

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001561-MR

NORTHERN STAR, INC.; AND
RALPH NORFLEET

APPELLANTS

v. APPEAL FROM McCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 02-CI-00401

UNION PLANTERS BANK, NATIONAL
ASSOCIATION; K.C. ENTERPRISES, INC.;
KIRBY CORDELL; KIMBERLY CORDELL;
COMMONWEALTH OF KENTUCKY, REVENUE
CABINET; COMMONWEALTH OF KENTUCKY,
COUNTY OF MCCREARY; DAVID PERRY, A/K/A
DAVID W. PERRY; CARMAN PERRY; AND
PC LAND, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Northern Star, Inc. and Ralph Norfleet appeal from an order of the McCreary Circuit Court vacating the sale of a parcel of commercial property and directing the forfeiture of a \$70,000 deposit. The circuit court found that Northern Star

¹ Senior Judge John W. Potter, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and Norfleet breached a purchase agreement on the parcel, entitling Union Planters Bank to damages in the amount of the deposit. Northern Star and Norfleet contend that they are entitled to the return of the entire deposit or, alternatively, the entire deposit minus the costs of a resale. For the reasons stated below, we affirm the order on appeal.

K.C. Enterprises, Inc., Kirby Cordell and Kim Cordell were defaulting mortgagors on a parcel of commercial real property located in McCreary County, Kentucky. The mortgagee, Union Planters Bank, instituted a foreclosure action against the mortgagors in McCreary Circuit Court. On February 25, 2003, the bank obtained a summary judgment and order of sale directing the parcel to be sold.

On March 29, 2003, the property was sold to Northern Star, Inc., and Ralph Norfleet. Under the terms of the purchase contract, Northern Star and Norfleet were to pay a \$70,000 deposit representing 10% of the purchase price, with the balance of \$630,000 due within 60 days. Norfleet executed a bond as surety in the amount of \$630,000.

Sometime thereafter, Northern Star and Norfleet learned that the Commonwealth and the United States had placed tax liens on the parcel. The liens were filed prior to the foreclosure.

Before the sale was confirmed, on April 25, 2003, Northern Star and Norfleet filed a motion to set aside the sale. As a basis for the motion, they alleged that undisclosed fuel tanks were situated on the property; that an inspection revealed cracks and other potential problems in the building; that a severe drainage problem was discovered; and, that a new highway right-of-way would result in additional costs. Northern Star and Norfleet sought to terminate the sale and requested the return of the deposit. In the alternative, they requested the resolution of the aforementioned problems.

After a series of agreed orders were entered, on November 25, 2003, the circuit court entered an order overruling the objections of Northern Star and Norfleet and confirming the sale in all respects. On December 4, 2003, Northern Star and Norfleet filed a motion to alter, amend or vacate the November 25, 2003, order confirming the sale. Two weeks later, on December 19, 2003, they moved to withdraw the motion to alter, amend or vacate the sale.

Northern Star and Norfleet failed to pay the \$630,000 balance on the purchase price, and on March 24, 2004, Union Planters Bank filed a motion for an order vacating the order confirming the sale, directing the forfeiture and distribution of the deposit, and directing the resale of the parcel.

Northern Star and Norfleet responded that they objected to the

order forfeiting the deposit, but not to that part of the order vacating the sale.

On May 25, 2004, the circuit court rendered an order vacating the sale and directing the forfeiture of the deposit. The parcel was ordered resold to satisfy the bank's claim to recover on the defaulted note of K.C. Enterprises and the Cordells. On June 3, 2004, Northern Star and Norfleet moved to vacate the May 25, 2004 order. The motion was denied. Thereafter, the parcel was resold on July 31, 2004 to Union Planters Bank for \$402,000. Northern Star and Norfleet now appeal the order that directed the forfeiture of the \$70,000 deposit.

Northern Star and Norfleet first argue that the trial court erred in directing the entire \$70,000 deposit to be forfeited to Union Planters Bank. They maintain that under KRS 451.170(2) the court did not have the authority to order the entire sum forfeited. Rather, they contend that equity requires the trial court to return to them the entire deposit. In the alternative, they argue that the circuit court should have returned the entire deposit minus only the costs of the resale after offsetting the amounts for the title defects, damages, and costs. In sum, they seek an order reversing the order on appeal and directing the circuit court to refund the deposit in whole or in part.

KRS 451.170(2), upon which Northern Star and Norfleet rely, states that,

The court may by rule require purchasers at judicial sales to deposit with the officers making the sale, at the time of sale, a specified sum of money, sufficient to cover the expense of a resale. If the deposit is not made at that time, the officer shall at once resell the property.

We are not persuaded by Northern Star and Norfleet's contention that this statutory language bars the circuit court from requiring a deposit in excess of the anticipated expense of resale, nor that it prohibits the court from ordering that the deposit be forfeited in the event of the buyers' non-performance. Rather, KRS 451.170(2) merely states that the court *may* require a deposit sufficient to cover the expense of resale. It does not address whether the court may require a larger deposit, nor whether the deposit may be forfeited for non-performance of the purchase agreement.

A deposit is "[M]oney placed with a person as earnest money or security for the performance of a contract. The money will be forfeited if the depositor fails to perform."² This general principle applies specifically in the context of real estate purchase contracts. "The ordinary . . . real estate contract . . . generally provides that in the event the buyer fails to perform the contract, the seller may retain the down

² Black's Law Dictionary (8th ed. 2004).

payment (usually no more than ten per cent of the contract price) as liquidated damages.”³ Furthermore, the Kentucky Supreme Court has held that a party to a real estate sales contract who advanced money in part performance and then failed to make further payments was not entitled to recover any of the money so advanced.⁴

The trial court is presumptively correct in its rulings, and the burden rests with Northern Star and Norfleet to overcome this strong presumption.⁵ Northern Star and Norfleet have not met that burden. One may reasonably ask what Northern Star and Norfleet believed their deposit to represent, if not surety of their future performance. Given that the trial court has discretion in establishing the terms of a judicial sale (so long as those terms comport with KRS Chapter 451), and because Northern Star and Norfleet accepted those terms and subsequently failed to perform by paying the \$630,000 balance, we have no basis for tampering with the order on appeal on this issue.

For the same reasons, we are not persuaded by the argument of Northern Star and Norfleet that equity requires the return of the deposit, nor that in the alternative they are

³ Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979).

⁴ Id. at 384, citing Miles v. Proffitt, 266 S.W.2d 333 (Ky. 1954). Miles referred to an installment land sales contract, but Sebastian notes that the modern trend is to regard such contracts as analogous to conventional mortgages.

⁵ City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964).

entitled to a partial refund of the deposit. Again, a legal basis exists both for the requirement that a deposit be paid, and that it be forfeited for non-performance of the purchase agreement. Nothing in the record or the law indicates that the trial court abused this discretion. As such, these issues do not justify reversing the order on appeal.

For the foregoing reasons, we affirm the order of the McCreary Circuit Court.

ALL CONCUR.

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