

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 5th day of April, 2018.

James T. Wilson, Appellant,

against Record No. 170347
Circuit Court No. CL16001556-00

Edward B. Lee, III, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Arlington County.

James T. Wilson filed an amended complaint against Edward B. Lee, III, Mark Tate, and KKR 2, LC, claiming they fraudulently induced Wilson to transfer his real estate to KKR 2 by misrepresenting to Wilson that he was only placing his real estate into a trust for protection from creditors. The circuit court sustained appellees' demurrers and dismissed Wilson's amended complaint with prejudice. Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no reversible error in the rulings of the circuit court. Therefore, we will affirm the judgment of the circuit court.¹

I.

"Since this case was decided below on demurrer, we accept as true the well-pleaded facts set forth in the amended complaint and all inferences fairly drawn therefrom." *Tharpe v. Saunders*, 285 Va. 476, 478-79, 737 S.E.2d 890, 891 (2013). On February 18, 2014, Wilson, an 82-year old retired businessman, entered into a listing agreement with Paladin Real Estate, LLC

¹ We are advised that Wilson died while his appeal was pending in this Court. Pursuant to Code § 8.01-20, we will "retain jurisdiction and enter judgment . . . in the case as if such event had not occurred."

("Paladin") under which Paladin was granted the exclusive right to sell seven parcels of real estate owned by Wilson for \$5,755,163.² Wilson was "suffering from some level of mental incapacity and physical illness" and "struggling with payments of debt and liens associated with [his] real estate." In May 2014, Lee, a real estate agent employed by Paladin, contacted Wilson and told him that Tate "worked for the Mellon Trust and Mellon Bank" (hereinafter referred to as "Mellon") and that, through Mellon, "Tate could arrange a refinance for all of Plaintiff Wilson's debts and liens." Lee introduced Wilson to Tate, who told Wilson he could arrange for Wilson to place his property in a Mellon trust fund "so it would be protected from Plaintiff Wilson's creditors" while permitting Wilson "to sell his land after settlement." Lee and Tate told Wilson they would help him refinance his existing debts and obtained his permission to communicate with Wilson's lenders and creditors.

In June and July 2014, Lee and Tate met with attorney Michael Briel in connection with the purchase of Wilson's property. In August 2014, Lee and Tate told Wilson that KKR 2 was to be a "holding entity" for all of Wilson's real estate and that Wilson needed to execute a contract with KKR 2 "to sell and convey all of his real estate to this entity in trust." Lee and Tate also told Wilson that the Mellon Board had a meeting and decided that they would not refinance Wilson's real estate, but that an unnamed woman on the Mellon Board "volunteered" to refinance Wilson's real estate herself. Lee and Tate "advised" Wilson to transfer all of his real estate to KKR 2 to "protect" Wilson "by holding the real estate in [a] trust fund for his benefit." Tate "repeatedly" told Wilson that he would be able to "sell [his] Real Estate after the

² Although Wilson alleged that the listing agreement was presented to him by Lee, the agreement, which is attached as an exhibit to Wilson's amended complaint, is not signed by Lee but rather by Jim Sisley, on behalf of Paladin.

refinancing and that [his] properties in the trust would be protected from creditors because it was in trust with KKR2, LC.”

On August 21, 2014, Wilson signed a contract in which he agreed to sell his real estate to KKR 2 for \$2,600,000. The sales contract provided that, at closing, Wilson would execute a general warranty deed conveying fee simple absolute title to the property.³ Tate told Wilson that “he had prepared, or that he was preparing a trust agreement for Plaintiff Wilson to sign at closing.” When “Wilson signed the sales contracts he did not think it was a regular sale but simply the right to transfer his property into the fund from Mellon Trust.” Lee and Tate told Wilson all of his debt would be paid in connection with a \$2,500,000 to \$3,000,000 loan they were arranging.

At the closing on October 24, 2014, Wilson signed a general warranty deed conveying the real estate to KKR 2. “The room was dark and Mr. Wilson was told that he only had 15 minutes to sign the documents.” Briel charged attorney fees to Wilson in the amount of \$15,810 as listed on the HUD-1 statement given to Wilson on October 24, 2014 and an amended statement given to him on March 2, 2015, despite never meeting with Wilson prior to closing. Wilson “believed that he was transferring all seven (7) parcels of his real estate into a trust fund” and was told by Tate “that he was signing documents to change the name on the Real Estate Property from his name into the name of the trust fund.” When Wilson asked “about the whereabouts of the agreement delineating the terms of the trust fund into which Plaintiff’s real

³ In September, Tate presented Wilson with two contracts for the sale of the same property – a contract for the sale to KKR 2 of one parcel for \$2,000,000 and another contract for the sale to KKR 2 of six parcels for \$600,000. These contracts, also dated August 21, 2014, were executed by Wilson.

estate would be transferred,” Tate told Wilson that “the trust agreement was completed” and Wilson “needed to sign it after closing.”

In the months following the closing, Wilson came to realize that his real estate “was not actually transferred into a trust and that [he] did not have the right to continue to market and sell his properties.” Wilson also came to understand that Lee and Tate, with the assistance of attorney Briel, only “negotiated partial payoffs on Wilson’s loans and liens and allowed for over \$1,217,000 judgment liens to be left in place.”

In Count I of the amended complaint, Wilson asserts a claim for actual fraud against Lee, Tate, and KKR 2. Wilson contends that Lee and Tate falsely represented that Tate had a connection with Mellon, that Tate was representing Wilson’s interest against his creditors, and that Tate would assist Wilson “in paying off his various creditors in a reasonable manner by helping Plaintiff Wilson to put his Real Estate in [a] trust fund, while at the same time, allowing Plaintiff Wilson to maintain a right to market and sell Plaintiff’s Real Estate.” Wilson further contends that, but for Lee and Tate’s false representations and Tate’s assurance that the trust agreement was ready to be signed, Wilson would not have signed any documents or transferred his real estate. Wilson claims that KKR 2 was “complicit” in the fraud and was not a bona fide purchaser since it is controlled by Tate.

In Count II, Wilson asserts a claim for breach of fiduciary duty against Lee and Tate. Wilson contends that Lee and Tate “assumed the role of Wilson’s agent[s]” when they told Wilson that Tate worked with Mellon, could help Wilson refinance his debt, and negotiated payoffs and lien releases on Wilson’s behalf. According to Wilson, Lee and Tate “had a fiduciary duty to act in good faith and fair dealing” with Wilson, to disclose that they “were in fact planning to purchase Mr. Wilson’s property for their own financial gain,” “that they had not

negotiated complete payoffs of Mr. Wilson’s creditors,” and “that the [sales] contract did not transfer property to a trust fund.” Wilson alleges that Lee and Tate “breached their fiduciary dut[ies]” to Wilson by “falsely representing” that Wilson was transferring his real estate into a trust and that Wilson would have a right to market and sell his real estate in the future.⁴ Wilson seeks punitive damages, attorney fees, and rescission of the contracts and deed, or in the alternative, an award of \$7,755,500, which he estimates to be the fair market value of the real estate.

Each of the appellees filed demurrers to Wilson’s amended complaint, which the circuit court sustained. With regard to Count I, the circuit court ruled that Wilson was “unable, as a matter of law, to show that [he] reasonably relied upon Defendants’ alleged misrepresentations” and, therefore, “incapable of pleading fraudulent inducement.” The circuit court reasoned that Wilson “was aware throughout that the contracts and documents he was signing were contrary to the alleged representations that there would be a trust, that he would have control over the properties and that he would be able to remain financially intact.” The circuit court noted:

Every document attached to the Complaint at every turn in this alleged sordid affair were blinking warning lights to the Plaintiff. First, the properties were being sold off at bargain basement prices (half of their former listing price). Second, the contract sold the properties to KKR 2; not transferred to a trust that would benefit the Plaintiff. Plaintiff nevertheless signed the contract. Third, at settlement, Plaintiff signed all of the settlement documents including a general warranty deed and a HUD-1 statement containing all of the sales information and creditor payoff amounts. There was never a trust document.

The circuit court further explained that Wilson’s inquiry into the whereabouts of the trust agreement reflected his awareness at the closing that the documents he was signing did not

⁴ In Count III, Wilson sought a claim for civil conspiracy but has not assigned error to the circuit court’s dismissal of that count.

transfer his real estate into trust or identify a trust and “any reasonable person would doubt the validity or the accuracy of the representations made and stop the transaction.”

With regard to Count II, the circuit court ruled that there was no basis alleged in the amended complaint upon which a fiduciary duty to Wilson could exist. The circuit court reasoned that KKR 2, the buyer of the real estate, and Tate, an agent for KKR 2, had “no apparent legal obligation to Plaintiff in contract, by statute, at common law or by any established relationship to him.” Similarly, the circuit court found no basis to conclude that Lee owed a fiduciary duty to Wilson, specifically noting that the listing agreement with Paladin did not identify Lee as the broker or listing agent.

II.

In reviewing the circuit court’s judgment sustaining the appellees’ demurrers, we note that “[t]he purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted.” *Murayama 1997 Trust v. NISC Holdings, LLC*, 284 Va. 234, 245, 727 S.E.2d 80, 86 (2012); *see* Code § 8.01-273. A demurrer tests the legal sufficiency of the facts properly alleged, and the inferences fairly drawn therefrom, but does not admit the correctness of the complaint’s legal conclusions. *Murayama 1997 Trust*, 284 Va. at 245, 727 S.E.2d at 86.

A.

Wilson argues on appeal that the circuit court erred in granting appellees’ demurrers to his fraud claim on the grounds that Wilson could not have reasonably relied upon appellees’ misrepresentations.

If a defendant makes a promise that, when made, he has no intention to perform, that promise constitutes a misrepresentation of present fact and may provide the basis for a claim of

actual fraud. *Gelber v. Glock*, 293 Va. 497, 530, 800 S.E.2d 800, 819 (2017). “[T]he wrong of fraud requires an intentional, knowing misrepresentation by a defendant of a material fact upon which a plaintiff has relied to its detriment.” *Metrocall of Delaware v. Continental Cellular Corp.*, 246 Va. 365, 374, 437 S.E.2d 189, 193 (1993). “But to establish fraud, it is essential that the defrauded party demonstrates the right to reasonably rely upon the misrepresentation.” *Id.* at 374, 437 S.E.2d at 193-94. Therefore, to withstand a demurrer, Wilson’s allegations must support the conclusion that he reasonably relied upon the misrepresentations made by appellees. *Murayama 1997 Trust*, 284 Va. at 246, 727 S.E.2d at 86. Absent allegations demonstrating such reasonable or justifiable reliance, no fraud is established. *Id.*

Although Wilson argues that the circuit court erred in deciding the issue of reasonable reliance as a matter of law at the pleading stage, we disagree. Wilson alleged that he believed he was entering into a scheme in which the appellees would shield his real estate from his creditors. Yet, the details of the proposals by Lee and Tate to Wilson remained elusive throughout their discussions, ranging from a deal directly with Mellon to a plan involving an unidentified female “on the Board” of Mellon who “volunteered” to refinance Wilson’s real estate herself. Despite repeated statements by Lee and Tate that Wilson’s real estate would be placed in trust and that he would be able to market and sell his own property, no documents reflecting any such arrangement ever materialized before or after Wilson signed the sales contracts, in which Wilson agreed to sell his property to KKR 2. Even as Wilson prepared to execute the deed and finalize the conveyance of his real estate in a darkened room and under time pressure, he was inquiring as to the whereabouts of the trust agreement in recognition of the fact that the documents he was signing did not comport with the representations made to him. He was therefore fully aware of

the absence of trust documents or provisions. No reasonable person, under all of the circumstances alleged in the amended complaint, would be justified in relying on the continued assurances that the real estate was actually being placed in a trust. Accordingly, we conclude that Wilson's allegations do not demonstrate reasonable reliance upon the appellees' misrepresentations.

B.

Wilson also asserts that the circuit court erred in granting Lee's demurrer to Wilson's breach of fiduciary duty claim. The circuit court sustained Lee's demurrer to this claim because it found "nothing in the Complaint upon which the Court can conclude that Mr. Lee had a fiduciary duty to the Plaintiff." On appeal, Wilson asserts that his amended complaint "alleges facts from which it is reasonable to infer that Paladin in fact appointed Lee as a subagent to represent Wilson as the Owner." Citing, in particular, § 5 of the Restatement (Second) of Agency, Wilson contends that as Paladin's subagent, Lee owed a fiduciary duty to Wilson. We reject Wilson's argument, however, because his amended complaint does not allege that Paladin appointed Lee as a subagent or even assert such theory as a basis for the existence of a fiduciary duty owed by Lee to Wilson.

C.

Finally, Wilson argues that the circuit court erred in granting the appellees' demurrers to Wilson's claim for rescission because he has alleged sufficient facts to state a claim for undue influence. We likewise reject this argument because Wilson's amended complaint does not assert a claim of undue influence.

Accordingly, we affirm the circuit court's judgment. The appellant shall pay to the appellees two hundred and fifty dollars damages.

Justice Mims took no part in the resolution of the appeal. Senior Justice Russell participated in the hearing and decision.

This order shall be certified to the said circuit court.

A Copy,

Teste:

John L. Hamington

Clerk