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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002333-MR

JAMES E. DEATON AND
VALERIE B. DEATON APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 04-CI-01286

KAY F. McMILLIAN[1] APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES, SENIOR JUDGE.

COMBS, CHIEF JUDGE: James and Valerie Deaton appeal from a summary judgment entered by the Pulaski Circuit Court ordering the Deatons to reimburse Kay F. McMillan $3,854.34, the amount that she spent on attorney's fees and costs

[1] There is a discrepancy in the spelling of the appellee's name. "McMillian" appears on the Notice of Appeal, but the circuit court pleadings refer to "McMillan." Throughout this opinion, we shall refer to the appellee as "McMillan" since that is the spelling used by her attorney on her appellate brief.

in a boundary dispute case involving a third party. The court found that the Deatons had fraudulently misrepresented to McMillan that a pending dispute would be settled prior to her purchase of the property at issue. After our review, we are persuaded that the summary judgment must be vacated and that this matter be remanded for further proceedings.

In April 2004, McMillan expressed an interest in purchasing the Deatons' property at 94 Twin Rivers Drive in the Twin Rivers Estates subdivision in Bronston, Kentucky. McMillan received a form entitled, "Seller Disclosure of Property Condition," signed by both James and Valerie Deaton. Item (d) of the "Boundaries" portion of the form contained a question: "Are there any encroachments or unrecorded easements relating to the property of which you are aware?" The Deatons answered, "YES," providing the following handwritten explanation: "We are currently dealing with a boundary dispute on the S.E. side of the property which will be settled prior to closing." McMillan subsequently reached an agreement to purchase the property at 94 Twin Rivers Drive from the Deatons for $230,000.00. The sale was closed on May 27, 2004.

The boundary dispute involved an ongoing claim by Roscoe and Cheryl Vanover, the owners of an adjoining lot at 110 Twin Rivers Drive. The Vanovers contended that the Deatons' recently enclosed garage/boat-house encroached upon their property by approximately five feet. Roscoe Vanover first spoke with the Deatons about the encroachment on September 1, 2003. On September 15, 2003, he sent them a letter offering to convey the disputed property

to them in exchange for $5,000.00 and payment of all fees related to the sale. Vanover received no response to this offer. On February 26, 2004, he sent another letter to the Deatons advising them that his offer would remain valid only for another thirty days.

On May 26, 2004 (one day prior to the sale of 94 Twin Rivers Drive to McMillan), the Deatons' attorney, John T. Mandt, wrote a letter to the Vanovers, asserting that the alleged area of encroachment had been adversely possessed by the Deatons and their predecessors in interest pursuant to *Combs v. Combs*, 240 S.W.2d 558 (Ky. 1951). The letter was supported by affidavits from previous property owners of 94 Twin Rivers Drive and 110 Twin Rivers Drive. The record does not contain any indication of a response to this letter.

Approximately six months after McMillan purchased the property at 94 Twin Rivers Drive from the Deatons, she was served with a complaint that had been filed by the Vanovers seeking to quiet title as to the area of the alleged encroachment. They also asked for injunctive relief, an order that McMillan be forced to remove the encroaching garage from her property, and damages for trespass. McMillan subsequently filed a third-party complaint against the Deatons for fraud, alleging that they were required to indemnify her as to any damages and to reimburse her as to any costs that might result from the Vanover litigation. She relied on: (1) the covenants inherent in a general warranty deed and (2) the express written warranty that the Deatons had made in their seller disclosure form indicating that the boundary dispute would be settled prior to closing.

In January 2006, McMillan purchased the adjoining property at 110 Twin Rivers Drive from Roscoe Vanover, and the parties agreed to settle and dismiss the lawsuit between them. The matter was dismissed by agreed order on January 19, 2006. McMillan then moved for summary judgment in her third-party claim against the Deatons and asked for reimbursement of her litigation and the survey costs resulting from her lawsuit against the Deatons. The trial court granted this motion in an order entered on September 5, 2006, and in a supplemental order entered on October 9, 2006. The court found that there was no showing that the Deatons had made an intentional misrepresentation to McMillan as to the seller disclosure form. However, finding that they did make a **reckless** misrepresentation intended to induce her reliance, the court awarded McMillan a total of $3,854.34 in fees and costs. This appeal followed.

In reviewing a summary judgment, we are governed by the following standard:

> [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.

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996); Kentucky Rules of Civil Procedure ("CR") 56.03. Our review is *de novo* since we analyze solely questions of law. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky.App. 2000). We are required to view the record in a light most favorable to the party opposing summary

judgment, and all doubts are to be resolved in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is appropriate only when "it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Id.* The issue of impossibility is viewed in a practical sense rather than an absolute one. *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). We must review the record as it stands at the time of the motion for summary judgment rather than as to how it may be developed at trial:

> [t]he inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.

Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). Consequently, a party opposing a motion for summary judgment cannot defeat that motion without presenting at least some affirmative evidence that there is a genuine issue of material fact that requires a trial. *O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Steelvest*, 807 S.W.2d at 482.

The Deatons first argue that the trial judge should have recused himself from this matter because of an alleged conflict of interest. However, it does not appear that this issue was ever raised below. Consequently, as it is not preserved for our review, we decline to consider it. *See Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

The Deatons' remaining arguments and allegations are unsupported by any affirmative evidence within the record. Nonetheless, even though the Deatons failed to present at least a modicum of affirmative evidence, we conclude that the record does not contain sufficient evidence to sustain entry of summary judgment in McMillan's favor. Kentucky law requires that a motion for summary judgment be **properly supported**. *Steelvest*, 807 S.W.2d at 481. As McMillan's motion was deficient, we are persuaded that summary judgment was prematurely entered in her favor despite the shortcomings of the Deatons' evidence.

McMillan's action against the Deatons was essentially one for fraud. False and fraudulent misrepresentations which were made to induce a purchaser to enter into a contract do not merge into a deed of conveyance so as to preclude an action for fraud. *See Yeager v. McLellan*, 177 S.W.3d 807, 809 (Ky. 2005); *Sanford Const. Co. v. S & H Contractors, Inc.*, 443 S.W.2d 227, 232 (Ky. 1969); *Dunn v. Tate*, 268 S.W.2d 925, 927 (Ky. 1954). In order to demonstrate that the warranty was a fraudulent misrepresentation, McMillan bore the burden of establishing by clear and convincing evidence the six elements of fraud. *Yeager*, 177 S.W.3d at 809. Those elements are:

a) 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.

Id.; *see also United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). Just as all six of these elements must be satisfied in an action for fraud, so must they be shown to properly support a motion for summary judgment.

In a fraud action, detrimental reliance can be shown by evidence that a person either acted or failed to act because of the fraudulent misrepresentations of another party. *Rickert*, 996 S.W.2d at 469. After reviewing the record, we can find no evidence of detrimental reliance on McMillan's part (through deposition, affidavit, or any other source) other than the fact that she purchased the property from the Deatons. While this fact may suggest reliance, by no means does it indicate McMillan's state of mind at the time of purchase. Reliance cannot be inferred; it must be established by credible evidence of record. As the record currently stands, we are presented with a mere inference unsupported by actual evidence.

There is no evidence or testimony from McMillan as to her mental state at the time she received the seller disclosure form and at the time she purchased the subject property. Thus, there is no basis upon which to conclude that she acted either in reliance upon the Deatons' alleged misrepresentation or in spite of it. In her third-party complaint and her memorandum in support of her motion for summary judgment, McMillan recited that she relied upon the Deatons' written warranty. However, pleadings are not evidence. *Educational Training Systems, Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky.App. 2003).

Summary judgment is appropriate only when a moving party shows his or her right to judgment "with such clarity that there is no room left for controversy." *Steelvest*, 807 S.W.2d at 482. As McMillan failed to satisfy all of the elements for fraud, the requisite clarity is absent. Therefore, summary judgment was entered erroneously.

The summary judgment of the Pulaski Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James E. Deaton
Somerset, Kentucky

BRIEF FOR APPELLEE:

John B. Adams
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