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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002347-MR

JONATHON MILLER — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 06-CI-00158

GERALD CLARK MASSEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,[1] SENIOR JUDGE.

KELLER, JUDGE: Jonathon Miller (Miller) sued Gerald Clark Massey (Massey) and others alleging they were responsible for numerous defects in the construction of Miller's house. Miller and the other defendants reached a settlement. The Pulaski Circuit Court then granted Massey's motion for summary judgment. It is

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

from this summary judgment that Miller appeals. On appeal, Miller argues: (1) the circuit court prematurely entered summary judgment before any discovery had been undertaken; and (2) the circuit court erred when it found a contract between Miller and Massey relieved Massey from any liability for defects in construction of the house. For the reasons set forth below, we affirm.

FACTS

The trial court granted summary judgment before any discovery had taken place; therefore, our recitation of the facts is based on the trial court's findings of fact; the complaint filed by Miller; the parties' motions, responses, and replies; the parties' briefs; and various documents attached to the preceding.

Miller and Massey agree that they entered into a contract regarding the construction of a house on land owned by Miller in Somerset, Kentucky. However, they disagree regarding what that contract entails and it is that disagreement which is at the heart of this appeal. According to Miller, the contract called for Massey to construct a single-family house on Miller's land. According to Massey, the contract simply called for him to "oversee the construction and facilitate the completion of the" house. It did not call for him to actually construct the house or to ensure that the construction was consistent with applicable building codes or done in a workmanlike manner. According to Massey, those duties fell to J. Forrest Cooper and/or Cooper Property Inspections, Inc. (hereafter collectively referred to as Cooper).

Following completion of construction, Miller had the house inspected by a third party, who allegedly determined that the house was not constructed in a workmanlike manner and that construction was not in compliance with the building code. Miller then filed suit against Massey and Cooper alleging that they breached their duties to construct the house in a workmanlike manner, to use suitable materials, and to comply with the building code. Miller also alleged Massey, as a "construction professional," was liable for any acts or omissions "of his agents, employees, or subcontractor [sic]" under Kentucky Revised Statute (KRS) 411.256.

Cooper and Miller reached a settlement and the trial court dismissed all of Miller's claims against Cooper. Although the time line is not clear, it appears Miller changed attorneys approximately eight months after reaching the settlement with Cooper. More than thirteen months after Miller filed his complaint, his new attorneys propounded interrogatories and requests for production of documents to Massey. This appears to have been the first attempt at formal discovery by any party to this action. Before responding to Miller's written discovery, Massey filed a motion for summary judgment, arguing primarily that his contract with Miller relieved him of any liability for faulty construction. In his response, Miller argued, as he does in part before us, that the parties should be permitted to conduct discovery prior to any summary judgment. Miller also argued Massey, by operation of law, had provided a non-delegable warranty of workmanlike construction.

The trial court, after reviewing the pleadings, granted Massey's motion for summary judgment. Miller timely filed a motion to alter, amend, or vacate, which the trial court denied. It is from these orders that Miller appeals.

As to the contract, Miller argues that it consists of a type-written document designated as a "Construction Agreement" that was generated by his then-attorney and signed only by Miller. Massey argues that the contract consists of a number of handwritten pages that contain various dates and that are initialed or signed by both Miller and Massey. According to Massey, the Construction Agreement is not part of the contract.

The Construction Agreement designates Massey as "lender" and Miller as "buyer" and sets forth: the amount Massey lent to Miller; the payment schedule for repayment of that loan; Massey's responsibility for overseeing construction and facilitating completion of the house; Cooper's responsibility to "actively and regularly review the ongoing construction of the" house; that there are attachments including certain handwritten agreements and modifications; and specifications regarding construction, such as materials, closet shelving, solarium size, etc.

Unlike the Construction Agreement, the handwritten notes are initialed, dated, and signed by the parties. The notes have different dates, all of which precede the Construction Agreement and contain specifications regarding construction materials, etc., similar to those in the Construction Agreement. Because the contents of these handwritten notes are dispositive to our opinion, we

set forth the pertinent parts below. A note, signed by both parties, which appears to be dated May 7, 2004, states:

> 11 – Repeat – Clark[2] is not the general contractor and <u>is not</u> responsible for the construction of the bldg. – Cooper Home Inspection is responsible for this. Clark is the "bank" & will try to keep contractors working to complete the house in a reasonable time frame. – See item #2 on sheet C-8.[3]
>
> [Illegible] Clark M. has no insurance – J. Miller and his insurance co. will be responsible to replace any and all items in case of theft or vandelism [sic]– material and labor.

What appears to be "sheet C-8" referred to above states:

> Clark is not the general contractor – Clark is the "bank" and is loaning J.M. some of the money to build this house.
>
> Clark does not know the bldg. codes or requirements. Clark will do whatever is reasonable to try to keep the job moving until completion.
>
> Forrest Cooper of Cooper Home Insp. has been hired and is being paid by J.M. to oversee, inspect, and make sure the house is built correctly – Mr. Cooper is responsible for this....

The page containing this language appears to be initialed by the parties and is dated July 12, 2004. There is no explanation in the record regarding the apparent discrepancy in the dates between the two pages.

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[2] Although referred to as Clark in the handwritten documents, the reader should note that this is Gerald Clark Massey, the appellee.

[3] It appears to us that the document makes reference to page "I-8". However, in his motion for summary judgment, Massey states the reference is to page "C-8." Therefore, we will use that alpha-numeric reference herein.

As noted above, the circuit court granted Massey's motion for summary judgment, finding the Construction Agreement was not a contract. However, the court found the handwritten notes did constitute a contract. Based on that contract, the court found Miller and Massey "agreed that the liability for the building would be placed on Defendant Cooper." Furthermore, the court found the contract did not explicitly relieve Massey from liability that might arise under any implied warranty of workmanlike construction. However, the language allocating the responsibility for "mak[ing] sure the House is built correctly" to Cooper "amount[ed] to an assignment of the implied warranty . . . ."

The court recognized that Cooper was not a party to the contract and could not be bound by any terms in the contract. Nevertheless, the court noted Miller was free to relieve Massey of liability under the contract, which he did. Whether Miller then chose to enter into a contract with Cooper was essentially irrelevant to the agreement between Miller and Massey. Finally, the court, noting the equal bargaining power of the parties, found that absolving Massey from future liability did not violate public policy.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent

to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Steelvest, Inc.,* 807 S.W.2d. at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id*. at 481.

With the above standards in mind, we will address the issues raised by Miller in the order set forth above.

ANALYSIS

1. Whether Summary Judgment was Prematurely Granted

Miller argues that the circuit court improperly granted summary judgment before completion of discovery. This argument takes three different tacks: (1) Massey did not support his motion with any evidence; (2) if Miller had been able to conduct discovery, he could have proven his claims; and (3) any dilatoriness is the fault of his first attorney and should not be imputed to Miller.

As to the first tack, Miller argues the circuit court erred when it found the contract between Massey and Miller consisted of the handwritten documents

only. According to Miller, there was no evidence to support this finding by the circuit court. We disagree.

Rule 56.02 of the Kentucky Rules of Civil Procedure (CR) provides that a defending party seeking summary judgment "may, at any time, move with or without supporting affidavits" for that relief. Miller is correct that there must be some evidence in the record supporting the movant's position. However, an exhibit to a motion, that is evidentiary in character and sufficient to support the motion "may be properly regarded the same as would be an uncontradicted supporting affidavit." *Daniel v. Turner*, 320 S.W.2d 135, 137 (Ky. 1959). The Construction Agreement, the handwritten notes attached to that Agreement, and Miller's admission that the parties had a contract are sufficient documentary evidence to support Massey's motion. Therefore, there is evidence in the record sufficient to support the circuit court's findings.

As to the second tack, Miller is correct that summary judgment should not be granted before a party has had the opportunity to conduct discovery. However, "[i]t is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.,* 579 S.W.2d 628, 630 (Ky. App. 1979). In *Hartford*, this Court noted that the respondent did not conduct any discovery during the six months following the filing of the complaint. Furthermore, the evidence filed by the movant favored summary judgment, and the

respondent did not file any evidence in contradiction of the movant's. Under those circumstances, the Court concluded that summary judgment was appropriate.

Miller cites to *Pendleton Bros. Vending, Inc. v. Com. Finance and Admin. Cabinet,* 758 S.W.2d 24 (Ky. 1988); *Suter v. Mazyck*, 226 S.W.3d 837 (Ky. App. 2007); and to two unpublished opinions, *Hassler v. Paramount Arts Center, Inc.*, 2007 WL 1954095 (Ky. App. 2007), and *Dawson v. Combs and Wilbert, Inc.*, 2003 WL 1893269 (Ky. App. 2003), to support his argument that the trial court prematurely granted summary judgment. A reading of those cases leads us to the conclusion that whether "a summary judgment was prematurely granted must be determined within the context of the individual case." *Suter v. Mazyck,* 226 S.W.3d 837, 842 (Ky. App. 2007). As noted in *Suter*, the more complex the case, the more time the trial court should allot to discovery. The case herein is not complex; therefore, thirteen months was more than enough time for Miller to conduct discovery.

Even absent discovery, thirteen months was more than enough time for Miller to generate some evidence, in the form of affidavits or otherwise, to contradict Massey's motion. This he failed to do. Furthermore, Miller failed to set forth what additional evidence he could have developed through discovery and why that evidence could not have been developed outside of discovery.

Finally on this issue, Miller argues that any dilatoriness in conducting discovery is the fault of his first attorney and he should not be prejudiced thereby. "[A] litigant may not employ an attorney and then wash his hands of all

responsibility. The law demands the exercise of due diligence by the client as well as by his attorney in the prosecution or defense of litigation." *Gorin v. Gorin*, 167 S.W.2d 52, 55(Ky. App. 1942). Miller has not offered any evidence, by way of affidavit or otherwise, indicating that his first attorney failed to prosecute the case in compliance with his instructions. Furthermore, Miller has not offered any evidence explaining why he failed to exercise due diligence in prosecuting his claim.

For the foregoing reasons, we conclude that the trial court did not prematurely address Massey's motion for summary judgment.

2. Whether the Trial Court Correctly Interpreted the Contract and Correctly Applied the Law

As with the discovery issue, Miller's argument takes several tacks: (1) the trial court erred when it interpreted the contract as assigning liability to Cooper; and (2) the parties could not, as a matter of law, make such an assignment. We will address these in order.

The trial court found the handwritten notes constituted a contract, but the Construction Agreement did not. We agree with the trial court. The handwritten notes, although somewhat confusing in their organization and containing arguably inconsistent dates, are signed or initialed by the parties. The Construction Agreement is certainly easier to decipher; however, it is signed only by Miller. As noted by the trial court, in order for a contract to exist, there must be an offer and acceptance of that offer. *See General Steel Corp. v. Collins*, 196

S.W.3d 18, 21 (Ky. App. 2006). While the Construction Agreement may constitute an offer by Miller, there is no indication Massey accepted that offer. Therefore, the Construction Agreement is not an enforceable contract. On the other hand, the signatures and initials of the parties on the handwritten notes are indisputable indicia that an offer was made and accepted.

Having determined what writing reflects the parties' contractual agreement, we must determine the scope of that agreement. The plain language of the contract establishes that Massey "is not the general contractor and is not responsible for the construction of the" building. (Emphasis in original.) The contract puts the responsibility for construction on Cooper. Massey is designated as "the bank" and although he "will try to keep contractors working to complete the house in a reasonable time frame," Cooper "has been hired and is being paid by [Miller] to oversee, inspect, and make sure the house is built correctly." Therefore, by its terms, the contract relieves Massey of any liability related to the actual construction of the building. This disposes of the first part of Miller's argument.

However, our analysis cannot end there because Miller argues Massey provided an implied and non-assignable warranty of workmanlike construction. We agree with Miller that "in the sale of a new dwelling by the builder there is an implied warranty that in its major structural features the dwelling was constructed in a workmanlike manner and using suitable materials." *Crawley v. Terhune,* 437 S.W.2d 743, 745 (Ky. 1969). If there were any evidence Massey was "the builder," then he might be bound by that warranty. However, the plain language of

the contract is that Massey is not responsible for construction of the building; therefore, Massey is not the builder and *Crawley* does not apply.

Miller has cited to authority from other jurisdictions in support of his warranty argument. However, that authority is distinguishable and not beneficial to Miller's argument. In *Park v. Sohn,* 89 Ill.2d 453, 433 N.E.2d 651 (Ill. 1982), Sohn and his wife, who were part-time builders, built a house, lived in the house for two years, and then sold the house to the Parks. The Parks discovered a number of construction defects and sued the Sohns, in pertinent part, for breach of the implied warranty of habitability. The Sohns argued the implied warranty of habitability applied only to "mass producers" of homes, not to part-time builders. However, the court determined the warranty applied to anyone in the business of building a house for sale. *Id.* at 461-62, 655. *Park* is distinguishable from the case herein because the contract specifically states that Cooper, not Massey, is the builder. Therefore, any implied warranty of habitability attached to Cooper, not Massey.

In *Mazurek v. Nielsen*, 42 Colo.App. 386, 599 P.2d 269 (Colo. App. 1979), the Nielsens hired an architect, contractors, and sub-contractors to design and build a house for them on property they owned in the mountains. There was some evidence the Nielsens unsuccessfully attempted to sell the house before completion of construction; however, it was not disputed the Nielsens lived in the house for two years before selling it to the Mazureks. After purchasing the house, the Mazureks discovered the well on the property was inadequate, and they sued

the Nielsens claiming breach of the implied warranty of habitability. The Nielsens argued they were not builder/vendors and therefore not subject to that warranty. The court held that, by hiring an architect, contractors, and sub-contractors the Nielsens could be deemed to be general contractors. However, the court stated the Mazureks also had to establish that the Nielsens primary reason for constructing the house was to sell it. *Id.* at 388, 271. Because the jury instructions did not take this factor into consideration, the court remanded the case for a new trial.

Mazurek is easily distinguishable from the case herein. As noted above, the evidence establishes that Cooper was the builder, not Massey. Furthermore, the evidence establishes Miller owned the land on which the house was constructed, and there is no evidence Massey retained an architect, contractor, or any sub-contractors. Finally, the evidence establishes Massey did not own the house but simply acted as "the bank," financing the project. Therefore, *Mazurek* is not persuasive.

In *Rogers v. Lewton*, 570 N.E.2d 133 (Ind. App. 1991), Lewton purchased plans, hired subcontractors, and performed some of the actual construction on a house he later sold to the Rogers. When the health department determined the septic system was illegal, the Rogers sued Lewton. In his defense, Lewton argued he did not build the septic system; therefore, he could not be held liable under an implied warranty theory for its deficiencies. The court determined that Lewton acted as a general contractor. Therefore, he had liability under an

implied warranty of workmanlike construction, whether he built the faulty septic system or not.

As with *Park* and *Mazurek, Rogers* is distinguishable. There is no evidence Massey performed any construction, hired any contractors or sub-contractors, or provided oversight of any part of the project except for timeliness of completion. In the absence of that evidence, Massey cannot be deemed a general contractor and is not subject to an implied warranty of workmanlike construction or of habitability.

Based on the above, we hold that the circuit court properly granted summary judgment. However, we do so for a different reason. While the circuit court found the contract acted as an assignment of the implied warranty of workmanlike construction to Cooper, we hold that Massey was never subject to that warranty. Therefore, whether the contract acted as an assignment is irrelevant.

CONCLUSION

For the foregoing reasons, we hold that Miller had sufficient time to conduct discovery prior to the circuit court's summary judgment. Therefore, the circuit court did not prematurely issue that judgment. Furthermore, we hold that, in the absence of any evidence that Massey was a builder, the circuit court correctly found he has no liability under the implied warranty of workmanlike construction. Therefore, we affirm.

ALL CONCUR.

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