

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000789-MR

GENEVA KING;
DIANA LIVENGOOD, TRUSTEE
FOR GENEVA KING; DIANA
LIVENGOOD, CO-TRUSTEE
FOR THE KING FAMILY IRREVOCABLE
TRUST AGREEMENT; AND
KING FAMILY IRREVOCABLE TRUST,
AGREEMENT DATED MARCH 9, 2008 AND
ANY AMENDMENTS THEREOF

APPELLANTS

v. APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NO. 10-CI-00102

BUTLER REST HOME, INC., D/B/A
RIVER VALLEY NURSING HOME;
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES, DEPARTMENT FOR
MEDICAID SERVICES; LEIGH TAYLOR;
JANIE MILLER; NEVILLE WISE; AND
PATRICIA WILSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Geneva King (King) and Diana Livengood, as Trustee for King and for the King Family Irrevocable Trust (Livengood), appeal from a summary judgment by the Pendleton Circuit Court awarding contractual damages, attorney fees and pre-judgment interest to Butler Rest Home, Inc., d/b/a River Valley Nursing Home (River Valley). King and Livengood argue that summary judgment was inappropriate due to genuine issues of material fact concerning the enforceability of the contract, the amounts owed, and River Valley's right to recover attorney fees and pre-judgment interest. We agree with the trial court that there were no genuine issues of material fact concerning these issues and that River Valley established its entitlement to judgment as a matter of law. Hence, we affirm.

In 2008, King was admitted to River Valley. Livengood, King's daughter, executed the "Financial Agreement" in her capacity as "Trustee." On the separate "Admission and Financial Agreement," Livengood signed at the "Party to Receive Correspondence," but neither King's nor Livengood signatures appear on the signature line. King was initially a private pay patient, but later elected to apply for Medicaid benefits. Upon filing for Medicaid, King stopped making payments to River Valley.

Thereafter, the Cabinet for Health and Family Services, Department for Medicaid Services ("the Cabinet") denied King's application for Medicaid.

King re-applied for benefits, but the Cabinet again denied the application.

Following the second denial, RiverValley sent a letter to Livengood stating that King would be discharged on February 4, 2010, due to non-payment of an outstanding balance of \$41,683.55.

King thereafter filed an appeal with the Cabinet contesting the involuntary discharge. Following a hearing, the Cabinet affirmed the discharge. That decision was upheld on appeal to the Franklin Circuit Court and to this Court. *King v. Butler Rest Home*, 365 S.W.3d 561 (Ky. App. 2011).

While that matter was pending, River Valley filed the current action against King and Livengood, seeking payment of the outstanding balance. When the other litigation was completed, RiverValley filed a motion for summary judgment seeking to discharge King and to collect the outstanding balance. In response, Livengood stated that she had not signed the admission and financial agreements either individually, as King's personal representative, or as trustee for King. Rather, Livengood asserted that she only signed in her capacity as Trustee for the King Family Irrevocable Trust Agreement. Based upon these assertions, the trial court permitted King and Livengood to file an amended answer. King generally denied liability, while Livengood argued that she was not a proper party to the action. King also asserted a counterclaim, asserting that River Valley had failed to properly credit payment made prior to her application for Medicaid.

Thereafter, River Valley filed a renewed motion for summary judgment, along with a motion to dismiss the counterclaim. In response, King and

Livengood challenged River Valley's calculation of the amount due and the claim for attorney fees and costs. King noted that she had not personally signed the admission forms, while Livengood argued that she could not be held liable in her individual capacity.

The parties further briefed the summary judgment motion and River Valley filed additional documents supporting its claims concerning the balance due, pre-judgment interest, and attorney fees. On March 8, 2012, the trial court granted River Valley's motion and awarded a judgment against King and Livengood in the amount of \$87,413.32. Although the order did not so specify, this amount included pre-judgment interest in the amount of \$11,666.51 and \$20,000.00 in attorney fees. King and Livengood filed a timely motion to alter, amend or vacate the judgment pursuant CR¹ 59.05. On April 11, 2012, the trial court entered an amended order which included the finality language required by CR 54.02. This appeal followed.²

King and Livengood first argue that the trial court erred in granting summary judgment for River Valley. "The 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

¹ Kentucky Rule of Civil Procedure.

² King and Livengood also sought to assert a third-party claim against the Cabinet based upon its denial of the Medicaid application. The Cabinet responded and moved to dismiss the complaint. The trial court granted that motion on July 27, 2012, after the filing of the notice of appeal in this case. King and Livengood named the Cabinet and its representatives as parties to this appeal. However, they do not raise any issues relating to the Cabinet. Therefore, we shall not address the Cabinet's involvement further.

judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. *Steelvest*, 807 S.W.2d at 480. The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. *Id.* On the other hand, a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Id.* at 481. Since a summary judgment involves no fact-finding, this Court’s review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

King and Livengood argue that there were genuine issues of material fact concerning whether a binding contract existed because King did not sign the contract and there is no evidence that Livengood had the authority to bind her mother. We find no merit to this argument. Livengood executed the Financial Agreement with River Valley, indicating that she was acting in her capacity as “Trustee.” The signature line on the Agreement refers to “Resident/Responsible Party. By executing the Agreement in this manner, Livengood represented that she

had the capacity to bind her mother. River Valley admitted King in reliance upon this signature. Furthermore, Livengood has never denied her capacity to bind King until this action.

Under these circumstances, we conclude that Livengood is estopped from denying her capacity to bind King to the Financial Agreement. *See Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 595 (Ky. 2012), *citing Restatement (Third) of Agency* § 2.05 (2006). For similar reasons, King and Livengood are estopped from relying on their failure to sign the Admission and Financial Agreement. We also note that River Valley named Livengood in her representative capacity, which the judgment reflects. Consequently, the trial court properly found no genuine issue of material fact on this issue.

King and Livengood next argue that summary judgment was not appropriate because River Valley failed to prove the amounts owed by King. Again, we find no error. In support of the summary judgment, River Valley submitted an itemized invoice showing the charges and interest. When King and Livengood objected to certain charges and claimed certain credits, River Valley's Administrator submitted a supporting affidavit and corrected invoice which explained the disputed charges and credits. Other than generally objecting to the charges and to the inclusion of pre-judgment interest, King and Livengood presented no affirmative evidence challenging River Valley's calculations. Therefore, the trial court properly granted summary judgment on this issue.

Finally, King and Livengood argue that the trial court improperly awarded attorney fees and pre-judgment interest to River Valley. We find no error on either point. In the absence of a contractual or statutory provision, generally a trial court cannot require one party to pay the other's attorney fees. *Bell v. Com., Cabinet for Health & Family Servs., Dep't for Cmty. Based Servs.*, 423 S.W.3d 742, 750 (Ky. 2014). In this case, however, Section 7 of the Admission and Financial Agreement provided:

7. The Resident agrees to be responsible for:

...

b. Paying all costs, expenses, and a reasonable attorney's fee incurred by River Valley in the collection of any and all sums due and owed by Resident, including a service charge equal to the highest rate permitted by law, not to exceed 1.5% per month, for all accounts over thirty (30) days; ...

The relevant contract clearly provides for payment of attorney fees and pre-judgment interest. We have concluded that King and Livengood are estopped from denying that contract. Furthermore, KRS 360.010(1) permits parties to contract for pre-judgment interest at a higher rate than the statutory rate. King and Livengood challenge the rate and calculation of interest, but fail to show that the amount of interest awarded was clearly erroneous. Therefore, we decline to consider that issue further.

Accordingly, the summary judgment by the Pendleton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. McClelland
Mark A. Maddox
Lexington, Kentucky

BRIEF FOR APPELLEE:

Arnold Taylor
Covington, Kentucky