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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002236-MR

AARON MORTGAGE COMPANY APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
DIVISION TWO
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 02-CI-00145

KDS PROPERTIES, INC. APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

COMBS, JUDGE: Aaron Mortgage Company (Aaron Mortgage) appeals from a judgment of the Boyd Circuit Court that awarded KDS Properties, Inc., $1,245.59 in compensatory damages and $70,000.00 in punitive damages. At issue were misrepresentations of the agent of a mortgage company in a commercial loan

transaction. Following our review of the proceedings, we affirm in part, vacate in part, and remand.

In 1995, KDS Properties bought a parcel of commercial property in Ashland from Family Bank (FSB), a federally chartered saving and loan association. The bank financed the purchase and retained security interests in the property. KDS Properties eventually defaulted on the promissory notes. Family Bank filed a foreclosure action in the fall of 1999.

In the winter of 1999, Dale Sexton, president of KDS Properties, communicated with Charles Hatfield, a mortgage broker working with Aaron Mortgage. Sexton discussed his efforts to refinance the debt to Family Bank.

In early 2000, Sexton requested a written loan guarantee from Hatfield confirming their oral communications. In correspondence dated February 22, 2000, Hatfield assured Sexton that he had secured "conditional loan approval" for a refinance of the debt. Hatfield also advised Sexton that "we do have several other lenders interested in your deal," explaining that he would "take one lender's commitment and ask the others to meet or beat it. . . ." Finally, Hatfield indicated, "[w]ith the new appraisal, [we] should close in 10 to 14 days." Sexton was not satisfied with the letter.

In a subsequent letter dated February 23, 2000, Hatfield represented to Sexton that loan approval had been secured in an amount not to exceed 85% of the value of the subject property. Hatfield explained that the loan approval was contingent "upon a submission of a satisfactory appraisal" and made a reference to

"other items that you and your CPA need to submit." No mention was made of an interest rate, loan term, or loan amount. Hatfield's correspondence of February 22, 2000, indicated that these items were to be "negotiable up until the day prior to closing."

On February 25, 2000, summary judgment was entered in favor of Family Bank in the foreclosure action. However, based upon Hatfield's written and oral representations, Sexton obtained a delay in the sale of the property. The sale was set for May 12, 2000.

On April 27, 2000, Hatfield again corresponded with Sexton and advised that a title report had been ordered and that the appraisal was "undergoing a desk review." He indicated that his office expected "to have your file complete and ready to fund by May 10th."

Hatfield next corresponded with John Blackburn of Family Bank in a letter dated May 9, 2000; a copy of that letter was faxed to Sexton. Hatfield wrote that the correspondence would "serve as our commitment to your bank that we will be closing the loan for the above referenced (*sic*) client. . . ." He further explained that the office "has met all stipulations our lender needed to close the loan except the title endorsement" and that he "expects to receive that title today." He indicated that the delay "has been a result of obtaining the best terms possible for Mr. Sexton. . . ." Hatfield admitted in testimony that he intended to mislead Blackburn through this correspondence; however, he claimed that Sexton was well aware that the representations made in this letter were false.

After the property had been sold to satisfy the mortgages, Sexton filed a motion to set aside the sale. He alleged that Family Bank had perpetrated a fraud against him by misrepresenting that it would refinance his indebtedness. Sexton claimed that because of the bank's misrepresentation, he had delayed "seeking another financial source in a timely fashion." The sale was confirmed by order of the Boyd Circuit Court entered on June 23, 2000.

On February 13, 2002, KDS Properties, Inc., filed a civil action against Aaron Mortgage. KDS Properties alleged that the mortgage company had represented that it would make a loan sufficient to pay the indebtedness related to the subject commercial property and that, in reliance upon that representation, KDS Properties had refrained from making any payment to Family Bank toward the indebtedness after February 2000. KDS Properties contended that Aaron Mortgage then breached its express written and oral commitments to make the loan. KDS Properties argued that as a result of the breach, the subject property had been sold on May 12, 2000, damaging KDS in the amount of $180,000.00. KDS sought compensatory and punitive damages and attorneys' fees. In its answer, Aaron Mortgage denied all of the allegations.

In September 2005, Aaron Mortgage filed a motion for summary judgment. KDS Properties responded and filed a motion for leave to amend its complaint in order to assert an additional claim for damages based upon negligent and intentional misrepresentations made by Hatfield. The trial court denied the motion for summary judgment but granted leave to KDS to amend its complaint.

Aaron Mortgage answered the amended complaint and denied the additional allegations made against Hatfield. Aaron Mortgage also filed a third-party complaint against Hatfield and Sexton. Hatfield then filed cross-claims against Sexton and KDS Properties.

In May 2008, Aaron Mortgage renewed its motion for summary judgment. The motion was denied in September, and the trial court set the matter for trial. The trial was conducted on August 9 – 11, 2010.

At the conclusion of testimony, Aaron Mortgage moved for a directed verdict. The court denied the motion. The court determined that Hatfield was an agent of Aaron Mortgage as a matter of law and overruled Aaron Mortgage's objection to a jury instruction concerning the propriety of punitive damages.

The jury found in favor of KDS Properties on the fraud and negligent misrepresentations claims made against Hatfield. It awarded KDS Properties $1,243.59 in compensatory damages and $70,000 in punitive damages. Judgment was entered on August 19, 2010. The trial court denied the motion of Aaron Mortgage and Hatfield to alter, amend, or vacate the judgment. This appeal followed.

Aaron Mortgage presents three arguments on appeal. First, it argues that the trial court erred by denying its motion for directed verdict, contending that the evidence was insufficient to support a verdict in favor of KDS Properties. Next, it argues that the court erred in instructing the jury that it could impose punitive damages. Finally, it contends that the punitive damages award was excessive and

that the trial court erred by denying its motion to alter, amend, or vacate the judgment on that basis.

The standard of review of a trial court's denial of a motion for a directed verdict is well summarized as follows:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky., 743, 184 S.W.2d 111 (1944), and *Cochran v. Downing,* Ky., 247 S.W.2d 228 (1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" *NCAA v. Hornung,* Ky., 754 S.W.2d 855, 860 (1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.

Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461-62 (Ky.1990). Aaron Mortgage contends that "the complete lack of evidence on essential elements of [KDS Properties's] claims requires reversal under this standard." Brief at 6.

An actionable claim for fraudulent misrepresentation depends upon proof – by clear and convincing evidence – of the following six elements:

> (1) that the declarant made a material representation to the

plaintiff related to a past or present material fact;
(2) that the representation was false;
(3) that the declarant knew that the representation was false or made it recklessly;
(4) that the declarant induced the plaintiff to act upon the misrepresentation;
(5) that the plaintiff reasonable relied upon the misrepresentation
and
(6) that the misrepresentation caused injury to the plaintiff.

See Flegles, Inc. v. Truserv Corp., 289 S.W.3d 544 (Ky. 2009).

The Restatement (Second) of Torts § 552 (1977), outlines the elements of negligent misrepresentation:

> (1) 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, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created,

> in any of the transactions in which it is intended to protect them.

Aaron Mortgage contends that KDS Properties utterly failed to prove that it had reasonably (or justifiably) relied upon the representations of its agent, Hatfield, or that Hatfield's conduct resulted in any financial loss whatsoever. Aaron Mortgage characterizes Hatfield's oral and written representations as mere "sales talk" or "puffing" and describes Sexton as an experienced businessman who should have known better than to rely upon Hatfield's changing and often contradictory assurances. It also contends that the loss of the equity in the property as a result of the foreclosure sale was attributable solely to the conduct of KDS Properties and could not reasonably have been attributed to Hatfield's representations. We disagree.

Since KDS Properties prevailed at trial, we must recognize its entitlement to all inferences that the jury could reasonably have drawn from the facts and evidence presented. The trial court did not err by concluding that the proof introduced was sufficient to put into dispute an issue of fact for the jury to consider in this matter.

Sexton testified that Hatfield had thoroughly convinced him through the winter of 1999-2000 that Aaron Mortgage could and would secure the necessary loan even while the foreclosure action was pending. Sexton indicated that he had sent to Hatfield (per Hatfield's request) all the necessary information for processing the loan -- including appraisals of the property, his business and

personal financial information, and a list of tenants leasing space at the subject property. Sexton indicated that he had come to rely entirely upon Hatfield's knowledge of the mortgage business and his energetic and positive representations. Consequently, Sexton testified that he refrained from pursuing other financial alternatives when Hatfield persuaded him that Aaron Mortgage had secured the necessary loan. Sexton stated that once he realized that Aaron Mortgage was never going to close the loan, he had run out of time to obtain alternate financing.

Tom Hobbs, a mortgage broker from the area, confirmed that refinancing the subject property would likely have been an option in 1999-2000 – even after a foreclosure action had already been filed. He testified that the appraisal showed a sufficient amount of owner equity and that the property was income-producing – both favorable factors for securing a new loan. He indicated that refinancing would reasonably have been available up until the redemption period ended.

As an appellate court, we are not at liberty to assess the credibility of the witnesses. Nor are we in as advantageous a position as the trial court to decide whether the jury could reasonably have found that Sexton justifiably relied on Hatfield's representations. Accepting all the evidence presented in favor of KDS Properties as true and drawing all reasonable inferences in its favor as we must, we cannot conclude that the trial court erred by finding that the evidence was sufficient to support the fact that Sexton had reasonably relied (and was justified in relying) upon Hatfield's representations. We are also persuaded that Hatfield's assurances to Sexton and others that the loan would, in fact, close on a date certain

amounted to significantly more than mere "puffing" or "sales talk," rendering his representations actionable.

Moreover, the evidence was sufficient to support the jury's subsequent finding that Sexton's reliance upon the material misrepresentations made to him caused KDS Properties to suffer a real financial loss. Sexton testified that Hatfield had convinced him that the loan was a "done deal." Consequently, the failure to fund the loan caused KDS Properties to suffer financial loss since Sexton had no time to seek alternative financing. Hobbs testified that alternative financing was very likely available under the economic conditions as they existed at that time – despite the fact that the foreclosure action was moving forward.

Jury verdicts are not to be disturbed lightly. After our review of the evidence presented in this case, we conclude that the verdict rendered was not palpably or flagrantly against the evidence so as to indicate that it was a result of the jury's passion or prejudice.

Aaron Mortgage next argues that the trial court erred by instructing the jury that it could impose punitive damages. It contends that the evidence presented was insufficient to overcome its motion for a directed verdict on the issue. We disagree.

There was substantial probative evidence in this case to indicate that Hatfield acted with indifference and reckless disregard for the interests of KDS Properties. The jury found that Hatfield intentionally (or recklessly) had repeatedly misrepresented the status of the loan application to KDS Properties. It

was persuaded that Hatfield had supplied materially false information to KDS Properties as he guided it through an unconventional loan process and that his conduct was aimed at furthering his own interests at the expense of his client's. The jury was convinced that Hatfield meant to convince Sexton that he (Hatfield) had successfully negotiated a favorable loan agreement so that Sexton would not pursue other loan packages available from other brokers and that this false representation caused KDS Properties to suffer financial loss. Under the circumstances, the trial court did not err by concluding that an instruction on punitive damages was wholly warranted. The evidence was sufficient to overcome the mortgage company's motion for a directed verdict on the issue of punitive damages. *Hanson v. American Nat'l Bank & Trust Co.,* 865 S.W.2d 302 (Ky. 1993).

Finally, Aaron Mortgage contends that the jury's award of punitive damages was excessive and that the trial court erred by failing to alter, amend, or vacate the judgment on this basis. Our evaluation of an award of punitive damages is subject to *de novo* review. On this point, we are compelled to agree with the appellant's argument.

The jury apparently did not find Hatfield's conduct particularly egregious in this case since it awarded to KDS Properties only 1% of the compensatory damages that it sought to recover -- $1,243.59; however, it awarded ***more than 56 times this amount*** in punitive damages. This disproportionately high ratio alone calls into question the validity of the award. The United States Supreme Court has

noted that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process standards. *State Farm Mutual Automobile, Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

Grossly excessive or arbitrary punishment in the form of punitive damages is prohibited by the provisions of the Fourteenth Amendment. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Nothing about the facts and circumstances of the case justifies the enormous and disproportionate disparity between the amount of compensatory damages and punitive damages. Consequently, we must remand the matter for a new trial on the amount of punitive damages to be awarded.

Accordingly, the judgment of the Boyd Circuit Court is affirmed in part, vacated in part, and remanded for a new trial solely as to the amount of the punitive damages award.

NICKELL, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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