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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA12-444

BENNY EDWARDS and SANDRA EDWARDS
APPELLANTS

V.

MSC PIPELINE, LLC, BLACKMON AUCTIONS, INC., AND PULASKI COUNTY TITLE, LLC
APPELLEES

Opinion Delivered MARCH 6, 2013

APPEAL FROM THE VAN BUREN COUNTY CIRCUIT COURT
[NO. CV-11-9-2]

HONORABLE MICHAEL A. MAGGIO, JUDGE

REVERSED AND REMANDED

KENNETH S. HIXSON, Judge

Appellants Benny and Sandra Edwards ("Edwards") bring this appeal from an order of the Circuit Court of Van Buren County awarding appellee, MSC Pipeline, LLC, ("MSC") damages in summary judgment. The trial court denied the Edwardses' cross-motion for summary judgment in the same order. The Edwardses assert that the trial court erred in entering summary judgment in favor of MSC because (1) genuine issues of material fact existed, and (2) summary judgment was not proper without first conducting a hearing. We reverse and remand on the first issue, mooting the second issue.[1]

[1]There were other cross-complaints, third-party complaints, cross-claims, and cross-motions for summary judgment among the parties. The sellers' agent, Blackmon Auctions, Inc., and the title company, Pulaski County Title, LLC, were drawn in as potentially liable on this real-estate deal. All the remaining claims and parties were properly dismissed after the appellants were deemed liable. Thus, the summary-judgment order on appeal does not contain a jurisdictional defect regarding finality.

This case involves the sale of unimproved property in downtown Bee Branch, Arkansas. In March 2010, the Edwardses ("sellers") entered into an exclusive listing agreement with an auction and realty company to sell the property at issue. The property was advertised and described as "1.32 acres more or less" vacant level lot with development potential. At an auction in May 2010, MSC ("buyer") was the prevailing bidder, paying $69,577.82 for the property.[2]

As a result of the high bid, a real-estate contract between the Edwardses and MSC was executed on May 27, 2010, wherein the property was described as "1.32 acres more or less with footage along Highway 65 and Highway 92, situated at the SE corner of the junction of the two highways." The contract provided that the buyer had the sole responsibility to engage surveyors to determine the size of the property and further provided that if the buyer did not elect to obtain a survey of the property that the buyer agreed to hold the sellers and their agent harmless for any problems discovered after closing. Specifically, the contract states, in pertinent part:

> Buyer is not relying on Seller, . . . Buyer having the sole responsibility to engage surveyors, engineers, attorneys, or other professionals to determine the location, size, slope and boundaries of the Property. If Buyer is dissatisfied with the results of such determination, Buyer, without further obligation, may declare this Real Estate Contract null and void and receive a return of Earnest Money.

Section 9 of the contract states:

> Buyer has been given the opportunity to obtain a new certified survey. Should Buyer decline to obtain a survey as offered in Paragraph 9A of this Real Estate Contract,

[2]The contract purchase price was $68,200, but additional costs were incurred to close the transaction.

> Buyer agrees to hold Seller, . . . harmless of any problems relative to any survey discrepancies that may exist or be discovered after Closing.

Further, Section 16 of the contract provided that the buyer disclaimed any reliance on any representation made by the seller or agent as to the property's "size." And, finally, Section 23 of the contract is a merger clause that provided that the real-estate contract was the entire understanding and agreement between the parties, superseding all prior representations and understandings. The sale closed on June 30, 2010. At closing, the sellers conveyed title to buyer for the 1.32 acres more or less.

Between the date the real-estate contract was executed and the closing date, the buyer chose not to have the property surveyed. Then, on August 26, 2010, almost two months after closing, the buyer had a survey performed that determined that the property was actually .88 acre, not "1.32 acres more or less" as advertised and represented. A post-survey inquiry determined that the sellers had previously sold a portion of that property in 2003. The 2003 sale resulted in a conveyance of .558 acre to a third party, leaving the sellers with only .88 acre. As a result of the new survey, in October 2010, the sellers filed corrected warranty deeds transferring title to the property at issue "less and except" the .558 acre that they sold in 2003.

In January 2011, MSC filed suit alleging the elements of misrepresentation and seeking "reimbursement" of $23,191.34, which it contended represented the amount that MSC believed it overpaid based upon the acreage or square footage actually conveyed, plus expenses and attorneys' fees. The parties filed various pleadings and motions, including cross-motions for summary judgment and replies to those motions, over the course of August through early

December 2011. MSC eventually amended its complaint to allege constructive fraud, breach of contract, and unjust enrichment.

In support of MSC's original motion for summary judgment filed in August 2011, MSC appended an affidavit executed by its manager Mike Simpson in which he stated in relevant part:

> 7. That MSC's bid was based upon the Defendant's representations that the property being sold was 1.32 acres.
>
> . . . .
>
> 9. Had MSC known that the property was only .88 acres on the date of the auction, MSC would not have bid and/or paid the sum of $69,577.82.
>
> 10. MSC has been damaged in the amount of $23,191.34, plus expenses in the amount of $3,522.00.

The Edwardses responded in resistance to MSC's motion for summary judgment, denying that there was any acreage discrepancy known by them and stating they were unaware that the property contained less than 1.32 acres more or less until after the MSC survey was performed on August 26, 2010, almost two months after closing. The Edwardses also sought a cross-motion for summary judgment, which served to rebut MSC's motion, contending that the real-estate contract contained a "Buyer's Disclaimer of Reliance" provision disavowing any reliance by the buyer on representation of "size"; an option for the buyer to have its own survey completed to determine the actual size, which MSC did not do; and, a hold-harmless provision.

On January 31, 2012, the trial court entered summary judgment in favor of MSC against the Edwardses. MSC was awarded the $23,191.34 it sought, plus $3,522 in expenses,

$167.50 in costs, and $2,319 in attorney fees. In the same order, the trial court denied the Edwardses' motion for summary judgment. The Edwardses timely appealed.

The Edwardses assert that the trial court erred in entering summary judgment in favor of MSC because (1) there remained genuine issues of material fact, and (2) summary judgment was not proper without first conducting a hearing.[3] We agree genuine issues of material fact exist and reverse and remand for a trial on the merits.

Arkansas Rule of Civil Procedure 56(c)(2) states that when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact then the moving party is entitled to a judgment as a matter of law. The moving party bears the burden of sustaining a motion for summary judgment; once the moving party meets this burden, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact.

The law on summary judgments and appellate review of summary judgments is well settled. We view the evidence in the light most favorable to the opposing party and resolve all questions and ambiguities against the moving party. *Morris v. Rush*, 77 Ark. App. 11, 69 S.W.3d 876 (2002). Summary judgments are used to determine whether there are any genuine issues of material fact that remain to be decided, and if not, whether one party is entitled to judgment as a matter of law. *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 652 (1997). Even where cross-motions for summary judgment are filed, if it is impossible to

[3]This point is rendered moot by our decision that there exist genuine issues of material facts and summary judgment was improper.

determine on appeal that either party is entitled to judgment as a matter of law, summary judgment should be reversed. *Po-Boy Land Co., Inc. v. Mullins*, 2011 Ark. App. 381, 384 S.W.3d 555.

The trial court granted summary judgment to MSC based on misrepresentation. Section VI of the Order states in pertinent part: "MSC has established a claim of misrepresentation against the Edwardses. The Edwardses had previously conveyed a portion of the subject property, yet still claimed to be selling a tract of land of 1.32 acres at auction . . . ."

The trial court correctly set forth the elements of misrepresentation: (1) a false representation of material fact, (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation, (3) intent to induce action or inaction in reliance upon the representation, (4) justifiable reliance on the representation, and (5) damage suffered as a result of the reliance. *Wochos v. Woolverton*, 2010 Ark. App. 802, 378 S.W.3d 280.[4]

To establish fraud in Arkansas, a plaintiff must prove that the defendant intentionally misrepresented a material fact and that the plaintiff was damaged by justifiably relying on that misrepresentation. *Downum v. Downum*, 101 Ark. App. 243, 274 S.W.3d 349 (2008). When there are genuine issues of material fact with regard to a party's intent, summary judgment is improper. *Wochos*, *supra*.

[4]Both parties cite authorities for constructive fraud; however, the trial court based its summary judgment on misrepresentation and unjust enrichment.

In this case, at least three of the elements of misrepresentation involve factual determinations: whether the Edwardses had knowledge that the representation was false; whether the Edwardses intended to induce action by MSC in reliance on the representation; and whether MSC justifiably relied to its detriment on the representation that proved to be untrue.

Regarding the second element of misrepresentation, i.e., knowledge, the Edwardses denied knowing that the property contained less than 1.32 acres more or less in their answer and in their response to the motion for summary judgment. Further, the Edwardses stated in their response to the motion for summary judgment that they did not know the property contained less than 1.32 acres more or less until after MSC performed the survey two months after closing. Whether the Edwardses had knowledge that their representation was false is a genuine issue of material fact.

The analysis of the third and fourth elements of misrepresentation, i.e., intent to induce and justifiable reliance, are to an extent intertwined. What constitutes detrimental reliance, and the reasonableness of that purported reliance, are questions that are factually driven by the particular circumstances presented. *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W.3d 568 (2002); *Wochos v. Woolverton*, *supra*. Similarly, intent to induce is also a fact-driven inquiry. *Wochos*, *supra*. Here, the real-estate contract between the parties purported to constitute the entire agreement to sell 1.32 acres "more or less." The contract contained a merger provision wherein MSC agreed that all prior representations by the sellers were superseded. The contract contained a specific declaration for the buyer to inspect and survey the property to

its satisfaction prior to closing. And, the contract contained a provision that if MSC chose not to perform a survey prior to closing, that MSC agreed to hold the Edwardses harmless in the event a discrepancy was discovered after closing. These competing positions create genuine issues of material fact to be weighed and decided at a trial on the merits.

In addition, the order granting summary judgment states that the Edwardses have been unjustly enriched for receiving payment for 1.32 acres while only transferring title to .88 acres. Whether the Edwardses have been unjustly enriched is a genuine issue of material fact to be decided by a trial. For a court to find unjust enrichment, a party must have received something of value to which he is not entitled and which he must restore. *Feagin v. Jackson*, 2012 Ark. App. 306, 419 S.W.3d 29. One who is free from fault cannot be held to be unjustly enriched merely because he has chosen to exercise a legal or contractual right. *Id.* It is an equitable principle invoked to render a situation fair under the circumstances. *Id.* The issue of unjust enrichment is a question of fact. *Id.*

Because we hold that the court erred in granting MSC's summary-judgment motion asserting that the Edwardses had committed misrepresentation by stating that property contained 1.32 acres rather than .88 acre, without a hearing, we hold that the court could not determine whether or not the Edwardses have been unjustly enriched. It must be determined that the Edwardses had received something of value to which they were not entitled. In the case at bar, a trial must be held to determine that question.

Since genuine issues of material fact remain, we hold that the court erred in granting appellees' motion for summary judgment, and we reverse and remand for a trial on the merits.

Reversed and remanded.

GLADWIN, C.J., and WYNNE, J., agree.

Blagg Law Firm, by: *Ralph Blagg* and *Nicki Nicolo*, for appellants.

Southern & Jordan, by: *Byron S. Southern*, for appellee.