RENDERED: JULY 19, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000534-MR

J. WAYNE MURPHY — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 08-CI-00790

BILL SAALWAECHTER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: J. Wayne Murphy appeals from the Daviess Circuit Court's entry of summary judgment in favor of Appellee Bill Saalwaechter. After careful review, we affirm.

Murphy was the plaintiff below, and the defendants were Brian Kamuf, Jeremy Kamuf, Saalwaechter, and Thomas A. Carroll, Esq. Although they

are named appellees, the Kamufs do not have counsel and have not participated in this appeal. Murphy petitioned this Court to have Carroll dismissed as an Appellee, and this Court granted his motion by order entered April 10, 2013.

In 2006, Brian Kamuf contacted Carroll about a business matter. Brian Kamuf wanted to obtain loans and secure them by mortgaging various properties he and others owned. Brian Kamuf identified Murphy and Ryan McDaniel as partners in the transaction. Some of the property to be used as collateral for the loans would be furnished by Murphy, McDaniel, himself, and his brother, Jeremy Kamuf. At that time, Carroll had never had any personal or business dealings with Murphy, McDaniel, or either of the Kamufs.

Carroll approached his client, Saalwaechter, concerning whether he would lend funds to Brian Kamuf and his partners. Saalwaechter did not personally know Brian Kamuf or his partners and was not interested in providing a loan to them which would be secured by mortgages or other collateral. He did agree, however, to purchase the properties Brian Kamuf wanted to offer as collateral, but he would instead lease those properties to Brian Kamuf and grant him an option to repurchase the properties within a specified amount of time. Carroll advised the Kamufs and McDaniel about this proposition, and they agreed to it.

Carroll prepared the necessary documents for the transaction, and on October 19, 2006, McDaniel, Ashley McDaniel, Brian and Jeremy Kamuf, and McDaniel Enterprises executed an agreement with Carroll acting as Saalwaechter's

agent. Under the terms of the October 19, 2006, agreement, Saalwaechter agreed to pay the Kamufs, the McDaniels, and McDaniels Enterprises the total sum of $425,000.00 in exchange for them conveying property located on Illinois Street, Evansville, Indiana, and property located at 900 Pleasant Valley Road, Owensboro, Kentucky, to Saalwaechter. Saalwaechter also agreed to re-convey the property to the McDaniels and the Kamufs for the sum of $425,000.00, so long as that sum was tendered to Saalwaechter on or before December 18, 2006. If the sum was not tendered by then, the obligation to re-convey the property ceased.

On October 19, 2006, Saalwaechter obtained a cashier's check in the amount of $401,354.87 payable to himself. He endorsed that check and delivered it to Carroll, with the understanding that Carroll would deposit the check into his escrow account and disburse the funds as directed by the sellers. In return, Saalwaechter received the deeds for the Evansville and Pleasant Valley Road properties. He also reached an agreement through Carroll with Brian Kamuf that the total purchase price would be $420,000.00 because he was going to be charged a penalty of approximately $5,000.00 by his bank for redeeming a certificate of deposit early in order to make the payments required by the October 19, 2006, Agreement.

On November 1, 2006, Saalwaechter delivered a second check to Carroll in the sum of $18,645.13 with the understanding that he would disburse the funds pursuant to the instructions of the sellers.

Subsequent to the October 19, 2006, closing, Brian Kamuf and McDaniel approached Carroll and requested a transfer of the Evansville property back to McDaniel Enterprises. They proposed to substitute a property belonging to Murphy, the Appellant herein, which was located at 3230 Alvey Park Drive, Owensboro, Kentucky, for the Evansville Property, which was to be transferred back to McDaniel Enterprises. Carroll advised Saalwaechter of this proposal, and he agreed that he would transfer the Evansville property back to McDaniel Enterprises in exchange for Murphy's transferring the 3230 Alvey Park Drive property to Saalwaechter. Carroll communicated the information to Brian Kamuf and was advised that Murphy agreed that he would be substituted for McDaniel Enterprises in the October 19, 2006, Agreement and that he would transfer the 3230 Alvey Park Drive property to Saalwaechter, thereby subjecting it to the provision that it could be bought back on or before December 18, 2006.

Again, Carroll prepared the necessary documents. He prepared an agreement which required Saalwaechter to convey the Evansville, Indiana, property to McDaniel Enterprises and Murphy to convey the 3230 Alvey Park Drive property to Saalwaechter. Murphy was given the right to repurchase the property before December 18, 2006, just as in the previous agreement.

The agreement between Saalwaechter and Murphy was allegedly signed on November 14, 2006, (hereinafter the Substitution Agreement) by Murphy and Saalwaechter. The agreement also bore the signature of Kamuf, but his signature was not notarized. The essence of Murphy's claim in this lawsuit is

that he never signed any agreement with Saalwaechter to substitute his property in the transaction. Instead, Murphy claims that he and Brian Kamuf signed a deed dated November 14, 2006, conveying property at 3230 Alvey Park Drive, Owensboro, Kentucky, from Murphy to Kamuf. Murphy contends that at his deposition, Brian Kamuf testified that on that same day, he and Murphy signed a separate agreement to transfer the subject real property back to Murphy in thirty days. Brian Kamuf further testified that he and Murphy went alone to Carroll's office to sign the deed and were in each other's presence the entire time. Murphy denies ever signing an agreement bearing Saalwaechter's signature, and he further denies ever being in the presence of Donna Kassinger, who notarized the Substitution Agreement.

Pursuant to the Substitution Agreement, Saalwaechter and Andi, his wife, conveyed the Evansville, Indiana, property to McDaniel Enterprises on November 14, 2006, and signed the deed prepared by Carroll, which transferred the Alvey Park Drive property to Saalwaechter.

Carroll claims that when Murphy came to his office on November 14, 2006, he explained each document to Murphy before he signed either. His explanation included that Murphy was transferring the 3230 Alvey Park Drive property to Saalwaechter and that he could repurchase the property for $325,000.00. Carroll claims that Murphy signed the Substitution Agreement and the November 14, 2006, deed in Carroll's office on that date. In his affidavit, Carroll testified that no changes were made to the typed written content of either

the Substitution Agreement, or the November 14, 2006, deed after Murphy signed them. As stated above, Murphy's signature on both documents was notarized by Carroll's assistant, Donna Kassinger. She testified that she did not alter, change, or modify the November 14, 2006, deed or the Substitution Agreement in any way after Murphy executed them.

According to Saalwaechter, when he transferred the Evansville, Indiana, property back to McDaniel Enterprises, he received no payment for that property. Likewise, when Murphy conveyed the 3230 Alvey Park Drive property to him, he paid no money to Murphy. From his perspective, Murphy was simply stepping into the shoes of McDaniel Enterprises regarding the October 19, 2006, transaction. The parties did not repurchase the properties from Saalwaechter prior to the deadline, and the buy-back option expired.

Murphy filed the instant complaint on June 3, 2008, and an amended complaint on April 7, 2009. The trial court entered summary judgment in favor of Saalwaechter and Carroll on February 20, 2012, and March 1, 2012, respectively. Thus, three years passed during which Murphy had ample time to conduct discovery and overcome the motions for summary judgment. Murphy alleged in his complaint that "by some means of deception" his Alvey Park Drive property was actually conveyed to Saalwaechter without his knowledge or consent. He also alleged that the recorded deed to Saalwaechter was modified or altered after his signature and that such modification constituted fraud.

Saalwaechter sent interrogatories to Murphy concerning the allegations he made in the Complaint. Saalwaechter asked Murphy to state all facts upon which he based the allegation that "by some means of deception" the 3230 Alvey Park Drive property was conveyed to Saalwaechter. Murphy's response was "the Deed signed by J. Wayne Murphy identified at the time he signed the Deed indicated that the grantee was Brian Kamuf, not Bill Saalwaechter." Murphy alleged that Saalwaechter, or an agent for him, altered the deed after signature. Another interrogatory asked Murphy to state all the facts upon which he based the allegation that the recorded deed to Saalwaechter was modified or changed after he signed it including, but not limited to, the identification of the person, or persons, who modified or changed his signature. Murphy's response was "See Answer to Number 8 above." Murphy never supplemented his responses to any of the interrogatories, except to say in response to Carroll's interrogatories that the deed was in Carroll's control between the time Murphy signed it and the time it was recorded.

During 2008, Saalwaechter propounded an interrogatory to Murphy asking him to disclose his expert witnesses, the subject matter of their testimony, the substance of the facts and opinions to which the experts would testify, and the grounds for their opinions. On November 7, 2008, Murphy responded to this interrogatory by stating that he had not retained any experts.

In February 2011, Saalwaechter served his initial motion for summary judgment, which was denied following a hearing. In its order, the trial court stated:

> Defendant Saalwaechter presents a compelling argument for summary judgment. However, there remain issues which have not been fully explored in discovery and there is sufficient indicia [sic] to indicate Plaintiff may yet discover facts to take this matter to a jury. The Court notes, as Mr. Stainback mentioned at the hearing, that this case has been pending since 2008. Accordingly, Defendant Saalwaechter's Motion for Summary Judgment will be denied but the parties are requested to arrange a mutually agreeable date for a conference in December of this year to report the status of discovery. If by that date no evidence has been discovered by the Plaintiff, Saalwaechter is requested to renew his Motion for Summary Judgment.

On May 12, 2011, Murphy served amended answers to interrogatories. In these amended answers, Murphy disclosed the name of a handwriting expert, Jane Eakes, who was certified by the National Association of Document Examiners. Murphy advised that Ms. Eakes would provide verification of authenticity and signature comparisons and identifications, and that she could determine whether alterations of documents had been made.

Following Murphy's disclosure of Ms. Eakes as an expert, the parties entered into a protocol for delivery of the November 14, 2006, deed to her and its return to the parties. The protocol was followed, and Ms. Eakes examined the deed and returned it to counsel for Saalwaechter. Ms. Eakes wrote on July 21, 2011, that she received the deed and examined it under "lighted magnification and with various measuring instruments." Following the examination by his selected expert, Murphy filed no supplemental disclosure or report detailing Ms. Eakes' analysis or findings.

After receiving no further information, Saalwaechter believed that no evidence had been discovered by Murphy, and as requested by the trial court in its May 26, 2011, order, renewed his motion for summary judgment on November 17, 2011. Attorney Carroll also filed a separate motion for summary judgment as to the claims made against him. The motions were heard on December 9, 2011. The trial court entered its order of summary judgment in favor of Saalwaechter on February 20, 2012, and in favor of Carroll on March 1, 2012. Murphy now appeals these judgments.

Our standard of review is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment 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.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999).

The inquiry with respect as to whether there is a genuine issue of material fact, however, is to be made from the perspective of what is in the record and not what might be proven at trial:

> *Steelvest* did not repeal CR 56. *See* CR 56.03 (summary judgment shall be granted if 'there is no genuine issue as to any material fact'). It merely stated forcefully that trial judges are to refrain from weighing evidence at the summary judgment stage; that they are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party. *Steelvest* at 482–483. The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.

Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 729-30 (Ky. 1999). Not only must the evidence which creates the genuine issue of material fact come from the record, but that evidence must also be more than speculation and supposition before the underlying case may be submitted to the jury. *O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006).

On appeal, Murphy argues that he provided "abundant" evidence that the deed transferring his property to Saalwaechter was a forgery and was therefore void. He maintains that by some sort of "trickery" by a third party, the deed was altered to remove Brian Kamuf and substitute Saalwaechter as grantee. Murphy argues that when viewed in a light most favorable to him, the evidence shows a material issue of genuine fact. He argues that he never testified that he signed a deed with Saalwaechter as the grantee, and that in fact both he and Brian Kamuf

have testified that the only deed signed identified Brian Kamuf as the grantee. Therefore, he takes issue with the trial court's finding that he testified that he remembered signing the deed in question: "The deed of record dated November 14, 2006, is regular on its face and has no apparent deletions or alterations. The Plaintiff's real signature appears on the deed and he recalls signing the document on the date in question."

We believe that the trial court's order refers to Murphy's testimony that he remembers signing a deed on November 14, 2006, not that he remembers signing a deed with Saalwaechter's name identified as the grantee. Further, in requests for admissions, Murphy admitted that he signed the November 14, 2006, deed and has not objected to that admission or sought to withdraw it. Murphy's own identified expert provided no report, testimony, or opinion that Murphy's signatures on the deed were forged or fraudulent, or that any alterations had occurred. Thus, Murphy has not pointed to any concrete evidence of fraud or forgery sufficient to surpass summary judgment, despite ample opportunity of time by the trial court to do so.

Murphy alleges that there is other evidence of forged deeds involving the Appellees. Murphy contends that Ryan McDaniel testified at a 2008 deposition that a forged deed was prepared and notarized by Carroll transferring property to Saalwaechter, and that such conduct constitutes a scheme of forging deeds. Saalwaechter responds that Murphy's allegation is not relevant, because he was not alleging that Saalwaechter forged the documents, and was instead alleging that

Carroll or Kamuf forged the documents. Thus, Saalwaechter contends, the evidence is not relevant to demonstrate prior bad acts under Kentucky Rules of Evidence (KRE) 404(b) because it does not show a pattern of conduct by Saalwaechter. We agree.

To be admissible to show a pattern of conduct, evidence must be evidence of bad acts of the defendant-i.e., Saalwaechter. *See, e.g.*, *Dant v. Commonwealth*, 358 S.W.3d 12, 19 (Ky. 2008). In the instant case, the allegation in the complaint is that Saalwaechter authorized or directed his agents to alter the November 14, 2006, deed. We agree that evidence of subsequent transactions with McDaniel is not relevant to the instant case.

Murphy also argues on appeal that the purported deed is invalid for failure of stated consideration. In support of this, Murphy contends that while persons can transfer real property without consideration, or consideration of love and affection, when consideration is stated in the deed, it becomes a question of fact for the jury as to whether the stated consideration was actually paid. *Nagle v. Wakefield Adm'r*, 263 S.W.2d 127 (Ky. 1953). Murphy argues that the deed in question has consideration language as follows: "for and in consideration of the equal exchange of property by the parties hereto." Murphy claims that because he did not receive the "equal exchange of property[,]" a clear question of fact exists for the jury as to whether the stated consideration in the deed was actually given.

Saalwaechter maintains that Murphy's reliance on *Nagle* is misplaced. That case involved an allegation of undue influence and lack of capacity, of which

Murphy makes no allegation. *Id.* at 129. The consideration in that case was $5,300.00, and the only proof was the testimony of the grantee. *Id*. In the instant case, the consideration is not the payment of money, but the recited exchange of properties. The proof indicated that Saalwaechter had already paid $420,000.00 for a property on Pleasant Valley Road and a property in Evansville, Indiana on October 19, 2006. After paying $420,000.00 for the two properties, Saalwaechter was asked to exchange the Evansville property for Murphy's Alvey Park Drive property. He agreed to do so and conveyed the property back to its owner and received the Alvey Park Drive property in exchange. From Saalwaechter's perspective, the only thing Murphy was doing in this case was stepping into the shoes of McDaniel Enterprises, which had conveyed the Evansville property to him and to whom he re-conveyed that property in exchange for the Alvey Park Drive property. Saalwaechter contends that Murphy would have been looking to McDaniel Enterprises for payment, if he was entitled to any, since Saalwaechter had paid for that property and received no money for conveying it back to McDaniel Enterprises.

The law on this subject is clear. As stated in American Jurisprudence:

> Any valuable consideration, even a nominal sum of money, is sufficient, as between the parties and their privies, to render a deed operative to pass title to property. It is common practice to recite the payment and receipt of one dollar and other good and valuable consideration, and such a recital is sufficient. Mere inadequacy of consideration is not in itself sufficient to justify a court of equity in setting aside a deed. When a conveyance is voluntary and absolute on its face, the

> question of consideration is immaterial. However, adequacy of consideration is an element in a case where the instrument is alleged to have been procured by fraud or undue influence, where the grantor did not have the mental capacity to enter into the transaction, or in a suit to set aside the transfer of an expectancy or to reform the deed.

AMJUR DEEDS § 77 (footnotes omitted).

We agree with Saalwaechter that absent a showing that the deed is fraudulent or was altered, it cannot be set aside. Murphy has not established proof to surpass summary judgment on this question. In the alternative, Murphy argues that the deed fails for want of consideration. However, only nominal consideration is required in Kentucky, and in the instant case, the consideration was the prior money given to McDaniel Enterprises for the properties previously transferred.

Discerning no genuine issues of material fact, we affirm the summary judgment entered by the Daviess Circuit Court in favor of Saalwaechter on February 20, 2012.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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