RENDERED: MAY 6, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000875-MR

MICHAEL LADD — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 08-CI-00074

PREMIUM HARDWOODS, INC.;
JOHN R. FORBES; MARIE M. FORBES;
BUCKEYE ACRES, LLC AND
CHUCK WALLACE — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, THOMPSON, AND VANMETER, JUDGES.

THOMPSON, JUDGE: The sole issue presented is whether a settlement agreement among Premium Hardwoods, Inc., John and Marie Forbes, and Michael Ladd is enforceable. The trial court found that the agreement was procured by fraud and, therefore, unenforceable. Because there was no clear and convincing

evidence of fraud, we reverse and remand the case for entry of an order enforcing the settlement agreement.

The underlying facts are not in dispute. Michael Ladd is a consulting forester in Madisonville, Kentucky, who was contacted by the Forbeses to provide forestry consultation and services relating to the sale of timber located on the Forbeses' reality. Ladd and the Forbeses entered into a timber and marketing agreement pursuant to which the Forbeses' timber was marked, evaluated, and offered for bid. The terms of the contract included a clause stating that Ladd agreed to "save harmless, the Client, from any and all liability" as a result of his activities executed under the contract. Ultimately, Premium Hardwoods was the highest bidder resulting in a timber sale contract entered into between it and the Forbeses.

Premium Hardwoods paid the Forbeses the stated purchase price and began harvesting the timber. In 2007 and during the harvesting process, Premium Hardwoods was notified by a representative for Buckeye Acres, LLC, an adjoining landowner, that timber was cut on property owned by Buckeye Acres.[1] As a consequence, on October 22, 2007, Premium Hardwoods sent a letter to the Forbeses informing them that Buckeye Acres claimed ownership to a number of trees purchased by Premium Hardwoods pursuant to its contract with the Forbeses. Buckeye Acres asserted that it did not receive written notice of the pending cutting and were entitled to treble damages pursuant to KRS 364.130.[2] After Premium

[1] Buckeye Acres did not acquire the property until 2007. For clarity, we include its predecessor in title in the references to Buckeye Acres.

[2] KRS 364.130 provides:

Hardwoods and the Forbeses were unable to resolve their dispute, on January 14, 2008, Premium Hardwoods filed an action against the Forbeses for breach of the timber contract. The Forbeses filed a third-party complaint against Ladd alleging that the "hold harmless" clause in the timber and marketing agreement precluded their liability.

Premium Hardwoods, the Forbeses, and Ladd agreed to mediate their claims. Although Buckeye Acres had not intervened in the action prior to

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(1) Except as provided in subsection (2) of this section, any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times the cost of any damages to the property as well as any legal costs incurred by the owner of the timber.

(2) (a) If a defendant can certify that prior to cutting:

1. A signed statement was obtained from the person whom the defendant believed to be the owner of all trees scheduled to be cut that:

a. All of the trees to be cut were on his property and that none were on the property of another; and

b. He has given his permission, in writing, for the trees on his property to be cut; and

2. Either:

a. A written agreement was made with owners of the land adjacent to the cut that the trees to be cut were not on their property; or

b. Owners of the land adjacent to the cut were notified in writing, delivered by certified mail, restricted delivery, and return receipt requested, of the pending cut and they raised no objection,

the court may render a judgment for no more than the reasonable value of the timber, actual damages caused to the property, and any legal costs incurred by the owner of the timber.

(b) With respect to subsection (2)(a)2.b. of this section, if no written objection was received from the persons notified within seven (7) days from the date of signed receipt of mail, it shall be presumed, for the purposes of setting penalties only, that the notified owner had no objection to the proposed cut.

(3) This section shall not be construed as repealing any of the provisions of KRS 514.030 of the Kentucky Revised Statutes and any penalties provided by this chapter shall be considered as additional thereto.

mediation, counsel for Premium Hardwoods received an email correspondence from Buckeye Acres' counsel advising of its claims for trespass and wrongful cutting of timber and its claim for treble damages. Also prior to mediation and apparently in response to Buckeye Acres' possible claim against it, Premium Hardwoods requested from Ladd copies of the KRS 364.130 notices sent to adjoining landowners. Ladd complied and provided copies of all notice letters.

A mediation was held on January 26, 2009, that was attended by representatives of Premium Hardwoods, the Forbeses, Ladd and their respective legal counsel. Ladd's counsel filed a mediation settlement outlining the issues, including copies of the KRS 364.130 notice letters sent to adjoining landowners.

The mediation resulted in a settlement among the parties and a written settlement agreement was executed by the parties. A mediator's report was filed wherein the mediator reported that the parties and counsel attended the mediation, participated in good faith, and reached a full settlement agreement.

Under the terms of the agreement, the Forbeses agreed to pay Premium Hardwoods $33,500 and Ladd agreed to pay $20,000. In anticipation of a possible claim by Buckeye Acres, the agreement also provided that Premium Hardwoods agreed to indemnify Ladd and the Forbeses from any claims asserted against them by Buckeye Acres. In accordance with the terms of the agreement, Ladd's counsel prepared a settlement agreement and full release. However, Premium Hardwoods did not execute the agreement after Buckeye Acres filed a motion to intervene as a third-party plaintiff. Thereafter, Ladd filed a motion to

enforce the settlement agreement and to dismiss the third-party complaint with prejudice.

The basis for Premium Hardwood's refusal to comply with the parties' written settlement agreement is Ladd's counsel's statement at mediation that prior to the cutting of the timber, KRS 364.130 notice letters had been sent to adjoining landowners and the parties' acknowledgment that treble damages were not an issue. Premium Hardwoods contends that the statements of Ladd or his counsel constituted fraud because no notice was actually received by Buckeye Acres.

Findings of fact will "not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [trial] court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. In our review of this case, we adhere to the appropriate standard but are compelled to reverse the circuit court's order.

Kentucky recognizes the amicable resolution of disputes and settlement agreements.

> In the administration of justice and the prompt dispatch of business, courts must and do act upon the statements of counsel and upon the stipulations of parties to pending causes. Where the parties have voluntarily entered into a stipulation, which appears fair and reasonable for the compromise and settlement of the issues of a pending cause, and where the stipulation is spread upon the record with the consent and approval of the court, as here, the parties are bound thereby and the court may, thereafter, properly proceed to dispose of the case upon the basis of the pleadings, the stipulation and admitted facts.

Calloway v. Calloway, 707 S.W.2d 789, 791 (Ky.App. 1986)(quoting *Peirick v. Peirick*, 641 S.W.2d 195 (Mo.App. 1982). However, a settlement agreement is subject to the court's scrutiny and will not be enforced when procured by fraud or a material misrepresentation: It is a contract subject to the rules of contract interpretation. *Humana, Inc. v. Blose,* 247 S.W.3d 892 (Ky. 2008).

Fraudulent misrepresentation as alleged by Premium Hardwoods requires proof by clear and convincing evidence of six elements: "(1) that the declarant made a material misrepresentation to the plaintiff; (2) that this representation was false; (3) that the declarant knew the representation was false or made it recklessly; (4) that the declarant induced the plaintiff to act upon the misrepresentation; (5) that the plaintiff relied upon the misrepresentation; and (6) that the misrepresentation caused injury to the plaintiff." *Flegles, Inc. v Truserv Corp*., 289 S.W.3d 544, 549 (Ky. 2009).

The plaintiff's reliance must be reasonable. If the true facts can be readily ascertained, the plaintiff must use ordinary prudence and care to ascertain those facts. As stated by past jurists:

> The general rule applicable to cases of this kind is that, if no confidential relations exist between the parties, and if the facts misrepresented or concealed are not peculiarly within the knowledge of the party charged, and the other party has available means of knowing the truth by the exercise of ordinary prudence and intelligence, and nothing is said or done to prevent inquiry by him, he must make use of his means of knowledge, or he cannot complain that he was misled.

Ripy v. Cronan, 131 Ky. 631, 115 S.W. 791, 793 (1909). In the context of a settlement agreement, the rule is stated as follows:

> Ordinarily the absence of knowledge of a material fact by one of the parties alone does not afford a ground for the rescission of a compromise and settlement because the mistake was not mutual. The law is thus stated in 11 Am.Jur., Compromise and Settlement, Sec. 32: 'Ignorance of a fact by one party, even though had he known the fact he would not have entered into the compromise, is not generally ground for relief, unless it can be shown that the other party had superior means of ascertaining the facts and concealed the true state of affairs.

Creson v. Carmody, 310 Ky. 861, 863-864, 222 S.W.2d 935, 936 (1949).

We apply these legal principles to the facts presented.

It is undisputed: (1) that prior to mediation and the settlement agreement, Premium Hardwoods was provided copies of all notices sent pursuant to KRS 364.130; (2) that prior to mediation, Premium Hardwoods received an email correspondence from counsel for Buckeye Acres asserting a claim for treble damages; and (3) that the settlement agreement included a provision that Premium Hardwoods indemnify the Forbeses and Ladd against any claims by Buckeye Acres. Thus, Premium Hardwoods was aware that Buckeye Acres was asserting that it had not received written notice and a claim for treble damages. By simply reviewing the documents provided by Ladd prior to mediation, Premium Hardwoods would have discovered whether Buckeye Acres received the statutory notice. Under the circumstances, we conclude that the evidence is woefully insufficient to sustain a finding of fraud and, therefore, conclude that the circuit court's finding is clearly erroneous.

Based on the foregoing, the order of Christian Circuit Court is reversed and the case remanded for entry of an order enforcing the settlement agreement.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert E. Ison
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

David L. Cotthoff
Hopkinsville, Kentucky