

RENDERED: NOVEMBER 3, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000280-MR

BARDSTOWN CAPITAL CORPORATION

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HON. BARRY WILLETT, JUDGE
ACTION NO. 14-CI-003890

NATIONSTAR MORTGAGE, LLC;
AUCTION.COM, LLC, D/B/A
AUCTION.COM; AND
STEVEN D. WEBB

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Bardstown Capital Corporation brings this appeal from a November 18, 2015, Order of the Jefferson Circuit Court granting the motions for summary judgment filed by Nationstar Mortgage LLC, and Auction.com, LLC. We affirm.

Nationstar Mortgage, LLC (Nationstar Mortgage) owned real property located at 9815 Wingfield Road in Louisville, Kentucky. In April 2014, Nationstar Mortgage listed the real property for sale with an online company, known as Auction.com LLC (Auction). Bardstown Capital Corporation (Bardstown Capital) submitted an online bid of \$82,500 for the real property. Eventually, Bardstown Capital was informed by Auction that it was the highest bidder and was sent via email a winning bidder confirmation document to sign. The winning bidder confirmation document included an addendum. Under the terms of the addendum, Bardstown Capital's purchase of the real property was made contingent upon seller's approval, which may be given in seller's absolute discretion in accordance with the purchase agreement. The seller was, of course, Nationstar Mortgage.

Frank Csapo, President of Bardstown Capital, signed both the winning bidder confirmation and the addendum. These documents were submitted to Auction. Thereafter, Bardstown Capital received a purchase agreement, and Bardstown Capital altered the purchase agreement by striking numerous provisions thereof. Csapo signed the amended purchase agreement on April 21, 2014, and submitted it to Auction.

On May 7, 2014, Bardstown Capital received an email from Auction and "the seller." The email informed Bardstown Capital that the "online contract for digital signature" had been cancelled.

Bardstown Capital then filed a complaint and amended complaints in the Jefferson Circuit Court against, *inter alios*, Auction, Nationstar Mortgage, and

Steven Webb.¹ Bardstown Capital asserted that Nationstar Mortgage breached a contract for the sale of real property located in Louisville, Kentucky. Bardstown Capital asserted the claims of, *inter alia*, breach of contract and equitable estoppel. Bardstown Capital also moved the court for appointment of a receiver; however, the court denied said motion by order entered March 9, 2015.

Bardstown Capital, Nationstar Mortgage, and Auction filed separate motions for summary judgment. By order entered November 18, 2015, the circuit court denied Bardstown Capital's motion for summary judgment but granted the motions for summary judgment filed by Nationstar Mortgage and Auction. The circuit court held that the winning bid confirmation did not contractually obligate Nationstar Mortgage to sell the real property to Bardstown Capital. The circuit court also concluded that Bardstown Capital made significant alterations to the purchase agreement and in so doing, submitted a counter-offer. By order entered February 23, 2016, the circuit court denied Bardstown Capital's motion to alter, amend or vacate the November 18, 2015, order. This appeal follows.

Bardstown Capital contends that the circuit court erred by rendering summary judgment in favor of Auction and Nationstar Mortgage. In particular, Bardstown Capital maintains that a binding contract existed between it and Nationstar Mortgage and that Nationstar Mortgage breached the contract by failing to sell it the real property. In support thereof, Bardstown Capital asserts that two

¹ Bardstown Capital Corporation named Steven Webb as an appellee in the Notice of Appeal. Webb subsequently purchased the real property located at 9815 Wingfield Road in Louisville, Kentucky, from Nationstar Mortgage, LLC.

documents “Acceptance Email” and “DocuSign Confirmation” evidence that Nationstar Mortgage assented to and signed the amended purchase agreement. Specifically, Bardstown Capital argues:

The Acceptance Email – which was sent after Bardstown Capital sent the revised Purchase Agreement to the Defendants – has a signature line which reads: “Subject: **Completed** *** CORRECTED*** Online Contract for Digital Signature for Auction 0-451 item #[EM96016]” (emphasis added). Further, the Acceptance Email indicates that “**Your document has been completed**” and that “**All parties have signed the envelope** ***CORRECTED*** Online Contract for Digital Signature for Auction 0-451 #[EM96016]” (emphasis added). See **Exhibit F**.

Likewise, the DocuSign Confirmation – also sent after Bardstown Capital delivered the revised Purchase Agreement to the Defendants – indicates that the Purchase Agreement had in fact been signed by all parties and includes at the top of the page a “Certificate of Completion.” The subject document totaled 88 pages, and its status is listed as “Completed.” The “Envelope Summary Events” section of the DocuSign Confirmation indicates the following events occurring on April 23, 2014, the same date that BCC [Bardstown Capital Corporation] received the Acceptance Email (and again which followed sending the revised Purchase Agreement): (1) Envelope Sent, (2) Certified Delivered, (3) Signing Complete, (4) Completed.

In other words, Bardstown Capital has two written documents sent following its returning the revised Purchase Agreement to Auction.com and Nationstar showing that the Purchase Agreement had been accepted and signed by all parties. Bardstown Capital does not dispute the finding of the Order that “. . . the winning bidder confirmation email did not constitute a contract acceptance by Nationstar or Auction.com,” as clearly Nationstar’s subsequent approval was necessary as stated in the Addendum. However, the Nov. 18 Order is in

error to the extent it relies on that finding to grant summary judgment to the Defendants and deny summary judgment to Bardstown Capital. Because Nationstar and/or Auction.com sent the Acceptance Email and the DocuSign Confirmation to Bardstown Capital following the Winning Bidder Confirmation, both indicating that the Purchase Agreement had been signed by all parties and was complete, this finding is erroneous. To the extent that the contents of either of these writing are subject to interpretation, those are genuine issues of fact that preclude summary judgment.

Bardstown Capital's Brief at 11-12. Citing to the Acceptance Email and the DocuSign Confirmation, Bardstown Capital believes that material issues of fact existed as to whether National Mortgage signed the purchase agreement, thus creating a binding contract for the sale of real property.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences are viewed in a light most favorable to the nonmoving party. *Id.* Our review proceeds accordingly.

In Kentucky, an agreement for the sale of real property must "be in writing and signed by the party to be charged therewith." KRS 371.010. And, in instances where a signature is required by law, "an electronic signature satisfies the law." KRS 369.107(4).

The Acceptance Email received by Bardstown Capital contained a subject line that read, "Completed: *** CORRECTED *** Online Contract For Digital Signature For Auction 0-451 item # [EM96016]." It then stated that "[y]our

document has been completed” and that “[a]ll parties have signed the envelope *** COMPLETED *** Online Contract For Digital Signatures.” The Acceptance Email also included a link tab conspicuously located in the middle of the email. On the link tab were the words “View Documents,” and the instructions to click on the link to view the documents, recipients, and general information concerning the Acceptance Email.

The DocuSign Confirmation also received by Bardstown Capital has an envelope number and subject line that read, “*** CORRECTED *** Online Contract For Digital Signature.” Relevant to this appeal, the DocuSign Confirmation indicated three signatures under “signer events.” Csapo was listed as having signed by uploading his handwritten signature. Bardstown Capital’s realtor was listed as electronically signing; however, no other parties were listed as signing either electronically or otherwise.

Auction filed the affidavit of Darrell Wall. Wall was employed by Auction as Director of Contracts. In the affidavit, Wall averred:

5. After a winning bidder is declared in an Auction.com online auction, an electronic “envelope” is sent via DocuSign first to the buyer parties, which include the buyer and the buyer’s real estate agent, if any. A DocuSign “envelope” contains electronic copies of the required purchase agreement and other documents relating to the real estate transaction, including any necessary addendum to the required purchase agreement. The seller parties, which include the seller and the seller’s real estate agent, if any, are not parties to the buyer parties’ envelope and are not sent the buyer parties’ envelope.

6. The document attached to Plaintiff's Response to Nationstar Mortgage, LLC's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment ("Plaintiff's Response) as Exhibit G [Acceptance Email] is a DocuSign printout showing that all the buyer parties, Plaintiff Bardstown Capital Corporation and its real estate agent, Anne E. Mayhugh, signed the documents in the buyer parties' envelope as of 12:04:47 PM PT on April 23, 2014. As the message indicates, Plaintiff could have clicked on the "View Documents" hyperlink and viewed the documents referenced in the message. One of the documents available for Plaintiff's review at the time from the "View Documents" link was an altered purchase agreement, attached hereto as an exhibit, signed with ink by Plaintiff's representative, Frank Csapo, and electronically signed by Ms. Mayhugh. No documents from the "View Documents" hyperlink were signed by Nationstar.

7. A separate DocuSign envelope is sent to the seller parties after the buyer parties properly sign the documents in the buyer parties' envelope. This process is not automated for Nationstar assets. Instead, Auction.com must act to send the seller parties' envelope to Nationstar upon successful completion of the buyer parties' envelope. In the auction at issue in this case, Auction.com never sent Nationstar a DocuSign seller envelope because Plaintiff failed to sign the purchase agreement as provided, without alteration.

8. The document attached to Plaintiff's Response as Exhibit H [DocuSign Confirmation] is the DocuSign Certificate of Completion relating to the buyer parties' envelope referenced in Exhibit G. Exhibit H shows that only Plaintiff and Plaintiff's real estate agent signed the envelope – only Plaintiff and Ms. Mayhugh are listed under "signer events." Nationstar is not listed as a signer under "signer events."

9. Exhibit H [DocuSign Confirmation] shows that there are three "signatures" because it tracks the number of signatures affixed to the document using the DocuSign, and in this case, the buyer's agent was the

only party that signed using DocuSign and her electronic signature appears three times. Exhibit H's time stamps reflects this fact. Ms. Mayhugh electronically signed the documents in the buyer's envelope at 12:04:42 PM PT on April 23, 2014, the envelope was copied to Ms. Feehan and marked as complete three seconds later, as 12:04:45 PM PT on April 23, 2014, and Plaintiff received Exhibit G [Acceptance Email], the confirmation email that the buyer party's envelope was complete at 12:04:47 PM PT on April 23, 2014. The buyer's party's envelope confirmations in Exhibit G [Acceptance Email] and H [DocuSign Confirmations] in no way depended on any action or inaction on the part of Nationstar.

10. Auction.com has never had a document evidencing that Nationstar signed a purchase agreement for the real estate at issue in this case, nor am I aware of such a document.

Darrell Wall Affidavit at 2-3.

Additionally, Nationstar Mortgage filed the affidavit of A.J. Loll, who was the Vice President of Nationstar Mortgage. According to Loll, "Nationstar never signed, or authorized anyone to sign, its name (electronically or otherwise) to any document that reflects, or relates to, the sale of the Property" to Bardstown Capital.

A.J. Loll's Affidavit at 1.

We begin our analysis by pointing out that Bardstown Capital has never produced a purchase agreement signed by Nationstar Mortgage. To cure this glaring deficit in its proof, Bardstown Capital essentially argues that the Acceptance Email and the DocuSign Confirmation constitute sufficient circumstantial proof that Nationstar Mortgage signed the purchase agreement so as to create a material issue of fact. We, however, disagree.

According to Wall, the Acceptance Email and DocuSign Confirmation were merely sent by Auction to Bardstown Capital to confirm that all of the buyer's parties had signed the amended purchase agreement. Wall explained that Nationstar Mortgage never even received the amended purchase agreement from Auction. Additionally, the Vice President of Nationstar Mortgage, Loll, confirmed that it did not assent to or sign the amended purchase agreement. We agree with the circuit court that the amended purchase agreement was nothing more than a counter offer which was not accepted or asserted to by Nationstar Mortgage. Bardstown Capital simply misinterpreted the Acceptance Email and the DocuSign Confirmation. Also, Bardstown Capital has offered no facts to controvert either Wall's affidavit or Loll's affidavit. Bardstown Capital's conclusory allegations without supporting facts are insufficient to defeat summary judgment. *See Henninger v. Brewster*, 357 S.W.3d 920 (Ky. App. 2012). Consequently, we cannot conclude that material issues of fact precluded summary judgment upon the breach of contract claim.

Bardstown Capital next asserts that the circuit court erroneously rendered summary judgment upon its claim of equitable estoppel. Bardstown Capital specifically argues:

[I]n good faith reliance on both the words and deeds of Nationstar, BCC [Bardstown Capital Corporation] signed the Purchase Agreement and returned same to Nationstar. BCC further wired the Good Faith Deposit to the agent for Nationstar's choosing in furtherance of the closing which had been scheduled for May 13, 2014. Additionally, BCC obtained a title policy at its own

expense in anticipation of the scheduled closing. There are numerous genuine issue of fact related to whether equitable estoppel applies, including but not limited to whether the Defendants actions in sending the Acceptance Email (and the contents of those writing) included false representations of concealment of materials [sic] facts, or at least were calculated to convey the impression that Bardstown Capital had an enforceable contract for the purchase of the Property. Despite BBC's complete good faith in this matter, Nationstar unilaterally breached the Purchase Agreement by cancelling the sale without justification. . . .

Bardstown Capital's Brief at 18.

Our Supreme Court has recently set forth the "essential elements" of equitable estoppel:

The essential elements of equitable estoppel are[:] (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.

Sebastian-Voor Props., LLC v. Lexington-Fayett Urban Cnty. Gov't, 265 S.W.3d 190, 194-95 (Ky. 2008) (quoting *Weiland v. Bd. of Trs. of Ky. Ret. Sys.*, 25 S.W.3d 88, 91 (Ky. 2000)); *Elec. & Water Plant Bd. of Frankfort v. Suburban Acres Dev.*,

Inc., 513 S.W.2d 489, 491 (Ky. 1974). Thus, to prevail upon a claim of equitable estoppel, the claimant must offer “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.” *Kindred Nursing Ctrs. Ltd. P’ship v. Brown*, 411 S.W.3d 242, 247 (Ky. App. 2011).

Bardstown Capital claims that it reasonably relied upon the Acceptance Email and the DocuSign Confirmation as verification that Nationstar Mortgage had, in fact, signed the amended purchase agreement. However, as averred by Wall, Bardstown Capital could have easily clicked the view documents link and examined the documents referenced in the Acceptance Email. According to Wall, those documents consisted of the amended purchase agreement signed by Csapo and the real estate agent; however, “[n]o documents from the View Documents hyperlink were signed by Nationstar Mortgage.” These facts are undisputed. Additionally, as to the DocuSign Confirmation, Wall stated that it listed three signatures because the realtor was the only person to sign electronically, and her electronic signature occurs three times in the documents. These facts are also uncontroverted. And, a review of the DocuSign Confirmation reveals that it did not even mention Nationstar Mortgage anywhere therein.

We cannot conclude that Bardstown Capital’s reliance was reasonable. Bardstown Capital could have easily discovered that Nationstar Mortgage had not signed the amended purchase agreement by clicking on the view documents link situated predominately in the Acceptance Email. Hence, we are of the opinion that

Auction and Nationstar Mortgage were entitled to summary judgment upon the claim of equitable estoppel.

Bardstown Capital further argues that summary judgment was premature because it was still conducting discovery. In the context of summary judgment, the circuit court's decision that a sufficient amount of time has elapsed to complete discovery is reviewed for an abuse of discretion. *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010). Thus, we must determine whether Bardstown Capital had a reasonable opportunity to complete discovery. *Henninger*, 357 S.W.3d 920. The record indicates that Bardstown Capital filed the complaint on July 23, 2014, and that the circuit court stayed discovery by order entered June 10, 2015. Therefore, Bardstown Capital had some eleven months to conduct discovery. Upon the whole, we simply cannot conclude that the circuit court abused its discretion.

We view any remaining contentions of error as moot.

Accordingly, we hold that the circuit court properly rendered summary judgment in favor of Auction and Nationstar Mortgage.

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

MAZE, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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