RENDERED: SEPTEMBER 30, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001011-MR

SYLVIA A. BUSH AND LEWIS BUSH — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOSEPH R. HUDDLESTON, SPECIAL JUDGE
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 02-CI-01511

MERRILL LYNCH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Sylvia A. Bush and her husband, Lewis Bush,[2] (collectively the Bushes) have appealed from the summary judgment entered by the Warren Circuit Court[3] on January 12,

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Merrill Lynch argues that Lewis has no standing to bring suit in this case. Because we find in favor of Merrill Lynch, we will not discuss this issue.

[3] There have been three trial court judges who presided over this case. Judge John D. Minton, Jr. initially presided over this case until his election to

2004, in an action instituted by the Bushes to recover damages from Merrill Lynch for breach of fiduciary duty. Having concluded that there is no genuine issue as to any material fact and that Merrill Lynch is entitled to judgment as a matter of law, we affirm.[4]

When Frances Alford died on June 15, 1996, her will devised 40% of her residual estate to her son, Calvin Alford, with the remaining 60% percent to a testamentary trust for the benefit of her daughter, Sylvia. Calvin and Edna Mae Alford[5] were designated as co-trustees of the trust. On October 29, 1996, Sylvia and Lewis purchased the family farm from the estate. The deed indicated that the consideration for the purchase of the farm was $200,000.00 and this amount was paid at the time of closing.

Calvin argued that the fair market value of the farm was $350,000.00, and that Sylvia owed him an additional $60,000.00 out of her share of their mother's estate proceeds for his interest in the farm in consideration for reducing the

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the Court of Appeals. Judge Joseph R. Huddleston then served as a special judge for several months and granted summary judgment for Merrill Lynch. Judge Steve Alan Wilson denied Sylvia and Lewis's motion to set aside the order granting summary judgment.

[4] This case follows a case filed by Sylvia against her brother, Calvin Alford, styled Bush v. Alford, Warren Circuit Court, Division II, Civil Action No. 98-CI-00540. A judgment was entered against Calvin in favor of Sylvia. The case shall be referred to hereafter in this Opinion as "the 1998 case."

[5] Edna Mae was married to Sylvia and Calvin's brother, who had previously passed away.

purchase price of the farm below its fair market value. Under this scenario, Calvin would receive $80,000.00 (representing 40% of $200,000.00), plus the additional $60,000.00 from Sylvia. This total sum of $140,000.00 would equal 40% of the $350,000.00 that Calvin estimated as the fair market value of the farm. Calvin alleged that this scheme was devised so Sylvia could afford to purchase the farm, while Calvin would receive his share of the farm proceeds and the tax consequences would be minimized. Sylvia maintained that she agreed to pay only $200,000.00 for the farm, and never consented to paying Calvin the additional $60,000.00.[6]

Regardless of any agreement the parties may have had, Calvin received $80,000.00 and the remaining $120,000.00 of the purchase price was placed in the hands of Calvin and Edna Mae, as the trustees of the testamentary trust. Immediately after the closing on the real estate, the trustees and Sylvia went to the local Merrill Lynch office and met with Thomas Scott Lowe, an account manager. At that meeting, Lowe created an account known as the Frances Alford Testamentary Trust, FBO, Sylvia A. Bush. The application used to open the trust account identified

[6] Sylvia argued in the 1998 case against Calvin that his plan was an illegal and unethical scheme to reduce the amount of tax incurred on the sale. In support of this contention, she points to a handwritten note contained in the record in which Calvin wrote, "[P]urchase farm for $200,000.00 + 6000 [sic] under the table . . . ." She also directs our attention to Calvin's testimony at the trial of the 1998 case in which he admitted asking an auctioneer to prepare an appraisal misrepresenting the facts for the purpose of concealing the farm's value from the IRS.

Calvin and Edna Mae as co-trustees under Frances's will and both of them signed the application.[7] A copy of this account application was given to Sylvia at the meeting. The remaining sale proceeds of $120,000.00 were placed in the trust account.

On that same date, upon request of the trustees and in the presence of Sylvia, Lowe took a form promissory note originally set up with the Bank of Bowling Green as payee and altered the promissory note to reflect that the trust would be the payee and Sylvia would be the payor of a note for $60,000.00. Calvin testified in the 1998 case that Lowe misunderstood the arrangement, and that the promissory note should have been made out to Calvin as payee. Regardless, Sylvia signed the promissory note in favor of the trust, and received a copy of the note. However, she later testified that

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[7] The account application, in part, stated:

> 9. The trust authorizes the trustees and any authorized agent(s) named in paragraph 12 to make distributions/transfers by check, Visa card, if issued, or otherwise to beneficiaries and others as the trustees or any authorized agent(s) may direct. Specify any limitations: [none supplied] [emphasis added].
>
> . . .
>
> 13. You are hereby authorized to accept orders and other instructions from any of the undersigned trustees unless the following is required by the trust (check if applicable):
>
> A. All trustees must act jointly.
>
> B. Majority of the trustees must act jointly.
>
> C. The following trustees must act jointly: [none checked].

she signed the note under duress, that she did not owe Calvin any money, and that the note did not obligate her to Calvin. Both Lowe and Sylvia testified at the trial in the 1998 case that neither understood the purpose of the note at the time it was signed. However, Sylvia asked no questions prior to signing the note.

At the same meeting, the trustees signed a written authorization requesting that Merrill Lynch make a check to Sylvia in the amount of $60,000.00. The next day, a cashier's check was prepared and Lowe requested, on three separate occasions, that Sylvia endorse the check, but she refused. Calvin then took possession of the check and was also unsuccessful in getting Sylvia to endorse it. The cash management monthly statement on the trust account for October 26, 1996, through November 29, 1996, reflects that $60,000.00 was deducted from the trust account. On February 13, 1997, Calvin re-deposited the check in the trust account. The next day, pursuant to Calvin's instructions, a draft made payable to Calvin, personally, in the amount of $60,000.00 was drawn on the trust account. Calvin deposited the funds into his personal investment account at Merrill Lynch.[8]

On May 13, 1998, Sylvia filed the 1998 case against

[8] It was alleged in the 1998 case that Calvin used a portion of these funds to purchase stock for his personal use.

Calvin, alleging conversion, breach of fiduciary duty, intentional infliction of emotional distress, and embezzlement, and sought compensatory damages and punitive damages. Calvin counterclaimed, seeking a judgment in the amount of $60,000.00, and an order revoking the conveyance of the farm. On May 11, 1999, the trial court entered summary judgment in favor of Sylvia in the amount of $60,000.00, plus interest. Sylvia's remaining claims for compensatory damages and punitive damages and Calvin's counterclaims were tried before a jury. On June 3, 1999, the jury awarded Sylvia $80,000.00 in punitive damages. The jury did not award Sylvia any damages for emotional distress. Calvin's counterclaims were dismissed and his post-trial motions were denied. He then appealed to this Court,[9] which affirmed the trial court's judgment. Calvin then paid Sylvia a total of $177,500.00, for full satisfaction of the judgment.

No claims were asserted against Merrill Lynch in the 1998 case. On October 8, 2002, Sylvia and Lewis filed this lawsuit in the Warren Circuit Court against Merrill Lynch, claiming a breach of fiduciary duty for its involvement in the removal of the $60,000.00 out of the trust account.[10] On January

[9] The appeal in the 1998 case was Alford v. Bush, No. 1999-CA-001826-MR, rendered November 22, 2000.

[10] Neither party has raised any issue regarding Merrill Lynch's liability under the theory of respondeat superior. Because we are affirming the trial

12, 2004, the trial court granted summary judgment in favor of Merrill Lynch. Sylvia's post-judgment motions were all denied. This appeal followed.

STANDARD OF REVIEW

"The 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."[11] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor" [citations omitted].[12] Summary judgment "'is only proper where the movant shows that the adverse party could not prevail under any circumstances.'"[13] Because the trial court found that there were no factual findings at issue, we are not required to defer to the trial court and thus we review the trial court's summary judgment ruling de novo.[14]

CR 56.03 states that "[t]he judgment sought shall be

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court's summary judgment in favor of Merrill Lynch, this issue is not relevant.

[11] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03).

[12] Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

[13] Id. (quoting Steelvest, supra).

[14] Scifres, 916 S.W.2d at 781 (citing Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378, 381 (Ky. 1992)).

rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sylvia argues that material issues of fact exist as to whether Merrill Lynch breached the fiduciary duty it owed to her. Merrill Lynch argues that it owed no fiduciary duty to Sylvia, and thus there was no breach of such duty, and that Sylvia was not damaged by any of its actions.

BREACH OF FIDUCIARY DUTY

Sylvia's initial argument is that Lowe, as an employee of Merrill Lynch, breached his fiduciary duty to her by creating a false promissory note, by preparing various checks for $60,000.00 on monies in the trust account, which Sylvia refused to sign, and by removing $60,000.00 from the trust account, contrary to Sylvia's best interest.

First, we must determine if Merrill Lynch owed a duty to Sylvia that could be breached. A fiduciary duty is "one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with

such undertaking."[15] KRS 386.120 provides as follows:

> If a fiduciary makes a deposit in a bank or trust company to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or of checks payable to his principal and endorsed by him if he is empowered to endorse them, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank or trust company receiving the deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary. The bank or trust company may pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless it receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the deposit or in drawing the check or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith [emphases added].

Sylvia argues that Merrill Lynch was on notice of the fiduciary relationship, and, therefore, had a duty to see that any checks drawn on the trust account were for her benefit. We conclude that KRS 386.120 absolves Merrill Lynch from any such duty on monies drawn on the trust account and made payable to Calvin, unless Lowe had actual knowledge that Calvin was breaching his fiduciary duty to Sylvia as trustee of the trust account. The statute addresses the situation in which a

[15] Steelvest, 807 S.W.2d at 485.

fiduciary deposits a check payable in his or her fiduciary capacity, and deposits the check in his or her individual account.[16]

While the standard for granting summary judgment is high,[17] "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" [citations omitted].[18] The only evidence supporting Sylvia's position is that Merrill Lynch issued a check on the trust account upon authority of its trustees for $60,000.00, which she refused to endorse, and that Merrill Lynch then issued a check in the name of one of the trustees, which was ultimately deposited into that trustee's individual account with Merrill Lynch. Pursuant to the application for the trust account, reviewed by all parties, Lowe was instructed to execute checks at the request of either of the

[16] The origin of KRS 386.120 is in the Uniform Fiduciaries Act § 9. Only a portion of the Uniform Fiduciaries Act was enacted in Kentucky. See 1930 Ky. Acts ch. 14. The commentary to the section states that "[b]y the weight of authority a depository of fiduciary funds is not bound to inquire into the authority of the fiduciary to make the deposit even where the deposit is made in the personal account of the fiduciary." Uniform Fiduciaries Act (U.L.A.) § 9 comment (2002).

[17] As the Court stated in Steelvest, "summary judgment is to be cautiously applied and should not be used as a substitute for trial" and "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" 807 S.W.2d at 483 (quoting Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985)).

[18] Steelvest, 807 S.W.2d at 482.

trustees. The record contains no evidence of bad faith or knowledge of breach of fiduciary duty by Lowe.[19] Unless there is evidence of bad faith or knowledge of breach of fiduciary duty, KRS 386.120 explicitly absolves Merrill Lynch of liability. Therefore, summary judgment was appropriate.

COLLATERAL ESTOPPEL

In its answer to Sylvia's complaint, Merrill Lynch asserted an affirmative defense of estoppel.[20] Since we have concluded that there was no duty and no breach by Merrill Lynch, this issue is moot, however, we will briefly discuss it. Calvin's breach of fiduciary duty was litigated and resolved on the merits. However, Sylvia argues to this Court that collateral estoppel or claim preclusion does not apply to the claims against Merrill Lynch because the elements of collateral estoppel are not met,[21] and the issue of Merrill Lynch's

[19] Taylor v. Citizens Bank of Albany, 290 Ky. 149, 160 S.W.2d 639, 640-41 (1942).

[20] See Sedley v. City of West Buechel, 461 S.W.2d 556, 559 (Ky.App. 1970) (stating that "[o]ur rules of court procedure provide that the defense of res judicata must be set forth in a responsive pleading, CR 8.03, 12.02, which means by answer and not by motion"). See also Moore v. Commonwealth, 954 S.W.2d 317, 318 (Ky. 1997)(stating that "a close cousin to the doctrine of res judicata is the theory of collateral estoppel, or issue preclusion" [footnote omitted]).

[21] See Moore, 954 S.W.2d at 319 (stating the elements of collateral estoppel as follows:

(1) identity of the issues;
(2) a final decision or judgment on the merits;
(3) a necessary issue with the estopped party given a full and fair opportunity to litigate;
(4) a prior losing litigant [citations omitted]).

fiduciary duty was not raised in the 1998 case. While Merrill Lynch was not a party to the original action against Calvin, Lowe was deposed and testified at trial.

Our Supreme Court has "abandoned the mutuality requirement of res judicata in adopting non-mutual collateral estoppel, applicable when at least the party to be bound is the same party in the prior action."[22] The Court in Sedley stated as follows:

> [T]he doctrine of "claim preclusion" or "issue preclusion" [provides that] a person who was not a party to the former action nor in privity with such a party may assert res judicata against a party to that action, so as to preclude the relitigation of an issue determined in the prior action. The rule contemplates that the court in which the plea of res judicata is asserted shall inquire whether the judgment in the former action was in fact rendered under such conditions that the party against whom res judicata is pleaded had a realistically full and fair opportunity to present his case" [citations omitted].[23]

A plaintiff certainly is in a better position to have an opportunity to present their case than a defendant.[24]

It is well established that a party is "required to

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[22] Moore, 954 S.W.2d at 319. See also Sedley, 461 S.W.2d at 559 (stating the former law as follows: "Kentucky has subscribed basically to the rule which permits only parties to the former action, and their privies, to plead res judicata, and which requires 'mutuality' in the application of the rule" [citations omitted]).

[23] Sedley, 461 S.W.2d at 559.

[24] Id.

bring forward their whole case[,]"[25] and that a party should not "split up his cause of action[.]"[26] While it would have been reasonable and prudent for Sylvia to bring her claims against Merrill Lynch and Calvin in the same law suit, "'[t]he res judicata rule does not mean that the prior judgment is conclusive of matters which were 'not germane to, implied in or essentially connected with the actual issues in the case although they may affect the ultimate rights of the parties and might have been presented in the former action.'"[27] There is no doubt that the issues in the 1998 case and this case "both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action" [citations omitted].[28] Even though the cases against Merrill Lynch and Calvin concern the same controversy, in the 1998 case it was not necessary to determine whether Merrill Lynch was liable for any wrongdoing to Sylvia, in order to find Calvin liable. Thus, we hold that Merrill Lynch's affirmative defense of estoppel is not applicable.

[25] Combs v. Prestonsburg Water Co., 260 Ky. 169, 84 S.W.2d 15, 18 (1935).

[26] Hays v. Sturgill, 302 Ky. 31, 193 S.W.2d 648, 650 (1946).

[27] Arnold v. K-Mart Corp., 747 S.W.2d 130, 132 (Ky.App. 1988) (quoting Egbert v. Curtis, 695 S.W.2d 123 (Ky.App. 1985)).

[28] Yeoman v. Commonwealth, 983 S.W.2d 459, 465 (Ky. 1998).

DAMAGES

Since Sylvia cannot prevail against Merrill Lynch because there was no duty and no breach, the issue of damages is moot and will not be further discussed.

DUE PROCESS AND JANUARY 12, 2004, AND APRIL 30, 2004, ORDERS

After the hearing before the trial court on November 10, 2003, the trial court entered an order denying Merrill Lynch's motion for summary judgment. However, on November 24, 2003, in its pretrial order, the trial court instructed the parties to submit briefs on the summary judgment issues. Sylvia argues that the trial court then ruled in favor of Merrill Lynch on the summary judgment motion, prior to a hearing, and, thus, violated her due process. However, in reviewing the record, this is not what occurred.

After the parties submitted briefs, a hearing was held in front of the trial court, with Hon. Joseph R. Huddleston presiding as special judge. After this hearing, the January 12, 2004, order was entered. Sylvia argues that the trial court erred in its ruling because Judge Huddleston misunderstood what type of check was on the account. However, Merrill Lynch cleared up this misunderstanding at the hearing and further, there is nothing to indicate that Judge Huddleston was under a false assumption when entering the order granting summary

judgment to Merrill Lynch on January 12, 2004. Sylvia argues for the same reasons that the April 30, 2004, order was invalid. However, in reviewing the record, both parties again had an opportunity to be heard regarding the summary judgment issue on April 5, 2004, and the trial court upheld the summary judgment. Thus, we find no merit in these arguments raised by Sylvia.

EXPERT WITNESS

Sylvia argues that she should have been allowed to present expert testimony at trial, regarding her damages. However, because the trial court granted summary judgment to Merrill Lynch, she was unable to present this evidence. She further argues that Merrill Lynch failed to comply with the trial court's pretrial orders. For the reasons set out above, these two issues are moot.

Having concluded that the trial court properly awarded summary judgment to Merrill Lynch, we affirm.

ALL CONCUR.

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