

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000480-MR

KENNETH MANDELL

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE ALLAN R. BERTRAM, JUDGE
ACTION NO. 96-CI-00065

STEPHEN HALE, INDIVIDUALLY;
STEPHEN HALE, EXECUTOR OF THE
ESTATE OF MARTHA W. HALE, DECEASED

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: GUIDUGLI, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: Kenneth Mandell appeals from a February 9, 2001, summary judgment of the Washington Circuit Court. We reverse and remand.

In the spring of 1991, Mandell and his then wife, Rebecca Parth Mandell, (Parth) contacted appellee Stephen Hale (Hale) to engage him as a real estate agent to locate farm property in Washington County. Hale was a duly licensed real estate agent and insurance broker. He showed Mandell and Parth several properties he had listed, among which was a property called "Glenmar." Glenmar consisted of a home, roughly 19 acres,

and various outbuildings. It was then owned by Hale's mother, Martha Hale (Martha). Hale was also acting as selling agent for Martha.

Hale allegedly made several misrepresentations about Glenmar. Hale represented that Glenmar operated as a profitable eight room bed and breakfast, grossing between \$20,000.00 to \$30,000.00 per year, had eight working fireplaces, complete central heat and air, had been restored by his father, and that the property was not subject to frequent flooding.

On July 18, 1991, Mandell, Parth, Hale, and Martha met at Glenmar for the purpose of signing an agreement for the sale/purchase of Glenmar. At this time, Mandell claims that Hale represented that he and Martha had just completely overhauled the water cistern, that the house was fully compliant with the building code, and that Hale would re-roof the original house, including the mud room and sitting room. Hale then indicated his mother would sell Glenmar for \$225,000.00. Hale's offer was made contingent on Mandell and Parth making a non-refundable deposit of \$50,000.00. Parth maintained she told Hale at this meeting that she and Mandell would not purchase Glenmar on an "as-is" basis and Hale agreed. Based upon Hale's alleged misrepresentations, Mandell and Parth agreed to purchase Glenmar for \$225,000.00. Hale drew up a form real estate contract. A list of antiques in the house to be included in the sale was incorporated by reference. Mandell and Parth signed the contract, and gave Hale the \$50,000.00 non-refundable deposit. After Mandell and Parth signed the contract, Hale took it to his

office without giving Mandell and Parth a copy. Later that day, Hale gave Parth a copy of the contract. Parth put the contract in her purse without looking at it.

Prior to closing, but after tendering the non-refundable deposit, Mandell and Parth asserted they had some difficulty with Hale. Hale allegedly refused a request by Mandell and Parth to inspect the property. Hale allegedly provided a list of personalty removed from the house, in contravention of the contract. When Mandell and Parth expressed anger at the removal of the items, Hale allegedly reminded them of their non-refundable \$50,000.00 deposit. Also prior to closing, Hale showed Mandell and Parth a termite inspection indicating the house was free of termites.

The purchase of Glenmar closed August 15, 1991. Subsequent to the closing, Mandell and Parth contended they discovered the antiques that were to be sold with the property either gone or rearranged. Because the original list of antiques was compiled room by room, Mandell and Parth were unable to determine exactly what had been taken. Mandell and Parth also began to discover the extent of the alleged misrepresentations made by Hale.

The cistern was completely clogged with mud, and was unusable. Hale's part-time employees allegedly advised Mandell and Parth they were instructed to put bowl rings in each toilet, and four or five gallons of chlorine bleach in the cistern prior to visits by Mandell and Parth in order to mask the cistern problems. The water heater was filled with mud. The water pipes

had been laid in concrete, and could only be cleaned after jack hammering through the concrete. Glenmar had only 100 amps of electricity, making it impossible to use more than one major electrical appliance at a time. Mandell claims the house had live wires protruding from the walls, some of which had been repaired with Band-Aids. On one occasion, flames allegedly shot out of the wall when Mandell tried to turn on a light. Glenmar had also suffered severe termite damage. It was further alleged that serious cracks in the floors had been covered by rugs, and cracks in the walls covered by furniture. The baseboard heating system apparently burned the wooden baseboards. Mandell asserts none of the eight fireplaces worked. Five of the rooms lacked heating and air conditioning. Glenmar allegedly flooded some ten times in the first year, even during normal rains. Though Hale put a new roof on the house as per the contract, he allegedly did so over rotting timbers, and without flashing. Two years later, the roof collapsed. It is also alleged that Glenmar owed the Kentucky Revenue Cabinet back taxes in the sum of nearly \$6,500.00 of which Mandell and Parth paid around \$2,600.00.

When Parth telephoned Hale to inform him of the problems with the property, Hale allegedly denied responsibility, and asserted that, according to the contract, the property had been sold "as-is", no warranty, no guarantees. Mandell and Parth allege the contract had been materially altered by Hale's having added the "as-is", no warranty, no guarantees language to the contract after they signed it. Additionally, they allege he changed the word "include" to "exclude" on the contract regarding

the list of personalty that was to have been conveyed with the real property.

On July 17, 1996, Mandell filed this action against Hale and Martha in Washington Circuit Court. On February 9, 2001, the circuit court granted summary judgment in favor of Hale and Martha. This appeal followed.

The sole issue before us is whether the circuit court erred in granting summary judgment in favor of Hale and Martha. Summary judgment is appropriate only where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

In his complaint, Mandell alleged fraud, fraudulent inducement, breach of contract, breach of warranty, breach of fiduciary duty, breach of covenant of good faith and fair dealing. Mandell's allegations were also made against Martha as having had knowledge of the circumstances surrounding the transaction. See Kirby v. Frith, Ky., 311 S.W.2d 799 (1958).

Concerning Mandell's allegation of fraud, the circuit court opined that Mandell was not entitled to "rely upon [Hale's and Martha's] representation of the future profitability of the property." Fraud is a present material misrepresentation, known to be false or made recklessly, inducing action in reliance of another, thereby causing injury. United Parcel Service v. Rickert, Ky., 996 S.W.2d 464 (1999). We agree with the circuit court that one may not allege fraud on another's misrepresentation of future events. See Campbell County v.

Braun, Ky., 174 S.W.2d 1 (1943). We, however, observe that fraud may lie to the extent that Hale represented Glenmar's past profitability as a bed and breakfast. Mandell claims Hale represented that in prior years the bed and breakfast had grossed between \$20,000.00 and \$30,000.00 per year. Viewing these facts most favorably to Mandell, we believe there is a material issue of fact as to whether Hale misrepresented the past profitability of Glenmar as a bed and breakfast, thus precluding summary judgment upon the issue of fraud.

Concerning Mandell's allegation of fraudulent inducement, the circuit court wrote:

[Mandell] admitted sufficient knowledge of the transaction and the sufficient opportunity to gain additional knowledge as to establish the absence of fraudulent inducement(Emphasis added).

Fraudulent inducement occurs where one party to a contract knows that the other relies on him to disclose all material facts thereto, but fails to so disclose, thereby causing the other party injury. See Faulkner Drilling Company, Inc. v. Gross, Ky. App., 943 S.W.2d 634 (1997). Mandell alleges numerous instances of latent defects.

Viewing the facts most favorably to Mandell, we believe there exists a material issue of fact as to whether Glenmar had latent defects, thus precluding summary judgment upon the issue of fraudulent inducement.

The circuit court dismissed Mandell's claims of breach of contract and breach of warranty, asserting Mandell waived both

by reading and signing the contract. Presumably, the circuit court relied upon language in the contract, which reads;

The parties to this contract have read its entire contents and acknowledge receipt of a copy. It is agreed that all terms and conditions pertinent hereto are included in this writing, and no verbal agreements or understandings of any kind shall be binding upon the parties. The BUYER has examined the property purchased, is thoroughly acquainted with its condition, and accepts it as such. (Emphasis added).

It is well established that one cannot contract against his own fraud. Thus, if a seller of real property intentionally fails to disclose to buyers known latent defects in the property which are unknown to the buyers, and buyers were thus induced to purchase the property, a clause such as that above quoted will not relieve the sellers of fraud. See Bryant v. Troutman, Ky., 287 S.W.2d 918 (1956). Considering Mandell's sundry allegations of latent defects, and construing those allegations most favorably to him, we are of the opinion that summary judgment on the issue of breach of contract and warranty was inappropriate.

The circuit court found that Mandell ratified the altered contract by signing it and proceeding with the transaction after he became aware of the alteration.

Fraud inducing a contract may be waived by affirmance that is equivalent to ratification of the contract by the party who claimed to have been deceived into entering into it. That ratification may be shown by his acts after he acquired full knowledge of the real facts and had shown a clear intent to affirm the contract despite the fraud, (Emphasis added).

Hampton v. Suter, Ky., 330 S.W.2d 402, 406 (1959). Mandell asserts he complained about the transaction, but was reminded by

Hale of the non-refundable \$50,000.00 deposit. We believe this also raises a question as to whether Mandell "clearly intended" to ratify the contract. Viewing the facts most favorably to Mandell, we believe there exists a material issue of fact as to whether Mandell clearly intended to ratify the contract, thus precluding summary judgment on the issue of contract ratification.

Presumably addressing Mandell's claims of breach of fiduciary duty and covenant of good faith and fair dealing, the circuit court wrote:

[Mandell's] failure to allege or demonstrate the existence of any form of consideration is fatal to his claim of breach of duty.

Fiduciary relationship exists when a party is "under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation." Lappas v. Barker, Ky., 375 S.W.2d 248, 251 (1963). A real estate broker, by virtue of the contract with his principal, owes the principal a duty of good faith and fair dealing. See Crabtree v. Board of Trustees of Immanuel Baptist Church, Ky., 512 S.W.2d 311 (1974).

It is undisputed that the contract between Hale and Mandell included the following language: "1. Through you as agent [we will give] the sum of Two Hundred Twenty-Five Thousand Dollars" It is likewise undisputed Mandell hired Hale as a real estate agent. Thus, we believe, as a matter of law, Hale and Martha owed Mandell a fiduciary duty, the only question being whether that duty was breached. We are baffled by the circuit court's conclusion that the existence of fiduciary duty is

contingent upon consideration. We observe, however, even if consideration were necessary, Hale stood to receive a 5% commission on the sale of the property at closing. Additionally, Mandell had also given Hale a non-refundable deposit of \$50,000.00. Thus, we believe summary judgment on the issues of breach of fiduciary duty and covenant of good faith and fair dealing was inappropriate.

For the foregoing reasons, the February 9, 2001, summary judgment of the Washington Circuit Court is reversed and the cause remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kent Masterson Brown
Lexington, Kentucky

BRIEF FOR APPELLEE, STEPHEN
HALE:

Daniel Carroll Kelly
Springfield, Kentucky

BRIEF FOR APPELLEE, MARTHA
HALE:

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