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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001450-MR

KEA-HAM CONTRACTING, INC.

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
CIVIL ACTION NO. 97-CI-00172

FLOYD COUNTY DEVELOPMENT AUTHORITY and
BURL WELLS SPURLOCK

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON,¹ JUDGE; HUDDLESTON,² SENIOR JUDGE.

HUDDLESTON, SENIOR JUDGE: Kea-Ham Contracting, Inc. appeals from a summary judgment in favor of the Floyd County Development Authority (FCDA) and its former chairman, Burl Wells Spurlock. Kea-Ham contends that the Floyd Circuit Court erred in granting summary judgment because genuine issues of material fact exist

¹ Judge John D. Minton, Jr. concurred in this opinion prior to his resignation effective July 25, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

regarding the alleged breach of a construction contract between the parties. First, Kea-Ham charges that the FCDA negligently or fraudulently misrepresented the status of funding for a construction project which induced Kea-Ham to enter into a contract to excavate the work site. Kea-Ham also claims the FCDA is liable for allegedly erroneous specifications supplied by Summit Engineering that Kea-Ham relied on in submitting its bid. Finally, Kea-Ham alleges that Spurlock, as chairman of the FCDA, negligently or fraudulently induced Kea-Ham to enter into the contract by making material misrepresentations as to financing for the project.

This litigation arose after the FCDA solicited bids for a construction project to develop land that could be sold for industrial purposes. On October 1, 1995, the FCDA began accepting bids for excavation work on the project. The bid advertisement outlined the project specifications and estimates calculated by an engineering and consulting firm, Summit Engineering. The bid invitation required all bidders to inspect the work site and conditions of the land. Kea-Ham submitted a bid for the excavation work. When the FCDA unsealed the bids on October 16, 1995, Kea-Ham's bid was more than \$500,000.00 lower than the next-lowest bid. Kea-Ham's bid was also substantially lower than the costs calculated in the Summit Engineering estimate. The FCDA had reservations about the disparity in Kea-

Ham's bid, and its members were concerned about Kea-Ham's ability to complete the job. In response, Kea-Ham's president, David Hamilton, penned a letter of assurance to the FCDA stating that the company was satisfied it could complete the project for the amount of its bid. The FCDA subsequently awarded the contract for the project to Kea-Ham. On November 2, 1995, Spurlock wrote a letter at the request of Kea-Ham's insurance and bonding agent for the project, River City Insurance. The letter, addressed to Thomas Lafferty of River City Insurance, stated:

Per your request, this is to advise that Kea-Ham Contracting, Inc., will be paid pursuant to invoices presented on a monthly basis by them to the Floyd County Development Authority. The invoices will be reviewed by Summit Engineering, the consulting engineering company, for verification of labor performed and materials supplied, and compliance with all terms of their contract, and then transmitted to the Authority for payment.

The Authority has interim financing approved in the amount of \$1.5 million from The Bank Josephine, Prestonsburg, Kentucky, which will be supplemented by LGEDF (coal severance tax) of \$1,460,000 and a CDBG of \$595,555.

Should you need additional information, please advise.

Kea-Ham began work pursuant to the contract on or about November 13, 1995. The contract stated that the project was funded through grants obtained by the FCDA as well as other

community funds. The contract further provided that if work on the project was delayed for reasons beyond the control of the FCDA, Kea-Ham had no claim for damages.

In March 1996, Kea-Ham abandoned work on the project because two of the FCDA's payments were overdue. The funds were withheld by the Floyd County Fiscal Court at the behest of the Floyd County Judge-Executive.³ According to the affidavit of Spurlock, the Fiscal Court retained and disbursed the money for the project. Kea-Ham returned to work in May 1996 after receiving payment. However, Kea-Ham ultimately abandoned the project in January 1997.

Kea-Ham sued the FCDA alleging breach of contract, breach of warranty, negligent misrepresentation, estoppel and fraud. Kea-Ham's complaint also included allegations of fraud and negligent misrepresentation against Spurlock individually.

This Court reviewed this case in an earlier appeal from a summary judgment based on sovereign and official immunity.⁴ This Court affirmed the trial court's order, and the Supreme Court granted discretionary review. That court

³ Apparently, Floyd Fiscal Court was involved in a financial dispute with the company which planned to purchase the site upon completion of the project.

⁴ *Kea-Ham Contracting, Inc. v. Floyd County Development Authority*, 97-CA-002144-MR (Ky.App. 1998).

reversed, holding the FCDA and Spurlock were not immune from Kea-Ham's lawsuit.⁵

On remand to Floyd Circuit Court, Kea-Ham claimed that the specifications supplied by Summit Engineering were inaccurate thereby causing Kea-Ham's bid to be lower than necessary for the work the project required and entitling it to additional compensation. Kea-Ham also focused on the letter written by Spurlock on November 2, 1995, which assured River City Insurance of the available funding for the project. Kea-Ham asserted that the funding was never really in place, which resulted in the March 1996 work-stoppage. Likewise, Kea-Ham charged that Spurlock misrepresented the funding of the project in his November 2, 1995, letter and that Kea-Ham relied to its detriment on Spurlock's assurances.

In April 2005, Kea-Ham failed to respond to the FCDA's and Spurlock's motions for summary judgment. Although the circuit court granted both motions,⁶ Kea-Ham successfully moved the court to vacate the judgment and filed a belated response to the FCDA's and Spurlock's motions. In May 2005, the FCDA and Spurlock renewed their motions for summary judgment. Kea-Ham

⁵ *Kea-Ham Contracting, Inc. v. Floyd County Development Authority*, 37 S.W.3d 703 (Ky. 2000).

⁶ Spurlock's motion was granted on the ground that Kea-Ham could not sustain its burden of proving fraud or misrepresentation related to Spurlock's November 2, 1995, letter. The FCDA was granted partial summary judgment on the same issues arising out of the financial assurances contained in the letter.

did not respond to the motions, nor did the corporation take any depositions over the course of this litigation. Following a June 2005 hearing, the circuit court granted the renewed motions for summary judgment in favor of the FCDA and Spurlock.

Upon review of a summary judgment, we consider whether there is a genuine issue as to any material fact and, if not, whether the moving party is entitled to judgment as a matter of law.⁷ "Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted."⁸

We first address Kea-Ham's contention that the FCDA is liable for breach of contract and negligence because the specifications supplied by Summit Engineering were inaccurate. Kea-Ham argues that it relied on the Summit plans to calculate its bid and because of inaccuracies, Kea-Ham lost money on the extra work required by the project.

The FCDA argues, however, it is absolved from liability for any errors because Summit was an independent contractor. "As a general rule, an employer is not liable for the torts of an independent contractor in the performance of his

⁷ Ky. R. of Civ. Proc. (CR) 56.03; *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

⁸ *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991).

job."⁹ To determine whether the relationship constitutes an employer and independent contractor relationship, the most important factor is whether the employer retains the right to supervise and control the work.¹⁰ In this case, the FCDA entered into a written contract for professional services with Summit Engineering. Nothing in the record indicates that Summit was anything other than an independent contractor hired by the FCDA to draft engineering specifications for the construction site. "[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."¹¹ Kea-Ham produced no such evidence. Consequently, summary judgment was proper on this issue.

Next, we turn to Kea-Ham's claim that the November 2, 1995 letter from Spurlock constituted fraud or, alternatively, negligent misrepresentation.

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

⁹ *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (Ky.App. 1994).

¹⁰ *United Engineers & Constructors, Inc. v. Branham*, 550 S.W.2d 540, 543 (Ky. 1977).

¹¹ *Steelevest*, *supra*, note 7, at 482.

acted upon e) acted in reliance thereon and
f) causing injury.¹²

Furthermore, a colorable claim of negligent
misrepresentation requires a showing that

One who, in the course of his business,
profession or employment, or in any other
transaction in which he has a pecuniary
interest, supplies false information for the
guidance of others in their business
transactions, is subject to liability for
pecuniary loss caused to them by their
justifiable reliance upon the information,
if he fails to exercise reasonable care or
competence in obtaining or communicating the
information.¹³

In this case, Spurlock wrote the letter after the FCDA
accepted Kea-Ham's bid, and Kea-Ham's president admitted that
once Kea-Ham was named the low-bidder on the project, it was
obligated to perform. Furthermore, evidence is lacking that
funding was not in place at the time the invoices were due.
Kea-Ham did not receive payment due to the unilateral action of
Floyd Fiscal Court and the Floyd County Judge-Executive.
Because no factual dispute exists on this issue, summary
judgment was appropriate.

The judgment is affirmed.

ALL CONCUR.

¹² *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999),
citing *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky.App. 1978).

¹³ *Presnell Construction Managers, Inc. v. EH Construction, LLC*, 134 S.W.3d
575, 580 (Ky. 2004), quoting *Restatement (Second) of Torts* § 552 (1977).

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