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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001222-MR

JENNIFER AND TIM TIPTON — APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 08-CI-01652

J. CHESTER PORTER, INDIVIDUALLY AND IN HIS CAPACITY AS A PARTNER AND/OR PRINCIPAL AND/OR ASSOCIATE OF PORTER & ASSOCIATES; JENNIFER E. PORTER, INDIVIDUALLY AND IN HER CAPACITY AS A PARTNER AND/OR PRINCIPAL AND/OR ASSOCIATE OF PORTER & ASSOCIATES; THE UNKNOWN DEFENDANTS, CONSISTING OF ANY OTHER UNIDENTIFIED PARTNERS AND/OR PRINCIPALS AND/OR ASSOCIATES OF PORTER & ASSOCIATES IN THEIR INDIVIDUAL CAPACITY AND IN THEIR CAPACITY AS A PARTNER AND/OR PRINCIPAL AND/OR ASSOCIATE OF PORTER & ASSOCIATES; AND PORTER & ASSOCIATES, AN UNINCORPORATED ASSOCIATION BY AND THROUGH ITS PARTNERS AND/OR PRINCIPALS AND/OR ASSOCIATES, J. CHESTER PORTER, JENNIFER E. PORTER, AND THE UNKNOWN DEFENDANTS CONSISTING OF ANY OTHER UNIDENTIFIED PARTNERS AND/OR PRINCIPALS AND/OR ASSOCIATES OF PORTER & ASSOCIATES — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND WINE, JUDGES.

WINE, JUDGE: Tim Tipton and Jennifer Tipton ("the Tiptons") appeal from a summary judgment in favor of Chester Porter, Jennifer Porter, Sharon Satterly, and the Porter & Associates law firm (hereinafter "Porter & Associates") in a legal negligence action. On appeal, the Tiptons aver that the Bullitt Circuit Court erred by determining that there was no attorney-client relationship between the Tiptons and Porter & Associates; that the court further erred by failing to find Porter & Associates could be liable to the Tiptons as a third party for legal negligence; and that summary judgment was premature as the parties had not yet had the opportunity to complete discovery. Upon a review of the record, we reverse and remand to the Bullitt Circuit Court.

History

Prior to June of 2007, the Tiptons were residents of Jefferson County. In June of 2007, they were displaced by the Louisville Regional Airport Relocation Authority and were given $14,070.00 to use as rental assistance over the next three-year period or to use as a down-payment on the purchase of real property. Thereafter, the Tiptons learned of a house for sale in Bullitt County by Dan and Beverly Lucas ("the Lucases").

On or about June 22, 2007, the Tiptons signed a document entitled "Sales and Purchasing Contract" with the Lucases, wherein the Lucases agreed to sell their real property to the Tiptons for the amount of $105,500.00. In said document, the Lucases agreed to convey an unencumbered and marketable title to the Tiptons. The "Sales and Purchasing Contract," in pertinent part, included the following language:

> [The Buyers shall pay the Sellers] [t]he sum of __105,500.00__ (one hundred-five thousand five hundred dollars) ($105,500) payable as follows: __$14,070.00__ cash including the deposit: balance, if any, of __$91,500__ to be financed by PURCHASER on _____ loan plan for a term of _____ years, with interest at the rate of _____8 ½____% per annum, or by assumption of existing Mortgage as follows: _____Owner financed_____.

Although the blank for a purchaser-financed transaction *was not* marked, an interest rate of 8.5% per annum *was* marked. Interestingly, the blank that indicated the Buyers would assume the existing mortgage *was* marked with the notation "Owner financed."

Dan Lucas then engaged the services of Porter & Associates in Shepherdsville to conduct the closing. Some time before the closing, a HUD-1 was completed. The Tiptons and Lucases were named as Buyers and Sellers, respectively, on the form. However, the name of Lender on the HUD-1 was marked as "TBD".[1] Porter & Associates ultimately handled the closing and the

[1] This Court assumes this shorthand reference was intended to stand for the phrase "to be determined."

Tiptons moved into the property. Porter & Associates did not complete a title search in connection with the document preparation or closing. It should also be noted that no real estate agent or attorney was consulted as to the sales and purchasing contract nor was any real estate agent or attorney involved in its drafting. Further, Porter & Associates was not retained until after the contract was formed, and was then retained by the Lucases for the sole purpose of drafting the deed and mortgage and handling the closing.

The closing occurred on July 11, 2008. Apparently, three different closing statements were submitted to the trial court. The first one was faxed to the Louisville Regional Airport Authority on July 3, 2008. The second statement, dated July 11, 2008, was submitted as "Exhibit 5" to Porter & Associates' memorandum in favor of summary judgment and indicated that the closing fee was split equally between the parties. The third closing statement, also dated July 11, 2008 and attached as "Exhibit 5" to the Tipton deposition, showed the Tiptons were to pay $50.00 for a closing fee, but did not indicate whether any party would pay any fee for document preparation.[2] It is undisputed, however, that Dan Lucas retained Porter & Associates to handle the closing and that the Tiptons never met any member of Porter & Associates until the day of closing, where they met a non-attorney employee who handled the closing.

After the closing, the Tiptons moved into the residence. Thereafter, it appears that the agreement of the parties was that the Tiptons would make monthly

[2] In viewing the evidence in a light most favorable to the Tiptons, the trial court relied upon this third closing statement in its summary judgment.

"mortgage" payments to the Lucases.[3] The Lucases then paid the mortgage on the property, which remained in their name. The Tiptons claim that they had no knowledge of the Lucases' mortgage on the property, although it is unclear from the record how they believed the transaction was financed or if they believed the Lucases owned the property outright.

In connection with the closing, Porter & Associates prepared a residential real estate mortgage which named Daniel and Beverly Lucas as the Mortgagees, Tim and Jennifer Tipton as the Mortgagors, and listed a principal amount due on the Note of $91,430.00. Dan Lucas contended, via unsworn testimony in a signed statement attached as an exhibit to Tim Tipton's deposition, that the Tiptons were aware of the mortgage and that the arrangement between the parties was that the Tiptons were to secure their own financing within one year's time. There is no sworn testimony in the record, however, that the Tiptons had any knowledge of the mortgage.[4]

Regardless of the parties' actual understanding, the Tiptons at some point failed to make the agreed upon payments on the home to the Lucases. The Lucases, in turn, failed to make pre-existing mortgage payments to Community First Bank (the Senior Mortgagee of the subject property). As would be expected, a foreclosure suit was filed on May 22, 2008, in the Bullitt Circuit Court. The

[3] The Tiptons did not assume the existing mortgage.

[4] We will not consider the unsworn out-of-court statement by Dan Lucas because the statement is hearsay. *See*, Kentucky Rules of Evidence ("KRE") 801 and 802.

Tiptons were served in the action and filed no response. The property was sold at judicial sale on December 9, 2008.

On December 18, 2008, the Tiptons filed the action herein alleging that they retained the firm of Porter & Associates on July 11, 2007, to represent them in their purchase of real property from the Lucases. The Complaint alleged generally that, "in connection with the real estate closing, [Porter & Associates] owed certain legal duties to the Tiptons, which duties [Porter & Associates] breached, which breach proximately caused the Tiptons[']s damages."

During discovery, Porter & Associates deposed the Tiptons. Thereafter, Porter & Associates filed motions for protective orders to preclude Jennifer Porter's deposition from being taken[5] and to generally halt discovery, as well as a motion for summary judgment. It appears that the Bullitt Circuit Court never ruled on the motions for protective orders, but did render a summary judgment in favor of Porter & Associates based upon the pleadings and limited evidence that had been introduced thus far. The court entered summary judgment on the ground that no attorney-client relationship existed between Porter & Associates and the Tiptons.

The Tiptons now appeal from this judgment. The Tiptons contend that Porter & Associates was negligent in failing to perform a title exam on the subject property. The Tiptons do not dispute that they never requested a title

[5] While Porter & Associates has alleged that Jennifer Porter was not personally involved in the present transaction, it does appear that her name is listed as one of the parties preparing the deed in the instant case.

examination be performed and, in fact, testified they did not know what a title exam was. However, they allege generally that Porter & Associates owed certain duties to them in connection with the document preparation and real estate closing.[6]

Analysis

On appeal, the Tiptons allege (1) that an attorney-client relationship existed between themselves and Porter & Associates; or (2) in the alternative, that Porter & Associates is liable to them as a third party under *Seigle v Jasper*, 867 S.W.2d 476 (Ky. 1993); and (3) that the trial court erred by entering a summary judgment before they had a reasonable opportunity to conduct or complete discovery.

On review of a summary judgment, we adhere to the principle that summary judgment should be cautiously applied. Indeed, summary judgment should only be used "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), *quoting Roberson v. Lampton*, 516

[6] It is not clear why the Tiptons have not included the Lucases in the present action, as they have far more possible claims against the Lucases than against Porter & Associates. Indeed, from our review of the record, and based upon the Tipton's assertions if taken to be true, it appears causes may lie under breach of warranty, breach of contract, rescission, fraudulent misrepresentation, and under the Truth in Lending Act (TILA).

S.W.2d 838, 840 (Ky. 1974). Our standard of review in such cases is whether the trial court was correct in finding that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rule of Civil Procedure ("CR") 56.03; *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). As this determination involves a question of law, we review the trial court's judgment *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

We first address the Tiptons' argument that they enjoyed an attorney-client relationship with Porter & Associates. The relationship between attorney and client "is a contractual one, either expressed or implied by the conduct of the parties." *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. App. 1978). Stated another way, an attorney-client relationship need not arise by written contract, but can also arise from the conduct between the parties. *Lovell v. Winchester*, 941 S.W.2d 466, 468 (Ky. 1997). Our Courts have held that the attorney-client relationship "is created as a result of the client's reasonable belief or expectation that the lawyer is undertaking the representation." *Id*. It should be emphasized, however, that such belief must be reasonable.

Here, there was clearly no *contractual* relationship between the parties. Thus, an attorney-client relationship, if any, could only have arisen by the *conduct* between the parties. In the present case, it is stipulated that the Tiptons never even met any of the attorneys with the Porter firm. Indeed, the Tiptons did not even meet with an attorney of the Porter firm at the real estate closing, as a non-attorney performed the closing. *See, Countrywide Home Loans, Inc. v.*

Kentucky Bar Ass'n, 113 S.W.3d 105 (Ky. 2003). Thus, the Tiptons could have only believed that they were being represented by an attorney of Porter & Associates because Porter & Associates handled the real estate closing.

Even when viewing the evidence in a light most favorable to the Tiptons, this was not a reasonable belief or expectation on their part. The Lucases were the only party in contact with Porter & Associates. Further, the Lucases directed Porter & Associates as to what documents to draft (the deed and mortgage) and as to the date of closing and to whom the paperwork should be sent (the HUD-1 was directed to be sent to the Airport Authority). Finally, although we may assume that the Tiptons paid one-half of the closing fee to Porter & Associates ($50.00 per the HUD-1), this single factor cannot outweigh the other, overwhelming evidence that no attorney-client relationship existed. Accordingly, we agree with the trial court that no attorney-client relationship existed.

However, there "is no privity requirement for legal malpractice actions in Kentucky." *Sparks v. Craft*, 75 F.3d 257, 261 (6th Cir. 1996). Rather, an attorney may be held "liable for damage caused by his negligence to a person *intended to be benefited* by his performance irrespective of any lack of privity." *Seigle*, 867 S.W.2d at 483, *quoting Donald v. Garry*, 19 Cal.App.3d 769, 97 Cal.Rptr. 191 (1971). In addition, the Restatement (Second) of Torts, §552, *Information Negligently Supplied for the Guidance of Others*, states in pertinent part, that:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, *supplies false information* for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information . . .

(Emphasis added). Thus, the trial court should not have ended its analysis with the conclusion that summary judgment was proper simply because no attorney-client relationship existed between the parties. As such, we must now ask, when viewing the evidence in a light most favorable to the Tiptons, whether Porter & Associates could be found liable to the Tiptons as a third party intended to be benefitted by its performance.

We may quickly dismiss liability under the Restatement (Second) of Torts §552, as adopted by our courts in *Seigle,* because Porter & Associates clearly did not supply any false information. However, whether Porter & Associates may be held liable to the Tiptons under a legal negligence theory for damages is a more difficult question. To be sure, it is not alleged that Porter & Associates negligently performed a title search and failed to find the pre-existing mortgage and tax liens. This case would be much clearer if that were the state of affairs. *See, e.g., Seigle, supra*. Instead, the allegation is that Porter & Associates (1) never undertook to complete a title exam in the first place and; (2) that Porter & Associates drafted a deed warranting that the land was free of encumbrances and the title was marketable.

As to Porter & Associates' liability for warranties made within the deed, this argument must fail because warranties in a deed are made solely by the grantor. 21 C.J.S. Covenants §22 (1990). *See also*, *Smith v. Jones*, 17 Ky.L.Rptr. 456, 31 S.W. 475, 475-76 (1895). Porter & Associates merely drafted the deed and cannot be held liable for any misrepresentations made therein by the Lucases.

However, the question of whether Porter & Associates was negligent for failing to perform a title search before drafting the deed and mortgage and performing the closing is a different question. Specifically, the Tiptons were intended to be benefitted by Porter & Associates' performance in drafting the deed and mortgage documents. Nonetheless, the appellants have cited no statutory law or case law in this Commonwealth which would require a closing attorney to perform a title exam before drafting a deed or mortgage. Additionally, we are aware of no statutory law or case law which would require a title exam before an attorney or firm performs a real estate closing.

Nonetheless, legal negligence cases are determined by a standard which considers the care and skill that would be exercised by a reasonably competent attorney in the same or similar circumstances. *Daugherty v. Runner*, 581 S.W.2d 12, 16 (1978). When determining whether the degree of care and skill an attorney exercises meets the aforementioned standard of care, "the attorney's act, or failure to act, is judged by the degree of its departure from the quality of professional conduct customarily provided by members of the legal profession." *Id*. This is a factual question that cannot be determined by resort to summary

judgment, but is a question for the jury. *Id*. Expert testimony would be required to answer this question as this is not the sort of question that would be within the common knowledge of a layperson. *Stephens v. Denison*, 150 S.W.3d 80, 82 (Ky. App. 2004). Although appellants have cited no law specifically requiring title exams in such circumstances, this Court would be stepping into the role of fact-finder were we to speculate that such is not the standard practice in the field of real estate law and with attorneys who routinely perform real estate closings.

The Tiptons' final argument is that Porter & Associates was resistant to discovery attempts and that summary judgment was inappropriate given that the Tiptons had not yet been given adequate time or opportunity to depose them. We find that summary judgment may have been premature in this respect, given that it was granted a mere two months after the amended complaint was filed and before the Tiptons were able to depose the members of Porter & Associates.[7] *See, e.g., Pendleton Bros. Vending, Inc. v. Com. Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988). However, as we are remanding on the issue of legal negligence and this issue is unlikely to recur, we decline to address this issue further.

Accordingly, we reverse and remand on the grounds that summary judgment was inappropriate on the legal negligence claim. Whether Porter & Associates was negligent for failing to conduct a title search before drafting a deed and mortgage and performing the closing is a question for the finder of fact. On

[7] The Tiptons allege that the Appellees would not make themselves available for deposition. There is some support in the record for this, as it appears that the Appellees filed motions for protective orders to prevent same. Regardless, we do not need to reach this issue at this time.

remand, the trial court shall provide the Tiptons adequate time to obtain an expert for testimony on this issue.[8] The Tiptons must also be provided reasonable time to in which to depose Chester Porter, Jennifer Porter, and Sharon Satterly.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David B. Mour
Louisville, Kentucky

BRIEF FOR APPELLEE:

Richard V. Evans
R. Gregg Hovious
Louisville, Kentucky

[8] Of course, the court may also consider whether the Tiptons knew of the mortgage the Lucases held on the property. As previously stated, there is currently no evidence of this in the record at this point. We will not consider an unsworn statement by Dan Lucas that the Tiptons agreed to the arrangement (in which case the question is also begged whether Lucas conveyed this "arrangement" to Porter & Associates).