RENDERED: October 1, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002014-MR

KEENE MANAGEMENT GROUP, INC.
AND RICK A. PRUSATOR APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 97-CI-2797

RALPH J. MARTIN, COMMUNITY
NEWSPAPER HOLDINGS, INC.
AND NEWSPAPER HOLDINGS, INC. APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GARDNER AND JOHNSON, JUDGES.

GARDNER, JUDGE: Keene Management Group Incorporated (Keene) and Rick Prusator (Prusator) appeal from an order of the Fayette Circuit Court dismissing their action pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f). Keene and Prusator asserted in their complaint before the circuit court that they were entitled to recover from the appellees a commission based upon their role in helping Ralph J. Martin (Martin) and Community Newspaper Holdings, Inc. (CNHI) acquire several local newspapers from another company. They asserted a breach of contract claim and a

fraud claim against the appellees. On appeal they maintain that the circuit court's application of the Kentucky real estate licensure laws to the transaction in the instant case was erroneous, that the circuit court's dismissal of their claims based on Kentucky Revised Statutes (KRS) Chapter 324, leads to an absurd result and that the circuit court's dismissal violates other important public policies. After reviewing the facts of this case and the applicable law, this Court affirms.

Prusator and appellee, Martin were at one time both employees of Park Communications, Inc. (Park), a corporation which owned and operated newspapers, radio stations and television stations. Prusator was named vice president in charge of Park's radio division in 1991, and Martin was hired as the vice president of Park's newspaper division in 1995. In 1995 Park Acquisitions, Inc. (PAI) was formed to acquire Park. In order to help retire debts, PAI initiated steps to sell off Park's assets and operations. In 1995, PAI began selling off Park's radio stations. In 1996, Martin believed that PAI would likely soon take steps to sell off the newspaper division, thus eliminating his job. In April 1996, he began to assemble a group of Park employees to attempt to acquire and operate Park's newspaper assets and operations.[1] In July 1996, Media General, Inc. (Media General) issued a press release stating that an agreement had been reached for Media General to acquire Park's

[1]This group will be referred to herein as the Martin Group. The appellees maintain that the group of seven potential owners whom Martin had assembled to purchase the newspapers was called the Gemini Group. After efforts to obtain financing failed, the Gemini Group disbanded, and CNHI was formed.

television and newspaper operations. Media General also announced that it was interested in selling some of the newspapers that it was acquiring from Park. The Martin Group continued efforts to acquire some or all of these newspaper assets. The members of the Martin Group wished to remain anonymous so that they could retain their jobs.

In late September 1996, Martin met with Prusator regarding Prusator assisting the Martin Group in its efforts to acquire the newspapers. Prusator was no longer employed by Park and had incorporated a consulting firm known as Keene Management Group, Inc. On Sunday, September 29, 1996, Martin and Prusator met at Prusator's home. Prusator has contended that Martin asked Prusator/Keene to act as a broker or underwriter for the Martin Group, offering to pay Prusator/Keene the customary broker's fee of one-half of one percent of the total purchase price of any and all newspapers acquired by the Martin Group, which would be paid at the closing of the contemplated acquisition. Specifically, Prusator/Keene would assist in obtaining information from Media General and/or Thompson Newspapers, Inc., including a listing of newspapers possibly available for sale to the Martin Group and related financial and other information; Prusator/Keene was to act as an agent for an undisclosed principal and was not to disclose the identities of members of the Martin Group. Prusator/Keene would turn over to Martin the information and documentation so obtained in order for the Martin Group to evaluate and make an offer to purchase the newspapers. Prusator/Keene would otherwise assist the Martin Group as needed

and/or as requested by Martin in attempting to obtain such debt and/or equity financing and Prusator would be paid the fee. Martin contends that no meeting of the minds occurred at that meeting.

Prusator has maintained that in reliance on this agreement, he undertook actions at the request of Martin, to expedite the purchase of the newspapers by the Martin Group. He contends that in September 1996, on behalf of the Martin Group, he sent letters to Media General and Thompson Newspapers, Inc. requesting disclaimer documents permitting a review of the past financial performance of the newspapers. After receiving a confidentiality agreement, Prusator executed and returned it, and then he reviewed the information he received with Martin. He also contends that he flew to Charlotte, North Carolina to attend a meeting regarding financing for the Martin Group's acquisition. He later contacted Media General on behalf of the Martin Group. He maintains that Martin continually assured him that he would receive the fee that the two allegedly agreed upon. He also maintains that he subsequently learned that Martin took steps early in the process to cut him out of the deal in order to avoid paying the fee. As an example, he states that in October 1996, Martin without Prusator's knowledge sent a letter directly to Media General in which he proposed to lease certain newspapers for five years, at the end of which period the Martin group would purchase the papers.

Appellees maintain that following a meeting with First Union Bank in Charlotte at which First Union stated it could not

provide full financing, everyone who attended the meeting realized that the potential buying group could not obtain the necessary financing. They contend the specific group ceased its existence and any role of Prusator/Keene as brokers necessarily terminated. They maintain that after this group ceased, Martin made no promise to Prusator other than to reimburse his out-of-pocket expenses. They claim a new, separate group formed which sought to purchase the newspapers. Prusator maintains that he was never informed of the formation of this new group.

In January 1997, NHI, a subsidiary of CNHI, acquired the newspapers. The closing occurred in February 1997. Prusator states that on February 21, 1997, he telephoned Martin to inquire about his fee. He maintains that he learned then for the first time that there was an issue as to whether he would receive a fee. In March 1997, Prusator received a letter from Martin in which Martin claimed that he and Prusator had not entered into a contractual agreement. Prusator and Martin spoke about the fee several times after that, but Prusator never received a fee.

In August 1997, Prusator and Keene filed a complaint against the appellees in the circuit court, alleging breach of contract and common law fraud. In July 1998, the appellees moved the circuit court to dismiss Prusator and Keene's complaint pursuant to CR 12.02(f) for failure to state a claim upon which relief could be granted. They argued that the alleged contract between Prusator and Martin was void and unenforceable, because Prusator was not licensed as a real estate broker in Kentucky. They also maintained that Prusator and Keene's common law fraud

claim must be dismissed, because the facts did not support such a claim, and Prusator and Keene could not enforce an illegal contract by calling it a fraud claim. On August 5, 1998, the circuit court noted in an order that it was treating the appellees' motion as one for summary judgment. The court concluded that no genuine issues of material fact existed and that the appellees were entitled to a judgment as matter of law. The court granted the appellees' motion to dismiss. Prusator and Keene have subsequently brought this appeal.

Prusator and Keene first argue to this Court that the circuit court's application of the Kentucky real estate licensure laws to the alleged contract between Martin and Prusator was erroneous. They maintain that the contract was not covered under the applicable statutes. Specifically, they contend that the contract did not contemplate Prusator performing any acts nor did he perform any acts which constituted unlicensed real estate brokering and that the agreement was for the acquisition of newspaper businesses as on going businesses, not for the acquisition of real estate. They also argue that the circuit court's dismissal of their claims based upon KRS Chapter 324 leads to an absurd result, which is contrary to the purposes of the statutes. This Court has concluded that based on the applicable law, the circuit court correctly dismissed Prusator and Keene's breach of contract claim.

KRS 324.020(1) states, "[i]t shall be unlawful for any person to act as a broker or real estate sales associate or to advertise or assume to act as a broker or sales associate within

the Commonwealth of Kentucky, without a license issued by the Kentucky Real Estate Commission." KRS 324.010(1) provides,

> '[r]eal estate brokerage' means a single, multiple, or continuing act of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, engaging in property management, leasing or offering to lease, renting or offering for rent, or referring or offering to refer for the purpose of securing prospects, any real estate or the improvements thereon for others for a fee, commission, compensation, or other valuable consideration[.]

This Court in Kirkpatrick v. Lawrence, Ky. App., 908 S.W.2d 125 (1995), and Lockridge v. Hale, Ky. App., 764 S.W.2d 84 (1989), construed the above statutes and applied them to arguments similar to those raised by Prusator and Keene in the instant case. This Court rejected the arguments raised by the parties in those cases. Kentucky's real estate licensing statutes were enacted to protect the people from unscrupulous and incompetent brokers. Kirkpatrick v. Lawrence, 908 S.W.2d at 127, citing Ledford v. Faulkner, Ky., 661 S.W.2d 475 (1983). Under the act, a person dealing in real estate must obtain a real estate brokers' license. Id., at 127-28. In both Kirkpatrick v. Lawrence, supra, and Lockridge v. Hale, supra, this Court was presented with the issue of whether an unlicensed business broker can recover a commission on the sale of a business when the transaction includes the transfer of an interest in real property. In Lockridge, this Court adopted a bright-line rule that a commission contract involving the sale of real estate is unenforceable regardless of whether the parties' intent was to include personalty in the computation of a commission. Lockridge

v. Hale, 764 S.W.2d at 86. This Court considered the approaches of other jurisdictions, and ruled that a person who negotiates the sale of an ongoing business which includes real estate must be licensed as a broker to be entitled to any commission on the sale. Id. This Court in Kirkpatrick v. Lawrence adopted the same ruling as in Lockridge.

Thus, these cases rejected Prusator's and Keene's argument that Prusator was negotiating for the sale of ongoing businesses rather than for the sale of real property. The sale of the newspaper businesses in the case at bar also involved the sale of real estate as in the above cases. Further, the record shows that Prusator in this case was acting as a "broker" as defined in the statutes. He was clearly negotiating the sale or purchase of businesses including real estate and asserts that he is entitled to receive a commission for his services. Thus, the circuit court correctly ruled that the provisions of KRS Chapter 324 applied to the alleged contract in the instant case.

Prusator and Keene also maintain that Martin engaged in unethical conduct which should prevent him from prevailing in this case. It has been held that any contract of an illegal nature cannot be the proper basis for a legal or equitable proceeding. Miller v. Miller, Ky., 296 S.W.2d 684, 688 (1956). A court will not enforce an illegal contract; the policy of law is not to aid either party to an illegal contract but to leave the parties where the court finds them. Barnell v. Jacobs, 304 Ky. 374, 200 S.W.2d 940, 942 (1947). A party cannot predicate a cause of action on a contract that is contrary to public policy

and void. Tobacco By-Products and Chemical Corp. v. Western Dark Fired Tobacco Growers Ass'n., 280 Ky. 469, 472, 133 S.W.2d 723 (1939). A party cannot use estoppel to get around such contracts. Id. If through applying equitable estoppel, courts could bring about a result expressly forbidden by a statute and public policy, then estoppel does what public policy and the law have forbidden. Id., 280 Ky. at 473-74. Thus, in the case at bar, Prusator's and Keene's estoppel theory must fail.

Prusator and Keene additionally argue that the circuit court's dismissal violates other important public policies. Specifically, they contend that the dismissal violates the law and public policy prohibiting fraudulent conduct and the law recognizing an individual's right to contract. Their argument lacks merit.

Generally, a litigant may not by an attempted characterization of the nature and form of his or her action control the application of legal principles; a court must look beyond the attempted characterization and ascertain the true scope and nature of the action. Chesapeake & Ohio R. Co. v. State National Bank of Maysville, 280 Ky. 444, 451, 133 S.W.2d 511 (1939). Fraud must relate to a present or preexisting fact and cannot ordinarily be predicated on representations or statements that involve matters to be performed in the future. Brooks v. Williams, Ky., 268 S.W.2d 650, 652 (1954). "If, by the terms of a contract, a person promises to perform an act in the future and fails to do so, the failure is a breach of contract, not a fraudulent or deceitful act. . . ." Id.

The action asserted by Prusator and Keene was essentially a breach of contract claim. It does not properly fall under a common law fraud action and cannot be so re-cast. Further, they have shown no breach of the public policy which allows an individual the right to contract. In this case, the parties entered into an illegal contract which cannot be enforced. Viewing the evidence in the light most favorable to Prusator and Keene, it is clear that as a matter of law, their claims fail. See Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991); Upchurch v. Clinton County, Ky., 330 S.W.2d 428 (1959); Bowlin v. Thomas, Ky. App., 548 S.W.2d 515 (1977). The circuit court correctly dismissed their action.

For the foregoing reasons, this Court affirms the Fayette Circuit Court's order.

ALL CONCUR.

BRIEF FOR APPELLANTS:

William C. Rambicure
Lexington, Kentucky

BRIEF FOR APPELLEES:

Jay E. Ingle
Lexington, Kentucky