

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001278-MR

WAREHOUSE, INC.

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE RON DANIELS, JUDGE
ACTION NO. 97-CI-000567

MID-CONTINENT INNS OF
KENTUCKY, LTD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, GARDNER AND MILLER, JUDGES.

EMBERTON, JUDGE: The appellee, Mid-Continent Inns of Kentucky, LTD, filed this action to recover earnest money paid pursuant to a purchase and sale agreement. The appellant, Warehouse, Inc., counterclaimed alleging fraudulent misrepresentations. The trial court found that Warehouse, Inc., materially breached the agreement, ordered the return of the earnest money paid, and dismissed Warehouse's counterclaim.

In November 1995, Warehouse as seller, and Mid-Continent as purchaser, entered into an agreement for the purchase and sale of certain commercial real estate located in

McCracken County. Pursuant to the agreement, Mid-Continent paid to Warehouse \$41,000 as a down payment with the remainder to be paid at closing. The \$41,000, the agreement provided, would be forfeited if Mid-Continent failed to purchase the property. By oral agreement, the January 20, 1996, closing date was extended to February 6, 1996.

On February 6, 1996, Mid-Continent announced it would not purchase the property and requested a return of the earnest money because Warehouse failed to deliver proof that it had acquired the rights to an access road as required by the agreement. Warehouse contends that it did provide such proof and that Mid-Continent refused to close because it had insufficient funds. Additionally, it argues that under the forfeiture provision of the contract, it is entitled to retain the earnest money.

When the parties entered into the purchase and sale agreement, the property being purchased had no direct access to U.S. Highway 60. Contained in the agreement is the following warranty made by Warehouse:

K. That the property has direct access to U.S. Highway 60 across Kentucky Oaks Mall property at a point of intersection on U.S. Highway 60 at the present location of El Chico's Restaurant, by virtue of the platted roadway, designated as 'James Sanders Boulevard.' Said access road, in its entirety shall be conveyed by easement to Purchaser at closing or shall have been previously dedicated to the City of Paducah. Said access road shall be a road constructed in conformity with all state, county and city specifications. Purchaser shall not be responsible for any construction costs or future maintenance of the road. Said roadway shall be sufficient to allow the City of

Paducah to issue a building permit for a 250 room hotel on the 4.52 acre hotel parcel. Additionally, a construction road shall be constructed on the property by Seller prior to closing.

There is no dispute that on February 6, 1996, an access road from the property to Highway 60 did not exist. Warehouse maintains that a November 21, 1995, agreement with the City of Paducah, pursuant to which the city committed to constructing a street from Highway 60 to the Warehouse property line, is sufficient to meet its obligation under its agreement with Mid-Continent.

The significance of an access road to the major highway from the property on which Mid-Continent proposed to build a multi-million dollar hotel complex was clear to Warehouse from the inception of the parties' negotiations in 1994. Although a road was platted, construction had not begun at the time of the parties' scheduled closing, and despite the agreement entered into between Warehouse and the city, neither Warehouse nor the city owned the property on which the road was contemplated. The City Mayor, Albert Jones, testified, that shortly after assuming his position as Mayor in January 1996, there was no activity regarding the construction and indicated that the road would not be built absent evidence as to the identity, intent, and designs of the developers involved with the Warehouse property. Additionally, there was a controversy as to whether the proposed road was intended to have direct access to the highway or was to be only a thoroughfare from the highway to a secondary road.

"[A] conditional agreement is void if the condition does not occur." Edwards v. Inman, Ky. App., 566 S.W.2d 809, 811

(1978). Not only was the condition of an access road not fulfilled at the time of the closing, but Warehouse could not establish that such a road would be built within a reasonable time or would ever be built. Warehouse, therefore, failed to substantially fulfill the condition precedent.

The failure to perform an essential term of the contract was not caused by Mid-Continent, and while possibly attributable to Warehouse's misunderstanding of the building of the access road, Warehouse is not entitled to retain the earnest money. A deposit or partial payment on a contract for the purchase of the property is recoverable where the sale fails because of the fault or some failure on the part of the seller. Graves v. Winer, Ky., 351 S.W.2d 193 (1961).

Warehouse's reliance on the forfeiture clause in the contract which provides that the earnest money is forfeited if Mid-Continent failed or refused to purchase the property is misplaced. The forfeiture clause must be read in the context of the entire contract. City of Louisa v. Newland, Ky., 705 S.W.2d 916 (1986). According to the agreement, Mid-Continent was under no obligation to close the transaction unless the warranties made by Warehouse remained true and correct as of the closing date. Because Warehouse failed to perform its obligation under the contract, it is not entitled to retain the earnest money paid by Mid-Continent. See Guill v. Pugh, 311 Ky. 90, 223 S.W.2d 574, 575 (1949).

Despite its failure to fulfill a material condition of the contract, Warehouse alleges it is entitled to retain the

earnest money because Mid-Continent fraudulently represented to it that it could obtain financing. The agreement provides that Mid-Continent obtain a mortgage loan commitment the terms of which are satisfactory to Mid-Continent. The record discloses that Mid-Continent's efforts to obtain financing were delayed because of questions regarding the existence of the access road. Warehouse was aware of the difficulty in obtaining financing when the initial closing date was extended and made no effort to rescind or alter the agreement. Under the circumstances, the trial court did not err in finding, as a matter of law, that the counter-claim be dismissed. Hopkins v. Performance Tire & Auto Service Center, Inc., Ky. App., 866 S.W.2d 438 (1993).

The judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

E. Frederick Straub, Jr.
Paducah, Kentucky

BRIEF FOR APPELLEE:

David C. Booth
Paducah, Kentucky