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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001452-MR

KEY STAR CAPITAL FUND, L.P. APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 16-CI-00052

HRD, LLC; SAH, LLC; JOSEPH P. HAYDON;
AND NELL R. HAYDON APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Key Star Capital Fund, L.P. appeals from four orders of the Washington Circuit Court. Those orders found that Key Star and HRD, LLC entered into a settlement agreement wherein Key Star would settle its foreclosure action against HRD in exchange for $300,000. Key Star argues on

appeal that there was no valid settlement agreement. HRD, SAH, LLC, Joseph Haydon, and Nell Haydon (hereinafter referred to collectively as "Appellees") claim that the settlement agreement was enforceable. We find no error in the trial court's conclusion that the parties entered into a valid settlement agreement; therefore, we affirm.

This case has already been before a panel of this Court. We will utilize that Court's recitation of the facts.

> In 2003, SAH, LLC, executed and delivered a promissory note in the principal amount of $500,000, plus interest, in favor of First Federal Savings Bank and granted a mortgage upon real property located at 1075 Bardstown Road, Springfield, Kentucky, to secure repayment of the indebtedness.[1] Joseph P. Haydon, Nell R. Haydon, and HRD, LLC, each executed guarantees agreeing to repay the promissory note in the event of default by SAH.
>
> In 2006, HRD executed and delivered a promissory note in the principal amount of $1,120,000, plus interest, in favor of First Federal Savings Bank and granted a mortgage upon real property located at 805 Bardstown Road, Springfield, Kentucky, to secure repayment of the indebtedness.[2] The Haydons also executed guarantees agreeing to repay the promissory note in the event of default by SAH.
>
> In November of 2015, the aforesaid notes were sold and transferred to Key Star Capital Fund, L.P. The

[1] This property is a vacant lot.
[2] This property is a lot with an empty building on it. At all times relevant, Appellees were trying to open a flea market in the building.

> mortgages securing the note indebtedness were assigned to Key Star.
>
> On May 2, 2016, Key Star filed a Complaint in Foreclosure in the Washington Circuit Court against SAH, HRD, the Haydons, Springfield, Kentucky, and Washington County, Kentucky. Key Star alleged that the SAH promissory note and the HRD promissory note were in default and sought to foreclose on the mortgaged real properties located at 1075 Bardstown Road and 805 Bardstown Road.
>
> SAH, HRD, and the Haydons filed answers. Springfield and Washington County filed answers and cross-claims for unpaid real property taxes for the 2016 tax year.
>
> Key Star ultimately filed a motion for summary judgment and for order of sale. HRD and the Haydons subsequently filed a Motion to Enforce Settlement Agreement. HRD and the Haydons alleged that a settlement agreement was reached between them, SAH, and Key Star after the lawsuit was filed. Key Star filed a response and disputed that a settlement agreement existed. Key Star claimed that the parties did engage in settlement negotiations but no settlement agreement had been reached. To determine whether a settlement was reached by the parties, the court thoroughly reviewed and relied upon an email chain between counsel for the parties for the period of June 30, 2016, through August 1, 2016.

Key Star Capital Fund, L.P. v. HRD, LLC, No. 2017-CA-001233-MR, 2018 WL 3954279, *1 (Ky. App. Aug. 17, 2018).

These emails are at the center of this case; therefore, we will set them forth.

June 30, 2016: Counsel for Appellees contacted counsel for Appellant informing him that Appellees were opening a flea market in the building, that Appellees already had tenants lined up to occupy flea market booths and asking for a discounted "walk away" figure.

July 6, 2016: Counsel for Appellant replied stating the following:

> David [(counsel for Appellees)] here is what I can do. All of this is considered settlement discussions which are afforded all protections recognized by the Rules of Evidence and the Rules of Civil Procedure.
>
> First off, my client needs to see copies of the contracts with the tenants to assure they are out there. Please forward copies at your earliest convenience.
>
> The vacant lot owned by SAH needs to be listed with a reputable realtor at a price consistent with market rates. Proof of the listing needs to be provided to my client.
>
> With respect to the HRD loan, my client would take a lump sum payment of $300,000 to release its mortgage on the retail building while retaining its mortgage on the acreage.
>
> My client will give your client until October 15 to refinance the obligations. During that time, there would need to be forbearance payments of $5,000 per month beginning August 1 and continuing on the first day of each month thereafter until the loan is refinanced in October. Failure to comply with any of the above would result in the breach of this agreement and the debtors would have to consent to a judgment and order of sale of all of the subject properties. Let me know your thoughts.

July 11, 2016: Appellant's counsel emailed Appellees' counsel asking if Appellees were interested in "this proposal."

July 11, 2016: Counsel for Appellees stated that he would check with his clients.

July 11, 2016: Appellees' counsel emailed Appellant's counsel and stated, "Yes, absolutely. They are in the process of getting me information to respond."

August 1, 2016: Appellees' counsel emailed Appellant's counsel and stated, "Please see attachments [(a list of vendor tenants)]. The mall is opening next week. Who are the checks made out to and where [do Appellees] send them?

August 1, 2016: Appellant's counsel responds with, "Aren't there any signed contracts for the tenants?"

August 1, 2016: Appellees' counsel states, "I'll get those. Where does he send his check?"

August 1, 2016: Appellant's counsel states, "David – by the way there is a major typo in my offer to you. My client will accept $900,000 to release its mortgage on the retail building, not $300,000. Sorry about that."

August 1, 2016: Appellees' counsel responds, "THAT is probably a deal killer. That's almost payment in full."

August 1, 2016: Appellant's counsel responds, "So sorry David. It is 100% my fault. I simply misread my notes."

By order entered October 20, 2016, the circuit court concluded that a valid and enforceable settlement

> agreement was reached by SAH, HRD, the Haydons, and Key Star.[3] Consequently, the circuit court denied Key Star's motion for summary judgment and granted the motion to enforce the settlement agreement. The court specifically noted that its order was interlocutory. Key Star then filed a motion to reconsider or, alternatively, to designate the October 20, 2016, order final and appealable.
>
> By order entered December 1, 2016, the circuit court determined that an evidentiary hearing was necessary to rule upon Key Star's motion to reconsider. The court conducted the evidentiary hearing on January 30, 2017. Following the evidentiary hearing, the circuit court rendered an order on May 1, 2017. Therein, the circuit court again found that a valid and enforceable settlement agreement was reached between Key Star, HRD, SAH, and the Haydons. At the end of the order, the circuit court stated that the order "is final and appealable."
>
> Key Star then filed a Kentucky Rules of Civil Procedure (CR) 52.02 motion for additional findings of fact. By a calendar order dated July 12, 2017, the circuit court denied the CR 52.02 motion and included language that the "case is final and appealable." Key Star filed a notice of appeal on July 27, 2017, from the May 1, 2017, order. Key Star named as appellees HRD, SAH, and the Haydons.

Key Star at *1-2.

The previous panel of this Court dismissed the first appeal because it was taken from interlocutory orders. The Court held that the orders on appeal did not adjudicate the rights of Washington County and Springfield for unpaid taxes;

[3] The court found that the July 6 email contained the complete terms of the agreement.

therefore, they were interlocutory. In addition, the Court stated that a party may appeal from interlocutory orders if the circuit court indicates in the order that there is no just cause for delay and that the order is final. Here, the orders only indicated that they were final. The Court held that the "no just cause for delay" language was mandatory.

On remand, agreed orders of satisfaction were entered for the claims brought by Washington County and Springfield and those claims were dismissed. On September 19, 2018, the trial court then entered an order amending the May 1, 2017 order. The court amended the order to state that there was no just reason for delay and that it was a final and appealable order. This appeal followed.

On appeal, Appellant argues that the trial court erred in finding there was a valid agreement. Appellant alleges there was no complete agreement because the email was simply a beginning to negotiations and the agreement would need to be set forth in a legal document. To support this theory, Appellant argues that the alleged agreement was lacking terms regarding the sale of the vacant lot and the terms of the consent judgment. Additionally, Appellant argues that even if there was an offer, Appellees had not accepted the offer prior to Appellant's August 1 revelation that the offer contained a typo. Finally, Appellant argues that the $300,000 figure was so low as to put Appellees on notice that it was an erroneous number, thereby preventing a meeting of the minds.

> An agreement to settle legal claims is essentially a contract subject to the rules of contract interpretation. It is valid if it satisfies the requirements associated with contracts generally, *i.e.*, offer and acceptance, full and complete terms, and consideration. The primary object in construing a contract or compromise settlement agreement is to effectuate the intentions of the parties. "Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible."

Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 384-85 (Ky. App. 2002) (citations omitted).

Whether or not a contract exists is a question of fact. *Audiovox Corp. v. Moody*, 737 S.W.2d 468, 471 (Ky. App. 1987).

> In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

CR 52.01.

> The Court of Appeals, however, [is] entitled to set aside the trial court's findings only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless

> of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 353-54 (Ky. 2003) (footnotes omitted).

Appellant first argues that there was no agreement because the July 6 email was the starting point for negotiations and the alleged offer did not contain complete terms. Appellant argues that a minimum amount required for the sale of the vacant lot, a timeframe for selling the vacant lot, and the terms for the consent judgment were all missing from the offer. In addition, Appellant argues there could be no agreement without proper legal documents.

The trial court found that a complete offer was given to Appellees by Appellant's counsel. We agree. The July 6 offer set forth the requirement for a lump sum payment of $300,000, set a deadline for that payment, required $5,000 monthly forbearance payments, required tenant contracts be provided to Appellant, and required that the vacant lot be listed for sale at a price consistent with market rates. Also, the email stated that failure to abide by the terms would constitute a "breach of this agreement" and subject Appellees to a consent judgment and order

of sale. Also relevant is the trial court's reliance on Appellant's counsel referring to his July 6 email as an "agreement" and as an "offer."

We do not believe that the lack of a minimum amount for the vacant lot, nor a timeframe for selling the lot, make the agreement unenforceable. Appellees listed the lot for sale for a price of $500,000. Mr. Haydon testified that he was experienced at selling property and that this was a reasonable price. He also stated that the realtor with whom he listed the property did not try and get him to lower the price. Finally, $500,000 is the original amount of the mortgage taken on the property in 2003. As for the timeframe in which to sell the vacant property, we do not believe this is a necessary term for this settlement agreement. The settlement agreement is for the property with the building only. Appellant will still have its mortgage on the vacant lot. By maintaining its mortgage, Appellant can always petition the court for a judicial sale.

As for the terms of the consent judgment, Appellant does not identify what terms should have been included other than the parties agreeing to a foreclosure and selling the properties at issue should the terms of the settlement agreement be breached. Courts routinely determine the terms of judicial sales and could easily do so in this case should the need arise.

As to the need of a formal written document, Appellant cites to no law requiring such a document. The July 6 email was a written document that contained all the necessary terms; therefore, it was the settlement agreement.

Appellant next argues that there was no valid settlement agreement because Appellees did not accept the agreement before Appellant's counsel informed them of the mistake in the settlement amount. We disagree. Appellees accepted the offer both in writing and by performance. On July 11, counsel for Appellant emailed counsel for Appellees and asked if Appellees were interested in the proposal sent on July 6. Eventually Appellees' counsel responded with "Yes, absolutely." "An acceptance must be unequivocal in order to create a contract." *Venters v. Stewart*, 261 S.W.2d 444, 446 (Ky. 1953). This was an unequivocal acceptance of the offer.

Additionally, Appellees accepted the offer through their performance. "[W]here a party makes an offer and another acts upon it, the party making the offer is bound to perform his promise." *Messick v. Powell*, 314 Ky. 805, 810, 236 S.W.2d 897, 899-900 (1951); *see also Ham v. Miss C.E. Mason's Sch., The Castle*, 249 Ky. 478, 61 S.W.2d 7 (1933). On August 1, prior to Appellees being informed of the error in the settlement amount, Appellees' counsel informed Appellant's counsel that Appellees were ready to tender the first forbearance check

and inquired as to who to make the check out to and where to send it. This partial performance indicated acceptance.

As a side note, Appellant briefly argues that Appellees breached the terms of the agreement by not tendering the first forbearance payment until after August 1. Appellant is correct that the first payment was due on August 1 but was not received until later. We conclude that it would be unfair to invalidate the agreement based on the circumstances of this case. On August 1, Appellees had the first check ready to tender to Appellant. Counsel for Appellees asked counsel for Appellant who Appellees should make the check out to and where to send it. Counsel for Appellant did not answer this question. It would be unjust to invalidate the agreement because Appellant's counsel did not timely indicate who to make the check out to and where to send it.

Appellant's final argument on appeal is that the $300,000 settlement amount was incorrect which prevented Appellant from assenting to the agreement. Also, Appellant claims that the incorrect amount was so low that Appellees had to know it was a mistake and could not have reasonably relied on it; therefore, there was no meeting of the minds to make this a valid and enforceable contract. Appellant cites to *Whitaker v. Associated Credit Servs., Inc.*, 946 F.2d 1222 (6th Cir. 1991), for support.

In *Whitaker*, Linda and Kenneth Whitaker filed suit against Trans Union Corporation, a consumer credit reporting agency, alleging inaccuracies in their credit reports. Counsel for Trans Union drafted an offer of judgment to be transmitted to counsel for the Whitakers. The amount offered was supposed to be $500 but was listed as $500,000. This offer was transmitted to counsel for the Whitakers. The Whitakers' counsel was expecting an offer of $500 but did not notice the offer was for $500,000. The Whitakers accepted the amount, signed the necessary documents, and filed the offer of judgment with the court. When Trans Union's counsel received the acceptance, she first noticed the error. She notified the Whitakers' counsel of the error, but the Whitakers refused to accept $500. Trans Union's counsel motioned for the court to set aside the judgment and substitute in its place an offer of judgment for $500.

The trial court found that "the error was 'just too big a mistake to ignore'; that plaintiffs had made no demands for money prior to the instigation of their action against Trans Union; that Trans Union never had any intention to offer $500,000; and that to allow the judgment to stand would be unjust[.]" *Id.* at 1224. The court then substituted the lower amount. The Whitakers appealed and argued, among other things, that they were entitled to the full $500,000. The United States Court of Appeals for the Sixth Circuit held there was no meeting of the minds, and therefore no settlement agreement, because the Whitakers were aware the offer was

"outrageous." The Whitakers had not asked for monetary damages in their lawsuit and the offered amount was ridiculously high. Additionally, the Whitakers would not be damaged by the revocation of the $500,000 offer because it would put them back in the same position as they were pre-offer, and they could continue with their lawsuit against Trans Union. Finally, the Court found that Trans Union never intended to offer more than $500 and that "courts are reluctant to attribute to clients the mistakes of their attorneys." *Id.* at 1226.

We believe that the case *sub judice* is distinguishable from *Whitaker*. "Courts may apply general contract principles to determine what was intended in an offer of judgment and whether there has been a valid offer and acceptance. A valid offer and acceptance requires a mutual manifestation of assent, a meeting of the minds as to the terms of the contract." *Id.* (citations omitted). Here, the trial court found that counsel for Appellant did not have the authority to make an offer of $300,000 but believed it to be a reasonable amount to settle the claim. As the court found in its order, the purported offer of $900,000 would have almost settled the foreclosure claim in full and was not a reasonable "walk away" settlement amount. In addition, both Mr. Haydon and counsel for Appellees testified before the trial court that they believed the $300,000 offer was legitimate and reasonable.

Furthermore, *Whitaker* was rendered before *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996), which is relevant to the case at hand. In *Clark*, Alma

Clark brought an action against Foley Burden and Jones Buick GMC Trucks, Inc. for personal injuries. While litigation was pending, Clark's trial attorney submitted a written settlement offer to Burden and Jones Buick offering to accept a sum of $26,000. Burden and Jones Buick replied with a counteroffer of $23,000, which was accepted by counsel for Clark. Settlement documents and $23,000 were forwarded to Clark's attorney; however, the documents were never signed, and Clark's attorney informed Burden and Jones Buick that the deal was off. Burden and Jones Buick then moved to enforce the settlement agreement.

The trial court held a hearing on the matter and ultimately held that Clark's counsel was acting with apparent authority on Clark's behalf; therefore, that authority bound Clark to the agreement. The court did not make any findings as to whether Clark's counsel had actual authority to accept the settlement. The Court of Appeals affirmed the judgment of the trial court.

On appeal to the Kentucky Supreme Court, the Court held that under certain circumstances, a client could be bound by the actions of his or her attorney even when that attorney is acting without authority.

> [T]he proper inquiry is whether the peculiar agency relationship between attorney and client is sufficiently comprehensive with respect to third parties to overcome the fundamental right of the client to ultimately decide upon the settlement. An important consideration is the extent to which those dealing with an attorney in such circumstances may be harmed by unauthorized offers or acceptances of settlement. If it should be determined that

> third parties who may be dealing with such attorneys would be substantially and adversely affected by unauthorized attorney settlements, then the client employing the attorney should be bound. On the other hand, if it is determined that no substantial harm will befall third parties, then ultimate control should remain with the client, notwithstanding purported settlements by an attorney.

Id. at 576. While *Whitaker* stated that the Court was reluctant to bind a client to an attorney's unauthorized activity, *Clark* allows such action under certain circumstances.

In the case at hand, the trial court utilized the *Clark* analysis. The trial court held that a settlement offer had been extended by Appellant's counsel and that Appellees accepted; therefore, an enforceable contract had been created. The court then moved on to determine whether Appellant's counsel had express authority to settle the case for $300,000. The court found that he did not. Brad Hrevenar, Appellant's corporate representative who purchased the mortgages in this case and who was communicating directly with trial counsel, testified via deposition that he did not authorize a settlement in the amount of $300,000. Additionally, Appellant's counsel testified that he was not given express authority to settle for this amount.

The court having found that Appellant's counsel did not have express authority to settle the case for $300,000 then examined whether innocent third parties, namely Appellees, were adversely affected by the settlement agreement.

The court answered this question in the affirmative. Mr. Haydon testified that he spent approximately $60,000 improving the real estate at issue so as to open the flea market. Although he could not remember the exact dates he expended these funds, he testified that he did not want to spend much money until he determined whether Appellant would work with him. Mr. Haydon did not want to spend a lot of money on improving the property and then have the property foreclosed on. The court found that this expenditure occurred prior to Appellees being made aware of the settlement amount error. The trial court also took into consideration that Appellees listed the vacant lot for sale, were ready to begin tendering the $5,000 monthly forbearance payments and were approved for a $300,000 loan. The court found that Appellees would be substantially and adversely affected if the settlement agreement was not enforced.

We agree with the trial court's *Clark* analysis. During the hearing in this matter, the trial court heard testimony from Appellant's counsel, Appellees' counsel, Mr. Haydon, and Robbie Polin, the loan officer who approved the $300,000 loan for Appellees. Also, Mr. Hrevenar's deposition was introduced into evidence. Evidence shows that a settlement agreement was entered into, but without the express authorization of Appellant. Appellees, however, would be substantially and adversely affected if the agreement were not enforced. Appellees

spent approximately $60,000 improving the property at issue and would not be able to recoup this substantial amount if the agreement were not enforced.

We are required to affirm the judgment of the trial court if the court's findings of fact are not clearly erroneous. The court, as fact finder, was in the best position to judge the credibility of the witnesses and weigh the evidence presented. We believe that the court's findings were supported by substantial evidence and conclude that there was a meeting of the minds in this case. A valid agreement was entered into because the July 6 email contained full and complete settlement terms. Further, even though Appellant did not authorize a settlement, it is bound by the actions of its attorney because Appellees would be substantially and adversely affected if the agreement were deemed invalid.

Appellant also raises an issue regarding the bond he was required to tender to the trial court during the pendency of this appeal. This issue is not preserved, and we will not address it. The order regarding the bond in this case was not listed in the notice of appeal. Failure to designate the judgment being appealed can result in the dismissal of an appeal. *Rose Bowl Lanes, Inc. v. City of Louisville*, 373 S.W.2d 157, 158-59 (Ky. 1963). In addition, this issue was not listed in Appellant's prehearing statement; therefore, it is not preserved. *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004).

Based on the foregoing, we affirm the judgment of the Washington Circuit Court.

ALL CONCUR.

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