

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001340-MR

ALICE A. ADDINGTON;  
KEVIN D. ADDINGTON

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE THOMAS L. WALLER, SPECIAL JUDGE  
ACTION NO. 05-CI-00533

KENNETH N. LEWIS;  
LEWIS AUCTION COMPANY, LLC

APPELLEES

### OPINION AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: Alice A. Addington and Kevin D. Addington have appealed from the Hardin Circuit Court's summary judgment entered in favor of Lewis Auction Company and Kenneth Lewis (collectively "Lewis") and dismissing their claim alleging a breach of

---

<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11-(5)(b) of the Kentucky Constitution and KRS 21.580.

fiduciary duty in relation to the auction of the Addington estate. Having determined that the circuit court properly entered summary judgment, we affirm.

Kevin Addington is a successful businessman in Elizabethtown, Kentucky, where he lives with his family. Alice Addington is Kevin's mother. Alice and her husband, before he passed away, amassed an estate consisting of more than 100 acres of land, a 4,800 square foot house, automobiles, antiques, and collectibles. Prior to October 2005, Kevin and his family lived with Alice in the house. When Alice's health started to deteriorate, Kevin and his siblings began discussing her long-term plans. Kevin discussed a possible sale of the estate with a friend, Mark Haynes, who was a licensed auctioneer with Lewis Auction Company. After about a year, Kevin decided to auction the estate. We note that Kevin has been involved in at least five auctions as either the seller or the buyer. Kevin met with Haynes and Kenneth Lewis, the owner of Lewis Auction Company, and decided after talking with them, as well as another family member, to sell the property in an absolute auction. Based upon Haynes's and Lewis's estimations, Kevin expected the house to bring between \$240,000 and \$280,000, and the other tracts to bring \$4000 to \$5000 per acre. They entered into an exclusive auction listing contract on August 4, 2004. The contract contained the agreed upon auction date of October 16, 2004, and provided for a 10% buyer's premium. The contract also contained a provision related to absolute auctions, which was initialed by Kevin for himself and for Alice through his power of attorney. The provision states:

This property is to be sold at absolute auction with no minimum bid and no reserve selling price. Seller or anyone

acting upon behalf of the seller is prohibited from bidding on the real estate. This does not prohibit a lienholder, or individual party to a divorce, partnership or corporate dissolution or heirs to an estate from bidding on one's behalf. Property is free and clear of liens or encumbrances. Auctioneer has made no guarantee as to the selling price.

Additionally, the contract provided that the property would be offered in tracts and combinations using the multi-par method of selling, that the seller would be responsible for paying for the survey, and that Lewis would pay for all advertising, labor and auction expenses.

The real property was surveyed and split into sixteen different tracts for development. Fourteen tracts of just over three acres each lined the two roads abutting the property. Two twenty-eight-acre tracts were located behind the fourteen smaller tracts. A seventeenth tract included the house and approximately 5 acres of property. Lewis created a fifteen-page color brochure identifying the items being offered in the auction, including detailed information regarding the real estate. Sometime prior to the auction date, Kevin realized that the auction was scheduled during Glendale Days, a popular arts and crafts show thirty minutes away. Concerned about this, Kevin discussed the matter with Haynes and Lewis, who did not see Glendale Days as posing any potential harm to the auction, as many more people would have access to the auction brochures.

The auction began on Saturday, October 16<sup>th</sup>. That day, Alice's personal property items, including antiques, were auctioned. At the end of the day, Kevin asked Haynes and Lewis if everything was on track; they assured him that it was. The next day,

the real property and automobiles were auctioned. Lewis and Haynes had Kevin remain inside the house as the real estate was sold, although he was periodically kept apprised of the results during the auction. The real property sold as follows:<sup>2</sup>

- Tracts 1 – 2 – 3: \$49,500 (9.187 acres; \$5,388/acre)
- Tracts 4 – 5: \$50,600 (8.062 acres; \$6,276/acre)(each tract includes a barn)
- Tracts 6 – 7: \$36,850 (7.322 acres; \$5,032/acre)
- Tracts 8 – 9 – 10: \$46,200 (9.074 acres; \$5,091/acre)
- Tract 11: \$14,300 (3.018 acres; \$4,738/acre)
- Tract 12: \$14,300 (3.002 acres; \$4,763/acre)
- Tracts 13 – 14: \$26,400 (6.437 acres; \$4,101/acre)
- Tract 15: \$71,500 (28.040 acres; \$2,550/acre)
- Tract 16: \$50,600 (28.040 acres; \$1,804/acre)
- Tract 17: \$198,000 (house and five acres)

Excluding Tract 17, the sale of the real estate tracts totaled \$360,250, including the \$32,750 buyer's premium. The record does not have any documents detailing the proceeds from the sale of any personal property, including the automobiles. At the conclusion of the auction, Kevin expressed his dissatisfaction with the results and how the auction was conducted.

On March 22, 2005, Kevin and Alice filed a verified complaint with the Hardin Circuit Court, seeking damages from Lewis and Lewis Auction Company for breach of their fiduciary duties. The suit was based upon their claim that Lewis insisted

<sup>2</sup> The prices listed include the 10% buyer's premium.

on holding an absolute auction, as opposed to a reserve auction, and that as a result their property was sold for far less than the expected price. Following discovery, Lewis filed a motion for summary judgment, describing this case as one of seller's remorse. Although he agreed that an auctioneer has a fiduciary relationship to the principal, Lewis argued that Kevin and Alice failed to establish that an actionable breach took place in that the only basis for the complaint was that the property did not bring what they had hoped it would. In response, Kevin and Alice argued that Lewis abused his friendship with them to induce Kevin into selling the property at absolute auction rather than at reserve auction, despite his knowledge that Kevin needed to get a minimum amount in order to pay for Alice's health care. This, he asserts, led to the property bringing in less than expected. On June 8, 2006, the circuit court granted the motion and entered a summary judgment in favor of Lewis. This appeal followed.

On appeal, Kevin and Alice argue that summary judgment was inappropriate for several reasons: 1) the issue of whether a party breached a fiduciary duty is a question of fact; 2) the circuit court ignored several disputed issues of material fact; and 3) damages must be determined by a jury. On the other hand, Lewis argues that Kevin and Alice's claim must fail as a matter of law. We agree with Lewis.

Our standard of review is set forth in *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001):

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to

judgment as a matter of law.” The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” The trial court “must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” While the Court in *Steelvest[, Inc. v. Scansteel Service Center, Inc.]*, 807 S.W.2d 476, 480 (Ky. 1991),] used the word “impossible” in describing the strict standard for summary judgment, the Supreme Court later stated that that word was “used in a practical sense, not in an absolute sense.” Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court’s decision and will review the issue de novo. (Citations in footnotes omitted).

First, we shall address whether there are any genuine issues as to material facts that remain to be decided. Based upon our review of the record, we cannot identify any disputed factual issues. The undisputed facts reveal that Kevin is a successful businessman who had experience with auctions as both a buyer and a seller and who knew and appreciated the difference between an absolute auction and a reserve auction. Furthermore, it was Kevin's decision to sell his mother's property at absolute auction. Finally, it is clear that Kevin's entire claim is based upon his belief that the property did not sell for the price he expected, despite the language of the contract providing that the auctioneer has not guaranteed a sale price.

Next, we shall determine whether the circuit court properly held that Lewis was entitled to a judgment as a matter of law. A fiduciary relationship, we are instructed, “is one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with such undertaking.” *Steelvest*, 807 S.W.2d at 485. The parties are in agreement that a fiduciary relationship exists between an auctioneer and a seller. *See Chernick v. Fasig-Tipton Kentucky, Inc.*, 703 S.W.2d 885 (Ky.App. 1986); *Becker v. Crabb*, 223 Ky. 549, 4 S.W.2d 370 (Ky. 1928). The duty owed by an auctioneer is one of ordinary care.<sup>3</sup> *Chernick*, 703 S.W.2d at 889-90.

In the present case, the facts, even in a light most favorable to Kevin and Alice, do not establish that Lewis breached his fiduciary duty to Kevin and Alice. The record reflects that Kevin, not Lewis, decided to hold an absolute auction and that the auction contract clearly states that the auctioneer does not guarantee the property will bring a specified sum. Furthermore, Lewis produced and executed an extensive marketing plan for the auction, including a lengthy, full-color brochure and advertising, to publicize the event, and they were able to attract a large crowd. Kevin even admitted that the advertising was acceptable to him. While Kevin attempts to blame Lewis's greed and desire for a commission for initially inducing him to choose an absolute auction and

---

<sup>3</sup> Kevin and Alice rely upon this Court's opinion in *Worswick v. Switzer*, 778 S.W.2d 226 (Ky.App. 1989), to support their position that the duty owed is that of utmost care. However, the *Worswick* opinion was withdrawn from the bound volume after rehearing was granted, and a superseding opinion was rendered that was not designated for publication.

to continue with the second day of the auction, the record does not support this allegation. Clearly, it was in the best interest of all of the parties that the property bring in the highest amount possible. The higher the sale price, the higher Lewis's commission would be. Furthermore, Kevin made it very clear that he needed to sell the property in order to pay for Alice's long-term health care; if he had opted for a reserve auction and set the reserve too high, the property would not have sold and his mother's future care would have been negatively affected. We also note that Kevin never established what the personal property and automobiles sold for or what he expected such property to bring. It is obvious to this Court, as it was below, that Kevin regretted his decision only when the property did not bring the price he expected it to bring. This is simply not enough to establish a breach of fiduciary duty. As a matter of law, Lewis was entitled to a summary judgment in its favor.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Theresa A. Canaday  
Griffin Terry Sumner  
Louisville, Kentucky

BRIEF FOR APPELLEES:

Ryan F. Quick  
Jerry M. Coleman  
Elizabethtown, Kentucky