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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001842-MR

RALPH T. GATEWOOD and DOROTHY T. GATEWOOD — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 04-CI-001680

GERALDINE H. SANDERSON, TRUSTEE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND STUMBO, JUDGES; KNOPF, SENIOR JUDGE.[1]

KNOPF, SENIOR JUDGE: At issue in this appeal is the propriety of the summary dismissal of appellants' action for specific performance of a real estate purchase agreement. Finding no error in the trial court's application of the law to the undisputed facts, we affirm its judgment in this case.

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

In 1995, appellee Geraldine H. Sanderson became trustee of an inter vivos trust which included among its assets the 23.193-acre tract of land which is the subject of this appeal. As noted by the trial court, prior to the agreement with appellants, Sanderson had repeatedly attempted to sell this tract of land without success. On June 3, 2004, however, she agreed to sell the property to appellants for the sum of $250,000.00 and the closing was set for June 11, 2004.

Prior to the closing, appellants contacted an attorney to examine the property's title as well as to assess its development potential. After discovering several title defects, the attorney wrote a letter dated June 10, 2004, to Sanderson's counsel addressing these title issues. Although most of the defects were cured, a title defect concerning a .113 acre tract of land went unresolved and precipitated the dispute at the heart of this appeal.

The disputed tract had been part of a land exchange between the Hockensmith heirs, settlors of the trust, and T.O.Thompson. This 1978 conveyance of the .113 acre tract to the Hockensmiths was recorded in an deed of exchange, but the property was never placed into the inter vivos trust controlled by Sanderson. Although the .113 acre tract was not part of the legal description of the land encompassed by the sales agreement between Sanderson and appellants, it was included in a survey of the larger tract which had been appended to the purchase agreement. In his June 10th letter to Sanderson's counsel, appellants' attorney described the .113 acre tract as a small “but important section of the property” which “was not included in the deed description of the

property conveyed from the Hockensmith heirs into the *Inter Vivos* Trust." [Emphasis original.] He acknowledged that because the property was not included in the trust, Sanderson had no power to sell it. Appellants' counsel suggested that the Hockensmith heirs either convey the property to the trust or sell it separately to appellants.

In a June 27, 2004 letter, appellants' counsel stated that his clients would be willing to purchase the front portion of the tract immediately and then close on the back half at a later date to allow additional time for Sanderson to cure the defect so that appellants could obtain marketable title to the entire tract. Sanderson's counsel responded with an August 2, 2004 letter which contained the following statements which are of particular pertinence to the issues advanced in this appeal:

> However, Ms. Sanderson is unwilling and unable to revise the deed to include the sliver of land which was not included in the property conveyed to Ms. Sanderson as Trustee of the *Inter Vivos* Trust dated April 14, 1995. Furthermore, she is not interested in selling the front half of the property as described in your letter.
>
> Ms. Sanderson is ready to execute the deed as originally contemplated without that sliver of land conveying the property to your clients. [Sic]. We believe ten (10) days from this date should be sufficient time to finally close this transaction. If your clients are unwilling to close within that period of time, we will consider the contract null and void.

More than a month later, on September 13, 2004, appellants' counsel responded with a letter which included the following terms:

> As I related to you last week, my clients would like to pursue the purchase of the above referenced property, pursuant to the terms of the Real Estate Sales and Purchase Contract entered into on June 28, 2004, with two caveats.

> (1) The first would be that we would like it conveyed in two (2) tracts of land. I believe that Ms. Sanderson will provide to us the survey conducted by Wayne Carroll so we can obtain the legal description from that survey. If not, we can have Mr. Carroll prepare for us the legal description.
> (2) We would also need for the individual owners to convey their interest in the disputed sliver of land connecting the two (2) tracts. I understand that all of the heirs would not sign, but we would need as many as possible to secure our rights to the property. Therefore, I assume that Ms. Sanderson would agree to sign and if Ms. Wood, Ms. Hockensmith and the Shaw brothers would sign, this would give us sufficient ownership in that sliver of land and we would proceed with closing.

After considering these two letters in conjunction with the terms of the purchase agreement, the trial court concluded that Sanderson was entitled to judgment as a matter of law. We agree.

The purchase agreement clearly specified what was to occur should Sanderson fail to be able to convey "unencumbered, good, and marketable fee simple title":

> If title to the property proves defective..., after Seller's failure to cure such defect within thirty (30) days from the date of notification to Seller, then Buyers may either accept title or declare this contract null and void and rescind their offer, and Buyers good faith deposit shall be returned to them.

As noted by the trial court, nothing in this term required Sanderson to cure the defect. Furthermore, the undisputed facts make clear that Sanderson had no authority to convey the .113 acre tract on her own and no obligation to somehow attempt to coerce the other

owners to do so. Thus, contrary to appellants' protestations in this appeal, nothing in the record leads us to conclude that Sanderson acted other than in good faith regarding the consummation of the purchase agreement insofar as she was able. The letter of August 2 made clear that she was ready and willing to convey the property as originally contemplated with the exception of the .113 acre tract she had no power to convey. Finally on the issue of good faith, we are convinced that appellants' reliance upon *Cowden Mfg. Co. v. Systems Equipment Lessors, Inc*., 608 S.W.2d 58 (Ky.App.1980), is misplaced. Unlike the situation in *Cowden*, Sanderson is not the cause of her inability to perform the contract. The stumbling block here is a mistake of which neither she nor the Hockensmith heirs were aware at the time the purchase agreement was signed. Nothing in Sanderson's conduct implies an unreasonable refusal to provide the good and marketable title contemplated by the agreement.

Appellants next challenge as error the trial court's conclusion that they failed to timely accept the title "as is," despite the remaining defect. The previously cited paragraph of the purchase agreement allowed Sanderson thirty days after notification of defects in which to attempt to cure any problems with the title. Because appellants apprised her of the defects on June 10, 2004, Sanderson had until July 10, 2004 to cure. At that point, appellants had two options: accept the title "as is" or declare the contract null and void.

However, apparently because the parties were still negotiating, the strict terms of the contract were not followed. Accordingly, we agree with the trial court that

Sanderson's letter of August 2 imposed a firm deadline of August 12, 2004, for acceptance of the title "as is." Like the trial court, we find nothing unreasonable or unfair with this extended deadline for acceptance under the terms of the original purchase agreement. And, like the trial court, we are convinced that there is no dispute that appellants failed to unconditionally accept the property by that date. Although they continued to insist upon a cure of the defects, their letters to Sanderson constituted nothing more than counter-offers which she was not obliged to accept.

Relying upon *Henry v. Gaddy*, 44 Ky. 450, 5 B. Mon. 450 (1845), appellants suggest that Sanderson had waived the right to demand compliance with the time set out in the contract and was thus apparently required to continue attempts to either cure or negotiate until they decided to either accept or terminate. We do not agree that *Henry* stands for that proposition nor do we find it applicable to the facts of the instant case. The buyer in *Gaddy* was ready to perform; appellants in this case were attaching conditions to performance. The seller in *Gaddy* was delaying conveyance; Sanderson was ready to convey according to the legal description within a reasonable time certain. Under these circumstances, we concur the trial court's assessment that Sanderson was entitled to judgment on appellants' specific performance claim as a matter of law.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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