RENDERED: SEPTEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001415-MR

CHARLES AND GINA GARRETT — APPELLANTS

APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 06-CI-00236

THE LANCASTER AGENCY, INC.,
CHARLES LANCASTER, JR., AND
PHILIP LYVERS — APPELLEES

AND NO. 2008-CA-000099-MR
AND
NO. 2008-CA-000587-MR

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PHILIP[1] LYVERS APPELLEE

OPINION
AFFIRMING IN PART;
REVERSING IN PART; AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, NICKEL, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This opinion addresses three separate judgments rendered by the Marion Circuit Court as a result of the same civil action. Although we previously declined to consolidate the appeals, we have decided to render a single opinion because the issues in each appeal are based in a common nucleus of material facts. After providing the relevant factual and procedural history of the case, we will address each appeal in order.

FACTUAL AND PROCEDURAL HISTORY

On April 19, 2006, appellants, Charles and Gina Garrett signed an exclusive listing contract with The Lancaster Agency, Inc., through Charles Lancaster, Jr.—the owner and president of the corporation—for the absolute auction sale of 74.273 acres of land in Marion County, Kentucky. The terms of the exclusive listing contract provided that the property would be auctioned first in whole and later in individual tracts by the "pick-and-choose" method. The "pick-and-choose" method allows prospective buyers to bid price-per-acre values, and the highest bidder has the option of purchasing one or more tracts at that price. The bidding process is repeated until all tracts have been sold. According to the

[1] Notice of Appeal incorrectly spelled Philip as Phillip.

listing contract, the Garretts' land was to be sold according to the results of whichever auction method realized more money. At Lancaster's deposition, he stated that the average price of undeveloped farm land in Marion County is between $1500 and $2500 per acre.

In preparation for the auction, the Garretts commissioned a survey of the property. The surveyor divided the land into seven tracts and composed a plat of the property to be displayed and distributed at the time of the auction. The surveyor subdivided the property into six large tracts ranging from 6.6685 acres to 19.1219 acres, and one smaller .7198 acre tract, which was labeled "Lot 7 - Right of Way." Lot 7 contained only a short access road, which the surveyor indicated on the map to be a private extension of "Old Shipp County Road," which extended to the border of the property.

The Garretts also drafted and signed a document titled "Private Road Maintenance Agreement" (PRMA) on June 23, 2006. The PRMA purported to establish a private road on Lot 7 (as an extension of Old Shipp County Road) and to "impose . . . covenants and stipulations on the properties adjoining the private road[.]" The language of the PRMA achieves two primary goals: (1) to ensure that owners of the multiple tracts of land would equally share the cost of maintaining Lot 7; and (2) to ensure that the owners of each tract should "have the absolute right to use and privilege of such roadway, free and clear of any and all fences, gates or other encumbrances which by their construction and installation

would prevent or otherwise hinder free and easy passage." The PRMA does not purport to transfer title from the Garretts to the prospective owners of the tracts.

The auction was held on June 24, 2006. Prior to the auction, Phillip Lyvers approached Lancaster and informed him that what was indicated to be "Old Shipp County Road" on the surveyors' plat was in fact not a public roadway. This was based upon the survey Lyvers had commissioned for a previous lawsuit. Believing he had a duty to disclose information material the value of the land and believing Lyvers' claim to have been made in good faith, Lancaster immediately announced to the prospective buyers that "it ha[s] been brought to our attention that [Old Shipp County Road] is not a county road." At the time he made this statement, Lancaster was unsure of the legal status of the road because he had been presented with two conflicting surveys. At the time of this appeal, the issue whether this roadway is public or private is still contested by the parties. Because Old Shipp County Road is the only means of access to the Garretts' property, its status as a public roadway or as private property (which is owned by someone other than the Garretts') is material to the value of the property.

At the auction, the land was first offered for sale in whole. Lyvers was the highest bidder at $55,000. The land was then offered in parcels according to the "pick-and-choose" method. Lots 1 – 6 were offered for sale and Lot 7 (containing the access road) was not. Lyvers was again the highest bidder with an offer of $1600 per acre. He chose to purchase two of the six tracts for sale at that price. In the next round of bidding, Lyvers was yet again the highest bidder, and

bought the remaining four tracts of land for $700 per acre. Following the auction, Lyvers and the Garrets signed an Auction Purchase Agreement (Agreement) in which they agreed to close on the property on July 24, 2006. The total purchase price for Lots 1- 6 was $71,441.77, or just under $962 per acre. The Agreement makes no reference either to Lot 7 or to the PRMA.

Prior to the closing date, but after Lyvers had paid the Lancaster Agency in full, the Garretts refused to transfer the property, and filed suit in Marion Circuit Court. The Garretts' amended complaint and second amended complaint together contain the following five claims: (1) that the auction contract was void because the Garretts were not fully informed of the "pick-and-choose" auction process, thus preventing a meeting of the minds; (2) that Lancaster was negligent in announcing to the crowd at the auction that "Old Shipp County Road" was not a county road; (3) that Lyvers's discussion with Lancaster on the morning of the auction constituted tortious interference with a contract; (4) that Lyvers's statements regarding the legal status of the roadway constituted slander of title; and (5) that Lancaster was negligent in his management of the auction, and that he owed the Garretts a duty as established by administrative regulations. The fifth claim is merely a reiteration of the second claim with an additional basis for Garrett to claim that Lancaster owes them a duty as an auctioneer.

Lancaster and the Lancaster Agency filed a counter-claim against the Garretts for breach of the listing contract, by the terms of which they were entitled to $11,521.99 as a commission for the sale and as repayment for expenses incurred

during the listing process. Lyvers also filed a counter-claim against the Garretts for breach of the auction purchase contract. Lyvers demanded specific performance of the contract, attorney's fees, and interest on all money which he had transferred to Lancaster for the purchase of the property.

On May 18, 2007, Marion Circuit Court entered summary judgment in favor of Lancaster and the Lancaster Agency on both the claims against them and the counterclaims against the Garretts. This judgment is the subject of Appeal No. 2007-CA-001415.

On August 14, 2007, the trial court entered summary judgment in favor of Lyvers on both the claims against him and his counterclaims against the Garretts. Although this judgment refers to Lyvers's motion for summary judgment, it is clear that Lyvers did not file a written motion for summary judgment. This judgment is the subject of Appeal No. 2008-CA-000099.

After the above two summary judgments had been entered against the Garretts, they proposed to Lyvers to convey only Lots 1-6 to him because the auction purchase contract did not indicate that Lot 7 had been purchased. Lyvers moved the trial court to compel the Garretts to include Lot 7, the right of way tract, in the property which they conveyed to Lyvers. On February 21, the trial court ordered the Garretts to convey all seven lots to Lyvers. The court did not provide justification for conveying Lot 7, which was not sold during the pick-and-choose auction. The court also denied the Garretts' motion to compel Lyvers to pay the interest on mortgages that should have been paid in full after the closing of the

sale, but were not paid because of the court proceedings. This judgment is the subject of Appeal No. 2008-CA-000587.

Following a brief explanation of the standard of review, we will address each of these appeals in order.

STANDARD OF REVIEW ON SUMMARY JUDGMENT

The 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. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992). Rather, "[t]he record must be viewed in a light most favorable to the party opposing the motion for 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 only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W. at 480 (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor[.]" *Huddleston By and Through Lynch v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992).

With this standard in mind, we will deal with each summary judgment separately.

I. NO. 2007-CA-001415

The issue on this appeal is whether the trial court properly granted summary judgment in favor of Lancaster and the Lancaster Agency with regard to the Garretts' claims against them and their counterclaim against the Garretts. The Garretts have not reiterated the first claim in their complaint—that there was no meeting of the minds—and we will therefore not consider it on appeal.

The Garretts set forth a new claim on appeal, namely, that Lancaster and the Lancaster Agency were negligent *per se* for failing to sell Lot 7 during the pick-and-choose session of the auction. However, no similar claim was made at the trial level. It is outside the authority of the Court of Appeals "to review issues not raised in or decided by the trial court," *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989), so we will also not consider this issue on appeal.

The Garretts have preserved, however, their claim that Lancaster was negligent when he announced immediately prior to the auction that the access road to the property was not a county road. While the legal status of the road is still a matter of contention, we will assume for the purposes of this appeal that the road is in fact a county road because the standard of review dictates that we view disputed facts in the light most favorable to the party opposing summary judgment.

In order to sustain an action based on negligence, four elements must be proven. There must be a duty, the breach of that duty, damages and causation.

We find that Lancaster and the Lancaster Agency, as auctioneers, owed a fiduciary duty, and consequently a duty of ordinary care, to the Garretts as a matter of law. A fiduciary duty "is 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." *Steelvest*, 807 S.W.2d at 485. A fiduciary relationship exists between an auctioneer and a seller. 201 Kentucky Administrative Regulations (KAR) 11:121(4) (imposing on all licensed real estate agents, including auctioneers, the fiduciary duties of loyalty, obedience to lawful instructions, disclosure, confidentiality, reasonable care and diligence, and accounting); *See Chernick v. Fasig-Tipton Kentucky, Inc*., 703 S.W.2d 885 (Ky. App. 1986); *Becker v. Crabb*, 223 Ky. 549, 4 S.W.2d 370 (Ky. App. 1928). The duty owed by an auctioneer is one of ordinary care. *Chernick,* 703 S.W.2d at 889-90.

Next, viewing the record in the light most favorable to the Garretts' negligence claim, we find there is sufficient evidence to support a conclusion that Lancaster breached his duty of ordinary care on the day of the auction. A breach occurs when one acts in an objectively unreasonable manner when measured against a "reasonable man," who embodies "those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others." Restatement (Second) of Torts § 283 cmt. b (1965). "Normally, the jury is considered better

qualified than the court to determine what an ordinarily prudent person would do under given circumstances[.]" *Slusher v. Brown*, 323 S.W.2d 870, 872 (Ky. 1959). We find that the circumstances here, construed in favor of the Garretts, establish a significant possibility that a fact finder could determine Lancaster to have breached his fiduciary duty. Certainly, to assert in such a public manner a material change in the attributes of real estate on the morning of its auction, on the advice of a prospective bidder, and without consulting the sellers does not demonstrate a high level of attention, knowledge, intelligence, and good judgment. As a normative matter, we find—and believe that a jury is also likely to find—that it would be better for auctioneers to act with more prudence, especially considering the low cost, in terms of time and money, of preventing such a breach.

Third, given our procedural posture towards this summary judgment, we are of the opinion that there exists a sufficiently substantial likelihood that the Garretts suffered damages in this case. By the admission of Lancaster himself, the property sold for a price per acre that was between 38 percent and 64 percent of the expected market price of similar property in the same county. We have not been provided with any alternative reason for the price the Garretts realized for their property to have been significantly less than similarly situated property. Summary judgment, therefore, would be inappropriate.

Fourth, there is sufficiently substantial likelihood that the damages incurred by the Garretts, in the form of the decreased price per acre obtained at auction, was caused by Lancaster's statement immediately prior to the sale. We do

not think it is clear from the record that Garretts could not have established the statement to have been the proximate and but-for cause of the reduced sale price, and believe that the issue merits a factual inquiry. If there were other prospective bidders at the sale who decided not to bid because they believed the legal status of the road would make the property unreachable, as the Garretts have claimed, such evidence can be easily discovered and should be heard.

Thus, we believe that summary judgment with respect to this claim of negligence was not appropriate because there are disputed material issues of fact and because the Garretts have a substantially sufficient likelihood of prevailing at trial. Accordingly, we REVERSE the summary judgment in favor of Lancaster with regard only to the negligence claim, and AFFIRM the summary judgment with regard to the Garretts' other claims against Lancaster. We also REVERSE the summary judgment in favor of Lancaster with regard to his counterclaim, and REMAND the case to the Marion Circuit Court for further proceedings in accordance with our holding.

II. NO. 2008-CA-000099

There are three issue on this appeal. The first is whether specific performance of the contract was an inappropriate remedy as a matter of equity because the contract is "tainted with foul play." The second is whether there was a procedural defect in the summary judgment because no written motion was submitted by Lyvers. The third is whether the court appropriately granted

summary judgment in favor of Lyvers with regard to the Garretts' claims against him and his counterclaim against the Garretts.

With regard to the first issue, we have been presented with no reason that specific performance should not have been granted. If Lyvers were in fact entitled to summary judgment, this would conclusively establish that there had been no actionable inequities in the conception of the Auction Purchase Agreement. Thus, we will not address this issue.

With regard to the second issue, we first note that no motion for summary judgment was evident in the record, either in writing or at a hearing . Lyvers asserts, without citation to the record, that he made an oral motion for summary judgment at a May 14, 2007 hearing, regarding the motion for summary judgment submitted by Lancaster. After reviewing the tape of the hearing, we find that no motion was made during the hearing, but that the trial court and all the parties proceeded as if one had been made or as if the motion made by the Lancaster Agency was applicable to Lyvers as well.

In the order and summary judgment entered May 18, 2007, in favor of Lancaster, the trial court stated "[t]hat the Motion of Defendant, Philip Lyvers, for Summary Judgment, shall stand submitted for decision by the Court[.]" Later, at a June 18, 2007 hearing, regarding the Garretts' motion to vacate the summary judgment in favor of Lancaster, the trial court asked counsel for both the Garretts and Lyvers if there were anything else to consider regarding the issue of slander of title. Both responded in the negative. Although the Garretts were given notice that

their claims against Lyvers were subject to a ruling for summary judgment, we find that they were not afforded due process and that the summary judgment entered against them was made in error.

A trial court's dismissal of a plaintiff's claims against the defendant, *sua sponte,* is highly discouraged but is permissible where there is no undue prejudice to the plaintiff. *Fourroux v. City of Shepherdsville,* 148 S.W.3d 303 (Ky. App. 2004). Whether the trial court's actions resulted in undue prejudice against the plaintiff depends upon whether the court has afforded the plaintiff certain due process rights by:

> (1) allow[ing] service of the complaint upon the defendant; (2) notif[ing] all parties of its intent to dismiss the complaint; (3) giv[ing] the plaintiff a chance to either amend his complaint or respond to the reasons stated by the [trial] court in its notice of intended *sua sponte* dismissal; (4) giv[ing] the defendant a chance to respond or file an answer or motions; and (5) if the claim is dismissed, stat[ing] its reasons for the dismissal.

Storer Communications of Jefferson County, Inc. v. Oldham County Board of Education, 850 S.W.2d 340, 341 (Ky. App. 1993) (*citing Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App.1987)).

In *Storer*, this Court outlined another line of cases which allow *sua sponte* summary judgment. However, we made clear that this is an incredibly narrow judicial prerogative and that:

> this authority is limited to those situations where [(1)] a motion for summary judgment has been made by some party to the action, [(2)] the judge has 'all of the pertinent issues before him at the time the case is submitted,'

> [*Green v. Bourbon County Joint Planning Com'n*, 637 S.W.2d 626, 630 (Ky. 1982)] and [(3)] 'where overruling the [movant's] motion for summary judgment *necessarily would require* a determination that the [non-moving party was] entitled to the relief asked.' [*Collins v. Duff*, 283 S.W.2d 179, 183 (Ky. 1955) (Emphasis added)].

Storer, 850 S.W.2d at 342.

We note first that the ruling of the trial court with regard to Lancaster and the Lancaster Agency's motion for summary judgment would not *necessarily require* a determination that Lyvers was entitled to summary judgment. Lancaster's negligence or lack thereof does not control the outcome of the claims made against the Lyvers. Thus, there is no justification for this summary judgment in the *Green* and *Collins* line of cases.

Furthermore, we find that the trial court provided insufficient notice of its intent to enter summary judgment against the Garretts, and failed to provide the due process guarantees outlined in the *Gall* case. Specifically, according to *Gall*, the trial court must express not that it is *considering* ruling against the plaintiffs, but that it *intends* to do so. Not only must the trial court divulge its intent, it must also divulge its reasoning and provide the parties with an opportunity to respond. None of those protections were provided here.

Because the summary judgment against the Garretts and in favor of Lyvers was procedurally defective, we REVERSE and REMAND this case to Marion Circuit Court. We do not reach the issue of whether the summary

judgment was substantively appropriate as it is not appropriately before us on the merits.

III. NO. 2008-CA-000587

The issues in this appeal are: (1) whether the trial court erred when it ordered plaintiffs to transfer Lot 7 of the property even though the property was not sold at auction; and (2) whether the trial court erred when it denied the Garretts' motion to compel Lyvers to pay the interest on mortgages that the Garretts would have paid full following the auction sale.

Because the proper disposition of the property involved is now contingent upon further litigation on remand in cases 2008-CA-000099 and 2008-CA-000587, we decline to address the issues raised in this case. We REVERSE and REMAND pending further proceedings in the previous two cases.

ALL CONCUR.

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