RENDERED: APRIL 6, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002116-MR

HERBERT L. JUMP;
AND VERNA M. JUMP — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 03-CI-00944

TIMOTHY IRWIN MILLER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,[1] SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Herbert L. Jump and his wife, Verna M. Jump, appeal from an order and judgment of the Boone Circuit Court in which the trial court adopted the deputy master commissioner's report which recommended dismissal of the Jumps' complaint against Timothy Irwin Miller. On appeal, the Jumps argue that the trial court erred when it adopted the report since the deputy master commissioner erred when he

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

held that the Jumps had failed to prove the lease option agreement between them and Miller was unconscionable. Finding no error, we affirm.

In 1998, the Jumps purchased approximately 20 acres of real property in Burlington, Kentucky. Later, in early 2002, Miller approached the Jumps about purchasing the 20 acres. On March 8, 2002, Miller and the Jumps entered into a purchase contract in which the Jumps agreed to sell 15.6836 acres of the 20 acres to Miller for $145,000.00. The purchase contract incorporated by reference a lease option agreement between the Jumps and Miller in which the Jumps agreed to lease the remaining 4.5 acres to Miller for 12 months in exchange for $100.00 per year. According to the agreement, the lease would automatically renew unless Miller decided to terminate it. In addition, Miller agreed to pay any real estate taxes assessed against the rental property. Most importantly, the agreement contained a provision granting Miller an option to purchase the remaining acreage for $55,000.00, provided he exercised the option within 3 years. Subsequently, in June of 2002, the parties closed on the purchase contract, and Miller paid the first year's rent on the 4.5 acres.

In March of 2003, the Jumps, through an attorney, sent Miller a letter in which they attempted to terminate the lease option agreement. On March 26th, Miller, through his attorney, sent a letter to the Jumps' attorney in which Miller contested their right to unilaterally terminate the lease option agreement. Moreover, in the March 26th letter, Miller informed the Jumps that he intended to exercise his option to buy the remaining acreage.

On July 8, 2003, the Jumps filed in the Boone Circuit Court a complaint and petition for declaratory judgment against Miller. In their complaint, the Jumps claimed that the lease option agreement was unconscionable, that no consideration was given for the purchase option provision, and that Miller had violated the terms of the lease option agreement by failing to pay the real estate taxes assessed against the rental property. Miller filed a counterclaim against the Jumps seeking to enforce the purchase option provision. The trial court assigned the Jumps' case to a deputy master commissioner.

On August 4, 2005, the deputy master commissioner held a final hearing at which the Jumps and Miller testified. Verna Jump testified that she and Herbert had been willing to sell approximately 16 acres of their property to Miller, and she admitted that Miller had paid a fair and reasonable amount for the property. According to Verna's testimony, if she and Herbert ever decided to sell the remaining acreage, then they would give Miller the first opportunity to buy it. Verna admitted that she signed both the purchase contract and the lease option agreement but that she did not read either document. Additionally, she testified that they did not have an attorney review the documents. Herbert Jump testified as well, and his testimony was consistent with his wife's. In addition, Herbert testified that he only had a 7th grade education and that no one explained the lease option agreement to him. Moreover, Herbert did not indicate whether he read either the purchase contract or the lease option agreement. At the final hearing, the Jumps raised the arguments presented in their complaint; additionally, they

argued that Miller had obtained the lease option agreement by fraud and misrepresentation.

At the hearing, Miller testified that he would not have bought the 15.6836 acres unless he had an agreement to buy the remaining acreage. According to Miller, he only agreed to such a piecemeal bargain because he had trouble obtaining financing for the entire 20 acres and because the Jumps' daughter was living in an old house on the property and the Jumps wished for her to continue living there until Miller had put his finances in order.

In the deputy master commissioner's report, he concluded that the $145,000.00 that Miller had paid for the 15.6836 acres formed part of the consideration for the purchase option provision, so that provision was supported by consideration. Upon considering the purchase contract and lease option agreement together, the deputy master commissioner concluded that the Jumps had received a fair bargain. Thus, he held that the Jumps had failed to prove that the lease option agreement was unconscionable and that the purchase option lacked consideration. Regarding fraud, the deputy master commissioner held that the Jumps had failed to prove fraud, and they could not claim fraud as a matter of law since they had not read the lease option agreement. Regarding breach of the agreement, the deputy master commissioner found that the Jumps presented no evidence that they had paid the taxes on the rental property, and the deputy master commissioner concluded that even if Miller had failed to pay the taxes, that was not sufficient to set aside the agreement. The deputy master commissioner recommended that the trial court conclude that the lease option agreement was valid and binding on the

parties; that the trial court order the parties to comply with it; that the trial court dismiss the Jumps' complaint with prejudice; and that the trial court order Miller to pay 90% of any taxes assessed against the remaining acreage for the years 2003, 2004 and 2005.

After the trial court adopted the deputy master commissioner's report on October 6, 2005, the Jumps did not file written objections to the deputy master commissioner's report; instead, they filed an appeal with this Court.

On appeal, the Jumps claim that they are elderly and have limited education. They claim that they did not understand the provisions contained in the lease option agreement, even though they admit that they never read it. According to the Jumps, they thought the purchase option provision meant that Miller would have the right of first refusal in the event that they ever decided to sell the remaining acreage. The Jumps aver that they did not consult with an attorney regarding the lease option agreement. In addition, they claim that the purchase option lacked consideration; that the lease option agreement did not contain an accurate legal description of the remaining acreage; that the agreement lacked a determinable beginning and end; and that it gave Miller the unilateral right to terminate it. Citing *Louisville Bear Safety Service, Inc. v. South Central Bell Telephone,* 571 S.W.2d 438 (Ky.App. 1978), the Jumps argue that, based on the above assertions, the lease option agreement was unconscionable.

In response, Miller points out that the Jumps failed to file objections to the deputy master commissioner's report as provided by CR 53.06(2). Miller argues that, in a cause of action tried before a commissioner, a party must file written objections to the

commissioner's report with the trial court in order to preserve any claim of error for appellate review. *Eiland v. Ferrell,* 937 S.W.2d 713, 716 (Ky. 1997).

CR 53.06(2) reads:

> Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in CR 6.04. The court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

In *Eiland v. Ferrell, supra*, the Supreme Court of Kentucky addressed this issue and held:

> While actions tried before the court without intervention of a jury are governed by CR 52, *et. seq.*, it seems apparent that on matters referred to a commissioner pursuant to CR 53.03, the specific provisions of the rules relating to commissioners prevail. In general, a party who desires to object to a report must do so as provided in CR 53.06(2) or be precluded from questioning on appeal the action of the circuit court in confirming the commissioner's report. Such a rule does not create in the commissioner an additional level of the Court of Justice or elevate the status of the office, but merely recognizes that enforcement of such a rule is necessary as the means of informing the trial court of the parties' disagreement with or complaint about the report. Ordinarily, appellate courts review only the orders or judgments of lower courts, and pursuant to CR 46, a party must make "known to the court the action which he desires the court to take or his objection to the action of the court." If we should merely apply the provisions of CR 52.03, as appellant urges, and authorize review of questions of sufficiency of evidence without requiring objections to the commissioner's report, appeals would be taken from trial court judgments adopting commissioner's reports without the trial court ever having been apprised of any disagreement with the report. Not only would this amount to the blind-siding of trial courts, it would also result in unnecessary appeals, confusion in appellate courts, needless reversals, and in general, would

> invite all the mischief associated with appellate review of unpreserved error.

Id. at 716 (Citations omitted.). The Supreme Court has made it abundantly clear that written objections are necessary to preserve claims of error when a trial court has adopted a commissioner's report even if the claim is questioning the sufficiency of the evidence. In the present case, the Jumps failed to file written objections with the trial court; thus, they failed to preserve the issue of unconscionability for appeal.

However, despite being unpreserved, we will briefly address the Jumps' argument. Essentially, the Jumps are questioning the sufficiency of the evidence. That is, they are claiming that they presented sufficient evidence to compel a conclusion that the lease option agreement was unconscionable. However, after reviewing the record, we agree with the deputy master commissioner that the Jumps failed to prove unconscionability.

The judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
Darrell A. Cox Covington, Kentucky	Thomas R. Nienaber Covington, Kentucky