IS FURTHER ORDERED that, should [Caudill Construction] prevail at the bench trial on the issue of ownership of two pieces of equipment, namely one 1994 TEREX 4066 Articulated Truck, Serial Number A5291003 and one 1986 CASE 1450B Bulldozer, Serial Number 8383233, [Pennington] shall be ordered to pay all costs [Caudill Construction] has incurred in [Pennington’s] detainment of the same, including, but not limited to costs of replacement rental, taxes, and other expenses relating to [Caudill Construction’s] loss of use of the same.

Thereafter, a bench trial was held on February 2, 2007. By order entered three days later, on February 5, 2007, the circuit court found that the oral

contract included preparing the property to finished grade. Additionally, the court permitted an offset to the final bill, one-half of the cost of hauling expenses associated with another agreement between the parties in the amount of \$14,116.50. As Caudill Construction did not fully perform under the contract, including failing to complete to finished grade, the court found that Caudill Construction would only be entitled to \$9,383.50 for work performed on Pennington's property. The court also concluded that Caudill Construction owned the equipment on Pennington's property and that Pennington blocked access to this equipment "without any legal authority." The court concluded that Pennington attempted to "strong arm" Caudill Construction into a settlement by holding the equipment. The court ordered that Caudill Construction was entitled to immediate possession of its equipment. The court also awarded Caudill Construction \$46,173.60 in damages, representing the total price paid for rental equipment while being denied possession of their equipment. This appeal follows.

Pennington argues that the circuit court erred "when it made orders regarding possession of equipment without requiring [Caudill Construction] to pursue its remedy provided by KRS Chapter 425, Writ of Possession." Pennington maintains that Caudill Construction was required to pursue a writ of possession, and if Caudill Construction had pursued such a writ, "possession could have been obtained without any need to obtain 'substitute' equipment, with the cost attendant to same." Caudill Construction's Brief at 3.

A writ of possession is a statutory mechanism that allows a party to obtain prejudgment seizure of property under certain circumstances. KRS 425.011; KRS 425.012; KRS 425.046. We are aware of no legal requirement that mandates a party to utilize such a statutory prejudgment writ. And, Pennington fails to cite this Court to any legal authority to support his argument. Consequently, we conclude this argument to be without merit.

Pennington also contends that the circuit court's findings of fact were clearly erroneous. Specifically, he contends that the circuit court's finding that Caudill Construction owned the equipment and assessment of \$46,173.60 in damages were not supported by substantial evidence.

When an action is tried by the circuit court without a jury, Kentucky Rules of Civil Procedure (CR) 52.01 requires the court to set forth its findings of fact and conclusions of law. CR 52.01 states that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” A finding of fact is not clearly erroneous if supported by substantial evidence of a probative value. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky. 1964).

At trial, Robert Caudill, president of Caudill Construction, testified that Caudill Construction owned the equipment on Pennington's property. Also, Caudill Construction introduced as exhibits the bill of sale for the articulated truck and a Kentucky Secretary of State revised Article 9 UCC search that listed the bulldozer under Caudill Construction. We believe this evidence alone constituted

substantial evidence of a probative value to support the circuit court's finding that Caudill Construction owned the equipment on Pennington's property.

As to damages, Stuart Caudill was vice-president of Caudill Construction and in charge of bookkeeping. He testified that Caudill Construction was denied access to the equipment for over a year, and in September 2006, the company had to rent a replacement truck for a period of three and one-half months. Stuart testified that the total rental bill amounted to \$46,173.60. In its judgment, the circuit court awarded Caudill Construction \$46,173.60. We view the above testimony as constituting substantial evidence of a probative value to support the circuit court's damage award.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul D. Deaton
Paintsville, Kentucky

BRIEF FOR APPELLEE:

A. David Blankenship
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