RENDERED: SEPTEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000385-MR

DAPPLE STUD, LLC — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 14-CI-02669

KENNETH L. RAMSEY;
SARAH K. RAMSEY; AND
RAMSEY FARM, INC. — APPELLEES

AND NO. 2015-CA-000592-MR

DAPPLE STUD, LLC — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 14-CI-01698

HICKSTEAD FARM, INC. — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JONES AND TAYLOR, JUDGES.

JONES, JUDGE: This is a consolidated appeal. The Appellant, Dapple Stud, LLC ("Dapple Stud"), was named as a defendant in two separate, but similar suits that were filed in Fayette Circuit Court. The circuit court granted summary judgment in favor of the plaintiffs in both actions. Dapple Stud appealed both judgments. Upon review, we VACATE both orders and REMAND these actions to the lower court for additional proceedings.

I. Background

The Appellant, Dapple Stud, is a Kentucky limited liability company with its principal place of business in Lexington, Kentucky. Dapple Stud deals almost exclusively in Thoroughbred horses.

Hickstead Farm, Inc., ("Hickstead Farm") is the Appellee in Appeal No. 2015-CA-000592-MR. Hickstead Farm is a Florida corporation engaged primarily in the business of breeding, raising, and selling Thoroughbred horses. According to Hickstead, Dapple agreed to act as a consignor of two of Hickstead's Thoroughbred yearlings, a colt and a filly, at the September 2013 Keeneland sale.

The colt sold for a gross sales price of $250,000 and the filly sold for a gross sales price of $290,000. Following the sale, Keeneland issued a check to Dapple Stud

for the proceeds of the sale of the horses in the amount of $513,500, representing the combined sales price of the horses minus Keeneland's commissions and fees. Hickstead Farm asserts that Dapple Stud still owes it at least $175,000 from the sale of its horses.

Kenneth L. Ramsey, Sarah K. Ramsey, and Ramsey Farm (hereinafter collectively referred to as "Ramsey Farm") are the Appellees in Appeal No. 2015-CA-000385-MR. Ramsey Farm alleges that it engaged Dapple Stud to serve as its agent for the purpose of selling two of its yearlings, a filly and a colt, at the 2013 Fasig-Tipton October Fall Yearling Sale, and four of its older broodmares at the 2013 Fasig-Tipton Midlantic December Mixed Sale. Thereafter, a total of $158,565.50 in sales proceeds was remitted to Dapple Stud for the account of Ramsey Farm from the 2013 Fasig-Tipton October Sale and an additional $8,018.85 in sales proceeds was remitted to Dapple Stud for the account of Ramsey Farm from the 2013 Fasig-Tipton December Sale. Ramsey Farm asserts that despite its repeated demands, Dapple Stud has failed to pay it the sales proceeds and interest due to it from the sale of the horses by Dapple Stud.

Hickstead Farm was the first to file a complaint against Dapple Stud. Its May 5, 2014, complaint against Dapple Stud seeks damages (compensatory and punitive) based on claims of: (1) theft by failure to make required disposition of property; (2) conversion; (3) fraud; (4) breach of fiduciary duty; and (5) breach of contract. Approximately two months later, Ramsey Farm filed a nearly identical complaint against Dapple Stud. The only substantive difference between the two

complaints is the amount of damages sought. Dapple Stud answered both complaints. In its answers, Dapple Stud denied that it entered into any relationship or agreement with the plaintiffs for the sale of their horses.

Thereafter, both plaintiffs moved for summary judgment on their breach of contract claims. To support their assertions that valid contracts existed with Dapple Stud, the plaintiffs relied on similar evidence.

In support of its motion for summary judgment on the breach of contract claim, Hickstead Farm attached the authorized agent form its principal, Melodee Hicks, signed and sent to Keeneland prior to the September 2013 sale. The form is a pre-printed, fill-in-blank form prepared by Keeneland. The form is not signed by anyone from Dapple Stud. In relevant part, it provides:

> **Consignor's Authorized Agent**
> This form cannot be altered without the written consent of the agent and Keeneland.
>
> Date: 6/12/13
> I have this day appointed
>
> Print Name Dapple Stud
>
> Property Line Dapple Stud, Agent
> **(Please include Property Line as stated on entry form)**
> (Property Line will not be taken from this form for cataloguing purposes)
>
> To act for me in the September Yearling Sale.
>
> **Identify Horses:** Hard Spun x Campionessa, Filly
> Indian Charlie x Miss Barrister, Colt
> Afleet Alex x Toccet Over, Filly

> Said appointee, as my duly appointed and authorized agent, shall have full power and authority to act for me in any and all matters in connection with or arising out of the sale of horses at the aforementioned sale. Said agent is further authorized to execute any and all documents in connection with the sale and to receive any and all funds to do all things incidental to and in furtherance of the sale of horses. Unless otherwise agreed to in writing by both the agent and the consignor, I authorize payment of all proceeds of the sale to my agent. This agency is revocable only in writing.

Hickstead Farm also filed the affidavit of Melodee Hicks. It provides as follows:

> Comes the Affiant, having been duly sworn, and states as follows.
>
> 1. I have personal knowledge of the matters stated herein.
> 2. I am a shareholder and officer of Hickstead Farm, and I am authorized to speak on its behalf.
> 3. In my capacity as a shareholder and officer of Plaintiff, I signed the form permitting Dapple Stud, LLC to act as authorized agent for and on behalf of Plaintiff.
> 4. The allegations contained in the First Amended Complaint herein are true and accurate to the best of my knowledge and belief.
> 5. Between November 2013 and March 2014, due to Defendant's failure to pay the proceeds of sale to Plaintiff, Plaintiff was forced to expend $15,910.00 in retail credit card interest.
> 6. Plaintiff was then forced to obtain a line of credit, which required $4,996.50 in closing costs. Plaintiff further paid five percent interest per month on the $175,000.00 line of credit. The total interest paid on the line of credit through June 30, 2014 is $2,181.27.
> 7. Therefore, the total interest and costs incurred by Plaintiff due to Defendant's failure to remit the complete proceeds to Plaintiff is $23,087.77 through June 30, 2014, and such interest continues to accrue.
> Further, Affiant sayeth naught.

In support of its motion for summary judgment, Ramsey Farm filed the Authorization of Agent form that its farm manager, Mark Partridge, signed and sent to Fasig-Tipton. The relevant portions of that form provide:

Fasig-Tipton
Authorization of Agent

Sale: Ky. OCT Sale Date: 10/21/13
I hereby appoint:

Agent's Name: Dapple Stud

Address: ON FILE
City, State, Zip:_____
Tel: _____ Fax:_____ Email:_____
Horses:

110:Siempre Lista 1115: Pretty Cozzene

576: Crumbs of Comfort

629: Double Faced

The undersigned as Owner of the horses listed above hereby appoints the above named as my agent to act on my behalf in any and all matters in connection with the sale of these horses. These powers include, but are not limited to, cataloguing, providing additional information, executing any and all documents in connection with the sale, incurring appropriate and incidental expenses related to the Sale or withdrawing horses from the Sale. Said agent may establish expenses related to the Sale or withdrawing horses from the Sale. Said agent may establish reserve prices, or bid-in any horse on this contract whether or not a reserve price has been previously established. Owner authorizes the payment of all proceeds of sale to above named agent.

Ramsey Farm also filed a similar form that its accountant, Jeanine Hamilton, executed prior to the 2013 December Sale.

Along with these forms, Ramsey Farm also included an affidavit from Mark Partridge. Mr. Partridge's affidavit states:

> Comes the Affiant, having been duly sworn, and states as follows:
>
> 1. I have personal knowledge of the matters stated herein.
> 2. I am employed by Ramsey Farm as its manager and am authorized to speak on its behalf.
> 3. On October 22, 2013, I executed a Fasig-Tipton Authorization of Agent form on behalf of Ramsey Farm whereby the Plaintiffs engaged and authorized Dapple Stud, LLC as their agent to sell the 2012 Thoroughbred filly by TEMPLE CITY out of DOUBLE FACED and the 2012 Thoroughbred colt by STEPHEN GOT EVEN out of SIEMPRE LISTA at the 2013 Fasig-Tipton October Kentucky Fall Yearling Sale.
> 4. In addition to the foregoing horses, Dapple also entered the 2012 Thoroughbred colt by KITTEN's JOY out of IMARI (JPN), also owned by Mr. and Mrs. Ramsey into the same sale, apparently erroneously listing Dapple as the owner.
> 5.On December 9, 2013, Plaintiff Ramsey Farm, through its Accountant, Jeanine Hamilton, executed a Fasig-Tipton Authorization of Agent form whereby the Plaintiff engaged and authorized the Defendant Dapple as Plaintiffs' agent to sell the Thoroughbred mare IMARI (2011) by SUNDAY SILENCE out of WESTERN SHARP (JPN), the Thoroughbred mare NO SPEED LIMIT (2006) by MALIBU MOON out of STEAMING HOME, the Thoroughbred mare TREASURED SONG (2003) by UNBRIDLED SONG out of HOLY TREASURE and the Thoroughbred mare SUNCOAST PARKWAY (2001) by QUIET AMERICAN out of MACKENSIE SLEW at the 2013 Fasig-Tipton Midlantic December Mixed Sale.
> 6. Following appointment of Defendant Dapple as the Plaintiffs' agent for the sale of the foregoing horses, a total of $158.565.50 in sales proceeds was remitted to the Defendant Dapple for the account of the Plaintiffs from the 2013 Fasig-Tipton October Kentucky Fall Yearling

> Sale, and an additional $8,018.85 in sales proceeds was remitted to the Defendant Dapple of the account of the Plaintiffs from the 2013 Fasig-Tipton Midlantic December Mixed sale.
> 7. To the present day, and despite repeated demands by the Plaintiffs, the Defendant Dapple has failed to pay to Plaintiffs the sales proceeds and interest due to it from the sale of the above horses by the Defendant Dapple Stud.

During briefing on Ramsey Farm's summary judgment motion, Mr. Partridge filed a supplement to his affidavit. It provides as follows:

> Comes the Affiant, having been duly sworn, and states as follows:
> 1. I have personal knowledge of the matters stated herein.
> 2. I am employed by Ramsey Farm as its manager and am authorized to speak on its behalf.
> 3. In retaining Dapple Stud, LLC as the consignor of the horses which are the subject of this litigation, I dealt with Stewart Morris, who was then the account manager of Dapple Stud, LLC.
> 4. Stewart Morris told me that Dapple Stud, LLC would consign the horses. Stewart confirmed this in multiple conversations with me both at Ramsey Farm, and at the Fasig-Tipton, Lexington, Kentucky premises, in or about Fall 2013.
> 5. Mr. Morris would come out to Ramsey Farm and look at the horses on occasion and see how they were progressing.
> 6. There was never any question that Dapple Stud, LLC was the consignor.
> Further Affiant sayeth naught.

Dapple Stud filed a response to the motions for summary judgment. Therein, Dapple Stud asserted that it had never entered into any contractual relationship with the plaintiffs. Instead, it claimed that Mike Akers, one of its former managing members, acting as an individual, used the name of Dapple Stud

to commit the fraud and take the money for his personal benefit. Dapple Stud asserts that Akers sold his interest in Dapple Stud to Jeff Brown in February of 2012. Dapple Stud admits that it neglected to remove Akers name from its records with the Kentucky Secretary of State.

Hickstead Farm responded that even though Akers may have sold his interest in Dapple Stud prior to events in question, he was still listed on Dapple Stud's website and on its current filings with the Kentucky Secretary of State. Based on this evidence, Hickstead Farm maintained that Akers had the authority, either actual or apparent, to bind Dapple Stud in contract. For its part, Ramsey Farm asserted that: "Partridge dealt with Stewart Morris, the then-account manager of Dapple Stud, LLC in consigning the horses at issue herein. Therefore, Defendants' argument concerning Akers in this case is largely a red herring."

On October 15, 2014, the circuit court entered summary judgment in favor of Hickstead Farm. In pertinent part, the circuit court's order provides as follows:

> Dapple Stud argues that even if Akers is considered an agent of the LLC, Plaintiff has put forth no proof of a contract with Dapple Stud. It notes that the only document provided by Plaintiff relating to a contract is a consignment agreement that is not signed by Plaintiff, Dapple Stud, or anyone purporting to act on its behalf. However, an oral contract is generally no less binding than one reduced to writing. *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 105 (Ky. 2003). Dapple does not deny that Akers spoke with Plaintiff about consigning her horses and used the name "Dapple Stud" as the consignor. Neither does Dapple Stud deny that Akers told Plaintiff that Dapple Stud was the consignor or that

> the Authorized Agent form designated Dapple Stud as Plaintiff's agent. Finally, Dapple Stud acknowledges that when the horses were sold, Keeneland issued a check to Dapple Stud in the amount of $513,500. Here Plaintiff has met the initial burden of showing the existence and partial performance of a contract between Plaintiff and Dapple Stud. Dapple Stud has failed to present any affirmative evidence to create an issue of material fact.
>
> Plaintiff has met the initial burden of showing that Dapple Stud held Akers out as its agent and that Plaintiff and Dapple Stud entered to a contract. Plaintiff has shown that Dapple Stud, through Akers, agreed to act as Plaintiff's selling agent at the Keeneland September Yearling Sale. Plaintiff has shown that the horses sold for $513,500, that Keeneland issued a check to Dapple Stud in that amount, and that Dapple Stud has failed to present any affirmative evidence to create an issue of material fact on these issues. Accordingly, Plaintiff's Motion for Partial Summary Judgment on the issue of liability is SUSTAINED, and Plaintiff is entitled to $175,000 in compensatory damages.

On January28, 2015, the circuit court entered summary judgment in favor of Ramsey Farm. In pertinent part, the circuit court concluded:

> Plaintiffs have met the initial burden of showing that Dapple Stud held Akers out as its agent and that Plaintiffs and Dapple Stud entered into a contract. Plaintiffs have shown that Dapple Stud, through Akers, agreed to act as Plaintiffs' selling agent at the October Kentucky Fall Yearling sale and the Midlantic December Mixed sale. Plaintiffs have also shown that the horses sold for a total of $166,584.35, that Fasig-Tipton issued checks to Dapple Stud in that amount and that Dapple Stud has yet to remit the proceeds from the sales. Dapple Stud has failed to present any affirmative evidence to create an issue of material fact on these issues. Accordingly, Plaintiff's Motion for Partial Summary Judgment is SUSTAINED, and Plaintiff is entitled to $166,584.35 in compensatory damages, plus interest at the legal rate.

Dapple Stud appealed both actions to our Court. Given the similarity of the issues, we consolidated the appeals.

II. Standard of Review

Pursuant to Kentucky Rules of Civil Procedure ("CR") 56.03, summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The party moving for summary judgment bears the initial burden of showing that no genuine issue of material fact exists, and then 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." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991)).

Because summary judgment involves no fact-finding by the trial court, we accord no deference to the trial court's decision; our review is *de novo*. *See Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citing *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005)).

III. Analysis

Much of the attention in this case has been devoted to the issue of whether Mike Akers had the authority (either apparent or actual) to bind Dapple Stud in contract. In both cases, this was the first issue the circuit court examined.[1] Ultimately, the circuit court concluded that even if Akers did not have actual authority, Dapple Stud's representations on its website and filings with the Kentucky Secretary State were sufficient to cloak him with apparent authority. Thereafter, almost as a second thought, the circuit court determined that a valid, enforceable contract existed between Dapple Stud and the plaintiffs.

The circuit court put the cart before the horse. The issue of authority only comes into play where the plaintiff has demonstrated the existence of an otherwise enforceable contract. Only if the plaintiff is able to prove he or she entered into a contract with an agent, do we need to examine whether the agent had the actual or apparent authority necessary to bind the principal. Therefore, our first task is to determine whether, from the record, summary judgment was proper on the contract issue.

"Not every agreement or understanding rises to the level of a legally enforceable contract." *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997). "The approved definition of a contract is, an agreement by the parties, upon a sufficient consideration, to do or not to do a particular thing." *Thomas v. Kerr*, 66 Ky. 619,

[1] Admittedly, we are perplexed as to why the circuit court devoted the majority of its opinion in the Ramsey Farm matter to Akers. Ramsey Farm disavowed any relationship with Akers. Mr. Partridge's supplemental affidavit, which Ramsey Farm filed in support of its summary judgment motion, states he worked with Stewart Morris, Dapple Stud's account manager. There was no allegation by Ramsey Farm that it reached an agreement with Akers.

621 (1868). The fundamental elements of a valid contract are "offer and acceptance, full and complete terms, and consideration." *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 834 (Ky. 2013). For the terms to be considered complete they must be "definite and certain" and must set forth the "promises of performance to be rendered by each party." *Kovacs*, 957 S.W.2d at 254. Indeed, "[m]utuality of obligations is an essential element of a contract, and if one party is not bound, neither is bound." *Id.*

"Additionally, under Kentucky law the terms of a contract must be sufficiently complete and definite to enable the court to determine the measure of damages in the event of breach." *Id.* (citing *Mitts & Pettit, Inc. v. Burger Brewing Co.*, Ky., 317 S.W.2d 865 (1958)). In an action for breach of contract, the measure of damages "is that sum which will put the injured party into the same position he would have been in had the contract been performed." *Barnett v. Mercy Health Partners-Lourdes, Inc.*, 233 S.W.3d 723, 727 (Ky. App. 2007).

Both Hickstead Farm and Ramsey Farm rely on the agency authorization forms their agents executed and filed with the two auction houses at issue to support the existence of contracts with Dapple Stud. However, the authorization agreements are not agreements between the Appellees and Dapple Stud; they are agreements between the Appellees and the auction houses. The authorization agreements are silent about the terms of any agreement between Dapple Stud and Appellees.

Nowhere does this become more obvious than when one looks for the essential element of consideration. Consideration is defined as:

> A benefit to the party promising, or a loss or detriment to the party to whom the promise is made. "Benefit," as thus employed, means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled. And 'detriment' means that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise.

Huff Contracting v. Sark, 12 S.W.3d 704, 707 (Ky. App. 2000) (internal quotations omitted).

The authorization forms do not contain a statement that Appellees agreed to pay for the agency services of Dapple Stud. No consideration whatsoever is recited. To be enforceable as a contract, any agency agreement would have to be supported by some agreement between the parties as to the consideration the agent was to receive for undertaking and entering upon the agency.[2]

Without evidence of what Dapple Stud's consideration for acting as a sales agent was to be, it is impossible to accurately award damages for breach of contract. "It is well established in this jurisdiction that the measure of damages for breach of contract is that sum which will put the injured party into the same

[2] Hickstead Farm asserts that $18,000 represents the amount of commission. However, it is unclear to us where Hickstead Farm came up with this amount. Neither the exhibits nor Hicks's affidavit explains where the $18,000 came from. Ramsey Farm's filings are silent as to a commission amount.

position he would have been in had the contract been performed." *Perkins Motors, Inc. v. Autotruck Fed. Credit Union*, 607 S.W.2d 429, 430 (Ky. App. 1980).

This quandary in attempting to quantify damages illustrates the circuit court's error. The circuit court should not have allowed recovery on a breach of contract theory until the plaintiffs had alleged and proven definite and certain contract terms, including mutuality of obligation. The authorization forms are not competent evidence to prove the terms of any agreement with Dapple Stud.

The circuit court seemed to recognize that the authorization forms might be lacking because it noted that Kentucky recognizes oral contracts. This is a correct statement in certain situations. However, a valid oral contract, like a written contract, requires proof of an offer and acceptance, full and complete terms, and consideration. If the Appellees reached an oral agreement with certain and definite terms there is no proof of it in the record. The closest the evidence comes on this point is Mr. Partridge's supplemental affidavit in which he avers that he met with Stewart Morris and discussed the consignment. However, no further details are provided as to how Dapple Stud was to be compensated for its services.

Equally troubling, is the lack of undisputed facts upon which to base the circuit court's determination that summary judgement was appropriate on the authority issue. "Apparent authority is not actual authority but is the authority the agent is held out by the principal as possessing. It is a matter of appearances on which third parties come to rely." *Mt. Holly Nursing Ctr. v. Crowdus*, 281 S.W.3d 809, 813 (Ky. App. 2008). "[A]pparent authority arises not from the purported

agent's manifestations of authority, but rather from manifestations by the principal." *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 594 (Ky. 2012). To prevail on a theory of apparent authority, the plaintiff must demonstrate reliance on the principal's representations. *See Roethke v. Sanger*, 68 S.W.3d 352, 364 (Ky. 2001). The court must then determine if that reliance was reasonable.

The problem in these cases is that the circuit court determined that reliance by the plaintiffs would have been reasonable without any proof in the record that the plaintiffs actually relied on Dapple Stud's website, its filings with the Secretary of State, or any prior dealings they had with Dapple Stud. None of the affidavits submitted by the Appellees addressed the issue of reliance or even discussed any representations by Dapple Stud that they relied upon prior to executing the agency authorizations.

In sum, having reviewed the record, we cannot agree with the circuit court's decision to grant summary judgment in these cases. Too many issues of disputed fact exist and the evidence submitted to the circuit court was insufficient in terms of proving either the existence of enforceable contracts or actual/apparent authority.

IV. Conclusion

For the reasons set forth above, we VACATE the Fayette Circuit Court orders and REMAND these matters for further proceedings consistent with the opinions expressed herein.

ALL CONCUR.

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