

RENDERED: JANUARY 13, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001152-MR

NICK DATTILO AND HEIDI A. DATTILO

APPELLANTS

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN ATKINS, JUDGE
ACTION NO. 11-CI-01643

RALPH L. COLLINS AND JANET COLLINS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND VANMETER,¹ JUDGES.

STUMBO, JUDGE: Nick Dattilo and Heidi A. Dattilo appeal from an Order of the Christian Circuit Court granting Summary Judgment in favor of Ralph L. Collins and Janet Collins. The Dattilos argue that the trial court erred in finding that they were time barred from bringing their action alleging fraud, and erred in concluding

¹ Judge Laurence B. VanMeter concurred in this opinion prior to being elected to the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

that their breach of contract claim was without merit. For the reasons stated below, we find no error and AFFIRM the Order on appeal.²

On September 16, 2004, the Christian County Board of Education entered into a contract providing that the Board would purchase a 62-acre parcel of real property, including an easement, from the Collinses. The agreement provided that the Board would develop two entrances to the parcel from the 68-80 Bypass, including an easement in favor of the Collinses at the second entrance allowing the Collinses access to their property. The sale was carried out on October 22, 2004.

The following year, on November 7, 2005, the Collinses agreed to sell the Dattilos 75.75 acres adjacent to the Bypass. The agreement was memorialized in a purchase contract. Appended to the contract was an exhibit referencing the Board's promise to construct the street. The sale was consummated on or about July 31, 2006, with the deed being duly recorded in the Christian County Clerk's Office. Included in the conveyance were the easement and the Board's contractual obligation to construct a street over the easement. Specifically, the deed stated that "[I]ncluded in this conveyance is a 60 foot wide Access Easement as depicted on a plat . . . together with the contract rights of Grantors obligating the Christian County Board of Education to construct and dedicate a street over the easement."

Thereafter, the Board constructed Martin Luther King, Jr. Elementary School with two entrances. The second entrance was about 200 feet from the

² The Dattilos' name is spelled at least three ways in the record. We will employ the spelling set out in the Notice of Appeal, which reflects the spelling used by Mr. Dattilo in the real estate sales contract with the Collinses.

Bypass and ended short of the Dattilos' property. The second entrance was never dedicated as a street.

On March 24, 2010, the Dattilos unsuccessfully sought a zoning change of the parcel from residential to business usage. On June 5, 2010, they filed an action against the Hopkinsville-Christian County Planning and Zoning Commission, and the Board, alleging that the Board breached the 2004 purchase agreement regarding the construction of the street. That action was remanded to Planning and Zoning, where it appears from the record that the matter reached finality after the Dattilos neither submitted a standard appeal form nor paid a filing fee.

On May 12, 2011, the Dattilos sold the parcel for \$510,000 and realized a \$33,612.50 profit. Later that year, on December 15, 2011, they filed the instant action against the Collinses and the Board alleging fraudulent misrepresentation and breach of contract. Specifically, the Dattilos maintained that the Collinses conveyed the right to a street which they did not lawfully possess and in so doing wrongfully denied the Dattilos ingress and egress to their property.

The matter proceeded in Christian Circuit Court. On March 7, 2013, the court granted the Board's Motion for Summary Judgment upon finding that the Dattilos' sale of the parcel constituted a waiver of any right to assert a claim against the Board. The Dattilos prosecuted an appeal of the Order. On October 17, 2014, a panel of this Court affirmed the Summary Judgment in favor of the

Board upon finding that the Dattilos failed to demonstrate that they pled damages in a manner sufficient to create a genuine issue of material fact.

The action continued in Christian Circuit Court as against the Collinses. On April 16, 2015, the court rendered an Order sustaining the Collinses Motion for Summary Judgment. As a basis for the Order, the court determined that the action was time barred because the Dattilos did not commence the action within the five-year statutory period for asserting a fraud claim. As to the claim asserting breach of contract, the court determined that it was the Board's obligation to build the street, and not the obligation of the Collinses. The court also concluded that the Dattilos' sale of the parcel divested them of their right to specific performance and injunctive relief. It determined that while the Dattilos did have the right to allege damages from the claimed breach, they failed to specify those damages. The court found that merely alleging that they suffered delay damages and lost profit was insufficient to sustain the claim. This appeal followed.

The Dattilos now argue that the Christian Circuit Court committed reversible error in sustaining the Collinses' Motion for Summary Judgment. They first argue that the trial court erred in finding that the Dattilos were time barred from asserting their claim of fraud as against the Collinses. Specifically, the Dattilos argue that the court improperly concluded that, "Plaintiffs have failed to allege with particularity when the fraud occurred." They maintain that this conclusion is not supported by substantial evidence of record, and contend that "at the time of this ruling by the trial court, the record had set forth the Appellants had

confirmed the occurrence of the fraud when taking the deposition of Ralph Collins with reference to the deposition page and line of the testimony wherein the Appellant received notice of the fraud.” In sum, the Dattilos maintain that the five-year statutory period for commencing the fraud claim did not commence when the parcel was sold, but at some time thereafter.

An action for damages for fraud or mistake must be brought within five years after the cause of action accrued. Kentucky Revised Statute (KRS) 413.120(11). The Dattilos purchased the parcel from the Collinses on July 31, 2006. The Dattilos did not file the instant action until December 15, 2011, or approximately five and one-half years after the sale. The question for our consideration is whether the Christian Circuit Court committed reversible error in concluding that the action was filed outside the statutory period. We conclude that it did not so err. As a basis for its conclusion, the circuit court determined that while the Dattilos alleged that the action did not accrue until some later date, they gave no indication of exactly when it did commence. The court found that the cause of action accrued on July 31, 2006. We find no error in this conclusion. While the Dattilos contend that the deposition of Ralph Collins confirms the occurrence of fraud, they do not demonstrate when they became aware of the alleged fraud, nor the specific date when their cause of action commenced. The court concluded that, “There is nothing in the record showing that the cause of action commenced at a later date. Plaintiffs have failed to allege with particularity when the alleged fraud occurred.” This conclusion is supported by the record.

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.” CR 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to the Dattilos and resolving all doubts in their favor, we find no error in the circuit court’s conclusion that there were no genuine issues of material fact and the Collinses were entitled to a Summary Judgment as a matter of law. The Dattilos failed to allege with particularity or otherwise demonstrate that the purported fraud occurred at some time subsequent to the sale rather than at the time of the sale. As such, the court’s

determination that the action was commenced outside the statutory period is supported by the record and the law. We find no error.

The Dattilos also argue that the trial court erred in concluding that their claim for breach of contract was without merit. The court determined that the Dattilos' sale of the parcel to a third party divested them of any right to specific performance and injunctive relief. As to actual damages stemming from the alleged breach, the court found that the Dattilos did have the right to proceed; however, the court found that the Dattilos failed to demonstrate any actual damages, in part because the parcel was sold to a third party at a profit, and because merely alleging general damages without specificity was insufficient to overcome the Motion for Summary Judgment.

We find no error on this issue. The Dattilos direct our attention to *Dattilo v. Christian County Board of Education*, 2014 WL 5315095 (Ky. App. 2014), wherein a panel of this Court concluded that the Dattilos' sale of the parcel did not preclude them from seeking damages. While the Dattilos properly state one of the holdings of that Opinion, the question before us is not whether a party may seek damages after selling the subject matter property. Rather, the issue is whether the Dattilos have shown the existence of a genuine issue of material fact sufficient to overcome the Collinses' Motion for Summary Judgment. A party opposing Summary Judgment cannot successfully defeat such a motion without presenting at least some evidence demonstrating that there is a genuine issue of material fact. *Steelvest*, 807 S.W.2d at 482. The Christian Circuit Court concluded

that the Dattilos made no such showing. Because this conclusion is supported by the record and the law, we find no error on this issue.

For the foregoing reasons, we AFFIRM the Order of the Christian Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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