

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001913-MR

MARK G. TABLER AND
JANICE L. TABLER

APPELLANTS

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 05-CI-00071

JOHN WOLHOY AND
ALICE WOLHOY

APPELLEES

OPINION
AFFIRMING

** * * * *

BEFORE: VANMETER, ACTING CHIEF JUDGE; KELLER, JUDGE; WHITE,¹
SENIOR JUDGE.

KELLER, JUDGE: Mark G. Tabler and Janice L. Tabler (the Tablers) appeal from
the March 17, 2005, Order of the Greenup Circuit Court dismissing the individual
claims against John and Alice Wolhoy (John and Alice), the Order denying the

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

motion to Alter, Amend or Vacate entered March 31, 2005, the Trial Order and Judgment entered May 14, 2008, and the Order and Amended Judgment entered September 12, 2008. For the reasons set forth below, we affirm.

At the outset, we note that John and Alice have not filed a brief in this matter. Therefore, pursuant to Kentucky Rules of Civil Procedure (CR) 76.12(8)(c)(iii), we could regard their failure to file a brief “as a confession of error and reverse the judgment without considering the merits of the case.” However, because we believe the trial court’s order is correct, we will not do so.

The facts are essentially undisputed. On January 7, 2004, the Tablers entered into a contract with Wolhoy Construction, LLC, (Wolhoy Construction), to purchase a house. John and Alice were the sole members of Wolhoy Construction. At the time the contract was entered into, approximately ninety percent of the house had been built. Part of the contract required Wolhoy Construction to finish construction of the house in accordance with specifications attached to the agreement. Wolhoy construction also promised to deliver a warranty to the Tablers. Additionally, the agreement provided a warranty that no latent defects known to Wolhoy Construction existed.

After the closing in May 2004, the Tablers discovered that several portions of the home were defectively constructed. Subsequent investigation revealed that the house had numerous building code violations. Additionally, it was later discovered that water had intruded into the house causing property

damage and mold to grow. Due to the mold infestation, the Tablers vacated the premises in January 2005.

As a result of these discoveries, the Tablers filed suit in the Greenup Circuit Court against Wolhoy Construction and John and Alice, individually, on February 1, 2005.² The complaint alleged fraud and intentional misrepresentation, negligent misrepresentation, breach of contract, breach of express and implied warranties, negligent hiring, negligent supervision, negligence, negligence *per se*, and violation of applicable building codes. On February 23, 2005, citing CR 12.02(f), John and Alice filed a motion to dismiss arguing that they could not be held personally liable. The trial court granted the motion to dismiss by Order dated March 17, 2005. The Tablers filed a Motion to Alter, Amend, or Vacate, which was denied by the trial court on March 31, 2005. The case continued against Wolhoy Construction. At the conclusion of a seven-day trial, the jury returned a verdict against Wolhoy Construction. Consistent with that verdict, the trial court entered a Trial Order and Judgment on May 14, 2008. On September 12, 2008, the trial court entered an Order and Amended Judgment making the March 17, 2005, Order final. This appeal followed.

Our standard of review for a trial court's dismissal of a complaint pursuant to CR 12.02(f) is as follows:

The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his

² Although other parties were named in the complaint, the claims against those parties are not relevant to this appeal.

claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002)(internal quotation and citation omitted).

On appeal, the Tablers argue that the trial court erred when it granted the motion to dismiss the actions against John and Alice. Specifically, the Tablers contend that although John and Alice are the sole members of Wolhoy Construction, they are still personally liable for any torts they committed even when acting on behalf of Wolhoy Construction. Although we agree that members and agents of limited liability companies may at times be held personally liable for torts they commit, we believe that the trial court properly granted the motion to dismiss.

As stated in *Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 363 (Ky. App. 2007):

Generally, an agent is not liable for his own authorized acts, or for the subsequent dealings between the third person and the principal after the principal is disclosed. Likewise, an officer, director, or shareholder, when acting as an agent of the corporation, is also protected from personal liability when acting within his authority to bind the principal. While an agent or corporate officer is normally not liable for the debts or contractual obligations of the principal, an agent or corporate officer is not immune from liability for his own intentional misconduct or for negligence based upon a breach of his own duty.

(internal citations omitted). Therefore, “the agent of a corporation, albeit a principal shareholder and officer of the corporation, ‘is personally liable for a tort committed by him although he was acting for the corporation.’” *Smith v. Isaacs*, 777 S.W.2d 912, 914 (Ky. 1989) (quoting *Peters v. Frey*, 429 S.W.2d 847 (Ky. 1968)). Kentucky courts treat limited liability companies the same as corporations for purposes of a liability analysis. See *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204 (Ky. App. 2009).

The Tablers contend that the complaint states causes of action for the torts of: fraud and intentional misrepresentation; negligent misrepresentation; negligent hiring; negligent supervision; negligence and negligence *per se*.³ Therefore, the Tablers argue that the trial court erred when it granted the motion to dismiss John and Alice Wolhoy because the complaint stated viable causes of actions against them. We disagree.

Although the fraud and intentional misrepresentation and the negligent misrepresentation claims sound in tort, they are based on contractual duties owed by Wolhoy Construction, and not by John and Alice. Specifically, the portions of the complaint for these two causes of action allege that as part of the contract, the Builders⁴ represented that the house would be built in accordance with the specifications attached to the contract and applicable building codes; that they

³ Because the Tablers do not contend that the claims of breach of contract, breach of express and implied warranties, and the violation of applicable building codes are tort claims, we will not address them.

⁴ The complaint defines “Builders” as John and Alice, Wolhoy Construction, and Wolhoy Enterprises, Inc., which is another company owned by John and Alice.

would deliver an express warranty to the Tablers, which was not delivered; and that the contract provided a warranty that there existed no latent defects known to the Builders. Because these allegations all refer to representations made within the contract, they are based on contractual duties owed by Wolhoy Construction, and not John and Alice.

Further, we note that the complaint fails to allege that John and Alice personally made any misrepresentations. The misrepresentations alleged in the complaint all stem from provisions within the contract. Therefore, John and Alice cannot be held personally liable for the fraud and intentional misrepresentation and negligent misrepresentation claims. *See Young*, 243 S.W.3d at 363-64 (concluding that a president and vice-president of a home construction company could not be held personally liable for the contractual warranty, building code violation, or negligence claims because they were based on contractual and statutory duties owed by the construction company).

Similarly, although the negligent hiring, negligent supervision, negligence, and negligence *per se* claims sound in tort, they are also based on contractual and statutory duties owed solely by Wolhoy Construction. Under the negligence, negligent hiring, and negligent supervision portions of the complaint, the Tablers allege that Wolhoy Construction and John and Alice failed to construct the house in a workmanlike manner; that they failed to hire subcontractors that could construct the house in a workmanlike manner; and that they failed to

supervise the subcontractors that constructed the house. Again, these are duties owed by Wolhoy Construction pursuant to the contract.

Under the negligence *per se* claim, the Tablers allege that Wolhoy Construction and John and Alice had a duty to construct the house in accordance with applicable building codes and that they violated such duties. However, complying with applicable building codes was a statutory duty owed by Wolhoy Construction. *See Young*, 243 S.W.3d at 364 (finding that a president and vice-president of a home construction company were not personally liable for a building code violation claim because it was based on a statutory duty owed by the company). Because all of the claims are based on contractual and statutory duties owed by Wolhoy Construction, John and Alice cannot be personally liable for these claims. Therefore, the trial court properly dismissed the individual claims against John and Alice Wolhoy.

For the foregoing reasons, we affirm the order of Greenup Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

NO BRIEF FOR APPELLEES.

Carl E. Grayson
Edgewood, Kentucky