

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002584-MR

JON TUBBS

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 06-CI-00306

RAY SMITH

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,¹ SENIOR JUDGE.

KELLER, JUDGE: This appeal arises from the Calloway Circuit Court's order granting the motion for summary judgment filed by Ray Smith (Smith). In his brief, Jon Tubbs (Tubbs) argues that he and Smith had an oral contract regarding the sale of certain real estate in Calloway County. According to Tubbs, he performed under the oral contract, but Smith did not. Tubbs acknowledges that a contract for the sale of real estate

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

generally falls under the statute of frauds; however, he argues that, since he performed under the contract, the statute of frauds does not apply. Finally, Tubbs argues that the trial court wrongfully dismissed Smith's wife, Wilma Smith (Wilma), as a defendant. For the reasons set forth below, we affirm.

FACTS

The basic facts in this matter are not disputed.² Smith owned approximately 596 acres of land in Calloway County that he wanted to sell. Smith asked Bobby Smith (Bobby), who had assisted Smith in previous real estate transactions, to help him sell the land. At some point, Tubbs contacted Bobby and asked if Smith would be interested in selling the land at \$900 an acre and paying Tubbs \$25 per acre as a "finder's fee." According to Tubbs, Bobby stated that Tubbs or his assignees could purchase the land at \$912.50 per acre and Tubbs could keep any amount in excess of \$912.50 per acre he could obtain. According to Smith, Bobby stated that Smith would pay Tubbs \$12.50 per acre if Tubbs could find a buyer willing to pay \$950 per acre. The land eventually sold for \$950 per acre to five purchasers. Following the sale, Smith sent Tubbs a check in the amount of \$7,451.59, representing \$12.50 per acre. Tubbs returned the check to Smith, indicating that Smith owed \$22,354.88, the difference between \$912.50 per acre and \$950 per acre.

When Tubbs did not receive the requested \$22,354.88, he filed the subject lawsuit against Smith and Wilma. In his complaint, Tubbs alleged that Bobby, acting as

² At the hearing on his motion for summary judgment, Smith conceded, at least for the purposes of his motion, that all of the allegations in Tubbs's complaint are factually correct.

agent for Smith, entered into an oral contract with Tubbs promising to sell to Tubbs or his assignees the land at the price of \$912.50 per acre with Tubbs keeping any sums received in excess of that per acre amount. Wilma filed a motion to dismiss, stating that she lived in Tennessee and that the only interest she had in the land was her dower interest. The trial court dismissed Wilma and designated that the order of dismissal was final and appealable. However, the court did not state that there was no just reason for delay.

Smith then filed a motion for summary judgment arguing that any agreement regarding the sale of the land was required to be in writing in order to be enforceable pursuant to the statute of frauds. Tubbs argued in his response to that motion, as he does here, that his performance under the oral agreement removed it from the purview of the statute of frauds. The trial court granted Smith's motion finding that this transaction was governed by the statute of frauds and that the absence of a writing made the agreement unenforceable. Tubbs then filed a motion for reconsideration and for additional findings, which the trial court denied.

STANDARD OF REVIEW

The standard of review on appeal of a summary judgment is whether the trial court "correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the [plaintiff] to produce any evidence at trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807

S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record “in a light most favorable to the party opposing the motion” *Id.* at 480.

ANALYSIS

A. Statute of Frauds

There are two ways to view this case. Either Tubbs and Bobby entered into an oral contract whereby Tubbs would purchase the land in question, or Tubbs and Bobby entered into an oral contract whereby Tubbs agreed to find a buyer for the land and Bobby agreed to pay Tubbs a fee for finding that buyer. In either case, our analysis must begin with the statute of frauds. KRS 371.010 reads in pertinent part as follows:

No action shall be brought to charge any person:

. . .

(6) Upon any contract for the sale of real estate, or any lease thereof for longer than one year;

. . .

(8) Upon any promise, agreement, or contract for any commission or compensation for the sale or lease of any real estate or for assisting another in the sale or lease of any real estate;

. . .

unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it

may be proved when necessary or disproved by parol or other evidence.

In his complaint, Tubbs alleged that Bobby "agreed to sell to Jon Tubbs or his assignees approximately 596 acres of real property located in Calloway County, Kentucky, for a sale price of \$912.50 per acre, with all sums received in excess of \$912.50 per acre to be the property of Jon Tubbs." Taking this allegation at face value, as we must, Tubbs is alleging that he had an agreement to purchase real estate either personally or through his assignees. It is undisputed that Tubbs never purchased the land; therefore, Tubbs argues that the ultimate purchasers were his assignees. This argument fails because there is no evidence that Tubbs assigned any rights he may have had to the purchasers. Furthermore, even if Tubbs had assigned his rights to the purchasers, he could only have assigned the right he had, which was to purchase the land at \$912.50 per acre. That per acre price was not the ultimate selling price; therefore, if Tubbs did assign his contract with Bobby to the purchasers, that contract was not the contract the parties performed. Finally, we note that any assignment of the right to purchase the land, like the right to purchase the land, had to be in writing to be enforceable pursuant to KRS 371.010. Tubbs has not provided any writing memorializing the alleged agreement between Bobby and him or any writing memorializing the alleged agreement between the purchasers and Tubbs. Therefore, any agreement regarding the purchase of the land is not enforceable.

Although we do not believe that we need analyze this matter further, we will address Tubbs's argument that Bobby agreed to pay Tubbs a finder's fee. As set forth

above, KRS 317.010(8) provides that "any promise, agreement, or contract for any commission or compensation for the sale or lease of any real estate or for assisting another in the sale or lease of any real estate" (emphasis ours) must be in writing to be enforceable. Tubbs argues that he found the buyers for Smith's property and that he should therefore be compensated. This argument by Tubbs falls squarely within KRS 317.010(8), i.e., he assisted another (Bobby and/or Smith) in the sale of real estate. Therefore, in order to enforce any claim for compensation, Tubbs must have a written agreement. No such agreement exists; therefore, Tubbs cannot enforce whatever agreement he had with Bobby.

Finally, we will address the case law cited by the parties. In support of his position that his oral agreement with Bobby was enforceable despite the statute of frauds, Tubbs cited a number of cases. In *Head v. Schwartz' Ex'r*, 304 Ky. 798, 202 S.W.2d 623 (1947), the Heads lived on and farmed land owned by Schwartz. Prior to Schwartz's death, the Heads indicated that they were going to move. In order to entice them to stay, Schwartz promised that she would leave a tract of unimproved land to the Heads in her will. The Heads stayed and made some improvements to the land, and Schwartz changed her will devising the land to the Heads; however, Schwartz subsequently amended her will removing that provision. When Schwartz died, the Heads sought to enforce the promise to devise that Schwartz had made. The Court held that the Heads may have had a cause of action under quantum merit; however, they had no action for breach of contract. We believe *Head* is distinguishable because it dealt with the failure to devise

real estate, not the failure to pay a commission or compensation for assisting with the sale of real estate.

In *Ma-Beha Co., Inc. v. Acme Realty Co., Inc.*, 286 Ky. 382, 150 S.W.2d 1 (1941), the appellant rented space from the appellee. At some point during the term of the lease, the appellant sought a reduction in rent. The appellee forwarded a letter to the appellant stating that rent would be reduced for the period of one year. The appellant believed that the reduction was for the remaining term of the lease, more than 3 years, and paid rent accordingly. After the expiration of the lease, the appellee sought additional rent for the additional years. The court held that the appellee was not entitled to the additional rent because it had accepted the reduced rent without complaint until after the lease expired. The court, in finding for the appellant, deemed that the appellee had either waived its entitlement to the additional rent or made a gift to the appellant of the additional rent. Again, this case is distinguishable because it does not deal with commission or compensation for assisting someone with the sale of real estate.

In *Salyers v. Kenmont Coal Co.*, 226 Ky. 655, 11 S.W.2d 705 (1928), and *Pilcher v. Stadler*, 276 Ky. 450, 124 S.W.2d 475 (1939), the issue was whether the disputed contracts could be performed within one year. In *Salyers*, the Court held that an employment contract for an indefinite period of time does not fall within the statute of frauds, because it could be performed within one year. In *Pilcher*, the court held that, when one party performed within one year and the other did not, but could have, the matter did not fall within the purview of the statute of frauds. Therefore, neither *Salyers*

nor *Pilcher* are applicable because the issue herein is not the length of time within which the contract can be or should be performed, but rather concerns the subject matter of the contract. In *Montgomery v. Graves*, 301 Ky. 260, 191 S.W.2d 399 (1945), unlike in this case, there were written documents. The only question before the court was whether those documents contained enough information to satisfy the requirements of the statute of frauds. The court found that they did.

We find the case cited by Smith to be more instructive, if not dispositive. In *Louisville Trust Co. v. Monsky*, 444 S.W.2d 120 (Ky. 1969), a licensed real estate broker, Bean, contacted Monsky and asked if Monsky would be interested in selling real estate Monsky owned in downtown Louisville. Approximately one year later, the Cabot Corporation purchased the real estate in question. There was no written agreement between Bean and Monsky; however, Bean claimed that he was entitled to a commission based on *quantum meruit*. The Court held that, based on the "plain, positive, and unambiguous" language of the statute, Bean did not have the "right to sue on a verbal contract." *Monsky*, 444 S.W.2d at 121. As with Bean, Tubbs did not have any written contract with either Smith or Bobby. Therefore, based on the plain, positive, and unambiguous language of the statute, Tubbs did not have the right to sue.

B. Dismissal of Co-Defendant

Because we affirm the trial court's dismissal of Tubbs's claim based on the statute of frauds, the issue regarding the dismissal of Wilma as a party defendant is moot.

CONCLUSION

Based on the above, we hold that Tubbs's claim is barred by the statute of frauds, and that Tubbs has put forth no evidence that would remove his claim from the purview of the statute of frauds. Therefore, we affirm the decision of the Calloway Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen C. Sanders
Murray, Kentucky

BRIEF FOR APPELLEE:

Gerald L. Bell
Murray, Kentucky