RENDERED: February 12, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001786-MR

GERALD RUHS AND JANICE RUHS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 89-CI-004595

JOHN RUHS — APPELLEE

OPINION

AFFIRMING IN PART;
REVERSING IN PART AND REMANDING

* *

BEFORE: BUCKINGHAM, GARDNER, AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE. Gerald and Janice Ruhs (Gerald and Janice) appeal from orders of the Jefferson Circuit Court relating to a summary judgment entered in favor of John Ruhs (John). We affirm in part and reverse in part and remand.

In 1980, Gerald and Janice purchased an apartment building from John, who is Gerald's brother, for $30,000. John conveyed the property to Gerald and Janice by deed with a covenant of general warranty, a covenant of seisin, and a

covenant of freedom from encumbrances with the exception of applicable property taxes. Gerald and Janice made a down payment to John of $8,000 at the time of the purchase and executed a promissory note to John for $22,000, payable by one payment of $2,000 due on January 1, 1981, and a payment for the remainder of the balance due on March 24, 1986. The note also provided that interest would be paid at the rate of ten percent per annum until paid in full.

Gerald and Janice made the $2,000 payment in 1981. They subsequently made monthly payments of $170 to John from early 1981 until May 1983, although they were not required to make monthly payments under the terms of the note.[1] In late 1983, Gerald and Janice contracted with Ray-Mit Limited Partnership (Ray-Mit) to sell the property which they had purchased from John for $57,000. The sale to Ray-Mit was not consummated, however, due to an unreleased contract for deed which created a cloud on the title to the property and of which Gerald and Janice apparently had no prior actual notice. On March 20, 1986, four days prior to the date set for Gerald and Janice to make their final payment to John, the contract for deed on the property was finally released. By that time, however, Ray-Mit had refused to close the deal with Gerald and Janice, and the proposed transaction was never completed.

Gerald and Janice failed to make the scheduled payment of the remaining balance owed on the note to John on its due

[1] Gerald and Janice voluntarily made the payments in order to reduce the unpaid balance of the note.

date, and John filed suit against them in 1989 seeking the balance due to him. Gerald and Janice filed an answer and counterclaim against John seeking to recover the profits which they allege they lost on the Ray-Mit transaction due to John's breach of covenant of general warranty. John then filed a third-party complaint against Chicago Title Insurance Company (Chicago Title) for indemnification, as Chicago Title had insured title to the property when it was purchased by John.

John eventually moved for summary judgment against Gerald and Janice in August 1996. Gerald and Janice did not file a response to John's summary judgment motion, and thus the trial court granted it in December 1996, noting that Gerald and Janice had failed to respond. The summary judgment stated that John was entitled to judgment as a matter of law on his claim and on Gerald and Janice's counterclaim. However, the judgment was not for a sum certain.

Gerald and Janice filed a timely motion under Kentucky Rule of Civil Procedure (CR) 59 in which they sought to have the court "set aside or vacate" its summary judgment. A belated response to John's summary judgment motion was attached to their motion. The trial court denied Gerald and Janice's motion to set aside the summary judgment, noting in its order that it had considered Gerald and Janice's response to John's summary judgment motion.

In June 1997, John moved the trial court to enter a judgment for a sum certain against Gerald and Janice. John calculated the amount owed to him to be $74,960.69, representing

the remaining principal balance due under the note along with accumulated interest. Although John did not explain in his motion how he arrived at that figure, the trial court entered a judgment in John's favor on June 9, 1997, for the amount requested plus twelve percent interest from the date of the summary judgment.

On July 2, 1997, Gerald and Janice moved the trial court to amend its June 9 judgment pursuant to CR 60.02.[2] The basis of the CR 60.02 motion was Gerald and Janice's contention that John and the trial court had improperly computed and compounded the interest due on the promissory note. The motion was denied by the trial court, and Gerald and Janice filed a notice of appeal in which they stated they were appealing the trial court's orders of December 1996 (the summary judgment order), February 1997 (the order denying the motion to set aside or vacate the summary judgment order), June 1997 (the order granting John judgment for a sum certain), and July 1997 (the order denying the motion to amend the judgment for a sum certain).

John raised the issue of the timeliness of Gerald and Janice's appeal in his supplemental prehearing statement. He did not, however, raise the issue in his brief, and we assume that he has conceded that the appeal was timely filed. Nevertheless, we have independently reviewed the issue and determine that the appeal as to all four orders was timely filed.

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[2] The motion was presumably made under CR 60.02 because it would have been untimely under CR 59.

The next issue is whether or not the trial court erred in granting summary judgment in favor of John on his claim and on Gerald and Janice's counterclaim. The standard for summary judgment is clear:

> A movant should not succeed in a motion for summary judgment unless the right to judgment is shown with such clarity that there is no room left for controversy and it appears impossible for a nonmoving party to produce evidence at trial warranting judgment in his favor. . . . The motion for summary judgment must convince the circuit court from evidence in the record of the nonexistence of a genuine issue of material fact.

Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992). The standard of review by an appellate court is equally clear as the question 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, Ky. App., 916 S.W.2d 779, 781 (1996). A trial court's decision to grant summary judgment is entitled to no deference. Id.

The parties have discussed the issue of whether the unreleased contract for deed constituted a breach of the covenant of general warranty or a breach of the covenant against encumbrances. "In this Commonwealth, a general warranty encompasses the covenant of seisin, covenant of right to sell, covenant of freedom from encumbrances, covenant of quiet enjoyment, and covenant of warranty of title." Ralston v. Thacker, Ky. App., 932 S.W.2d 384, 387 (1996). Gerald and Janice contend that the unreleased contract for deed constituted a breach of the covenant against encumbrances, while John contends

that the unreleased contract for deed was not an encumbrance but represented an ownership interest in a third party.

We agree with John that the unreleased contract for deed was not a breach of the covenant against encumbrances. A "covenant against encumbrances" has been defined as follows:

> A covenant against encumbrances is a stipulation by the covenantor that there are no outstanding rights or interest to the estate conveyed or any part thereof which will diminish the value of the estate, but which are consistent with the passing of the estate. An encumbrance may be defined in this context as any right to or interest in the land which may subsist in a third party, to the diminution of the value of the land, but at the same time consistent with the passage of the fee thereto.

20 Am. Jur. 2d Covenants, Etc., § 74 at 518 (1995). The unreleased contract for deed represented an ownership interest in the property which was not "consistent with the passing of the estate." Rather than being an encumbrance in the nature of a mortgage or other lien, the contract for deed interfered with John's ability to pass title to the property to Gerald and Janice.

Coates v. Niven, Ky., 517 S.W.2d 744 (1974), is factually similar to the case sub judice. In Coates, the purchasers sought to rescind the sale of property when they learned that the Department of Fish and Wildlife might claim title to all or a large portion of the property under a previous deed. In reversing the trial court in that case, the appellate court held as follows:

> The firmly established rule in this jurisdiction is that after a contract for the sale of land has been executed and the vendee

> has been placed in peaceable possession, the vendee cannot maintain an action for rescission or for damages, for breach of warranty of title, until he has been evicted, unless the vendor is insolvent or a nonresident or has been guilty of fraud in the transaction.

Id. at 745. The appellate court did not grant relief to the purchasers "because they did not show an eviction." Id. at 746. See also Pendleton v. Centre College of Kentucky, Ky. App., 818 S.W.2d 616, 620 (1991), holding that "an action cannot be maintained by a vendee of land upon warranty of title until he is either evicted or his title is adjudged inferior in a suit to recover the land."

Gerald and Janice are not seeking a rescission of the deed. That is evident as they are not offering the property back to John in exchange for the money they paid when they purchased the property. However, by arguing the breach of a covenant as a defense to the collection of the note, Gerald and Janice are in essence arguing that they should not have to pay the note due to the alleged breach but should nevertheless be allowed to keep the property. Such an argument is without merit, and we conclude that the trial court properly granted summary judgment on John's claim for money due on the note. Likewise, we conclude that the trial court properly granted summary judgment against Gerald and Janice on their counterclaim as they may not maintain a claim for damages since they have not been evicted. Coates, supra at 745; Pendleton, supra at 620.

Finally, Gerald and Janice argue that the trial court erred in allowing prejudgment interest to be compounded monthly

rather than allowing prejudgment simple interest or, at least, compounding the prejudgment interest annually. The note is silent as to whether interest is to be compound or simple.

"Ordinarily, allowance of interest and the fixing of time from which interest shall accrue are discretionary with the trial court." Beckman v. Time Finance Co., Ky., 334 S.W.2d 898, 899 (1960). See also E.E.O.C. v. Kentucky State Police Dept., 80 F.3d 1086 (6th Cir. 1996), cert. denied 117 S. Ct. 385, 136 L. Ed. 2d 302 (1996), holding that the decision of whether to award compound or simple interest was in the trial court's discretion. Id. at 1098. We hold that it was within the discretion of the trial court to allow prejudgment compound interest rather than simple interest, but we further hold that the trial court abused its discretion in compounding the interest on a monthly basis rather than an annual basis since the note provided for interest "per annum."

The judgment and orders of the Jefferson Circuit Court are affirmed in part and are reversed in part and remanded for the recomputation of interest on the judgment.

GARDNER, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with the majority's holding regarding the assessment of interest in this case. However, I respectfully dissent from the portion of the majority opinion which affirmed the dismissal of

Gerald and Janice Ruhs' claim for breach of the general warranty clause of their deed. First, I disagree with the majority's position that the prior unreleased contract for deed does not constitute an encumbrance. A covenant against encumbrances is violated by the existence of a mortgage. 20 Am.Jur.2d Covenants, Conditions and Restrictions, § 89, p. 526 (1995). There is no practical distinction between the land sale contract using a contract for deed, and a purchase money mortgage, in which the seller conveys legal title to the buyer but retains a lien on the property to secure payment. Sebastian v. Floyd, Ky., 585 S.W.2d 381, 383 (1979). A breach of the covenant against encumbrances does not require eviction, and constitutes a violation of the warranty on the day that the deed was conveyed. 20 Am.Jur.2d Covenants, Etc., § 76, p. 519.

The majority defines "encumbrance" narrowly, excluding any interest which might be inconsistent with the passage of a fee in the property under any circumstance. The unreleased contract for deed in this case was a cloud on the title, and may have interfered with the passage of a fee interest. However, depending upon the facts of the case, the contract for deed may have been merely an encumbrance upon the property. After all, no party asserted an interest in the property. Indeed, Gerald and Janice did not discover the adverse interest until a title search was conducted during the attempted sale to Ray-Mit. Therefore, I conclude that the trial court acted prematurely in dismissing the Ruhs' counterclaim.

Yet even if the unreleased contract for deed did not constitute an encumbrance, it still constituted a breach of the covenant of seisin contained in the general warranty deed. The covenant of seisin guarantees that the grantor is, at the time of the conveyance, lawfully seised of the estate in quality and quantity which he purports to convey. It is a personal covenant which operates *in praesenti* and a breach thereof arises upon delivery of the deed. Ralston v. Thacker, Ky. App., 932 S.W.2d 384, 387 (1994). *See also*, 20 Am.Jur.2d Covenants, Etc., § 69, p. 515.

The majority refers to the rule noted in Pendleton v. Center College of Kentucky, Ky. App., 818 S.W.2d 816 (1990); and Coates v. Niven, Ky., 517 S.W.2d 744 (1974), holding that after a contract for the sale of land has been executed and the vendee has been placed in peaceable possession, the vendee cannot maintain an action for recission or for damages until he has been evicted. Coates, 517 S.W.2d at 745. However, the covenants breached in Pendleton and Coates were that of title. Breach of the covenants against encumbrances or seisin do not require an eviction, but are breached, if at all, upon conveyance of the property. Ralston v. Thacker, *supra* at 387; Blankenship v. Stovall, Ky. App., 862 S.W.2d 333, 334 (1993). Therefore, Gerald and Janice Ruhs were entitled to maintain this action for damages in the absence of an eviction from the property.

The 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. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Summary judgment should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. Paintsville Hospital Company v. Rose, Ky., 683 S.W.2d 255 (1985). I agree with the majority that the alleged breaches of the warranties against encumbrances and seisin did not excuse Gerald and Janice's continued performance under the land sale contract, nor did it allow them to keep the property without making the final payment. However, I conclude that genuine issues of material fact did exist concerning the alleged breaches of the warranties in the deed, and the amount of damages they suffered as a result. Consequently, I believe that summary judgment was improperly granted, and I would remand this action for further proceedings.

BRIEFS FOR APPELLANTS:

David P. Chinn
Louisville, KY

BRIEF FOR APPELLEE:

Jan M. West
Louisville, KY