

RENDERED: August 22, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-000639-MR

DARYL E. GRIFFITH

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
CIVIL ACTION NO. 94-CI-000543

PAUL MILLER FORD-MAZDA-ISUZU, INC.

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, HUDDLESTON and MILLER, Judges.

HUDDLESTON, JUDGE. Daryl E. Griffith appeals from a summary judgment in favor of Paul Miller Ford-Mazda-Isuzu, Inc. (Paul Miller) on Griffith's claim for damages occasioned by the repainting of his 1985 Ford F-150 pick-up truck. On appeal, Griffith argues that, because there was testimony of record from two "experts" on his behalf regarding the decrease in value of his truck, the court erred in granting Paul Miller's motion for summary judgment.

As Griffith admits in his brief, the facts are not in dispute. Ford Motor Company sponsored a program in which vehicles manufactured by it between certain dates were eligible to be

repainted at Ford's expense because of a defect in the paint originally used. Griffith elected to participate and delivered his truck to Paul Miller, an authorized Ford dealer, to perform the service.

Paul Miller repainted the vehicle, supposedly in accordance with the guidelines required by Ford. Griffith was not satisfied with the result. He claims that the vehicle was repainted at least once by Paul Miller in an attempt to correct the problem; however, Paul Miller disputes this allegation and points out that there is no evidence that the paint job was redone. Griffith did obtain estimates for the cost of repainting the truck from two autobody shops in Lexington.

Thereafter, Griffith filed suit against Paul Miller claiming that it did not properly repaint his vehicle, that the failure to paint his truck correctly has decreased its value by \$4,000.00, and that he had requested on numerous occasions, and been refused, that Paul Miller correct the problem. Paul Miller denied the claim.

Discovery was conducted with the parties exchanging interrogatories and Paul Miller taking the depositions of Griffith's two named "experts." The two experts were employed by establishments that provided Griffith with estimates for repainting his truck. Almost two full years after the initial complaint was filed, the court granted summary judgment in favor of Paul Miller. This appeal followed.

The standard for summary judgment applied by courts in Kentucky is explained in Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 482 (1991):

[W]e conclude that the movant should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy. Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.

Finally, . . . 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. (Citations omitted).

See also Old Mason's Home of Kentucky, Inc. v. Mitchell, Ky.App., 892 S.W.2d 304, 307 (1995).

In considering whether the court properly granted Paul Miller summary judgment, we note that some difficulty is caused in this case by the brevity and vagueness of Griffith's complaint. It is not clear whether he intended to plead his cause on the basis of breach of contract or on the basis of negligence. However, since pleadings are construed liberally to avoid injustice, we will consider both grounds. Ky. R. Civ. Proc. (CR) 8.06.

Assuming that Griffith's cause of action is based on negligence, we think the court properly granted Paul Miller summary judgment. Griffith's claim of negligence must be based upon breach

of an implied contract because no other facts that would suggest negligence have occurred. See, e.g., Capitol Cadillac Olds, Inc. v. Roberts, Ky., 813 S.W.2d 287, 288 (1991) (light fixture in defendant's garage fell on vehicle and damaged paint).

A claim of negligence may be based on a breach of contract where the contract furnishes the occasion of the tort. Louisville Cooperage Co., Inc. v. Lawrence, 313 Ky. 75, 230 S.W.2d 103, 105 (1950). In other words, where the contract gives rise to a duty of care that must be observed, breach of the contract can also be a tort when that duty is violated. Here, there is at least an implied in-fact contract between Griffith and Paul Miller for the latter to repaint Griffith's truck in a workmanlike manner. See Perkins v. Daugherty, Ky.App., 722 S.W.2d 907, 909 (1987) (defining implied in-fact contract); King v. Ohio Valley Terminix Co., 309 Ky. 35, 214 S.W.2d 993, 995 (1948) ("One who undertakes to accomplish a certain result agrees by implication to do everything to accomplish the result intended by the parties").

The evidence of record falls far short of showing negligence on Paul Miller's part, even under the exacting standard applied to a summary judgment motion. The only affirmative evidence in Griffith's favor comes from his own deposition in which he asserts that the paint job is not satisfactory. Paul Miller introduced evidence, by way of affidavit, that it repainted the truck in accordance with the standards of the industry and through strict adherence to Ford's guidelines.

Griffith's two experts were deposed by Paul Miller. Both individuals stated that they do not recall Griffith, his truck, or preparing an estimate. Neither had been asked to be an expert witness on behalf of Griffith nor were they aware they had been designated as such until receiving a subpoena. Neither would venture an opinion regarding the value of Griffith's truck or whether its value had decreased due to the paint job.

There are no photographs in the record of the vehicle or any other positive physical evidence that the truck was not painted in accordance with industry standards. Quite simply, there is no proof that Paul Miller breached any duty of care it owed under the implied contract to repaint Griffith's truck.

If Griffith's claim is construed as based on breach of contract, then Paul Miller was under an obligation to perform the job in a workmanlike manner and is responsible for any defects which may result from its failure to observe that standard. Cf. Shreve v. Biggerstaff, Ky.App., 777 S.W.2d 616, 617 (1989). For the same reasons that a cause of action based on negligence fails, a claim against Paul Miller for breach of contract also fails. There is no proof beyond the complaint and Griffith's deposition that any breach occurred.

While Griffith's testimony is evidence, he is still obliged to come forward with some positive proof in favor of his claim to avoid summary judgment when faced with a properly supported motion, such as Paul Miller's. Capitol, supra at 289 (buyer's personal belief regarding reduced value of automobile is

not determinative); Steelvest, supra (some affirmative evidence in nonmovant's favor must be produced to avoid summary judgment). This he has not done.

The judgment is affirmed.

ALL CONCUR.

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