

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000689-MR

GEORGE RANDOLPH DODD, III
AND NATHAN E. DODD

APPELLANTS

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 97-CI-00074

DAVID HOWARD LONG
AND CRAIG ALLEN LONG

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BAKER, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from a summary judgment entered against plaintiffs/appellants in their claim for funds owing under a contract defendants/appellees entered into to purchase a liquor store from appellants' late father and stepmother. The trial court based its judgment in large part on its interpretation of a prior Court of Appeals' opinion

reversing and remanding a previous summary judgment in this case. Since the appeal before us hinges on the interpretation of this Court's previous opinion, we feel it necessary to set out this prior opinion, rendered December 23, 1999, in its entirety:

"Brothers George Randolph Dodd and Nathan E. Dodd appeal from a May 8, 1998, summary judgment of the Fulton Circuit Court dismissing their breach-of-contract and fraud complaint against brothers David Howard Long and Craig Allen Long. The trial court held that the parol evidence rule and the Statute of Frauds provide the Longs with an inescapable and total defense. For the reasons discussed below, we disagree and so remand the matter for additional proceedings.

At issue is the 1993 sale to the Longs of a retail liquor store owned at the time by a corporation comprising the Dodds' father, Bo, and stepmother, Anne. Because we are reviewing a summary judgment against them, we shall render the history of this transaction as favorably to the Dodds as the record reasonably allows. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

In the late spring of 1993, the Longs told Bo Dodd that they were interested in buying his liquor store. Negotiations commenced, and by mid-July the parties had fashioned the following agreement: The Longs would pay Bo

approximately \$395,000.00 for the business, of which almost \$156,000.00 would be for the inventory. The balance, some \$239,000.00, would be for the building, land, furniture, and fixtures. Of this \$239,000.00, \$25,000.00 would not appear in the documents memorializing the sale, but would be paid to Bo in cash "under the table." Bo was contemplating a divorce from Anne and desired to keep this portion of the transaction from her knowledge. Accordingly, the sales contract, executed in mid-July 1993, reflected a sales price of about \$370,000.00. Pursuant to this written agreement, during the first two or three days of August 1993, the Longs paid approximately \$156,000.00 cash for the inventory and executed a note for the balance of the nominal purchase price in the amount of \$214,500.00. This balance was to be financed at 6% interest for four years and was secured by a mortgage on the real property. The note further provided that there was to be no down payment and that monthly installment payments would commence as of September 1, 1993. Pursuant to their unwritten understanding, the Longs also gave Bo three cashiers checks totaling \$25,000.00.

A short time later, for reasons the record does not disclose, Anne fatally shot Bo. The \$25,000.00 cash payment came to light. And, by inheritance and by settlement, respectively, Bo and Anne's interests in the note passed to the

appellants. They received regular monthly payments from the Longs, but when the final balloon payment came due in September 1997, the Longs claimed credit for the \$25,000.00 cash paid initially to Bo and so refused to pay what the Dodds maintained was the final \$25,000.00 due under the note. The Dodds eventually brought suit for this amount, and, as we observed above, the trial court, invoking the parol evidence rule and the Statute of Frauds, granted summary judgment for the Longs.

Because summary judgments involve no fact finding, this Court reviews judgments *de novo*. As did the trial court, we ask whether material facts are in dispute and whether the party moving for judgment is clearly entitled thereto as a matter of law. Under this state's rules of practice, summary judgments are to be granted cautiously; they are appropriate only when it appears impossible for the non-movant to prove facts establishing a right to relief or release, as the case may be. Steelvest Inc. v. Scansteel Service Center, Inc., *supra*.

For the reasons that follow, we are persuaded that this strict standard has been met. The parties in their briefs and the trial court its order focus on the rights the Dodds derived from their father under the Longs' alleged agreement to pay him a portion of the purchase price in under-the-table cash. We agree with the trial court that the Dodds may not recover on that basis. The Dodds also claim, however, a right to recovery

derived from Anne's interest in the transaction, and this claim, we believe, has not been shown to lack legal merit.

The Dodds maintain that the real agreement between their father and the Longs included a \$25,000.00 unrecorded cash payment in addition to the sale price reflected in the transaction documents. Much of the argument in this case concerns whether evidence of this alleged unwritten agreement is barred by either the parol evidence rule or the Statute of Frauds. The Dodds insist that it is not. We are inclined to agree with the trial court that it is. KRS 371.010(6); M.R. Kopmeyer v. Barnes, Ky., 276 S.W.2d 21 (1955). Even if the Dodds are correct, however, and those rules do not defeat this aspect of their claim, the fact that the unwritten agreement they allege was clearly illegal as a device to defraud Anne renders it unenforceable. Miller v. Miller, Ky., 296 S.W.2d 684 (1956); Zeitz v. Foley, Ky., 264 S.W.2d 267 (1954).

Thus, if the only basis from the Dodds' claim were this alleged breach of their father's unwritten contract, then summary judgment would be warranted. The Dodds' claim also derives from Anne, however, and on that basis, it is another matter. This aspect of their claim, evidenced apparently by the Longs' own depositions and by statements of an accountant allegedly privy to the unwritten agreement, is that the written agreement was part of a fraudulent scheme to deprive Anne of a

portion of her interest in the liquor store and/or a portion of her share of the marital estate. This claim does not depend upon proving and enforcing the illegal parol contract. It hinges, rather, on proof that the written contract, with respect to Anne, involved a fraud. The parol evidence rule and the Statute of Frauds do not bar proof of fraud and thus do not preclude this aspect of the Dodds' claim. United Parcel Service Company v. Rickert, Ky., 996 S.W.2d 464 (1999); M. R. Kopmeyer v. Barnes, *supra*; Hanson v. American National Bank and Trust Co., Ky., 865 S.W.2d 302 (1993); Shpilberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Ky., 535 S.W.2d 227 (1976). The Longs, of course, deny that the sale price appearing in the contract and note understated, fraudulently or otherwise, the value of the liquor-store property or the value of their agreement with Bo. That may well be true. If the Dodds can prove their allegations to the contrary, however, (and the record does not suggest that such proof is impossible), they would seem to have a claim, derived from Anne, for damages.

We are persuaded therefore that summary judgment was premature. Accordingly we reverse the May 8, 1998, summary judgment of Fulton Circuit Court and remand this matter for additional proceedings consistent herewith."

Pursuant to the above opinion, the Dodds filed a motion to set the matter for trial. The Longs opposed the

motion on grounds that, under the Court of Appeals' opinion, there were no issues to be tried because a fraud claim stemming from Anne's interest could not be maintained. The court then ordered the parties to submit briefs on whether a fraud claim could be maintained by the Dodds. The Longs first argued that the Dodds never maintained an action for fraud, which was the basis of the Court of Appeals' opinion. Hence, the claim could not proceed. In the alternative, the Longs argued that even if the Court of Appeals in its opinion recognized the Dodds' made a claim for fraud, the fraud claim could not proceed because it was brought outside the statute of limitations and because jurisdiction would be in Tennessee since that was where the alleged fraud took place. Although the Dodds admit that they never made an actual claim for fraud, they maintained such was not necessary under the Court of Appeals' opinion. Rather, the Dodds argued that the Court of Appeals' opinion merely held that the Statute of Frauds and the parol evidence rule could not be applied to bar any claim derived from Anne's interest because of the allegations of the scheme to defraud her of her interest in the \$25,000. On March 8, 2002, the trial court once again entered summary judgment against the Dodds. In that judgment, the trial court interpreted the Court of Appeals' opinion as follows:

In its opinion reversing and remanding, the Court of Appeals held that the oral agreement was unenforceable because of the parol evidence rule and Statute of Frauds, and was further unenforceable as an illegal contract. However, the Court of Appeals held that the oral agreement was an attempt to defraud Ann Dodd. It opined that the alleged oral agreement could be used to establish that a fraud was committed upon Ann Dodd. The case was remanded back to the Fulton Circuit Court for further proceedings regarding the potential fraud claim.

The trial court then proceeded to find that a fraud claim could not be maintained by the Dodds because of a lack of jurisdiction, it was barred by the five-year statute of limitations, and because the Dodds lacked standing. The Dodds again appeal to this Court.

The Dodds' first argument is that even if the evidence of the "under the table" agreement was not admissible pursuant to the parol evidence rule and the Statute of Frauds, the \$25,000.00 payment could not be considered to be payment toward the \$214,500.00 note because it could not be shown to be a prepayment and because the mortgage was amortized based on the full amount of the note (\$214,500.00) and did not reflect a credit for the \$25,000.00. In our view, the previous Court of Appeals' opinion rendered this argument moot. In that opinion, the Court affirmed the trial court's summary judgment, except to the extent of the Dodds' potential fraud claim. Under the law of the case doctrine, a decision of the Court of Appeals is

conclusive of questions resolved therein and is thereafter binding on the parties, the trial court, and the Court of Appeals. Williamson v. Commonwealth, Ky., 767 S.W.2d 323 (1989).

The Dodds' next argument is that the clean hands doctrine will not allow the Longs to claim a credit to which they are not due or to shield them from the consequences of their own transactions. Assuming this argument is based on the Dodds' fraud claim derived from Anne's assignment of her interest, we must first resolve the issue of whether a fraud claim based on that assignment could be even maintained by the Dodds since that was the only issue remanded to the trial court. The trial court found that a fraud action based on Anne's assignment of her interest could not be maintained because of a lack of jurisdiction, the statute of limitations had run, and because the Dodds lacked standing to bring such a claim. Without passing on the merits of either of the first two grounds, we adjudge that the Dodds did not have standing to maintain a fraud claim derived from Anne's interest.

CR 17.01 provides in pertinent part that "[e]very action shall be prosecuted in the name of the real party in interest." It is undisputed that Anne Dodd only assigned her interest in marital property to Bo Dodd's estate. Contrary to the Dodds' position that the fraud claim was part of this

marital property, we agree with the trial court that the fraud claim, like a personal injury claim, would be non-marital property, except for any lost wages during the marriage. See Weakley v. Weakley, Ky., 731 S.W.2d 243 (1987). Since lost wages would not be part of Anne's fraud claim, no part of the claim would be marital and thus the Dodds were not entitled to pursue Anne's fraud claim.

The Dodds next argue that there exist material questions of fact in the case that preclude summary judgment. Since this Court in its earlier opinion affirmed the summary judgment on all claims except the fraud claim derived from Anne's interest and since we have adjudged above that said claim could not proceed, there are no remaining issues, factual or otherwise, to be decided in the case.

Finally, the Dodds argue that the prior Court of Appeals' opinion should not be interpreted to limit their action on remand to a fraud claim derived from Anne's interest. Rather, they maintain that the opinion should be interpreted to mean simply that the Statute of Frauds and the parol evidence rule would not apply if fraud existed in the transaction. We cannot agree. It is clear from our reading of the opinion that the Court meant to limit the Dodds' remaining cause of action to a fraud claim based on Anne's interest. The Court specifically

referred to a separate fraud claim in the first sentence of the opinion.

The Court of Appeals has no power on a second appeal to correct an error in the original judgment which either was, or might have been relied upon in the first appeal.

Hogan v. Long, Ky., 922 S.W.2d 368, 370 (1995), (quoting Commonwealth v. Schaefer, Ky., 639 S.W.2d 776, 777 (1982)).

For the reasons stated above, the judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy C. Stark
Mayfield, Kentucky

BRIEF FOR APPELLEE:

James B. Brien, Jr.
J. Todd Elmore
Mayfield, Kentucky