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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000891-MR
&
NO. 2010-CA-000914-MR

THORO-GRAPH, INC. AND
JERRY BROWN APPELLANTS/CROSS-APPELLEES

v. APPEAL AND CROSS-APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 09-CI-00157

JAMES LAUFFER APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; STUMBO, JUDGE; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Thoro-Graph, Inc., and Jerry Brown appeal from the trial court's $25,000 *quantum meruit* judgment in their favor for advice and

[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 Kentucky Revised Statutes (KRS) 21.580.

information provided to James Lauffer in connection with his purchase of a one-half interest in the race horse Rachel Alexandra. From his ownership interest in Rachel Alexandra, Lauffer earned over $4.5 million. Upon review, we affirm.

Jerry Brown is the founder and owner of Thoro-Graph, Inc. Thoro-Graph is based in New York and has ten full time and fifteen part time employees. Among the activities of Thoro-Graph is publishing what it terms "performance figures" regarding racing horses and providing consulting services to potential buyers and sellers of thoroughbred horses. Brown's system is based on a proprietary analysis of horse races over a considerable period of time and includes traditional analytical factors and some factors that are not ordinarily used by others in his business. Thoro-Graph does not rely on any information regarding the breeding stock that produced the animal.

During the summer of 2008, James Lauffer, together with Greg McDonald and Ron Kirk, formed a joint venture with the goal of acquiring a thoroughbred filly for racing. Kirk knew Brown and began communicating with him about the joint venture's interest in purchasing such a filly. Brown sent Kirk an email on August 5, 2008, inquiring whether the members of the joint venture knew his commission rates. Kirk responded that Brown should send an email listing those rates so it was clearly documented. Brown then sent an email to Kirk on August 6, 2008, listing his rates.

Brown charges what he terms a 5-5-5 fee when he advises a potential buyer and a horse is purchased. The 5-5-5 fee is comprised of 5 percent of the

purchase price; 5 percent of any money earned by the horse, generally from stakes races; and 5 percent of any increase in the value of the horse from the time of purchase to the end of the animal's racing career as determined by resale price, appraised value or life insurance valuation.

Brown suggested the joint venture purchase a filly named Kiss With A Twist. The group made an unsuccessful bid to purchase the horse based on Brown's information and recommendation. Brown also provided information and recommendations for three other horses, but the joint venture group did not purchase any of them. In November 2008, Brown sent emails to Kirk comparing a two-year-old champion named Stardom Bound with the filly Rachel Alexandra. He recommended the purchase of Rachel Alexandra for $1.2 million.

Kirk told the joint venture members about the recommendations from Brown. Lauffer called Brown on November 7, 2008, to discuss Rachel Alexandra. This was the first direct contact between Brown and Lauffer. After discussing the merits of the horse, Lauffer asked Brown about his commission rates. When Brown explained the 5-5-5 structure, Lauffer said the commission rates would be a problem but that he would get back to Brown at a later time.

Lauffer then called Donald Brauer who is a bloodstock agent. Lauffer told Brauer that he and McDonald would like to see Rachel Alexandra. Brauer testified that during that conversation, Lauffer asked if there was any way to avoid paying Brown the 5-5-5 commission as Lauffer thought the commission rate was excessive. After viewing the filly, Lauffer again contacted Brauer and stated he

really liked the horse, but again asked if there was any way to avoid paying Brown. Brauer responded that he did not think that would be ethical. McDonald also liked the horse, but told Lauffer he absolutely would not pay Brown's commission as he thought it was too high.

Lauffer then called Brown on November 9, 2008, and indicated that the joint venture had decided to make a purchase offer of $1 million for Rachel Alexandra and would pay Brown the normal 5 percent commission charged by most bloodstock agents but no more. Brown insisted on retaining the 5-5-5 commission schedule. Lauffer then called Brauer and said the joint venture was no longer interested in purchasing Rachel Alexandra.

On November 13, 2008, Lauffer, in his name alone, purchased a fifty percent ownership interest in the filly Rachel Alexandra for $500,000. The original owner retained the remaining fifty percent ownership interest. At that time, the filly had run a total of five races, winning two, with none being stakes races. Thereafter, she won the 2009 Kentucky Oaks by over twenty lengths, the largest winning margin in the history of that race. The owners sold Rachel Alexandra after that race, and she went on to win the Preakness and was selected as the 2009 American Horse of the Year. During his six months of partial ownership, Lauffer made approximately $4.5 million in profits from his one-half interest.

Lauffer admitted that Brown's information about Rachel Alexandra was one consideration he used in his decision to purchase the filly. He also

acknowledged that if the joint venture had purchased the horse, it would have been obligated to pay Brown a fee. Lauffer ultimately paid Brauer a 3 percent bloodstock agent fee for his purchase. Brauer settled for this reduced fee from his customary 5 percent of the purchase price because he thought it was better than litigating a full 5 percent fee.

Lauffer then filed a complaint seeking declaratory relief in the Johnson Circuit Court on March 27, 2009, against Thoro-Graph and Brown. He sought a declaration that there was no contract obligating Lauffer to pay any fees to Brown or Thoro-Graph and that any claims by Brown or Thoro-Graph were barred. Brown and Thoro-Graph filed an answer and counterclaim. Following a bench trial conducted April 6 and 7, 2010, the trial court determined that there was never an agreement concerning any fee; that Lauffer was not made aware of the requested 5-5-5 fee structure prior to the time he sought Brown's advice: that Brown provided advice regarding the purchase of Rachael Alexandra before discussing his fee structure; but that Brown had provided valuable information and advice relied upon "at least in part" by Lauffer.

Notwithstanding its determination that no contract came into existence, the trial court awarded Brown and Thoro-Graph $25,000 under the theory of *quantum meruit.* This amount was based on the industry standard sales commission of 5 percent of Lauffer's purchase price, characterized by the court as "a reasonable amount for the services rendered." The trial court further found Brown and Thoro-Graph were not entitled to judgment on the claim of fraud

finding there was no false representation by Lauffer. It also found against Brown and Thoro-Graph on the claims of punitive damages and disgorgement of profits. Brown and Thoro-Graph then filed this appeal with Lauffer filing a cross-appeal.

Brown and Thoro-Graph first argue that although the trial court correctly found they met the elements of *quantum meruit* recovery, the trial court incorrectly calculated the amount owed at $25,000 instead of $271,423 as calculated by Brown and Thoro-Graph. "*Quantum meruit* is an equitable doctrine granting one 'who has rendered services in a quasi-contractual relationship the reasonable value of services rendered.'" *Cherry v. Augustus*, 245 S.W.3d 766, 779 (Ky.App. 2006) (citing Black's Law Dictionary (8th ed. 2004)). Brown and Thoro-Graph argue they are entitled to the 5-5-5 commission scheme as the appropriate measure of the reasonable value for the services rendered. Here, the trial court heard from numerous witnesses all of whom indicated a simple 5% commission was the industry standard for agents who assisted a buyer with the purchase of a horse. That assistance included analysis of the horse's potential such as provided by Brown and Thoro-Graph.

As fact finder, the trial court had the sole discretion to determine the quality, character and substance of the evidence. *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418, 419 (Ky. 1985). We see nothing in the record to significantly distinguish the services rendered by Thoro-Graph from services that typically garner a 5 percent commission within the horse racing industry. If anything, Brown and Thoro-Graph provided fewer services than the typical

bloodstock agent. While Brown's menu may have been subtly different from the services offered by other agents, it was not significantly different; it was fundamental information about the winning potential of a particular horse. Although Brown and Thoro-Graph argue that it was equitable to hold Lauffer to the 5-5-5 commission rate as quoted to the joint venture, upon the trial court's conclusion that only *quantum meruit* recovery was appropriate, we find no fault with the trial court's application of the industry standard fee of 5 percent.

Next, Thoro-Graph and Brown argue the trial court ignored the claim for unjust enrichment. There is no contention "that an action based upon unjust enrichment is equitable in nature." *Emerson v. Emerson,* 709 S.W.2d 853, 855 (Ky.App. 1986). With an "award of equitable remedies there is normally an element of great discretion." *Western Casualty & Surety Co. v. Meyer,* 192 S.W.2d 388, 391 (Ky. 1946). As in other jurisdictions, the phrase "unjust enrichment" is often freely used as an element of the requirements necessary for recovery in *quantum meruit.* "A contract implied by law allows for recovery *quantum meruit* for another's unjust enrichment." *Quadrille Business Systems v. Kentucky Cattlemen's Association, Inc.,* 242 S.W.3d 359, 365 (Ky.App. 2007). Here, the trial court simply interchanged the terms and found an equitable and reasonable recovery.

Thoro-Graph and Brown then argue that it was error when the trial court failed to explicitly rule on a claim of fraud by omission. Lauffer was accused of fraud, both fraud by material representation and fraud by omission. The trial

court's order explicitly dealt with an analysis of fraud by material representation, yet admittedly failed to explicitly address the claim of fraud by omission. "To prevail on a claim of fraud by omission, or fraud based on failure to disclose a material fact, a plaintiff must prove: a) that the defendants had a duty to disclose that fact; b) that defendants failed to disclose that fact; c) that the defendants' failure to disclose the material fact induced the plaintiff to act; and (d) that the plaintiff suffered actual damages." *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.,* 113 S.W.3d 636, 641 (Ky.App. 2003). Thoro-Graph and Brown allege that Lauffer had a duty to disclose the fact that he was unwilling to pay the 5-5-5 commission. Yet that is exactly what he did when he learned of the commission schedule and informed Brown that it would be a problem. In this regard, the trial court rendered three significant findings of fact:

> 21) Based upon the evidence, the Court finds that the Plaintiff and the Defendant never reached an agreement concerning any fee to be paid to the Defendant for services rendered in the sale of Rachel Alexandra.
>
> 22) The Court finds that the Plaintiff was not made aware of the fee structure requested by the Defendant prior to the time that he sought advice from the Defendant concerning Rachel Alexandra.
>
> 23) The Court finds from the evidence that the Defendant provided advice to the Plaintiff concerning Rachel Alexandra before discussing his fee structure with him.

The foregoing findings sum up the trial court's view of the evidence. There was no failure by Lauffer to disclose. The trial court found no reliance or inducement. The elements of fraud, either by omission or by a material

misrepresentation, were not present and no recovery was allowed on this basis. Similarly, there is no basis for punitive damages and the trial court correctly dismissed that claim. "The threshold for the award of punitive damages in a tort case is whether there is misconduct[.]" *Horton v. Union Light, Heat & Power Co.,* 690 S.W.2d 382, 389 (Ky. 1985). The trial court found no misconduct on the part of Lauffer and we agree.

Finally, Thoro-Graph and Brown argue the trial court improperly dismissed the request for disgorgement of profits. At trial, Brown and Thoro-Graph "candidly admits that there are no Kentucky cases which authorize disgorgement of profits as an element of damages." Now, they seek a reversal for the trial court taking them at their word. *Henson v. Commonwealth,* 20 S.W.3d 466, 470 (Ky. 1999).

We note that Kentucky's highest court has ordered the surrender of profits received by a wrongdoer. *Edwards v. Lee's Adm'r.,* 96 S.W.2d 1028, 1032 (Ky. 1936). Here there is no applicability of the theory of disgorgement absent a finding that Lauffer was a wrongdoer. There was no error.

For his cross-appeal, Lauffer brings into question the trial court's failure to grant summary judgment and deny any relief in favor of Thoro-Graph and Brown based on an interpretation of what Lauffer refers to as a statute of frauds regarding the sale of horses. He relies on Kentucky Revised Statutes (KRS) 230.357(11) for what he terms a statute of frauds regarding the sale, purchase or transfer of an equine within the Commonwealth of Kentucky.

> No contract or agreement for payment of a commission, fee, gratuity, or any other form of compensation in connection with any sale, purchase, or transfer of an equine shall be enforceable by way of an action or defense unless:
> (a) The contract or agreement is in writing and is signed by the party against whom enforcement is sought; and
> (b) The recipient of the compensation provides a written bill of sale for the transaction in accordance with subsections (2)(a) and (3) of this section.

Id.

KRS 230.357(2)(a) requires "[a]ny sale, purchase, or transfer of an equine shall be: (a) Accompanied by a written bill of sale or acknowledgement of purchase and security agreement setting forth the purchase price[.]" The trial court expressed difficulty applying the statutes as it would require Brown and Thoro-Graph to produce written documentation of a sale which had not been specifically disclosed to them. Lauffer's argument goes on to suggest that when involved with a statute of frauds requiring a written instrument, recovery in *quantum meruit* is not allowed. In *Louisville Trust Co. v. Monsky,* 444 S.W.2d 120 (Ky. 1969) the Kentucky Supreme Court examined a situation where it was held that in a real estate transaction that requires a written instrument pursuant to the statute of frauds, *quantum meruit* recovery of a commission was improper.

We agree with the trial court that the statutes do not apply to this case. The question before the trial court involved recovery of a fee for advice. It was not in "connection with any sale, purchase, or transfer of an equine[.]" Even if the statute were to apply, Lauffer misinterprets the holding of the *Monsky* case.

> [I]n Louisville Trust Company v. Monsky, 444 S.W.2d 120 (Ky. 1969), we held that quantum meruit could not be used to avoid the statute of frauds, and so we did in that instance; but to regard that as a general proposition is an erroneous overstatement.

Buttorff v. United Electronic Laboratories, Inc., 459 S.W.2d 581, 587 (Ky. 1970). There is nothing to support the proposition that the existence of a statute of frauds forecloses recovery in *quantum meruit*.

We find no error and affirm the judgment of the Johnson Circuit Court.

ALL CONCUR.

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