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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001367-MR

DEBRA MONTGOMERY,
MONTGOMERY REAL ESTATE HOLDINGS, INC. APPELLANTS

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 12-CI-00100

WHITAKER BANK, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, JONES, AND LAMBERT, JUDGES.

CAPERTON, JUDGE: Montgomery Real Estate Holdings, Inc. and Debra Montgomery (hereinafter "Montgomery") appeal from the Wolfe Circuit Court's grant of summary judgment to Whitaker Bank, Inc. (hereinafter "Whitaker"). After having reviewed the parties' arguments, the record, and the applicable law, we find no reversible error and accordingly, affirm.

Montgomery formerly owned the IGA store in Campton, Wolfe County, Kentucky. She contracted to sell the property to Delbert Brown in February 2012. After the contract was signed, the property sustained storm damage. The insurance company issued a check for the damage in the amount of $60,461.22, made payable jointly to Montgomery and Whitaker, as Whitaker had a mortgage on the property. The mortgage stated that Montgomery was obliged to maintain insurance on the property. Whitaker was permitted "at its election, apply the [insurance] proceeds to the reduction of the Indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property."

The contract for sale was extended by written agreement, known as the Addendum. The Addendum was signed by Montgomery on April 12, 2012, extending the closing date to May 15, 2012. Montgomery claims that unbeknownst to her, an alteration/forgery was placed on the Addendum in different handwriting that the insurance money for the storm damage was to be given to the buyer at closing. Specifically, the language read "Seller to pass to buyer the insurance check for repairs with $8,200 being held in Whitaker Bank Escrow for lien of Anderson News, LLC until this lien can be desolved [sic] and released. At this time this escrow money to be released to buyer." Montgomery alleged that she went to the closing and signed the insurance proceeds check over to Whitaker but expected to receive a distribution check from the closing.[1]

[1] Montgomery alleges that the contract for the sale of the property was "as is".

Whitaker, as a lender in the real estate closing for the property, attended the closing. At the closing, Montgomery endorsed and delivered the insurance check to Whitaker. Whitaker accepted the check and issued funds to the buyer in the amount of $52,261.22 and agreed to escrow the remaining insurance funds of $8,200.00 to address a third-party lien and to facilitate the closing. Montgomery claims that once the forgery was revealed to her, after the closing, she stopped payment on the check.

On August 21, 2012, Whitaker filed suit against Montgomery to recover the full amount of the insurance proceeds. Whitaker sought to recover the $52,261.22 it paid to buyer, while the remaining $8,200.00 was to remain in escrow to address the third party lien or to pay to buyer if that was resolved. Whitaker stated multiple legal grounds for recovery of the insurance proceeds, including breach of contract pursuant to Montgomery's mortgage, the Addendum, and the parties' representations at the closing, as well as equitable estoppel and detrimental reliance, and fraudulent misrepresentation based upon Montgomery's action in delivering the endorsed check to Whitaker at the closing. Montgomery filed an answer, counterclaim, and cross-claim in this matter.

Thereafter, Whitaker moved for summary judgment, which was briefed and argued before the circuit court on July 18, 2013. The court granted Whitaker's motion for summary judgment, ordered the insurance proceeds to be distributed to Whitaker, and dismissed Montgomery's counterclaim. The court in so doing, noted that it was relying upon the reasons it had set forth in its oral

ruling, which was "primarily on the grounds that the insurance proceeds was to be, was for damage to the property of which Whitaker Bank had a mortgage on." It is from this that Montgomery now appeals.

On appeal, Montgomery argues: (1) there were clearly genuine issues of material fact which should have precluded the court from rendering summary judgment; and (2) there having been no discovery taken whatsoever, the issuance of summary judgment was premature. In response, Whitaker argues: (1) Montgomery's failure to raise the legal arguments regarding the mortgage and estoppel preclude review of those issues on appeal; (2) there is no factual dispute regarding two distinct legal grounds offered in support of the court's judgment; and (3) Montgomery was given ample opportunity for discovery and has proffered no evidence that would alter the court's judgment. With these arguments in mind we turn to our applicable standard of review.

We note that the applicable standard of review on appeal of a summary judgment is, "Whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the

record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id*. However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra. See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

First, we shall address the argument that summary judgment was prematurely granted as discovery was incomplete. Simply stated, "It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co*., 579 S.W.2d 628, 630 (Ky. App. 1979). *Sub judice*, Montgomery had approximately seven months to conduct discovery or identify documents or evidence they deemed necessary to respond to Whitaker's claims. The record shows that Montgomery did not offer any relevant discovery that they

believed should have been considered by the court prior to ruling on Whitaker's motion for summary judgment. Indeed, Montgomery has failed to explain to this Court what discovery was needed prior to the grant of summary judgment. As such, we cannot say that the court granted summary judgment prematurely.

Next, we address the argument that there were clearly genuine issues of material fact which should have precluded the court from rendering summary judgment. The crux of Montgomery's argument is that there were disputed material facts regarding the authenticity of the Addendum. Whitaker argues that there is no factual dispute regarding two distinct legal grounds offered in support of the court's judgment; that of equitable estoppel based on Montgomery's own actions when she endorsed and delivered the insurance proceeds check to Whitaker which facilitated closing, and that Whitaker was to escrow the proceeds of the insurance policy under the terms of the mortgage. Thus, Whitaker argues, the authenticity of the Addendum is immaterial.

We note that based upon the mortgage, it was clear that Whitaker was entitled to the insurance proceeds and, at its election, could apply the proceeds to the reduction of the indebtedness, payment of any lien affecting the property, or the restoration and repair of the property. We agree with the court below that the insurance proceeds could properly be used to reimburse for or repair the damage to the property mortgaged to Whitaker Bank. We also agree with the court that Whitaker was entitled to the distribution of the insurance proceeds.

We note that while Montgomery's argument centers upon the authenticity of the Addendum which would give the buyer the right to the proceeds, Whitaker is not the buyer and was entitled to the insurance proceeds via the mortgage. Moreover, there has not been an argument advanced that Whitaker improperly utilized the insurance proceeds as permitted by the mortgage by turning over the proceeds to the buyer, which we presume was used to repair the property. We are not persuaded that the trial court was required to delve into the authenticity of the Addendum prior to granting summary judgment as Whitaker's claim to the proceeds rested on the mortgage. Thus, we decline to reverse on this ground.

Last, we address Whitaker's claim that they were justified in turning over the proceeds to the buyer and escrowing the remaining funds based on Montgomery's actions of endorsing the check and giving said check to Whitaker, which facilitated the closing of the real estate sale.

"[E]stoppel is a question of fact to be determined by the circumstances of each case." *Weiand v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, 91-92 (Ky. 2000) (internal citations omitted). Under the doctrine of equitable estoppel, certain conduct by a party is viewed as being so offensive that it precludes the party from later asserting a claim or defense that would otherwise be meritorious. *Akers v. Pike County Bd. of Educ*., 171 S.W.3d 740, 743 (Ky. 2005). In order to prevail on a theory of estoppel, there must be proof not only of an intent to induce action or inaction on the party to be estopped, but also of reasonable reliance by the party claiming the estoppel. *Gailor v.*

Alsabi, 990 S.W.2d 597, 604 (Ky. 1999)(internal citations omitted). Indeed in *Weiand, supra*, the Kentucky Supreme Court set out the essential elements of equitable estoppel as:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Weiand v. Board of Trustees of Kentucky Retirement Systems, 25 S.W.3d 88, 91 (Ky. 2000)(internal citations omitted).

Whitaker could view the actions of Montgomery in endorsing and tendering the check to it as actions pursuant to the terms of the mortgage, and thereupon rely on those actions in handling the insurance proceeds consistent with the mortgage. Based on the aforementioned actions of Montgomery, we cannot say that the court improperly granted summary judgment.

Finding no error, we affirm.

ALL CONCUR.

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