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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000427-MR
AND
NO. 2009-CA-000011-MR

MARIA JACOBS AND SHANE JACOBS
D/B/A JACOBS LADDER, LLC — APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 07-CI-00510

CENTER SERVICES, INC.;
LOUISVILLE MALL ASSOCIATES, L.P.;
W & G LOUISVILLE ASSOCIATES; AND
THREEMCEE PROPERTIES, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

DIXON, JUDGE: In these consolidated appeals, Maria Jacobs and Shane Jacobs, doing business as Jacobs Ladder, LLC, (hereinafter collectively "Appellants")

appeal from an order of the Oldham Circuit Court granting summary judgment in favor of Center Services, Inc. ("CSI"), Louisville Mall Associates, L.P., W & G Louisville Associates, and Threemcee Properties, LLC. Appellants also appeal a subsequent order of the Oldham Circuit Court denying their motion for post judgment relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Finding no error, we affirm.

Appellants operated a pre-school in the Crestwood Station shopping center in Crestwood, Kentucky. The shopping center was owned by Louisville Mall Associates and managed by CSI.[1] In addition to renting space inside the center, Appellants also had permission from CSI to utilize a fenced playground located on an outlot adjacent to the shopping center (hereinafter "the outlot"). On May 23, 2007, Jess Greene, the vice president of development for CSI, sent a letter to Appellants, which is the focus of this controversy. The introductory paragraph of the letter stated:

> This Letter of Intent will summarize the terms and conditions under which Center Services, Inc. is willing to simultaneously proceed with (1) a Lease Agreement for Space 14 within the Crestwood Station Shopping Center and (2) a Purchase Agreement of Property (as defined below).

[1] We note that this dispute concerns the transaction between Appellants and CSI. Further, it appears W & G Louisville Associates had no tangible interest in this case, as it was the prior owner of the outlot property, which it sold to Louisville Mall Associates. Finally, Threemcee Properties, LLC, was named as a party to the lawsuit because it claimed title to the outlot by adverse possession.

The remainder of the letter summarized several terms for both a lease agreement and a purchase agreement, as the Appellants wanted to purchase the outlot to build a daycare center. At the conclusion, a signature line for CSI was left blank, and a signature line was provided for Appellants to accept or reject the terms contained in the letter. Appellants accepted the terms, signed the letter, and tendered a $7500.00 deposit to CSI.[2]

On June 8, 2007, Greene sent a second letter to Appellants, which stated in part:

> Unfortunately a problem has just popped up that is going to delay our planned lot sale. Yesterday (Thursday June 7, 2007) the Oldham County School Board's General Counsel, Anne Coorsen, called to advise us that there is a potential Adverse Possession Claim from the previous adjoining property Owner, BB&T. This claim is against a portion of the property that we want to sell to you.
>
> * * *
>
> I apologize for this unforeseen obstacle and will keep you informed of our progress. We would, of course, be willing to go forward with the sale to you if you would close subject to the bank's claim. I doubt that your attorney would permit this – and I must say that I don't blame him.

Shortly thereafter, on July 13, 2007, Appellants filed a complaint against CSI alleging breach of contract and seeking specific performance of the May 23, 2007, agreement. CSI filed an answer denying Appellants' allegations and asserting a counter-claim for trespass. On December 27, 2007, the court held a

[2] One of the terms delineated in the letter was payment of a "purchase deposit." While Appellants characterize the deposit as accepted by CSI, they do not dispute CSI's contention that the deposit was returned.

hearing to address CSI's motion to obtain rent from Appellants for their use of the outlot. Based on expert testimony from a commercial real estate agent, the court concluded CSI was entitled to monthly rent of $1125.00. The parties subsequently filed cross-motions for summary judgment, and on January 30, 2008, the court granted summary judgment in favor of CSI. Thereafter, Appellants filed a notice of appeal with this Court. (2008-CA-000427-MR).

While their appeal was pending, Appellants moved the trial court for post-judgment relief pursuant to CR 60.02. This Court agreed to hold the first appeal in abeyance until the trial court ruled on the CR 60.02 motion. On December 4, 2008, the trial court rendered an order denying Appellants' motion. Appellants then filed a second notice of appeal (2009-CA-000011), and the two appeals were consolidated for review by this Court.

We first address Appellants' contention that the court erred by granting summary judgment in favor of CSI. On appeal of a summary judgment, we consider whether the trial court correctly found that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (quoting Kentucky Rules of Civil Procedure (CR) 56.03). Furthermore, we are mindful that "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id*. at 482.

In the case at bar, both parties moved for summary judgment. Appellants believed they were entitled to summary judgment because the Letter of Intent constituted a contract for sale of real estate, and CSI breached the contract by failing to follow through with the sale. CSI argued it was entitled to summary judgment because the Letter of Intent was not an enforceable contract. After thorough review of the record and consideration of the parties' arguments, we conclude that summary judgment in favor of CSI was proper.

Appellants refer to the Letter of Intent as a "Purchase Contract," and they contend that, although CSI did not sign the Letter of Intent, Greene's subsequent letter regarding the adverse possession claim ratified the prior agreement, thereby satisfying the statute of frauds. We disagree with Appellants' theory and find their focus on the statute of frauds misplaced.

Under the Statute of Frauds, KRS 371.010(6), for a contract to sell real estate to be enforceable, it must be in writing and signed by the party to be charged. However, "[t]he statute of frauds does not lend itself to the issue of whether there is or is not a contract in existence." *Bennett v. Horton*, 592 S.W.2d 460, 463 (Ky. 1979).

In *Dohrman v. Sullivan*, 310 Ky. 463, 220 S.W.2d 973 (Ky. 1949), a case cited by Appellants in support of their statute of frauds argument, the Court noted,

> Preliminary negotiations leading up to the execution of a contract are distinguishable from the contract itself; likewise, a mere agreement to reach an agreement, which

> imposes no obligation on the parties thereto. It is sometimes a close question whether correspondence between parties constitutes final and complete mutual assent or meeting of minds, essential to the creation of a contract. The correspondence may constitute only negotiation and but evidence their intention ultimately to form or to execute a contract. The question of whether there was a consummated contract is to be determined from the consideration and practical construction of all the separate letters or telegrams that make up the whole correspondence.

Id. at 466-67 (citation omitted).

In the case at bar, we are not persuaded that the Letter of Intent created a binding contract between the parties. The opening paragraph of the document contemplated the subsequent execution of both a lease agreement and a purchase agreement. The Letter of Intent provided a summary of several terms proposed by CSI, and it included an exhibit page, which stated the lease agreement document was "to be provided upon execution of letter of intent." According to the affidavit of Greene, and not disputed by Appellants, Appellants submitted counter-terms when they returned the Letter of Intent. CSI did not sign the Letter of Intent, and Greene thereafter sent Appellants a proposed lease agreement document on May 31, 2007, which Appellants did not execute. Further, while the June 8, 2007, letter from Greene referenced a willingness to sell the property, it did not imply that a contract existed. The letter, instead, advised of a material change in circumstances, as the adverse possession claim clouded title to the property. Under the circumstances presented here, we are simply not persuaded that the "correspondence between parties constitute[d] final and complete mutual assent or

meeting of minds, essential to the creation of a contract." *Dohrman*, 220 S.W.2d at 466. We conclude the Letter of Intent merely summarized terms acceptable to CSI for executing a subsequent lease agreement and purchase agreement; consequently, summary judgment in favor of CSI was proper.

Next, Appellants contend CSI was estopped from claiming a contract did not exist. The elements of equitable estoppel are:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.
>
> And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Electric and Water Plant Bd. of City of Frankfort v. Suburban Acres Development, Inc., 513 S.W.2d 489, 491 (Ky. 1974).

Appellants contend they relied on the Letter of Intent by: 1) tendering a deposit; 2) obtaining preliminary bids and drawings from a construction company; 3) having the property appraised; 4) having an accountant review their finances; and 5) discussing the project with their bank.

In light of Appellants' allegations, we note, "the injury or prejudice involved must be actual and material or substantial, and not merely technical or formal." 28 Am. Jur. 2d Estoppel and Waiver § 83. After reviewing the record, we are simply not persuaded that Appellants satisfied the requirements of equitable estoppel.

Appellants next argue the court erroneously awarded CSI monthly rent to compensate for Appellants' continued use of the outlot. Appellants maintain they were the equitable owners of the property and were not obligated to pay rent. Appellants also acknowledge they did not execute a lease for the lot, but nonetheless continued occupying the property. In light of our conclusion that there was not an enforceable contract, we are not persuaded by this argument.

Finally, in their CR 60.02 motion, Appellants asserted they were not obligated to pay rent because they were holdover tenants from their prior lease, which permitted them to use the lot as a playground. Appellants further argued the court's calculation of rent was erroneous, as Appellants only occupied one-third of the lot, they should not pay rent for the entire one-acre parcel. Finally, the Appellants contended the final judgment should be amended to reflect that rent was owed by Jacobs Ladder, LLC, rather than Shane and Maria Jacobs personally.

It is well settled that "the determination to grant relief from a judgment or order pursuant to CR 60.02 is one that is generally left to the sound discretion of the trial court with one of the chief factors guiding it being the moving party's ability to present his claim prior to the entry of the order sought to

be set aside." *Schott v. Citizens Fidelity Bank and Trust Co.*, 692 S.W.2d 810, 814 (Ky. App. 1985). In the case at bar, the allegations raised by Appellants are precisely the sort of claims that could have (and should have) been raised at the December 2007 hearing which addressed CSI's claim for rent. Consequently, we decline to address these arguments on appeal.

For the reasons stated herein, the orders of the Oldham Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Kathleen M.W. Schoen
Stuart E. Alexander, III
Louisville, Kentucky

BRIEF FOR APPELLEES:

Myrle L. Davis
Louisville, Kentucky