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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000184-MR

GERRI HOLLINS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
CIVIL ACTION NO. 01-CI-006154

JOE GUY HAGAN REALTORS COMPANY, LLC
AND PAMELA STRAUB

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND MINTON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

MINTON, JUDGE: Gerri Hollins appeals from a summary judgment granted to Joe Guy Hagan Realtors Company, LLC, and Pamela Straub. Because Kentucky law does not imply duties upon real estate brokers and their agents beyond the duties expressed or implied by the language of the agency agreement between the

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

broker and the client and because a motion for summary judgment cannot be defeated solely on hearsay testimony, we affirm.

Hollins entered into an agreement to purchase a patio home through Straub, a real estate agent employed by Hagan Realtors. Both Straub and Hollins signed a "Buyer's Agent" agreement, as well as a "Sales and Purchasing" agreement. Sue Krebs, the patio home owner, also signed the purchasing agreement. The closing of the Hollins-Krebs transaction was set in the purchasing agreement. Although Hollins had been pre-approved for an FHA loan from Cendant Mortgage, as it turned out, she could not use the FHA loan to buy the patio home because it was a condominium, not a house.

So Straub, as Hollins's agent, tried to help find alternative financing for Hollins through various financial institutions. Straub also obtained a two-week extension on the closing date from Krebs. Due to Hollins's credit history, she was denied approval by two mortgage companies before Monte Edwards of Approval One secured a conditional loan commitment from American Money Company. But, meanwhile, without Straub's knowledge, Hollins found another house and bought it using the proceeds of the FHA loan. When Straub discovered this acquisition, the relationship between Hollins and Straub deteriorated; and the Hollins-Krebs transaction ultimately failed.

Hollins sued Straub and Hagan Realtors for breach of a fiduciary duty of acting in good faith. Hollins also claimed that Straub intentionally interfered with the Hollins-Krebs contract by not using her "best efforts" to secure financing for Hollins. The circuit court granted summary judgment to Straub and Hagan Realtors, and this appeal followed.

Before considering the merits of the summary judgment, we must first determine whether two other issues raised on brief by Hollins were properly preserved for appellate review. In Kennedy v. Commonwealth, the Kentucky Supreme Court held that "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court."² Hollins claims that Straub knew the FHA loan would not work for a condominium; and, yet, she negligently failed to inform Hollins of that fact. As noted by Straub and Hagan Realtors, our review of the record shows that Hollins did not raise this argument to the circuit court. So she may not raise it now on appeal.

Hollins also claims that Straub violated her duty to maintain confidential information by telling Krebs that Hollins had breached the sales contract. Again, because our review of the record shows that Hollins did not raise this issue before the trial court, she may not raise it on appeal.

² 544 S.W.2d 219, 222 (Ky. 1976).

Thus, the only issues properly before us are whether there was a breach of a fiduciary or assumed duty on the part of Straub and whether Straub tortiously interfered in the Hollins-Krebs transaction.

In assessing the propriety of the trial court's grant of summary judgment to Straub and Hagan Realtors, we are mindful of the fact that summary judgment was appropriate only if Straub and Hagan Realtors showed that Hollins "could not prevail under any circumstances."³ In ruling on a motion for summary judgment, we must view the evidence in the light most favorable to the non-movant, Hollins.⁴ When we review a trial court's decision to grant summary judgment, we must determine whether the trial court correctly found that there were no genuine issues of material fact.⁵ As findings of fact are not at issue, the trial court's decision is entitled to no deference.⁶

In her brief, Hollins argues that summary judgment was wrongfully granted on two grounds. First, she argues that there are questions of fact relating to Straub's breach of a fiduciary or assumed duty as her real estate agent. Namely, Hollins

³ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

⁴ *Id.*

⁵ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

⁶ *Id.*

asserts that Straub failed to perform her fiduciary duty by failing to inform Monte Edwards of the closing date extension.

Hollins has not cited, nor have we independently located, any authority holding that real estate agents owe a fiduciary duty to their clients that arises outside the duties expressly stated in the agreement between the agent and client. Thus, as the trial court analyzed it, Hollins's breach of fiduciary duty claim rests entirely upon Straub's violating the terms of her written agreement with Hollins. According to the "Agency Agreement" signed by both Hollins and Straub (in a form approved by the Kentucky Real Estate Commission), agents owe clients certain duties, including negotiation for the client's best interests; informing the client of all known material facts; and maintaining confidential information. The collective implication of these expressed responsibilities is that a general duty of good faith exists among all parties to an agreement.⁷ "Good faith," as defined by BLACK'S LAW DICTIONARY, is:

A state of mind consisting in
(1) honesty in belief or purpose,
(2) faithfulness to one's duty or
obligation, (3) observance of reasonable
commercial standards of fair dealing in a
given trade or business, or (4) absence of
intent to defraud or to seek unconscionable
advantage.⁸

⁷ See, e.g., Odem Realty Co. v. Dyer, 242 Ky. 58, 45 S.W.2d 838 (1932) (holding that parties to real estate contract, including broker, have mutual obligation of good faith).

⁸ BLACK'S LAW DICTIONARY (8th ed. 2004).

Straub and Hagan correctly maintain that Straub was under no duty to assist Hollins in obtaining financing through the express terms of the agency agreement. Without such an expression, the responsibility of obtaining financing lies with the buyer, Hollins. Because Straub had no contractual duty to secure financing for Hollins, her alleged failure to do so was not a breach of her contractual duties. Furthermore, Hollins did not present evidence to show that Straub breached any of her contractual duties. So summary judgment was appropriate on Hollins's breach of fiduciary duty claim.

Hollins also claims that there are questions of fact relating to Straub's alleged interference with the contractual relationship between Hollins and Krebs. Hollins insists that Straub "gave up" on Hollins by failing to submit the contract extension to Edwards. Hollins further argues that Straub interfered with the Hollins-Krebs contract by contacting Krebs and telling Krebs that Hollins had breached the sales agreement.

In order to establish intentional interference with a contract, there are six elements which Hollins must prove. First, Hollins must prove a contract existed. Next, it must be shown that Straub had knowledge of the contract. Hollins must also prove that Straub intended to cause breach of that contract. Straub's conduct must be proven to have caused the

breach. The breach must have resulted in damages to Hollins. Finally, Hollins must show that Straub had no privilege or justification to excuse her conduct.⁹ While the first two elements are clearly met, Hollins fails to meet the third, fourth, and sixth elements.

The third element requires proof that Straub intentionally caused Hollins to breach the sales and purchasing agreement. Hollins cannot prove such an element. First, Hollins argues that it was Straub's failure to submit the contract extension to Monte Edwards that caused the breach. As established earlier, Hollins was solely responsible for securing her own financing to purchase the condo. Straub had no contractual obligation to find financing for Hollins, thus, her alleged failure to notify Edwards of the extension could not have led to a breach of the contract. In fact, the record reflects that Straub made numerous phone calls to prospective lenders, meaning that she labored on behalf of Hollins well beyond the duties specified in their agreement. Thus, we find that Straub more than fulfilled her duty to act in good faith on behalf of Hollins.

In order to prove the fourth element, Hollins must demonstrate that Straub's conduct directly caused the breach.

⁹ CMI, Inc. v. Intoximeters, Inc., 918 F.Supp. 1068, 1079 (W.D. Ky. 1995).

Again, Hollins cannot establish this element. In her brief, Hollins declares, "Krebs **would** testify that Straub came to tell her that Hollins had breached the contract and told Krebs to sue Hollins."¹⁰ But this claim lacks merit because it is based entirely upon hearsay and speculation. Based on our careful review of the record, there is no indication at any point that Krebs testified that Straub told her that Hollins had breached the contract, or that Straub told her to sue Hollins. Indeed, Krebs never testified before the trial court at all; and she was not deposed. Hollins's testimony in her deposition on this point (that Straub had contacted Krebs and told her Hollins was breaching and that she should sue) is simply conjecture and hearsay. Kentucky Rules of Civil Procedure (CR) 56.05 requires that any affidavits "shall be made on personal knowledge" of the affiant and should "set forth such facts as would be admissible in evidence[.]" Generally, evidence must be admissible at trial or have some probative value to be considered in ruling on a motion for summary judgment.¹¹ Hollins's hearsay speculation is not enough to defeat summary judgment.

¹⁰ Emphasis added.

¹¹ See 73 Am.Jur.2d *Summary Judgment* § 50 (2001); Nelson v. Martin, 552 S.W.2d 668 (Ky.App. 1977); Wiley v. United States, 20 F.3d 222, 225 (6th Cir. 1994); Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992).

Finally, in order to prove the sixth element, Hollins must show that Straub had no privilege or justification to excuse her conduct. The Kentucky Supreme Court addressed this element in Hornung when it stated that the plaintiff must prove that the defendant "'improperly' interfered" with the plaintiff's contract.¹² As Straub and Hagan's brief points out, the high court defined improper interference in Hornung thusly:

From these authorities, it is clear that to prevail a party seeking recovery must show malice or some significantly wrongful conduct. In *Prosser and Keeton on Torts* § 130 (W.P. Keeton ed. 5th ed. 1984), this is stated as follows:

[T]he [interference] cases have turned almost entirely upon the defendant's motive or purpose, and the means by which he has sought to accomplish it. . . .

[S]ome element of ill will is seldom absent from intentional interference; and if the defendant has a legitimate interest to protect, the addition of a spite motive usually is not regarded as sufficient to result in liability.¹³

Hollins's claim that Straub acted maliciously fails based on both the testimony of Edwards and Hollins herself. Straub contacted Edwards daily and even went above him to speak to a supervisor in attempting to secure financing for Hollins.

¹² National Collegiate Athletic Assn. v. Hornung, 754 S.W.2d 855, 858 (Ky. 1988).

¹³ *Id.* at 859.

Thus, we agree with the trial court that Hollins offered no evidence to support malicious interference by Straub. So we find no error in the trial court's grant of summary judgment.

For the foregoing reasons, the Jefferson Circuit Court's order granting summary judgment to Straub and Hagan Realtors is affirmed.

ALL CONCUR.

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