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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001639-MR

EWG CORPORATION; GEERS
DEVELOPMENT, LLC; AND
WILLIAM GEERS

APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 98-CI-00393

DAVID HILS AND NEIL BLUNT

APPELLEES

OPINION AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: EWG Corporation and its sole shareholder,
William Geers (Geers), appeal from a judgment of the Boone
Circuit Court resolving a contract dispute among the parties.
A Special Master Commissioner presided over a four-day hearing

¹ Senior Judge John D. Miller, sitting as Special Judge by Assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

pursuant to a court order and the agreement of the parties. The Special Commissioner filed extensive recommended findings and conclusions in his report, which the court affirmed and adopted as its own. The court concluded that Geers was liable to the appellees, David Hils and Neil Blunt, for sums owed for their consulting services. On appeal, Geers argues that the Commissioner erred: (1) in excluding from evidence certain documents relating to his alleged damages and (2) in failing to conclude that he was fraudulently induced to enter into the consulting agreement. Finding no error, we affirm.

The facts underlying this matter involve property owned by Geers's late wife, Edna Mae Geers. Edna Mae inherited forty-two (42) acres of property from her father. She had unsuccessfully attempted to sell the acreage over a period of years. After several realtors had failed to find a buyer willing pay her price, she again listed the property for sale in 1994 with Hils, the owner of Concepts Realty, Inc. Hils attempted to find a buyer for the property for many months, but he, too, could not find a buyer willing to pay the amount sought by Edna Mae.

Edna Mae became ill. Because her husband's employment frequently required his absence from home, Edna Mae hoped that Geers would retire. She also wanted to obtain as much money for the property as possible in order to provide for her seven

children upon her death. Hils devised a plan to accomplish both objectives of bringing about Geers's retirement and of realizing a hefty profit on the property. He suggested that the Geerses apply to re-zone for commercial use 11.88 acres of the property situated along U.S. Highway 25; he urged them to subdivide the remaining acres into residential building lots.

At a meeting on October 17, 1995, Hils presented his development plan to the Geerses. Also present at the meeting were Dennis Helmer, an attorney, and Blunt, who had recently retired as the executive director of the Clermont Housing Authority in Cincinnati. Hils had prepared a document containing estimates of the costs for developing the property along with the potential profit to be realized by the Geerses. His figure for the total development cost (which included a 7% real estate commission and a 5.5% consulting fee) was \$816,250. He projected that the Geerses would realize \$2,324,000 tax free -- as distinguished from \$594,000 if the property were sold in its undeveloped state.

Helmer gave the Geerses tax advice and agreed to assist them with the re-zoning. The parties reached an oral agreement that if the property were re-zoned, Concepts Realty would continue to list the property; Hils and Blunt would act as project managers for a fee of 5.5% of the gross sales of the property.

Through the efforts of Blunt and Helmer, the zoning change was approved in April 1996. With the assistance of Hils, Geers then obtained financing for the project. Hils introduced Geers to Ray Erpenbeck of Erpenbeck Engineering, Inc., who agreed to perform the necessary engineering work for the development. The Geerses obtained legal counsel to assist them in forming a limited liability corporation into which Edna Mae transferred her interest in the property.

Geers retired from his job in June 1996. He testified that since he had no source of income, he advanced money to himself every month from the line of credit established at Heritage Bank for the development of the property. Geers later testified that he had no idea how much of that money was spent for his own personal expenses.

Before Erpenbeck began any work, the Geerses learned that Hils's estimates were significantly understated. Although Geers considered canceling the project at this juncture, he testified that he decided to continue in deference to Edna Mae's wishes.

Construction of the development began in the fall of 1996. In September of that year, an agent with Concepts Realty found a buyer for 101 of the 123 residential lots in the development. Keystone Home Builders (Keystone) agreed to pay \$2,449,500 for these lots in four installments to begin in the

late summer of 1997. After the Keystone agreement was in place, the parties reduced their oral consulting agreement to writing. The written terms reflected their previous agreement. In consideration for their work in planning the development, obtaining the new zoning classification, managing the development, and performing other services, Hils and Blunt were to receive 5.5% of the proceeds of the sale of the property at the time of closing.

Blunt had been instrumental in obtaining the zoning change, and he performed most of the work involved with managing the development as noted in the findings of fact of the Commissioner:

The Court finds that Mr. Blunt spent an exhaustive number of hours on this project in performing duties considered by him to be project management. He was certainly on the job site nearly every day for hours at a time. Both he and Mr. Hils solicited bids from engineering companies to prepare a preliminary plat and a preliminary cost estimate for the project. . . . Mr. Blunt generated numerous project reports . . . These services provided a benefit to the project.

(Commissioner's Report (CR) at p. 12.)

Numerous problems developed during the construction phase. The contractor hired to clear the property failed to remove large pieces of trees -- an omission that resulted in problems with soil compaction. Consequently, Keystone incurred

added expenses in securing a proper foundation for the newly constructed houses. The road contractor failed to place a sufficiently thick layer of asphalt on the streets. More unforeseen costs resulted. In addition to these problems, wet weather caused delays in completing the project as scheduled; additional interest accrued.

Edna Mae died in May 1997. The first of the four closings to transfer ownership of twenty-five residential lots to Keystone occurred on October 8, 1997. Hils and Blunt were paid \$31,350 pursuant to the agreement. However, by December 1997, Geers had become dissatisfied with Hils and Blunt. He instructed them not to have any contact with contractors without his approval. Geers went to Florida for the entire month of January 1998. He did not inform Hils or Blunt that he would be out of town, and he did not return their phone messages.

Geers testified at trial that Hils and Blunt quit their jobs while they contended that they had been fired by Geers. While finding no evidence either of a formal firing by Geers or of a voluntary termination by Hils and Blunt, the Commissioner found that "the parties mutually agreed to end the contract at that time." (CR at p. 10.)

After his return from Florida, Geers actively assumed management of the project. About forty lots remained to be completed. Keystone purchased the remaining lots under its

contract on May 4, 1998; November 25, 1998; and June 4, 1999. At Geers's insistence, the amount due the appellees from these closings -- \$98,655 in total -- was placed in escrow. Geers sold some of the remaining lots without paying or escrowing any fees for Hils and Blunt. He also gave some of the lots to two of his children. He eventually listed the commercial property with another real estate broker.

On April 8, 1998, Geers filed a complaint alleging that Hils and Blunt had breached their contract to supply certain services relating to the development. Asking for an unspecified amount of damages, he also sought to be released from any further obligation to pay for the appellees' services. Hils and Blunt filed a counterclaim, also alleging a breach of contract and additionally asserting a claim against Geers for misrepresentation. Geers responded and filed a claim against Hils for fraud.

After the pleadings were closed, Hils and Blunt conducted extensive discovery to determine Geers's damages. During a three-day deposition, Geers was unable to articulate the amount or nature of his damages. The appellees served him with interrogatories and requests for production of documents, seeking "any and all documents that pertain, refer or relate in any way" to his damages. On November 11, 1998, in response to these discovery requests, Geers stated that all documents

relating to his damages had been produced with the exception of his tax returns. He objected to producing his personal income tax returns for the years in question.

Trial was first scheduled to begin on November 19, 2001. The trial court granted Geers's motion for a continuance, and the trial was re-scheduled for April 9, 2003. On March 19, 2003, pursuant to an agreement of the parties, the trial court referred the matter to the Special Master Commissioner.

On April 7, 2003, two days prior to trial, Geers produced EWG's corporate tax returns for 1998 and 1999. Hils and Blunt learned for the first time that Geers intended to seek damages from them for the costs associated with the soil compaction and paving problems. Meanwhile, Geers already had two lawsuits pending in the Boone Circuit Court against the contractors actually responsible for the damages from the soil and paving troubles.

On April 9, 2003, the morning of trial, Hils and Blunt filed a motion *in limine* requesting that Geers be prohibited from introducing any documents relating to his damages that had not been previously produced during discovery. The Commissioner observed that the corporate tax returns had not been timely produced to the appellees and granted their motion. His ruling pertained to the tax returns as well as to any other documents related to Geers's claim of damages that had not been furnished

in response to discovery requests. However, the documents were placed in the record by avowal. With the exception of the 1997 corporate tax return, none of the documents had been produced by Geers during discovery when they surfaced two days before trial. Indeed, some of the documents actually appeared the day immediately preceding the trial.

After presiding over four days of testimony, the Commissioner rendered thorough and detailed findings of fact and conclusions of law. In addition to those facts already recited, the Commissioner made the following findings that are relevant to the issues in this appeal:

The Court cannot conclude [] that Mr. Hils'[s] and Mr. Blunt's services were worth only the amount paid to them so far by Mr. Geers. They contributed to the development of the project and through Mr. Hils [sic] idea to develop the property as residential/commercial, they clearly assisted in increasing the value of the Geers[es]' property. Unfortunately, due to their inexperience and marginal ability to oversee and develop this project, the project suffered delay, poor quality soil compaction and street pavement problems. The significant underestimation of the development cost by Mr. Hils and Mr. Blunt led Mr. and Mrs. Geers to believe their profit on the development would be much greater than it actually was. The Court finds that a competent and qualified project manager could have prevented or ameliorated these problems.

. . . .

The Court further finds that Mr. Hils and Mr. Blunt acted in good faith both in entering into the agreement with Mr. and Mrs. Geers and in attempting to carry out their duties under the contract. They were simply not very efficient project managers and the project suffered because of that fact. The "tax free" language contained in the original proposal prepared by Mr. Hils was referred to by Mr. Hils as a misnomer and the Court accepts this as fact. There was no evidence that Mr. Geers reasonably relied upon the "tax free" misstatement contained in the proposal. Mr. Helmer was present at the meeting to clear up any questions about Mr. and Mrs. Geers' tax status and there is some evidence that this was done at least peripherally. Mr. Hils dramatically underestimated the development costs and should have first consulted with an engineer before presenting these estimates to Mr. and Mrs. Geers. The Court finds that although quite low, these estimates were made in good faith by Mr. Hils.

The Court finds that while Mr. Hils and Mr. Blunt worked hard, they could not accomplish what a reasonably competent project manager should have accomplished with this project.

That Mr. Hils and Mr. Blunt have thus far been paid \$31,350.00 for their services to the Geers[es]. This payment was made to them at the closing of the first Keystone closing in October 1997. There remains \$98,655.00 in escrow representing 5.5% of the proceeds of the remaining three (3) closings under the Keystone contract. To-date, the commercial property construction is not complete and the entire commercial acreage remains unsold.

(CR at pp. 16-18.) The Commissioner concluded that although they were not very efficient managers, Hils and Blunt had

labored hard and had conferred substantial benefits to Geers. They "spent many hours in management in a good faith attempt to complete their tasks" and "contributed to the increase in value of the real estate." (CR at p. 20.) The Commissioner also concluded that they were entitled to the entire balance held in escrow under the doctrine of substantial performance. (CR at p. 22.)

The Commissioner found that Geers was not entitled to recover damages attributable to street repairs or piercing to stabilize the foundations of the houses. He also denied Geers any additional interest because of his "failure to provide documentary evidence . . . prior to trial in response to discovery requests." (CR at p. 21.) Nevertheless, the Commissioner determined that Geers was entitled to some relief, holding as follows:

However, since [Hils and Blunt] did not fully complete their tasks and those tasks which they did complete were of questionable utility; since much of the project was incomplete when they left the job and remains incomplete; and, since Mr. Geers was required to serve as project manager for approximately one year, the Court concludes that Mr. Hils and Mr. Blunt are not entitled under the Contract to any fees associated with the sale of the 11.8 acres of commercial property. The Court determines this is a fair and equitable reduction in the balance due Mr. Hils and Mr. Blunt in order to compensate Mr. Geers for his damages associated with the project

manager's failure to fully perform under the Contract.

(CR at p. 21.)

As to his claim of fraud, the Commissioner concluded that Geers had failed to present clear and convincing evidence that Hils and Blunt had engaged in any fraudulent conduct in their dealings with either Geers or Edna Mae. (CR at p. 23.)

All parties filed exceptions to the Commissioner's report. Hils and Blunt argued that they were entitled to pre-judgment interest; Geers contended that the Commissioner erred in failing to award him damages for the costs associated with soil compaction, street paving, and interest and for his own time in finishing the project. The exceptions were overruled. On June 27, 2003, the trial court entered a final judgment that was consistent with the findings and recommendations of the Commissioner. This appeal followed.

We observe at the outset that Geers has not complied with CR² 76.12(4)(c)(iv) and (v) in the narrative portion of his brief. He has made no reference to the specific portions of the evidentiary record supporting his narrative statement; he has not stated where and how his issues were preserved for review. Where a reference in his summary was provided, it pertained to a finding of the Commissioner rather than to the record. In fact,

² Kentucky Rules of Civil Procedure.

some of the underlying citations to the Commissioner were not consistent with the finding as referenced. For example, on page one of the appellate brief, Geers stated:

[Hils] further represented [at the October 17, 1995 meeting] that [the development] costs had been reviewed by Ray Erpenbeck Engineers and were therefore good estimates. [Special Commissioner Report, R., p. 183.]

Our review of the Commissioner's report, including page 183, revealed that the Commissioner made no such finding. Although Geers **alleged** that Hils had advised him and Edna Mae that Erpenbeck had reviewed his estimates, the Commissioner rejected Geers's allegation, finding instead that Hils did not make any misrepresentations about Erpenbeck in his negotiations with the Geerses. Geers's reference to the Commissioner's report as supporting his statement of the case is both mistaken and misleading.

Other examples of the license that Geers has taken with the facts are contained on page two of his brief. Geers stated that both Hils and Blunt "were essentially realtors." Hils was a realtor/broker; however, Blunt, as found by the Commissioner, had experience as a project manager during his twenty-year tenure with the Clermont Housing Authority. Geers stated: "Hils and Blunt stood to gain 12.5% of the sale price [of the development property]." Actually, it is undisputed that

the 7% sales commission was shared by Hils and another agent with his company. Blunt received nothing from the sale of the property except his share of the consulting fee.

Even more at variance with the truth is Geers's repeated assertion that he had timely provided Hils and Blunt with EWG's corporate tax returns in seeking to persuade this Court that the Commissioner erred by excluding these documents from evidence. He stated that the tax returns "were produced twice: three days before trial and at the time of the original document production on November 11, 1998, four years before trial." (Appellants' brief, at p. 7 and at p. 11.) (Emphasis added.) As discussed above (and as admitted by Geers's counsel on the morning of trial), Geers had previously produced only the 1997 and 1998 tax returns in response to the appellees' discovery requests; the 1999 tax return was not produced until two days prior to the trial.

In challenging the Commissioner's evidentiary ruling, Geers argues that the exclusion of the corporate tax returns constituted a "grave error" and resulted in a great injustice. (Appellant's brief, at p. 7.) He contends that the tax returns provided the only evidence of his "lost profits": the difference between what he actually realized from the sale of the property as distinguished from the amount that Hils originally had estimated as profit. We disagree.

The admissibility of evidence is a matter which is entrusted to the sound discretion of the trial judge. Moore v. Commonwealth, 771 S.W.2d 34 (Ky. 1998). Our standard of review of an evidentiary ruling is abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2001). In this case, we cannot conclude that the Commissioner abused his discretion.

Although Geers consistently refused to supplement his discovery responses and to provide the tax returns prior to trial, Geers now contends that the **corporate** tax returns should not have been excluded. His argument is based on the omission by Hils and Blunt to file a motion pursuant to CR 37.01(b)(i) to compel him to produce his **personal** income tax returns. He cites Poe v. Rice, 706 S.W.2d 5 (Ky.App. 1986) and M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114 (Ky.App. 1998) for the proposition that the appellees should have been estopped from seeking to exclude previously unproduced documents. However, those cases are factually dissimilar, and neither case supports the estoppel argument.

Geers also erroneously described the motion *in limine* as focusing on "Mr. Geers'[s] objection to producing his personal income tax return." (Appellants' brief at p. 4.)

However, our review reveals that the basis for the motion *in limine* was Geers's failure to produce the **corporate** tax returns and other documents relating to Geers's damages. Geers quite simply disregarded his duty to supplement his discovery responses as mandated by CR 26.05(b). Therefore, we find no abuse of the discretion in the Commissioner's ruling to exclude the tax returns. See also, Greathouse v. American National Bank and Trust Co., 796 S.W.2d 869-870 (Ky.App. 1990); Fratzke v. Murphy, 12 S.W.3d 279 (Ky. 1999).

Additionally, we conclude that any arguable error in excluding the corporate tax returns is moot. Geers's alleged entitlement to lost profits was wholly premised on his theory that he was fraudulently induced into entering the consulting agreement. The Commissioner rejected that claim, concluding that neither Hils nor Blunt had engaged in fraudulent behavior and that at all times they had acted in good faith. Thus, even if we were to assume that the excluded evidence might have tended to establish Geers's lost profits, the Commissioner's correct resolution of the fraud claim has rendered the issue moot.

Geers also argues that that the Commissioner erred in excluding certain documents which would substantiate his expenses for two subcontractors. He contends that most of these documents were contained in the files of Raymond Erpenbeck

Engineering, Inc. -- a file which was in the possession and control of counsel for Hils and Blunt until a week prior to trial. He contends that Hils and Blunt were not surprised or prejudiced by his failure to supplement his discovery with these excluded documents.

As a preliminary matter, we observe that Geers did not present this argument to the Commissioner in response to the motion *in limine*. The file to which Geers refers is not in the record. Thus, we have no means of verifying this bare assertion. However, even if error occurred, we are unable to conclude that Geers suffered any prejudice by the exclusion of this evidence. The Commissioner allowed Geers to testify about these damages and amply compensated him for the losses he sustained. The Commissioner absolved Geers of the obligation to pay the 5.5% consulting fee on the 11.8 acres of commercial property and the twenty-two residential lots not purchased by Keystone. Thus, he more than off-set the damages sustained by Geers for these alleged elements of damages.

Finally, with respect to the issue of the Commissioner's exclusion of evidence, Geers argues that the Commissioner both erred as a matter of law and exceeded his authority by ruling on the motion *in limine*. Geers fails to cite where or how this issue was preserved for review. Having reviewed the entire record, we have been unable to find any

previous suggestion made by Geers -- either before the Commissioner or the trial court -- that the Commissioner lacked authority to rule on the evidentiary motion. Thus, we hold that the argument was not preserved for review. Combs v. Knott County Fiscal Court, 283 Ky. 456, 141 S.W.2d 859 (1940); Regional Jail Authority v. Tackett, 770 S.W.2d 225 (Ky. 1989).

Geers next argues that the Commissioner erred in failing to find fraudulent conduct on the part of Hils and Blunt in inducing him to enter into the consulting agreement. He makes numerous allegations in his brief that Hils lied with respect to the integrity of his original cost estimates; he charges that both appellees engaged in "puffing" with respect to their qualifications to act as project managers. The Commissioner found that Hils's cost estimates were extremely low and that both he and Blunt were inefficient managers. Based on their inexperience, the Commissioner relieved Geers of any obligation to compensate Hils and Blunt for any property not covered by the Keystone purchase, removing from consideration any commissions for all 11.88 acres of the commercial real estate.

However, the Commissioner also found that Geers failed to present sufficient, credible evidence that either appellee acted fraudulently. After examining the record, we agree that Geers failed to present evidence sufficient to establish that

either Hils or Blunt engaged in behavior meeting the criteria for fraud as set forth in UPS v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999).

In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury.

There was no evidence that Hils was aware that his estimates were low or that he falsified them. When the actual bids were acquired, Geers knew that the estimates were not wholly accurate. Geers could not contend in good faith that he had relied on the estimates produced by Hils in order to prevail on his claim of fraud. The Commissioner's findings on this issue are fully substantiated by the evidence.

Additionally, the injury element of Rickert cannot be shown. There was no evidence that Geers was injured by the appellees. On the contrary, the Commissioner found the efforts of Hils and Blunt resulted in a significant benefit to Geers -- in spite of their low estimates and inexperience. Geers was paid \$2,449,500 by Keystone; the twenty-two remaining lots were valued at \$514,500; and the 11.88 acres of commercially-zoned property had an appraised value of \$1,336,228 in 1995. If we were to assume that Hils underestimated the development costs by

\$1,000,000 (as found by the Commissioner), Geers's profit from the development would still exceed \$2,000,000. Thus, we conclude that the Commissioner's findings with respect to the benefits conferred upon Geers and the good faith dealings demonstrated by the appellees are supported by substantial evidence and are not clearly erroneous. Owens-Corning Fiberglass Corp. v. Golightly, 976 S.W.2d 409 (Ky. 1998).

Finally, Geers argues that the 5.5% consulting fee was so unconscionable as to constitute a "badge" of fraud. He cites the testimony of his expert, David Hunley, who stated that he would have charged \$30,000 to \$40,000 for managing such a project. However, Geers's argument ignores Hunley's testimony that he would not have undertaken the project under a contingency fee contract in the first instance. Geers testified that he could not have paid a project manager until the property sold. Therefore, under the facts of his situation, an arguable fee that a more experienced project manager would have charged becomes irrelevant. Hils and Blunt took considerable risk and worked for many months with no compensation for their time and efforts in planning and managing the development. These circumstances wholly support the Commissioner in his conclusion that Geers was not fraudulently induced into entering the contract.

The judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

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