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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000341-MR

PULASKI PROPERTIES, INC.

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 15-CI-00462

NEAL HANEY; LAKE CUMBERLAND
INVESTMENTS, LLC; AND STEPHEN ACTON

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * **

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

DIXON, JUDGE: Pulaski Properties, Inc., (“PPI”) appeals from the Pulaski Circuit Court’s January 29, 2018, order granting partial summary judgment to Neal Haney, Lake Cumberland Investments, LLC (“LCI”), and Stephen Acton.

Following review of the record, briefs, and law, we affirm in part, reverse in part, and remand, with instructions for entry of an order consistent with this Opinion.

FACTS AND PROCEDURAL BACKGROUND

On November 30, 2012, PPI—by and through its president, Jerry Stykes—and LCI—by and through its member, Haney—entered into a written agreement for PPI to loan LCI \$6,500 until January 1, 2013, interest free, and for LCI to sell PPI a certain piece of real estate for \$55,000 on January 1, 2013, free of “all liens, etc[.]” PPI’s payment of \$6,500 was negotiated on December 3, 2012. No repayment of the loan or sale of the subject property was made on January 1, 2013, or thereafter. No written demand for repayment of the loan or sale of the property was made until May 8, 2015, when PPI filed suit against Haney and LCI for specific performance. On December 27, 2016, PPI’s amended complaint was filed adding Acton—the managing member¹ of LCI—as a defendant, as well as other causes of action against all defendants, including breach of contract, fraud, and conversion. Regardless of employment of motions to compel and other discovery squabbles, significant discovery was conducted, including written discovery and the depositions of Stykes, Haney, and Acton. Haney and LCI moved the trial court for partial summary judgment. Acton also moved the trial

¹ Haney and Acton are the only two members of LCI.

court for summary judgment. The trial court granted partial summary judgment in favor of Haney, LCI, and Acton. This appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate “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 a judgment as a matter of law.” CR² 56.03. An appellate court’s role in reviewing a summary judgment is to determine whether the trial court erred in finding no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698 (Ky. App. 2000)).

LEGAL ANALYSIS

PPI raises six arguments on appeal: (1) its fraud claims should be reinstated, (2) Acton is liable for breach of contract, (3) its claim for conversion of the \$6,500 against LCI and Haney is not time-barred, (4) summary judgment on its claim for attorney’s fees was erroneous and/or premature, (5) summary judgment

² Kentucky Rules of Civil Procedure.

on its claim for punitive damages against Acton was erroneous, and (6) material issues of fact preclude summary judgment. We will address each argument, in turn.

PPI's first argument is that its fraud claims should be reinstated. We begin our analysis of PPI's arguments by noting that CR 9.02 requires claims of fraud be stated with particularity.

Concerning PPI's fraud claims against Haney and LCI, the trial court found:

[a]lthough the pleading is made with broad strokes, as it applies to the conduct of Neal Haney and LCI on November 30, 2012, the claim does not fail for lack of specificity under CR 9.02. Any other alleged misrepresentations that occurred "in the months thereafter" do not meet the heightened pleading standard because they do not specifically allege "the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud," as to put the defendants on notice of the claims against them.

In another case reviewing the sufficiency of pleading fraud claims, the former Court of Appeals held:

[i]t is not necessary that the 'particularity' commanded by CR 9.02 attain such detail as to recite each minute detail; it is enough to plead the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud. *See* Clay, CR 9.02, pp. 165-166 wherein is contained a statement from *Union Mutual Life Ins. Co. v. Simon*, D.C.Pa., 22 F.R.D. 186 as follows:

‘Rule requiring that averments of fraud be made with particularity does not require textbook pleading of all elements of fraud but requires merely that plaintiff set forth facts with sufficient particularity to apprise defendant fairly of charges against him.’

As further noted in Clay CR 9.02 at p. 165, the rule requiring pleading of fraud and mistake with particularity is to be considered in light of the entire spirit of modern pleading which lays emphasis upon short, concise and direct pleading. *United States v. Dittrich*, D.C.Ky., 3 F.R.D. 475.

The appellants did not seek a more definite statement of the complaint as permitted to them by CR 12.05, nor is there any suggestion that appellants suffered surprise or prejudice when evidence was presented which had not been ‘spelled out’ in detail in the complaint. In these circumstances the appellants may not complain.

Scott v. Farmers State Bank, 410 S.W.2d 717, 722 (Ky. 1966).

In the case at hand—contrary to the trial court’s findings—PPI sufficiently pled the time, from November 30, 2012, through 2015; the place, in Pulaski county; the substance of the false representations, that the loan would be repaid and the sale of the property finalized; the facts misrepresented, also that the loan would be repaid and the sale of the property finalized; and the identification of what was obtained by the fraud, \$6,500 plus payments of utilities, mortgage, and other improvements. Neither Haney nor LCI sought a more definite statement of the complaint or amended complaint concerning these allegations. Review of the pleadings demonstrates that PPI stated its fraud claims against Haney and LCI

sufficiently to survive dismissal under CR 9.02. Additionally, in viewing the evidence of record in favor of the non-moving party, PPI, under the standard for summary judgment in CR 56.03, there are material issues of genuine fact which preclude a grant of summary judgment in favor of Haney and LCI on PPI's fraud claims. Therefore, we must reverse the trial court's grant of summary judgment in favor of Haney and LCI on PPI's fraud claims.

Concerning PPI's fraud claims against Acton, however, the trial court found that PPI failed to allege that Acton made any representation to PPI which it relied upon or which induced it to act. On review, this finding is supported by both the record and the law concerning actions for fraud.

The Supreme Court of Kentucky has held:

in Kentucky such a claim requires proof, by clear and convincing evidence, of the following six elements: (1) that the declarant made a material representation to the plaintiff, (2) that this representation was false, (3) that the declarant knew the representation was false or made it recklessly, (4) that the declarant induced the plaintiff to act upon the misrepresentation, (5) that the plaintiff relied upon the misrepresentation, and (6) that the misrepresentation caused injury to the plaintiff.

Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544, 549 (Ky. 2009) (citation omitted).

Herein, the trial court found:

Stykes, on behalf of PPI, in his deposition stated that Acton did not make representations to him regarding this transaction and the allegations in the amended complaint. In fact, Stykes admitted that he was unaware that he had

brought such a claim against Acton. According to Stykes, no representation was made by Acton, nor were any false statements made to him. Stykes did state that it was his opinion that Acton made a misrepresentation when he signed the deed, but the deed could not be filed.

(internal footnotes omitted).

“[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The only misrepresentation PPI alleges Acton made was when he signed the deed in 2015. PPI has failed to allege that it was either induced to act or relied upon this purported misrepresentation. These missing elements are fatal to PPI’s fraud claims against Acton. Consequently, the trial court did not err in dismissing this claim as insufficiently pled and granting Acton summary judgment as a matter of law.

PPI’s second argument is that Acton is liable for breach of contract. PPI cites KRS³ 275.135 and KRS 275.165, asserting “Acton effectively and legally *is* LCI for all purposes pertaining to the agreement with [PPI.]” (emphasis in original). PPI alleges, “[b]y failing to cause LCI to honor the agreement by the simple expedient of making the conveyance in his capacity as manager, yet

³ Kentucky Revised Statutes.

personally accepting and keeping part of the consideration therefore, he should indeed be liable for breach of contract.” (emphasis in original). However, this argument disregards KRS 275.150, which provides:

(1) Except as provided in subsection (2) of this section or as otherwise specifically set forth in other sections in this chapter, **no member, manager, employee, or agent of a limited liability company, including a professional limited liability company, shall be personally liable by reason of being a member, manager, employee, or agent of the limited liability company, under a judgment, decree, or order of a court, agency, or tribunal of any type, or in any other manner, in this or any other state, or on any other basis, for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise.** The status of a person as a member, manager, employee, or agent of a limited liability company, including a professional limited liability company, shall not subject the person to personal liability for the acts or omissions, including any negligence, wrongful act, or actionable misconduct, of any other member, manager, agent, or employee of the limited liability company. That a limited liability company has a single member or a single manager is not a basis for setting aside the rule otherwise recited in this subsection.

(2) Notwithstanding the provisions of subsection (1) of this section, under a written operating agreement or under another written agreement, a member or manager may agree to be obligated personally for any of the debts, obligations, and liabilities of the limited liability company.

(3) Subsection (1) of this section shall not affect the liability of a member, manager, employee, or agent of a limited liability company for his or her own negligence, wrongful acts, or misconduct.

(emphasis added). Thus, KRS 275.150 specifically provides immunity from personal liability for members/managers of an LLC in instances such as this.

Additionally, and more fundamentally, the trial court correctly found that there was no contract between PPI and Acton personally to be breached. KRS 371.010 provides:

[n]o action shall be brought to charge any person . . .
[u]pon any contract for the sale of real estate . . . [or
u]pon any agreement that is not to be performed within
one year from the making thereof . . . unless the promise,
contract, agreement, representation, assurance, or
ratification, or some memorandum or note thereof, be in
writing and signed by the party to be charged therewith,
or by his authorized agent.

Acton did not personally sign the contract, nor was Haney authorized to do so on Acton's behalf.⁴ The trial court correctly found that the "only writing produced between Acton and PPI is an incomplete deed of conveyance where Acton signed as an officer of LCI, not personally." PPI has not shown, nor have we found, any error with the trial court's grant of summary judgment in favor of Acton on PPI's breach of contract claim against him.

PPI's third argument is that its claim for conversion of the \$6,500 against LCI and Haney is not time-barred. However, this issue was not presented to the trial court. For this Court to have authority to review a claim, the trial court

⁴ Haney signed the agreement on behalf of LCI, not on behalf of any individual.

must have had an opportunity to correct its alleged error. *Harrison v. Leach*, 323 S.W.3d 702, 708-09 (Ky. 2010).

PPI's fourth argument is that summary judgment on its claim for attorney's fees was erroneous and/or premature. Although PPI admits that there is no contractual or statutory basis for an award of attorney's fees in this case, the trial court made no ruling relative to an award of attorney's fees against Acton. It is well-established that where further steps are required to fully adjudicate the parties' rights, an order is not final under CR 54.01 and cannot be appealed. *See Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 102 (Ky. App. 2011). The proof required on the issue of attorney's fees against Haney, LCI, and Acton is the same. Because these issues are inextricably intertwined, the issue before us is interlocutory. Therefore, we must decline to render an opinion on this issue.

PPI's fifth argument is that summary judgment on its claim for punitive damages against Acton was erroneous. Before addressing the merits of this argument, we would note that it is not the job of an appellate court to scour a record to determine whether it supports a party's assertions. *Walker v. Commonwealth*, 503 S.W.3d 165, 171 (Ky. App. 2016). Counsel must exercise care, diligence, and trustworthiness to ensure the accuracy of citations provided to the appellate court in support of any arguments pursuant to CR 76.12, pertaining to both location and substance. Review of the cited portions herein, however,

suggests that PPI misinterprets or mischaracterizes the record as it pertains to this argument. Nevertheless, exercising our discretion relative to counsel's compliance with CR 76.12, rather than ordering PPI's brief stricken—either in whole or in part—we have elected to simply include no analysis of unsupported matters asserted in the offending portions of PPI's argument. Our review is limited to those portions of PPI's argument supported by correct citation to the record.

Only Acton's motion for partial summary judgment addressed punitive damages. Moreover, Acton only argued against punitive damages as inappropriate in breach of contract suits, citing KRS 411.184(4). Nevertheless, the trial court found that "Acton, personally, did not act towards PPI and therefore, no question of fact exists as to whether Acton acted with oppression, fraud, or malice toward PPI."

It is well-established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1955). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc.*, 807 S.W.2d at 481 (citations and internal quotation marks omitted). PPI failed to present any affirmative evidence

that Acton acted with oppression, fraud, or malice as required by KRS 411.184; therefore, the trial court did not err in granting summary judgment in favor of Acton on PPI's claim of punitive damages against him.

PPI's final argument is that material issues of fact preclude summary judgment. Although this argument is not well-organized and gives only cursory treatment to many issues previously raised, the predominant point of this argument is PPI's contention that discovery was "incomplete due to the deficient and incomplete responses to discovery requests." Considering the record as developed, it is unlikely there is anything capable of production which could create genuine issues of material fact sufficient to preclude summary judgment on the issues previously discussed herein. Nor can PPI's argument that it does not have complete responses to discovery requests support its claim that discovery is somehow not substantially complete, when it had ample opportunity—nearly three years—to obtain information and records to support its claims. "A summary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence." *Pendleton Bros. Vending, Inc. v. Com. Fin. & Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979)). Furthermore, PPI neither adequately explains nor supports its assertions of how and why Haney, LCI, or Acton's "incomplete" discovery

responses create genuine facts precluding a grant of summary judgment.

Consequently, the trial court did not err in this regard.

CONCLUSION

Therefore, and for the foregoing reasons, the order of the Pulaski Circuit Court is **AFFIRMED** in part; **REVERSED** in part; and **REMANDED** for proceedings consistent with this Opinion.

ALL CONCUR.

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⁵ The cover page of this Appellee brief indicates it was also filed on behalf of Stephen Acton. However, based on information available, Attorney Sergent only represents and has only responded on behalf of Haney and LCI. Acton, through counsel, filed his own separate Appellee brief.