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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000473-MR

LV VENTURES, LLC; AND
LV VENTURES, LLC, AS
ASSIGNEE OF KURT ROSE
CONSTRUCTION, INC.

APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CI-01124

TREY SCHOTT; AND
WES ACE HARDWARE, LLC

APPELLEES

AND NO. 2011- CA-000640-MR

TREY SCHOTT; AND
WES ACE HARDWARE, LLC

CROSS-APPELLANTS

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CI-01124

LV VENTURES, LLC

CROSS-APPELLEE

AND NO. 2011-CA-001132-MR

LV VENTURES, LLC; AND
LV VENTURES, LLC, AS
ASSIGNEE OF KURT ROSE
CONSTRUCTION, INC. APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CI-01124

TREY SCHOTT; AND
WES ACE HARDWARE, LLC APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
APPEAL NOS. 2011-CA-000473-MR AND 2011-CA-001132-MR;
AFFIRMING AS MOOT CROSS-APPEAL NO. 2011-CA-000640-MR

** ** ** ** **

BEFORE: NICKELL, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: LV Ventures, LLC, and LV Ventures, LLC, as assignee of Kurt Rose Construction, Inc. (collectively referred to as LV Ventures) bring Appeal No. 2011-CA-000473-MR and Trey Schott and Wes Ace Hardware, LLC bring Cross-Appeal No. 2011-CA-000640-MR from a January 13, 2011, Trial Verdict and Judgment and from a March 3, 2011, Final Order and Supplemental Judgment of the Fayette Circuit Court. LV Ventures also brings Appeal No. 2011-CA-001132-MR from a June 14, 2011, Order of the Fayette Circuit Court. We affirm in part, reverse in part, and remand Appeal Nos. 2011-CA-000473-MR and

2011-CA-001132-MR. We affirm as moot Cross-Appeal No. 2011-CA-000640-MR.

These appeals stem from a commercial lease between LV Ventures, LLC as lessor and Wes Ace Hardware, LLC, (Wes Ace) as lessee. LV Ventures owned a commercial building located in Lexington, Kentucky. Trey Schott was the sole member of Wes Ace and sought commercial property suitable to open an Ace Hardware store. The parties entered into negotiations for rental of the commercial property; however, the building and parking lot were in disrepair and needed much renovation and "fit-up" construction work.

In December 2004, a lease agreement was executed between LV Ventures and Wes Ace. Therein, LV Ventures, as lessor, agreed to perform certain improvements to the commercial property as set forth in Exhibit B, which was attached to the lease. The lease agreement specifically capped the improvements paid for by LV Ventures at $200,000. Also, the lease agreement contained Exhibit C, which outlined improvements that Wes Ace, as tenant, was permitted to make to the commercial property during the tenancy.

Before execution of the lease, Kurt Rose Construction was hired by LV Ventures to perform the improvements upon the commercial property well below the $200,000 budget cap.[1] For reasons that are disputed, Kurt Rose claimed that because of extra work and overages, an additional $127,000 was due and sought payment of this additional sum from both LV Ventures and Wes Ace. LV

[1] Within the $200,000 budget cap, LV Ventures, LLC, paid a third party approximately $46,000 to replace or repair the commercial property's roof.

Ventures refused to pay the additional sum and maintained it had paid the full $200,000 for improvements; Wes Ace also refused to pay the additional sum. Eventually, Kurt Rose filed a mechanic's lien upon the commercial property for the unpaid amount.

After Kurt Rose had completed some improvements on the property but before it filed the mechanic's lien, Wes Ace took possession of the commercial property and opened an Ace Hardware store in July of 2005. Immediately upon taking possession, Schott alleged that the improvements contained in Exhibit B of the lease were not completed by LV Ventures. Also, Schott maintained that LV Ventures failed to adequately maintain the commercial property resulting in flooding of the property. With his monthly rental payments, Schott repeatedly sent LV Ventures letters outlining the improvements not carried out by LV Ventures as set forth in Exhibit B and noted several maintenance issues with the leased property. Eventually, Wes Ace deducted amounts from the monthly rental payments based upon its inability to utilize part of the leased property. As a result, LV Ventures filed a forcible detainer action, and on July 8, 2008, Wes Ace vacated the leased property.

Kurt Rose initially filed the underlying action against both LV Ventures and Schott for breach of contract and unjust enrichment seeking recoupment of the $127,000. Eventually, LV Ventures and Schott filed answers, counterclaims, and cross-claims. Wes Ace filed an intervening complaint. Relevant to our appeals, LV Ventures brought claims against both Schott and Wes

Ace alleging breach of the lease agreement. Wes Ace and Schott asserted claims against LV Ventures for breach of the lease agreement and fraudulent inducement to enter into the lease agreement. Kurt Rose filed a counterclaim to the intervening complaint against Wes Ace also alleging breach of contract and unjust enrichment. LV Ventures and Kurt Rose ultimately entered into a settlement agreement whereby Kurt Rose assigned its claims against Wes Ace and Schott to LV Ventures.

A jury trial on the complaint, intervening complaint, counterclaim and cross-claim was held over a four day period. The jury found in favor of Wes Ace and Schott upon its claims of fraudulent inducement and breach of the lease agreement and awarded $290,959.99 in damages. A judgment was entered against LV Ventures reflecting the jury verdict on January 13, 2011. Thereafter, LV Ventures filed a Kentucky Rules of Civil Procedure (CR) 59 motion to vacate the judgment, and Wes Ace and Schott filed a motion for attorney's fees and costs. By Final Order and Supplemental Judgment entered March 3, 2011, the circuit court denied LV Venture's CR 59 motion and awarded Wes Ace and Schott attorney's fees in the amount of $20,000. Later, on May 31, 2011, LV Ventures filed a

Motion to Enforce Lease Provision 12.2.[2] That motion was denied by order entered June 14, 2011. These appeals follow.

APPEAL NOS. 2011-CA-000473-MR
AND 2011-CA-00132-MR

LV Ventures contends that Wes Ace and Schott failed to prove by clear and convincing evidence its claim of fraudulent inducement; thus, the jury should never have been instructed upon this claim. By so contending, LV Ventures is effectively arguing that it was entitled to a directed verdict upon the claim of fraudulent inducement. A directed verdict is proper if reasonable people could not differ upon the verdict after hearing the evidence. CR 50.01; *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963). In reviewing a directed verdict, all the evidence and reasonable inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Com. v. Benham*, 816 S.W.2d 186 (Ky. 1991)

[2] Article 12.2 of the Lease Agreement reads:

> Liability of Landlord. If the Landlord shall fail to perform any covenant, term or condition of this Lease, as a consequence of such default, the Tenant shall recover a money judgment against Landlord, such judgment shall be satisfied only out of the proceeds of sale received upon the execution of such judgment and levy thereon against the right, title and interest of the Landlord in the Center as the same may be then encumbered and the Landlord shall not be liable for any deficiency. It is understood that in no event shall the Tenant have any right to levy execution against any property of the Landlord other than its interest in the Center as herein above expressly provided. In the event of the sale or other transfer of Landlord's right, title and interest in the Premises or the Center, the Landlord shall be released from all liability and obligations hereunder, provided that the transferee assumes the Landlord's obligations under this Lease or any modification or amendment thereof.

To prevail upon a claim of fraud, it must be demonstrated by clear and convincing evidence the following elements:

> a) [M]aterial representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury.

PRC Contractors, Inc. v. Danial, 354 S.W.3d 610, 613 (Ky. App. 2011) (quoting *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). To constitute fraud, the misrepresentation must relate to a present or pre-existing fact; a misrepresentation as to a future fact is only actionable if the promisor had no intention of fulfilling the promise at the time it was made. *See Bear, Inc. v. Smith*, 303 S.W.3d 137 (Ky. App. 2010). And, a misrepresentation of a future fact may constitute fraudulent inducement; fraudulent inducement occurs when an individual makes "representations as to his future intentions when in fact he knew at the time the representations were made he had no intention of carrying them out[.]" *PRC Contractors, Inc.*, 354 S.W.3d at 614 (quoting *Bear*, 303 S.W.3d at 142). Although the promisor misrepresents a future fact, fraudulent inducement is conceptually based upon a misrepresentation of a present fact; i.e., the promisor's state of mind or intent at the time the future promise is actually made. 26 Richard A. Lord, *Williston on Contracts* § 69:11 (4th ed. 2012). Thus, a party induced by a future false promise to enter into a contract may maintain an action to rescind the contract based upon fraudulent inducement.

From the very beginning of negotiations, Schott testified that he had certain absolute conditions that had to be met by LV Ventures before he would consider leasing the commercial property. These conditions were construction of an outside building behind the leased property for inventory storage and completion of major improvements to the commercial property. Schott testified that he would not consider leasing the commercial property if these conditions were not met by LV Ventures. Schott also stated that LV Ventures knew and explicitly promised him before and at the time of signing the lease agreement that these conditions would be satisfied by LV Ventures. Despite these promises, Schott related that once he took possession of the leased premises LV Ventures did little to satisfy these conditions. In fact, Schott testified that he was never able to build an outside storage building because there was no approved development plan and that several improvements to the leased premises were never made by LV Ventures. In retrospect, Schott stated that he believed when LV Ventures made these promises it had no intention of fulfilling them.

During trial, Wes Ace and Schott also introduced numerous letters from Schott to LV Ventures; wherein, Schott over a period of several months after taking possession of the leased property, repeatedly informed LV Ventures that the improvements to the commercial property as contained in Exhibit B were not completed, including that the property needed maintenance because of flooding and that use of the property has premised on having an outside storage building. In one letter dated July 26, 2005, Schott specifically referenced that "[t]hese needs

and square footage space issues were addressed up front during the lease negotiation and lease agreements." He emphasized that Wes Ace could not get a building permit to build the building "because the development plan has not gone forward as promised." Despite repeated notifications, Schott testified that LV Ventures failed to ever remedy any of the maintenance or space issues. In particular, due to lack of maintenance, Schott claimed that the roof, gutters, and foundation leaked resulting in flooding inside the store and around the leased property.

Upon the whole of the evidence, we conclude that Schott submitted clear and convincing evidence upon each element of fraudulent inducement. We also note that fraud may be demonstrated by circumstantial evidence. *See Rickert*, 996 S.W.2d 464. Particularly considering Schott's testimony, the documentary evidence, and other facts, the jury could have reasonably believed that LV Ventures made promises to Schott to induce him into signing the lease agreement, Schott relied on these promises and signed the lease agreement, LV Ventures did not intend to carry out these promises at the time it made them, and Schott suffered injury as a result. *See Rickert*, 996 S.W.2d at 468 (holding that when considering a claim of fraud, "proof may be developed by the character of the testimony, the coherency of the entire case as well as the documents, circumstances and facts presented"). Hence, we conclude that LV Ventures was not entitled to a directed verdict upon the claim of fraudulent inducement.

LV Ventures also argues that Wes Ace and Schott's claims of fraudulent inducement and breach of contract were barred by the one-year limitation period as set forth in the lease agreement.[3] For the following reasons, we disagree.

As to the fraudulent inducement claim, it is well recognized that "fraud vitiates everything into which it enters." *Veterans Serv. Club v. Sweeney*, 252 S.W.2d 25, 27 (Ky. 1952). If a party prevails upon a claim of fraudulent inducement, the contract is rescinded upon the basis of fraud; as a consequence, it is axiomatic that a claim for fraudulent inducement is not controlled by the rescinded contract's limitation period. We, thus, do not believe the limitation period of the lease agreement bars Wes Ace and Schott's claim of fraudulent inducement.

As to the breach of contract claims, LV Ventures only argument was:

> The date of both the Appellees' testimony and the Intervening Complaint is August 7, 2006. Therefore, the Appellees are time barred from making a claim for any damages prior to August 6, 2005. . . .

[3] Article 15.1 of the lease agreement provides:

> Article 15
> Tenant's Time to Sue
>
> 15.1 Commencement of Action. Any claim, demand, right or defense by Tenant that arises out of this Lease or the negotiations that preceded this Lease shall be barred unless Tenant commences an action thereon, or interposes a defense by reason thereof; within one year after the date of the inaction, omission, event or action that gave rise to such claim, demand, right or defense.

LV Ventures' Brief at 23 (citations omitted). LV Ventures' argument is terse at best. Most importantly, LV Ventures fails to set forth the date(s) it asserts the breach of contract claims accrued. As an appellate court, we will neither search the record for facts to support an argument nor practice a party's case on appeal. Considering the inane argument advanced by LV Ventures, we are unable to conclude that Wes Ace and Schott's breach of contract claims were barred by the one-year limitation period set forth in the lease agreement.

LV Ventures next maintains that the circuit court erred in its jury instruction upon damages resulting in Wes Ace and Schott receiving double recovery. Specifically, LV Ventures argues that the circuit court improperly instructed the jury to award damages upon both claims of fraudulent inducement and breach of contract. Upon review of the jury instructions, we are compelled to agree and begin our analysis with a brief recitation of the law.

It is a firmly entrenched rule that a party may not recover upon both claims of fraudulent inducement and breach of contract; rather, a party "has an option either to disaffirm the contract and seek its rescission or to affirm the contract and seek his remedy by an action for damages[.]" *Hampton v. Suter*, 330 S.W.2d 402, 406 (Ky. 1959). An award of damages upon claims of both fraudulent inducement and breach of contract is clearly improper. However, a party may alternatively plead both a fraudulent inducement claim and a breach of contract claim in his or her complaint; however, a party may not recover upon both claims.

In this case, the jury instruction upon damages did not conform to the law. Instead, the jury was instructed to award damages upon both claims of fraudulent inducement and breach of contract in a single instruction.[4] Consequently, the jury was seemingly permitted to award Wes Ace and Schott damages for both fraudulent inducement and breach of contract.

It is our opinion that the circuit court's jury instruction for damages constituted reversible error,[5] and because of such erroneous jury instruction, we reverse this case for a new trial upon the single issue of damages. Upon remand, Wes Ace and Schott must elect to either seek recovery upon the claim of fraudulent inducement or the claim of breach of contract before retrial. Thereupon, the circuit court shall conduct a new jury trial limited to the proper measure of damages upon the elected claim, and the jury shall be so instructed.

In sum, we reverse and remand for a new jury trial limited to the issue of damages either upon Wes Ace and Schott's claim of fraudulent inducement or

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[4] The erroneous jury instruction upon damages read:

QUESTION NO. 5

> If you have found for Trey Schott and Wes Ace Hardware, LLC[,] under Instruction No. 3 [fraud claim] or Instruction No. 4 [breach of lease claim], what sum of money do you believe the evidence will fairly and reasonably compensate for such financial loss it has incurred as a direct result of the misrepresentations made to them or violation of any duties by LV Ventures, LLC?

[5] West Ace and Schott argue that the issue of an erroneous jury instruction upon damages was not properly preserved for appeal. Even if this issue were not preserved for our review, we think that the error constitutes a palpable error affecting the substantial rights of LV Ventures and resulting in manifest injustice. Kentucky Rules of Civil Procedure 61.02; *see Deemer v. Finger*, 817 S.W.2d 435 (Ky. 1990).

claim of breach of lease agreement. We do so with great reluctance; however, Wes Ace and Schott may not recover damages upon both claims of fraudulent inducement and breach of contract.

LV Ventures further asserts that it was entitled to rent from Wes Ace under the lease agreement and that Wes Ace damages were limited by Article 12.2 of the lease agreement. As we reverse for a new trial on damages, we view these issues as moot unless Wes Ace and Schott elect to seek damages under breach of contract, whereupon the circuit court shall address the issue accordingly.

CROSS-APPEAL NO. 2011-CA-000604-MR

Schott and Wes Ace contend that the circuit court's award of $20,000 in attorney's fees were inadequate. Considering our reversal for a new trial in Appeal Nos. 2011-CA-000473-MR and 2011-CA-001132-MR, we deem this contention to also be moot on appeal and shall be addressed again at the conclusion of the new trial on damages.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed in part, reversed in part, and remanded in Appeal No. 2011-CA-000473-MR and Appeal No. 2011-CA-001132-MR; Cross-Appeal No. 2011-CA-000640-MR is affirmed as moot.

ALL CONCUR.

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