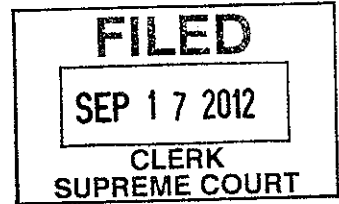


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2011-SC-000415-D
(2010-CA-001544)



RAMESH PATEL

APPELLANT


VS. APPEAL FROM MONTGOMERY CIRCUIT COURT
CASE NO. 07-CI-90109

TUTTLE PROPERTIES, LLC;
BT'S QUICK MART, LLC;
CECIL TUTTLE and
BRIAN TUTTLE

APPELLEES

BRIEF FOR APPELLEES

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this Brief were served upon the following named individuals by First Class Mail, postage pre-paid, on this the 14th day of September, 2012: Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9230; Hon. Beth Lewis Maze, Judge, Montgomery Circuit Court, P.O. Box 1267, Mount Sterling, Kentucky 40353; M. Alex Rowady, Esq., Blair & Rowady, P.S.C., 212 South Maple Street, Winchester, Kentucky 40391 and Original to Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Avenue, Frankfort, Kentucky 40601-3488; via Registered Mail.



JESSE R. HODGSON

INTRODUCTION

This case involves an appeal from Summary Judgment from the Montgomery Circuit Court. At issue is whether the vendors in a real estate and commercial business transaction are entitled to retain funds, submitted as an earnest money deposit, as liquidated damages after the proposed purchaser breached the Purchase and Sale Agreement and failed to close the transaction, as agreed.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellees do not request an oral argument. The facts of this case are not contested, and issues presented on appeal are primarily legal issues which may be adequately considered on the parties' briefs, without oral argument.

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COUNTERSTATEMENT OF THE CASE

The facts of this case are primarily undisputed. On or about October 12, 2006, the Appellant, Ramesh Patel (hereinafter "Patel") entered into an Asset Purchase and Sale Agreement (the "Agreement") with Tuttle Properties, LCC ("Tuttle") and BT's Quick Mart, LLC ("BT's"). Tuttle owned certain real property upon which BT's operated a convenience store and gasoline station. The Agreement pertained to the purchase, by Patel, and sale, by Tuttle & BT's, of certain personal property and real property owned by BT's and Tuttle in conjunction with the ownership and operation of said convenience store and gasoline station. The Agreement was negotiated between Patel, Cecil Tuttle ("Cecil") (on behalf of Tuttle) and Brian Tuttle ("Brian") (on behalf of BT's).

Pursuant to the Agreement, the purchase price was four hundred fifty thousand dollars (\$450,000.00), with the closing of the transaction to occur within one hundred twenty (120) days of execution of the Agreement (February 9, 2007). The Agreement specified "(t)ime is of the essence in regard to all aspects of this Agreement." (Agreement, p. 10).

The sum of one hundred twenty-five thousand dollars (\$125,000.00) was deposited by Patel as an earnest money deposit (the "Deposit"). The Deposit was to be applied to the above purchase price at closing or refunded to Patel if the closing did not take place due to no fault of or breach of the Agreement by Patel. The Deposit was initially tendered to, and deposited into, an escrow account with White Peck Carrington, LLP, counsel for Tuttle and BT's.

The closing was scheduled for October 18, 2006. (Deposition Testimony of Cecil Tuttle, p. 14). On that date, Patel informed the above sellers he was having difficulty

securing financing for the purchase price and requested to lease the real property which was the subject of the agreement for the sum of one thousand five hundred dollars (\$1,500.00) per month. (*Id.*). Cecil first rejected the proposal because he had previously received three thousand dollars (\$3,000.00) per month in rent and could not meet his expenses if he only received one-half of that amount. (*Id.*). According to Cecil, Patel then proposed to rent the property for one thousand five hundred dollars (\$1,500.00) per month and allow Cecil to use the Deposit. (*Id.* pp. 14-15).

On October 18, 2006, Patel, Tuttle and BT's entered into a First Amendment to Asset Purchase and Sale Agreement (the "Amendment"). The Amendment provided the Deposit was to be transferred from the White Peck Carrington, LLP escrow account to Tuttle, with the remaining terms and conditions of the Agreement being unmodified.

Also on October 18, 2006, Patel, as tenant, entered into a lease of the convenience store premises, which was a partial subject of the Agreement, from Tuttle, as landlord, effective immediately. Said lease provided that Patel was to pay Tuttle one thousand five hundred dollars (\$1,500.00) per month for the use of said premises (which was one thousand five hundred dollars (\$1,500.00) per month less than Tuttle requested and customarily received). The Amendment did not alter the closing date, which was to occur no later than one hundred twenty (120) calendar days after October 12, 2006. (Agreement, p. 4).

The sale was never consummated because Patel was unable to secure financing, due to no fault of Tuttle and/or BT's. Patel breached the terms and conditions of the Agreement, as amended, and was in default thereunder by not delivering the balance due on the purchase price on the date set for the closing of the transaction. Tuttle retained the

Deposit, taking the position that Patel forfeited said Deposit by failing to close the transaction, as agreed.

Patel filed suit on April 13, 2007 alleging he was entitled to recover the Deposit from Tuttle on the grounds of unjust enrichment and constructive trust. On July 19, 2010, the Montgomery Circuit Court entered an order of summary judgment in favor of Tuttle and BT's, dismissing all of Patel's claims with prejudice. The Montgomery Circuit Court's summary judgment was affirmed by the Kentucky Court of Appeals by written opinion dated June 17, 2011. Patel then filed for discretionary review with this Court. For the foregoing reasons, the judgment entered by the Montgomery Circuit Court, and affirmed by the Kentucky Court of Appeals, should once again be affirmed.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE AFFIRMED AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND APPELLEES ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Montgomery Circuit Court's entry of Summary Judgment in favor of the Appellees was appropriate in this case. The standard of review on appeal of a summary judgment is whether the trial court correctly found there were no genuine issues of material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 781 (Ky. App. 1996). Regardless of any deference given, or not given, to previous rulings in this action, the facts and law remain the same, as should the ruling herein.

Both the Montgomery Circuit Court and the Kentucky Court of Appeals found the essential facts to be undisputed. Both courts found Patel's \$125,000.00 earnest money deposit should be retained by Tuttle, because Patel breached the Agreement, as amended, by failing to close the transaction. The Court of Appeals held "the only reason the sale was not completed was Patel's failure to secure financing. The failure of the sale being solely Patel's fault or breach, the award of summary judgment was entirely appropriate." *Patel v. Tuttle Properties*, No. 2010-CA-001544-MR, p. 5 (Ky. App. 2011).

II. PATEL WAS NOT ENTITLED TO A REFUND OF THE EARNEST MONEY DEPOSIT BECAUSE HE BREACHED THE AGREEMENT.

Patel breached the Agreement, as amended, and therefore, is not entitled to a refund of the Deposit. As the majority opinion of the Kentucky Court of Appeals sets forth, the sole issue in this case is whether the Agreement was breached. *Patel v. Tuttle Properties*, No. 2010-CA-001544-MR, pp. 4-6 (Ky. App. 2011). Both the Montgomery Circuit Court and the Kentucky Court of Appeals each determined Patel breached the Agreement and held that Tuttle was entitled to retain the Deposit, as clearly set forth in the Agreement, as amended.

Tuttle was entitled to retain the Deposit, pursuant to the Agreement, which clearly sets forth the terms and the conditions pertaining to the Deposit. Pursuant to numerical paragraph 3 of the Agreement, the Deposit was to be “applied on the total purchase price due and payable hereunder at [C]losing, or refunded to Buyer [Patel] if the Closing does not take place pursuant to the terms, conditions and provisions of this Agreement *due to no fault of, or breech (sic) hereunder by, Buyer [Patel].*” Asset Purchase and Sale Agreement, pp. 2-3, ¶ 3 (emphasis added). If the closing had occurred as agreed, the Deposit would have been applied to the total purchase price at closing. However, Patel failed to close to transaction, due to no fault of Tuttle or BT’s and Patel should not receive a benefit from his own failure and damages caused thereby.

Once the time for closing expired, Tuttle was legally entitled to retain the Deposit pursuant to the terms and conditions of the Agreement, as amended. The Deposit was only to be returned to Patel if the closing did not take place: (1) on or before the closing date set forth in the Agreement and (2) due to no fault of Patel.

There is no dispute that Patel breached the Agreement by failing to close on the transaction and Patel's failure to close was due to no fault of Tuttle or BT's. Patel admitted in his Motion for Summary Judgment that the closing did not occur due to the fact that "Patel was unable to obtain financing to complete the purchase of the convenience store." See Plaintiff's Motion for Summary Judgment, p. 3, ¶ 2. Patel was not entitled to have *any* of the Deposit returned to him, because he was the sole party responsible for failing to close the contemplated transaction and was the sole party in breach of the Agreement.

Patel's reliance on the cases of *Furlow v. Sturgeon*, 436 S.W.2d 485 (Ky. 1985) and *Lawson v. Menefee*, 132 S.W.3d 890 (Ky. 2004) is unfounded, as they involve real estate disputes wherein the measure of damages can be calculated as the difference between the contract price and the actual value of the land on the date of breach, plus compensatory damages. *Furlow*, 436 S.W.2d 487 (citing *Graves v. Winer*, 351 S.W.2d 193 (Ky. 1961), *Lawson*, 132 S.W.3d at 893. The case at hand involves an agreement for the sale of a commercial business, goodwill, real estate, and personal property. As set forth more particularly hereinbelow, Tuttle suffered additional damages from Patel's failure to close the transaction and Patel's lease of the premises, including disrepair and loss of goodwill to his ongoing commercial business enterprise. Therefore, case law wherein the measure of damages is relatively simple to measure and involving non-complex transactions has no bearing on the case herein. In the present case, the measure of damages cannot be accurately or approximately determined using the above simple formula.

The Court of Appeals correctly held: (1) Patel breached the agreement and (2) Tuttle was entitled to retain the Deposit upon Patel's breach based on the clear language of the Agreement. *Patel v. Tuttle Properties*, No. 2010-CA-001544-MR, pp. 5-6 (Ky. App. 2011). However, Patel claims the Court of Appeals erred in failing to address whether the Deposit constituted a proper liquidated damages provision. (Patel Brief, p. 3). Neither the Agreement nor the Amendment thereof inserted the term "liquidated damages" into said contracts. If Patel wanted to classify the Deposit, if forfeited, as liquidated damages, Patel had the opportunity to include such in either the Agreement or the Amendment, but he chose not to do so and never requested such.

The majority opinion of the Court of Appeals found no need to address the issue of whether the Agreement contained a valid liquidated damages clause because the express language of the Agreement nullified any concerns regarding liquidated damages as it clearly provided that Tuttle was entitled to retain the Deposit on Patel's breach of the Agreement, as amended.

III. THE EARNEST MONEY DEPOSIT PROVISIONS ARE ENFORCEABLE AS LIQUIDATED DAMAGES, NOT AN UNENFORCEABLE PENALTY.

Even if Tuttle is not entitled to retain the Deposit pursuant to the express language of said contracts, the Deposit provisions of the Agreement and Amendment are enforceable as liquidated damages, and Tuttle's retention of the Deposit did not serve as an unenforceable penalty. The Court of Appeals did not analyze whether the Deposit was proper liquidated damages or a penalty, instead, holding the clear language of the Agreement allowed Tuttle to retain the Deposit upon Patel's breach. However, under the relevant analysis, the provisions of the Agreement and Amendment regarding the Deposit created enforceable liquidated damages rather than a penalty.

Courts generally favor liquidated damages provisions in contracts. *Coca-Cola Bottling Works (Thomas,) Inc. v. Hazard Coca-Cola Bottling Works, Inc.*, 450 S.W.2d 515, 518 (Ky. 1970) (citations omitted). Although once disfavored, courts are “strongly inclined” to allow parties to make their own agreements which result in the recovery of liquidated damages upon proof of breach of the agreement, without proof of the damages actually sustained. *Id.* at 518-519 (citing *United States v. Bethlehem Steel Co.*, 205 U. S. 105 (1907)).

Courts enforce agreements with respect to liquidated damages unless the amount was grossly disproportionate to the damage which might flow from a breach. *Id.* at 519. If the retention of liquidated damages is not a penalty, the retaining party is entitled to keep the liquidated damages. *United Services Auto Ass'n v. ADT Sec. Services, Inc.*, 241 S.W.3d 335 (Ky. App. 2006). Kentucky Courts have struggled to define when liquidated damages are a “penalty”, but have given some guidance. If the sum of liquidated damages is “greatly disproportionate”, “unjust or oppressive” or “unreasonably large”, the liquidated damages will be deemed a penalty. *Smith v. Ward*, 256 S.W.2d 385, 387 (Ky. 1953); *Potter v. Dark Tobacco Growers Co-op Ass'n*, 257 S.W. 33, 36 (Ky. 1923); *Man O War Restaurants, Inc. v. Martin*, 932 S.W.2d 366, 368 (Ky. 1996); *Coca-Cola Bottling Works (Thomas) Inc.*, 450 S.W.2d at 518.

The Deposit sum of \$125,000.00 is not greatly disproportionate to the total consideration set forth in the Agreement (\$450,000.00) nor is the sum unjust, oppressive or unreasonably large. “Where, at the time of the execution of the contract, damages may be uncertain in character or amount, or difficult to reasonably ascertain, a provision for liquidated damages will be enforced, provided the amount agreed upon is not greatly

disproportionate to the injury which might result.” *United Services Auto Ass’n*, 241 S.W.3d at 340-341 (citations omitted).

Tuttle suffered considerable damages as a result of Patel’s lease of the convenience store and failure to close the transaction pursuant to the Agreement, although the exact amount of said damages is uncertain and difficult to ascertain. If the amount of liquidated damages suffered is uncertain or is difficult to ascertain, the liquidated damages provision will be enforced so long as the amount is not “greatly disproportionate” to the amount of damages suffered. *Id.* at 340-341.

Prior to the contemplated transaction, the convenience store generated approximately \$7,188.00 per day in business. After Tuttle resumed possession of the convenience store, upon the expiration of the Lease with Patel and failure of Patel to close the transaction, the store generated roughly \$1,200.00 per day in business. (Deposition of Cecil Tuttle, p. 19). Tuttle’s additional damages are more difficult to ascertain and are not readily calculable, including the loss of customers, loss of goodwill within the community, overall depreciation in the value of the store as a going concern and the depreciation in value of the assets which were the subject of the Agreement. (See *United Services Auto Ass’n* above.)

Patel argues the Deposit should be characterized as a penalty because the amount is twenty-eight percent (28%) of the total purchase price. However, when the Amendment was executed, Patel released the Deposit to Tuttle in exchange for the lease of the business premises for the sum of \$1,500.00 per month, which was one-half the amount of rent Tuttle customarily received for the property. Tuttle suffered considerable damages from Patel’s failure to close the transaction; and therefore, it is insufficient to

look solely to the percentage of the total purchase price when determining whether the amount of the Deposit is appropriate compensation for Tuttle's losses.

As Tuttle and BT's damages exceed the amount of the Deposit, said damages are not greatly disproportionate, unjust or oppressive or unreasonably large and Tuttle's retention of the Deposit is far from the imposition of a penalty upon Patel. Tuttle suffered actual damages, although in an amount not readily ascertainable, and is entitled to retain the Deposit as liquidated damages. Therefore, the earnest money deposit was enforceable as liquidated damages, not a penalty.

IV. THE LOWER COURTS CORRECTLY DISMISSED PATEL'S CONSTRUCTIVE TRUST CLAIM.

It was unnecessary for the lower courts to impose a constructive trust on the Deposit. Patel argues that the trial court should have employed its equitable powers to impose a constructive trust upon said Deposit. Tuttle owes no fiduciary or equitable duties with respect to the Deposit, and Tuttle was not unjustly enriched by his retention of the Deposit, as more particularly set forth below.

Tuttle owed Patel no fiduciary duty as safe keeper of the Deposit. Neither the Agreement nor the Amendment imposed a fiduciary duty as safe keeper of the Deposit upon Tuttle. If Patel wanted to impose fiduciary duties upon Tuttle to Patel, he had the opportunity to include such in either the Agreement or the Amendment, but he chose not to do so and never requested such. When the Amendment was executed, Patel agreed to release the Deposit to Tuttle, and the Amendment did not place any stipulations on Tuttle's use of the Deposit or impose any duties on Tuttle with respect to the Deposit. If the transaction had closed, the amount of Deposit would have been credited to the total purchase price at closing. Patel has not cited any law imposing a fiduciary duty upon

Tuttle, as transferee of the Deposit under the Amendment, with full use thereof permitted by Tuttle.

Further, the imposition of a constructive trust is not appropriate, as Tuttle was not unjustly enriched by retaining the Deposit. Patel alleges a constructive trust may be established “when a person entitled to property is under the equitable duty to convey it to another because he would be unjustly enriched if he were permitted to retain it.” Appellant’s Brief, Page. 7 (quoting *Terrell v. Estate of Terrell*, 217 S.W.3d 858 (Ky. App. 2006)). Patel’s claim for constructive trust fails because Tuttle was not unjustly enriched in retaining the Deposit, as established herein. To the contrary, Tuttle was not adequately compensated for his damages resulting from Tuttle’s breach of the Agreement.

Tuttle was not unjustly enriched, pursuant to the above definition, as his retention of the Deposit was legally justified given the terms and conditions of the Agreement, as amended. Unjust enrichment is defined as a “benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.” *Black’s Law Dictionary* 1573 (Bryan A. Garner ed., 8th ed., West 2004).

To claim relief under the legal theory of unjust enrichment, a party must prove three elements, namely: (1) a benefit conferred upon the defendant at the plaintiff’s expense; (2) a resulting appreciation of benefit by the defendant and (3) inequitable retention of benefit without payment for its value. *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009) (citing *Guarantee Electric Co. v. Big Rivers Electric Corp.*, 669 F. Supp. 1371, 1380-81 (W.D. Ky. 1987)). No benefit was conferred upon Tuttle and/or BT’s by the payment of the earnest money deposit, as more particularly set forth

hereinafter. Tuttle's retention of the Deposit was not inequitable, given the fact that Patel failed to close the transaction and Tuttle suffered numerous damages. A constructive trust should not be imposed upon the Deposit, as the retention of the Deposit does not satisfy the requirements of unjust enrichment.

Patel gave Tuttle express permission to use the Deposit prior to closing. Patel leased the convenience store from Tuttle Properties, LLC for a sum \$1,500.00 per month less than (1) requested by Tuttle Properties, LLC and (2) customarily received as rent by Tuttle Properties, LLC. (Deposition of Cecil Tuttle, p. 14). In return for a reduced rental payment, Patel granted Tuttle Properties, LLC the right to immediately use the Deposit as needed. (Deposition of Cecil Tuttle, p. 15).

When Tuttle regained possession of the convenience store, Patel had severely depreciated the value of the assets which were the subject of the Agreement, the goodwill of the company and its reputation in the community. (Deposition, Cecil Tuttle, pp. 19-21). Although the exact amount is uncertain, the amount of decrease in the value of the business exceeded the amount of the Deposit and said decrease in value was payment/consideration by Tuttle and BT's, for the value of the Deposit. Due to said depreciation and loss of business, retention of the Deposit did not confer a benefit upon Tuttle.

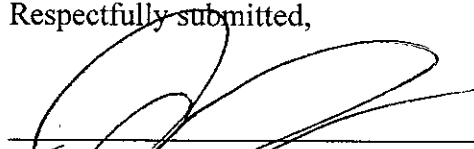
Tuttle's retention of the Deposit was legally justified, as set forth above and pursuant to the express terms and conditions of the Agreement, as amended. Therefore, the imposition of a constructive trust would only result in the Deposit being returned to Tuttle due to Patel's breach of the Agreement, as amended. Tuttle's retention of the Deposit should not involve the imposition of a constructive trust, as it cannot meet the

requirements of “unjust enrichment,” more particularly the lack of benefit conferred and actual payment/consideration for value. Tuttle incurred serious damages due to Patel’s breach of the Agreement and failure to close the transaction. The facts herein do not support the imposition of a constructive trust, namely that Tuttle was entitled to keep the Deposit, Tuttle had no equitable or fiduciary duties with respect to the Deposit, Tuttle incurred substantial damages due to Patel’s breach of the Agreement and Tuttle was not unjustly enriched by retaining the Deposit. Therefore, the Montgomery Circuit Court and the Kentucky Court of Appeals both correctly dismissed Patel’s constructive trust claim.

CONCLUSION

The respective decisions of the Montgomery Circuit Court and Kentucky Court of Appeals should be affirmed. Patel breached the Agreement by failing to close transaction, due to no fault of Tuttle. Under the clear language of the Agreement and Amendment, Tuttle was entitled to retain the Deposit. Tuttle's retention of the Deposit was not an unenforceable penalty, as the amount of the Deposit was not disproportionate to the entire sum of the contract. Tuttle suffered actual and considerable damages as result of Patel's breach and failure to close the transaction. Furthermore, Tuttle owed no fiduciary or equitable duties with respect to the Deposit, and Tuttle was not unjustly enriched by his retention of the Deposit. Under the clear language of the Agreement and Amendment, Tuttle was entitled to retain the Deposit upon Patel's breach of the Agreement. The Appellees respectfully request this Court to affirm the judgment entered by the Montgomery Circuit Court, affirmed by the Kentucky Court of Appeals.

Respectfully submitted,



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APPENDIX

1. Opinion from the Kentucky Court of Appeals (Case No. 2010-CA-0001544-MR)
2. Asset Purchase and Sale Agreement
3. First Amendment to Asset Purchase and Sale Agreement
4. Deposition Testimony of Cecil Tuttle