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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002122-MR

BETSY WILSON REALTY, INC.;
BETSY WILSON; AND
TONY WILSON

APPELLANTS

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 07-CI-00133

LINDA GREEN

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: This appeal arises out of a dispute over a real estate sales commission. A jury awarded Linda Green (Green), \$30,676.00 in compensatory and punitive damages. Betsy Wilson (Betsy), Betsy Wilson Realty (Wilson

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 KRS 21.580.

Realty), and Tony Wilson (Tony), appeal from the trial court's judgment in that amount. On appeal, the appellants argue that the trial court erred by not granting their motions for summary judgment, for directed verdict, and for judgment notwithstanding the verdict. The appellants also argue that the jury instructions were faulty. For the following reasons, we affirm in part, vacate in part, and remand.

FACTS

In 1998, Green, as agent for Wilson Realty, entered into an "Exclusive Right to Sell" agreement (the Right to Sell Agreement), with Randall Pyles (Pyles), d/b/a Boyle Land Development to sell lots in the Colonial Heights subdivision of Danville, Kentucky. The parties extended the Right to Sell Agreement a number of times, last doing so to cover the 2006 calendar year.² While operating under the Right to Sell Agreement, Wilson Realty, as the broker, received a commission. Wilson Realty then paid a portion of that commission to Green based on a formula set forth in Wilson Realty's policy manual.

In October 2006, Pyles and his brother Joe, who was a partner in Boyle Land Development, met with Betsy and stated that they wanted to sell the remaining lots at public auction. Because of health problems and other factors, the brothers indicated that they wanted the auction and all closings to take place by the end of the year. Betsy referred the brothers to Tony, who is a licensed auctioneer.

² There was some testimony that Pyles may not have signed the final extension of the Right to Sell Agreement. Pyles testified that he could not remember if he signed that agreement. However, he testified that the issue was irrelevant to him because he considered Wilson Realty to be the exclusive broker of the property and acted accordingly.

Tony met with the brothers, and they entered into an auction agreement (the Auction Agreement), which provided for payment of a five percent commission to Wilson Realty from the proceeds of the auction. We note that neither the policy manual nor the auction agreement provide for payment of any portion of the commission to the listing agent or to the auctioneer. However, all parties testified that commissions from public auctions were traditionally split one-third to Tony, one-third to Wilson Realty, and one-third to the listing agent.

The auction, which Tony admitted was the largest he had ever undertaken, was scheduled for November 11, 2006. Because Green had a trip planned for November 14th through November 28th, and would not be available to work immediately following the auction, Tony advised Green that she would only be paid one-sixth of any commission, rather than the traditional one-third. Green testified she believed this was unfair and asked Tony if she could get someone to cover for her during her vacation and thereby receive the customary one-third. Tony advised Green that was not acceptable and the conversation ended at that. Despite her dissatisfaction with the proposed arrangement, Green helped with pre-auction preparations: making telephone calls, gathering documents, arranging for mowing and clearing of the property, and passing out fliers.

Less than one week before the auction, Green's husband told some friends that Tony and Wilson Realty were cutting Green's commission. Another Wilson Realty agent told Betsy that Green's husband was disparaging the Wilsons and Wilson Realty. Betsy told Tony who then called Green into the office where

he berated her for an extended period of time. Ultimately, Tony advised Green that she would not get a “damn dime” in commission from the auction and Betsy told Green that she should leave the agency.

The auction took place and the property sold for a total of \$920,300. Betsy testified that Wilson Realty incurred a total of \$16,705.32 in expenses, which was taken out of the commission prior to distribution of the remainder to Wilson Realty and Tony. Those expenses included a fee to Century 21 and payment to Betsy’s daughter for her work putting together pre-auction packets and assisting with post-auction closings. Green did not receive any portion of the commission or any remuneration related to the auction.

On March 7, 2007, Green filed a complaint alleging that the appellants, by entering into the Auction Agreement, breached the Right to Sell Agreement; that the appellants breached the Auction Agreement; that the appellants interfered with the contractual relationship between Green and Pyles; that Green relied to her detriment on the appellants’ misrepresentations that she would receive one-third of the commission from the auction; that the appellants converted Green’s share of the commission; and that Betsy breached her fiduciary duty to obtain and pay a commission to Green. In addition to compensatory damages, Green asked for punitive damages.

On July 17, 2007, the appellants filed a motion for summary judgment arguing that the Right to Sell and Auction Agreements were between Pyles and Betsy, Tony, or Wilson Realty, not Green. The appellants argued that any claims

arising under any contract theories were not viable and that, because Green did not have a written contract with anyone regarding entitlement to commissions, her contract claims were barred by the Statute of Frauds. Finally, the appellants argued that Wilson Realty and Betsy owed no fiduciary duty to Green and that they could not convert a commission to which Green was not entitled. Finding that issues of material fact existed as to all counts of the complaint, the court denied the appellants' motion.

The parties tried this matter to a jury on August 28 and 29, 2008. After Green presented her case, the appellants moved for a directed verdict, making essentially the same arguments they made in their motion for summary judgment. The court found that, once the agency entered into the Right to Sell Agreement with Pyles, Green had an expectation of payment that flowed from that Agreement. Because Green was an independent contractor working through Wilson Realty, she also had an expectation of payment based on that contractual relationship. As to interference with a contract, the court stated that the issue was whether Tony's decision to alter prior practice and reduce Green's share of the auction commission interfered with her reasonable expectation of payment equal to one-third of that commission. Furthermore, the court stated that once Tony indicated he was reducing the amount payable to Green, Green had a reasonable expectation of receipt of at least that amount and Tony's unilateral decision to pay nothing interfered with that contract. The court also indicated that, if the jury found that Green was entitled to a commission, then the retention of Green's

commission by the appellants would amount to conversion. Finally, the court stated that evidence would support a finding that Wilson Realty and Betsy stood in a fiduciary relationship *vis à vis* Green with regard to payment of commissions.

Following the presentation of proof, the jury returned a verdict for Green on all counts awarding compensatory damages of \$15,338.39 and punitive damages of \$15,338.39. The appellants timely filed a motion for judgment notwithstanding the verdict arguing, in large part, what they previously argued in their motions for summary judgment and for directed verdict. Additionally, the appellants argued that fraud, unjust enrichment, and breach of fiduciary duty instructions should not have been submitted to the jury. The court overruled the appellants' motion and this appeal followed.

Distilled to their essence, the appellants' arguments revolve around three basic issues: (1) whether Green had any contractual entitlement to a commission; (2) whether Wilson Realty and/or Betsy owed Green any fiduciary duty; and (3) whether the court's jury instructions were fatally flawed. We will address each issue and their attendant sub-issues in turn, setting forth additional facts as necessary.

STANDARD OF REVIEW

Because we apply different standards of review to the various issues raised by the appellants, we will set forth those standards as we address each issue.

ANALYSIS

As noted above, the primary issue raised by the appellants, from which the majority of sub-issues flow, is: whether Green had a contract in writing that entitled her to receive a real estate commission. We disagree with the appellants' arguments on that issue and hold that Green had a contract sufficient to support her claim.

A. Existence of a Contract

We begin our analysis by examining whether Green had an exclusive right to sell contract. The interpretation and legal effect of a contract is a matter of law. *Bank One, Pikeville v. Commonwealth of Kentucky, Natural Resources and 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 Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000).

With the preceding in mind, we note that a contract, to be enforceable, need not necessarily be in writing. A contract can be implied in fact if there is evidence of facts and circumstances from which a meeting of the minds concerning mutual promises may be deduced. *Perkins v. Daugherty*, 722 S.W.2d 907, 909 (Ky. App. 1987); *see also Rider v. Combs*, 256 S.W.2d 749, 750 (Ky. 1953). However, based on KRS 371.010(8) (the statute of frauds) a "contract for any commission or compensation for the sale or lease of any real estate or for assisting another in the sale or lease of any real estate" must be in writing to be enforceable

against “a party to be charged therewith.” We will first address whether Green had a contract, then we will address whether that contract was required to be in writing.

The appellants first argue that Green, as a real estate agent, could only enter into a Right to Sell Agreement on behalf of her broker, Betsy and/or Wilson Realty. She could not enter into a sales contract in her own right. The appellants point to the definitions of a real estate agent and broker in the Kentucky Revised Statutes (KRS) as supporting this argument. They cite to no specific statutory provisions prohibiting Green from entering into such an agreement although the statutes certainly imply that is the case. That being said, we note that KRS 324.121(1) provides that a principal broker, such as Wilson Realty:

may designate one (1) or more affiliated licensees to act as agent for a seller . . . to the exclusion of all other licensees affiliated with the principal broker The designation procedure shall be made in writing and communicated to all licensees affiliated with the principal broker. . . . The designated agent shall inform and obtain the consent of the seller . . . to the designation. The principal broker shall not designate himself or herself as a designated agent.

The uncontested evidence is that Green entered into and signed the Right to Sell Agreement on behalf of Wilson Realty. She placed her name on page one of the Agreement as the “listing broker” because that is how Wilson Realty kept track of who the listing agents were. Pyles was aware that Green would be the listing agent and that Wilson Realty would be the listing broker, as evidenced by his signature on the Right to Sell Agreement. The Wilson Realty policy manual provided for compensation of agents based on their status as listing agent and/or

selling agent. Throughout the nearly nine years the Right to Sell Agreement was in effect, Green received payment based on her status as listing agent for each of Pyles's lots that sold. She received these payments regardless of what, if any, actions she took to forward a sale and there was no evidence that any other Wilson Realty agent received similar payments.

Contrary to the appellants' arguments, Green's contract was not with Pyles, but with Wilson Realty. Furthermore, the contract was not for a "commission" but, as set forth in the policy manual, for "Salesman's Compensation . . . based on collected sales commission only." The fact that Green's compensation was calculated as a percentage of the commission collected by Wilson Realty does not alter the fact that the payment due her was compensation from Wilson Realty for obtaining the listing, not a commission. Additional evidence that the payment due to Green was not a commission can be found in the policy manual's prohibition against agents taking any legal action to recover commissions owed. The preceding evidence establishes that Green had a contract with Wilson Realty as exclusive listing agent and was entitled to compensation accordingly. Therefore, the trial court correctly denied the appellants' dispositive motions on this issue and the jury's decision on this issue was supported by the evidence.

The appellants also argue that Green was not entitled to any commission based on the Auction Agreement because she was not a party to that Agreement. We agree that Green was not a party to the Auction Agreement and

that she, therefore, did not have any right to a commission pursuant to that Agreement. However, that is not to say that Green did not have a contract that entitled her to compensation. The parties do not dispute that, prior to this auction, listing agents received one-third of any auction related commission received by Wilson Realty, after the deduction of expenses. The appellants characterized this payment at trial as representing largesse on the part of Wilson Realty and/or as compensation to a listing agent for work performed pre and post auction. They argued at trial and herein that the policy manual did not cover auctions and that the provision for compensation to listing agents in that manual did not apply.

A review of the policy manual reveals that it sets “forth the basic rules and general guides to be followed in the day-to-day operation of” Wilson Realty & Auction Co. The manual is silent regarding auctions and, notably, the portion of the manual discussing compensation for listing agents does not exclude commissions received from auctions. A reasonable interpretation of the manual, in conjunction with the practice of Wilson Realty, is that a listing agent is entitled to compensation equal to one-third of the commission Wilson Realty receives from an auction. Furthermore, even if the policy manual did not create an obligation to pay Green one-third of the Wilson Realty’s commission from the auction, Tony’s statement to Green that she would be paid one-sixth of the commission obligated Wilson Realty to pay Green. Therefore, the trial court correctly denied the appellants’ dispositive motions regarding the Auction Agreement, and the jury’s decision on this issue was supported by the evidence.

Based on the preceding determination that Green's entitlement to payment flowed from her relationship with Wilson Realty, not her relationship with Pyles, the appellants' statute of frauds argument is without merit. The statute of frauds is a defense that can be asserted by the one to be charged under an alleged contract. In this instance, the one to be charged under the Right to Sell Agreement was Pyles and the defense of the statute of frauds was personal to him. *Niagara Fire Ins. Co. v. Layne*, 162 Ky. 665, 172 S.W. 1090, 1094 (1915). Certainly, Pyles could have asserted the statute of frauds as a defense if Green had attempted to collect a commission from him. However, that is not what Green did. She sought to collect compensation from Wilson Realty. That compensation, while calculated based on the commission Wilson Realty received, was not a commission. Therefore, Wilson Realty was not entitled to assert the statute of frauds as a defense, and the trial court correctly denied the appellants' dispositive motions on this issue.

In summary, Green had, at a minimum, an implied-in-fact contract to act as exclusive listing agent for the property in question. Additionally, Green had an implied-in-fact contract entitling her to receive at least one-sixth of the commission Wilson Realty received from the auction proceeds. We next address the contract related sub-issues raised by the appellants.

1. Unjust Enrichment

The appellants argue that, absent a written contract, Green cannot assert a claim for unjust enrichment. In support of their position, the appellants

cite to *Louisville Trust Co. v. Monsky*, 444 S.W.2d 120 (Ky. 1969). In *Monsky*, the Court held that, absent a signed agreement sufficient to satisfy the statute of frauds, a real estate broker cannot recover a commission from a seller in *quantum meruit*. *Id.* at 121-22. *Monsky* is neither dispositive nor persuasive because Green is not a broker, and she did not attempt to recover a commission from Pyles. She merely attempted to recover compensation that was due her from Wilson Realty, her broker. Thus, we are not persuaded by the appellants' argument and find no error in the court's denial of the appellants' dispositive motions on this issue.

2. Intentional/Fraudulent Misrepresentation

As with their unjust enrichment argument, the appellants argue that, based on the statute of frauds, Green could not rely on oral representations made by Tony or Betsy to support her claim to a commission. Because we have previously determined that Green was not seeking a commission, there was no need for a written contract. Therefore, the appellants' reliance on the preceding argument is misplaced.

Although it does not arise from their contract arguments, the appellants also argue that Green's claim of intentional/fraudulent misrepresentation was not supported by the evidence. We agree. Green's intentional/fraudulent misrepresentation claim arose from her allegations that the appellants falsely promised to pay her one-third of the commission from the auction and that she relied on that promise to her detriment.

In order to succeed in her claim for intentional/fraudulent misrepresentation, Green was required to prove that: (1) the appellants made a material representation that they knew to be false or that they made recklessly in order to induce Green to take some action; (2) Green then took action in reliance on the representation; and (3) Green suffered injury. *Yeager v. McLellan*, 177 S.W.3d 807, 809-10 (Ky. 2005). Green put before the jury evidence that the appellants, through their past actions and the policy manual, represented to her that she would receive one-third of the auction proceeds. Green also put before the jury evidence that Tony represented to her that, because she was going on vacation, she would only be paid one-sixth of the auction proceeds. Green testified that she then took actions to promote the auction and to assist with preparing for the auction but received none of the proceeds. However, Green failed to put on any evidence indicating that, when the appellants made the representations regarding payment from the auction proceeds, they did so recklessly or falsely. In fact, the evidence establishes that, until Green's husband disparaged Tony, Betsy, and Wilson Realty, the appellants intended to pay Green compensation of at least half the regular rate. Because Green did not prove that the appellants' statements about compensation were false when made or recklessly made, the trial court should have granted appellants' motion for a directed verdict on that issue. Furthermore, because there was no evidence to support Green's claim of intentional/fraudulent misrepresentation, the court erred when it instructed the jury on that issue.

3. Conversion

Green alleged that appellants, by retaining all of the commission from the auction, converted that portion of the commission due to her. The appellants argue that Green had no written agreement entitling her to a commission; therefore, the appellants could not have converted any portion of the commission. As we have held that Green was not paid a commission, a written contract was not necessary, and appellants' argument is not persuasive. Therefore, we discern no error in the trial court's denial of the appellants' dispositive motions on this issue or in the jury's decision.

We next address whether the appellants had a fiduciary duty to Green.

B. Fiduciary Duty

[B]ecause the circumstances which may create a fiduciary relationship are so varied, it is extremely difficult, if not impossible, to formulate a comprehensive definition of it that would fully and adequately embrace all cases. Nevertheless, as a general rule, we can conclude that such a relationship 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, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 485 (Ky. 1991).

Green alleged, and the jury found, that Betsy had a fiduciary duty to collect commissions and distribute the proceeds from those commissions to her agents. Green further alleged that Betsy breached that duty by retaining the portion of the commission she owed to Green. The appellants argue that, because

there was no contract between them and Green, they had no duty to Green. We disagree.

As we held above, Green had, at a minimum, an implied contract as exclusive listing agent with Wilson Realty and Betsy that entitled her to one-third of the commission from the auction. She also had an explicit contract to receive at least one-sixth of the commission from the auction. At trial, Betsy testified that, as broker, she was the only person entitled to receive a commission. The policy manual provides that only Wilson Realty, not individual agents, may sue to recover commissions. Because Betsy, when she collects commissions, acts not only for herself and Wilson Realty but also on behalf of her agents, she has a duty to act with integrity and fidelity. Based on the preceding, we hold that Betsy and Wilson Realty had a fiduciary duty to Green. We discern no error in the trial court's denial of the appellants' dispositive motions regarding this issue. Furthermore, we hold that the evidence was sufficient to support the jury's finding that Betsy and/or Wilson Realty breached that duty when she refused to compensate Green pursuant to either the implied-in-fact contract or the explicit contract.

C. Jury Instructions

Alleged errors regarding jury instructions are questions of law and must be examined using a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). When examining jury instructions for error, we must read the instructions as a whole. *Bills v. Commonwealth*, 851 S.W.2d 466, 471 (Ky. 1993).

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Kentucky Rules of Civil Procedure (CR) Rule 51.

Appellants argue three errors with regard to the court's jury instructions. First, appellants argue that the court erred when it failed to instruct the jury to subtract expenses associated with the auction before determining damages. The appellants note Betsy testified that, pursuant to the Auction Agreement, Wilson Realty assumed certain expenses related to the auction. Wilson Realty then deducted those expenses from the commission it received before paying itself or Tony. Based on a total sales amount of \$920,300.00, the commission earned was \$46,015.00. Betsy testified that Wilson Realty incurred expenses in the amount of \$16,705.32, leaving \$29,309.68 for distribution. The jury instructions stated that the jurors should "determine from the evidence, and award to the Plaintiff, a sum of money that will fairly and reasonably compensate the Plaintiff for damages resulting from your findings, not to exceed the sum of one-third (1/3) of the commission of the auction." This instruction does not parrot the damage instructions offered by the appellants. However, the instructions offered by the appellants measured damages as an amount "not to exceed 1/3 of the Commission earned from the auction contract." None of the appellants' proffered damage instructions indicated that the jurors should first deduct expenses before

calculating damages, although counsel argued as much to the jury. The appellants' failure to offer an instruction regarding deduction of expenses and failure to object to the instructions as submitted to the jury forecloses them from raising that issue on appeal.

Second, the appellants argue that the court improperly answered three questions the jurors asked about the damages instruction during deliberations. The first question was whether they were required to put a dollar amount in their finding of damages. The second was what amount of commission they were required to use in determining damages. The third was whether they could consider \$33,309.68 as commission rather than \$29,308.68. As to the first question, the court advised the jurors that they were required to put a dollar amount in their finding of damages, if they believed that damages were due. As to the second and third questions, the court stated that the jurors could determine what amount of damages was the correct amount. Neither counsel objected to the court's answers to the jury, and the jury awarded \$15,338.33, which is one-third of the total amount of commission. Because counsel for the appellants did not object to the court's responses to the juror's questions, that issue is not preserved for our review, and we will not address it further.

Third, the appellants argue that there was no evidence of fraud; therefore, the issue of punitive damages should not have been presented to the jury. The mere fact that an act is intentional or reckless does not justify punitive damages absent a finding that the defendant's conduct amounted to fraud,

oppression, malice, or gross negligence. *Banks v. Fritsch*, 39 S.W.3d 474, 480 (Ky. App. 2001). Because we have held that there was no fraudulent misrepresentation and Green did not assert a negligence claim, her entitlement to punitive damages must rest on oppression or malice.

The trial court appropriately defined oppression and malice in its jury instructions, but also included the definition of fraud. Therefore, it is unclear whether the jurors awarded punitive damages based on their finding of fraud or because they believed the appellants acted oppressively or with malice. Because we have determined that the issue of fraud should not have been submitted to the jury, the instructions on punitive damages and the jury's findings on that issue are faulty. Therefore, we remand this matter to the trial court with instructions that, if a new trial is held, the jury should not consider fraud and fraud should not be included in any punitive damage instructions.

CONCLUSION

In summary, the trial court erred when it submitted the issue of intentional/fraudulent misrepresentation to the jury. Furthermore, the trial court erred when it included fraud as a basis for an award of punitive damages. We discern no other errors. Based on the preceding, the punitive damage portion of the judgment is vacated and this matter is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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