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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001196-MR

OHIO VALLEY AUTO SALES, INC.,
D/B/A EARL FLOYD FORD — APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 05-CI-00101

KENNETH EVANS AND JAN M. EVANS[1] — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Ohio Valley Auto Sales, Inc., d/b/a Earl Floyd Ford (hereinafter "Earl Floyd Ford"), appeals from the May 10, 2005, order and judgment of the Carroll

[1] We note that Jan M. Evans (hereinafter "Jan") was dismissed from the suit by the trial court at the close of the Plaintiff's case-in-chief. However, Jan's name appears in the jury instructions and she is listed as an appellee on the notice of appeal and in the briefs filed by both parties in this Court. However, neither party contests the propriety of the dismissal of the claims against her in this appeal. Therefore, we will not address this matter any further in this opinion.

Circuit Court absolving Kenneth and Jan Evans of liability for $4,000 allegedly owed on a vehicle purchased from Earl Floyd Ford. Having concluded (1) Earl Floyd Ford was not entitled to summary judgment, (2) Earl Floyd Ford was not entitled to a directed verdict, and (3) the trial court did not err in instructing the jury, we affirm.

On September 4, 2004, Kenneth and Jan Evans went to Earl Floyd Ford in Carrollton, Carroll County, Kentucky, intending to purchase a 2004 Ford Mustang. Kenneth Evans (hereinafter "Kenneth") called Brook Doll (hereinafter "Doll"), a salesperson with Earl Floyd Ford, to locate the particular Mustang Kenneth wanted.

Doll purchased the Mustang from a Ford dealership in Tennessee and prepared the initial buyer's order in the presence of the Evans. The right-hand column of the buyer's order form reflected the Mustang's base purchase price was $22,842.63,[2] plus state and local taxes of $1,190.55, and licensing and registration fees of $60.00. Thus, the total list price of the automobile was $24,093.18. The left-hand column of the buyer's order form listed $7,300.00 as the trade-in value of Kenneth's Pontiac Grand Am, $3,000.00 in rebates,[3] and a $4,000.00 down payment, for a total credit of $14,300.00 towards the purchase price of the Mustang. The unpaid cash balance listed on the right side of the buyer's order form was $9,793.18.

[2] This amount represented a reduction from the original sticker price of $24,600.00 by virtue of a Friends and Family Plan/also known as the "X-plan." Kenneth was entitled to this reduction in price because his father was a former Ford Motor Company employee.

[3]Kenneth received credit for two different rebates totaling $3,000.00. The first was on the Mustang in the amount of $2,500.00, and the second was a military service rebate of $500.00.

The Evans then met with Judy Keith (hereinafter "Keith"), Earl Floyd Ford's finance manager, who prepared the form sales contract.[4] Following a discussion of service plans for the vehicle, Kenneth added an extended service plan for the additional cost of $1,630.00. Hence, the right-hand column of the form sales contract reflected a purchase price of $24,472.63 for the Mustang, state and local taxes of $1,190.55, and licensing and registration fees of $60.00, for a total cost of $25,723.18. The left-hand column of the sales contract showed Kenneth was receiving credit of $7,300.00 for the trade-in vehicle, and $7,000.00 as "additional cash with order," for a total credit of $14,300.00. The form sales contract reflected an unpaid cash balance of $11,423.18. Jan Evans wrote a personal check to Earl Floyd Ford in the amount of $4,000.00 and Kenneth wrote a check from the Navy Federal Credit Union for $7,423.18. Kenneth and Keith signed the form sales contract and Keith prepared a receipt showing a total amount paid of $11,423.18.[5]

Doll contacted the Evans within a few weeks and told them that they still owed $4,000.00 on the automobile. Earl Floyd Ford contended the Evans had been credited with a $4,000.00 payment in the "additional cash with order" line of the contract that was still to be paid. Thus, following their payment of $11,423.18, the Evans still owed $4,000.00 on the vehicle. When Kenneth refused to pay any additional money on

[4] "Form sales contract" was the term used by Keith to identify the final document signed for purchase of the vehicle.

[5] It was discussed at trial that Kenneth and Jan never saw this receipt until they were deposed. Keith testified the receipt only identified the "loose transaction" between the parties and did not reflect the Evans owed any additional money.

the vehicle, the dealership filed suit in the Carroll District Court on April 22, 2005, to recover the sums it was allegedly owed.[6] The complaint was originally filed in district court due to the amount in controversy.[7] The Evans counterclaimed alleging violations of the Kentucky Consumer Protection Act[8] and sought dismissal of the action as having been filed in the improper venue, as jurisdiction over actions under that Act is exclusively vested in the circuit court. The district court refused to dismiss the complaint, but rather transferred the action to the Carroll Circuit Court on June 15, 2005.

Following the taking of depositions by both parties, Earl Floyd Ford moved for summary judgment prior to the start of trial alleging it was undisputed the parties had entered into a written contract and Kenneth was in default on the contract. The trial court denied the directed verdict and the jury trial commenced on May 2, 2006. Earl Floyd, Doll, Keith, Kenneth, and Jan testified. Keith testified that she questioned Kenneth while filling out the paperwork regarding the additional money owed on the vehicle and Kenneth told her to discuss the matter with Doll. Keith further testified she attempted to discuss the matter with Doll before the Evans drove the Mustang off the lot but she could not locate Doll until the next day. Kenneth and Jan both denied anyone spoke to them

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[6] Kenneth offered to return the Mustang to Earl Floyd Ford, but the dealership refused. Earl Floyd contends they would have lost too much money on the used vehicle.

[7] Kentucky Revised Statutes (KRS) 24A.120 grants exclusive jurisdiction to district courts for *inter alia*, "[c]ivil cases in which the amount in controversy does not exceed four thousand dollars ($4,000.00), exclusive of interests and costs, except matters affecting title to real estate and matters of equity. . . ."

[8] KRS 367.220.

about any remaining sums due on the day of the sale. They maintained Doll contacted them approximately one month after the transaction.

Further, Kenneth testified he assumed the $7,000.00 "additional cash with order" included the two rebates totaling $3,000.00 and the X-plan reduction. He also stated it was not explained to him until the taking of his deposition that the purchase price of the vehicle was reduced by the X-plan amount and he had been credited with his $4,000.00 payment in the "additional cash with order" column of the form sales contract. Kenneth admitted that once the form had been fully explained to him during his deposition, he believed he still owed $4,000.00 on the vehicle. At the close of its case and again at the conclusion of all the evidence, Earl Floyd Ford moved for a directed verdict which the trial court denied each time.

Both parties submitted proposed jury instructions to the trial court. Earl Floyd Ford states in its brief to this Court that its proposed jury instruction[9] asked, "[d]oes the Defendant Kenneth D. Evans owe the Plaintiff Ohio Valley Auto Sales, d/b/a Earl Floyd Ford, the sum of $4,000.00 pursuant to the parties' contract for the sale of the Mustang?" However, the trial court changed this instruction to read, "[d]o the Defendants Kenneth D. Evans and Jan M. Evans owe the Plaintiff Ohio Valley Auto Sales, d/b/a Earl Floyd Ford, the sum of $4,000.00 pursuant to the transaction between the parties?" As to this question, the jury responded "No". Based upon the jury's verdict,

[9] The proposed instruction submitted by Earl Floyd Ford is contained within the record on appeal; however, it appears the trial court chose to white-out and write over the disputed portion of the instruction thereby obliterating the language Earl Floyd Ford proposed.

a trial order and judgment was entered on May 10, 2005, wherein Earl Floyd Ford's complaint was dismissed with prejudice. This appeal followed.

Earl Floyd Ford contends the trial court committed three errors: it denied Earl Floyd Ford's motion for summary judgment; it denied Earl Floyd Ford's motion for a directed verdict; and it gave flawed instructions to the jury. All three arguments are without merit.

First, Earl Floyd Ford contends it was entitled to summary judgment. Generally, summary judgment is only proper in the "absence of genuine issues of material fact, and where the moving party is entitled to judgment as a matter of law." *Beasley v. Trontz*, 677 S.W.2d 891, 893 (Ky.App. 1984) (citations omitted). The denial of a motion for summary judgment "can in no sense prejudice the substantive rights of the party making the motion, since he still has the right to establish the merits of his motion upon the trial of the cause." *Bell v. Harmon*, 284 S.W.2d 812, 814 (Ky. 1955). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citation omitted). Athough the trial court may believe the party opposing the motion may not be successful at trial, summary judgment should not be rendered if any issue of material fact is present. *Id.* Here, the trial court refused to grant Earl Floyd Ford's motion for summary judgment because it determined genuine issues of material fact existed regarding the agreement and understanding of the parties concerning the purchase of the vehicle. Earl Floyd Ford was

allowed the opportunity to proceed with trial upon the merits of its complaint. Accordingly, the trial court properly denied the motion for a summary judgment.

Next, Earl Floyd Ford contends the trial court erred in denying its motion for a directed verdict. "Appellate review of a trial court's denial of a directed verdict is limited to a determination of whether the jury's verdict was palpably or flagrantly contrary to the evidence presented at trial." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 78, 787 (Ky. 2004). Our review is limited to a determination of whether the trial court erred in failing to grant the motion for a directed verdict. *Id.*

Our Supreme Court further states:

> All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" If the reviewing court concludes that such is the case it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to [grant] the motion for directed verdict. Otherwise, the judgment must be affirmed.

Id. (quoting *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461-62 (Ky. 1990)). "A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed facts exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998).

Doll testified that prior to leaving the dealership neither Kenneth nor Jan mentioned they owed any additional money, nor that Doll needed to speak to Keith regarding another $4,000.00 owed on the Mustang. Keith testified she spoke to Doll regarding the remaining money and requested that he contact Kenneth. Doll testified he did not know anything about additional money owed by the Evans until the office manager, "April," told him an amount of money was still unpaid. Doll further testified he immediately called and spoke to Jan regarding the remaining $4,000.00, however, he did not tell Jan that Keith had requested he make the call.

Kenneth testified no one at the dealership told him he owed more money prior to leaving the lot with the vehicle. It was not until his deposition, when the form sales contract was presented and explained to him, that he learned and acknowledged he still owed $4,000.00 on the Mustang. Further, Kenneth received a receipt showing the remaining balance owed on the Mustang was $0.

We agree with the trial court that based on the conflicting testimony, Earl Floyd Ford failed to introduce sufficient evidence to support the granting of a directed verdict. Since there were disputed facts relating to the terms of the contract, reasonable minds could differ as to the interpretation of the form sales contract. Kenneth was given a receipt saying he owed no additional money, but Earl Floyd Ford contends an additional $4,000.00 is owed. We further do not believe the jury's verdict was palpably or flagrantly contrary to the evidence presented at trial.

Finally, Earl Floyd Ford contends the trial court abused its discretion in instructing the jury. Earl Floyd Ford argues an unambiguous contract existed between the parties, and the only issue of "fact" was whether $4,000.00 was due on the contract. The trial court did not believe a valid contract existed between the parties and changed the verdict form to delete the reference to a "contract" and substituted the term "transaction" in its place. Thus, Earl Floyd Ford alleges that the trial court placed the burden upon the jury to determine whether the "transaction" constituted a binding "contract" between the parties. We disagree.

Proper resolution of this question hinges on construction of the document in question. To create a valid, enforceable contract there must be a meeting of the minds or the "mutual assent" of the parties to the agreement. *Cuppy v. General Accident Fire & Life Assurance Corp.*, 378 S.W.2d 629, 632 (Ky. 1964). The trial court determined that to accurately instruct the jury it had to replace the word "contract" as the agreement between the parties was ambiguous. Therefore, as a preliminary inquiry, we must determine whether the trial court correctly concluded the terms used in the transaction were ambiguous.

By definition, "[a]n ambiguous contract is one capable of more than one different, reasonable interpretation." *Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32, 33 (Ky. 1981). *See also Transport Insurance Co. v. Ford*, 886 S.W.2d 901, 905 (Ky.App. 1994) (stating "[t]o determine that an ambiguity exists, the court must first determine that the contract provision is susceptible to inconsistent interpretations."). If

ambiguity exists, "the court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written[,]" *Whitlow v. Whitlow*, 267 S.W.2d 739, 740 (Ky. 1954), by evaluating extrinsic evidence as to the parties' intentions. *Teague v. Reid*, 340 S.W.2d 235 (Ky. 1960). However, "[i]n the absence of ambiguity a written instrument will be enforced strictly according to its terms[,]" *O'Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. 1966), and a court will interpret the contract terms by assigning language its ordinary meaning and without resort to extrinsic evidence. *Hoheimer v. Hoheimer*, 30 S.W.3d 176 (Ky. 2000).

We agree with the trial court's conclusion that the agreement was ambiguous on its face. In concluding the agreement did not constitute a valid contract, the trial court recognized there was a disagreement between the parties as to what was meant by "additional cash with order," more specifically, whether the Evans knew the X-plan reduced the purchase price of the vehicle instead of being listed as part of the claimed rebates on the vehicle. The Evans were given a receipt stating they owed no additional money on the vehicle. Yet, Earl Floyd Floyd contends they still owed $4,000.00. Thus, the intentions of the parties could not be discerned based solely upon the writings.

As the trial court correctly found, there were clearly "two ways to reasonably interpret the agreement." *Central Bank and Trust, Co., supra.* Jurors were not unduly burdened in being asked to determine whether the two parties had a meeting of

the minds concerning the form sales contract. Thus, having found the agreement to be ambiguous, the trial court properly determined a factual issue existed as to whether there was a mutual assent between the parties. Resolution of such factual questions is properly left to the trier of fact. Thus, we cannot say the trial court abused its discretion in instructing the jury.

For the foregoing reasons, the order and judgment of the Carroll Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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