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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001796-MR

J. STAN DEVELOPMENTS, LLC
AND J. STAN MINNIC, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 05-CI-010917

MICHAEL LINDO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellants, J. Stan Minnic, individually ("Minnic") and J. Stan Developments, LLC ("J. Stan"), appeal from a judgment of the Jefferson Circuit Court awarding Appellee, Michael Lindo, $70,000 in damages as well as

[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 Kentucky Revised Statute 21.580.

$28,675.42 in attorney fees. The judgment was entered after a jury found Minnic and J. Stan joint and severally liable to Lindo in this joint venture/security agreement action. Finding no error, we affirm.

Minnic is the sole member of J. Stan as well as another company, Minnic Homes, LLC. In May 2003, Lindo entered into a joint venture agreement with Minnic and J. Stan, whereby Lindo invested $232,400 for a project called "The Meadows of the Polo Fields" located in Jefferson County. According to Lindo, Minnic stated that he would use the investment to purchase and develop the property in question for the purpose of building residential homes on it. The parties agreed that Lindo, who had no expertise in the area of real estate development, would act solely as an investor while Minnic and J. Stan would manage all project operations. It is undisputed that the joint venture agreement was not registered with the State of Kentucky or the Kentucky Division of Securities.

Several months into the project, Lindo began having difficulty contacting Minnic or acquiring any information about the status of the development. In fact, Minnic had been sued by the owners of the Polo Fields for repeated failures and breach of the terms and conditions of the purchase agreement. Minnic eventually settled the claim by giving up all interest in the property. However, Minnic did not inform Lindo about the lawsuit until after it was settled and all rights to the property were relinquished. Lindo additionally discovered that

contrary to Minnic's claims, Minnic had no expertise or experience in developing property or constructing residential homes.

In December 2005, Lindo filed a civil action in the Jefferson Circuit Court against Minnic, individually, and J. Stan seeking damages for violations of Kentucky's Blue Sky Laws, KRS Chapter 292 et seq., for securities fraud, gross negligence, breach of fiduciary duty, and breach of contract. Following a trial in November 2007, the jury returned a verdict in favor of Lindo against Minnic and J. Stan in the amount of $70,000[2]. Further, because the trial court had previously determined that as a matter of law the joint venture agreement constituted the sale of a security, the trial court awarded Lindo $28,675.42 in attorney's fees pursuant to KRS 292.480. Following the denial of a motion for judgment notwithstanding the verdict or new trial, Minnic and J. Stan appealed to this Court as a matter of right.

This action was brought under Kentucky's Blue Sky Laws, Chapter KRS 292. The stated purpose of Chapter 292 is to "[p]rotect Kentucky investors by preventing investment fraud and related illegal conduct or, if this fraud or illegal conduct has already occured, remedying, where possible, the harm done to Kentucky investors through active implementation and application of this chapter's enforcement powers[.]" KRS 292.530(1). Essentially, Blue Sky Laws place upon the seller of a security a duty of full disclosure relevant to the issuance of the security. *Securities Exchange Commission v. W.J. Howey Company*, 328 U.S. 293,

[2] After the lawsuit was filed, Minnic returned approximately $69,323.66, for which he was given credit under KRS 292.480(1).

299, 66 S.Ct. 1100, 1103, 90 L.Ed. 1241 (1946). In other words, one cannot "promise the sky," and fail to disclose the pitfalls of the deal.

As previously noted, the trial court ruled that the joint venture agreement was a security within the purview of Chapter 292, and no appellate issue has been raised as to such ruling by either party. With regard to the sale of a security, KRS 292.320 provides, in relevant part:

> (1) It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> > (a) To employ any device, scheme, or artifice to defraud;
> >
> > (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
> >
> > (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

The jury herein concluded that in offering for sale the joint venture agreement, Minnic knowingly or recklessly made an untrue statement of material fact or omitted to state a material fact and, as a result, Lindo reasonably relied upon the statement or omission.

On appeal, Minnic first argues that he was entitled to a directed verdict because Lindo failed to properly plead or prove a cause of action against him individually under KRS 292.320. Minnic claims that Lindo's complaint only

imputed liability to Minnic as a "broker-dealer" of the security, and it was not until trial that he advanced the new theory of individual liability. We disagree.

Paragraph Six of Lindo's complaint states as follows:

> Minnic, individually, as a broker dealer, and in active concert with J. Stan Developments and Minnic Homes offered to sell, and sold, the Security by means of written and oral communications that included untrue statements of material fact, and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . . .

The complaint then enumerates six specific allegations of securities fraud under KRS 292.320. Lindo concedes in his brief that he was unable to prove that Minnic fell within the definition of a "broker-dealer" as set forth in KRS 292.310(2). Nevertheless, Lindo clearly pled and proved that Minnic acted in his individual capacity and in concert with J. Stan.

KRS 292.320 prohibits a "person" from selling a security through the use of untrue material statements and material omissions. "Person" is defined in KRS 292.310(14) to include an "individual." It is undisputed that Minnic is the individual who sold the security to Lindo and, in fact, as the trial court noted, was the only person involved in any of the entities at issue. *See generally Pinter v. Dahl*, 486 U.S. 622, 642-643, 108 S.Ct. 2063, 2076, 100 L.Ed.2d 658 (1988). We find Minnic's claim that he was unaware until the date of trial that Lindo was asserting a claim of individual liability disingenuous at best. It is clear from the pleadings herein, that in addition to asserting the claim in his complaint, Lindo

thoroughly discussed Minnic's individual liability in both his motion for summary judgment and his pretrial memorandum.

Next, Minnic claims that because J. Stan is a limited liability company, he is immune from individual liability pursuant to the provisions of Chapter 275. As such, Minnic argues that there must be a piercing of the corporate veil in order to impose individual liability. Again, we disagree.

Chapter 275 affords members of a limited liability company a significant measure of immunity from individual liability. In fact, KRS 275.150 provides:

> (1) Except as provided in subsection (2) of this section or as otherwise specifically set forth in other sections in this chapter, no member, manager, employee, or agent of a limited liability company, including a professional limited liability company, shall be personally liable by reason of being a member, manager, employee, or agent of the limited liability company, under a judgment, decree, or order of a court, agency, or tribunal of any type, or in any other manner, in this or any other state, or on any other basis, for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise. The status of a person as a member, manager, employee, or agent of a limited liability company, including a professional limited liability company, shall not subject the person to personal liability for the acts or omissions, including any negligence, wrongful act, or actionable misconduct, of any other member, manager, agent, or employee of the limited liability company.

Notwithstanding the above provision, KRS 292.320 makes it unlawful for "any person" to defraud another in connection with a security transaction. To interpret KRS 292.320 as requiring a piercing of the corporate veil before

individual liability can be imposed essentially renders the phrase "any person" meaningless. And it would require this Court to ignore the expansive definition of "person" set forth in KRS 292.310(14), which includes an individual, in addition to companies, corporations, partnerships, associations, organizations, and governments.

Statutes are to be read as a whole and construed so as to give effect to each word. *United States v. Branson*, 21 F.3d 113 (6th Cir. 1994), *cert. denied*, 513 U.S. 884 (1994). As observed by the Kentucky Supreme Court,

> When presented with a statutory conflict whereby one interpretation would render a portion of a statute meaningless and the other would harmonize and give effect to both provisions, rules of statutory construction require the interpretation that harmonizes the statutes and prevents a part of a statute from becoming meaningless or ineffectual.

Brooks v. Commonwealth, 217 S.W.3d 219 (Ky. 2007). To harmonize the statutes in question, the provisions of KRS 275.150 cannot afford individual immunity when KRS 292.320 specifically imposes individual liability for a violation of Kentucky's securities laws.

Further, although KRS 275.150 provides members of limited liability companies immunity for the acts or liability of the company, whether arising in contract, tort, or otherwise, as well as for the negligence, wrongful act, or actionable misconduct of any other member, notably absent from the statutory language is immunity for the member's own negligence or actionable misconduct. A similar interpretation is found in Restatement (2nd) of Agency wherein it is noted

that a shareholder is personally liable for a tort committed by him although he was acting for the corporation. *See Smith v. Isaacs*, 777 S.W.2d 912 (Ky. 1989). Indeed, even if KRS 275.150 provided Minnic immunity for the acts committed by J. Stan, he is nevertheless liable under KRS 292.320 for his individual participation in the joint venture agreement.

Minnic also argues that the jury instruction pertaining to individual liability was erroneous. Interrogatory No. 2 provided:

> Do you believe clearly and convincingly from the evidence that the Defendant, J. Stan Minnic in offering for sale the "security-joint venture agreement" knowingly or recklessly made an untrue statement of material fact, or, omitted to state a material fact, and, as a result, the Plaintiff reasonably relied upon the statement, or omission.

The above instruction was patterned after the language of KRS 292.320 and was consistent with the theory upon which the case was tried. Again, we find no merit in Minnic's claim that he was immune from individual liability. The instruction was proper.

Finally, Minnic and J. Stan argue that the trial court erred in denying the motion for a new trial based upon the health of trial counsel. Apparently, on the second day of trial, counsel was unknowingly suffering from a serious medical condition that led to his collapse in the courthouse immediately after closing arguments had concluded. In support of the motion for new trial, counsel attached his affidavit wherein he stated that his deteriorating medical condition prevented him from effectively representing his clients and addressing the critical evidence

that was presented on the last day of trial. In denying the motion, the trial court noted that "[o]ther than counsel's profuse perspiration that manifested itself shortly before closings, there was nothing to indicate anything unusual to the Court."

As an appellate court, we review the trial court's denial of the new trial motion for an abuse of discretion and will only reverse if there is clear error. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001); *Rippetoe v. Feese*, 217 S.W.3d 887, 890 (Ky. App. 2007). A CR 59.01 ruling is "a discretionary function assigned to the trial judge who has heard the witnesses firsthand and observed and viewed their demeanor and who has observed the jury throughout the trial." *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984), *overruled on other grounds* by *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493-95 (Ky. 2002)[3]. Furthermore, an appellate court is precluded from stepping "into the shoes" of the trial court, and disturbing its ruling unless it is found to be clearly erroneous. *Prater v. Arnett*, 648 S.W.2d 82, 86 (Ky. App. 1983). As our Supreme Court noted in *Turfway Park Racing Association v. Griffin*, 834 S.W.2d 667, 669 (Ky. 1992), "a proper ruling on a motion for new trial depends to a great extent upon factors which may not readily appear in an appellate record. Only if the appellate court concludes that the trial court's order was clearly erroneous may it reverse."

Without question, counsel was suffering from a serious medical condition that manifested itself following the close of trial. Nevertheless, this Court cannot step into the shoes of the trial court to conclude that counsel

[3] *Sand Hill* was subsequently vacated by *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003).

somehow did not fulfill his duties. The trial court observed counsel firsthand and determined that other than perspiring, counsel exhibited no signs that he was impaired or ineffective on the final day of trial. Our review of the trial video also leads to the conclusion that counsel provided satisfactory representation. Thus, we cannot find that the trial court's denial of the motion for new trial was clearly erroneous.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Steven D. Yater
Louisville, Kentucky

BRIEF FOR APPELLEE:

F. Larkin Fore
Louisville, Kentucky