RENDERED: APRIL 9, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000930-MR

FABIAN LEON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 06-CI-005282

PENSKE TRUCKING LEASING CO. — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** **

BEFORE: STUMBO, TAYLOR, AND VANMETER, JUDGES.

STUMBO, JUDGE: Fabian Leon, d/b/a/ FBN Enterprises, appeals from Findings of Fact, Conclusions of Law and Order of the Jefferson Circuit Court in an action instituted by Penske Truck Leasing Company to recover damages it sustained when Leon inadvertently drove one of its rental vehicles into an overpass. Leon argues that the circuit court erred by improperly allowing into evidence a "rental folder" which Penske claimed contained the rental agreement to which Leon bound

himself prior to the accident. The rental folder was material to Penske's claim because it set out the extent of Leon's liability in the event of an accident. We are not persuaded by Leon's contention that the Jefferson Circuit Court improperly admitted the rental folder into evidence, and accordingly affirm the Order on appeal.

On March 31, 2005, Leon rented from Penske a 22-foot "medium reefer" refrigerated truck in Louisville, Kentucky. In order to take possession of the vehicle, Leon signed a Local Commercial Rental Agreement ("the Agreement") which included a $1,000 limited liability waiver. The Agreement was placed in what Penske refers to as a "rental folder" which was given to Leon. The rental folder allegedly set out language holding Leon responsible for any damages caused by insufficient clearance, such as driving on a roadway that was too narrow for the vehicle or driving under an obstruction that was too low for the height of the vehicle. After renting the truck, Leon drove under an overpass which was too low for the vehicle, resulting in extensive damage to the truck and to the refrigeration unit which was affixed to the top of the truck.

Penske initiated the instant action against Leon to recover damages resulting from the accident. Specifically, Penske claimed entitlement to $5,329.56 for loss of the use of the truck, plus $28,271.84 for the cost of repairing the vehicle, for total damages of $33,601.40. Penske also sought interest and attorney fees.

A bench trial was conducted on February 20, 2009, in Jefferson Circuit Court, where Leon argued that the Agreement was ambiguous, that the damage waiver limited his liability to $1,000.00, and that the Agreement was an adhesion contract with unconscionable terms. Though Penske did produce the original Agreement, neither Penske nor Leon was able to produce a copy of the rental folder. Instead, Penske District Manager, Debi Tribbey, produced a 2007 version of the rental folder. According to Tribbey, on the outside of the folder the words "Truck Rental Agreement" are printed, along with language stating that the $1,000.00 damage waiver did not protect Leon from liability for damages caused by insufficient clearance. After taking proof, Judge Mary M. Shaw determined that the $1,000.00 damage waiver was not applicable by virtue of the language set out on the folder. She went on to reject Leon's contention that the Agreement was ambiguous and was an unenforceable adhesion contract. Leon's counterclaim was dismissed for lack of proof. The circuit court awarded to Penske damages in the amount of $33,601.40, and this appeal followed.

Leon now argues *pro se* that the trial court erred in allowing into evidence Penske's Exhibit 2, which sets out the rental folder language. He maintains that though he purportedly received the rental folder in 2005, the copy which Penske introduced was published in 2007. Leon goes on to claim that Tribbey made "false assurances and representations" that the 2007 folder offered into evidence contained the same language set out in the 2005 folder that Leon received. He also argues that Tribbey later testified that the language of the 2007

folder was not the same as that which he received in 2005. In sum, Leon argues that the trial court improperly overruled his objection to the introduction of the 2007 folder, that Penske's failure to retain the original 2005 folder constitutes "contributory negligence," and that in the absence of the original folder he should be protected by the $1,000.00 liability waiver as set out in the Agreement.

We must first note that Leon has not complied with the requirement set out in CR 76.12(4)(c)(v) that he demonstrate at the beginning of his written argument whether the issue raised is preserved for appellate review and, if so, in what manner. We would be well within our authority to strike Leon's brief and summarily affirm the order on appeal. CR 76.12(8)(a). It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court. *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859 (Ky. App. 1940).

Even if the matter were preserved for appellate review, Leon has done nothing to demonstrate that the Jefferson Circuit Court erred in overruling his motion to exclude Penske's Exhibit 2, i.e., the 2007 rental folder language. While neither party was able to produce the original rental folder, the burden rested with Penske to demonstrate that the $1,000.00 limit of liability was not applicable to the instant facts. In support of this claim, it offered into evidence a folder printed about two years after Leon executed the rental agreement.

We find no error in the Jefferson Circuit Court's apparent determination that the proffered evidence was in conformity with the Kentucky

Rules of Evidence (KRE). Penske directs our attention to KRE 1004, which allows for the introduction of written, recorded or photographed evidence other than the original "if . . . [a]ll originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith" or if the original is otherwise "not obtainable." In the matter before us, it is uncontested that the original rental folder was lost or destroyed, and Leon made no claim that Penske destroyed the original in bad faith. Further, and as the trial court properly noted, Leon never denied receiving the folder.[1] And finally, the introduction of the 2007 folder was supported by the testimony of Tribbey, who stated that it contained the same waiver language set out in the 2005 folder which Leon received and which was made part of the rental agreement.[2] "[A] duplicate of an original document is admissible to prove the contents of the original under certain circumstances." *Johnson v. Commonwealth*, 231 S.W.3d 800 (Ky. App. 2007). The totality of the circumstances at bar, including Tribbey's testimony and the absence of any denial from Leon that he received the folder, support the admission into evidence of the 2007 rental folder. Accordingly, we find no error.

For the foregoing reasons, we affirm the Findings of Fact, Conclusions of Law, Order and Judgment of the Jefferson Circuit Court.

ALL CONCUR.

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[1] Leon asserts for the first time on appeal that he never received the 2005 folder. An appellant may not, however, "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

[2] The Agreement refers to the terms and conditions set out on the rental folder.

BRIEFS FOR APPELLANT:

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