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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001260-MR

LUKE KEITH, JR. — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 04-CI-00473

ALBERT ROBINSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

ABRAMSON, JUDGE: Luke Keith, Jr., a licensed real estate broker, appeals from a May 19, 2005, summary judgment of the Laurel Circuit Court dismissing his claim for a real estate sales commission against a fellow broker, Albert Robinson. Proceeding *pro se,* Keith contends that Robinson either breached their commission-splitting agreement or induced him to enter the agreement by misrepresenting the commission Keith would ultimately receive. The trial court erred, he maintains, by not permitting him to present these contentions to a jury. Finding

that the trial court correctly determined that Keith's claim fails as a matter of law, we affirm.

This Court reviews summary judgments by considering, as did the trial court, whether "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the 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." CR 56.03. Although reasonable doubts must be resolved in his or her favor, the "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." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 482 (Ky. 1991).

Construed favorably to Keith, the record indicates that in June or July 2003, Keith learned that Robinson's brokerage firm had listed a substantial tract of commercial realty in London known as the Sylvia Meyers Property on Meyers-Baker Road. The listed price for the property was $900,000.00, and the brokerage agreement apparently called for a 10% sales commission. Keith had a potential purchaser for this property, so, he claims, he inquired at Robinson's office and was told by one of Robinson's assistants that Robinson generally divided sales commissions with cooperating brokers on a fifty-fifty

basis. Keith then approached Robinson himself, and on July 8, 2003, the two entered the following agreement:

> In the event your customer, Cynthia B. Couch, purchases [the Sylvia Meyers] property, I will pay you $22,500.00 or 2½% of the $900,000.00 purchase price. In the event your customer does not pay for the deed, deed tax, the survey, and the property taxes, these will be deducted from your commission.

Notwithstanding the plain terms of this agreement, Keith maintains that he demanded a 5% commission—half of the listed percentage—and that Robinson assured him that at the conclusion of the transaction the sellers would pay him an additional 2½% "bonus," thus making his total commission 5% or $45,000.00. Without this assurance, Keith claims, he would not have entered the agreement.

Thereafter, the transaction went forward, but with snags on both sides. Couch, the would-be purchaser, was apparently unable to arrange the necessary financing, and so formed a legal entity with some of her relatives for that purpose.[1] It was the legal entity, not Couch individually, that ultimately purchased the property. On the seller's side, it transpired that a portion of the tract was subject to the potential claims of numerous remote heirs of a former owner, so the sale was divided into two stages. In August 2003, the

[1] The trial court stated that the purchaser appeared to be a partnership formed by Cynthia Couch and family members. Appellee's brief refers to a corporation, Begley, Inc.

portion of the property with clear title was transferred first, for half of the $900,000.00 purchase price, so that Couch could begin construction of an office for her dental practice. The rest of the property was transferred in February 2004, after the potential heirs had been contacted and their releases obtained. Pursuant to their written agreement, Robinson paid Keith $22,500.00 after the August closing. Expecting a like payment after the final closing, Keith then spent considerable time and effort helping a London attorney contact the potential heirs. When the deal finally came to a conclusion in February 2004, Keith demanded of Robinson his additional commission, which Robinson refused to pay, insisting that Keith had been paid in full. Keith then brought the present action seeking an additional $22,500.00.

Keith argues that the July 2003 written agreement does not represent the entire contract he and Robinson made, and that the oral portion of the contract, Robinson's promise of an additional 2½% commission, should be enforced. Alternatively, he appears to argue that the written agreement is not enforceable either because its terms were not met when Couch failed, individually, to purchase the property, or because it was fraudulently induced by Robinson's empty assurance of additional compensation. If the written agreement is not

enforceable, Keith concludes, then his compensation should be determined by his reasonable expectation of a 5% commission.

As the trial court noted, when the parties to a contract reduce their agreement to writing, there is a presumption that the writing represents the entire, final agreement, into which all prior negotiations and preliminary agreements are merged. *Russell v. Halteman's Adm'x,* 287 Ky. 404, 153 S.W.2d 899 (1941). Although this presumption is rebuttable, *Restatement (Second) of Contracts* §§ 210 and 214 (1981), if the court finds that the writing is a complete integration of the agreement, then parol evidence of prior and contemporaneous oral agreements is not admissible to vary or to add to the terms of the writing. *Childers & Venters, Inc. v. Sowards,* 460 S.W.2d 343 (Ky. 1970); *Restatement (Second) of Contracts* §§ 213 and 216 (1981). Here the trial court implicitly held that the July 2003 writing was a complete integration of the parties' agreement and thus that Keith's allegations of an oral supplement to the writing were not admissible.

Keith counters that Robinson's usual practice, according to Robinson's office assistant, of dividing commissions fifty-fifty; the fact that he, Keith, continued working to complete the real estate transaction even after he had been paid the 2½% commission called for in the writing; and

the fact that following the final closing Robinson asked the sellers to pay Keith the additional commission are strong enough indications of a supplemental understanding to overcome the presumption that the July writing was a fully integrated statement of Keith's and Robinson's agreement. We disagree.

The office assistant, of course, had no authority to bargain for Robinson, and her alleged representations about Robinson's usual practice say nothing about his practice in this case, which may well have been atypical. Under the written agreement, moreover, Keith was not entitled to the 2½% commission until the entire property sold for $900,000.00. *Wiggins v. Schubert Realty & Investment Co.,* 854 S.W.2d 794, 795 (Ky. App. 1993) (noting that "the general rule is that a real estate broker is not entitled to a commission on a sale of a portion of property unless the listing contract expressly provides otherwise"). To keep that commission, therefore, he had ample incentive, apart from the alleged "bonus" agreement, to help resolve the title problems that delayed the second stage of the transaction. And assuming that Robinson did ask the sellers for an additional commission, as Keith alleges, the fact that it was a request and not a demand suggests that at most Robinson offered Keith the hope, not the assurance, of additional compensation. Certainly, such a request to the sellers could not be deemed a binding addition to the written

agreement between Keith and Robinson. The trial court did not err, therefore, by ruling that the July 2003 writing was a complete integration of the parties' agreement and thus rejecting Keith's claim that the written contract had been orally supplemented.

The trial court also rejected Keith's claim that the writing was not enforceable because a legal entity, and not Couch individually, ultimately purchased the property. Although it is true that contracts are to be enforced according to their unambiguous terms, *Cantrell Supply, Inc. v. Liberty Mutual Ins. Co.,* 94 S.W.3d 381 (Ky. App. 2002), we agree with the trial court that the July 2003 agreement contemplated not only a sale to Couch individually but also to the legal entity formed in order to finance the sale. The sale was still substantially to Couch, and resulted from the negotiations initiated by Couch. The trial court did not err, therefore, by ruling that Keith's right to compensation for the sale to Couch's legal entity was governed by the July 2003 agreement, notwithstanding its reference to a sale to Couch personally. *Cf. Pitt v. Kent,* 179 A.2d 626 (Conn. 1962) (holding that a financing syndicate formed to purchase property on behalf of initial offerors was not a separate purchaser so as to deprive the offerors' broker of a commission).

Finally, Keith contends that the July 2003 agreement should not be enforced because he was induced to enter it by Robinson's fraudulent assurance of a "bonus" commission. The trial court addressed this contention only indirectly, but it is of no avail. It is true, of course, that "where a fraud has been perpetrated to induce a party to enter into a contract, the injured party may elect to affirm the contract and recover damages in tort for the fraud or disaffirm the contract and recover the consideration with which he has parted." *Hanson v. American National Bank & Trust Co.,* 865 S.W.2d 302, 306 (Ky. 1993). To be entitled to this relief, however, the claimant must prove, among other things, a material representation, that was false, and that the claimant relied upon to his detriment. *Yeager v. McLellan,* 177 S.W.3d 807 (Ky. 2005). The claimant, moreover, must have been "justified in relying" on the misrepresentation. *Restatement (Second) of Contracts* § 164 (1981). Even assuming, as Keith claims, that Robinson assured him of an additional commission from the sellers at the conclusion of the transaction, Keith's reliance on that assurance without a written confirmation of the sellers' alleged intent was not justified and so does not entitle him to relief.

Keith alleges, in effect, that Robinson assured him that the sellers had agreed to increase the commission from 10% to 12½%, but as Keith, an experienced broker, surely knows,

under the Statute of Frauds, KRS 371.010(8), a writing to that effect would be necessary to bind the sellers to the higher commission. *Louisville Trust Co. v. Monsky,* 444 S.W.2d 120 (Ky. 1969). Absent such a writing, and absent a writing from Robinson confirming his alleged assurance, Keith was not justified in regarding the assurance as any more than a hope that when all was said and done the sellers might increase the brokers' compensation. The fact that that hope did not materialize does not entitle Keith to avoid his written agreement with Robinson.

In sum, the trial court did not err by determining that the July 2003 written commission agreement between Keith and Robinson was their entire contract, which was neither supplemented nor invalidated by Robinson's alleged oral assurance of an additional "bonus" commission. Keith's claim for damages therefore fails as a matter of law, and summary judgment was appropriate. Accordingly, we affirm the May 19, 2005, judgment of the Laurel Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Luke Keith, Jr., *pro se*
London, Kentucky

BRIEF FOR APPELLEE:

Russell W. Burgin
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