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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001166-MR

EDWARD H. FLINT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 09-CI-010478

COACH HOUSE, INC.; JIM SHUFFLEBARGER, PRESIDENT; MARGARET WRIGHT, VICE-PRESIDENT; SHIRLEY SERGEANT, TREASURER; NORMA SAVAGE, SECRETARY; NANCY OSTERTAG, DIRECTOR; SUSAN KLEMPNER, DIRECTOR; DENNIS FLEMING, DIRECTOR; MULLOY PROPERTIES; and JANE DOE AND JOHN DOE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

WINE, JUDGE: Edward H. Flint, a condominium owner, appeals from a summary judgment of the Jefferson Circuit Court in favor of Coach House, Inc. *et. al*.,

dismissing his claims against Coach House alleging violation of the condominium association master deed and bylaws. Upon a review of the record, we affirm.

Flint is a condominium owner at the Coach House Condominiums in Jefferson County, Kentucky. This action arose after the Coach House Condominium Board ("the Board") imposed an assessment on its condominium owners for refurbishing common areas of the condominium property. Flint filed suit in the Jefferson Circuit Court seeking reimbursement for this assessment, alleging that Coach House redecorated common areas without first obtaining a majority vote of the owners. Flint alleged that it was in violation of the condominium association master deed and bylaws to impose an assessment for the refurbishment without obtaining a majority vote. Based upon his interpretation of the Coach House bylaws, Flint filed a complaint for compensatory and punitive damages under the tort theories of conspiracy, breach of fiduciary duty, and breach of contract, and under theories of discrimination and violation of Kentucky Revised Statutes ("KRS") 273.215 and 273.229.

The facts are not in dispute in this matter. Rather, the controversy between the parties arose over the interpretation of a subsection of the Coach House bylaws –particularly, subsection "m" on page D-16 of the Coach House bylaws. The parties disagree as to whether the redecorating of the lobby was a "capital improvement" or falls within the Board's stated authority to replace or restore portions of the common areas. If the refurbishment of the lobby is considered a "capital improvement," the Board was first required to obtain the

approval of the majority of the owners before proceeding. If it was not a capital improvement, but within the Board's authority to replace or restore common areas, then the Board was not required to first obtain approval of a majority of the owners.

Upon review of a summary judgment, the standard on review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). As this poses a question of law for the Court, we review the matter *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Upon review, we address each of Flint's claims and ask whether the trial court was correct in finding that there was no genuine issue as to any material fact with respect to Flint's claims of (1) conspiracy; (2) breach of fiduciary duty; (3) violation of KRS 273.215 and KRS 273.229; (4) discrimination; and (5) breach of contract. Finally, we also consider Flint's claims on appeal that the trial judge erred in refusing to grant a motion for change of venue and in failing to recuse himself.

Conspiracy

We first address Flint's claim of conspiracy. Civil conspiracy is "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.'" *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC,* 277 S.W.3d 255, 261 (Ky. App. 2008), quoting *Smith v. Board of Education of Ludlow,* 264 Ky. 150, 94 S.W.2d 321, 325 (1936). In order for a plaintiff to prevail on a claim of conspiracy, the litigant must show an unlawful or corrupt combination or agreement between the conspirators to engage in, by some concerted action, the unlawful act. *James v. Wilson*, 95 S.W.3d 875, 897 (Ky. App. 2002). Concerted action has been taken to mean that the parties undertook some "overt act done pursuant to or in furtherance of conspiracy." *Davenport's Adm'x v. Crummies Creek Coal Co*., 299, Ky. 79, 184 S.W.2d 887 (1945).

Upon a review of the record, we agree with the trial court that, given the nature of the work performed and the plain language of the applicable bylaws, there is no evidence of record which would reasonably suggest that the Board conspired to do anything unlawful and that the refurbishment fell within the Board's general power to make improvements to common areas. Indeed, a review of the applicable master deed and bylaws indicates that the Board was authorized, if not obligated, to perform refurbishment of common areas like the lobby when needed. As Coach House made clear before the trial court, the common area in question had not been refurbished since 1986.

As there was no unlawful act, and as no unlawful means were otherwise used to carry out this lawful act, a claim of conspiracy cannot stand. We reiterate the position of the trial court that while Mr. Flint undoubtedly feels

genuinely aggrieved, there are no legitimate issues of fact which would allow him to prevail at trial on this claim.

Breach of Fiduciary Duty Claim

We now address Flint's claim of breach of a fiduciary duty. A fiduciary duty is defined as "a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 485 (Ky. 1991), quoting *Security Trust Co. v. Wilson*, 307 Ky. 152, 157, 210 S.W.2d 336, 338 (1948). There can be no question in the present case that the Board did owe Coach House and the condominium owners such a duty. However, there is no evidence of record of any *breach* of that duty.

Indeed, we find that given the nature of the work performed and the plain language of the applicable bylaws, there is no evidence in the record which would suggest the Board did not act "in good faith and with due regard" for the condominium owners' interests in undertaking the refurbishment of the common area. *Id*.

Claim of Violation of KRS 273.215 and KRS 273.229

We next address Flint's claim that the Board violated the provisions of KRS 273.215 and KRS 273.229. These two statutes, when read in combination, require directors and officers to discharge their duties (1) in good faith, (2) upon an informed basis, and (3) in a manner they honestly believe is in the best interests of the corporation. *Id*.

For the same reasons espoused above in holding that the Board breached no fiduciary duty, we also hold that the Board did not violate KRS 273.215 or KRS 273.229. There is no evidence of record which would reasonably suggest that the Board did not act in good faith, on an informed basis, and upon an honest belief that they were acting in the best interests of Coach House and the condominium owners.

Discrimination Claim

Flint also alleges to have been discriminated against by the Board, although it is not readily apparent from the record exactly how Flint claims to have been discriminated against.

Drawing inferences from the pleadings, one may assume that Flint believes that the Board took certain actions against him out of "spite." It appears Flint believes such actions may have also been taken because of the fact he's eighty-years-old, that he has previously sought legal redress against the Board, or because of the fact that he is proceeding *pro se*.

Flint has not cited to any specific statute giving rise to this discrimination claim. As our Courts have previously noted, "the right to be free from discrimination based on race, color, religion, national origin, sex, and age is [based in statute]" and is not a common law cause of action. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981). Even if we were to consider the claim under KRS Chapter 344, Flint does not allege any actions were taken due to his age, familial status, race, gender, religion, or national

origin, but only vaguely asserts that certain actions appeared to be prompted out of "spite" due to his litigiousness. "Litigiousness" is not protected under KRS Chapter 344 or Title VI. KRS 344.20; 42 U.S.C. § 2000d, *et seq*.

Thus, there is no evidence of record posing any genuine issue of material fact on Flint's claim of discrimination, and Coach House was, therefore, entitled to judgment as a matter of law.

Breach of Contract Claim

Finally, we address Flint's claim against the appellee, Mulloy Properties, the company with whom Coach House contracted for the refurbishment. Flint alleges Mulloy violated its contract with Coach House and basically "did what they wanted to." We note that the pleadings offer no guidance as to what Flint claims Mulloy did, or did not, do. Moreover, we note that this claim is made against the Board, whereas it appears to be a breach of contract claim against Mulloy.

We agree with the trial court's dismissal of Flint's claim as Flint has not stated any specific grounds for breach, other than stating Mulloy "did what they wanted to." More importantly, however, Flint is not a party to that contract and has not argued that he should be treated as a third party beneficiary of said contract. *Sexton v. Taylor County*, 692 S.W.2d 808, 810 (Ky. App. 1985) (The law of this jurisdiction is that no stranger to a contract may sue for breach unless the contract was made for his benefit.). Thus, Flint raises no genuine issue of material fact in order to survive summary judgment on this claim.

Denial of Motions for Change of Venue and Recusal of Trial Judge

Flint's final claims on appeal are that the Jefferson Circuit Court erred in denying his motion for change of venue and that Jefferson Circuit Court Judge McKay Chauvin should have recused himself.

We first address the denial of Flint's motion for a change in venue. We note, at the outset, that this was Flint's *fourth* attempt to change venue since the case was filed. The appellees describe the situation aptly in their brief as follows:

> In every instance in which one of the previously presiding judges ruled against [Flint] on a motion brought before that court, no matter how trivial or routine a ruling, [Flint] would cry foul, demand recusal, and demand a change of venue[,] accusing that judge of bias and prejudice.

Flint cites KRS 452.010(2) as authority for a change of venue. Because Flint has sued Judge Chauvin and several other Jefferson County judges in federal court, Flint concludes that the entire Jefferson County panel of judges must be prejudiced against his case. Flint alleges that his suits against these judges have somehow "tainted" the entire pool of judges in Jefferson County, thus necessitating a change of venue to Oldham County. However, this leap of logic is unsupported by any factual basis. Flint has come forth with no evidence of undue influence, or of any circumstances which would render it impossible for him to have a fair and impartial trial in Jefferson County, other than bare assertions that Jefferson County

judges are "after him" because of said lawsuits. KRS 452.010(2). This is insufficient.

Flint also claims on appeal that Judge Chauvin should have recused himself. Flint alleges that Judge Chauvin should not be allowed to sit on the present case because he is the defendant in a suit in federal court where he is being sued by Flint.

The rule for recusal is that "[a] trial judge should disqualify himself in any proceeding where he has knowledge of any circumstances in which his impartiality might reasonably be questioned." *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995). However, "[a] party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal." *Id*. at 230.

While we realize that a sitting judge should not ordinarily hear a case where he is involved as a party in another action with a litigant appearing in his courtroom, we also agree with Judge Chauvin that Flint cannot be allowed to "manipulate the court system" by suing any judge who hands down a contrary ruling and later seek their recusal. Other jurisdictions have agreed with this rationale, concurring that a judge should not be "disqualified merely because a litigant sues or threatens to sue him." *U.S. v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977), *cert. denied*, 435 U.S. 954, 98 S. Ct. 1586, 55 L. Ed. 2d 806 (1978). One reason for this is to prevent "judge shopping," a practice where plaintiffs "name a judge as a defendant to get a new (and perhaps more favorably inclined)

judge." *Anderson v. Roszkowski*, 681 F.Supp. 1284, 1289 (N.D.Ill. 1988). We agree that such a practice must be discouraged.

Given the unique circumstances of this case, and the lack of evidence of Judge Chauvin's ability to be fair and impartial, we do not find that he should have been disqualified.

In conclusion, we affirm the summary judgment of the Jefferson Circuit Court on all grounds and hold that venue was proper in Jefferson County and that Judge Chauvin should not have been disqualified.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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