

RENDERED: DECEMBER 4, 2009; 10:00 A.M.  
TO BE PUBLISHED

**MODIFIED: DECEMBER 18, 2009; 10:00 A.M.**

**MODIFIED: MARCH 26, 2010; 10:00 A.M.**

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001948-MR

BARBER CABINET COMPANY, INC.

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 07-CI-00322

LUNDY L. SPARKS; PAMELA M.  
SPARKS; LEXINGTON UNIQUE  
COMFORT OF KENTUCKY, LLC;  
B.A. PARKER HOMES, LLC;  
FIFTH THIRD MORTGAGE COMPANY;  
E-Z BUILDERS, LLC; AND RICK  
SMITH EXCAVATING, INC.

APPELLEES

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: This residential construction contract case originated in 2005, when Appellees, Lundy L. Sparks and Pamela M. Sparks, contracted with B.A. Parker Homes, LLC (Parker) to construct a residence for them in Nicholasville, Kentucky, at a cost of about \$700,000.00. Parker was the general contractor. As is customary, an allowance was provided in the home-building contract for various items, including cabinetry. When time came to select cabinets, Parker, the contractor, directed Sparks to Barber Cabinet Company, a well-known Kentucky cabinetry company, with which Parker regularly did business. Sparks selected cabinetry more or less within the confines of the \$46,500.00 allowance. At the conference between Sparks and Barber Cabinet, detailed specifications were reduced to writing in a sales contract that was signed by Sparks. At the end of the document the following language appears:

The undersigned has ordered and approved all specifications, materials and finishes on this job. The undersigned will be responsible personally for payment in full of the total job cost listed above. This is the entire agreement and no other. Terms: 50% deposit due with contract and order, balance due upon delivery unless prior arrangements have been made.

Authorizing signature: /s/Lundy L. Sparks, date 9-6-06.

The first issue presented is whether, upon Parker's failure to pay Barber, Sparks is liable to Barber under the written instrument of September 6,

---

<sup>1</sup> 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 Kentucky Revised Statutes (KRS) 21.580.

2006, quoted hereinabove. In the event we determine that Sparks is liable pursuant to the writing, we must also consider whether and to what extent Barber is entitled to a lien to secure payment.

It is undisputed that Barber Cabinet provided the merchandise and services required and there is no contention that the Sparkses were dissatisfied in any way. However, Parker failed entirely to pay Barber Cabinet. In an effort to obtain payment, Barber Cabinet filed a lien on the residential property. A couple of months after the lien was filed, Lexington Unique Indoor Comfort of Kentucky, LLC, filed suit against Sparks and also named Barber Cabinet as a party based on its asserted lien. In turn, Barber Cabinet cross-claimed against Sparks and sought enforcement of its lien and payment of the entire amount of the debt.

At earlier stages of this litigation, there have been several other parties, but those parties, including Parker, are not participants in the litigation at this stage. The only parties presently in active litigation are Barber Cabinet and Sparks, and the Barber Cabinet claim is the subject matter of the instant appeal.

After a bench trial, the trial court determined that despite Sparks' signature on the sales agreement, a necessary element of contract formation was missing; i.e., there was no meeting of the minds with regard to Sparks' personal responsibility for payment. Instead, the trial court held that both Sparks and Barber Cabinet believed that Parker would be responsible for the debt. To reach this conclusion, the trial court allowed parol evidence of precontractual negotiations and looked to the parties' course of conduct to determine their intent.

The trial court noted that Barber Cabinet and Sparks did not discuss payment arrangements nor did Barber Cabinet require payment of the 50 percent deposit upon execution. Upon the project's completion, Barber Cabinet sent invoices to Parker, not to Sparks. Accordingly, the trial court determined that the parties' intent was not reflected in the written instrument. The trial court also pointed out that Barber Cabinet had supplied drawings to Sparks for approval during the design phase identifying Parker as the customer. Based on its determination that no contract was formed for lack of a meeting of the minds between Barber Cabinet and Sparks, the trial court dismissed Barber Cabinet's claim against Sparks and dissolved the liens on the property. This appeal followed.

Barber Cabinet asserts that the language of the written instrument is overwhelming and unambiguous, rendering the trial court without authority to examine parol evidence; Sparks contends that parol evidence was admissible to determine whether a contract was formed.

Generally, the interpretation of a contract, including the admissibility of parol or extrinsic evidence, is a question of law subject to *de novo* review. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 448 (Ky. 2005). With certain limited exceptions, such as fraud or mistake, parol evidence may not be considered as a means to vary or alter the terms of a written agreement. *Getzug v. Work*, 293 Ky. 193, 168 S.W.2d 721 (1943).

At the outset, we recognize that both Sparks and Barber are relatively innocent parties, yet one or the other must bear the loss resulting from Parker's default. As a practical matter, there is a natural sympathy with a hapless homeowner who pays his contractor and expects all other payment pieces to fall into place. As such, we understand the trial court's focus on contract formation and its abundant use of parol evidence. Nevertheless, we are bound to observe the basic precepts of contract law and the overriding principles served by the enforcement of contracts as written. These principles are designed, per force, to treat written contracts as an accurate reflection of parties' intent. The rule that a written contract should be enforced according to its terms in all but very limited circumstances is, in a broad sense, necessary to realize a primary objective of contract law, predictability and efficiency in business transactions. *See ConFold Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952 (7<sup>th</sup> Cir. 2006). Uncertain and inconsistent enforcement of contracts interferes with the extension of credit and effectively requires parties to obtain otherwise unnecessary security where credit transactions are entered into.

We recognize the similarity between this case and *Murphy v. Torstrick*, 309 S.W.2d 767 (Ky. 1958), the case relied on by the trial court. In *Murphy*, parol evidence was admitted to invalidate the terms of a contract upon the court's determination that the parties did not intend to be bound by the writing. The writing was actually a "bid" for a construction project. Parol evidence revealed that contract language had been utilized only to obtain financing from a

third party. The evidence was clear that neither party expected the writing to serve as a binding contract at the time of signing. This is of doubtful analogy to what happened here. In the *Murphy* case, there was no intent by either party to be bound. Lack of contractual intent is explained in *Wilkin v. 1<sup>st</sup> Source Bank*, 548 N.E.2d 170, 172 (Ind. App. 1990), where the Court of Appeals of Indiana stated:

Mutual assent is a prerequisite to the creation of a contract. Where both parties share a common assumption about a vital fact upon which they based their bargain, and that assumption is false, the transaction may be avoided if because of the mistake a quite different exchange of values occurs from the exchange of values contemplated by the parties. There is no contract, because the minds of the parties have in fact never met. [Citations omitted.]

In *Murphy*, mutual expectations were that the signed document would serve only as a bid, and this circumstance negated the intent of either party to form a contract. Here, the mutual expectation was that Parker would pay Barber, but this did not negate the parties' intent that the signed document be treated as a contract, albeit as a contingency. Essentially, the written contract served the very contingency that occurred, Parker's failure to pay Barber. Even though both parties expected Parker to pay, when Sparks signed the contract he undertook responsibility to see to it that Parker did pay prior to his final payment to Parker. By this means, Sparks enhanced his credibility with Barber by declaring that he was willing to pay the full contract price even if Parker failed to make payment. *See Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284 (7<sup>th</sup> Cir. 1985). While we empathize with Sparks, as did the trial court, the contract unambiguously shows

that Sparks personally obligated himself to make payment. Even with the trial court's liberal consideration of parol evidence, evidence of the lack of mutual assent sufficient to invalidate the contract was absent. "The fact that one party may have intended different results . . . is insufficient to construe a contract at variance with its plain and unambiguous terms." *3D Enterprises Contracting Corp.*, 174 S.W.3d at 448 (quoting *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002)).

To create an enforceable contract, there must be a mutual intent to create a legal obligation. The parties' mutual assent to a contract is determined by their objective manifestations of contractual assent. It is the words of the contract and the manifestations of assent which govern, not the secret intentions of the parties.

*Lenthe Investments, Inc. v. Service Oil, Inc.*, 636 N.W.2d 189, 192 (N.D. 2001).

Kentucky law is well-established in *Kirchdorfer v. Watkins*, 198 Ky. 69, 248 S.W. 251, 252 (1923), where the court enforced the instrument as written:

It is sufficient only to say here that, if the writing is complete on its face and contains nothing therein indicating and pointing to the fact that it is only a part of a larger or other transactions forming the entire and complete one, and there has been an absolute delivery and no claim of fraud or mistake, the rule as originally promulgated is still followed and adhered to as is shown in the late case, and the only one relied on by plaintiff, of *Tross v. Bills' Executrix*, 189 Ky. 115, 224 S. W. 660 [App. 1920].

A recent and compelling statement of Kentucky law on contract enforcement appears in *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 654 (Ky. 2007):

[C]ontracts voluntarily made between competent persons are not to be set aside lightly. As the right of private contract is no small part of the liberty of the citizen, the usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy or illegality. If the legality of the contract can be sustained in whole or in part under any reasonable interpretation of its provisions, courts should not hesitate to decree enforcement. [Citations omitted.]

Accordingly, and accepting that the parties intended for Parker to make payment to Barber, this mutual presupposition does not negate the intention expressed by the parties in their written instrument. Any objective analysis of the language used would require the conclusion that Sparks' assent was given. At the very least, Sparks placed himself in the role of the responsible party in the event Parker failed to pay Barber. The contract Sparks signed must be enforced, and on this issue, we reverse the trial court.

Having determined that Sparks' underlying contractual obligation is enforceable, we must also reexamine the trial court's decision to dissolve Barber's liens on the Sparkses' property. Sparks claims to have made payment in full to Parker for the cabinetry. He asserts that this prohibits Barber from obtaining a lien on his property. He relies on one of the six subsections of KRS 376.010, subsection (4):

Notwithstanding the foregoing provisions of this subsection, the lien provided for under this section shall not be applicable to the extent that an owner-occupant of a single or double family dwelling or owner of other property as described in this subsection has, prior to receipt of the notice provided for in this subsection, paid



the contractor, subcontractor, architect, or authorized agent for work performed or materials furnished prior to such payment. The contractor or subcontractor cannot be the authorized agent under this subsection. This subsection shall apply to the construction of single or double family homes constructed pursuant to a construction contract with a property owner and intended for use as the property owner's dwelling.

The record is not clear as to how much Sparks paid Parker for the cabinetry.

Although Sparks filed an affidavit stating that he had paid the full contract price, he had earlier testified by deposition that he retained \$24,000.00 of the contract price with Parker at the time he learned of Parker's failure to pay Barber. At oral argument, it was disclosed that \$40,000.00 is in escrow to satisfy construction liens.

Under KRS 376.010(4) and notwithstanding our conclusion that Sparks' contract with Barber is fully enforceable, if payment from Sparks to Parker is identifiable as payment for the cabinetry, Sparks shall be entitled to a dollar-for-dollar credit for such sums. *Bee Spring Lumber Co. v. Pucossi*, 943 S.W.2d 622 (Ky. 1997). Barber shall have a lien only to the extent that Sparks failed to pay Parker for the cabinetry.

As this case was decided in the trial court on the basis of failure of contract formation, that court failed to reach some of the accounting issues. Though perhaps not exhaustive of such issues, on remand the court should determine the amount due on the cabinetry contract, the amount Sparks paid Parker for the cabinetry, and the availability of escrow funds to satisfy all or part of the

debt to Barber. As such, the trial court should make a proper determination of the foregoing matters and of such other matters as may be properly before the court. On remand, Sparks shall have the burden of proving the fact, the amount, and the purpose of payment to Parker. As to such sums that remain unpaid for the cabinetry, Barber's lien may be enforced to such extent and its lien priority determined as required by law.

For the foregoing reasons, the judgment of the trial court is reversed.

This cause is remanded for further consistent proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Russell Lloyd  
Louisville, Kentucky

Jeffrey E. Hiatt  
Louisville, Kentucky

ORAL ARGUMENT FOR  
APPELLANT:

J. Russell Lloyd  
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT  
FOR APPELLEES, LUNDY L.  
SPARKS AND PAMELA M.  
SPARKS:

Christopher L. Stansbury  
Nicholasville, Kentucky