IN THE COURT OF APPEALS
AT KNOXVILLE

FILED

November 24, 1998

Cecil Crowson, Jr.
Appellate Court
Clerk

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| DANNY DEAN LINDSEY and RUTH MICHELLE NOVISKI LINDSEY, | ) | MONROE CIRCUIT |
| | ) | C.A. NO. 03A01-9612-CV-00397 |
| Plaintiffs-Appellants | ) | |
| vs. | ) | |
| | ) | HON. JOHN B. HAGLER |
| | ) | JUDGE |
| MACK COULTER d/b/a COULTER REALTY AND AUCTION COMPANY, | ) | |
| Defendant-Appellee | ) | VACATED and REMANDED |

R.D. HASH, Maryville, for Appellants.

JOHN CARSON III, White, Carson & Alliman, Madisonville, for Appellee.

O P I N I O N

McMurray, J.

This appeal involves an action by Danny Lindsey and Ruth Lindsey against Mack Coulter, a licensed auctioneer, for alleged negligence in advertising the sale of their residence and in selling it at auction. Coulter filed a counter-claim against the Lindseys, alleging they wrongfully refused to pay his commission for the sale. The trial court granted Coulter's motion for summary judgment against Mr. Lindsey, ordered Ms. Lindsey's pleadings stricken from the record, and entered default judgment against her. We find from our review of the record that genuine issues of material fact exist regarding the Lindseys' claims, and Coulter's counter-claim, such that the judgments in favor of Coulter must be vacated and the case remanded for trial.

On appeal, the Lindseys raise the issue of whether the trial court erred in granting summary judgment to Coulter. Our standard of review of a trial court's grant of summary judgment is well-settled:

> Tenn.R.Civ.P. 56.03 provides that summary judgment is only appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. Anderson v. Standard Register Co.,857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn.1991).
>
> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. Byrd, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion. Id.

Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn. 1995).

The Lindseys were divorced pursuant to a final decree of divorce entered by the Monroe County Circuit Court on August 23, 1993. The court's decree provided:

> That the parties['] residence shall be listed for sale by Realtor Faye Hickman at a price mutually agreeable by the parties. That in the event said residence cannot be sold within 120 days from the date of listing, the real property shall be sold at public auction.

The residence did not sell within the 120 days provided in the decree.

In June of 1994, the Lindseys contracted with Coulter to advertise and sell the residence by auction. The auction agreement, signed by Mr. Lindsey on June 18 and Ms. Lindsey on June 28, provides that "the Auctioneer shall advertise the Auction by doing all such newspaper work, brochures, signs, etc., as it may deem necessary ..." The auction agreement also provides that "[t]his contract is irrevocable ..."

Shortly after signing the agreement, Mr. Lindsey apparently changed his mind and made several attempts to stop the auction process. Mr. Lindsey's complaint alleges that he personally visited with Coulter at his office and advised him of his decision to rescind the contract, and

thereafter notified Coulter in writing of his decision to rescind and revoke the contract. Mr. Lindsey further alleges that Coulter "assured [him] that the auction would not take place and that [he] relied on the statements of Mack Coulter ... concerning the cancellation of said auction."

On July 12, 1994, Mr. Lindsey sent a letter to Coulter which states in relevant part:

> This is in regard to the "Auction Agreement" Ruth & (? Danny Lindsey) [sic] signed on
> **6/28/94.**
>
> **As per our conversation in your office on 6/30/94** that this agreement was ***null & void*** & [sic] I made it very clear that their [sic] would be "No Auction" of said property at this time, because we were coming to an agreement between ourselves & their [sic] would be no need for your services at this time. I also said that if their [sic] was any cost at this time, you would be composted [sic]. *I left your office with good faith, & felt that the matter was closed.* [all emphasis in original].

In his answer, Coulter denies that he told Mr. Lindsey the auction would not take place. Coulter's affidavit states the following in relevant part:

> Pursuant to the terms of the auction contract I advertised the home for auction in the newspapers of general circulation in Monroe and surrounding counties, printed and distributed approximately 1,000 flyers and placed signs on the property.
> Thereafter, Mr. Lindsey called me raving about his attempts to buy out his wife's [sic] interest in the property. He told me that he did not want to have an auction and to come and get my signs. I told [him] that both he and his wife [sic] had signed an irrevocable contract to auction the property and that it would be necessary for him to settle his differences directly with Mrs. Lindsey, otherwise, I would hold the auction as scheduled.
>
> As time for the auction drew near I scheduled an open house and called Mr. Lindsey who was then occupying the premises to advise him of the same. Mr. Lindsey said that he would "call his wife" and get back to me. Mrs. Lindsey later called me and said she would meet me for the open house and that Mr. Lindsey would be gone.
>
> On July 17 I held an open house at the premises. The front door was open and Mr. Lindsey was not there. It appeared that he had moved part of his belongings from the residence.
>
> On July 23 I held an auction at the premises. Mrs. Lindsey attended the auction. Mr. Lindsey did not, although he had moved the remainder of his belongings from the property.
>
> Both the open house and auction were well attended and conducted in a manner so as to maximize the sale of the property.

Coulter held the auction on July 23, 1994, and the property was struck off to the highest bidders (the Millsaps). Coulter produced a "contract for the sale of real estate," which was signed

by Ms. Lindsey. Mr. Lindsey subsequently refused to sign the contract or otherwise consummate the sale. This action began when the Millsaps sued Coulter and the Lindseys, which subsequently resulted in the parties involved in this appeal filing cross-complaints against each other. The Millsaps and the Lindseys reached a settlement agreement which was approved by the trial court, and which resulted in the Millsaps' purchasing the property at the auction price. The settlement agreement and the resulting sale of the property are not involved in this appeal, and the sale has become final and unassailable.

There remain questions of material fact regarding the Lindseys' allegations of negligence on Coulter's part in advertising and conducting the auction, and regarding Coulter's counter-complaint for his commission, however. Coulter, as an auctioneer, was an agent for the Lindseys. Green v. Crye, 11 S.W.2d 869, 870 (Tenn. 1928) ("A person employed as an auctioneer at the sale of property, real or personal, is primarily the agent of the owner or vendor."); Investors Syndicate of America, Inc. v. Allen, 279 S.W.2d 497, 501 (Tenn. 1955) ("... the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions are agents, although, as to their physical activities, they are independent contractors."); Lindsey v. Stein Bros. & Boyce, Inc., 433 S.W.2d 669, 671 (Tenn. 1968).

As noted by the Supreme Court in Knox-Tenn Rental Co v. Jenkins Insurance, Inc., 755 S.W.2d 33, 36 (Tenn. 1988):

> An agent is a fiduciary with respect to the matters within the scope of his agency. The very relationship implies that the principal has reposed some trust or confidence in the agent and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his principal or employer.

Id.; Roberts v. Iddins, 797 S.W.2d 615, 617 (Tenn.App. 1990). Our courts have recognized and held that an agent is liable to his or her principal for any breach of this fiduciary duty:

> It is universally recognized that an agent stands in a fiduciary relationship to his principal and is under a duty to be careful, skillful, diligent and loyal in the performance of his principal's business and that for a failure so to act he subjects himself to liability to his principal for any damages naturally and proximately flowing from the breach of duty.
>
> * * * *

> "Whenever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority or by positive misconduct, or by negligence or omission in the proper function of his agency, or in any other manner, and any loss or damage thereby falls on his principal, he is responsible therefor, and bound to make full indemnity. The loss or damage need not be directly or immediately caused by the act which is done, or omitted to be done. It will be sufficient if it be fairly attributable to it, as the natural result or just consequence."

Gay & Taylor, Inc. v. American Cas. Co. of Reading, Pa., 381 S.W.2d 304, 305-06 (Tenn. App. 1963); Marshall v. Sevier County, 639 S.W.2d 440, 446 (Tenn. App. 1982), quoting Walker v. Walker, 52 Tenn. (5 Heisk.) 425, 427-8 (1871).

It has long been well-established law that "[i]t is the primary duty of an agent, whose authority is limited by instructions, to adhere faithfully to those instructions in all cases to which they ought properly to be applied." Walker, supra at p. 428; Corbitt v. Federal Kemper Ins. Co., 594 S.W.2d 728, 737 (Tenn. App. 1980). Thus, irrespective of whether the contract was "irrevocable," Coulter had a duty to faithfully follow the instructions of his principal. While Coulter admits Mr. Lindsey approached him and told him he did not want to sell the house immediately and to stop the auction process, he denies agreeing to Mr. Lindsey's instructions and assuring him the auction would not take place.

The trial court found that Ms. Lindsey never took any action in opposition to the sale prior to the auction, and in fact actively encouraged the auction to take place. The record fully supports this position. In none of her pleadings does Ms. Lindsey assert that she told Coulter to stop or postpone the sale.

Coulter argues that the auction agreement was by its terms irrevocable and Mr. Lindsey had no power or right to unilaterally revoke the contract, particularly when his co-principal, Ms. Lindsey, was trying to go forward with the sale. Under these unusual circumstances, we are of the opinion that Coulter should have made certain that the Lindseys had reached an agreement regarding the sale before he proceeded with the auction. Mr. Lindsey, a co-principal, presented Coulter with a letter which was unequivocal in its demand that Coulter discontinue the auction sale process. He also

made several similar oral requests to Coulter. Under these circumstances, we believe that Coulter proceeded with the sale at his own potential risk.

The trial court held that "Mrs. Ruth Lindsey should be equitably and judicially estopped from making any filings or taking any actions inconsistent with closing the sale as she, through counsel, indicated to this Court and the attorneys involved that she wanted the sale to proceed for the last two years." As noted above, a careful reading of the record indicates that Mrs. Lindsey has not alleged that she took any action which would indicate or suggest her opposition to the sale. In her answer to the original complaint, Mrs. Lindsey states:

> The Defendant, Ruth Lindsey, avers that at the auction sale, the auctioneer was in charge, that she had no control over what transpired, and that she was aware her former husband had made appropriate efforts to stop the sale, including verbal and written notice to the auctioneer that the listing agreement was revoked, terminated and rescinded, but the auctioneer proceeded.

In her answer to Coulter's complaint, Mrs. Lindsey states that "she understood her former husband, Dan Lindsey, had advised Mr. Coulter not to continue with the auction. She believes Mr. Lindsey terminated and rescinded his authority for Mr. Coulter to continue with the sale." In her cross-complaint against Coulter, she alleges:

> Cross-Plaintiff, Ruth Lindsey, previously signed a listing contract for the auction sale of property of which she was part owner as a tenant in common with her former husband, Dan Lindsey ... Thereafter, Dan Lindsey rescinded, revoked, and terminated said listing agreement for the sale of said property at action by [Coulter]. Cross-Plaintiff avers that Mr. Lindsey personally visited with the Cross-Defendant, Mack Coulter, at his office on or about June 30, 1994 and advised him of his decision to rescind, revoke, and terminate the contract.
>
> That Mack Coulter ... personally assured her former husband that the auction would not take place and that she also relied on the statements of [Coulter] as communicated to her concerning the cancellation of said auction.
>
> That Cross-Plaintiff's belief that said auction was canceled was further bolstered by [Coulter's] failure to properly show or properly advertise the property in question.
>
> That Cross-Plaintiff went to the property on July 23, 1994, not knowing what to do, it being her belief that authority to conduct the auction had been canceled and/or terminated, and that any attempted auction on that date was done without her tenant in common's agreement, and also against her wishes and desires.

At the hearing, Ms. Lindsey admitted that, prior to the auction, she wanted the property sold, was not opposed to the auction, and that she told her former attorney "to do whatever it took to get it sold." Her former attorney testified to the effect that Ms. Lindsey consistently took the position that she wanted the sale to take place.

Under these circumstances, we agree with the trial court that Ms. Lindsey should be equitably estopped from taking the position that she opposed the sale prior to the auction. The Supreme Court, in Baliles v. Cities Service Co., 578 S.W.2d 621 (Tenn. 1979), has noted that:

> "Equitable estoppel, in the modern sense, arises from the 'conduct' of the party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do any thing. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed, or been enforceable by other rules of law, unless prevented by an estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel."

Id. at 624, quoting Evans v. Belmont Land Co., 21 S.W. 670, 673-4 (Tenn. 1893). This court has observed that "like all equitable doctrines, equitable estoppel is to be used to achieve fairness in dealings between parties." Metropolitan Dev't. and Housing Agency v. South Central Bell Tel. Co., 562 S.W.2d 438, 445 (Tenn. App. 1977).

Coulter has alleged that he relied on the assertions of Ms. Lindsey and her former attorney "that Mr. Lindsey was very emotional but to go ahead with [the] sale." Nowhere in Ms. Lindsey's carefully and cleverly drafted pleadings does she allege that she took any action or provided any indication to Coulter that she was opposed to the auction. She attended and witnessed the auction, and, significantly, signed the real estate sales contract without a word of protest. It is apparent from the record that the first time Ms. Lindsey expressed any dissatisfaction with the sale was after she had signed the contract and reconciled with her former husband. We are of the opinion that under these circumstances it would be unfair to Coulter to allow Ms. Lindsey to attempt to take the position or create the impression at trial that she opposed the auction before it took place. However, we do not believe the trial court should have taken the rather drastic action of ordering her pleadings stricken from the record and entering default judgment against her.

The plaintiffs have alleged that Coulter was negligent in promoting and advertising the auction. The trial court held "as a matter of law that the property was properly advertised." The record contains copies of eleven advertisements for the auction which were run in local and regional newspapers. It thus appears that Coulter ran a considerable quantity of advertisements for the sale. However, Mr. Lindsey states in his affidavit that "[t]he advertisements contained wrong dates, wrong months, wrong directions ..." There is no testimony in the record regarding this allegation that the ads contained erroneous information. If they did, a jury could reasonably conclude that Coulter was negligent in his promotion of the sale. We find from our review of the record that a genuine issue of material fact exists regarding Coulter's promotion and advertisement of the auction.

We now turn to Coulter's counter-claim for a commission on the auction sale. The trial court granted Coulter summary judgment on his claim that the Lindseys wrongfully refused to pay him a commission of $7,350 for the sale. The court awarded Coulter $7,350 for his commission, $1,500 for his expenses in advertising the sale, $2,655 in pre-judgment interest, and $6,630 in attorney's fees.

Both Mr. and Ms. Lindsey denied that any commission is due Coulter for the sale. We have carefully searched the record for evidence, other than Coulter's allegation in his counter-complaint, that either of the Lindseys agreed to pay Coulter a commission, and found none. The contract for the sale of the real estate provides that "[o]n the date of closing, SELLER agrees to pay a real estate commission for Listing Agent's services as negotiated on Listing Contract." There is no listing contract in the record. The auction agreement provides in relevant part:

> That for and in consideration of the services performed by Coulter Realty & Auction Company, the Seller does agree to pay the said Auctioneer $1500.00 in cash, to help pay the expenses of conducting said Auction. Said sum to be due and payable upon settlement of the property auctioned. In addition to the above mentioned fee, Coulter Realty and Auction Company will charge a ten percent (10%) Buyer's Premium to the purchaser(s) of said property.

It is not clear whether the purchasers paid Coulter a ten percent buyer's premium. The auction agreement makes no mention of a commission payable to Coulter. In any event, there is a

genuine issue of material fact as to whether either of the Lindseys contractually bound themselves to pay Coulter a commission.

For the aforementioned reasons, the summary judgment and default judgment of the trial court in favor of Coulter are vacated and the case remanded for trial. Costs on appeal are assessed to the appellee.

______________________________
Don T. McMurray, Judge

CONCUR:

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Herschel P. Franks, Judge

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Charles D. Susano, Jr., Judge

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AT KNOXVILLE

DANNY DEAN LINDSEY and RUTH ) MONROE CIRCUIT
MICHELLE NOVISKI LINDSEY, ) C.A. NO. 03A01-9612-CV-00397
)
Plaintiffs-Appellants )
)
)
)
vs. )
) HON. JOHN B. HAGLER
) JUDGE
)
MACK COULTER d/b/a COULTER )
REALTY AND AUCTION COMPANY, )
)
)
Defendant-Appellee ) VACATED and REMANDED

## JUDGMENT

This appeal came on to be heard upon the record from the Circuit Court of Monroe County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

The summary judgment and default judgment of the trial court in favor of Coulter are vacated and the case remanded for trial. Costs on appeal are assessed to the appellee.

PER CURIAM