

RENDERED: MAY 2, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000817-MR

LEONARD R. JAFFEE

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 97-CI-00236

IVA DAVIS AND CACHE, INC.
d/b/a CENTURY 21 GOLD STAR
REALTORS

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. Appellant, Leonard R. Jaffee (Jaffee), appeals from an order¹ of the Oldham Circuit Court granting summary judgment in favor of appellees, Iva Davis and Cache, Inc. d/b/a Century 21 Gold Star Realty (Davis). We affirm.

¹ Jaffee appeals from the individual orders of the circuit court. However, we conclude that the previous orders are encompassed in the February 21, 2001 order granting summary judgment to Davis.

Jaffee and his wife, Beverly Racine,² are owners of a home located at 7412 Shady Creek Lane, Crestwood, Kentucky. When Jaffee took a teaching position at the University of Seattle in Tacoma, Washington, the couple decided to lease their house. To that end, Jaffee and Racine entered into a management agreement with Davis on May 3, 1996. This agreement was drafted by Jaffee incorporating some terms from a Board of Realtors form. Soon after entering into the management agreement, Davis found a prospect, Brenda Watkins (Watkins), to lease the premises. Jaffee claims that he directed Davis to check Watkins' employment and to do a financial/credit check to ensure Watkins could pay the required rent. Jaffee testified that Davis confirmed Watkins' employment at Humana and that Davis represented that Watkins made enough money to support the lease. Jaffee also testified that Davis represented that she spoke with Watkins' former landlord and was given a positive report. According to Jaffee's testimony, he and his wife were aware that a credit check had not been completed prior to their signing the lease but they had relied upon the report from the prior landlord and Davis' assessment of Watkins' employment in their decision to proceed with the lease. The lease began on June 1, 1996.

² In the trial court Beverly Racine was also a Plaintiff. However, she has abandoned her claims on appeal.

Eventually Jaffee became unhappy with Davis' performance and terminated the management agreement by letter on or about August 20, 1996. Sometime thereafter Watkins failed to make timely lease payments and was evicted from the premises. Jaffee and his wife both testified that upon Watkins' eviction they discovered that the property had sustained significant damage. Jaffee and Racine filed suit against Watkins in January of 1997, and were granted a default judgment on August 11, 1997. Jaffee and Racine initiated a damages claim against Davis and her Century 21 agency in Oldham Circuit Court on May 27, 1997.

The complaint contained three claims against Davis, which Jaffee admits are really one - that "Davis bore a fiduciary duty that she investigate with great care and diligence any person who sought to lease from Plaintiff, and such duty made Davis and her firm strictly liable for failing to investigate Watkins properly and for misrepresenting, to Plaintiff, Watkins's [sic] bona fides and qualifications." Jaffee prayed for compensatory and punitive damages and attorney fees. As elements of compensatory damages Jaffee claimed loss of professional time, loss of business opportunity, loss of recreational time, and amounts for emotional distress.

From this point, the procedural history is lengthy and complicated, spanning four years. We will attempt to summarize the pertinent proceedings.

On September 3, 1998, the circuit court, pursuant to CR 77.02(2) entered a show cause order as to why the action should not be dismissed for lack of prosecution, and on October 15, 1998, the court entered an order dismissing. Jaffee subsequently filed a motion to set aside the order dismissing, claiming that he had not received the notice until October 31, 1998, and that "there had been a great deal of discovery exchanged between the parties outside the court's purview." The circuit court set aside the dismissal upon the condition that the deposition of Iva Davis be taken without undue delay.³

On July 6, 1999, Davis filed a motion for partial summary judgment on the grounds that Jaffee was not entitled to recover attorney fees or amounts for loss of business opportunity or planned recreation as a matter of law. After a flurry of motions and delays, the circuit court held a hearing on the motion on December 10, 1999. The trial court did not rule on the motion at the hearing but rather sustained a request by Davis to reply to the response to the motion. On January 10, 2000, Davis filed a "Motion to Dismiss or for Summary Judgment on Count Two and Count Three of the Complaint." The basis of this motion was that the two counts alleged breach of fiduciary duty and fraud, and that by the terms of the management agreement, Jaffee had waived those claims. On January 28, 2000,

³ Although the record reflects that a deposition of Iva Davis was taken, it was never entered into the record.

Davis filed an "Amended Notice - Motion - Order" moving the court to dismiss any claim by Jaffee for emotional distress on the grounds that "any mental anguish that could have been suffered by Plaintiffs was not accompanied by physical contact or injury." On March 28, 2000, Davis filed another "Motion to Dismiss or for Summary Judgment on Counts Two & Three of the Complaint." Before the circuit court ruled on these motions, on June 7, 2000, Davis filed a "Memorandum in Support of Motion for Summary Judgment on Count I of the Complaint." In support of the motion, Davis argued Jaffee had not produced some affirmative evidence that Davis failed to exercise slight care. Davis also argued that the claim was barred as a matter of law because of Jaffee's failure to obtain insurance to protect Davis, as required by the management agreement. On June 9, 2000, Davis also filed a motion asking the court to allow her to file a counterclaim alleging that Jaffee breached the management agreement by his failure to obtain and maintain the insurance policy.⁴

A hearing was held on August 25, 2000. On August 29, 2000, the circuit court entered "Findings and Order." As to count 1, the court sustained a request by Davis to file a reply brief to Jaffee's response to the motion to dismiss count I and for Jaffee to file a sur reply. The court withheld rulings

⁴ This motion was not ruled on. The circuit court indicated that if summary judgment was granted, there would be no need for the counterclaim.

pending the filings. As to counts II and III, the trial court acknowledged its failure to enter an order granting summary judgment to Davis.

Finally, on February 6, 2001, the circuit court entered "Findings and Order/Partial Summary Judgment" as follows:

2. Summary Judgment Motions: The Court has previously ruled in regard to several theories advanced by the Plaintiff that they are non recoverable under present Kentucky law. The Court has found that the Plaintiff's request for recovery of "loss of professional time" and "loss of business opportunity and planned recreation" damages are not otherwise recoverable.

3. Summary Judgment/Emotional Distress: The court sustains Defendant's request for partial summary judgment as to the exertion of damages for emotional distress. The Court finds that the Plaintiff's request for emotional distress is not supported by any accompanying physical contact and/or injury. The claims for emotional distress under these circumstances cannot result in a recovery absent the requisite elements.

4. Gross Negligence: The Court sustains pending request filed on behalf of the Defendant through counsel for summary judgment in regard to Count I. The Court finds that after extensive discovery the Plaintiff has failed to advance any affirmative identifiable evidence of "gross negligence". The Court finds that a matter of law [sic] there is no evidence to show that the Defendant in this case acted under the requisite elements necessary to establish "reckless disregard" to sustain a theory of gross negligence.

The circuit court made the additional finding that "the Plaintiff is an attorney and the document that he relies upon in advance of his theories of recovery were prepared by him and set out the requisite standard of gross negligence." On February 21, 2001, the circuit court entered "Corrected Findings and Order/Summary Judgment."⁵ On February 21, 2001, the trial court entered its final order granting summary judgment on counts I, II, and III of the complaint.

On March 2, 2001, Jaffee filed a motion to alter, amend or vacate. The trial court denied this motion in an order entered March 15, 2001. Jaffee filed a timely notice of appeal.

On appeal Jaffee argues that the trial court erred in 1) dismissing counts II and III of the complaint⁶; 2) dismissing count I of the complaint⁷; 3) dismissing the emotional distress claim; 4) ruling that attorney fees are not recoverable; 5) ruling that loss of professional time and professional opportunity are not recoverable; and 6) granting summary judgment to Davis before discovery was complete.

⁵ The text of the February 6, 2001, order and the February 21, 2001, order are identical except for the styling as "partial summary judgment" and "summary judgment," which leads us to the conclusion that the trial court realized that in addressing and granting summary judgment on all three counts, this was not a partial, but complete summary judgment.

⁶ Jaffee states in his brief that count II is a claim for "reckless conduct in . . . breach of fiduciary duty" and count III is a claim for willful misconduct.

⁷ Jaffee states in his brief that count I pleads gross negligence, simple negligence, detrimental reliance, and more.

When a trial court grants a motion for summary judgment, the standard of review on appeal 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." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). The trial court must view the evidence in the light most favorable to the nonmoving party and should grant summary judgment only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." Id. at 480. Because summary judgment addresses only legal questions and the existence of disputed material issues of fact, this court need not defer to the trial court's decision and will review the issue de novo. Scifres, 916 S.W.2d at 781.

In support of her motion for summary judgment, Davis argued that paragraph 4 of the management agreement defined the standard of care she owed to Jaffee and that any claims of simple negligence, fraud or willful misconduct were precluded by the terms of the agreement, in that the agreement waived any claim but that of gross negligence. Jaffee countered that

paragraph 8(b) defined the standard of care as one of reasonableness.

Paragraph 4 reads as follows:

Owner agrees to hold Agent harmless from any damages, costs, expenses, claims, or injuries to person or property by reason of any cause except Agent's gross negligence or wilful [sic] misconduct in, on, or about the leased premises or elsewhere when Agent is carrying out this Agreement or acting under the express or implied directions of Owner.

Paragraph 8 states in pertinent part:

Owner shall pay Agent for Agent's services as follows:

(b) For leasing: Agent shall use all reasonable efforts to keep the premises rented, and accordingly Agent is authorized to negotiate rentals for Owner, and all costs associated with such service shall be paid by mutual consent from monies supplied by Owner or from monies obtained from Tenant according § IV [sic] of the lease.

After a careful review of the management agreement, we conclude that neither of these sections defines the standard of care Davis owed to Jaffee.

We first note the well-established rule that a contract is to be construed more strongly against the preparer. See Wiggins v. Schubert Realty & Inv. Co., Ky. App., 854 S.W.2d 794, 796 (1993). While Jaffee points out that part of the contract was taken from the Board of Realtors form, it is clear

from his testimony that he primarily drafted the document because "he did not like" the Board of Realtors form.

Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. Hoheimer v. Hoheimer, Ky., 30 S.W.3d 176, 178 (2000). The primary object in construing a contract . . . is to effectuate the intentions of the parties. Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., Ky. App., 94 S.W.3d 381, 384 (2002). "Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible." City of Louisa v. Newland, Ky., 705 S.W.2d 916, 919 (1986). A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. Transport Ins. Co. v. Ford, Ky. App., 886 S.W.2d 901, 905 (1994). The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms. Cantrell, 94 S.W.3d at 385. The interpretation of a contract, including determining whether a contract is ambiguous, is a question of law. First Commonwealth Bank of Prestonsburg v. West, Ky. App., 55 S.W.3d 829, 835 (2000).

Paragraph 3 of the management agreement reads:

Agent shall be held strictly accountable for any and all receipts and expenditures related to management of the lease and

maintenance of the leased premises but shall not be liable to Owner for any other matter except the gross negligence or wilful misconduct of Agent or Agent's employees. (emphasis ours.)

We believe this provision is clear on its face that Jaffee intended a gross negligence and willful misconduct standard for "any other matter" except for the accounting for receipts and expenditures and maintenance of the leased premises. Jaffee clearly had in his power to include a standard of care lesser than that of gross negligence or willful misconduct but chose not to do so. He also had the power to include a provision directly relating to Davis' duties in verifying the suitability of tenants and a separate standard of care to be used as to those duties. Again, he chose not to do so, but rather chose the standard of care of gross negligence or willful misconduct as to "any other matter."

In granting summary judgment to Davis, the circuit court obviously accepted Davis' interpretation of the contract that Jaffee waived all claims except for those of gross negligence. The circuit court did not expressly state upon which provision of the contract it relied for its determination. However, we conclude that Paragraph 3 defines Davis' duty.

Having determined that by the express terms of the contract the standard of care owed to Jaffee by Davis was one of gross negligence or willful misconduct, we must next address

whether this precluded a claim by Jaffee for breach of fiduciary duty or fraud. It is our opinion that the contract, by its terms, does not preclude such claims. First, Kentucky law is clear that contractual relations between a real estate broker and his principal impose an obligation of mutual good faith and fair dealing. Odem Realty Co. v. Dyer, 242 Ky. 58, 45 S.W.2d 838 (1932). This fiduciary duty is imposed by law, not by the terms of the contract. Although Davis was acting as a leasing agent as opposed to a seller of the property, we see no reason that the same rule should not apply. Second, by the very terms of the contract, Davis was liable for willful misconduct. Willful misconduct is defined as "Conduct which is committed with an intentional or reckless disregard for the safety of others or with an intentional disregard of a duty necessary to the safety of another's property." Black's Law Dictionary 1600 (6th ed. 1990). Willful misconduct, by definition, encompasses fraud and misrepresentation as intentional conduct. We are of the opinion that it is illogical to conclude that by setting a standard of gross negligence, one is consenting to fraud and misrepresentation. If, as Jaffee contends, Davis intentionally disregarded a necessary duty or committed a fraud, which resulted in damages, Jaffee could maintain a claim against her.

Having determined that Jaffee could maintain claims against Davis for gross negligence, breach of fiduciary duty,

fraud or willful misconduct, the issue is really one of whether Jaffee produced some evidence in the record to support his claims. In order for a party to avoid summary judgment, at least some affirmative evidence demonstrating that there is a genuine issue of material fact must be produced. Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992). It is our opinion that summary judgment was proper in the case sub judice in that there is no evidence in the record to support any of Jaffee's claims.

In order to avoid summary judgment on his gross negligence claim, Jaffee was required to produce evidence of a conscious and voluntary act or omission likely to result in grave injury when in the face of clear and present danger of which Davis was aware. Sparks v. Re/Max Allstar Realty, Ky. App., 55 S.W.3d 343, 348 (2000). In order to maintain a claim for fraud, Jaffee was required to produce some evidence of a material representation, falsity, scienter, or recklessness, intention, reliance, deception, and injury. Scott v. Farmers State Bank, Ky., 410 S.W.2d 717, 720 (1966). Where the proven facts or circumstances merely show inferences, conjecture, or suspicion, or such as to leave reasonably prudent minds in doubt, it must be regarded as a failure of proof to establish fraud. Goerter v. Shapiro, 254 Ky. 701, 72 S.W.2d 444 (1934). To prove willful misconduct, Jaffee was required to present

evidence that Davis intentionally, or with reckless disregard for the safety of his property, failed in some duty. To maintain a claim for breach of fiduciary duty, Jaffee was required to produce evidence that Davis failed to disclose some information known to her. See Smith v. General Motors Corp., Ky. App., 979 S.W.2d 127 (1998). Jaffee has simply failed to produce any evidence to support any of these claims.

First, in an effort to explain why there is no evidence in the record to support his claims, Jaffee contends that the trial court "sua sponte and autocratically" granted summary judgment to Davis prior to the completion of discovery. We find this argument completely without merit. First, summary judgment was granted based upon motions by Davis for summary judgment, not sua sponte, as argued by Jaffee. Jaffee can hardly argue this was "unfair surprise." Second, this case was in the circuit court for nearly four years before summary judgment was granted. Jaffee's protestations to the contrary, the record establishes that the circuit court was extremely patient, even setting aside its order dismissing and ordering that Jaffee take the deposition of Davis more than a year after the Complaint was filed. Even so, Jaffee failed to file the deposition.

Jaffee argues that affidavits by Watkins' previous landlord and her husband would show that Davis never interviewed

the prior landlord. Other than Jaffee's claims that the landlord and her husband would support his argument, Jaffee failed to place any evidence in the record. He claims that one of his many previous attorneys lost or misplaced the affidavits. However, Jaffee failed to produce any evidence that the affidavits ever existed. Jaffee testified that Davis told him she called the previous landlord and spoke with him about Watkins. As it turned out, it was his wife that signed the lease with Watkins. However, Jaffee offers no evidence that the husband told Davis he was not the landlord and did not have the authority to speak as to Watkins' suitability as a tenant. On the contrary, the record reflects that the individual on the phone stated that he knew of no problems with Watkins. Even on appeal, all Jaffee offers is that "suppose" the landlord or her husband said or did this or that.

Jaffee also contends that Davis failed to properly check Watkins' financial credit and resources. Jaffee's testimony was as follows:

I insisted that Iva Davis run a credit check of Brenda Watkins which included a check of Watkins' employment, whether she was employed where she said, for how long and whether she made enough money to support the lease and that she checked Brenda Watkins' bank account, some statements, the balance and that she also run a standard credit check through a credit reporting agency.

Jaffee testified to a subsequent conversation with Davis as follows:

Now, about the employment check she said that Watkins was working, where Watkins said she was working and that she had been working there some good time and that she was earning enough money to support the lease.

However, when questioned about the credit and other financial checks, Jaffee admitted that he and his wife knew that Davis had not completed a financial check on Watkins but chose not to wait for this information, relying on Davis' conversation with the landlord. Jaffee and his wife, by their own admission, were in a hurry to enter into the lease and thus relieved Davis of any further investigation into Watkins' financial situation. Jaffee cannot now argue that he and his wife relied upon any information regarding Watkins' financial position. The record establishes that Davis verified that Watkins was employed by Humana. Jaffee claims that Davis should have recognized that Watkins' salary could not support the rent they were asking. Jaffee presented Humana payroll records to support this claim. However, even if we believed that these records show Watkins' salary at the time of lease, which we do not, this is no indication of what Davis could or should have known from those records. Jaffee claims that he spoke to his new leasing agent about the proper steps to be followed by a leasing agent in

checking out a potential tenant. However, again, he proffered no evidence to that effect. There is absolutely no evidence in the record to show that Davis knew or should have known Watkins was unable to meet the financial obligations of the lease or would be an unsuitable tenant. Although there is evidence that Davis took an application from Watkins, that application is not in the record, nor is there any evidence to show that Davis should have been on alert as to Watkins' financial situation or that she knew and intentionally withheld that information. While we sympathize with Jaffee's plight and acknowledge that Watkins turned out to be a nightmare tenant, Jaffee has simply failed to adduce any evidence that would make Davis liable under any of his proffered theories.

Because Jaffee failed to place any evidence in the record that Davis was grossly negligent, breached a fiduciary duty to him, or took any action that could be construed as fraud or willful misconduct, we are of the opinion that summary judgment was proper.

Because we conclude that summary judgment was proper we need not address Jaffee's claims for amounts for emotional distress, attorney's fees or loss of professional time.

ALL CONCUR.

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