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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000042-MR

CORINE MILLER — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 98-CI-00178

NATHAN BAISE d/b/a
JORDAN LUMBER COMPANY — APPELLEE

OPINION
AFFIRMING IN PART AND VACATING IN PART
AND REMANDING
** ** ** ** **

BEFORE: COMBS, KNOPF, and TACKETT, Judges.

COMBS, JUDGE: Corine Miller (Miller) appeals from the Muhlenberg Circuit Court order entered on December 4, 1998, which summarily dismissed her suit against Nathan Baise (Baise), d/b/a Jordan Logging, Inc. (Jordan), for damages arising from a timber contract between the parties. The trial court sustained Baise's motion for summary judgment because it found no genuine issue as to any material fact and determined that Baise was entitled to judgment as a matter of law. The primary issue on appeal is whether the dismissal of Miller's suit was justified. After

review of the trial record, we conclude that the summary judgment was appropriate as to Miller's claim of inducement by misrepresentation--but not as to the claim of commercially unreasonable removal of the timber from Miller's property. Accordingly, we affirm in part and vacate in part and remand.

In October and November of 1997, Ms. Miller engaged in discussions with Jack Cranmer (Cranmer), an agent of Jordan, regarding the possible sale of timber located on her property. Jordan had been engaged in negotiations for the cutting of timber on adjacent property and became interested in purchasing and cutting a number of trees on Miller's land. Cranmer marked eighty (80) trees for purchase by Baise/Jordan. On December 1, 1997, Miller met with Cranmer and Baise and executed a timber contract for the eighty (80) marked trees at a price of $2000.00, which was paid to Miller. Jordan received permission from the adjacent property owner to transport any timber taken from Miller's land across his property.

On December 3, 1997, Jordan's timber crew went to Miller's property to cut and remove the timber, but Miller stopped them from doing so. Jordan authorized Cranmer to offer Miller an additional $600.00 to allow the crew to proceed. Miller accepted this offer and also asked Jordan not to cut down a few of the trees that had been marked and designated in the contract of December 1, 1997. Cranmer paid Miller $400.00 following this agreement and the other $200.00 on December 29, 1997, following the cutting and removal of the timber (including a number of white oaks) from Miller's land. Both payments were

evidenced by invoices provided by Jordan, and each invoice was signed by Miller. The December 29, 1997, invoice acknowledges payment "in full".

On April 13, 1998, Miller filed a complaint with the Muhlenberg Circuit Court against Baise (as a representative of Jordan), alleging that she was induced to enter into the December 1, 1997, contract by the misrepresentations of Jordan that white oaks would not be cut and that the trees being cut were of minimal value. Miller also contended that the eighty (80) trees were marked after the execution of the contract and that more than eighty (80) trees were actually cut and removed. Additionally, Miller claimed that Jordan failed to follow normal and customary logging practices in removing the timber from her land and failed to follow through on an alleged promise to repair the damage resulting from the cutting and removal. She asked for damages in the form of compensation for the fair market value of the timber cut and removed from her land as well as for the costs of repairing the damages allegedly done to her property.

On November 13, 1998, attorneys for Baise/Jordan filed a motion for summary judgment seeking a dismissal of the complaint. On December 4, 1998, the Muhlenberg Circuit Court sustained this motion and dismissed Miller's complaint. In its order dismissing, the court stated that summary judgment was appropriate pursuant to CR 56 because there was no genuine issue as to any material fact, holding that Baise/Jordan was entitled to summary judgment as a matter of law. The court's conclusion was primarily based on the argument of Baise/Jordan that Miller's

acceptance of the additional $600.00 -- particularly the second payment of $200.00 -- after she allegedly had become aware of the removal of white oaks constituted an accord and satisfaction of her claim as a matter of law. This appeal followed.

The standard of review on an appeal of a summary judgment is whether the trial court correctly determined 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. Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 780 (1996). In determining whether summary judgment is appropriate, we are to view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Ctr., Ky., 807 S.W.2d 476, 480 (1991).

On appeal, Miller argues that summary judgment was inappropriate in this case. Three of her contentions merit consideration. Miller first maintains that accord and satisfaction was inappropriately applied as there was no actual disputed or unliquidated claim between the two parties. Yutz v. Commonwealth Life Ins. Co., 264 Ky. 142, 94 S.W.2d 326 (1936). Second, Miller claims that the question of whether or not she was induced to enter into the timber contract by the misrepresentations of Jordan was a disputed material fact that should have gone to a jury--precluding entry of summary judgment. Third, Miller contends that the trial court could not as a matter of law make a finding that she was not entitled to seek damages for the allegedly negligent manner in which the timber was cut

and removed from her property. We will address each of these arguments in turn.

Miller contends that the second agreement between the two parties did not constitute an accord and satisfaction as there was no disputed or unliquidated claim. Instead, she claims that the agreement constituted a "novation". 1 Am. Jur. 2d Accord and Satisfaction § 1 (1994), states that "accord and satisfaction" is:

> a method of discharging a claim whereby the parties agree to give and accept something other than that which is due in settlement of the claim and to perform the agreement. An 'accord' is the agreement and 'satisfaction' is its execution and performance.

In contrast, a "novation" is defined as "a mutual agreement between the parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation." 58 Am. Jur. 2d Novation § 1 (1994).

The distinction between the doctrine of accord and satisfaction and the concept of novation is that a new obligation is created by a novation generally extending beyond the original parties and maybe encompassing more or less subject matter than the original agreement. 1 Am. Jur. 2d Accord and Satisfaction § 3 (1994). In contrast, an accord and satisfaction "refers to the debt or controversy between *the original parties arising upon the original subject matter, and the satisfaction relates directly to that controversy*." (Emphasis supplied.) Id. Miller argues that an accord and satisfaction was inappropriate because there was no "controversy" as to the terms of the contract. We do not agree.

Miller initially stopped Jordan's timber crew from cutting her trees because she disputed their value as it had been represented to her by Jordan. To settle the dispute, Jordan offered additional consideration ($600.00) and also agreed not to cut down a number of trees that were part of the original contract. An "accord" was reached when Miller agreed to allow the timber to be cut, fulfilling her obligation under the original contract, in exchange for this new consideration. This accord was "satisfied" upon Miller's receipt of the final $200.00 and signing of the invoice indicating payment "in full". Hodges v. Daviess County, 285 Ky. 508, 148 S.W.2d 697, 701 (1941). We conclude that the second agreement between the two parties constituted a valid accord and satisfaction.

Miller next contends that the trial court had no right to find an accord and satisfaction as a matter of law because the question of misrepresentation by Jordan was a disputed material issue that belonged in the hands of a jury. An accord and satisfaction exists as a matter of law when the controlling facts of the case are "undisputed and clear". Bruestle v. S & M Motors, Inc., Ky. App., 914 S.W.2d 353, 354 (1996). In Bruestle, a buyer brought suit against a car dealership, claiming fraud and statutory violations. The claim was based on the purchase of a used car that had more miles than the odometer showed at the time of purchase. After discovering the discrepancy, the buyer asserted that the dealership had committed fraud but agreed to exchange the used car for a new one at no additional cost. Following receipt of the vehicle, the buyer filed suit against

the dealership. The trial court sustained the dealership's motion for summary judgment, finding that the acceptance of the new car constituted an accord and satisfaction as a matter of law because the controlling facts of the case were "undisputed and clear". Id.

The controlling facts of this case are equally "undisputed and clear". Miller stated in her deposition that she initially stopped Jordan from cutting her timber on December 3, 1997, because she felt she had been misled as to the value of that timber and wanted more money than the $2000.00 she had already received. Indeed, the appraisal of the cut timber months after its removal indicated that her suspicion may have very well been true. As was the case in Bruestle, however, the appellant did not then take action on the basis of this alleged fraud or misrepresentation. Instead, she elected to enter into a new accord with Jordan. It is not disputed by either party that--despite her concerns -- Miller nonetheless accepted Jordan's offer of an additional $600.00, the final $200.00 of which was accepted after Miller had seen that white oaks had been cut and removed. By signing the second invoice and thereby acknowledging payment "in full," Miller may not have subjectively believed that she was waiving her rights to seek damages for the alleged misrepresentations made by Jordan. However, she does not dispute "the controlling facts that we find to be a clear indication of an accord and satisfaction." Bruestle, supra, at 354. As a result, the issue of accord and satisfaction became fixed as a matter of law and formed a proper basis for entry of summary

judgment by the trial court because it would indeed have been impossible for Miller "to produce evidence at the trial warranting a judgment in [her] favor." Bruestle, supra, at 355, citing Steelvest, supra at 483.

Miller further contends that the second agreement for the additional $600.00 was also fraudulently induced since Jordan allegedly continued to insist that the timber was of poor quality. She maintains that she relied on this misrepresentation in accepting the money. However, we have not found any evidence in the record to support this bare contention. Consequently, we cannot say that the court was clearly erroneous in its finding.

Jordan urges that it was entitled to summary judgment on the basis of the doctrine of equitable estoppel. Equitable estoppel is applied in situations where "it would be unconscionable to permit a person to maintain a position which is inconsistent with one in which he has acquiesced." Hicks v. Combs, 311 Ky. 149, 223 S.W.2d 379, 381 (1949). Generally, equitable estoppel is a question of fact turning on the circumstances of a particular case. Bruestle, supra at 355, citing McKenzie v. Oliver, Ky. App., 571 S.W.2d 102, 106 (1978). Bruestle emphasizes that the circumstances of a case may render summary judgment appropriate. Id. at 355. We agree that summary judgment on the basis of equitable estoppel was appropriate in this case. Miller admits in her affidavit that she accepted the additional $600.00 even though she "suspected" that Jordan had misrepresented the value of her timber and even after she saw that white oaks had been cut. "The facts that support the

court's conclusion that an accord and satisfaction existed also establish estoppel." Bruestle, supra at 355. The same facts that support a summary judgment on the basis of accord and satisfaction apply equally as to the doctrine of equitable estoppel, rendering either theory a viable basis for sustaining the summary judgment.

Miller's third contention is that the trial court could not find as a matter of law that she was not entitled to seek damages for the allegedly negligent and commercially unreasonable manner in which the timber was cut and removed from her property. The record indicates that Jordan removed the timber during a period of rainy weather that left a large amount of mud. This removal left a large number of gullies and branches on Miller's property that she alleges would not have happened had Jordan followed "normal and customary logging practices." Miller argues that her claim for damages as to the manner in which Jordan removed the timber from her land should not have been dismissed as a matter of law. She describes this second claim as one "totally distinct and separate" from the issue of fraudulent inducement to enter into the underlying contract. We agree.

The trial court stated in its summary judgment order that all of Miller's claims essentially were precluded by her acceptance of the additional money and signing of the invoices--including the property damage. We do not agree. In its memorandum of authorities, Baise/Jordan makes no effort to address or rebut Miller's contention as to the commercially unreasonable removal of the timber.

Negligence claims traditionally turn on the question of whether or not a party acted reasonably -- "a classic jury question". Estep v. B.F. Saul Real Estate Inv. Trust, Ky. App., 843 S.W.2d 911, 914-15 (1992). As a result, summary judgment seldom applies in negligence cases. It is even more difficult -- if not impossible -- to justify summary judgment when the moving party provides absolutely no evidence to satisfy its burden of showing there are no issues of material fact as to a particular claim. Under Kentucky law, the moving party has the burden of convincing the court of the nonexistence of an issue of material fact. Steelvest, supra, at 480. Summary judgment is only proper where the moving party shows that the adverse party could not prevail under any circumstances. Id. at 480. Thus, as Baise/ Jordan failed to rebut her allegations on this point, Miller's claim of negligent removal was sufficient to survive a motion for summary judgment as it would not be patently impossible for her to prevail at trial. Estep, supra at 915.

"It is clearly not the purpose of the summary judgment rule...to cut litigants off from their right of trial if they have issues to try." Steelvest, supra at 480. Therefore, we vacate the summary judgment as to Miller's claim of commercially unreasonable timber removal by Jordan and remand that issue to the trial court for additional consideration.

We affirm in part and vacate in part and remand the judgment of the Muhlenberg Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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