

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001945-MR

JOSEPH J. RUMELL AND
TAMELA RUMELL

APPELLANTS

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 01-CI-00474

THE BARDEN & ROBESON CORPORATION
AND PILLAR DEVELOPMENT, INC.

APPELLEES

AND

NO. 2006-CA-002019-MR

PILLAR DEVELOPMENT, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 01-CI-00474

JOSEPH J. RUMELL AND
TAMELA RUMELL

CROSS-APPELLEES

OPINION
REVERSING AND REMANDING APPEAL NO. 2006-CA-001945-MR
AFFIRMING CROSS-APPEAL NO. 2006-CA-002019-MR

** ** *

BEFORE: HOWARD,¹ NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Joseph J. Rumell and Tamela Rumell (collectively referred to as the Rumells) bring Appeal No. 2006-CA-001945-MR and Pillar Development, Inc. brings Cross-Appeal No. 2006-CA-002019-MR from an August 15, 2006, summary judgment and an August 23, 2006, order of the Oldham Circuit Court dismissing certain claims advanced by the Rumells arising out of an alleged oral exclusive franchise agreement. We reverse and remand Appeal No. 2006-CA-001945-MR and affirm Cross-Appeal No. 2006-CA-002019-MR.

The procedural history of this case is convoluted and complex. The relevant facts are as follows:

- At a meeting in March 2000, the Rumells alleged that Joseph and the Barden & Robeson Corporation (Barden & Robeson) entered into an oral exclusive franchise agreement. The Rumells particularly claimed that Eric Barden, agent and officer of Barden & Robeson, granted Joseph an “exclusive franchise” to build Barden homes in eastern Jefferson County, Henry County, Oldham County, and Shelby County. In consideration thereof, the Rumells maintained that Joseph agreed to build Barden

¹ Judge Howard concurred in this opinion prior to Judge Michael Caperton being sworn in on December 7, 2007 as Judge of the Third Appellate District, Division 1. Release of this opinion was delayed by administrative handling.

homes in the exclusive area, to obtain financing of the homes through Milo Corporation, and to obtain a “home package” through Barden Built Homes of Indiana, Inc.

- On March 28, 2000, Joseph, as an authorized dealer of Barden Homes and Barden Homes of Indiana, Inc., sold to Comfortable Homes Construction, LLC a home package for the total price of \$76,017. In the sales agreement, Joseph also signed on behalf of Comfortable Homes.

- On August 1, 2000, the Rumells executed a promissory note in the amount of \$246,000.00 in favor of Milo Corporation. The promissory note was secured by a mortgage upon property where the Rumells intended to build a Barden home utilizing the previously purchased home package. The Rumells also entered into a building loan agreement with Milo.²

- On August 10, 2001, Milo filed a complaint against, *inter alios*, the Rumells for defaulting upon the terms of the promissory note and also seeking foreclosure upon the mortgage.

- The Rumells answered and counterclaimed raising various claims against Milo.

- The Rumells then filed a third party complaint against Barden & Robeson and Pillar Development, Inc. (Pillar). Relevant to this appeal, the Rumells claimed that Joseph and Barden & Robeson, through its agent Eric Barden, entered into an oral exclusive franchise agreement and that Barden & Robeson breached the agreement by permitting Pillar to build Barden homes in the exclusive area. The Rumells

² It appears that Milo Corporation extended credit to purchasers and builders of Barden Homes.

also alleged that Barden & Robeson and Pillar trespassed upon their property and committed the tort of outrage in connection with a video advertisement allegedly depicting the Rumells newly constructed home as a Barden home built by Pillar.

· By partial summary judgment entered August 15, 2006, and order amending entered August 23, 2006, the circuit court dismissed the Rumells' claim that Barden & Robeson breached the oral exclusive franchise agreement. The court concluded that the statute of frauds precluded enforcement of the oral agreement and that the oral agreement was also unenforceable as it lacked material terms. The court also dismissed the Rumells' claim of trespass against Pillar. The court also denied Pillar's motion for summary judgment upon the Rumells' claim for the tort of outrage against Pillar. These appeals follow.

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The Rumells contend that the circuit court erroneously entered summary judgment dismissing their claim for breach of the oral exclusive franchise agreement. They assert that the oral exclusive franchise agreement does not come within the purview of the statute of frauds (KRS 371.010); thus, the circuit court erred by concluding otherwise. Furthermore, the Rumells maintain that the oral exclusive franchise agreement was sufficiently definite as to its material terms to be enforceable.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). The circuit court must view

the facts most favorable to the nonmoving party. *Leslie v. Cincinnati: Sub-Zero Products, Inc.*, 961 S.W.2d 799 (Ky.App. 1998). With this standard in mind, we shall review whether the circuit court properly entered summary judgment concluding that the alleged oral exclusive franchise agreement was unenforceable. Specifically, the circuit court held the alleged oral exclusive franchise unenforceable upon two grounds: (1) it violated the statute of frauds (KRS 371.010), and (2) it was lacking sufficient definiteness as to material terms. We shall address these grounds *seriatim*.

As to the statute of frauds, Barden & Robeson agree with the Rumells that the circuit court erred by concluding the alleged oral exclusive franchise agreement was rendered unenforceable thereby. We also conclude that the circuit court erred.

KRS 371.010, the statute of frauds, provides in relevant part:

No action shall be brought to charge any person:

. . . .

(7) Upon any agreement that is not to be performed within one year from the making thereof;

Generally, an oral contract that is capable of being performed within a year of its creation does not come within the ambit of the statute of frauds. *Williamson v. Stafford*, 301 Ky. 59, 190 S.W.2d 859 (1945).

In our case, the alleged oral exclusive franchise agreement was between Joseph and Barden & Robeson. The Rumells claim that Barden & Robeson granted Joseph the exclusive right to build Barden homes in a certain area. The oral exclusive franchise agreement was allegedly consummated in March 2000. As it was possible for

Joseph to have built a Barden home and for Barden & Robeson to have excluded others from building Barden homes within a year of the oral agreement, we are of the opinion that the alleged oral exclusive franchise agreement was capable of being performed within a year of its creation. Hence, the agreement does not come within the purview of the statute of frauds, and the circuit court committed error by concluding that it did. We shall now examine whether the circuit court correctly held the alleged oral exclusive franchise agreement unenforceable for lacking certainty as to its material terms.

To constitute a valid enforceable contract, the material terms of the contract must be established with sufficient definiteness and certainty. *Walker v. Keith*, 382 S.W.2d 198 (Ky. 1964); *Mitts & Pettit, Inc. v. Burger Brewing Co.*, 317 S.W.2d 865 (Ky. 1958). In *Leon Manufacturing Co., Inc. v. Kubota*, 199 S.W.3d 759 (Ky.App. 2006), the Court of Appeals recently held that a valid franchise agreement will be recognized only when the following three material elements are present:

- (1) A franchisor is engaged in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by the franchisor; and
- (2) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and
- (3) The franchisee is required to pay, directly or indirectly, a franchise fee.

Id. at 762.

In the summary judgment, the circuit court determined that the oral exclusive franchise agreement lacked material terms and was unenforceable. However, the court did not specify the absent material terms but simply concluded that there existed a “lack of definite terms.” After the circuit court's summary judgment, this Court rendered *Leon* and specifically set forth three material elements necessary to constitute a valid franchise agreement. *See id.* We, therefore, remand to the circuit court for reconsideration in light of our holding in *Leon*, 199 S.W.3d 759. Upon remand, the circuit court should reconsider its decision that the alleged oral exclusive franchise agreement lacked material terms in view of *Leon*, 199 S.W.3d 759.

The Rumells also contend that the circuit court erred by entering summary judgment dismissing their claim against Pillar for intentional interference with the oral exclusive franchise agreement with Barden & Robeson. As this Court has remanded the issue of enforceability of the alleged oral exclusive franchise agreement to the circuit court, we believe this contention premature. If the circuit court concludes that the alleged oral franchise agreement is unenforceable, the Rumells' claim of intentional interference with such franchise agreement would, likewise, fail. On the other hand, if the circuit court concludes that the alleged oral franchise agreement is enforceable, it must reach the merits of the Rumells' claim of intentional interference with the oral agreement against Pillar. We, thus, decline to address this contention of error.

The Rumells finally argue that the circuit court erred by entering summary judgment dismissing their claim of trespass to real property against Pillar. The Rumells

allege that Pillar and, in particular, Steve Gill, owner of Pillar, entered the Rumells' newly constructed home without permission. In the summary judgment dismissing the trespass claim, the circuit court concluded:

[Milo] contends that Steve Gill, owner of Pillar, made a remark that he had “shown” Rummell's [sic] house, to a prospective client. When questioned, Rummell [sic] stated he was unable to give a date or describe how it was shown, but claimed he had a “source of information.” Rummell [sic] has made no claim for specific damages in this regard. Gill has denied he ever showed the house, although he did perform subcontracting work on it.

The Court sustains the Motion in this regard, as there is simply no proof presented by Rummell [sic] to indicate Gill trespassed upon the property. Gill's sworn testimony is in the record and he denies the allegation, Rummell [sic] has not presented material facts which show there is a genuine dispute as to this issue.

For the reasons hereinafter stated, we believe the circuit court erred and the Rumells presented sufficient evidence to create a material issue of fact upon the trespass claim against Pillar.

Generally, a trespass occurs when a person enters or remains upon real property in possession of another without the possessor's consent. *Nolan v. Thomas*, 379 S.W.2d 249 (Ky. 1964). A trespass may be intentional or negligent. *Rockwell International Corp. v. Wilhite*, 143 S.W.3d 604 (Ky.App. 2003). In this Commonwealth, “[a]ny intended intrusion or encroachment which is not privileged is actionable without regard for the shortness of the period of the interference, of the absence of pecuniary

harm.” *Smith v. Carbide and Chemicals Corp.*, 226 S.W3d 52, (Ky. 2007). Thus, actual damage to property is unnecessary in an intentional trespass claim.

In Joseph's deposition, he was specifically questioned concerning the claim of trespass against Pillar and, in relevant part, testified:

Q. Tell me what you know about the trespassing?
When did it occur as best you can determine?

A. I know that Pillar had called me – or Mr. Gill and said that he was showing my house. And I said, he didn't have authority to go on my property. That's all I can remember of that conversation. And I said, you're not allowed on the property.

Q. Is that the extent of your claim of trespass against Mr. Gill?

A. Well, after the ad was run there was another claim that he was on the property again.

Q. And --

A. That he was showing it after the fact that I told him not to go on. And then he did a video, and then he was showing it again.

. . . .

A. I just said that he did not tell me how many times he showed the house. He said he was showing the house.

Q. That's the full extent --

A. That's what he said, he was showing the house, he had already taken people through it. And I said he couldn't do it anymore because it wasn't his house, and he continued to do it. After he did the ad he showed it again. And I called him again about that ad that was on TV, and I said, stay off the property.

We believe Joseph's depositional testimony alone created a material issue of fact upon the claim of intentional trespass against Pillar. According to Joseph, Gill directly confessed to entering the newly constructed home without the Rumells' permission and continued to do so after being warned against same. Viewing the evidence most favorable to the Rumells, we conclude that material issues of fact exist upon their claim of intentional trespass against Pillar, thus precluding entry of summary judgment. As such, the circuit court erred by dismissing the Rumells' claim of intentional trespass against Pillar.

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Pillar argues that the circuit court erred by denying its motion for summary judgment upon the Rumells' claim of trespass against Pillar. We have examined the record and believe that Pillar is mistaken. In its August 15, 2006, summary judgment, and its August 23, 2003, order amending that judgment, the circuit court specifically dismissed the claim of trespass against Pillar. In particular, the court stated that it “does not allow the claim of trespass to go forward against Pillar” Moreover, we have concluded in Appeal No. 2006-CA-001945-MR that the Rumells sufficiently raised material issues of fact upon the claim of intentional trespass against Pillar, thus precluding entry of summary judgment.

Pillar next contends that the circuit court erred by denying its motion for summary judgment upon the Rumells' claim for the tort of outrage against Pillar. This claim of outrage stems from the making and airing of a video advertisement wherein the Rumells newly constructed home was allegedly portrayed as a Barden home built by

Pillar. The circuit court concluded that the Rumells created a material issue of fact upon their claim for the tort of outrage against Pillar, thus denying summary judgment.

It is well-established that an order denying a motion for summary judgment is interlocutory and, thus, not appealable. *Battoe v. Beyer*, 285 S.W.2d 173 (Ky. 1955).

As Pillar contends that the circuit court erred by denying summary judgment upon the tort of outrage, we are constrained from addressing the merits of this contention. *See id.*

For the foregoing reasons, the summary judgment and order of the Oldham Circuit Court is reversed and remanded in Appeal No. 2006-CA-001945-MR and affirmed in Cross-Appeal No. 2006-CA-002019-MR.

ALL CONCUR.

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