

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000483-MR

ESTATE OF FENIMORE H. CALLAWAY and
ANN THOMAS, EXECUTRIX

APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 14-CI-01144

ANTHONY FRANCIS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, CLAYTON, AND LAMBERT, J., JUDGES.

CLAYTON, JUDGE: Ann Thomas brings this *pro se* appeal from a Fayette Circuit Court Order granting summary judgment against her, individually and as executrix of the Estate of Fenimore H. Callaway, and against the estate itself. The summary judgment granted the relief Anthony Francis sought in his complaint to compel enforcement of a real estate contract entered into between Francis and

Callaway before Callaway's death. The circuit court found no genuine issue of material fact to support either of Thomas' defenses that Callaway lacked capacity to enter into the contract of sale or that Callaway was the victim of undue influence. We agree with circuit court and, therefore, affirm.

Fenimore H. Callaway (Callaway) is Thomas' grandmother. Prior to her death, Callaway hired Ruby Mason (Mason), a real estate professional, to sell some of her properties.

Mason listed the property that is the subject of this action for \$20,000. Anthony Francis (Francis) made a counteroffer of \$12,000. Callaway made a counteroffer for \$13,000, and Francis accepted. Callaway, who had been sent to Hospice Care on December 18, 2013, signed the paper work to sell the property on December 19, 2013. She passed away the following morning.

Thomas filed with the trial court an estimate of the actual value of the property at \$30,000. She argued to the trial court that Callaway had suffered from cerebral vascular disease, which affected the blood flow to her brain. Thomas entered an affidavit stating that she believed that Callaway was not lucid when she signed the contract for sale. Mason also entered a signed affidavit stating that she appeared lucid at the time of the contract. Thomas argued that the contract should be set aside due to mental incapacity, fraud, and undue influence. The trial court granted summary judgment, and this appeal follows.

A summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03. “[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Trial courts must “[r]efrain from weighing the evidence at the summary judgment stage...” and should “...[r]eview the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party.” *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999).

Thomas first argues that sufficient evidence existed in the record to support a defense of mental incapacity. In Kentucky, “courts will hesitate to upset a transaction which is entered into in good faith and where no undue advantage or fraud is shown[.]” *Hagemeyer v. First Nat. Bank & Trust Co.*, 306 Ky. 774, 776, 209 S.W.2d 320, 321 (1948). Furthermore, when considering a party’s capacity to enter into a contract, “courts will look only to the adequacy of the understanding where the validity of an act is questioned, and neither age, sickness, extreme distress, or debility of the body will affect the capacity to make a contract or conveyance, if sufficient intelligence remains to understand the transaction.” *Hall v. Crouch*, 341 S.W.2d 591, 594 (Ky. 1960). “[U]nsoundness of mind to avoid a contract must relate to the immediate time when the contract was made.” *Id.*

(quoting *Jefferson Standard Life Ins. Co. v. Cheek's Adm'r*, 258 Ky. 621, 80 S.W.2d 518, 521 (1935)). Bald allegations of incapacity are insufficient to defeat a motion for summary judgment. See *Coomer v. Phelps*, 172 S.W.3d 389, 393 (Ky. 2005). A transaction with a person not yet adjudicated mentally unsound will not generally be disturbed, see *Everett v. Downing*, 298 Ky. 195, 182 S.W.2d 232 (1944), and there is a presumption of contractual capacity. *Rose v. Rose*, 298 Ky. 404, 182 S.W.2d 977, 978 (1944).

Mason's affidavit stated that "[e]ven though Ms. Callaway was in poor health, she appeared lucid to Affiant at all times, including at the time she signed the [c]ontract." Thomas' affidavit stated that in August 2013 Callaway had "changed" and that "[s]he was very forgetful and would ask the same questions over and over again." It also provided as follows:

Affiant stayed the night with Ms. Callaway on December 6, 2013. Affiant observed that Ms. Callaway was sleeping about 20 hours per day and was no longer interested in her life-long interest. Also, she verbally stated that she was ready to die. On December 18, 2013, Affiant talked with Ms. Callaway over the telephone for the last time. During this call, Affiant specifically asked Ms. Callaway if any of the properties sold and she said, "No." Based on the last visit and the last telephone conversation with Ms. Callaway, it is Affiant's opinion that she was not lucid. Ms. Callaway's doctor indicated that he had not seen Ms. Callaway during the week that she died; consequently, he would not be able to comment on her mental capacity for that week.

Even though Thomas argued that Callaway's physical illness rendered her mentally unable to enter into a contract, she presented no proof on the matter.

The only evidence in the record at the time the contract was signed was provided by Mason; Thomas was apparently not present at the time the contract was signed. Furthermore, Thomas' affidavit only states that Callaway was forgetful. This evidence alone cannot defeat the presumption that Callaway possessed "sufficient intelligence remains to understand the transaction." *Hall*, 341 S.W.2d at 594. Because Thomas failed to show a genuine issue of material fact as to Callaway's mental incapacity, summary judgment on the issue was proper.

Thomas made several additional arguments to the trial court. Thomas argued that Callaway was fraudulently induced into selling her land before her death, because the amount of money that she was offered was too low. She also argued that Callaway was unduly influenced by Mason in selling the property. Finally, Thomas alleged that Mason made a material misrepresentation to Callaway. However, Thomas does not present any arguments to this court on those issues and therefore we decline to address them.

Francis has argued that he is entitled to attorney's fees because this appeal is frivolous. CR 73.02(4) provides as follows:

If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

We do not believe that this appeal was “so totally lacking in merit that it appears to have been taken in bad faith.” This case does not approach that standard, and sanctions against Thomas are inappropriate.

In sum, we hold that the circuit court did not err when it granted summary judgment, because Thomas failed to prove the existence of any genuine issue of material fact of contractual incapacity, fraud or undue influence.

The Fayette Circuit Court’s order granting summary judgment is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ann Thomas, *Pro Se*
Atlanta, Georgia

BRIEF FOR APPELLEE:

Kevan Morgan
Georgetown, Kentucky