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SEPTEMBER 10, 2008
(FILE NO. 2007-SC-0786-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001045-MR

MARY SUE MCKINNEY, D/B/A PERFORMANCE REALTY — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 04-CI-00483

CITY OF NEWPORT, KENTUCKY; AND BEAR CREEK CAPITAL, LLC — APPELLEES

AND:

NO. 2006-CA-001167-MR
AND
NO. 2006-CA-001208-MR

CITY OF NEWPORT, KENTUCKY; AND BEAR CREEK CAPITAL, LLC — CROSS-APPELLANTS/APPELLEES

v.

CROSS-APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 04-CI-00483

MARY SUE MCKINNEY, D/B/A
PERFORMANCE REALTY CROSS-APPELLEE/APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

THOMPSON, JUDGE: The appellant, Mary Sue McKinney, d/b/a Performance Realty, appeals from a jury verdict in favor of the appellee, City of Newport (Newport), finding that one of its agents, Jim McCord, was not the procuring cause of the sales of properties to Newport by property owners living in an area referred to as the Cote Brilliante neighborhood.

In a declaratory judgment entered prior to the jury trial, the trial court declared that appellant may be a third-party beneficiary of a development agreement entered into by Newport and the appellee, Bear Creek Capitol, LLC, (Bear Creek) only if the appellant was the procuring cause of Newport's acquisition of the property. As a consequence, in conformity with the jury's verdict, the trial court entered a judgment in favor of appellees. Appellant also appeals from that portion of the trial court's judgment.

Although various secondary issues are raised, the primary issue is whether, as a matter of law, McCord was the procuring cause of the real estate sales contracts. To preserve various issues should this court reverse the judgment, Newport and Bear Creek filed protective cross-appeals. We affirm.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

STIPULATION OF FACTS

Prior to trial, the parties entered into a stipulation of facts. As an introduction to our discussion and as relevant to this appeal, the stipulated facts are set forth as follows:[2]

> 1. In 2000, a private developer known as Neyer Properties identified the Cote Brilliante neighborhood in Newport, Kentucky, as a location for possible redevelopment for commercial and residential uses. Neyer named the proposed development the Newport Promenade.
>
> 2. In 2000, Newport commissioned a study by a consulting group known as McBride, Dale, Clarion to study the redevelopment of the Cote Brilliante neighborhood. The "Cote Brilliante Redevelopment Plan" was presented by McBride, Dale, Clarion on January 24, 2001.
>
> 3. In order to facilitate the successful redevelopment of the Cote Brilliante neighborhood into the Newport Promenade, Neyer approached staff members for the City of Newport, seeking support from them for the development project, and staff input as to the development and the municipal requirements that would need to be satisfied. Neyer estimated that it would have to acquire and raze approximately 105 - 120 homes that existed in the area which Neyer had identified for development.
>
> 4. At all times material to this case, Newport's staff was fully supportive of Neyer's efforts to develop the Cote Brilliante neighborhood.
>
> 5. In the Fall of 2000, Neyer's representative John Stevens met with Jim McCord, who was a real estate agent with Re/Max Affiliates. Stevens proposed that McCord act as the buyer-agent for Neyer, and negotiate purchase contracts from the 120 property owners in the Cote Brilliante area.
>
> 6. On February 26, 2001, Neyer, through its trustee, John Stevens, entered into an Exclusive Buyer-Agency Agreement with Jim McCord and his broker, Re/Max Affiliates.

[2] We have omitted portions of the stipulations such as to authenticity of the documents since they are not pertinent to this appeal.

7. From January 2001 through April 2002, Jim McCord worked to obtain Purchase Agreements from Cote Brilliante property owners. Of the 105 properties identified by Neyer as being necessary to acquire, Jim McCord was able to obtain signed Purchase Agreements with approximately 90 of the owners, with said Purchase Agreements being stipulated to by the parties. These purchase agreements were signed by the property owners and John Stevens, Trustee for Neyer, and the purchase price for each property is listed on the purchase agreement.

8. Throughout the period January 1, 2001, through April 2002, John Stevens and Jim McCord met with Newport City staff to keep them informed of Neyer's efforts to acquire the properties.

9. On October 21, 2001, the City of Newport and Neyer Properties executed a Development Agreement.

10. On March 11, 2002, the Newport City Commission passed Commissioners' Order O-02-15, which declared the Cote Brilliante neighborhood a blighted community consistent with KRS 99.

11. Consistent with the terms of the Development Agreement between Neyer and the City of Newport, during 2001 and 2002, the City of Newport approved zoning text amendments and map amendments affecting the Cote Brilliante neighborhood and agreed to vacate streets, including parts of Grand Avenue, Vine Street, Park Avenue, Ohio, Chesapeake, Race Street and Spring Street in the area of the planned commercial development.

12. Jim McCord completed his final negotiations with the property owners by April 2002, and did not undertake any additional work to acquire properties in the Cote Brilliante area after that date. Some of the Purchase Agreements had options that extended the time within which Neyer could purchase the property.

13. By summer-fall, 2002, Neyer's property acquisitions were stalling for a number of reasons, including the initiation of a law suit by some property owners. By the Fall, 2002, all of the Neyer Purchase Agreements had expired.

14. During 2001 and 2002, the Newport Promenade project was discussed at a number of Newport City Commission meetings. Specifically, it was discussed at the meetings of October 22, 2001; December 3, 2001; December 10, 2001; February 4, 2002; March 11, 2002; March 18, 2002; July 29, 2002; August 12, 2002; August 26, 2002; September 23, 2002; October 7, 2002; and December 9, 2002.

15. On October 4, 2002, the City Manager for the City of Newport, Phil Ciafardini, sent a letter to those property owners who previously had Purchase Agreements with Neyer to determine if a sufficient number of property owners in the Cote Brilliante neighborhood would agree to sell their properties to the City of Newport at the purchase price set forth in their Purchase Agreements with Neyer Properties.

16. At a Newport City Commission meeting on November 4, 2002, it was reported that 87% of the property owners had responded to the October 4, 2002, letter by stating that they were still willing to sell their properties at the Neyer prices. The City Commission voted 3-2 to authorize Bridget Cassidy, the City's Housing Development Coordinator, as the point of contact for property owners interested in selling their properties to the City of Newport.

17. Beginning around November 4, 2002, the City of Newport obtained contracts from approximately 81 of the property owners who had previously had Purchase Agreements with Neyer.

18. On August 18, 2002, and December 9, 2002, Jim McCord sent letters to Dan Neyer, President of Neyer Properties. On December 28, 2002, Jim McCord sent a letter to City Commissioner Ken Rechtin and the other city commissioners.

19. On March 23, 2003, the City of Newport enacted Commissioners' Order No. R-2003-55, releasing both the City and Neyer from the Development Agreement that the two parties had previously entered into.

20. On August 2, 2004, the City of Newport entered into a Development Agreement with Bear Creek Capital, LLC, pursuant to which Bear Creek Capital assumed development rights to the Newport Promenade Project, and the terms of which are set forth in that document.

FACTS DEVELOPED AT THE TRIAL

In addition to the stipulated facts entered into the record, the following evidence was produced at trial.

The terms of the contract between Neyer and McCord provided that for each of the Cote Brilliante properties purchased by Neyer, Neyer would pay McCord a 6% commission. There also was a bonus structure in the contract. Newport was never a party to the listing agreement and had no input into the terms of the agreement. The agreement was negotiated between McCord and Neyer over the course of a two-month period and was prepared by McCord.

During his contacts with the property owners in the area, McCord did not represent that he was acting as Newport's agent and did not negotiate with the property owners on Newport's behalf. There was no separate agreement with Newport for the payment of commissions to him.

McCord was not a party to the 2001 development agreement entered into between Newport and Neyer. However, from January 2001 through April 2002, acting as Neyer's agent, McCord contacted the property owners and approximately 90 property owners signed Neyer-drafted purchase agreements. The agreements all contained identical language including that the broker's real estate commission was to be paid by the purchaser who was identified as John Stevens.

According to John Stevens' testimony, he and Neyer viewed the purchase agreements as option contracts and they had no obligation to close if the conditions for development of the area were not met. McCord testified that he was aware of the conditions in the purchase agreements and that if the agreements were permitted to expire

by the passage of time, he would not be paid his commissions. He also stated that he had received no promise from Newport that it would pay him any commissions and that Neyer, not Newport, was his client. After his last negotiations with the property owners in April 2002, McCord left the area to undertake a cross-country run and remained away until November 1, 2002.

In March 2002, Newport declared the Cote Brilliante neighborhood a blighted area available for urban redevelopment under KRS 99.330 to 99.510. After several residents filed a lawsuit contesting that Cote Brilliante was a blighted area, Neyer believed the project had become too risky and expensive.[3] At that time, of the ninety properties for which McCord had negotiated purchase agreements, only six were purchased and the remaining purchase contracts expired.

After Neyer abandoned the project, Newport received complaints from property owners that in reliance on the purchase agreements, they had purchased other residences and faced double mortgage payments. Moreover, because of the blighted condition of the neighborhood and publicity that it was proposed to be razed for the new development, the property owners were unable to find purchasers willing to pay full value for their properties.

The letter sent by Newport to the property owners who had previous purchase agreements with Neyer stated in part:

> In an effort to facilitate the development of the project, and to show the City's commitment to the project, and if a sufficient percentage of the property owners respond favorably, we are prepared to honor the purchase price in your contract with Neyer Properties . . . for your property located at . . . .

[3] In an unpublished opinion this court affirmed Newport's declaration that the Cote Brilliante neighborhood was blighted.

In response to the letter, some of the property owners entered into purchase agreements with Newport for the Neyer prices and some continued with litigation against Newport challenging its determination that the area was blighted. Ultimately, over a period of several years from October 2002 through 2006, Newport negotiated for the sale and purchase of each home. McCord did not participate in any of the negotiations.

McCord testified that he did not approach either Newport or the property owners regarding Newport's purchase of the properties and took no action to consummate the purchases. McCord did not become employed with the appellant until January 2003, and acknowledged that neither McKinney nor Performance Realty had any involvement in any of the transactions.

Newport and Neyer reached an agreement which terminated their relationship, and Neyer was reimbursed for the six Cote Brilliante properties purchased. Newport began a search for a new developer and, in August 2004, it entered into a new development agreement with Bear Creek. Newport transferred all development rights to the commercial phase of the Cote Brilliante project to Bear Creek and conveyed to Bear Creek all of the Cote Brilliante properties which it had acquired. In return, Bear Creek promised to pay Newport between $10 million and $12 million to compensate it for its "acquisition costs."

After the trial court denied all motions for directed verdict by all parties, the case was submitted to the jury which entered a verdict in favor of Newport.

PROCEDURAL HISTORY

This is not the first action as a result of the proposed development of the Cote Brilliante neighborhood. On January 31, 2003, McCord and Jim Huff Realty, then

McCord's employer, initiated an action against Newport and Neyer to recover the commissions they alleged were owed as a result of the purchase agreements and alleged that Newport had interfered with their business relations. Bear Creek was not a party to that action. Subsequently, appellant filed a CR 15 motion to amend the complaint proposing to add herself and Performance Realty as the assignee broker of the claim for the commissions; that motion was denied and no appeal was taken.

The circuit court entered summary judgment on all claims against Newport, and the action was dismissed. Appellant subsequently filed this action naming only Newport as a defendant, but later named Bear Creek claiming to be an intended third-party beneficiary between Bear Creek and Newport.

Newport filed a motion for summary judgment asserting that appellant's claims were all barred due to: the statute of frauds; the doctrine of *res judicata*; and appellant's lack of standing. Although the court denied the motion it did rule that as a matter of law, there was no joint venture between Newport and Neyer, and that the only remaining issue was whether McCord was the procuring cause of the property sales which was a question of fact for the jury.

On February 24, 2006, appellant filed a motion for summary judgment. Since the motion was filed beyond the time stated in the pre-trial order and did not afford Newport and Bear Creek ten days to respond, Newport and Bear Creek moved to strike the pleading. A pre-trial conference was held on February 28, 2006, at which time the appellant withdrew the motion for summary judgment.

DISCUSSION

Appellant's initial contention is that the trial court erred when it denied her motion for summary judgment and that, as a consequence, our review is *de novo*. In view of the fact that appellant withdrew her motion for summary judgment prior to a ruling by the court, we find this contention perplexing. The law, however, is clear.

In *Transportation Cabinet v. Leneav*e, 751 S.W.2d 36, 38 (Ky.App. 1988), the court considered whether an unruled-upon motion for summary judgment could serve as the basis for a subsequent appeal from a jury verdict. The court ultimately concluded that once a trial commences, the motion is rendered moot by application of waiver. It reasoned that:

> By nature it is a pretrial motion. The judicial purpose of a summary judgment is to expedite disposition of civil cases and to avoid unnecessary trials. *See Continental Cas. Co. v. Belknap Hardware and Mfg. Co.,* Ky., 281 S.W.2d 914 (1955), *Preston v. Elm Hill Meats, Inc.,* Ky., 420 S.W.2d 396 (1967), and *Green v. Bourbon County Joint Planning Com'n,* Ky., 637 S.W.2d 626 (1982).
>
> Thus, once the trial begins, the underlying purpose of the summary judgment expires and all matters of fact and law procedurally merge into the trial phase, subject to in-trial motions for directed verdict or dismissal and post-judgment motions for new trial and/or judgment notwithstanding the verdict.
>
> Declaring an unruled-upon motion for summary judgment to be moot is more sensible than saying it is overruled by implication upon commencement of trial.

Id. Following the logic expressed in *Leneave*, a withdrawn motion for summary judgment cannot serve as the basis for a subsequent appeal.

The proper standard of review is that applicable to the granting of a directed verdict which was summarized by the court in *National Collegiate Athletic Assoc. v. Hornung,* 754 S.W.2d 855, 860 (Ky. 1988):

> A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made. *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (1944). Upon such motion, the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved to the trier of fact. *Cochran v. Downing*, Ky., 247 S.W.2d 228 (1952). Moreover, the trial court should favor the party against whom the motion is made with all inferences which may reasonably be drawn from the evidence. Upon completion of the foregoing evidentiary review, the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." If the trial court concludes that such would be the case, a directed verdict should be given. Otherwise, the motion should be denied. *Nugent v. Nugent's Ex'r.,* 281 Ky. 263, 135 S.W.2d 877 (1940).

With this standard in mind, we now turn to the merits of appellant's appeal.

A real estate broker faces the risk that as a result of his efforts, buyer and seller will be brought together and negotiate yet, either because of the expiration of time or a variety of reasons, the broker will not finalize the sale. In such situations, the party responsible for payment of the broker's commission may refuse payment based on the failure to complete the transaction. In response to the inequities of such a result, the courts have adopted the procuring cause rule. In *Mattingly-Lusky Realty Co. v. Camper*, 228 Ky. 407, 15 S.W.2d 240, 241 (1929), the court quoted with approval the trial court's recitation of the law as follows:

> The doctrine of procuring cause has its basis in the theory that when the owner of property engages the services of a broker to sell his property, and the broker secures a prospective purchaser, and such purchaser and the seller agree upon a price and terms without the further service of the broker, then the latter cannot be deprived of his commission by the act of the owner in concluding the negotiations without the assistance of the broker.

In *Brooks v. Tipton*, 298 Ky. 490, 494, 183 S.W.2d 496, 498 (1944), (quoting *Averill v. Hurt & O'Farrell,* 101 W.Va. 411, 132 S.E. 870, 875 (1926)), the court further explained the proof required to establish that the broker was the procuring cause and stated:

> The expression 'procuring cause' . . . refers to the cause originating a series of events which without break in their continuity result in the accomplishment of the prime object of the employment of the agent, which, as stated, is the procurement of a purchaser ready, willing, and able to buy the land on the principal's terms.

As made clear by the court in *Brooks*, the rule will not permit recovery of a commission where there has been a break in the continuity of events leading to sale and purchase of the property. Thus, a broker who abandons his agency will not be permitted to recover under the procuring cause rule even if he originally secured the purchaser.

> The owner is not denied the right to bring about a sale in good faith to the customer produced by the broker, if the latter has failed to bring about such sale, and he and the customer have abandoned further negotiations or efforts. The mere abandonment by the customer alone, however, is insufficient to justify the owner to make a sale that will defeat the broker in the collection of his compensation, unless the broker likewise has abandoned his efforts to make such a sale to the customer

Honaker v. Owens & Cowan, 204 Ky. 382, 264 S.W. 842, 844 (1929).

Applying the legal requirements of the procuring cause rule to the facts of this case, we are convinced that a jury question was presented as to whether there was a break in the continuity of events leading to Newport's purchase of the properties and, therefore, that the appellant's motion for directed verdict was properly denied. *See Brooks,* 298 Ky. at 494, 183 S.W.2d at 498.

We are cognizant that in the typical brokerage contract, the seller employs and pays the commission to the broker; in this case, however, the nature of the proposed development required that the buyer, Neyer, employ McCord. This distinction alone does not defeat the application of the procuring cause rule. Whether the broker works on behalf of the seller or the buyer, the reasoning for its application is the same. However, because there is evidence in the record sufficient to support the jury's finding that McCord was not the procuring cause, we affirm.

In addition to the stipulated facts, there was testimony at trial that after McCord negotiated for the sale of the properties to Neyer, he left the state and made no further attempt to complete the sale. He admitted that he was aware of the risk that if Neyer decided not to pursue the development project the contracts would expire and he would not be entitled to his commissions.

The testimony at trial further revealed that after the Neyer purchase contracts expired, Newport contacted the property owners and engaged in new negotiations with each homeowner and had each execute a new contract. Indeed, at the time the contracts were executed, Neyer was no longer involved in the development project and McCord's role as Neyer's agent in the acquisition of the properties had likewise ended. We find no error in the trial court's denial of the appellant's motion for directed verdict.

We comment briefly on the appellant's contention that Newport's failure to present expert testimony at trial mandated that she be granted judgment as a matter of law. Appellant fails to cite any authority for her position that the party who does not have the burden of proof must produce expert testimony. We strongly suspect that this

omission is due to the lack of such authority. We find this argument totally lacking in merit and need not address it further.

Because we affirm the judgment as to Newport, we likewise affirm the judgment in regard to Bear Creek. Appellant's theory of liability against Bear Creek was contingent upon McCord being found to be the procuring cause and, as a consequence, Newport held liable for the payment of the commissions. In that event, the commissions would be part of Newport's "acquisition costs" which, under the development agreement, Bear Creek was to pay. Since the jury found that McCord was not the procuring cause, appellant's third-party beneficiary claim is moot.

Before concluding, we emphasize that because the trial court permitted this case to be sent to the jury for it to make factual findings in regard to McCord's status as the procuring cause, we reviewed the sufficiency of the evidence to support the verdict. Our lack of reference to the merits of the cross-appeals filed by Newport and Bear Creek is not because we find them undeserving of comment, but because such is unnecessary. By affirming the judgment of the trial court, we make no comment or decision as to the issues raised by the cross-appeals, including the application of the statute of frauds, *res judicata*, appellant's standing, and the lack of privity of contract between the parties.

Based on the foregoing, the judgment is affirmed.

ALL CONCUR.

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