

RENDERED: OCTOBER 26, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002160-MR

MICHAEL P. ZIEGLER AND
THE ZIEGLER GROUP, LLC

APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 07-CI-00098

PHILIP DAVID KNOCK,
RICHARD KNOCK, AND
KNOCK INVESTMENTS, LLC

APPELLEES

AND

NO. 2008-CA-002370-MR

PHILIP DAVID KNOCK,
DAVID KNOCK, AND
KNOCK INVESTMENTS, LLC

CROSS/APPELLANTS

v. CROSS-APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO 07-CI-00098

MICHAEL P. ZIEGLER AND
THE ZIEGLER GROUP, LLC

CROSS-APPELLEES

OPINION
REVERSING

** ** * ** * ** *

BEFORE: CAPERTON AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

STUMBO, JUDGE: Michael P. Ziegler and the Ziegler Group, LLC appeal from a Trial Order and Judgment of the Boone Circuit Court awarding damages to Philip David Knock and Richard Knock in the Knocks’ action alleging fraud, negligent misrepresentation, breach of fiduciary duty and unjust enrichment. Ziegler argues that the trial court erred in determining that 1) the Knocks have standing to bring the action, 2) that their claims were not barred by operation of a Mutual Release agreement, 3) that the Knocks were entitled to damages, and 4) that the litigation should have been brought in Cincinnati, Ohio. Because the Membership Interest Purchase Agreement provides that any judicial proceeding arising from the parties’ joint venture must be brought in Ohio, we reverse the Trial Order and Judgment on appeal.

In May, 2004, The Ziegler Group, LLC (hereinafter “TZG”) – which is owned by Appellant Michael Ziegler – entered into a contract to purchase a strip mall center in Ohio called Park Plaza. The purchase price was \$3,700,000. Under the terms of the agreement, TZG was to receive a 2% sales commission from the transaction.

¹ Senior Judge Joseph E. Lambert 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.

At about the same time, Appellees David Knock and his father Richard Knock were owners of Knock Investments, LLC. The Knocks entered into negotiations with Ziegler and TZG for the purpose of becoming investors in Park Plaza. An agreement subsequently was reached providing that Knock Investments would provide \$710,600 toward the purchase of Park Plaza, which represented a 74% ownership interest. Conversely, Ziegler and TZG contributed \$249,400 toward the purchase representing a 26% ownership interest. The original purchase price of \$3,700,000 was reduced to \$3,625,000 based in part on an agreement that Ziegler would waive his 2% commission. This agreement was memorialized in a Membership Interest Purchase Agreement for the new Knock/Ziegler LLC – called TZG III, LLC – which stated that Ziegler warranted that he would not be paid, directly or indirectly, a real estate commission arising from the transaction.

The sale was made, and at closing a \$145,000 commission was paid to Cincinnati Capital Properties. On October 19, 2004, Cincinnati Capital Properties sent a sales commission check to TZG in the amount of \$72,500, which represented one-half of the sales commission.

On January 12, 2007, the Knocks and Knock Investments, LLC filed the instant action against Ziegler and TZG in Boone Circuit Court setting out claims of fraud, misrepresentation, breach of fiduciary duty and unjust enrichment. The action stemmed from the Knocks' determination that Ziegler had received a commission from the sale of Park Plaza in apparent violation of the Membership

Interest Purchase Agreement. Ziegler and TZG counterclaimed, alleging that they were entitled to recover the cost of some tax work performed by a third party.

The matter proceeded in Boone Circuit Court, culminating in a bench trial being conducted on July 10, 2008. The trial court subsequently rendered a Trial Order and Judgment on September 26, 2008, which held in relevant part that 1) the Knocks were proper parties to the litigation by virtue of their ownership interest in Knock Investments, LLC; 2) that a Mutual Release entered into by the parties was not enforceable; 3) that the Knocks incurred damages resulting from Ziegler's breach of fiduciary duty by taking a sales commission in violation of the Membership Interest Purchase Agreement; and 4) that Ziegler was entitled to a monetary judgment on his counterclaim for tax work performed by Jim Wilson. The court awarded a Judgment in favor of the Knocks in the amount of \$53,650 arising from Ziegler's acceptance of a sales commission in violation of the Membership Interest Purchase Agreement, and \$2,752.75 to Ziegler on his counterclaim for the cost of tax work. This appeal and cross-appeal followed.

Ziegler first argues that the trial court erred in concluding that the Knocks are proper parties to this litigation. He notes that the contracts and Membership Interest Purchase Agreement at issue are between Knock Investments, LLC and TZG and/or Ziegler individually, and he maintains that neither Richard Knock nor Phillip Knock have a written contract with the defendants/appellants. As such, he contends that the Knocks in their individual capacity are not proper parties to this action.

In addressing this issue below, the Boone Circuit Court determined that because Knock Investments, LLC is a closely held entity owned by the Knocks individually, and because the Knocks were asserting claims of fraud and misrepresentation in their individual capacities rather than through the corporate entity, they had standing to assert their individual interests as members of the limited liability corporation. Ziegler and TZG have cited no statutory law or case law in support of their assertion that this conclusion was erroneous. The trial court's rulings are presumptively correct, and the burden rests with the appellants to demonstrate error. *Boggs v. Burton*, 547 S.W.2d 786 (Ky. App. 1977).

Ziegler and TZG have not demonstrated that the Knocks do not have standing to assert claims in their individual capacities arising from Ziegler's alleged fraud and misrepresentation, and accordingly we find no error on this issue.

Ziegler and TZG next argue that the trial court erred in failing to find that a clear and unambiguous Mutual Release entered into between Knock Investments and TZG barred the plaintiffs/appellees from asserting their claims against Ziegler and TZG. Ziegler directs our attention to the language set out in the Mutual Release, which he maintains evinces the parties' intent to hold each other harmless for both known and unknown claims. He argues that the release cannot be overcome except in very limited circumstances which the facts at bar do not support. He seeks an Order reversing the Trial Order and Judgment and remanding the matter for dismissal of the action.

In examining this issue, the Boone Circuit Court noted the general enforceability of mutual releases, and it analyzed the release at issue under Ohio law since the governing documents of the agreement provided that Ohio law would be controlling. It further noted that the choice of laws issue was largely not relevant as there was little variance between Kentucky and Ohio law on this question. The court determined that while such releases are generally enforceable, they may be voided by mistake or fraud. The court then found that Ziegler's covenant not to accept a sales commission - as evidenced in the Membership Interest Purchase Agreement - coupled with his subsequent acceptance of a sales commission, constituted fraudulent inducement sufficient to void the Mutual Release. We find no error in this determination. The trial court made a finding that at the time the parties entered into the Mutual Release, the Knocks were not aware that Ziegler had accepted a sales commission in violation of the Membership Interest Purchase Agreement. This finding, which arises from testimony adduced at trial, reasonably supports the Boone Circuit Court's determination that Ziegler engaged in fraud in the inducement. Under both Kentucky and Ohio law, a release of liability procured by fraud is voidable. *Haller v. Borrer Corporation*, 552 N.E.2d 207 (Ohio, 1990); *Sallee v. Fort Knox National Bank*, 286 F.3d 878 (6th Cir., 2002), citing *Hooks v. Cornett Lewis Coal Company*, 260 Ky. 778, 86 S.W.2d 697 (Ky. App. 1935). Because the record supports the Boone Circuit Court's determination that Ziegler acted fraudulently in obtaining the release, we find no error on this issue.

Ziegler's third argument is that the Boone Circuit Court erred in concluding that the Knocks sustained damages arising from Ziegler's accepting a commission. He contends that no damages exist because even if he had taken no commission, that money would have been invested into the project, and thereby would have reduced the Knocks' percentage of ownership in the project.

We find no error on this issue. The trial court determined that if Ziegler had not breached his fiduciary and contractual duty to forgo a commission, the purchase price of Park Plaza could have been lowered. In the alternative, the court determined that at the very least, the Knocks were entitled to a percentile share of the commission which they could have reinvested in the project or disposed of in some other manner. The basis of the court's conclusion on this issue is that as partners with mutual fiduciary duties, the Knocks and Ziegler were vested with the right to reap the benefits of their joint venture commensurate with their percentile ownership interest. Since Ziegler secretly received a 2% commission, the court concluded that equity demanded that the Knocks also benefit from that commission commensurate with their percentile ownership interest in the venture. The court awarded to the Knocks a 74% interest in the commission based on their 74% interest in the project. Since the relationship of partners imposes upon each the obligation of good faith and fairness with respect to partnership affairs, *Betts v. Smither*, 310 Ky. 402, 220 S.W.2d 989 (Ky. App. 1949), and since Ziegler unduly benefitted from his acceptance of a commission in violation of his fiduciary duty and the Membership Interest Purchase Agreement,

we find no error in the court's determination that the Knocks are entitled to a pro rata share of the commission.

Lastly, Ziegler maintains that the trial court erred in failing to dismiss the action for lack of jurisdiction, improper venue, and for failing to recuse. In support of this argument, Ziegler directs our attention to the Membership Interest Purchase Agreement, which provides that any action arising under the agreement must be brought in Cincinnati, Ohio.

We find this argument persuasive. The Membership Interest Purchase Agreement states at Article 8.10 as follows:

Venue and Service of Process: Any judicial proceeding brought with respect to the Agreement must be brought in any federal or state court of competent jurisdiction in Cincinnati, Ohio and each party hereby (i) accepts, generally and unconditionally, the exclusive jurisdiction of such and any related appellate court, and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement and (ii) irrevocably waives any objection it may now or hereafter have as to the venue of any such suit, action or proceeding brought in such a court or that such court is an inconvenient forum.

This language is subject to but one interpretation. The claims of the Knocks in their individual capacities, as well as the claim of Knock Investments, LLC, each arise from the Membership Interest Purchase Agreement. The Knocks and Knock Investments raised this issue in their trial brief,² and again in their October 6, 2008 Motion to Alter or Amend Judgment. The terms of the agreement place venue in

² Record at p. 206.

Cincinnati, Ohio, for “[a]ny judicial proceeding brought with respect to the Agreement[.]” Additionally, it appears that both TZG and Knock Investments are Ohio LLCs,³ and the physical location of the joint venture was in Ohio.

Irrespective of this, the language of the Membership Interest Purchase Agreement, to which the parties bound themselves, is controlling. A forum-choosing clause in a contract or other agreement is enforceable as long as it is reasonable, does not place any undue burden on the parties, and does not subvert an important public policy of Kentucky. *Prudential Resources Corporation v. Plunkett*, 583 S.W.2d 97 (Ky. App. 1979). Nothing in the record demonstrates that *Prudential Resources Corporation* should operate to void the application of Membership Interest Purchase Agreement Article 8.10. Accordingly, we must conclude that Ziegler and The Ziegler Group, LLC are entitled to defend in Cincinnati, Ohio, any civil action arising under the Membership Interest Purchase Agreement. Accordingly, we reverse on this issue. The Knocks’ cross-appeal on the issues of pre-judgment interest and punitive damages is moot.

For the foregoing reasons, we reverse the Trial Order and Judgment of the Boone Circuit Court.

ALL CONCUR.

³ The Membership Interest Purchase Agreement states that both Limited Liability Companies were formed in Ohio. The Complaint, however, states that they are Kentucky LLCs.

BRIEFS FOR APPELLANTS/
CROSS-APPELLEES,
MICHAEL P. ZIEGLER AND
THE ZIEGLER GROUP, LLC:

William H. Crockett
Ft. Wright, Kentucky

Gary F. Franke
Cincinnati, Ohio

BRIEFS FOR APPELLEES/
CROSS-APPELLANTS,
PHILIP DAVID KNOCK,
RICHARD KNOCK, AND
KNOCK INVESTMENTS, LLC:

Mark G. Arnzen
Beverly R. Storm
Covington, Kentucky