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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001092-MR

W. DENIS O'CONNELL,
D/B/A ACQUISITION ALLIANCE — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 99-CI-00775

DAVID L. HART, AND
HART TO HART, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; JOHNSON, AND TACKETT, JUDGES.

TACKETT, JUDGE: W. Denis O'Connell d/b/a Acquisition Alliance appeals from an order of the Bullitt Circuit Court granting summary judgment in favor of David L. Hart and Hart to Hart, Inc. We affirm.

On February 19, 1998, O'Connell, on behalf of Acquisition Alliance, and Hart, as president of DLH Environmental, Inc. (DLH), (now known as Hart to Hart, Inc.), entered into a contract entitled "Finder's Fee Agreement." The purpose of this contract was for DLH to retain Acquisition Alliance to act as its "agent with sole and exclusive right to

seek out and identify" buyers of DLH or its business assets. DLH's principal business was the removal of asbestos and lead paint.

Prior to the execution of this agreement, Hart expressed reservations concerning the "sole and exclusive right" language found in the contract's first paragraph. O'Connell testified that he pointed out to Hart that the agreement was a sole and exclusive agency agreement. With this explanation, Hart explained he believed this provision to be exclusive to O'Connell's clients only in order that O'Connell's clients could not purchase DLH without first going through Acquisition Alliance. Hart further stated that he did not want Acquisition Alliance to be the sole and exclusive agent. O'Connell assured Hart that the agreement was simply a finder's fee agreement whereby if Acquisition Alliance failed to bring forward a satisfactory purchaser for DLH, Hart would owe O'Connell or his company no commission. With this discussion in mind, Hart proceeded to execute the contract.

In July 1998, O'Connell received a proposal from Jim Rogers concerning the purchase of DLH. Rogers informed O'Connell that he wanted to purchase the assets of DLH for $432,000.00, a figure that was significantly less than the $1.2 million Hart demanded. Hart rejected this offer and informed O'Connell not to bring another offer concerning DLH to his attention unless it was close to his asking price. According to the record, this was the only legitimate offer O'Connell brought to Hart's attention.

Frustrated with O'Connell's efforts, Hart met with Al Temple concerning Temple's interest in purchasing DLH. Hart and Temple met three times between August 20, 1998, and September 9, 1998. During the September 9, 1998 meeting, Temple presented Hart and his wife with an agreement granting Temple the "exclusive right" to pursue the purchase of DLH and expressly forbade the Harts from engaging in negotiations or discussions with any other potential purchasers of this company. The Harts executed this document after Temple expressed to them that the document represented his intent to purchase the business. At no time was O'Connell ever notified about these meetings, nor was Temple ever a client of O'Connell's Acquisitions Alliance.

On September 10, 1998, following the advice of counsel, Hart forwarded a letter to O'Connell terminating the Finder's Fee Agreement after the contractually required ten-day notice period. After receiving the letter, O'Connell telephoned Hart to discuss the matter. The discussion between Hart and O'Connell led to O'Connell's decision to offer his services on a non-exclusive basis to Hart. Hart testified during his deposition that, to the best of his understanding, this arrangement was the relationship the parties had enjoyed all along. O'Connell's employment on a non-exclusive basis did not, however, result in the identification of any additional prospective purchasers for DLH.

Temple and the Harts met again on November 6, 1998. During this meeting, the parties reached an agreement whereby Temple purchased DLH with Hart netting a profit of approximately one million dollars after taxes. O'Connell eventually discovered

DLH's sale to Temple and notified Hart that he was making a demand for compensation under the Finder's Fee Agreement. Hart refused to pay O'Connell the requested commission, and O'Connell promptly filed suit in the Bullitt Circuit Court seeking $108,000.00, the amount he claimed as a commission.

After a period of discovery, both sides filed motions for summary judgment with the trial court. On May 3, 2001, the trial court entered an order without an opinion granting summary judgment to Hart. The trial court denied O'Connell's motion to alter, amend, or vacate the order. This appeal followed.

Summary judgment is appropriate when no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Additionally, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 482. "On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law." Moore v. Mack Trucks, Inc., Ky. App., 40 S.W.3d 888, 890 (2001).

It is undisputed that Hart and O'Connell entered into a contract on February 19, 1998. The issue is whether the terms of the contract unambiguously granted O'Connell an exclusive privilege to sell Hart's business and collect a commission even if he failed to provide Hart with a suitable buyer.

O'Connell argues that the terms of the contract are clearly expressed and are unambiguous. Specifically, O'Connell argues that the language "sole and exclusive right" clearly provides his company with an exclusive privilege to sell the company and to collect the commission allowed therein even if a sale occurs without his involvement. We disagree.

A contract provision is ambiguous if a court determines that it is susceptible to inconsistent interpretations. Transport Ins. Co. v. Ford, Ky. App., 886 S.W.2d 901 (1994). In the case sub judice, the phrase "sole and exclusive" may be interpreted to mean that O'Connell's company was granted either an exclusive privilege or an exclusive agency to act on Hart's behalf. If O'Connell were granted an exclusive privilege to sell the business, the sale of the business was prohibited by any other person, including Hart, the owner of the property, and if indeed it were sold by another person, O'Connell would be entitled to his commission as provided within the agreement. Boggess Realty Co. v. Miller, Ky., 14 S.W.2d 140, 227 Ky. 813 (1929). If terms granting an exclusive agency were used, however, Hart, as owner of DLH would be able to sell the business because an exclusive agency contract only prohibits any other agent from selling it. Id. The language "sole and exclusive right," by itself, does not fall neatly into either of these categories.

O'Connell argues that Miller supports his assertion that the contract provides his company with an exclusive privilege to identify purchasers for DLH. In Miller, the court

declared that the contract at issue which gave Boggess Realty "sole and exclusive" right to sell property, was ambiguous and therefore granted only an exclusive agency. Id. at 140-141. The Miller court reached this conclusion by finding that the contract executed between the parties was prepared by the realty company and, because of its ambiguity, should be construed most strongly against the real estate firm. Id., at 141. This principle has also been reasserted in Boyd v. Phillips Petroleum Company, Ky., 418 S.W.2d 736, 738 (1966); Pulliam v. Wiggins, Ky. App., 580 S.W.2d 228, 231 (1979); and Wiggins v. Schubert Realty & Investment Company, Ky. App., 854 S.W.2d 794, 796 (1993). Here, it is undisputed that O'Connell drafted the Finder's Fee Agreement. If he meant to provide his company with an exclusive privilege to sell DLH and protect his commission, he was required to clearly express this intent in the contract.

O'Connell's reliance on Messick v. Powell, Ky., 236 S.W.2d 897, 314 Ky, 805 (1951) and Shanklin v. Townsend, Ky., 431 S.W.2d 874 (1968) is misplaced. Messick involved a contract that specifically stated that the broker was entitled to his commission if the property was sold to any person brought to the seller's attention by the broker and the broker had already commenced negotiations with that person. Messick at 901. Shanklin involved a contract where the sellers of property agreed to pay the commission to the brokers regardless of whether the broker actually sold the property as long as the land was sold within a specific time frame. Shanklin at 875. The contract here, on the other hand, failed to specifically grant O'Connell

his commission if the property was sold by Hart to a buyer who was never identified by O'Connell. Hart was relieved of his obligation to pay a commission if O'Connell was unable to find a suitable buyer. Since O'Connell drafted the instrument, he should have protected his right to the commission through specific language within the confines of the contract.

In construing a contract, in order to determine the meaning of any portion of the contract, as well as the parties' intent, the court must look to the instrument as a whole and consider the portion in question in connection with the remainder. Prestonsburg Water Company v. Dingus, Ky., 111 S.W.2d 661, 271 Ky. 240 (1937). Additionally, phrases are to be interpreted in light of their context. Fidelity-Phenix-Fire Ins. Co. v. Duvall, Ky., 106 S.W.2d 991, 269 Ky. 300 (1937). With this in mind, other paragraphs found in the Finder's Fee Agreement further support our conclusion that this contract merely granted O'Connell an exclusive agency with respect to the sale of DLH.

Paragraph two (2) of the Finder's Fee Agreement states that "unless and until an offer has been accepted, Finder (O'Connell/Acquisition Alliance) shall be due no contingent compensation hereunder." The provisions of paragraph three (3) apply only if Acquisition Alliance finds a satisfactory purchaser for Hart. Additionally, paragraph six (6) states that "Client (Hart) agrees to provide Finder with copies of all correspondence between Client and any Buyer prospects duly provided to it by Finder as provided for herein." That paragraph also required

Hart to notify O'Connell of the date and time of any transaction so that O'Connell can be present at closing. We conclude from reviewing this contract that Hart was required to pay O'Connell a commission only if Acquisition Alliance brought forward a satisfactory buyer. Furthermore, Hart was required to disclose to Acquisition Alliance correspondence between Hart and a potential buyer only if that potential buyer was identified by O'Connell and/or Acquisition Alliance. Here, Acquisition Alliance never identified Temple as a prospective buyer. Therefore, the contract did not require Hart to inform O'Connell of any negotiations with Temple. Simply put, the language of the contract clearly suggests that the relationship between the parties was one of exclusive agency, not exclusive privilege.

We believe the circuit court was correct in granting summary judgment because it is undisputed that O'Connell never brought forward a suitable buyer. O'Connell fully acknowledged that he only brought Hart one offer, from Jim Rogers, concerning the potential purchase of DLH. Temple, by O'Connell's admission, was never identified by Acquisition Alliance as a potential buyer, nor was any evidence presented that O'Connell was even inquiring about Temple's interest in purchasing DLH. Rather, it is apparent O'Connell stayed focused on Rogers' interest in the business despite Hart's repeated rejection of Rogers' proposals. With no satisfactory purchaser identified and, more importantly, no language in the contract he drafted granting a commission regardless of who actually sold DLH, O'Connell has failed to present a genuine issue as to a material fact as to whether he is

entitled to a commission for his services. Thus, the circuit court's summary judgment in favor of Hart was appropriate.

For the foregoing reasons, the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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