RENDERED: DECEMBER 16, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000938-MR

ROBERT WEBB — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 15-CI-00061

DAN CUMMINS CHEVROLET-BUICK, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND JONES, JUDGES.

JONES, JUDGE: Appellant, Robert Webb, appeals from the Bourbon Circuit Court's order granting the motion filed by Appellee, Dan Cummins Chevrolet-Buick, for dismissal and summary judgment. For the reasons set forth below, we AFFIRM.

I. BACKGROUND

This litigation stems from Robert Webb's ("Webb") trade-in of a 2003 Escalade (the "Vehicle") for credit with Dan Cummins Chevrolet-Buick, Inc. ("DCCB"). Webb originally purchased the Vehicle in 2009 from Paul Miller Ford; however, Webb never received the title paperwork for the Vehicle. In 2013, Webb began negotiations with DCCB to trade in the Vehicle for partial consideration towards his purchase of a newer model. Webb alleges that the parties initially discussed a trade-in value of $12,500; however, after reviewing a CarFax report for the Vehicle, DCCB informed Webb that the Vehicle had a "salvage brand title." DCCB told Webb that the branded title greatly reduced the Vehicle's fair market value, and that it could only offer him $3,000 in credit for the Vehicle. Webb alleges that he relied on DCCB's representations concerning the status of the Vehicle's title and therefore traded in the Vehicle for $3,000 worth of credit towards his purchase of a new car.

Subsequent investigation by Webb revealed that the Vehicle did have a salvage brand on the title from a different jurisdiction before he purchased it in 2009. Upon this revelation, Webb filed an action against Paul Miller Ford in Fayette Circuit Court alleging fraudulent misrepresentation. Webb also discovered that DCCB has since sold the Vehicle, with a clean title, to a third party for more than three times what DCCB told Webb the Vehicle's fair market value was. Webb believes that the Vehicle's resale evidences that DCCB was aware that the Vehicle did not currently have a salvage brand title, but misrepresented such fact to

Webb in order to induce him to agree to a greatly reduced credit. Webb filed claims against DCCB in Bourbon Circuit Court, alleging fraudulent misrepresentation and violations of Kentucky's Consumer Protection Act.

The Circuit Court found that Webb had no standing to assert a claim regarding DCCB's sale of the Vehicle to a third party, that there was no fraud as DCCB's statement to Webb regarding the branded title was truthful, and that there was nothing unfair, misleading, or deceptive about the negotiations between Webb and DCCB that would give rise to a claim under the Consumer Protection Act.

This appeal followed.

II. Standard of Review

When hearing a motion for summary judgment, a trial court "must view the record 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 is appropriate "if it appears impossible in a practical sense for the respondent to prevail at trial." *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007). On appeal, "the standard of review . . . of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Cantiff v. CSX Transp., Inc.*, 438 S.W.3d, 368, 372 (Ky. 2014). "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in

the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

III. Analysis

A. Webb's Fraudulent Misrepresentation Claims are not Actionable

To be successful on a fraud claim in Kentucky, the plaintiff must put forth proof, by clear and convincing evidence, of six elements: (1) that the declarant made a material representation to the plaintiff, (2) that this representation was false, (3) that the declarant knew that this representation was false or made it recklessly, (4) that the declarant induced the plaintiff to act upon the misrepresentation, (5) that the plaintiff reasonably relied upon the misrepresentation, and (6) that the misrepresentation caused injury to the plaintiff. *Flegles, Inc. v. Truserv Corp.*, 296 S.W.3d 544, 549 (Ky. 2009) (citing *United Parcel Service Corp. v. Rickert*, 996 S.W.2d 464 (Ky. 1999)). Further, the alleged misrepresentation must relate to a material *fact*, not "a mere statement of opinion or prediction." *McHargue v. Fayette Coal & Feed Co.*, 283 S.W.2d 170, 172 (Ky. 1955). Webb's Complaint asserts that DCCB made two fraudulent misrepresentations to him – when it informed him that the Vehicle had a "salvage title brand" and when it stated that the brand reduced the Vehicle's market value to less than $3,000.

As to DCCB's representation that the vehicle had a branded title, Webb cannot fulfill his burden of showing that this was a false representation, nor can he show that his reliance on the representation was reasonable. The purported

false statement is that "the trade in had a 'salvage title brand.'" Compl. ¶ 6. We agree with the Circuit Court that this statement cannot be considered fraudulent as the Vehicle "in fact had the type of title allegedly stated by [DCCB]." R78.

The Circuit Court found that DCCB's representation was necessarily true, citing Webb's "judicial admission" in his Complaint against Paul Miller Ford that the vehicle was already branded as salvage when Webb first purchased it. Webb contends that any statement made in his 2014 complaint against Paul Miller Ford cannot be deemed a judicial admission as it was made in a pending action against an entirely different defendant. While this fact does not *per se* preclude Webb's statements in his 2014 case from being used as an admission against him, "[o]ur customary reticence to apply the doctrine of judicial admissions is heightened in this case due to the lack of identity of parties." *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 380 (Ky. 1992). The trial court cited *Center v. Stamper*, 318 S.W.2d 853 (Ky. 1958), as its basis for finding that Webb's statement in his 2014 complaint was conclusive against him in the present action. However, while *Center* did allow for a party's statement in one case to be conclusive against him in a separate case, in *Center* both the underlying controversies and the parties were identical. *Goldsmith*, 833 S.W.2d at 380. The same is not true of Webb's action against Paul Miller Ford and the present action. "Unless the circumstances and conditions virtually eliminate the possibility of error, 'a judicial admission in one action is not conclusive in another action.'" *Id.* (quoting *Center*, 318 S.W.2d at 855-56).

However, regardless of whether there was a judicial admission, Webb's claim of fraud regarding this statement cannot succeed. A party alleging fraud must show both that the defendant made a false statement and did so knowingly or recklessly. *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). Webb has put forth no evidence demonstrating either of those elements. On the contrary, all evidence in the record indicates that the DCCB's representation was truthful. The CarFax report included in the record demonstrates both that the Vehicle had a salvage branded title and that DCCB relied on the CarFax report when it made the statement to Webb. It is true that the title brand was on the Vehicle's New York title and does not now appear on its Kentucky title. However, an indication that the Vehicle's title may have been "washed" does not render false DCCB's statement that the vehicle had a salvage title brand. DCCB did not inform Webb that the Vehicle had a present brand on the title in Kentucky; rather, Webb's Complaint purports that DCCB informed him that because the Vehicle had a salvage title brand on it, its value was greatly reduced. The fact that the Vehicle now shows a clean title does not mean that it was not salvaged.

Even assuming that DCCB's representation was false, Webb has failed to show that his reliance on the statement was reasonable. The Circuit Court stated that the owner of a vehicle has "a duty to be aware of official records regarding his vehicle." Webb argues that this statement creates an unprecedented "safe harbor for fraud and deceptive practices," however, to say so is to

misconstrue the Circuit Court's statement. It is settled law that "equity will give no relief to a complaining party who has means of knowledge of the truth or falsity of representations at hand." *McClure v. Young*, 396 S.W.2d 48, 50 (Ky. 1965) (citing *Mayo Arcade Corp. v. Bonded Floors Corp.*, 41 S.W.2d 1104, 1108 (Ky. 1931)). Neither Webb nor DCCB had access to the title paperwork for the Vehicle on which to rely; however, Webb was aware that DCCB had relied on CarFax, a public service, to obtain its information. Webb argues that claims for fraud cannot be defended by arguing the other party should have examined public information. In support of this argument Webb cites *Cowles v. Johnson*, in which the court held that a party claiming reasonable reliance on a fraudulent statement is under "no duty to make an investigation" into public records. 179 S.W.2d 674, 675 (Ky. 1944).

The present case is distinguishable from *Cowles* in that Webb is alleging that DCCB defrauded him with regard to information about his *own* car, not a car that he was negotiating to purchase from DCCB. The Circuit Court was not suggesting that Webb had a duty to search the records for information. It was merely stating that Webb should be informed on the status of his own property before negotiating to sell it. While there may be no duty to investigate public records, "one entering into a contract must exercise ordinary care for his protection." *McClure,* 396 S.W.2d at 50.

> One *sui juris* and in possession of his faculties, contracting at arm's length . . . is not permitted by law to rely exclusively upon the statements of the

> other contracting party. There must be something said or done by the party charged with fraud which would be reasonably calculated to disarm or deceive one of ordinary prudence . . . while exercising ordinary care for his own protection.

Kreate v. Miller, 11 S.W.2d 99, 102 (Ky. 1928) (quoting *United Talking Machine Co. v. Metcalfe*, 191 S.W. 881, 883 (Ky. 1917)).

With respect to DCCB's statement that it could only offer Webb $3,000 credit for the Vehicle, this is a statement of DCCB's opinion of the value of the Vehicle, not a statement of fact. "A mere representation of the value of an article is not such a representation of fact as will, if the representation be false, amount to a fraud in law." *Bowman v. Van Pelt*, 9 Ky. Op. 884, 886 (Ky. 1878).

B. CONSUMER PROTECTION ACT CLAIMS

The Circuit Court found that DCCB's statements during negotiations with Webb could only be interpreted as bargaining and we must agree. Unlawful acts under Kentucky's Consumer Protection Act are defined as "unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Unfair is "construed to mean unconscionable." KRS[1] 367.170.

There was nothing unfair, false, misleading, or deceptive in the negotiations between DCCB and Webb. DCCB truthfully represented to Webb that the CarFax report indicated that the Vehicle had a salvage title and that this information was the basis for DCCB's valuation of the Vehicle. Webb was free to further negotiate credit with DCCB or to refuse DCCB's offer and take his

[1] Kentucky Revised Statutes.

business to another dealership. While Webb may have received a poor bargain, this is not the type of situation the Consumer Protection Act is designed to remedy. Subsequent dissatisfaction with a deal is not, on its own, sufficient grounds for a claim for relief. *See Mortgage Union of Pennsylvania v. Wilson*, 117 S.W.2d 177, 179 (Ky. 1938) (citing *McCallister v. Gingles*, 50 S.W.2d 551, 553 (Ky. 1932) ("There was no fraud or duress, and where one person buys of another property at a certain price under such circumstances, he cannot claim that the transaction was usurious simply because the price was fixed too high.")).

IV. CONCLUSION

For the above stated reasons, we affirm the Circuit Court's summary judgment order in favor of DCCB.

ACREE, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Katherine K. Yunker Lexington, Kentucky	Thomas W. Miller Michelle L. Hurley Lexington, Kentucky