DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
John Mauzy Pittman, Judge

CA06-324

November 29, 2006

RITA MARTIN APPELLANT v. MARY LYNCH APPELLEE	AN APPEAL FROM CONWAY COUNTY CIRCUIT COURT [No. CV 2004-110] HONORABLE DAVID H. McCORMICK, CIRCUIT JUDGE AFFIRMED

The Conway County Circuit Court entered an order setting aside a deed from appellee Mary Lynch to appellant Rita Martin after Martin and her attorney failed to appear for a hearing. Martin now appeals, contending that the trial court erred in allowing Lynch to present her case but not allowing Martin to do the same. Martin also contends that the evidence does not support the trial court's decision. We disagree, and we affirm.

Martin and Lynch are sisters. Certain property was conveyed to Lynch in April 2003. Pursuant to an oral agreement, Lynch conveyed the property to Martin by deed dated December 5, 2003.

On July 1, 2004, Lynch filed suit, alleging that Martin had failed to pay for the property as agreed. The complaint, labeled a "Constructive Trust Complaint," further alleged

that Martin had paid only $400 towards an agreed price of $5,000, that Lynch had demanded that Martin convey the property to her, and that Martin held the property in constructive trust for Lynch. The complaint prayed that Martin immediately convey the property to Lynch. In response, Martin filed a motion to dismiss raising the statute of frauds as a defense, stating that there was no written agreement concerning the transaction, other than the warranty deed. The motion also asserted that the complaint failed to state facts upon which relief could be granted. Martin never filed an answer to the complaint.

After a continuance, the matter was scheduled for a one-hour hearing on November 4, 2005, at 10:00 a.m. When the case was called, neither Martin nor her attorney were in the courtroom, although Martin had been seen outside the courtroom earlier. After another call for Martin or her attorney went unanswered, Lynch was allowed to present her case. Lynch testified that she received the property from her mother. She said that Martin and Martin's then-husband talked Lynch into selling the property to them for $5,000, with payments to be $200 per month. Lynch identified the deed given to Martin and testified that Martin made only two payments totaling $400. She said that, after a dispute over the taxes on the property, Martin refused to make further payments. Lynch asked the court for a constructive trust so she could reclaim her land. The trial court ruled from the bench that the pleadings would be amended to conform to the proof and that the deed from Lynch to Martin would be set aside.

A short time later, Martin's attorney, John Purtle, appeared in court and explained that he was tardy because his watch had not been properly set. The trial court, after noting that it had made a ruling from the bench, stated that it did not believe that counsel's watch not

being properly set would be sufficient to set aside the ruling but added that it would considered any pleadings counsel chose to file.

On November 10, 2005, Martin filed a "Motion To Set Aside Opinion" that recited the chronology of events occurring the day of trial and asserted that "[t]here was nothing in writing except the deed to [Martin]." The motion also asserted that the statute of frauds, Ark. Code Ann. § 4-59-101 (Repl. 2001), requires deeds to be in writing. The motion prayed that a default judgment not be entered and that the case be reset for trial. Attached to the motion was an affidavit from Martin and her husband setting forth the chronology of events. The trial court did not rule on the motion. The order setting aside the deed from Lynch to Martin was entered on December 27, 2005. Martin timely appealed to this court.

On appeal, Martin raises two points: (1) that the trial court erred in allowing Lynch to present her case but not allowing Martin to present her case, and (2) that the evidence is insufficient to support the order setting aside the deed.

In the heading of her first point, Martin argues that the trial court erred in not allowing her to present her case. However, we are not sure what argument Martin is making in the body of the argument. If Martin is arguing that the trial court should have granted her motion for relief from the judgment, our review is governed by an abuse-of-discretion standard. *Farmers Union Mutual Insurance Co. v. Mockbee*, 21 Ark. App. 252, 731 S.W.2d 239 (1987). We cannot say that the trial court abused its discretion in not setting aside the judgment or in proceeding with trial despite the absence of Martin or her attorney. Martin does not argue that she did not have notice of the trial setting. She had been in the vicinity

of the courtroom prior to the case being called; however, she left and was not present when the case was called. Had she stayed near the courtroom, she could have explained the situation to the court and asked the court to proceed with other cases and come back to her case when her attorney arrived or asked for a continuance.

For her second point, Martin argues that the evidence does not support the judgment entered by the trial court. She seems to argue that there is no basis for the imposition of a constructive trust. However, this ignores the fact that the trial court amended the pleadings to conform to the proof and that, when Lynch testified that she wanted her property back, she was actually seeking rescission of the agreement to convey the property to Martin.

It is basic contract law that, where there is a material breach of contract, substantial nonperformance, and entire or substantial failure of consideration, the injured party is entitled to rescission of the contract and restitution and recovery back of money paid. *Economy Swimming Pool Co. v. Freeling*, 236 Ark. 888, 370 S.W.2d 438 (1963). Here, Lynch testified that she agreed to sell the property to Martin for $5,000 and that Martin paid only $400. This testimony, if believed by the trial court, would serve to establish Martin's breach and substantial nonperformance and provide the basis to rescind the agreement.

Martin also contends that the statute of frauds applies. It does not. First, Lynch is not seeking to *enforce* the agreement; she is seeking to disaffirm it. Second, Martin made two $200 payments under the contract, and that serves to take the agreement out of the statute of frauds. *Johnston v. Curtis*, 70 Ark. App. 195, 16 S.W.3d 283 (2000). Third, the mischief at which the statute of frauds is aimed no longer exists because the oral agreement has been

executed by a conveyance of the land to Martin. *See Hogue v. Hogue*, 247 Ark. 914, 448 S.W.2d 627 (1969); *Johnson v. Cheek*, 163 Ark. 176, 259 S.W. 368 (1924).

Finally, Martin raises suspicions about the receipts for payments, whether the proper parties were named, and whether there was an outstanding mortgage or other encumbrance on the property. However, these matters were never presented to the trial court, and no ruling was obtained. We will not consider issues raised for the first time on appeal. *See Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 734 (2000).

Affirmed.

GRIFFEN and GLOVER, JJ., agree.