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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002399-MR

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT;
JERRY E. ABRAMSON, in his official capacity as MAYOR;
LOUISVILLE/JEFFERSON COUNTY METRO COUNCIL, as successor of City of Louisville City Council;
RICHARD JOHNSTON, in his official capacity as DEPUTY MAYOR; AND
BRENDA J. BOWLIN, in her official capacity as PROJECT SPECIALIST, METRO FACILITIES MANAGEMENT — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE G. CLAYTON, JUDGE
ACTION NO. 05-CI-006277

COMMONWEALTH OF KENTUCKY, COMMERCE CABINET, DEPARTMENT OF PARKS, GEORGE WARD, COMMISSIONER — APPELLEES

OPINION
REVERSING, VACATING, AND REMANDING

** ** ** ** **

BEFORE: DIXON, KELLER, AND WINE, JUDGES.

KELLER, JUDGE: Louisville/Jefferson County Metro Government; Jerry E. Abramson, Mayor; Louisville/Jefferson County Metro Council; Richard Johnston, Deputy Mayor; and Brenda J. Bowlin, Project Specialist (collectively referred to hereinafter as the Metro Government[1]) appeal from the Jefferson Circuit Court's Opinion and Order requiring the Metro Government to convey certain real property (hereinafter referred to as the 1.466 acres) to the Commonwealth of Kentucky, Commerce Cabinet, Department of Parks, George Ward, Commissioner[2] (collectively referred to hereinafter as the Parks Department). The Metro Government argues on appeal that there was not a valid contract between it and the Parks Department related to the transfer of the 1.466 acres because: (1) no one authorized to do so by the Metro Government made an offer to the Parks Department; (2) the Metro Government did not approve of the transfer of the 1.466 acres; and (3) the Metro Government did not make a gift of the land to the Parks Department. The Parks Department argues to the contrary and that the Metro Government should be equitably estopped from denying the existence of a contract

[1] We note that, during the course of the transactions leading up to this litigation, Jefferson County and the City of Louisville merged. Some actions were taken by Jefferson County and some by the merged Metro Government. Because we do not believe the merger had any impact on the issues before us, we will refer to the appellants as the Metro Government throughout this appeal.

[2] We note that, on June 16, 2008, the Commerce Cabinet was reorganized and renamed the Tourism, Arts, and Heritage Cabinet and Jerry van der Meer is now Commissioner of the Parks Department. However, for consistency we will use the titles and names as they existed at the time this appeal was taken.

to transfer the land. For the reasons set forth below, we reverse, vacate, and remand.

FACTS

In the mid-1970's, the Commonwealth of Kentucky (the Commonwealth) purchased 376 acres in Jefferson County which became E.P. "Tom" Sawyer State Park ("Tom" Sawyer Park). In the late 1980's, the Metro Government and the Commonwealth began to implement plans to widen Hurstbourne Parkway in the area adjacent to "Tom" Sawyer Park. In order to effectuate the road construction, the Metro Government purchased 25 acres of "Tom" Sawyer Park from the Parks Department. In addition to the 25 acres from "Tom" Sawyer Park, the Metro Government purchased 2.70 acres from a private citizen. However, the Metro Government only needed 1.146 acres. Therefore, it sold .088 acres to an adjoining landowner so that he could have access to Hurstbourne Parkway and designated the remaining portion, the 1.466 acres, as surplus property.

In the summer of 2001, Brenda Bowlin (Bowlin), who worked for the Metro Government as a right-of-way acquisition agent, James Adkins (Adkins), director of public works for the Metro Government, the county engineer, and the manager of "Tom" Sawyer Park discussed disposition of the surplus property. Based on instructions from Adkins, Bowlin sent a letter to Michael Swatzyna (Swatzyna) in July 2001 stating the Metro Government

> had public interest in acquiring this property for commercial use, but in our discussions with Robert Burke, District 5, we concurred that it is appropriate to donate to E.P. Tom Sawyer State Park.
>
> . . .
>
> This lot was a residential property that was a full acquisition and included a building which has since been razed. The parcel in the 'before' was 2.657 acres, and when the property was deeded to the County, the remainder was not deeded separately. That means we do not have a separate legal description for the remainder. My estimation is that this remainder property is just over an acre. [3]
>
> If you evaluate this lot and wish us to deed it to you, we can do so by providing you with an 'exception' within the existing legal description. However, as you indicated, your department would prefer to write the legal description. If you will provide us with that information we will proceed with dedication upon your approval. If you need additional information, please let me know."

We note that the July 2001 letter does not contain a legal description nor does it state with specificity the amount of the property in question. Furthermore, it is signed by Bowlin as "Property Acquisition Agent."

After sending that letter, Bowlin had several conversations with personnel at the Parks Department but did not receive any confirmation that the Parks Department wanted to accept the donation of the property. Swatzyna testified that, when he received Bowlin's letter, he forwarded it to the "in-house management team" to determine the cost for a survey and preparation of legal

[3] It is unclear from Bowlin's letter if she was referring to only the 1.466 acres or the entire unused property; however, it appears from later communications that Bowlin was referring to the entire unused property.

description. However, because of various personnel changes at the Parks Department, the matter was not pursued at that time.

Bowlin testified that, while doing research for another project in the summer of 2004, she discovered the sale of the .088 acres to the adjoining landowner. Bowlin then sent a fax on August 11, 2004, to Swatzyna advising him that a portion of the property they had discussed in 2001 was not available and not part of the surplus property. On August 18, 2004, the commissioner of the Parks Department sent a letter to Bowlin asking her to "re-initiate the transfer effort from your agency." In that letter, the commissioner referred only to Bowlin's July 2001 letter, and made no reference to her August 11, 2004 fax.

Sometime after August 18th Swatzyna and Bowlin discussed this matter by telephone. Swatzyna testified that he advised Bowlin the Parks Department was prepared to move forward with a survey and title search; however, he wanted assurance from Bowlin that the Metro Government was prepared to proceed with the donation of the property. According to Swatzyna, Bowlin "said she couldn't say 100 percent but go ahead and survey the title." Bowlin testified that she told Swatzyna not to "spend any money until you have it in writing from us. Because [she] knew and [she] told him that there was a possibility that it might not go through." Apparently, based on Swatzyna's interpretation of his conversation with Bowlin, the Parks Department proceeded to obtain a survey and title search.

In the meantime, the Metro Government made a determination to sell the surplus property. That sale was approved by the Metro Government council in the spring of 2005.

On July 22, 2005, the Parks Department filed a complaint against the Metro Government in Jefferson Circuit Court. In pertinent part, the Parks Department alleged that the Metro Government, through Bowlin, offered to donate the 1.466 acres to it. The Parks Department also alleged that, based on assurances from Bowlin, it contracted for and paid for a survey and title search. However, as noted above, the Metro Government did not transfer the 1.466 acres to the Parks Department but sold it to a private developer.

The parties filed a number of motions, the transcripts of six depositions and briefs, and agreed to let the circuit court decide the case based on the record, in lieu of a formal trial. The circuit court found that

> it was proper for the Department of Parks to believe Ms. Bowlin had the authority to make the offer she made as is clear from the [July 2001] correspondence. There is no ambiguity regarding the intent of the conveyance and the offer of that conveyance to the Department of Parks. This Court agrees with the argument of the Department of Parks that while KRS 67.080 and KRs[sic] 67.0802 provide Fiscal Court with the authority to convey property, it is not exclusive authority. Ms. Bowlin, after consulting with the head of the Department of Public Works, offered the property and said offer was accepted. Thus, the property should be conveyed to the Department of Parks per the agreement.

We will set forth additional facts as necessary when analyzing the issues raised by the parties.

STANDARD OF REVIEW

The interpretation and legal effect of a contract is a matter of law. *Bank One, Pikeville, v. Com., Natural Resources & Environmental Protection Cabinet*, 901 S.W.2d 52, 55 (Ky. App. 1995), and *Morganfield Nat'l. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). Construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court. *First Com. Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000).

ANALYSIS

1. Existence of a Contract

The basic requirements of any contract are an offer and acceptance of that offer. *See General Steel Corp. v. Collins*, 196 S.W.3d 18, 21 (Ky. App. 2006). The Parks Department argues, and the circuit court found, that the Metro Government made an offer to donate the surplus property to the Parks Department and the Parks Department accepted that offer, resulting in an enforceable contract. Having reviewed the record, we disagree.

Assuming for the sake of argument that Bowlin had the authority to offer the surplus property to the Parks Department, the Parks Department never accepted that offer. In July 2001, Bowlin offered to the Parks Department a piece of surplus property that she thought included both the 1.466 acres and the .088 acres that had been sold to the adjoining landowner. In her August 11, 2004, fax, Bowlin advised Swatzyna that the parcel of land they discussed in 2001 was no

longer available because the .088 acres had been sold. With that fax, Bowlin altered and in essence revoked the July 2001 offer. *See Restatement of Contracts 2d §42* (1981), and *1 Williston on Contracts § 5:8* (4th ed. 2008). When the Parks Department stated that it was accepting the July 2001 offer on August 18, 2004, that offer no longer existed. Therefore, the acceptance by the Parks Department was not effective and no contract was formed.

Furthermore, in order for a contract to be formed, there must be a meeting of the minds. *Cuppy v. General Acc. Fire & Life Assur. Corp*., 378 S.W.2d 629, 632 (Ky. 1964). As set forth above, there was no meeting of the minds. If Bowlin made a valid offer in July 2001, that offer included both the 1.466 acres and the .088 acres. On August 18, 2004, the Parks Department stated that it accepted the July 2001 "offer." However, that "offer" included property the Metro Government did not own. Furthermore, as set forth above, that "offer" had been revoked by Bowlin's August 11, 2004, fax. Therefore, the parties never came to terms regarding the extent of the property "offered" or "accepted" and no contract was formed.

2. Agency of Bowlin

Bowlin testified that she was not authorized to transfer property on behalf of the Metro Government. Furthermore, although she did not realize it at the time, Bowlin has since learned that any donation of property must be approved by the Metro Government. James Braun, the property and leasing director for the

Metro Government, testified that only the mayor can authorize the purchase or sale of property.

The Parks Department argues, and the trial court agreed, that Bowlin had the apparent authority to act on behalf of and bind the Metro Government. "Apparent authority . . . is not actual authority but is the authority the agent is held out by the principal as possessing. It is a matter of appearances on which third parties come to rely." *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky. App. 1990).

The only evidence the Parks Department has offered to support its claim that Bowlin had apparent authority to bind the Metro Government is the July 2001 letter and testimony from Swatzyna. We note that, in the July 2001 letter, Bowlin does not make reference to herself as making the offer or being able to bind the Metro Government. Rather, Bowlin refers to "we," and states that "we will proceed with dedication upon approval." Furthermore, Bowlin signed the letter in her capacity as "Property Acquisition Agent." That signature might reasonably lead a person to believe that Bowlin was authorized to acquire property; however, it would not lead to the conclusion that Bowlin was authorized to transfer or dispose of property. Finally, we note that Swatzyna testified that he asked Bowlin for assurance that the Metro Government was prepared to move forward with the transfer of the property. Therefore, even Swatzyna had some question regarding Bowlin's authority.

We are cognizant of the Parks Department's argument that a principal can be bound by an agent's actions that go beyond her stated authority. As noted by the Court in *American Nat. Red Cross v. Brandeis Machinery & Supply Co.,* 286 Ky. 665, 151 S.W.2d 445, 451 (1941), a third party can hold a principal liable if an agent, while acting within the sphere of authority, goes beyond her specific authority and the third party has no knowledge of the agent's limitations. However, this law offers no solace to the Parks Department because there is no proof that the principal, the Metro Government, held out that the agent, Bowlin, had any authority, let alone the authority to dispose of property. As the Courts of the Commonwealth have made clear, it is the principal who clothes an agent with authority, not the agent. Therefore, in the absence of evidence that the Metro Government did anything to clothe Bowlin with the apparent authority to dispose of property, the circuit court erred when it found that Bowlin could and did bind the Metro Government.

3. Authority to Transfer Property by the Metro Government

The Parks Department argues that the circuit court properly held that while Kentucky Revised Statutes (KRS) 67.080 and 67.0802[4] provide the Metro Government, through council, with the authority to convey property, that authority is not exclusive. According to the Parks Department, KRS 67.712 gives the mayor of the Metro Government the power to convey property. However, we need not address that issue. The Parks Department's argument fails for two reasons. First,

[4] Although the statutes in question refer to the "fiscal court," the parties agree that the statutes apply equally to the Metro Government.

as noted above, the Metro Government did not clothe Bowlin with the authority to dispose of the surplus property.

Second, even if the Parks Department is correct and Bowlin was clothed with the authority to dispose of the surplus property, the county was required to follow the mandates of KRS 67.0802 before it could convey the property. Specifically, there is no written determination that sets forth a full description of the surplus property. The July 2001 letter makes reference to a parcel of property. However, the letter specifically stated that there is no separate legal description for the property in question, does not specify the exact amount of the property, includes property that was already disposed of, and underestimates the amount of the property. The Parks Department's arguments to the contrary notwithstanding, the July 2001 letter does not fulfill the requirements of KRS 67.0802. Therefore, any disposition of the surplus property pursuant to the July 2001 letter would have been inappropriate.

4. Equitable Estoppel

The Parks Department argues that the Metro Government should be estopped from denying its promise to donate the 1.466 acres to the Parks Department. As noted above, the Metro Government made no such promise, therefore, this issue is moot. However, for the sake of completeness, we will briefly address it.

The elements of equitable estoppel are:

> (1) conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied on this conduct to his detriment.

Gray v. Jackson Purchase Production Credit Ass'n, 691 S.W.2d 904, 906 (Ky. App. 1985). The Parks Department argues that it paid for a survey and title search in reliance on Bowlin's assurance that the transfer of the property had been approved. However, taken in a light most favorable to the Parks Department, this overstates the evidence. Bowlin testified that she advised Swatzyna that he should not expend any money until he received verification in writing from her. Swatzyna testified that Bowlin said she was not "100 percent" certain the transfer would take place but that he should move forward with the survey and title search. If the Parks Department chose to move forward after Bowlin advised Swatzyna that she was not certain the transfer would take place, then it cannot complain when the transfer did not take place.

5. Gift

The Metro Government argues that if it intended anything, it intended to make a donation of or gift of the 1.466 acres to the Parks Department. As evidence of this intent, the Metro Government cites to Ms. Bowlin's statement in the July 2001 letter "that it is appropriate to donate" the property and the handwritten notation on that letter from Maggard referring to a "land donation" related to "Tom" Sawyer Park. Although we believe the analyses in sections one

through four above dispose of the issues raised on appeal, we will briefly address the Metro Government's argument.

In support of its argument, the Metro Government cites *Howell v. Herald*, 197 S.W.3d 505 (Ky. 2006). In *Howell,* the Supreme Court of Kentucky stated that, in order for an *inter vivos* gift to be valid;

> (a) [t]hat there must be a competent donor; (b) an intention on his part to make the gift; (c) a donee capable to take it; (d) the gift must be complete, with nothing left undone; (e) the property must be delivered and go into effect at once, and (f) the gift must be irrevocable.

Id. at 507 quoting *Gernert v. Liberty Nat. Bank & Trust Co. of Louisville*, 284 Ky. 575, 145 S.W.2d 522, 525 (1940). Judged by this standard, the Metro Government is correct that it made no gift of any property to the Parks Department, because there was no delivery of the property.

Furthermore, even if the Metro Government effectively promised to make a donation, such a promise is unenforceable unless accompanied by the donation. Until the donation is delivered, the promise to make that donation is revocable and, by selling the 1.466 acres to a private buyer, the Metro Government revoked any promise it may have made to donate the property. *See* Am. Jur. 2d *Gifts* § 21 (2008).

CONCLUSION

For the foregoing reasons, we reverse the circuit court, vacate its opinion and order, and remand this matter for entry of an order dismissing the Parks Department's complaint.

ALL CONCUR.

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BRIEF AND ORAL ARGUMENT
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