

RENDERED: DECEMBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000362-MR

HINTON HARDWOODS, INC.

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 07-CI-00033

CUMBERLAND SCRAP PROCESSORS TRANSPORT, LLC
A/K/A CUMBERLAND SCRAP PROCESSORS, LLC
A/K/A CUMBERLAND RECYCLING GROUP, LLC;
RILEY-BURCHETT REALTY AND AUCTION, INC.;
JAMES MICHAEL RILEY; AND OMNISOURCE
CORPORATION

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND WINE, JUDGES.

CLAYTON, JUDGE: Hinton Hardwoods, Inc. (Hinton) appeals from the judgment of the Logan Circuit Court, which granted summary judgment on February 5, 2008, in favor of Cumberland Scrap Processors Transport, LLC

(Cumberland), James Michael Riley and Riley-Burchett Realty and Auction, Inc. (Riley), and Omnisource Corporation (Omnisource) in an action for breach of contract for the sale and purchase of commercial property in Logan County, Kentucky. Before the transaction was completed it was discovered that there was no recorded easement allowing permanent access over the railroad tracks which traverse the property. Cumberland contends that the circumstances constitute a defect in marketable title to the real estate and refused to purchase the property. Hinton contends that no defect exists in the title and seeks to enforce the offer against Cumberland. Furthermore, Hinton asserts that Riley wrongfully interfered with a sale of real estate to Cumberland. For the reasons set forth herein, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The case involves two separate sets of claims against two separate parties. Both claims arise out of a contract for the purchase of a parcel of real estate located in Logan County, Kentucky. The contract was between Hinton as the seller and Cumberland as the buyer. Riley was the real estate agent representing Hinton.

The events begin in the spring of 2006, when Mr. Carl Adkins (Adkins), the general manager of Cumberland, met with Jody Lassiter (Lassiter) of the Logan Economic Alliance for Development to inquire about available industrial properties in Logan County. Lassiter informed Riley, a local realtor, of Cumberland's interest. After Adkins viewed four sites, he focused on two sites -

one was the Hinton property, and the other property was owned by Riley and Barry Higgins (Riley/Higgins property). Ultimately, Cumberland decided that the Hinton property was its primary choice.

After Cumberland's decision, Adkins informed Riley, who was acting as Hinton's agent, that the Hinton property was its first choice. On July 17, 2006, Cumberland offered, and Hinton accepted, a \$10,000 non-refundable deposit on an option to purchase wherein Hinton agreed not to market or sell the property to any other party for 30 days.

On August 14, 2006, Cumberland delivered an Offer to Purchase Real Estate to Riley as Hinton's agent. The parties negotiated certain terms of the deal and eventually agreed that the purchase price would be \$565,000, Hinton would provide a commitment for title insurance, and Cumberland could survey the property. Riley contacted attorney J. Gran Clark (Clark) to prepare the real estate transfer and transaction documents for the closing. Clark prepared the title commitment and the proposed settlement statement. He found no title defects. Clark also modified, per Riley's instructions, the real estate commission from 6% of the purchase price to 3%.

Meanwhile, after the completion of the survey, Grant Schultz (Schultz), Cumberland's Vice President of Business Development, contacted Clark about an easement agreement with R.J. Corman (Corman) railroad and the Hinton property. When the Cumberland officials reviewed the survey, they discovered that the property does not extend to the highway (Lewisburg Road) but stops at the

boundary of the R. J. Corman Railroad right of way. Even though Hinton's drive crosses Corman's tracks, the deed did not provide any recorded right of ingress/egress over Corman's property nor was such a recording ever located by any party.

Thus, unable to find a guarantee to cross the railroad tracks, Cumberland asked Hinton to deliver such a guarantee. Riley, as Hinton's agent, contacted Lassiter, who had a working relationship with the railroad, and Clark to speak with the Corman representatives about obtaining a written crossing agreement for Cumberland. Initially, Lassiter obtained a one-year crossing agreement with Corman, which evolved into another offer for a ten-year agreement. Corman's representatives stated that this offer was a standard for the industry, and one they gave to all parties. Cumberland rejected this offer.

Then, on October 18, 2006, Cumberland gave formal notice of its objection to title and advised Hinton it did not intend to close on the property if it did not have permanent access over the Corman property. Furthermore, Cumberland gave Hinton twenty days to correct the problem or the offer to buy the land would be withdrawn. Hinton was never able to negotiate a deal with the railroad allowing permanent access onto the property. During the pendency of the Hinton sale, the owners of that property dismantled the family lumber mill and went out of business. Meanwhile, on October 26, 2006, during the aforementioned twenty-day cure period, Schultz informed Adkins that Cumberland should make an offer on the Riley/Higgins property.

Despite continuing to represent Hinton, Riley had a conversation with Clark on October 11, 2006, indicating the original deal was in jeopardy because of the rail crossing issue. Additionally, Riley told Clark that he thought Cumberland was now interested in buying the property that Riley jointly owned with Higgins. Riley asked Clark to prepare a deed transferring one-half ownership in the Riley/Higgins property to Higgins and his wife. Clark informed Riley he would not be comfortable preparing such a deed unless Riley informed the Hinton owners, the Courseys, about the transfer. Subsequently, Riley informed the Courseys, but did not tell them the purchase price. (Eventually, Higgins paid Riley \$150,000 for his half of the property.)

On November 3, 2006, the deed for Riley's one-half interest in the property was executed making Higgins the sole owner of the property. On that same day, Clark sent a letter from Hinton to Cumberland stating that Hinton had never implied that it owned the railroad property and that Cumberland would still have access to a public road. Yet, Hinton, never stated that the access would be permanent or that it was aware of the lack of permanent access over the railroad tracks prior to the parties' dealings. Surely, if it had known, it should and/or would have given the information to Cumberland.

Finally, on December 5, 2006, Higgins sold his property to Cumberland for \$390,000. Moreover, because Riley received not only the \$150,000 for the property but also a \$23,000 real estate commission for the deal, Hinton states Riley made significantly more money from that deal than he would

have if the original agreement had been fulfilled. And Hinton says it sold off its entire business, including all materials and equipment, in reliance on Cumberland's offer to purchase the property.

Hinton filed a complaint on January 30, 2007, alleging that Cumberland breached a written contract to purchase property and claiming, with regards to the same breach, causes for specific performance, promissory estoppel and fraudulent misrepresentation. Moreover, the civil complaint asserted claims against Riley for breach of contract, breach of fiduciary duty, and tortious interference with a contractual relationship and/or prospective advantage. Finally, in an amended complaint, Hinton set out its fraud claims against Cumberland with more specificity and also added an additional defendant, Omnisource. Hinton alleged a claim against Omnisource of tortious interference with the contractual relationship between Cumberland and Hinton.

The trial court, on February 5, 2008, granted Cumberland and Riley's summary judgment motions against Hinton on all issues. Cumberland moved for partial summary judgment arguing that the liquidated damages provision of the contract limited Hinton's damages to \$26,250. Further, Riley moved for summary judgment arguing that Hinton's claims against him relied solely on the fact that he profited financially from the transaction. Riley contended that this circumstantial inference was too speculative to create a material issue of fact for a jury. But, while the court found merit in both parties' arguments, it determined that both Hinton and Cumberland negotiated the real estate contract under a mutual mistake

of a basic and material fact. Each party assumed the property provided a perpetual right of ingress and egress to a public road. Therefore, the court ruled equity prevented enforcement of the agreement and ordered its rescission on grounds of unconscionability. The court further found that the claims of tortious wrong doing rendered moot by the lack of causation between the alleged wrongdoing and the damages. Hinton's appeal followed.

MOTION TO STRIKE

When Cumberland submitted its appellee brief, it included in its Appendix C an extra-judicial document not in the record – the form for the American Land Title Association (ALTA) owner's policy of title insurance. Hinton responded with a motion to strike the entire brief for failure to comply with Kentucky Rules of Civil Procedure (CR) 76.12. Hinton's motion was passed by the motions panel of the Court for consideration of the merits by this panel. We address this issue first.

CR 76.12(4)(c)(vii) governs the contents of a brief's appendix and contains this prohibition: "Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." CR 76.12(8)(a) permits, but does not require, a brief to be stricken for failure to comply substantially with the rule. We have previously ruled that an appellate court may elect not to consider a portion of a brief as a penalty for failure to comply with CR 76.12. *Pierson v. Coffey*, 706 S.W.2d 409, 413 (Ky. App. 1985). Likewise, in *Baker v. Jones*, 199

S.W.3d 749, 753 (Ky. App. 2006), the Court stated “[a]lthough the presentation of extraneous material in briefs is improper, it is not always sufficiently egregious to warrant the drastic relief urged by Baker.” In the case at hand, we elect not to strike the entire brief, but to disregard that portion of the brief that relies on the extra-judicial materials contained in the appendix. Thus, we will not consider Appendix C to Cumberland’s brief or the argument based on it, which is found in Cumberland’s brief in the third paragraph of Argument II.

STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for 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); (CR) 56.03. “The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.” *Lewis v. B & R Corporation.*, 56 S.W.3d 432, 436 (Ky. App. 2001), *citing Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

Additionally, “[t]he moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Lewis*, 56 S.W.3d

at 436, *citing Steelvest*, 807 S.W.2d at 482. “The trial court ‘must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.’” *Steelvest*, 807 S.W.2d at 480. The Kentucky Supreme Court has held that the word “impossible,” as set forth in the standard for summary judgment, is meant to be “used in a practical sense, not in an absolute sense.” *Lewis*, 56 S.W.3d at 436. “Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” *Id.* at 436.

CONTRACT CLAIMS

Hinton alleges that Cumberland breached a written contract to purchase its property and also asserts causes of action for specific performance, promissory estoppel and fraudulent misrepresentation. Additionally, the complaint asserts contract claims against Riley for breach of contract, breach of fiduciary duty, and tortious interference with a contractual relationship and/or prospective advantage. Later, Cumberland, in an amended complaint, added Omnisource as an defendant claiming that Omnisource tortiously interfered with the contractual relationship between Hinton and Cumberland. The trial court dismissed these claims based on the doctrine of mutual mistake.

Kentucky law holds that when parties entered into a contract under a mutual mistake, the contract is not enforceable. In *Belknap v. Bank of Prospect*, 259 Ky. 385, 82 S.W.2d 504, 505 (Ky. App. 1935), the Court noted that “[a] mutual mistake is one in which both parties participate by each laboring under the

same misconception.” quoting *Reiss v. Wintersmith*, 241 Ky. 470, 44 S.W.2d 609, 613 (Ky. App. 1931). Then, the Court cited the following language:

A written instrument may be canceled on the ground of mistake, where it is shown there was no meeting of the minds of the parties, if the application to cancel it is timely made, and a mistake on one side may be grounds for rescinding it, but is no grounds for reforming the instrument.

Bell v. Carroll, 212 Ky. 231, 278 S.W. 541 (Ky. App. 1925); *Fidelity and Casualty Co. of New York v. Waugh*, 222 Ky. 198, 300 S.W. 592 (Ky. App. 1927); *Reiss v. Wintersmith*, *supra*; *Bullock v. Young*, 252 Ky. 640, 67 S.W.2d 941, 946 (Ky. App. 1933). Furthermore, the Court in *McGeorge v. White*, 295 Ky. 367, 174 S.W.2d 532, 533-34 (Ky. App. 1943) explained the mutual mistake doctrine as follows:

To consummate a binding contract for the sale of land, as in the case of other contracts, there must be a meeting of the minds of the parties or mutual assent to the same thing, and all material terms and conditions of the contract, including a certainty of the subject matter, must be agreed on. . . . Subject to some qualifications not applicable here, equity will afford relief by rescission to either party if there was a mutual mistake, based upon ignorance or misapprehension, as to a material thing connected with the subject matter or essential in the inducement to or formation of the contract or involving the entire consideration.

Here, Cumberland was purchasing property for the purposes of conducting an industrial business. Unrestricted access to a public thoroughfare is vital for an industrial property. It is uncontested that the only public access to the Hinton property requires crossing the Corman railroad tracks. Absent a legal right to cross, the property is landlocked.

To date, Corman has only offered a ten-year easement to cross the railroad and maintains it controls the railroad crossing. Even though for many decades, Hinton and its predecessors used the railroad crossing to enter the property without resistance, once the right of access was raised, Corman declared it has the right to deny access to the property. In sum, neither party, Hinton nor Cumberland, was aware of the ownership of the real estate beneath the R.J. Corman railroad tracks. Both parties assumed, based on the Hinton's use of the property, that permanent access was available. Indeed, Hinton does not claim that Cumberland was aware when it offered to purchase the property that there was no guaranteed right of public access to the property. Hinton only says that the tracks were visible and it always had access. Thus, both parties were mistaken as to egress onto the Hinton property. And hence, we ascertain that it is unconscionable to enforce Cumberland's agreement to purchase the property without providing permanent access. Without Corman's permission to cross the railroad tracks, the Hinton property is landlocked, rendering the property useless to Cumberland. Corman's position creates a real and substantial legal issue.

Hinton's argument that Cumberland should be held to its bargain because it drafted the agreement and did not specify legally enforceable access to the property as a condition to the agreement is specious. First both parties assumed that access was available. Second, when the parties entered into the agreement to purchase the property, Hinton gave Cumberland the opportunity to further investigate the property by a title examination and a survey. And finally, the

contract was contingent on Hinton providing “marketable title.” Marketable title is discussed in *Williston On Contracts* as follows:

The meaning generally given to the expressions "marketable" or "merchantable," when used in connection with title to real property, is that even a title which the court believes good may be rejected if a reasonable person might seriously doubt its validity. "Merchantable title" or "marketable title" is that title which a reasonable, prudent person would accept in the ordinary course of business, after being fully apprised of the facts and the applicable law.

Stated otherwise, a merchantable or marketable title is that title which enables the record owner not only to hold the land, but to hold it in peace and, if he or she wishes to sell the land, to be reasonably sure that no flaw or doubt will arise to disturb its market value.

17 Williston on Contracts § 50:10 (4th ed.)

Although Hinton’s attorney was able to issue a commitment for title insurance, this commitment did not resolve the issue. The contract itself in paragraph 11(c) requires Hinton to issue an owner’s policy free from all exceptions except for real property taxes not yet due and those waived by the buyer. The title commitment prepared by Clark, on the other hand, contained the following exception:

1. Unrecorded easements, discrepancies or conflicts in boundary lines, shortage in area and encroachments which an accurate and complete survey would disclose.

Commitment for Title Insurance, Schedule B, Section 2. (Depo., Clark, Exhibit 4).

Hence, we determine that this mutual mistake inhibited a “meeting of the minds” necessary for the formation of binding contract. Because the title is not

marketable as anticipated, the trial court's ruling that the contract should be rescinded was appropriate. Thus, the court was correct in granting the summary judgment motion in favor of Cumberland as to the contract breach and specific performance. Consequently, Hinton's claims of tortious wrongdoing and resulting damages must also fail because the rescinded contract eliminates the causation between the act and the damages. Cumberland and Omnisource did nothing wrong by not consummating the contract.

BREACH OF FIDUCIARY DUTY

Finally, while the contract issues as related to Riley are resolved by the rescission of the contract, a question remains as to whether the grant of summary judgment was appropriate on the issue of Riley's purported breach of fiduciary duty. The trial court justified its grant of summary judgment by stating that Hinton's claim relied solely on Riley's financial profit from the resultant land transaction. The court found that this circumstantial inference was too speculative to create a material issue of fact to submit to the jury.

Kentucky law describes fiduciary duty as "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." *Steelevest*, 807 S.W.2d at 485. In order to prevail on a claim for breach of fiduciary duty, Hinton must establish that (1) Riley owes a fiduciary duty to it; (2) Riley

breached that duty; and (3) Hinton suffered damages as a result of the breach.

Sparks v. Re/Max Allstar Realty, Inc., 55 S.W.3d 343, 348 n. 15 (Ky. App. 2000).

Notwithstanding the requirements for fiduciary duty, with reference to the relationship between a real estate broker and a principle, the law is clear that contractual relations impose an obligation of mutual good faith and fair dealing. *Odem Realty Co. v. Dyer*, 242 Ky. 58, 45 S.W.2d 838 (Ky. App. 1932). This duty is imposed by law, not by the terms of the contract. As a rule, the duty of good faith and fair dealing merely requires the parties to “deal fairly” with one another. Although Hinton did not address the nature of the relationship between a realtor and a principal or provide a contract elucidating Riley’s duties in the transaction, Kentucky law seems to indicate that this relationship does not rise to the level required for a fiduciary.

Nonetheless, to maintain a claim for breach of fiduciary duty, Hinton must show that Riley owed him a duty, breached it, and caused Hinton damages. First, as to the issue of duty, Hinton provided no evidence that Riley did anything to cause it to lose its sale. It merely notes his profit from the sale of the other property. This fact alone does not establish wrongdoing. In fact, no evidence was provided that Cumberland withdrew from its contract because of any action by Riley. The record clearly demonstrates that Cumberland decided not to buy the Hinton property based on dissatisfaction over access to the property. Inferring wrongdoing on the Riley’s part because he received a profit and a real estate commission on the sale of the Higgins’ property is only speculative. Riley aptly

noted that, other than this inference, Hinton produce nothing to support its claim. Kentucky Supreme Court has held that, if the evidence presented allows only for supposition and speculation, then the question should not be presented to the jury. *Chesapeake & O. Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951). Therefore, summary judgment was appropriate on Hinton's breach of fiduciary duty claim.

For the foregoing reasons, we affirm the trial court's grant of summary judgment to the appellees.

ALL CONCUR.

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