

RENDERED: NOVEMBER 8, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000968-MR

DL CAPITAL, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 08-CI-001011

LINDSEY LAYTON MAXWELL;
DOUGLAS I. MAXWELL, III;
THE COMMONWEALTH OF KENTUCKY;
AND JEFFERSON COUNTY, KENTUCKY

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, COMBS, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal from the granting of summary judgment in a fraudulent transfer action in the Jefferson Circuit Court. Based upon the following, we affirm the decision of the trial court on the issue of fraud, but reverse and remand on the issue of rescission of the contract.

BACKGROUND INFORMATION

Appellees, Douglas I. Maxwell, III (“Douglas”) and Lindsey Layton Maxwell (“Lindsey”), were formally married and the parents of two children. In April of 2001, Lindsey filed for divorce in Jefferson Family Court. In the summer, the couple reconciled for a brief period at which time Douglas told Lindsey that he had paid off the mortgage on their marital residence. In fact, Douglas had created DL Capital, LLC (hereinafter “DL Capital”) for which he executed a promissory note, dated July 31, 2001, and payable to DL Capital for the principal amount of the mortgage along with interest on the unpaid principal at 5% per annum. Lindsey answered that while she signed documents leading to this transaction, she was unaware of the actual documents she was signing. Lindsey filed for divorce a second time in January of 2007. Sometime during the divorce proceedings, Douglas fled the country and his whereabouts are unknown.

On January 24, 2008, DL Capital filed a complaint against Lindsey as well as Douglas, the United States of America, the Commonwealth of Kentucky and Jefferson County, Kentucky, asserting that they had defaulted under the promissory note and sought a judicial sale of the property. Lindsey then filed counterclaims against DL Capital as well as cross-claims against Douglas. In the counterclaims, Lindsey asserted a breach of the duty of good faith and fair dealing, aiding and abetting a breach of fiduciary duty, misrepresentation by fraud or omission, civil conspiracy and concert of action, violation of the Kentucky Consumer Protection Act, and fraudulent conveyance. Under the cross-claims

against Douglas, she asserted breach of fiduciary duty, misrepresentation and fraud by omission, civil conspiracy and concert of action, violation of the Consumer Protection Act, and fraudulent conveyance.

In December of 2008, the couple's children, Layton and Douglas IV, intervened in the circuit court action asserting similar claims as Lindsey against DL Capital and Douglas for fraud and violations of the Uniform Transfer to Minors Act. Lindsey and her children made a motion for summary judgment asserting that there were no genuine issues of material fact since the mortgage, promissory note and UCC-1 financing statement were fraudulently procured by Douglas and that he was acting as an agent of DL Capital while committing the fraud. They argued that DL Capital had provided no consideration in exchange for the mortgage and promissory note, thus that they were invalid.

In granting summary judgment, the trial court held as follows:

The record appears undisputed that Lindsey had no knowledge that Douglas was transferring property to DL Capital when she signed the documents. The record is undisputed that Lindsey and Douglas III were married at the time that she was allegedly induced to sign the contracts. The record reflects that, due to their intimate relationship of husband and wife, Lindsey placed confidence in Douglas III's statements that the purpose of the documents he was getting her to sign was to transfer the Property into her name. The record also reflects that Lindsey trusted Douglas III with the financial end of the marriage and she trusted that he was transferring the title of the Property into her name when she signed the documents at issue in this case. The record also appears undisputed that Douglas III perpetrated a fraud against Lindsey in getting her to sign the documents. The record reflects that the Mortgage,

Promissory Note, and UCC-1 Financial Statement allegedly executed in favor of DL Capital were procured by the fraud of Douglas III, acting as an agent of DL Capital. Neither the cross-examination testimony of Lindsey nor the testimony of Jeffrey Wallace creates a genuine issue of material fact with regard to whether Lindsey had any knowledge about Douglas III's fraudulent activities or whether she trusted her husband at the time she executed the documents. DL Capital has provided no affirmative evidence to rebut Lindsey's testimony. Accordingly, it appears that there remain no genuine issues of material fact and the Moving Parties are entitled to judgment as a matter of law, and the Mortgage, Promissory Note, and UCC-1 Financial Statement must be rescinded and declared null and void.

DL Capital then brought this appeal contending that there were material issues of fact and that the trial court erred in granting summary judgment to Lindsey.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine 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." Kentucky Rules of Civil Procedure (CR) 56.03.

"[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden

shifts to the party opposing summary judgment to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court’s decision and must review the issue *de novo*. *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the granting of summary judgment by the trial court.

DISCUSSION

To establish a defense of fraud or misrepresentation the party must prove the following six elements:

- 1.) material representation;
- 2.) which is false;
- 3.) known to be false or made recklessly;
- 4.) made with inducement to be acted upon;
- 5.) acted in reliance there on; and
- 6.) causing injury.

United Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999).

DL Capital first contends that an attorney’s billing entry documenting a prior conversation with Lindsey about this transaction creates a genuine issue of material fact as to whether she fabricated her fraud defense. Specifically, DL

Capital contends that the following billing entry by one of Douglas's attorneys, Jeffrey Wallace, was evidence that Lindsey was aware of the transaction:

04/17/01 J-W Numerous telephone calls to and from, and discussions with, Mr. Maxwell and Ms. Maxwell concerning the proposed transfer.

DL Capital argues that the billing entry itself constituted proof in the record that a conversation occurred between Wallace and Lindsey in advance of her execution of the documents at issue. It argues that her denial of that fact merely creates a factual dispute appropriate for resolution only after deposition testimony sufficiently removes an imagined ambiguity about the context of the "transfer" referenced in the above time entry.

Lindsey, however, argues that the above entry only cites to alleged "discussions" about a "proposed transfer" and does not state the substance or type of transfer that is being discussed. She asserts that such vague and ambiguous language regarding a proposed transfer of unidentified property hardly suffices as evidence as to the nature of the representations made by Douglas at the time the documents were executed by Lindsey. We agree.

The attorney involved testified in his deposition that he had no independent knowledge of conversations with Lindsey on the above date nor does he have any other specific recollections with Lindsey about the mortgage or other documents relating to the transfer of the property. Given this testimony and the ambiguity of the time entry, we find there were no genuine issues of material fact and that the trial court did not err in granting summary judgment.

Next, DL Capital contends that Lindsey's own sworn testimony creates a genuine issue of material fact as to whether she had forfeited any residuary remedy by failing to exercise ordinary care and/or her delay in seeking that remedy. It argues that "failure of the defrauded party to act promptly will result in the loss of the right to rescind, leaving only the right to sue for damages. Stated in another way, a failure to act promptly constitutes an election of the remedy of damages." *Dunn v. Tate*, 268 S.W.2d 925, 928 (Ky. 1954).

DL Capital asserts that Lindsey conceded her awareness of the alleged fraudulent misrepresentations at least as of January, 2007. It contends that while she testified that when she consulted with a divorce attorney in January of 2007 and learned that Douglas had defrauded her on the mortgage that she took no action until January of 2008. DL Capital argues that under these circumstances, her delay in asserting her claimed entitlement to avoid her contractual obligations represented an election by delay that the trial court should have found prevented her from pursuing fraud-in-the-execution as a defense to her nonperformance; it cites *Hampton v. Suter*, 330 S.W.2d 402, 404 (Ky. 1959), in support of its argument.

In *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 261 (Ky. App. 2007), a panel of our Court held that when an individual is induced to enter into a contract based upon misrepresentations, he or she may maintain an action for rescission of the fraudulent contract. In *Hampton v. Suter*, 330 S.W.2d 402, 407 (Ky. 1959), the court held that "the plaintiff was not entitled to a rescission of the

contract for he did not move promptly and was unable to restore the consideration for the contract, or the status quo ante of the business purchased.”

In this action, Lindsey knew of the fraud when her attorney informed her of the transaction. Thus, in order to have been allowed to rescind the contract, she would have needed to have taken prompt action. The trial court did not address the issue of whether she acted promptly. Thus, we must reverse the decision of the trial court and remand this action for further proceedings on this issue.

DL Capital’s final argument is that the record contains ample evidence of its payment of consideration that creates a genuine issue of material fact as to whether Lindsey must first make restitution of that consideration before the court can relieve her from her performance obligations under the promissory note and mortgage. It contends that the summary judgment is incomplete because it fails to require Lindsey to fulfill a necessary precondition for relief, the restoration of the consideration that DL Capital gave in exchange for her execution of the documents.

Lindsey, however, contends that there was no consideration for the transfer and that, therefore, as a matter of law, no contract existed. We agree with her argument. There is no evidence in the record that there was consideration for the fraudulent transfer of the promissory note, mortgage and UCC-1 financial statement. When it filed its response to Lindsey’s motion for summary judgment, DL Capital did not provide any documentation or other evidence that it had paid

off the mortgage which existed with PNC Bank. Thus, we find the trial court was correct in granting summary judgment on this issue.

As set forth above, we affirm in part, reverse in part, and remand for further proceedings in conformity with this opinion.

CLAYTON AND COMBS, JUDGES, CONCUR.

VANMETER, JUDGE, CONCURRING IN PART AND

DISSENTING IN PART: I agree with so much of the majority opinion as reverses the trial court on the issue of whether Lindsey Maxwell took prompt action to rescind the transaction. In my view, however, the record also demonstrates the existence of factual issues concerning the allegations of fraud and DL Capital's payment of consideration such that summary judgment was inappropriate on those matters as well.

BRIEF FOR APPELLANT:

Mason L. Miller
Trevor W. Wells
Lexington, Kentucky

Adam K. Spease
Louisville, Kentucky

BRIEF FOR APPELLEES:

Scott P. Zoppoth
Louisville, Kentucky