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Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002287-MR

TAMMY HARRIS

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 00-CI-00103

SANDRA BROCK; AND BISCEGLIA REALTY
AND AUCTION COMPANY, INC.

APPELLEE

OPINION

VACATING AND REMANDING

** **

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

McANULTY, JUDGE. The appellant, Tammy Harris (Harris), appeals from a July 31, 2002 order of the Bell Circuit Court that granted summary judgment in favor of the appellee, Sandra Brock (Brock). Harris had sued Brock for fraud claiming that Brock had misrepresented the boundaries of Brock's property and

claimed to own more property that she actually could convey to Harris in a real estate transaction.

On appeal, Harris argues that in fraud cases the modern trend in the law has been to require less diligence on the part of a person to whom a misrepresentation has been made. Harris contends despite the fact that two recorded deeds and a duly recorded subdivision plat contained the correct information that contradicted Brock's representations regarding the property's boundaries, she was under no duty to investigate. Agreeing with Harris, this Court vacates and remands for further proceedings.

Prior to September of 1993, Otis Hoskins (Otis) owned lots four, five, six and seven of block nine of the Hull and Barclay addition in Pineville, Kentucky. The front boundary for block nine ran along Tennessee Avenue in Pineville and the back boundary for the block ran along a small alley. The front and back boundary for each lot in the Hull and Barclay addition was twenty-five feet wide and each side boundary for the lots was one hundred and twenty-five feet long. Thus, each lot in the addition, including those discussed in the case *sub judice*, was twenty-five feet wide and one hundred and twenty-five feet long. Lots four and five consisted of an open field and, to the east, lots six and seven contained a house, which Otis kept as rental property.

Also prior to September 29, 1993, Brock and Otis entered into an agreement to trade property with one another. Brock received the house that sat upon lots six and seven and Otis received real estate that Brock had inherited. On September 29, 1993, Otis conveyed the house and the lots it sat upon to Brock. The deed from Otis to Brock described what Brock received as follows:

Lots Six (6) and Seven (7), Block 9 of the Hull and Barclay addition to the City of Pineville as shown by map and plat thereof in the Bell Court Clerk's Office.

Brock duly recorded the deed in the Bell County Clerk's office. According to Brock's testimony, when she acquired the house from Otis, she believed, despite the legal description in the above-mentioned deed, that she had also received the open field situated on lots four and five.

In 1999, Brock decided to sell her house in the Hull and Barclay addition and move to Louisville, Kentucky. Brock contracted with Coldwell Bankers Bisceglia Realty Company (Bisceglia Realty) for it to market and sell the house. Kathy Hoskins (Kathy), who worked for Bisceglia Realty, was the agent responsible for selling Brock's property. According to both Brock's testimony and Kathy's testimony, Brock pointed out to Kathy the property's boundaries, and when Brock did so, she claimed ownership of lots four and five. Kathy testified that

when she showed the property to Harris, she told Harris that the property included the open field situated on lots four and five. Eventually, Harris bought Brock's property and on October 27, 1999, Brock conveyed the property to Harris. The deed described the property that Harris received as follows:

Lots Six (6) and Seven (7), Block 9 of the Hull and Barclay addition to the City of Pineville as shown by map and plat thereof of record in the Bell County Court Clerk's Office.

Being that same property conveyed to Sandra Brock, single, by Deed of Conveyance from Otis Hoskins, single, dated September 27, 1993 and recorded in Deed Book 274, page 643, Bell County Court Clerk's Office.

In Harris' deposition, she testified that, despite the legal description in the deed, she thought that she had received lots four and five along with the house. After moving in, Harris decided to do some home improvements on her new house. At this point, Harris found out that Otis, not she, owned lots four and five.

Harris filed suit against Brock and claimed that Brock fraudulently misrepresented the boundaries of the property to induce Harris to buy the property. Eventually, Harris moved to amend her complaint to include mutual mistake as well. Brock filed third party complaints against both Otis and Bisceglia Realty. On August 15, 2001, Otis filed a motion for summary judgment. On August 16, 2001, Bisceglia Realty originally filed

a motion for summary judgment as well. On August 27, 2001, the circuit court granted a partial dismissal in Otis' favor but stated that the partial dismissal did not affect the claims of the other parties. On July 16, 2002, Bisceglia re-noticed its motion for and summary judgment and on July 16, 2002, Brock also filed a motion for summary judgment and argued that the deed that conveyed Harris the property had been duly recorded and stated that Harris was receiving lots six and seven. Furthermore, a plat describing in detail the Hull and Barclay addition had been duly recorded as well. Thus, these instruments placed Harris on constructive notice as to their contents, which contradicted Brock's representations regarding the boundaries of the property. Furthermore, Harris' deed incorporated by express reference to the recorded plat; thus, Harris should have been estopped from relying upon Kathy's representations regarding the boundaries of the property. On July 31, 2002, the circuit court granted summary judgment in favor of both Brock and Bisceglia Realty. This appeal followed.

On appeal, Harris argues that she was justified in relying on Brock's representations regarding the property's boundaries despite the fact that the public record contained the correct information. Citing Cowles Ex'r v. Johnson, 297 Ky. 454, 179 S.W.2d 674 (1944), Harris argues that she was under no duty to investigate, because, "[t]he general rule is that fraud

may be predicated on false representation although the truth could have been ascertained from public records." (Citations omitted.) Id. at 675

Harris points to the case of Stallard v. Adams, 312 Ky. 532, 228 S.W.2d 430 (1950). In Stallard, buyer wished to purchase seller's property for the sole purpose of using the property to open a tavern. Id. at 431. Knowing this, seller sold the property to buyer but failed to disclose that a zoning restriction prevented the construction of a tavern on the property. Id. Buyer sued seller for fraudulent misrepresentation. The former Kentucky Court of Appeals, now the Supreme Court of Kentucky, held despite the fact that buyer could have gone to the public records and learned of the zoning restriction, buyer was not precluded from bringing a lawsuit against seller for fraud. Id. at 432.

Harris cites Reis v. Peabody Coal Company, Mo. App. E.D., 997 S.W.2d 49 (1999), in which the Missouri Supreme Court noted that in lawsuits for fraudulent misrepresentations, the modern trend has been to require less diligence on the part of the person to whom the misrepresentations have been made. According to the Missouri Supreme Court, "[t]he opportunity for investigation will not of itself preclude the right of reliance." Id. at 67. Harris points out that the Kentucky high court acknowledged the modern trend of requiring less diligence

from the victims of fraud in Bankers Bond Company v. Cox, 263 Ky. 481, 92 S.W.2d 790, 793 (1936).

Harris also cites Chesapeake Homes v. McGrath, 249 Md. 480, 240 A.2d 245 (1968). In Chesapeake Homes, buyer purchased a home in a subdivision that was laid out in lots, similar to the case *sub judice*. Id. at 246. Buyer, who was an attorney, relied on the seller's representation regarding the back boundary line of the property in question. Id. at 247. The seller argued that buyer failed to exercise due diligence by examining the subdivision plat that had been duly recorded. Id. at 247, 248. The Maryland Court of Appeals stated:

[W]here statements of fact which are essentially connected with the subject of the transaction . . . "and especially where they are concerning matters which, from their nature or situation, may be assumed to be within the knowledge or under the power of the party making the representation, the party to whom it is made has a right to rely on them, he is justified in relying on them, and in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast doubt upon the truth of the statements, he is not bound to make inquiries and examination for himself." This rule has been applied in many cases in other jurisdictions, even though the truth could have been ascertained by an examination of the public records. (Citations omitted.) Id. at 247-48.

The Maryland high court reasoned that the seller of a piece of property would be in a better position than a potential buyer to have actual knowledge of the property's boundary lines. Id.

Furthermore, the Maryland Court of Appeals quoting from an earlier Maryland case stated:

[A] purchaser of land has a right to rely upon representations made to him by the vendor as to its location when the facts concerning which the representations are made are unknown to the purchaser; and the vendor can be held liable for damages if he makes a false representation as to its boundaries with knowledge of its falsity or with reckless disregard for its truth or falsity, and the purchaser relies upon it. But where the boundaries of land are unmarked and the vendor undertakes to point out the boundaries to the purchaser, he is under an obligation to point them out correctly; and the purchaser has a right to rely upon such a representation, without being required to make an examination of the land records or to employ a surveyor to make a plat of the land, and he can hold the vendor liable for any fraudulent misrepresentation. (Citations omitted.) Id. at 248-49.

Harris argues that Chesapeake Homes is directly on point and urges this Court to apply its holding to the case *sub judice* and reverse summary judgment.

On appeal, Brock argues that the deed from Otis to herself described the property in question as lots six and seven of block nine in the Hull and Barclay addition, "as shown by map and plat thereof of record in the Bell County Clerk's office." Since she recorded this deed in the Bell County Clerk's office, this deed placed Harris on constructive notice of its contents. Brock points out that Harris never hired an attorney to conduct

a title examination, never had the property surveyed, never had it appraised and never examined either the recorded deeds or the recorded plat. Brock cites Stephens v. Click, Ky., 287 S.W.2d 630 (1956) and argues that instruments of record, such as deeds and plats, place all people everywhere on constructive notice of their contents. Since two deeds and a plat had been duly recorded and contained the correct information regarding the property's boundaries, Harris was on constructive notice of the property's correct boundaries. Furthermore, the deed from Brock to Harris specifically referenced lots six and seven. Thus, Harris was estopped from relying on Brock's representations regarding the property's boundaries. According to Brock, when Harris accepted the deed that contained a legal description based on a recorded plat, she waived any prior, contrary representation.

Summary judgment is only proper, "where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991) (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)). The circuit court must 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, 807 S.W.2d at 480 (citing Dossett v. New York Mining and Manufacturing Co., Ky.,

451 S.W.2d 843 (1970)). However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992) (citing Steelvest, supra, at 480). This Court has previously stated that, "[t]he standard of review on appeal of a summary judgment 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. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue." (Citations omitted.) Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

To prove fraud, a plaintiff must establish, by clear and convincing evidence, the following elements: 1) a 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 thereon, and 6) causing injury. United Parcel Service Co. v. Rickert, Ky., 996 S.W.2d 464, 468 (1999) (citing Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357, 359 (1978)).

According to the record, Brock testified that she pointed out the property's boundaries, and she claimed that her

property included lots four and five. In her deposition, Kathy Hoskins of Bisceglia Realty confirmed this. According to the record, no one disputed the fact that Brock's representations regarding the property's boundaries were false. In her defense, Brock testified that she thought she received lots four and five when she traded property with Otis Hoskins. However, in his deposition, Otis opined that, after they had traded property, Brock had to have realized that she did not in fact own lots four and five. According to her deposition, Harris thought that she had received lots four and five when she bought the property from Brock. Harris claimed that she would not have bought it otherwise.

Despite the evidence presented, the Bell Circuit Court granted summary judgment in both Brock's and Bisceglia Realty's favor. In its order, the circuit court stated:

The property in dispute is not described by a metes and bounds description whereby parties could be mistaken as to the property lines or the size of the tract. At all times herein the Plaintiff/Purchaser [Harris] was on constructive notice as to the dimensions of the property by virtue of recorded instruments, i.e., the deed and a subdivision plat which unequivocally [sic] showed that the property in question consisted of two lots. Each lot is twenty-five feet wide. The Plaintiff had a duty and obligation to ascertain the dimension of the property despite any representations made to her by the Defendant or the Third-Party Defendant. Misrepresentations can only occur when one party has exclusive

knowledge of facts withheld from another party. The dimensions of the lots in question were not exclusive and were not known only to the Defendant/Sellers. The dimensions of Lots 6 and 7 of the Barclay and Hull Addition was a fact available to the Plaintiff/Purchaser and the entire free world simply by making reference to the records of the Bell County Court Clerk.

The Bell Circuit Court based its decision on the proposition that the deed between Otis and Brock, the deed between Brock and Harris and the subdivision plat all contained the correct information regarding the property's boundaries. Since these instruments were duly recorded, Harris was placed on constructive notice regarding their contents. Also, the circuit court concluded that Harris was under an affirmative duty to investigate. Thus, Harris could not rely upon Brock's representations regarding the boundaries of the property in question.

In addition to the cases cited by Harris, Stallard v. Adams, Ky., 228 S.W.2d 430 (1950) and Chesapeake Homes v. McGrath, 249 Md. 480, 240 A.2d 245 (1968), this Court has found two earlier cases which shed light on the case *sub judice*. First is Sellars v. Adams, 190 Ky. 723, 228 S.W. 424 (1921). In Sellars, the appellees induced the appellants to purchase the appellees' property by fraudulently representing that they had complete title to the property including the rights to any gas and oil that might exist on the property. Id. at 425.

Appellants would not have purchased the property absent the mineral rights. The trial court granted demurrer in favor of the appellees. Id. The Court of Appeals reversed and remanded.

In its opinion, the high court stated:

The fact that a vendee holds under a deed containing covenants of warranty covering the defects complained of does not preclude him from the right to maintain an action for damages for deceit and fraud where he has been induced by such to purchase the land, and suffers an injury therefrom.

Furthermore, although the title to land may be ascertained by an examination of the public records, a failure of a vendee to examine such records does not preclude him from maintaining an action for deceit against a vendor who knowingly misrepresents the condition of the title to him, and he, in ignorance of the title, relies upon the representations to his damage. (Citations omitted.) Id. at 427.

The second case is Young v. Hopkins, 22 Ky. 18, 6 T.B. Mon. 18 (1827). In Young, an individual, Richard Manifee, conveyed the property in question to Elijah Atchison and Henry Atchison jointly. Id. Elijah Atchison, along with two of his cronies, Joseph Hopkins and William Rice, fraudulently represented to the appellant, Young, that Atchison held sole title to the property in question. Id. In reliance on the representations made by Atchison, Hopkins and Rice, Young bought the property. Young brought suit against the three, who defended themselves by arguing that they themselves thought that

the title was in Elijah Atchison alone. The trial court dismissed Young's lawsuit. Id. The Court of Appeals reversed and remanded. In its opinion, the high court cogently stated:

It is in effect assumed by the court below, that the title deeds being matter of record, Young was bound to look into them, and must be presumed to have seen them, as he took a deed for the lot. If this is to excuse from the effects of false representations, with regard to title, it would obviate the consequences of fraud in nearly all landed controversies, as all our titles are matters of record. Indeed men prudent and cautious, will examine them before they purchase, as the title papers are the safest guide. But we know that in many cases the credulous and confiding dealers do not do so, but act on seeing how the possession is held, and the representations of vendors. If these representations are false, the maker of them is, in such case, responsible. *It is a bad defense in the mouth of a misrepresentation of fact, to say that the vendee might have discovered these falsehoods, by using due caution and diligence, and therefore he ought to be excused.* It is true, in the case of warranty of personal chattels, the warranty is not supposed to extend to patent defects of the article sold, because the vendee is supposed to have seen their existence and not to have required a warranty against them. But in case of fraudulent misrepresentations, this does not excuse the fraud, and the case with which the defects can be seen, is given in evidence to prove that the vendee knew at the time, of the defect in relation to which he contends he is cheated. So far only is the evidence of use to the vendee. But we have seen in this case, that Young was, beyond all doubt, ignorant of this defect, and the defendants do not attempt to excuse themselves by alleging he was acquainted

with it, but by contending they were ignorant of it also.

It is no defense to an allegation of fraud in the sale of land, by representing the title complete, where vendor owned but a moiety, to show that the conveyances were recorded whereby vendee might with proper diligence have discovered the defect. Young, supra. (Emphasis supplied.)

In light of the case law, this Court must disagree with the circuit court's decision. This Court concludes that, regarding a real estate transaction, where a purchaser has alleged the seller has made fraudulent misrepresentations to the purchaser; the seller cannot defend himself by arguing that the purchaser should have examined the duly recorded instruments, such as deeds, that contain the correct information. In other words, in the case of fraud, the victim of fraud is not required to search public records, including instruments of record, to ascertain the truth of the misrepresentation. Given this and given the record clearly shows a genuine issue of material fact whether Brock knew that she did not own lots four and five when she claimed to have owned it and whether she claimed such ownership to induce Harris to buy Brock's property, this Court finds that the Bell Circuit Court erred when it granted summary judgment in favor of the appellees.

Thus, for the foregoing reasons, this Court vacates the Bell Circuit Court's order of July 31, 2002, granting

summary judgment and remands for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Henry Lawson
Lawson & Lawson, P.S.C.
Pineville, Kentucky

BRIEF FOR APPELLEE:

Ralph W. Hoskins
Corbin, Kentucky