RENDERED: JULY 9, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002389-MR

STONESTREET FARM, LLC;
AND FOUR STAR STABLES, LLC
(now known as STONESTREET
STABLES, LLC) APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CI-3186

BUCKRAM OAK HOLDINGS,
N.V. APPELLEE

AND NO. 2009-CA-000026-MR

BUCKRAM OAK HOLDINGS, CROSS-APPELLANT
N.V.

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CI-3186

STONESTREET FARM, LLC;
FOUR STAR STABLES, LLC
(now known as STONESTREET
STABLES, LLC);
AND JESS JACKSON CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

MOORE, JUDGE: Stonestreet Farm, LLC, Four Star Stables, LLC, and Stonestreet Stables, LLC (collectively "Stonestreet"), appeal from an order of summary judgment of the Fayette Circuit Court dismissing their fraud, conspiracy, and breach of contract claims against Buckram Oak Holdings, N.V. These claims were based upon the execution of a December 2004 purchase agreement between these entities and subsequent sale of real property pursuant to that agreement. Buckram cross-appeals for specific performance of a prior purchase agreement in the event that the December 2004 purchase agreement is voided. After a careful review of the record, we reverse the judgment of the trial court as it relates to Stonestreet's claim for breach of contract, otherwise affirm the judgment of the trial court, and remand this case for further proceedings not inconsistent with this opinion. Furthermore, because nothing contained in this opinion should be construed to invalidate the December, 2004 purchase agreement, we do not review Buckram's cross-appeal.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

The focus of this litigation is the purchase of real property, *i.e.*, a horse farm located in Fayette County, Kentucky, formerly owned by Buckram and currently owned by Stonestreet. In September of 2004, Jess Stonestreet Jackson personally met with Mahmoud Fustok, the sole owner of Buckram, to confirm that Buckram would be willing to sell that property. Jackson offered a purchase price of $15 million, but Buckram, through Fustok, refused that price and made a counter-offer of $17.5 million. Shortly after this meeting, the two signed a document entitled "Memo of Agreement of Sale," specifying that Jackson agreed to buy Buckram's property for $17.5 million and that the closing date of the transaction would be December 16, 2004. Jackson later formed Stonestreet Farm, LLC, to act in his stead as the buyer in this transaction and take title to the property.

In November of 2004, Stonestreet had Buckram's property appraised; that appraisal valued Buckram's property at $16.5 million, rather than $17.5 million. Nevertheless, Stonestreet and Buckram proceeded to enter into a revised purchase agreement on December 15, 2004, again specifying the $17.5 million purchase price. The transaction eventually closed on February 4, 2005, with Buckram conveying title to the property to Stonestreet, and Stonestreet's paying $17.4 million, rather than $17.5 million, for the property.

The litigation based upon this transaction began on September 15, 2005, in San Diego County, California, as *Four Star Stables LLC v. Narvick International, Inc., et al.*, Superior Court Case No. GIC853949; it was

subsequently dismissed on grounds of personal jurisdiction. Subsequently, it was re-filed in the Federal District Court for the Eastern District of Kentucky; it was dismissed from that Court on July 9, 2007, for want of subject matter jurisdiction. *See Stonestreet Farm, LLC v. Buckram Oak Holdings, N.V.*, 2007 WL 6995057 (E.D.Ky.) 2007. Finally, this matter was re-filed at the Fayette Circuit Court on July 11, 2007.

The reason for this litigation, as Stonestreet contended, was that Buckram had conspired with Stonestreet's agents to fraudulently induce Stonestreet to pay an inflated price for Buckram's property. The specifics of Stonestreet's theory were stated succinctly by the Eastern District in *Stonestreet Farm, LLC. V. Buckram Oak Holdings, N.V.*, 2007 WL 6995056 at *2-3 (E.D.Ky.) 2007:

> Jackson . . . enlisted the advice of [Emmanuel] de Seroux, Narvick [International, Inc.], [Bruce] Headley and [Bradley] Martin with respect to the purchase of land for his thoroughbred operation in Kentucky. Jackson and these defendants visited several Central Kentucky properties, including Buckram Oak Farm, then owned and controlled by Buckram Oak Holdings, N.V. ("Buckram Oak"), and operated by Mahmood Fustok. Unknown to Jackson, Fustok had previously informed interested buyers that the purchase price for Buckram Oak Farm was $15 million. Thomas Biederman, a local real estate agent, had previously listed the property for $16 million. According to Jackson, defendant Frederic Sauque acted as the principal agent and negotiator for Fustok and Buckram Oak, working with Headley, Martin, de Seroux and Narvick, on Jackson's possible purchase of the property.

> Jackson alleges that Headley, Martin, de Seroux and Narvick recommended that Buckram Oak Farm be purchased for $17.5 million, advising Jackson that Buckram Oak and Fustok had invested over $22.0 million[2] in the property and would not agree to sell it for less than $17.5 million. At the urging of the defendants and based on their representations, Jackson alleges that he purchased Buckram Oak Farm for $17.5 million.
>
> . . .
>
> Jackson also learned that Buckram Oak and Fustok had been ready, willing and able to sell Buckram Oak Farm for less than $16.0 million. Jackson alleges that de Seroux, Narvick, Martin and Headley urged Jackson to pay the inflated price because they stood to collectively make at least $500,000 in kickbacks and bribes from the sell [sic] of the property.

In sum, Stonestreet's complaint asserted breach of contract, fraud by misrepresentation, fraud by omission, civil conspiracy, and various equitable claims against Headley, Martin, de Seroux, Narvick, and Buckram. Only Stonestreet's claims against Buckram are at issue in this appeal.

On May 27, 2008, Buckram moved to dismiss the claims Stonestreet asserted against it or, alternatively, for dismissal of Stonestreet's claims as a sanction for what it alleged was misconduct on the part of Stonestreet's agents during discovery. The trial court treated Buckram's motion as one for summary judgment and, on November 25, 2008, entered summary judgment in favor of Buckram without addressing whether dismissal would also be an appropriate sanction. The bases for Buckram's motion, as well as the trial court's decision, are

[2] Stonestreet's brief and Jackson's deposition states this figure in some places as "$23 million" and in others as "$22 million."

more fully discussed in the analysis below. It is from the trial court's order of November 25, 2008, made final by its subsequent order of December 11, 2008, that this appeal arises.

II. STANDARD OF REVIEW

Buckram moved to dismiss for failure to state a claim pursuant to Kentucky Rule(s) of Civil Procedure (CR) 12.02(f), but the trial court considered several matters outside the pleadings in rendering its decision on this motion. As such, Buckram's motion to dismiss was converted into a motion for summary judgment. *See Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994); *see also Pearce v. Courier-Journal*, 683 S.W.2d 633, 635 (Ky. App. 1985).

Because Buckram's motion to dismiss was converted into a motion for summary judgment, the issue, thus, is not whether Stonestreet's complaint states a claim, but whether the record discloses a genuine issue of fact. *See* CR 56.03. When considering a motion for summary judgment, the court is to view the record in the light most favorable to the party opposing the motion, and all doubts are to be resolved in that party's favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue of material fact exists. *Id*. The moving party bears the initial burden of showing that no issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of

material fact for trial. *See Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Additionally, this appeal involves the construction and interpretation of a contract. Generally, the construction and interpretation of a contract is a matter of law and is also reviewed under the *de novo* standard. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998); *Coleman v. Bee Line Courier Service, Inc.*, 284 S.W.3d 123 (Ky. 2009).

III. ANALYSIS

A. BREACH OF CONTRACT

The December 2004 purchase agreement contains the following provision:

> 15. Miscellaneous.
>
> (a) Commissions and Expenses.
> . . . Seller represents and warrants that it has not and will not pay to any employee, agent, representative, or other affiliate of Purchaser any commission, fee, or other consideration for procuring or assisting in procuring the transaction contemplated by this Agreement.

Stonestreet claimed that Buckram violated this provision and was, consequently, liable for breach of contract. It alleged that Buckram paid commissions in excess of $500,000 to several of Stonestreet's agents shortly after the closing of this transaction as a commission for procuring it. In response,

Buckram did not contend that there was insufficient evidence of record to support Stonestreet's claim of breach; rather, its sole argument was one of contract interpretation, *i.e.*, that even if these payments did occur, a violation of this provision could not constitute a breach of contract because this provision did not survive after the closing of this transaction.

The trial court decided this claim in favor of Buckram. Specifically, it held that because the language of the purchase agreement did not particularly designate that the commissions clause of 15(a) would survive closing, the commissions clause did not survive closing by operation of the doctrine of merger and, therefore, could not be the basis of an action for breach of contract. Stonestreet contends the trial court erred in this regard. We agree.

In general, "[t]he rule that a contract is merged in a deed applies where the deed contains provisions which are inconsistent with provisions in the contract, where the deed varies from that stipulated for in the contract and where the purchaser protests against accepting the deed tendered as full performance of the contract." 77 Am. Jur. 2d *Vendor and Purchaser* § 241. In this regard, we stated in *Drees Co. v. Osburg*, 144 S.W.3d 831, 833 (Ky. App. 2003), that

> [u]nder the merger doctrine, upon delivery and acceptance of a deed the deed extinguishes or supersedes the provisions of the underlying contract for the conveyance of the realty. The doctrine applies to covenants pertaining to title, possession, quantity, or emblements of the property, the covenants commonly addressed in deeds. Covenants in the antecedent contract that are not commonly incorporated in the deed, and that the parties do not intend to be incorporated, are often

> referred to as collateral agreements. The merger doctrine does not apply to collateral agreements.

(Internal citations omitted.)

Several cases provide examples of "collateral agreements" that the merger doctrine will not extinguish. In *Drees*, we held that the merger doctrine did not apply to an arbitration clause contained in an agreement for the purchase of real property because it was

> collateral to the property transfer. It had nothing to do with the title, possession, quantity, or emblements of the property. And it is reasonable to suppose that the parties intended post-closing performance of that clause; disputes, after all, frequently arise after closing.

Drees Co., 144 S.W.3d at 833. In *Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC*, 182 S.W.3d 529, 532-3 (Ky. App. 2005), we held that an escrow agreement between a purchaser and vendor of land was likewise collateral because the clear language of the escrow agreement itself indicated that the parties intended it to survive the delivery and acceptance of the deed. And in *Miller v. Hutson*, 281 S.W.3d 791, 795 (Ky. 2009), the Supreme Court of Kentucky held that a one-year home warranty was collateral because it provided on its face that it would "continue for a period of one year from the date of original conveyance of title to such Purchaser(s) or from the date of full completion of each of any items completed after conveyance of title."

Consistent with these examples, 77 Am. Jur. 2d *Vendor and Purchaser* § 245 observes that

> [t]erms such as purchase price, interest, payments, and date of closing, included in the contract of sale, are normally not repeated in the deed and, therefore, are not merged with the deed in the instrument. Stipulations for the performance of acts in the future are not merged in the deed. A stipulation in a contract for the sale of real estate, to deliver a deed at a specified time upon a contingency fully performed, does not necessarily merge in a subsequently delivered and accepted deed. [And] [t]he presumption of merger is also negated when the contract of sale contains language providing that the agreement will survive the execution of the deed.

(Internal citations omitted.)

Based upon the foregoing, the commissions clause at issue in this case, section 15(a), is exempt from the merger doctrine as a collateral agreement for two reasons.

First, this term deals with the issue of payments. Terms regarding payments, included in the contract of sale, are normally not repeated in the deed and, therefore, are not merged with the deed in the instrument. *Id*. Furthermore, the deed that resulted from the sale of the property in this case does not address the issue of payments at all. Thus, because the term itself cannot be inconsistent with the deed, and because this term has nothing to do with "title, possession, quantity, or emblements of the property,"[3] the merger doctrine cannot operate to extinguish this provision.

[3] *Drees Co.*, 144 S.W.3d at 833.

Second, this term was not merged into the deed because it contains a stipulation for the performance of an act in the future.[4] *See* 77 Am. Jur. 2d *Vendor and Purchaser* § 245; *see also Miller*, 281 S.W.3d at 795. Specifically, it states that Buckram *will not* pay fees or commissions to Stonestreet's agents. Additionally, and irrespective of this clear language, "it is reasonable to suppose that the parties intended post-closing performance of that clause"[5] because persons involved with the purchase of real property may be paid after the closing; this is exactly what is alleged to have caused this dispute.

Buckram argues that a separate provision in the purchase agreement caused the merger doctrine to extinguish the commissions clause. That provision, 15(h), states:

> Survival of Representations and Warranties. Upon the occurrence of the Closing, the representations, warranties and post-closing covenants contained in Section 7[6] hereof shall survive the Closing.

Buckram does not rely upon the expressed language of that provision to support its interpretation of the contract; rather, it relies upon a broad interpretation of what that provision does *not* say. Buckram contends that a literal reading of 15(h) provides that the commissions clause could not have survived the closing because 15(h) listed every provision meant to survive the closing and included no reference

[4] Indeed, the trial court stated in its order that "this provision of the Agreement . . . is clearly dealing with a future event[.]"

[5] *Id*.

[6] By the time the final agreement was signed, the representations and warranties contained in section 7 of the purchase agreement had moved to section 8. Both parties agree that 15(h) refers to the warranties contained in section 8, rather than section 7.

to the commissions clause. It cites to *Prudential Ins. Co. v. Fuqua's Adm'r*, 314 Ky. 166, 234 S.W.2d 666, 669 (Ky. 1950), for the proposition that one rule of contract interpretation is that the expression of one thing is the exclusion of another.

However, entire contracts are not interpreted solely from a negative inference derived from one sentence. Rather, a more basic rule of contract interpretation is that

> [t]he contract must be construed as a whole in the light of its language, subject-matter, and surrounding circumstances. It should be considered in the light which the parties enjoyed when the contract was executed, and the court is entitled to place itself in the same situation as the parties who made it, so as to view the circumstances as they viewed them, and so as to judge the meaning of the words and the correct application of the language to the things which the contract creates. It is an established rule of construction that in order to arrive at the intention of the parties, the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in a contract or apparently conflicting clauses may be thus explained as to their meaning and application. It must be so construed as to give it such effect and none other than as the parties intended at the time it was made. If its language or clauses are susceptible of two constructions, the court will not adopt the oppressive one. With these general principles in mind, it is our duty to examine the contract as a whole, and if possible arrive at the intention of the parties as therein expressed.

Lockwood's Trustee v. Lockwood, 250 Ky. 262, 62 S.W.2d 1053, 1054 (1933) (internal citations omitted).

Here, it is evident from the language of the contract as a whole that 15(h) was not meant to encompass every provision, collateral or otherwise, that the parties intended to survive closing. One of the more demonstrative examples of this appears in section 10 of that contract, entitled "Post-Closing Holdover by Seller." Section 15(h) fails to incorporate this provision and the deed fails to mention it, but this provision describes the *post-closing* contractual right of Buckram and its agents to occupy and enter the property. Applying the forgoing principles of construction, we thus ask: After Buckram and Stonestreet agreed that Buckram and its agents had the right to occupy the property after the closing, did they mean it? Or did they intend that the same contract granting Buckram such a right would take it away before it could arise?

To avoid an absurd result, and because "[i]t is the rule of law that all writings, whether they be contracts or statutes, shall not be presumed to have been entered into or enacted in vain,"[7] our answer to this question is that Buckram and Stonestreet did indeed intend for the provision entitled "Post-Closing Holdover by Seller" to mean exactly what it says: that it applies *post-closing*. For that reason, 15(h) does not, as Buckram contends, encompass every provision that was intended to survive closing. And because it does not encompass every provision intended to survive closing, this Court will not infer, by negative implication, that it somehow voids the collateral agreement contained in the commissions clause, section 15(a).

[7] *Nuetzel v. Travelers' Protective Ass'n*, 168 Ky. 734, 183 S.W. 499, 501 (1916).

Furthermore, interpreting 15(h) to mean that only the provisions it references survive closing would necessarily require this Court to add language to that provision, *i.e.*, the word "only." This we cannot do: a court may not read words into or add conditions to a contract but is bound to consider the contract as written. *See Alexander v. Theatre Realty Corp.*, 253 Ky. 674, 70 S.W.2d 380 (1934).

In light of the above, the trial court erred in holding that the commissions clause and consequently Stonestreet's claim for breach of contract were extinguished following the closing of the sale. As such, we remand this claim to the trial court for a determination of whether this provision was, in fact, breached and what, if any, damages Stonestreet has suffered if the clause was in fact breached. [8]

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[8] We cannot help but note that this may be somewhat of an academic pursuit by the trial court. As will be fully explained in this opinion *infra*, this Court finds no other viable claims on appeal. Stonestreet has presented no evidence, under a summary judgment standard, that would lend support to any of its other claims. This Court has determined that there was nothing fraudulent regarding Buckram's offer to sell its property for $17.5 million and later accepting $17.4 million. The parties bargained for this price, and Stonestreet had information prior to the closing on this property that its appraisal was approximately $1 million less than the price it agreed to pay. If the trial court finds that the commissions clause was breached, the purpose of awarding damages for that breach would be to place Stonestreet in the position it would have been in, but for Buckram's alleged violation of the commissions clause.

> In the case of a breach of contract, the goal of compensation is not the mere restoration to a former position, as in tort, but the awarding of a sum which is the equivalent of performance of the bargain-the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled.

SEG Employees Credit Union v. Scott, 554 S.W.2d 402, 406 (Ky. App. 1977) (citation omitted).

In light of the decision of this Court regarding the amount paid for the property and the lack of any other viable claims, this may be a breach without damages. Nonetheless, this is an issue for the trial court to decide.

B. AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

Next, Stonestreet argues that "the trial court did not address Stonestreet's claim that Buckram Oak aided and abetted it's [sic] agents' breach of fiduciary duty ["Count X"], and its claim must therefore be reinstated." We disagree.

Stonestreet's complaint never asked the trial court for judgment against Buckram on this count. Rather, its complaint only requested

> Judgment on Count X against the Defendant Sauque for compensatory and consequential damages, as well as punitive damages in separate amounts to be determined at trial in excess of the minimum jurisdictional limits of this Court, for the wrongful and fraudulent aiding and abetting, substantially assisting and wrongfully inducing the breaches of fiduciary duty by the Defendants de Seroux, Narvick and Martin.

When Buckram moved to dismiss all of Stonestreet's claims, it specifically stated in its motion:

> C. **Counts II, IX, & X**
>
> These Counts seek judgment against other Defendants, not Buckram Oak. (See pp. 27-28 of the Amended Complaint.)

Stonestreet made no contrary argument in its response to Buckram's motion to dismiss, did not address Count X in its response to Buckram's motion to dismiss, and did not at any time seek to amend its complaint to assert Count X against Buckram. We are thus precluded from reviewing this argument. "An appellate court will not consider a theory unless it has been raised before the trial

court and that court has been given an opportunity to consider the merits of the theory." *Hopewell v. Commonwealth*, Ky., 641 S.W.2d 744, 745 (1982); *see also Daugherty v. Commonwealth*, 572 S.W.2d 861, 863 (Ky. 1978).

C. FRAUD

Stonestreet explains, as the basis of its claims for fraudulent misrepresentation and fraud by omission, that Buckram would have sold Stonestreet the property at issue for $15 million, but for Buckram's agreement with Stonestreet's agents to instead sell the property to Stonestreet for $17.5 million. Stonestreet's theory is that to get this higher price, Stonestreet's agents would tell Stonestreet that Buckram told the agents that Buckram had invested $22 million into the property and that the $17.5 million asking price was non-negotiable. In turn, Buckram would repeat these same statements to Stonestreet. Buckram and Stonestreet's agents would then hope that these representations would induce Stonestreet to pay $17.5 million for the property. If they succeeded, Buckram would pay Stonestreet's agents $500,000, in violation of the commissions clause discussed above.

In short, Stonestreet argues that it relied upon Buckram's representations, as well as the representations of Stonestreet's own agents, in order to assign a higher value to Buckram's property and negotiate a purchase price. Stonestreet based its claim of fraud by misrepresentation upon its allegation that Buckram, on its own or by and through Stonestreet's agents, stated that it 1) had invested $22 million into the property; 2) would not accept less than $17.5 million

for the property; and 3) would not pay a commission to Stonestreet's agents, and that these representations induced it to pay $17.5 million for the property. Stonestreet also contended Buckram was liable for fraud by omission because, as Stonestreet alleged, Buckram had concealed that it had previously offered to sell its property to other prospective purchasers for $15 or $16 million, rather than $17.5 million.

1. FRAUD BY MISREPRESENTATION

Buckram moved for summary judgment on Stonestreet's fraud by misrepresentation claim, arguing that 1) fraud cannot be premised upon the occurrence of a future act amounting merely to a breach of contract; 2) Buckram's misrepresentations alleged by Stonestreet were not material to the transaction; 3) Stonestreet could not have reasonably relied upon these misrepresentations if they were material; and 4) even assuming the contrary, Buckram's alleged misrepresentations did not cause Stonestreet's injury.

In granting summary judgment on this claim, the trial court only addressed Buckram's first argument, *i.e.*, that a claim of fraud cannot be premised upon the occurrence of a future act amounting merely to a breach of contract. In support, it cited to *Brooks v. Williams*, 268 S.W.2d 650, 652 (Ky. 1954), which held that "[i]f, 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, as we understand the term in law."

Stonestreet contends that only one of Buckram's three above-listed representations was a "future promise" and, in any event, that representation, which related to the commissions clause, falls under an exception to the "future promises" rule. That exception, as stated by *Edward Brockhaus & Co. v. Gilson*, 263 Ky. 509, 92 S.W.2d 830, 834-5 (1936), holds that "when a deliberately false opinion is expressed or when a promise is made with the present intent of a future breach, or with no intention of carrying out the promise or declaration of future expectations, [it] may be relied on as a basis of a cause of action[.]" *See also Major v. Christian County Livestock Market*, 300 S.W.2d 246, 249 (Ky. 1957) ("One may commit 'fraud in the inducement' by making representations as to his future intentions when in fact he knew at the time the representations were made he had no intention of carrying them out.") In this regard, Stonestreet contends that Buckram intended not to honor the commissions clause at the time it signed the purchase agreement and that this representation went beyond mere breach of contract and was thus actionable, under the exception, as fraud.

Even assuming that this exception applies, in general, a party claiming fraud must establish six elements by clear and convincing evidence: (1) material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon and, (6) which causes injury. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999), and *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky. App. 1978). Where the proven facts or circumstances merely show inferences,

conjecture, or suspicion, or such as to leave reasonably prudent minds in doubt, it must be regarded as a failure of proof to establish fraud. *Goerter v. Shapiro*, 254 Ky. 701, 72 S.W.2d 444 (1934). Similarly, "[t]he very essence of actionable fraud or deceit is the belief in and reliance upon the statements of the party who seeks to perpetrate the fraud. Where the plaintiff does not believe the statements—or where he has knowledge to the contrary—recovery is denied." *Wilson v. Henry*, 340 S.W.2d 449, 451 (Ky. 1960) (internal citations omitted).

Turning to the instant case, the misrepresentations alleged by Stonestreet fall into two categories: 1) misrepresentations made by Buckram, and 2) the same misrepresentations, but made by Stonestreet's agents whom Buckram allegedly paid.

As they relate to Buckram, the misrepresentations alleged by Stonestreet are 1) the non-negotiability of the $17.5 million sale price, and 2) the claim that $22 million had been invested into the property. Neither can be considered fraudulent.

Regarding the former, Stonestreet did not actually pay Buckram's "non-negotiable" price of $17.5 million for the property; Stonestreet was able to negotiate a lower price after all: $17.4 million. Moreover, there is no authority, and Stonestreet cites to none, demonstrating that a seller of property is obliged to tell a prospective purchaser that it had previously offered that property at a lower price to other prospective purchasers, that the price is negotiable, or that making a statement to the contrary is grounds for fraud. Gamesmanship that goes on

between a seller and a buyer of property does not, on its face, constitute evidence of fraud. Rather, it is more likely the rule than the exception that a seller will maintain a "poker face" to get a higher price for its property.

Regarding the latter, Stonestreet readily admits that, prior to closing, it did not ask or require Buckram to substantiate that it had invested $22 million into the property. Consequently, this representation, as stated by Buckram, is also not actionable as fraud; a person signing a contract cannot rely blindly on the other parties' statements, but must exercise ordinary care. *McClure v. Young*, 396 S.W.2d 48 (Ky. 1965); *see also Kreate v. Miller*, 226 Ky. 444, 11 S.W.2d 99 (1928). Indeed, "[i]t is generally held that one has no right to rely on representations as to the condition, quality, or character of property . . . where the parties stand on an equal footing and have equal means of knowing the truth, or where a right of inspection was given but not utilized." 37 Am. Jur. 2d *Fraud and Deceit* § 267 (2005).

The third misrepresentation at issue, relating to Buckram's intent to breach the commissions clause at the time of signing the purchase agreement, warrants a bit more discussion and necessarily leads to a re-analysis of the same representations, discussed above, as they were made by Stonestreet's agents, rather than Buckram. If Stonestreet did rely upon Buckram's representation that it would not pay a commission to its agents and thus continued to believe that it could rely upon these agents to decide whether to purchase the property, the question

becomes whether Stonestreet has put forth any evidence that it justifiably relied upon these representations, as stated by its agents, in making that decision.

To begin, most of what Stonestreet cites to support that it relied upon these representations as they were made by its agents are the allegations contained within its own first amended complaint. However, pleadings are not evidence. *Educational Training Systems, Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003).

From what we are able to distill from the record and Stonestreet's briefs, the evidence that Stonestreet does cite to support that it justifiably relied upon these representations consists entirely of testimony taken from two of Jackson's depositions. In one deposition, Jackson testified:

> That's—that's the—those are the facts, and I—at the time I closed this transaction, didn't know about those omissions. I didn't know about the—the falsity of the representations, and I was relying totally on my people to be honest, trustworthy, and truthful about those things, including what was invested in the property, that they had been told, evidently, including what the prior history of the property was, and that Mr. Fustok wouldn't accept any less, and that the fee of 17—or, the price of 17.5 was nonnegotiable.

In another deposition, Jackson testified:

> Q: So, through various conversations, [Sauque] informed you that he, personally, or through his companies, owned real estate in at least two different countries, correct?
>
> Jackson: That's correct. And that he also knew farm operations. He was purporting to be my advisor on whether a—an operation was adequate or not.

Q: All right. Did he ever represent to you that he was any type of real estate expert?

Jackson: In the context I just said, yes.

Q: So, in the context of, he knows what particular farm would work well with certain horses and that type of thing, correct?

Jackson: Yes. And he was urging, constantly urging, me to acquire Buckram Oaks. And he was trying to shift me from 60, for instance, to Buckram Oaks, or other farms that I was looking at.

Q: Did he ever represent to you that he had any type of specialized knowledge or training or experience in the acquisition of real estate?

Jackson: Yes.

Q: And what did he represent to you?

Jackson: He, at one time, mentioned that if I was going to Argentina, he would help me find a farm, in addition to evaluate it. I remember that comment. I remember several comments of that vein over the period of the time we were together.

Q: Okay. Was it your understanding, then, that his expertise is more in the suitability of a farm for a particular equine operation? Is that—

Jackson: Yes.

Q: -- basically—

Jackson: But he would make comments like, "Well, the Buckram Oaks property is a good value," comments like, "Well, they invested 23 million," and I relied on those comments because he was one of my advisors at that time.

> Q: Okay. Did he ever advise you that he had any legal training with respect to acquiring real estate?
>
> Jackson: I don't recall any position he took with respect to legal ability.
>
> Q: Did he ever represent to you that he had any training in due diligence for real estate transactions?
>
> Jackson: In one or two farms at the very beginning, in California, I recall he purported to know the values of those farms[.]

This testimony, however, does not constitute the evidence necessary to survive summary judgment because, in spite of these representations, Stonestreet had knowledge to the contrary. *See Wilson*, 340 S.W.2d at 451. Specifically, Stonestreet had hired an independent firm to conduct an appraisal of Buckram's property. One month before the closing of this transaction, Stonestreet had the results of this appraisal in its possession, which placed the value of the property at $16.5 million. This appraisal contradicted any representation that Buckram's property was worth $17.5 million and certainly dispelled the notion that, even if $22 or $23 million had been invested into it, the property was worth that much.

Furthermore, whether Jackson was personally aware of this appraisal at the time of the closing is irrelevant. Stonestreet is the party that alleged fraud against Buckram, Stonestreet's attorneys ordered the appraisal on its behalf, and, because Stonestreet's attorneys had knowledge of the appraisal, Stonestreet was

aware of it as well. As stated in *Lisanby v. Illinois Cent. R. Co.*, 209 Ky. 325, 272 S.W. 753, 754-5 (1925):

> It is also the general rule that knowledge of an attorney, at least where acquired in the course of his employment, is knowledge of his client. *Barnes v. Commonwealth*, 179 Ky. 725, 201 S.W. 318; *Semonin v. Duerson*, 13 Ky. Law Rep. 169; *Summers v. Taylor*, 80 Ky. 429, 4 Ky. Law Rep. 290. In 6 C.J. 639, after stating the general rule *supra*, the text says: "The facts constituting knowledge, or want of it, on the part of an attorney, are proper subjects of proof, and are to be ascertained by testimony as in other cases; but, when ascertained, the constructive notice thereof to the client is conclusive, and cannot be rebutted by showing that the attorney did not in fact impart the information so acquired."

In sum, it has long been the law of Kentucky that, where ordinary inspection or investigation would prevent a deception, an action for fraud will not stand: "With respect to points plainly within the reach of every man's observation and judgment, and where an ordinary attention would be sufficient to guard against imposition, the want of such attention is, to say the least, an inexcusable negligence." *Moore v. Turbeville*, 5 Ky. (2 Bibb) 602 (Ky. 1812). This principle applies no less to contracts for the sale of real property. *Borden v. Litchford*, 619 S.W.2d 715 (Ky. App. 1981). And where, as here, a party claiming to be defrauded actually conducted an investigation which revealed the misrepresentations at issue, and then proceeded to rely upon the misrepresentations anyway, it is similarly inexcusable. We affirm the trial court's decision on this claim.

2. FRAUD BY OMISSION

Much of the analysis regarding fraud by misrepresentation applies equally to this claim. When Buckram moved for summary judgment on Stonestreet's claim of fraud by misrepresentation, the upshot of its argument was that a seller does not defraud a purchaser by representing that it would sell its property at a higher price than it actually would. When Buckram moved for summary judgment on Stonestreet's claim of fraud by omission, it offered a parallel argument: a seller has no duty to disclose to a purchaser the lowest possible price it would be willing to accept for its property and thus cannot be liable on that basis either.

In granting summary judgment in favor of Buckram on this claim, the trial court outlined the factors constituting fraud by omission, as stated in *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky. App. 2003):

> To prevail on a claim of fraud by omission, or fraud based on failure to disclose a material fact, a plaintiff must prove: a) that the defendants had a duty to disclose that fact; b) that defendants failed to disclose that fact; c) that the defendants' failure to disclose the material fact induced the plaintiff to act; and d) that the plaintiff suffered actual damages.

(Internal citations omitted.) The trial court then held as a matter of law that a seller owes no duty to a purchaser to disclose prior asking prices, and consequently dismissed this claim on that basis.

Stonestreet argues the trial court erred in this respect. It prefaces and qualifies this argument by agreeing that

> in a true arms-length real estate transaction the seller owes no duty of care to the buyer, the buyer must conduct his own due diligence to protect his interests, the seller need not disclose his prior asking prices, and the real "market value" of the property is set when the buyer and seller agree upon the final sales price.

However, Stonestreet contends that, while Buckram did not have any duty to disclose its prior asking prices to Stonestreet, Stonestreet's agents, who allegedly conspired with Buckram, did. Stonestreet urges that, by virtue of this alleged conspiracy, its agents' duty to disclose that Buckram had previously offered its property to other prospective purchasers for $15 and $16 million was imputed to Buckram, and, as such, this element was not lacking and did not supply grounds for dismissal of its fraud by omission claim.

Stonestreet cites *Lappas v. Barker*, 375 S.W.2d 248 (Ky. 1964), as authority in support of this theory. That case involved a joint venture between three buyers to purchase an oil and gas lease; unbeknownst to the first buyer, Lappas, the actual sale price of the lease was $150,000 and the other two buyers, Smith and Craighead, had a secret agreement with the sellers entitling them to any amount Smith and Craighead could convince someone to pay over and above that amount. Smith and Craighead pretended to write checks in an amount totaling $50,000 in order to appear to Lappas that they were investing their own money into the lease and taking on a measure of risk. The sellers accepted these checks and, following the completion of this transaction, secretly returned them to Smith and Craighead.

The *Lappas* Court reasoned that Smith and Craighead had defrauded Lappas if Lappas' reliance upon the authenticity of their ostensible investment induced him to enter into the transaction. *Id*. at 250. The Court also reasoned that, if Lappas had been defrauded, the sellers would also be liable because their "ostensible acceptance and secret return of the two $25,000 checks *by them* la[id] at the very heart of [the fraud]" and "perpetuate[d] the fraud upon [Lappas] with respect to the selling price." *Id*. at 252.

The holding of *Lappas* is only that, in the event a buyer's fiduciary defrauds him into paying more for property than the actual sale price, and the seller assists the fiduciary in that fraud, equity dictates that the purchaser should be reimbursed for that difference from the fiduciary and the seller. *Id*. at 252. Lappas intended to pay $150,000 for a three-quarter's interest in an oil and gas lease he understood to be worth $200,000. But, the actual price of the entire lease was undisputedly $150,000, which meant that Lappas had paid the price for the entire lease instead of simply three-fourths of it. Lappas remained liable for the price of a three-fourth's interest in the oil and gas lease, but his debt was adjusted to reflect that he had paid for a three-fourth's interest in that lease—not for the lease in its entirety (and under the fiction created by the sellers, Craighead and Smith). The holding of *Lappas*, however, presupposes the existence of fraud; it was solely on the basis that fraud existed, and that the seller conspired to commit it, that the seller was held liable in that case.

Here, the actual price of Buckram's property was not undisputedly $15 or $16 million; to the contrary, the record in this case demonstrates that Stonestreet directly offered $15 million for the property and Buckram refused that offer. Nor, for that matter, was the $17.5 million asking price a fiction; Buckram insisted upon $17.5 million in direct negotiations with Stonestreet and did not accept any sham checks in an effort to perpetuate a fraud against Stonestreet, or in satisfaction of this price.

In sum, there is nothing to support that when Stonestreet's agents failed to disclose this information, that failure induced Stonestreet to purchase the property at a price of $17.5 million, rather than $15 million. When Stonestreet purchased this property, it already knew that it was purchasing it for one million dollars more than what its own appraisal valued it. And, while Buckram may have advertised a $15 or $16 million asking price for its property in the past, there is simply no evidence in the record demonstrating that Buckram would have sold its property to Stonestreet for anything less than $17.4 million, irrespective of its alleged agreement with Stonestreet's agents. The holding of *Lappas* is inapplicable and, as such, there was no inducement and consequently no fraud by omission.

D. CIVIL CONSPIRACY

The trial court dismissed Stonestreet's claim of civil conspiracy because, as it held, no such claim exists under Kentucky law. Stonestreet argues that this was erroneous because Kentucky does, in fact, recognize such a claim.

We agree with Stonestreet's contention that such a claim can be asserted in Kentucky. This claim was recently discussed in *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC*, 277 S.W.3d 255, 260-1 (Ky. App. 2008):

> [C]ivil conspiracy . . . has been defined as "a corrupt or unlawful combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means." *Smith v. Board of Education of Ludlow*, 264 Ky. 150, 94 S.W.2d 321, 325 (1936). In order to prevail on a claim of civil conspiracy, the proponent must show an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act. *Montgomery v. Milam*, 910 S.W.2d 237, 239 (Ky.1995).

Importantly, however, civil conspiracy is not a free-standing claim; rather, it merely provides a theory under which a plaintiff may recover from multiple defendants for an underlying tort. *See Davenport's Adm'x v. Crummies Creek Coal Co.*, 299 Ky. 79, 184 S.W.2d 887, 888 (1945). Stonestreet contends that it based its theory of civil conspiracy upon underlying theories of 1) aiding and abetting a breach of fiduciary duty, and 2) fraud. As such, we agree that the result of dismissing Stonestreet's claim of civil conspiracy was proper.

As to the first theory, and as noted above, Stonestreet never asserted a claim of aiding and abetting a breach of fiduciary duty against Buckram at the trial level, nor does a review of Stonestreet's complaint reveal that Stonestreet's claim alleging civil conspiracy was based upon anything other than fraud. The portion of Stonestreet's complaint describing its civil conspiracy theory provides only:

> 59. Each of the Defendants has conspired with each other, as well as with third parties, to deceive, mislead and *defraud* Stonestreet in connection with the purchase of Buckram Oak.
>
> 60. The Defendants' conspiracy was carried out by each of them for the purpose of *defrauding* Stonestreet as to the purchase of Buckram Oak and for the express purpose of concealing secret payments or profits received by them or others in the form of bribes, kickbacks, secret commissions, fees, gratuities or other forms of compensation arising out of the Buckram Oak transaction.
>
> 61. By virtue of each Defendant's complicity and participation in the *fraudulent* conspiracy to *defraud* Stonestreet in connection with the Buckram Oak transaction, each Defendant is jointly and severally liable for the damages incurred by Stonestreet as a result of such *fraudulent* and improper conduct in connection with the purchase of Buckram Oak.

(Emphasis added.)

Similarly, Stonestreet's claim of civil conspiracy cannot be based upon fraud because, as stated above, Stonestreet failed to produce evidence of fraud to defeat summary judgment. Stonestreet's claim of civil conspiracy thus has no tort to be based upon and cannot survive as a matter of law.

E. EQUITABLE CLAIMS OF UNJUST ENRICHMENT, ACCOUNTING, DISGORGEMENT, AND CONSTRUCTIVE TRUST

The trial court also summarily dismissed Stonestreet's claims relating to unjust enrichment, accounting, disgorgement, and constructive trust. On appeal, Stonestreet's response to that dismissal is, in total:

> To the extent that this Court overrules the Trial Court's rulings on Stonestreet's substantive claims against

> Buckram Oak, this Court should likewise rule that Stonestreet's equitable claims should be reinstated, and that Stonestreet should be permitted to pursue the remedies embodied therein.

As a preliminary matter, we do not consider this an "argument," as required by and defined in Kentucky Rule(s) of Civil Procedure (CR) 76.12(4)(c)(v), warranting review. An "argument," unlike this statement, contains "citations of authority pertinent to each issue of law." *Id*. Furthermore, we disagree with this statement.

To begin, the trial court properly dismissed Stonestreet's claim of unjust enrichment because "[t]he doctrine of unjust enrichment has no application in a situation where there is an explicit contract which has been performed." *See Codell Const. Co. v. Com.,* 566 S.W.2d 161, 165 (Ky. App. 1977). As the trial court's order points out, an explicit contract had been performed in this matter; pursuant to that performance, Stonestreet received title to the property and was enjoying its full use, and Buckram received only the benefit of its bargain, *i.e.*, the purchase price.

Furthermore, Stonestreet presents no authority, and this Court is aware of none, providing a purchaser of real estate the right to demand of the seller an accounting, disgorgement, or constructive trust with regard to profits received from that sale. Thus, we find no error on these bases, either.

F. CIVIL RULE 41.02

Buckram also moved to dismiss all of Stonestreet's claims as a sanction for what it alleged was "wrongful litigation conduct," pursuant to CR 37(2)(c) and 41.02(1). The trial court declined to address this motion, but Buckram argues that this presents an alternative basis for affirming the trial court's decision to dismiss Stonestreet's claims. We disagree.

As stated by the former Court of Appeals, "The proper application and utilization of [the Civil] Rules should be left largely to the supervision of the trial judge, and we must respect his exercise of sound judicial discretion in their enforcement." *Naive v. Jones*, 353 S.W.2d 365, 367 (Ky. 1961). In this regard, all the powers of sanctioning accorded under CR 11 and CR 37 were fully available to the trial court in this matter. In addition to the sanctions available under CR 11 and CR 37, the trial court was also authorized under CR 41.02(1) to involuntarily dismiss Stonestreet's claims if use of CR 11 and CR 37 sanctions failed to engender compliance with the Rules of Civil Procedure or further orders of the court. *See Jaroszewski v. Flege*, 297 S.W.3d 24, 36 (Ky. 2009) (one of the basic purposes of CR 41.02(1) is to provide a mechanism for sanctioning abuse or misuse of the legal system).

The problem arises, however, in that the trial court made no determination as to whether any sanction, let alone the extreme sanction of dismissal, was warranted in this matter; in fact, the trial court explicitly stated in its order that it had chosen not to address this issue at all. As such, there is simply no

exercise of judicial discretion for this Court to review and we are left, then, with the choice to review this issue in a vacuum.

It is true that an appellate court *may* affirm a lower court's decision on other grounds as long as the lower court reached the correct result. *See, e.g., McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n. 19 (Ky. 2009). But, prudence dictates we allow the trial court to revisit this issue upon remand if it so chooses. Additionally, all of the cases cited by Buckram indicate this to be the proper course of action because each involves the review of a trial court's *decision* to sanction, or not sanction, a litigant. *See, e.g., Nowicke v. Central Bank & Trust Co.*, 551 S.W.2d 809 (Ky. App. 1977); *Natural Resources and Environmental Protection Cabinet v. Williams*, 768 S.W.2d 47 (Ky. 1989); *Stapleton v. Shower*, 251 S.W.3d 341 (Ky. App. 2008); *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991). As such, we decline to alternatively affirm the trial court's decision on this basis.

IV. BUCKRAM'S CROSS-APPEAL

Buckram cross-appealed, asking for specific performance of a September 2004 purchase agreement in the event that the December 2004 purchase agreement was voided as a result of these proceedings. However, we have found nothing in the points raised by either party demonstrating that the December 2004 purchase agreement is invalid. Therefore, Buckram's cross-appeal is moot, and we need not review it.

V. CONCLUSION

For these reasons, we reverse the order of the Fayette Circuit Court as it relates to breach of contract; affirm its order as to Stonestreet's additional claims; and remand this matter for further proceedings not inconsistent with this opinion.

ALL CONCUR.

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