H.W. Energy

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NOT TO BE PUBLISHED

OPINION

AFFIRMING

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

Appellant, H.W. Energy, Ltd., appeals from an order of the Floyd Circuit Court granting summary judgment in favor of Appellee, Charles McCoy. Finding no error, we affirm.

The facts herein are generally not in dispute. On May 8, 2008, H.W. Energy, a Nevada corporation involved in the energy and coal mining business, entered into a coal lease with McCoy. McCoy is the legal representative of his family who owns coal on two tracts of land located on the Richard McCoy Branch of Burning Fork in Pike County, Kentucky. The property had previously been mined and McCoy, by and through his corporation CGM Coal, Inc., had maintained a $28,000 cash performance bond for reclamation with the Commonwealth since 1984.

Pursuant to the lease between H.W. Energy and McCoy, the term was for a period of one year and would be automatically be extended if coal was being produced. Further, the lease provided that before H.W. Energy could commence operations it would either transfer the bond from McCoy or deposit the sum of $28,000 with McCoy's counsel, who would hold the funds in its client trust account. The lease gave H.W. Energy two months from the May 2, 2008 signing date to have its own reclamation bond transferred in place of McCoy's bond, thereby releasing the latter. If the bond transfer occurred within the two month time period, McCoy's counsel was to refund the $28,000 to H.W. Energy. However, if the bond transfer did not occur within the specified time period, the lease stated:

If the Lessee, its successors and assignees, should fail to complete the transfer of the bond within two (2) months of the date of this Coal Lease or the Coal Lease has been breached, whichever event occurs first, then Combs and

Isaacs [McCoy's counsel] will deliver the monies paid to it by the Lessee to the Lessor, Charles Gary

McCoy.

On July 10, 2008, H.W. Energy tendered $28,000 to McCoy's counsel. However, H.W. Energy never subsequently filed a reclamation bond with the Commonwealth to replace McCoy's bond. On December 17, 2008, five months after the deadline for the transfer of the bond, McCoy exercised his right to take possession of the $28,000. McCoy maintained his bond until the lease with H.W. Energy expired on the property on May 2, 2008. Throughout the course of the lease, H.G. Energy never undertook any coal mining operations on the property.

In April 2009, just prior to the expiration of H.W. Energy's lease, McCoy was approached by another energy group, KYX Energy, LLC, and the parties signed a new lease on the same property. H.W. Energy did thereafter sell its interest in the coal lease to KYZ Energy in a separate deal, but it was not a party to the lease between KYZ Energy and McCoy. The lease between KYZ Energy and McCoy contained the same bond transfer requirements as did the prior lease between H.W. Energy and McCoy. KYZ Energy thereafter replaced the reclamation bond and McCoy's bond was released.

Following the release of McCoy's bond, H.W. Energy demanded the return of the $28,000 it paid in July 2008. When McCoy refused to refund the monies, H.W. Energy filed suit in the Floyd Circuit Court. After a brief discovery period, H.W. Energy moved for summary judgment arguing that the terms of the lease were ambiguous because it did not provide for disposition of the $28,000 in the event that H.W. Energy never mined the property. McCoy subsequently filed a motion for summary judgment as well. In a judgment rendered August 25, 2011, the trial granted summary judgment in favor of McCoy, finding:

[T]he Coal lease between [H.W. Energy] and McCoy concerning the disposition of the $28,000.00 deposited with McCoy's counsel to secure the replacement of McCoy's reclamation bond was not ambiguous and McCoy was entitled to receive the same as his own since the Plaintiff failed to file a reclamation bond with the Commonwealth within the agreed upon two month time period.

H.W. Energy thereafter appealed to this Court.

Our standard of review on appeal of a 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." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment shall be granted "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 judgment as a matter of law." CR 56.03. The trial court must view the record "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 v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." Id. Finally, since 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).

Our task in reviewing a grant of summary judgment is to determine whether the circuit court correctly concluded that no genuine issue exists as to any material facts, and whether based on such facts the moving party was entitled to judgment as a matter of law. Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). Because only legal questions and the existence, or non-existence, of material facts are considered by the appellate court, a grant of summary judgment is reviewed de novo. Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001). Additionally, we owe no deference to the trial court's interpretation of the coal lease because "the construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court." Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99, 105 (Ky. 2003) (quoting First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829, 835 (Ky. App. 2000)).

On appeal, H.W. Energy argues that in finding no ambiguity existed in the coal lease, the trial court ignored the alternative provision of the lease whereby H.W. Energy was permitted to pay McCoy in lieu of replacing the bond. H.W. Energy did pay McCoy and, as such, contends that it fully performed under the lease as written. Further, H.W. Energy maintains that the parties clearly intended that McCoy would refund H.W. Energy's money when his bond was released, regardless of who actually replaced the bond. To find otherwise, H.W. Energy posits, would result in McCoy being unjustly enriched, which is what H.W. Energy claims occurred herein. Accordingly, H.W. Energy believes that the contract contains a latent ambiguity, creating a genuine issue of material fact that should have precluded summary judgment.

"A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." Cantrell Supply Inc. v. Liberty Mutual Insurance Co., 94 S.W.3d 381, 385 (Ky. App. 2002); Frear, 103 S.W.3d at 106; Transport Ins. Co. v. Ford, 886 S.W.2d 901, 905 (Ky. 1994). Pertinent to this case, a latent ambiguity "is one which does not appear on the face of the words used, and it is not known to exist until the words are considered in light of the collateral facts." Thornhill Baptist Church v. Smither, 273 S.W.2d 560 (Ky. 1954) (Quoting Carroll v. Cave Hill Cemetery Co., 172 Ky. 204, 189 S.W. 186, 190 (1916)). If "a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties." Cantrell Supply Inc., 94 S.W.3d at 385. Significantly, however, "an otherwise unambiguous contract does not become ambiguous when a party asserts . . . that the terms of the agreement fail to state what it intended." Frear, 103 S.W.3d at 107. In other words, "[t]he fact that one party may have intended different results . . . is insufficient to construe a contract at variance with its plain and unambiguous terms." Cantrell Supply Inc., 94 S.W.3d at 385.

Conversely, where the contract's language is clear and unambiguous, the agreement is to be given

effect according to its terms, and the court "will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." Frear, 103 S.W.3d at 106. As such, in the absence of ambiguity, the parties' intention must be gathered from the four corners of the instrument at issue, and extrinsic evidence may not be admitted to vary the instrument's terms. Hoheimer v. Hoheimer, 30 S.W.3d 176, 178 (Ky. 2000).

The entire lease provision relating to the transfer of the bond provides as follows:

BOND TRANSFER: Notwithstanding the provision set forth hereinabove concerning the term of this Coal Lease, the Lessee may not begin operations upon the Leased Premises until one of the two following conditions has been satisfied: (1) the current performance bond securing the reclamation of the Leased Premises held by the Commonwealth of Kentucky has been transferred to the Lessee, or a designee of the Lessee or (2) the Lessee delivers to the law firm of Combs and Isaac of Prestonsburg, Kentucky, a sum of money equal to the amount of the performance bond mentioned hereinabove. In the event the Lessee decides to pay the amount of the performance bond to the law firm of Combs and Isaac then said law firm will hold same in its client/trust account until the above-mentioned performance bond has been transferred to the Lessee or its designee. Once the performance bond has been transferred the law firm of Combs and Isaac shall pay the sum of money being held by it to the Lessee. If the Lessee, its successors and assignees, should fail to complete the transfer of the bond within two (2) months of the date of this Coal Lease or the Coal Lease has been breached, whichever event occurs first, then Combs and Isaac will deliver the monies paid to it by Lessee to the Lessor, Charles Gary McCoy.

H.W. Energy contends that the lease provision is ambiguous because it does not provide for disposition of the $28,000 in the event the "deal fell through."

Accordingly, H.W. Energy seeks to introduce extrinsic evidence to support its belief that the parties intended the money to be refunded whenever McCoy's bond was released, regardless of who ultimately transferred the bond.

We are of the opinion that the lease contains no ambiguity, latent or otherwise. Certainly, H.W. Energy is correct that it opted to initially pay the $28,000 instead of transferring the bond. However, the second part of the clause clearly states that in either instance, H.W. Energy had two months to complete the bond transfer or the money would be dispersed to McCoy.

Contrary to H.W. Energy's position, the lease herein did not "fall through." The one-year term expired without H.W. Energy transferring the bond or producing any coal. If H.W. Energy had wished to prevent the money from being disbursed to McCoy, it simply had to follow through with the bond transfer provision, which it unquestionably did not. While H.W. Energy may have intended for the $28,000 to eventually be returned if McCoy's reclamation bond was ever released or assumed by a third party, the lease simply contains no language to that effect, and we are not at liberty to

discard the lease's clear and unambiguous terms in favor of what H.W. Energy may have intended, but failed, to memorialize in writing. See Frear, 103 S.W.3d at 107; Cantrell Supply Inc., 94 S.W.3d at 385. Accordingly, the Floyd Circuit Court properly granted summary judgment in favor of McCoy.

The judgment of the Floyd Circuit Court granting summary judgment in favor of Appellee, Charles Gary McCoy, is affirmed.

ALL CONCUR.