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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001070-MR

PHYLLIS M. SPALDING AND
NORMAN A. SPALDING — APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 06-CI-01005

GARY R. MYERS AND
SUNDOWNER OF KENTUCKY, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, STUMBO AND VANMETER, JUDGES.

KELLER, JUDGE: Phyllis and Norman Spalding (the Spaldings) appeal from a judgment of the Bullitt Circuit Court ordering specific performance of an option to purchase certain real property. They also appeal from an order awarding attorney

fees to Gary Myers (Myers) and Sundowner of Kentucky, Inc. (Sundowner) (collectively the Appellees). For the following reasons, we affirm.

FACTS

Sundowner is a Kentucky corporation that sells recreational vehicles and trailers, and conducts business on property located in Shepherdsville, Kentucky (the Property). The Property is owned by the Spaldings. Phyllis was the sole equity owner of Sundowner until July 15, 2004, when Myers and the Spaldings entered into a Stock Purchase Agreement (SPA). Pursuant to the SPA, Myers purchased all of the 1000 issued and outstanding shares of Sundowner from Phyllis. The SPA provided that Myers was to pay $200,000 to Phyllis for the stock. The sum was to be paid with a $50,000 down payment and a balance of $150,000 paid pursuant to a promissory note. The SPA further provided that the $50,000 down payment was to be made with a $25,000 payment at closing and the remaining $25,000 to be paid into Sundowner within thirty days following the closing. It is undisputed that Myers paid the Spaldings the initial $25,000 at the closing.

The Spaldings and Sundowner also entered into a Triple Net Lease (the Lease) on July 15, 2004, which provided that the Spaldings would lease the Property to Sundowner. The Lease had an initial term of two years beginning July 15, 2004, and ending July 15, 2006, with an option to renew via 180 days' prior written notice for up to two consecutive two-year terms. The Lease further provided that, during the term of the Lease and, "upon 60 days written notice" to

the Spaldings, Sundowner had the option to purchase the Property for $659,000, less a credit for all the rent that Sundowner had previously paid.

In March 2006, Myers obtained a loan commitment for Sundowner to purchase the Property, and subsequently retained legal counsel, Steve Solomon (Solomon), to assist with finalizing the purchase. In his deposition, Solomon testified that he contacted Norman on April 20, 2006, to confirm that the Appellees were exercising the option to purchase the property. According to Solomon, Norman acknowledged that the purchase option had been exercised and that he had been working with Myers on the matter. Norman also advised Solomon to contact Jack Seay (Seay), an attorney assisting the Spaldings with the sale. Solomon and Seay exchanged many phone calls and emails during the spring and summer of 2006 regarding the purchase option.

Eventually, a dispute between the parties arose regarding whether the Spaldings were obligated to satisfy debts to the Bullitt County Bank (the BCB debt) and Lynn and Betty Cambron (the Cambron debt). The BCB debt is a promissory note executed by Sundowner that is secured by a mortgage on the Property to BCB on February 3, 2003. The promissory note is also personally guaranteed by Phyllis. As to the Cambron debt, when Phyllis purchased Sundowner[1] from George and Vivian Cambron, she allegedly verbally agreed to assume an obligation to pay an outstanding note to Lynn and Betty Cambron. The

[1] Although it is not clear from the record on appeal, it appears that the name of the company at the time Phyllis purchased it was Cambron Trailers, Inc. Phyllis apparently changed the company's name to Sundowner.

Spaldings believed that the two debts were corporate debts that Sundowner was responsible for, and Myers believed that the two debts were the Spaldings' personal debts. The closing did not occur as a result of this dispute.

Thereafter, the Appellees filed suit in the Bullitt Circuit Court against the Spaldings alleging breach of contract and seeking specific performance to compel the Spaldings to convey the Property free of all liens and encumbrances, including the BCB and Cambron debts. The Appellees also sought attorney fees. The Spaldings disputed these claims arguing that the purchase option could not be enforced because Sundowner was required to give written notice to exercise the option as required by the Lease. The Spaldings further argued that, even if the purchase option had been properly exercised, the BCB and Cambron debts were corporate debts of Sundowner, which Sundowner was obligated to pay as a condition to transfer the Property. Additionally, the Spaldings argued that Myers still owed Phyllis the second $25,000 of the initial $50,000 down payment pursuant to the SPA.

On October 2, 2008, the trial court held a bench trial. Thereafter, the trial court entered its judgment concluding that the Spaldings had actual knowledge of Sundowner's intent to exercise the purchase option and had provided proper written notice of that intent to the Spaldings. The trial court further concluded that Sundowner was not obligated to pay the BCB and Cambron debts. Additionally, the trial court determined that Myers complied with his obligation under the SPA to pay the second $25,000 of the $50,000 down payment. The trial court also

concluded that Sundowner was entitled to specific performance of the Spaldings' obligation to transfer the Property pursuant to the purchase option. Therefore, it ordered the Spaldings to execute the documents necessary to transfer the Property.

On March 12, 2009, the Appellees filed a motion for the trial court to amend its decision by awarding them attorney fees. The trial court granted the motion and awarded the Appellees attorney fees in the amount of $30,000. This appeal followed. We set forth additional facts as necessary below.

STANDARD OF REVIEW

In this matter, the trial court acted as a finder of fact and reviewed the evidence firsthand; therefore, unless we conclude that the trial court's findings of fact are clearly erroneous, we will not set them aside. Kentucky Rule of Civil Procedure (CR) 52.01; *A & A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999). "The trial court's conclusions of law, however, including its interpretation of the written contract, are subject to independent appellate determination." *A & A Mech.*, 998 S.W.2d at 509.

ANALYSIS

On appeal, the Spaldings argue that the trial court erred by: (1) ordering specific performance of the purchase option; (2) concluding that the Spaldings were responsible for the BCB and Cambron debts; (3) concluding that Myers did not still owe them $25,000 of the $50,000 down payment pursuant to

the SPA; and (4) awarding the Appellees attorney fees. We address each issue in turn.

1. Option to Purchase the Property

The Spaldings first contend that the trial court erred by ordering specific performance of the purchase option because the Appellees did not comply with the written notice requirement set forth in the Lease. In support of their argument, the Spaldings point to Articles 3.5, 11.5, and 11.6 of the Lease. Article 3.5 of the Lease provides that, anytime during the term of the Lease, and upon 60 days prior written notice, Sundowner shall have the option to purchase the Property. The notice provision set forth in Article 11.5 of the Lease provides that notice must be delivered to the addresses listed therein. Article 11.6 provides that a waiver of a provision in the lease is not binding unless executed in writing. The Spaldings argue that, because the Appellees never sent written notice to their specified address, they did not properly exercise their option to purchase the Property. Furthermore, the Spaldings contend that, to the extent that their communications with Myers and his attorney regarding the purchase option constituted a waiver, such a waiver is not binding as it was not provided in writing.

We agree with the Spaldings that Sundowner did not comply with Articles 3.5 and 11.5. As set forth in *Allen v. Lawyers Mut. Ins. Co. of Kentucky*, 216 S.W.3d 657, 659 (Ky. App. 2007), "Where there is no ambiguity, a written instrument is to be strictly enforced according to its terms which are to be interpreted by assigning language its ordinary meaning and without resort to

extrinsic evidence." Although there were emails between the parties' attorneys regarding Sundowner's desire to exercise the purchase option, such written notice was not sent in the manner set forth in Article 11.5. Thus, the Appellees did not provide proper notice of their intent to exercise the purchase option in accordance with the terms of the Lease.

However, we conclude the Spaldings are estopped from asserting that Sundowner failed to comply with the notice provision. As set forth in *CSX Transp., Inc. v. First Nat. Bank of Grayson*, 14 S.W.3d 563, 568 (Ky. App. 1999):

> A party may be estopped to insist upon a claim or take a position which is inconsistent with an admission or denial of a fact which he has previously made or with a
>
> course of conduct in reliance upon which the other party changed his position to his detriment or prejudice.

(Citations and quotations omitted).

In this case, there was testimony that Myers spoke with Norman regarding the purchase option. Solomon also spoke with Norman and the Spalding's attorney. Additionally, there were numerous phone calls and emails between the parties' attorneys regarding the purchase option and the parties' desire to move forward with the option. It is undisputed that, until this lawsuit was filed, the Spaldings never claimed that they did not receive proper notice of the Appellees' intent to exercise the purchase option.

Myers testified that after making his intentions to exercise the option verbally known to the Spaldings, he obtained a survey, appraisal, and

environmental assessment of the Property; set up a new LLC to hold the Property; obtained financing to purchase the Property; and hired Solomon to handle the closing. Based on the preceding, we conclude that the Spaldings are estopped from asserting that the Appellees failed to provide written notice of their intent to exercise the purchase option. Therefore, the trial court did not err in ordering specific performance of the purchase option.

2. BCB and Cambron Debts

Next, the Spaldings contend that the trial court incorrectly determined that they were responsible for the BCB and Cambron debts. We disagree.

As correctly noted by the trial court, there is no reference in the SPA or the Lease regarding the assumption of the Cambron or BCB debts by Sundowner. Further, Section 5(o) of the SPA provides that:

> Unless otherwise appended to this Agreement as a schedule, [Sundowner] is the sole and exclusive owner of, and has good and valid title to, all assets used in the Business, wherever located, free and clear of all liens, mortgages, pledges, encumbrances or other charges other than having title to the Real Property and [Phyllis's] Personal Assets.

Section 2(c) sets forth the personal assets of Phyllis which were excluded from the transaction. Pursuant to these two provisions, Myers acquired all of Sundowners' assets, with the exception of Phyllis's personal assets specifically set forth in the agreement, free and clear of all liens, mortgages, and encumbrances. Thus, while the BCB promissory note was between Sundowner and BCB, Myers purchased

Sundowner free and clear of the BCB debt. Likewise, he purchased Sundowner free and clear of the Cambron debt.

Additionally, Section 6(b) of the SPA provided that "At Closing, [Myers] will acquire [Phyllis's] Stock free and clear of any security interests, mortgages, adverse claims, liens or encumbrances of any nature or description whatsoever . . . ." Furthermore, Article 3.5 of the Lease provided that the Spaldings were to transfer the Property free and clear of all liens and encumbrances. We believe these provisions further supports the Appellees' position that the Spaldings were required to transfer the property free and clear of the BCB and Cambron debts.

We note that, although there is no reference to the assumption of the Cambron or BCB debts by Sundowner contained in the SPA, these debts are listed as liabilities on the balance sheet attached to the SPA. To the extent that this creates an ambiguity in the SPA, we believe the parties' course of conduct clarifies their intent that the Appellees were not assuming these debts. *See Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (Ky. 2003). Specifically, Myers testified that he and the Spaldings agreed that Sundowner would directly pay the BCB and Cambron debts and another mortgage on the Property in lieu of making monthly rental payments to the Spaldings. Sundowner made these payments for more than two years with no complaints from the Spaldings. Myers further testified that the amount of the monthly rent set forth in the Lease was determined by the amount that the Spaldings had to pay on their personal obligations. Based on the

preceding, it is evident that the parties treated the BCB and Cambron debts as personal to the Spaldings, not as corporate debts. Therefore, the trial court did not err in concluding that the Spaldings are responsible for paying the BCB and Cambron debts.

3. $25,000 Down Payment

Next, the Spaldings contend that the trial court erred in concluding that Myers did not owe them $25,000 of the $50,000 down payment as required by the SPA. We disagree.

As set forth above, the SPA provided that the remaining $25,000 of the down payment was **"to be paid into [Sundowner]"** within thirty days following the closing. Additionally, the SPA stated that the down payment

> will pay-off the consignment obligation owed by [Sundowner] to ***(i)*** A. E. Embry (regarding that certain trailer identified as Unit NO. VA3213 ("**Trailer No. 1**"). Seller and Purchaser acknowledge that [Myers] payment to [Sundowner] in order to pay-off such previously existing consignment liability for Trailer No.1 inures to Seller's benefit and is, therefore, an offset against the Purchase Price.

At trial, Myers testified that the reason that the down payment was structured this way in the SPA was to address a debt Phyllis Spalding owed with respect to a trailer that her father, A.E. Embry, purchased. This trailer was encumbered by a lien held by Bank of America. According to Myers, Phyllis

intended to take money out of Sundowner's corporate account prior to selling him Sundowner to pay off the trailer lien. Myers testified that they agreed he would put the second $25,000 down payment back into Sundowner so that there would be money in Sundowner's corporate account to pay the company's bills. Myers further testified that it was not until he filed this lawsuit that the Spaldings complained about the second $25,000 down payment.

Because the SPA provides that Myers was to pay the second $25,000 **into** Sundowner and not to the Spaldings, the Spaldings lacked standing to assert a claim to the $25,000 owed to Sundowner. *See Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 473 (Ky. 1998) (noting that in order to have standing, a party "must have a judicially recognizable interest in the subject matter of the suit"). We therefore conclude that the trial court did not err in determining that the Spaldings were not entitled to the second $25,000 down payment.

4. Attorney Fees

Finally, the Spaldings argue that the trial court incorrectly awarded attorney fees to the Appellees. We disagree.

The law is well-settled that a contractual provision providing for the award of attorney's fees is valid and enforceable. *See Aetna Casualty & Surety Co. v. Com.,* 179 S.W.3d 830 (Ky. 2005); *Cummings v. Covey,* 229 S.W.3d 59 (Ky. App. 2007). In this case, Article 10.4 of the Lease provides that:

> If any party shall default with respect to any of such party's obligations under this Lease, such defaulting party shall pay all costs, expenses, and reasonable

> attorneys' fees which are incurred or paid by the other parties to this Lease in enforcing the covenants and agreements of the defaulting party under this Lease.

Article 10.2(a) provides that:

> A material default and breach of this Lease by [the Spaldings] shall occur upon the failure by [the Spaldings] to observe or perform any of the covenants, conditions, or provisions of this Lease to be observed or performed by [the Spaldings] . . . .

Because the Spaldings would not transfer the Property after the Appellees' exercised the purchase option, the Spaldings were in default of Section 3.5 of the Lease. Based on Articles 10.2(a) and 10.4, we cannot say that the trial court abused its discretion in awarding attorney fees. *See Giacalone v. Giacalone*, 876 S.W.2d 616, 621 (Ky. 1994) (concluding that an award of attorney fees will not be disturbed absent an abuse of discretion).

CONCLUSION

For the foregoing reasons, we affirm the Bullitt Circuit Court.

STUMBO, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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