

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001082-MR

PRATHER DRILLING AND
PRODUCING COMPANY;
SARA M. CALLAHAM

APPELLANTS

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 04-CI-00159

MICHAEL S. WALKER

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Prather Drilling and Producing Company (Prather) and Sara M. Callaham appeal from the judgment of the Martin Circuit Court awarding Michael S. Walker damages for a breach of contract. For the following reasons, we affirm in part, reverse in part and remand.

Callaham is the owner of Prather, which conducts business that deals with the production of natural gas. Walker is the owner of Ranger Natural Gas, LLC (Ranger), which services and tends gas wells. In 1998, Prather, Callaham and Walker entered into an agreement whereby Walker was to rework wells owned by Prather and then operate and manage certain wells for an indeterminate amount of time. The agreement set forth that Prather would pay Walker \$450 each month for rental of a gas compressor and \$125 each month for any well that produced gas and required tending.

In 2004, Prather, Callaham and Ranger entered into an agreement whereby Prather agreed to pay Ranger \$400 each month for rental of a gas compressor and \$100 each month for any well that produced gas and needed tending. Walker insisted the parties also orally agreed that he would be further compensated by receiving the production from junk wells previously drilled by Prather but now abandoned, which Walker intended to rehabilitate. Additionally, Walker claimed the parties orally agreed that Callaham and Prather would assign leases covering undrilled acreage to Walker.

Later in 2004, the business relationship between Callaham and Walker deteriorated. Callaham sold the junk wells and quit paying Walker. Walker filed a complaint against Callaham and Prather alleging breach of the 1998 agreement, as well as breach of the oral agreements regarding the development of undrilled

acreage. Over the next year and half, Walker attempted to elicit discovery responses from Callaham and Prather. During this period, Walker filed at least five motions to compel discovery, three motions to strike Callaham's and Prather's answer, and a motion for a default judgment. In July 2007, the trial court found Callaham and Prather in contempt of court, struck their answer, granted Walker's motion for a directed verdict, and set trial for damages.

At trial, Walker claimed damages stemming from Callaham's and Prather's breach of the 2004 contract with Ranger, as well as compensation for the salvage value of the junk wells, the production from rehabilitated junk wells, and the inability to develop the undrilled acreage. The trial court held Walker was entitled to \$66,300 under the well-tending agreement, \$100,000 for expenses he incurred in bringing abandoned wells back into production, and \$37,923.05 for recovery of advancements he made to Callaham. The trial court also ordered a sale of the natural gas leases covering the undrilled acreage, with the proceeds to be divided equally between the parties. This appeal followed.

A trial court's "[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." CR¹ 52.01. Findings of fact are clearly erroneous if they are not supported by substantial evidence. *Moore v. Asente*, 110

¹ Kentucky Rules of Civil Procedure.

S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence that “has sufficient probative value to induce conviction in the mind of a reasonable person.” *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005) (citations omitted). The trial court’s conclusions of law are reviewed *de novo*. *Id.* (citations omitted).

First, Callaham and Prather argue that the trial court erred by finding the evidence supported an award of \$66,300 in lost profits to Walker for breach of the 2004 well-tending agreement. We agree.

Lost profits must be proven with reasonable certainty. *Pauline’s Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401 (Ky. 1985). In other words, lost profits may be recoverable “when they can be legally ascertained, and when there is no lack of certainty on account of being too remote, conjectural, and speculative.” *Kentucky Util. Co. v. Warren Ellison Café*, 231 Ky. 558, 563, 21 S.W.2d 976, 978 (Ky. 1929).

Here, Walker alleges he is entitled to \$66,300 in lost profits because Callaham and Prather breached the 2004 agreement, which provided for payment of \$100 per month for well-tending services for any well with gas production, as well as \$400 per month for rental of a gas compressor. However, Walker failed to provide any evidence beyond his own testimony to identify the number of wells for which he provided well-tending services from 2004 through the date of trial. Walker estimated the fees amounted to \$15,600 a year, but failed to provide any

documentation to support such an award. This testimony is insufficient to support the trial court's award of \$66,300 in lost profits, and amounts to an error by the trial court.

Next, Callaham and Prather argue the trial court erred by awarding Walker \$100,000 for expenses he incurred reworking the junk wells because the evidence did not support such a finding. We agree.

Walker testified that he and Callaham orally agreed that Walker would keep all of the income from each junk well he reworked into production. Since Callaham failed to produce any records of the well production, Walker sought damages for his expenditures reworking the junk wells. Walker testified that he bore 100% of the expenses preparing the junk wells for production, and estimated those expenses to be in excess of \$100,000. However, Walker failed to produce any documentation, or testify as to any specific facts, which would afford a basis for measuring his expenses to a degree of reasonable certainty. *See Kentucky W. Virginia Gas Co. v. Frazier*, 302 Ky. 642, 646, 195 S.W.2d 271, 273 (1946) (holding that records of expenses, charge for labor, or other facts must be shown to afford the trial court a basis for computing damages for costs expended). The only evidence supporting Walker's claim was his own testimony estimating that he spent over \$100,000 to rework the junk wells, which we find to be

insufficient to support his claim for damages. Accordingly, the trial court erred by awarding Walker \$100,000 in damages.

Next, Callham and Prather contend the trial court erred by awarding Walker one-half of several natural gas leases covering undrilled acreage. We agree.

Walker's only evidence regarding the existence of this oral agreement was his own testimony that Callaham agreed that he could work the undrilled acreage and keep any profits from production. However, Walker took no steps toward working the undrilled acreage. Furthermore, the leases were never assigned to Walker prior to the deterioration of the business relationship. Walker asserts he lost profits as a result of Callaham's breach; however, no evidence was provided to calculate with any degree of reasonable certainty Walker's lost profits due to breach of the alleged agreement. *See Pauline's Chicken Villa Inc.*, 701 S.W.2d at 401. Walker failed to provide documentation to establish the undrilled acreage that was subject to the alleged oral agreement. The only documentation provided indicates Walker conducted a public records search and introduced a bulk exhibit without identifying any specific leases. Since Walker failed to prove damages beyond mere speculation, his claim in this respect fails. Accordingly, the

trial court erred by ordering a sale of the leases covering the undrilled acreage and dividing the proceeds between the parties.²

Next, Callaham and Prather argue the trial court erred by awarding damages to Walker for advances he made to Callaham. Specifically, Callaham and Prather argue Walker should not have been allowed to introduce evidence of checks drawn on the accounts of Ranger and Walker & Associates, also owned by Walker, because they were not parties to the action, and further that such evidence was not sufficient to support the court's award. We disagree.

At trial, Walker introduced evidence of checks drawn on accounts of two companies he owned which had dealings with Callaham and Prather. CR 9.01 requires that "[w]hen a party desires to raise an issue as to . . . the capacity of any party to sue . . . he shall do so by specific negative averment." *See Caldwell v. Hoskins*, 312 S.W.2d 616, 618 (Ky. 1958) (holding that the defendant waived the right to challenge the plaintiff's capacity to sue by not timely raising the collateral issue in the pleadings). Any challenge to Walker's capacity to sue on this claim should have been raised in the pleadings, and is now barred. The record reveals the checks provided by Walker reveal an amount of \$37,923.05 paid to Callaham

² Since we reverse the trial court's award of \$100,000 and half of the proceeds from the sale of the undrilled acreage, we decline to address Callaham's and Prather's argument that the oral agreements were in violation of the statute of frauds and that a new trial was warranted based on newly discovered evidence that the portions of the undrilled acreage had actually been drilled and abandoned.

from Walker-owned entities. Conflicting evidence presented by Callaham is to be weighed exclusively by the trial court. *See Moore*, 110 S.W.3d at 354 (the trial court has the exclusive province to judge credibility and weigh the evidence). Thus, the trial court's decision to accept Walker's evidence was not clearly erroneous and its judgment on the advancements will not be disturbed.

Finally, Callaham and Prather argue the trial court erred by striking their answer and counterclaim, and entering default judgment against them. We disagree.

CR 37.02 provides, in part:

(2) If a party . . . fails to obey an order to provide or permit discovery, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

...

(c) An order striking out pleadings . . . or rendering a judgment by default against the disobedient party.

In this case, Callaham and Prather willfully disregarded numerous discovery requests by Walker, and ultimately failed to comply with a court order compelling discovery. Once the court found Callaham and Prather in contempt, the court was within its discretion to enter a default judgment against them. *See Nowicke v. Cent. Bank & Trust Co.*, 551 S.W.2d 809, 811 (Ky.App. 1977) (holding that the trial court was justified in ordering a default judgment when defendant

disregarded discovery procedures). *See also First Horizon Home Loan Corp. v. Barbanel*, 290 S.W.3d 686, 688 (Ky.App. 2009) (trial courts have broad discretion to enter default judgments).

The judgment of the Martin Circuit Court is affirmed in part, reversed in part, and remanded for the trial court to enter an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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