RENDERED: APRIL 23, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001092-MR

RICHARD WILLIAMS, JEANIE WILLIAMS,
BART SMITH, CINDY SMITH,
JOHN MARK STULL, PATRICIA K. STULL,
ALVIN C. LYNCH, JR., DONNA LYNCH
AND ROBERT S. WILLIAMS APPELLANTS

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, SPECIAL JUDGE
ACTION NO. 07-CI-00342

KENTON SMITH AND
SANDRA SMITH APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

CAPERTON, JUDGE: The Appellants appeal the May 13, 2009, order of the Meade Circuit Court, granting the Appellees' motion for summary judgment and order of sale in a partition action for the sale of real estate pursuant to KRS 389A.030. Having reviewed the record, the arguments of the parties, and the applicable law, we reverse and remand for additional proceedings.

In November of 1996, the parties, along with Charles S. Williams (brother to Appellants Roberts S. and Richard L. Williams), and Timothy W. Smith (brother to Appellee Kenton R. Smith), and Katherine P. Smith, his wife, purchased 256 acres along the Ohio River; the riverfront real estate was located in the Big Bend area of Meade County. The property was purchased for $200,000.00.[2] Meade County Bank financed the purchase of the real estate and all parties to the transaction signed the note.[3] The parties called the property "Big Bend," due to it's location on a curve of the Ohio River.

According to the brief of the Appellants, the original plan was for the logging company owned by Appellant Williams to own the land in partnership with Appellant Lynch. Nevertheless, by the time the property was actually purchased, these parties had commenced discussions with other individuals, who were shareholders of a corporation called Bull Creek Hunting Club, Inc., which

[2] The property was initially deeded by the grantors to Richard Williams and Jeanie Williams, who then deeded the property to the rest of the parties.

[3] According to the parties, Appellee Kenton Smith contributed the "sweat equity" of his legal services by preparing the deeds of transfer.

owned a separate property in Breckinridge County called "Bull Creek." Bull Creek Hunting Club, Inc. was incorporated by Appellee Kenton Smith.

Subsequent to the purchase of the property, the property was timbered. According to the Appellees, Appellant Richard Williams and the logging business owned by his brothers took half of the proceeds from the sale of the timber, and the remaining proceeds were applied to the note. According to the Appellees, the remaining balance of the note, approximately $40,000.00, was divided equally among the parties pursuant to their respective interests. Thereafter, the parties used the property for recreational purposes.

In May of 1998, Appellants Richard Williams, Jeanie Williams, and Robert S. Williams exchanged real estate with Charles Williams for his interest in the property when the brothers' logging business was dissolved. Appellee Kenton Smith asserts that subsequently, in the summer of 2007, he learned of drug use on the property.[4] At that time, Smith was the elected Commonwealth Attorney for the 46th Judicial District of Kentucky. Appellee Smith asserts that after discovering the alleged drug usage, he moved all of his personal property from the real estate, did not travel to the property unaccompanied, and began negotiations to sell his and his wife's interest in the real estate. To that end, Appellee asserts that he made a buy/sell offer of $4,000.00 per acre, based upon a third party offer to purchase the real estate for $1,000,000.00. Those negotiations were ultimately unsuccessful.

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[4] Specifically, Smith asserts that Appellants Bart Stith, Mark Stull, Richard Williams, and Clifford Lynch were using methamphetamine on the property.

Appellee Kenton Smith asserts that as he did not want to sue his own brother in a partition action, he and Timothy Smith swapped property. Appellee states that Timothy traded his interest in the property to Kenton and Sandra Smith in exchange for their shares of stock in Bull Creek Hunting Club, Inc, and that Timothy also paid boot to Appellees in the amount of $13,900.00.[5] The Appellants assert that the agreement between the two brothers occurred only after Timothy failed at an attempt to broker a deal between Kenton Smith and the other owners.

The Appellants further state that they offered to pay Kenton Smith $10,600.00 for his new one-fourth interest in the property. They assert that Appellee Kenton Smith refused this offer, and that when he decided he wanted "out", requested that the other owners pay him $250,000.00 for his interest. The Appellants also assert that Smith threatened criminal prosecution against some of the owners and threatened to force a sale if the parties did not pay the sum he requested.[6]

Thereafter, Appellees, instituted this partition action pursuant to KRS 389A.030 to sell the real estate. Appellants filed an answer and pled five affirmative defenses, none of which included the alleged oral buy-sell agreement at

[5] Said amount representing the difference between the $19,200.00 paid by Timothy Smith for the Bull Creek stock and the $5,300.00 paid by Kenton Smith for his brother's one-eighth interest in the Big Bend property.

[6] Specifically, the Appellants direct this Court to a letter written by Smith, at pp. 106-107 of the record, in which he stated, "I now know a whole lot, enough for a lot of people to go to jail now ... If you start shooting straight, to the extent I can, I'll keep my mouth quiet ... Notwithstanding the above, you know, it is now impossible for me to co-own property with Ricky, et. al. I'm moving my camper out ... If suitable arrangements can't be reached, I'll force a sale, and soon."

issue in this appeal. Appellees initially filed a motion for summary judgment in September of 2007. Appellants did not file any affidavits in opposition to that motion at that time, and Appellants were given until December 31, 2007, to complete discovery. Following completion of discovery, Appellees again moved for summary judgment in February of 2008. Appellants responded with a motion for leave to file a counterclaim, leave to file a third-party complaint, and for an order recusing plaintiff's counsel from the case, as well as a response to Appellee's motion for summary judgment and order of sale. At that time, Appellants raised the argument that the alleged oral buy-sell agreement should be enforced.

Concerning the alleged buy-sell agreement, Appellant Bart Stith testified that there was a meeting, and that none of the wives were there, although he could not recall who was there. Further, he stated that "one of the big things was what happens if you want out, and it was discussed about the Bull Creek property[7], the situation there as well ... If you get out, you can get out for what you've got in it."[8] Likewise, during the course of his deposition, John Mark Stull stated, "You get out for what you got in it."[9]

Timothy Smith, brother of Appellee Kenton Smith, provided two affidavits below. In the first, he stated that the same "sell back" terms applied to the Big Bend property as to the Bull Creek property, and that "if anyone wanted

[7] Below, Appellee Smith denied that there was any written agreement as to how to sell the Bull Creek property, or how to handle shareholder interests if a sale occurred.
[8] *See* deposition of Bart Stith, p. 7.

[9] *See* deposition of John Mark Stull, p. 6.

out of the club/group, then they were to sell their interest back to the remaining club/group for what they had in it."[10] Smith went on to explain that it had been related to him at the time the Big Bend property was acquired that the same "sell back" terms applied to Big Bend as applied to Bull Creek.[11] In the second affidavit, Smith clarified statements made in the first, stating that Ricky Williams was the person who stated that the same sell-back terms applied to the Big Bend property as to the Bull Creek property. Timothy Smith clarified that the "agreement" was never formalized and that he could recall no formal meetings wherein all of the owners were present and came to an agreement.[12]

Appellee Sandra Smith also filed an affidavit below, stating that she was never present at any meeting wherein a disposition of the property was discussed. Appellee Kenton Smith also denied any agreement regarding disposition of the property, or any meeting where a discussion of same took place. No other affidavits were filed, nor was any other evidence produced below in response to the summary judgment motion filed by Appellees.

Subsequently, the trial court overruled Appellants' motion for leave to file counterclaim and third party complaint, and also overruled Appellants' motion to recuse Appellees' counsel. Appellants have not appealed from the court's

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[10] *See* affidavit of Timothy W. Smith, TR 69-71.

[11] *Id*. at 70.

[12] *See* affidavit of Timothy W. Smith, TR 175-176.

decision regarding those motions insofar as they relate to recusal or malpractice claims.

Thereafter, the case was referred to the Master Commissioner of the Meade Circuit Court. Following a review of the record, the Master Commissioner found that the only material fact remaining in the case was that of divisibility. Concerning the alleged oral buy-sell agreement, the Master Commissioner found that any such agreement was barred by KRS 371.010, the Kentucky Statute of Frauds. The trial court subsequently entered an order adopting the Master Commissioner's report in its entirety, and granted a hearing on the issue of divisibility.

The Appellants subsequently filed a motion to alter, amend, or vacate the order adopting the report of the Master Commissioner, which was denied by the trial court. The Appellants then withdrew their claim that the property was divisible. Upon withdrawal of that claim, the trial court entered a summary judgment and order of sale on May 13, 2009, and this appeal followed.

On appeal, the Appellants argue that KRS 371.010 does not bar the enforcement of an oral buy-sell agreement raised as a defense to a partition action. More specifically, they assert that the statute of frauds has no application to the matter *sub judice*, because in Kentucky, the Statute of Frauds applies to actions and

not to defenses. *See Midwest Mutual Ins. Co. v. Wireman*, 54 S.W.3d 177 (Ky.App.2001)[13] and *Bullock v. Young*, 252 Ky. 640, 67 S.W.2d 941, 946 (1933).[14]

On that basis, Appellants argue that they are not bringing any action to force Appellees to sell their interest in the land, and that to the contrary, they are using the alleged oral buy-sell agreement as a defense to the Appellees' attempt to force sale of the property by partition. Accordingly, the Appellants assert that the Statute of Frauds has no application in this case as the Appellees are not being forced to sell their interest back to the group. Additionally, there is no action brought by the Appellants to eliminate the Appellees' interest in the property and, thus, the statute is inapplicable.

In so arguing, Appellants assert that the true issue in the matter *sub judice* is not the statute of frauds, but instead the application of the parol evidence rule. Thus, Appellants assert that parol evidence should be permitted as to whether or not an oral buy-sell agreement existed, and that this is a genuine issue of material fact which should have precluded summary judgment.

In a second, and related argument, the Appellants assert that even if the Statute of Frauds was applicable to this case, Appellee Kenton Smith should be equitably estopped from using the Statute of Frauds to overcome his co-owners'

[13] Case in which motorcycle passenger injured in collision sued uninsured motorist insurer for benefits. The trial court denied the insurance company's motion for summary judgment arising out of a written waiver of uninsured motorist coverage. The insurance company appealed and the Court of appealed reversed, finding that KRS 371.010(2), part of the Statute of Frauds, did not prohibit enforcement of the waiver. Citing *Drake v. Rowe*, 162 Ky. 646, 172 S.W. 1068 (Ky. 1915), the Court held that even if the Statute of Frauds was applicable to insurance contracts, the statute applies to actions and not defenses.

[14] Stating that it is never permissible to use the Statute of Frauds as a "sword and not a shield."

defenses, as he was the attorney who created the deeds transferring the property from the original owners to the Williams, and then from the Williams to the larger group.[15] Accordingly, the Appellants assert that the doctrine of equitable estoppel, which we have previously held may be granted to relieve the harsh effect of the statute of frauds,[16] should apply to bar Smith from now seeking to use the Statute of Frauds to overcome their attempts to use the alleged oral buy-sell agreement as a defense against his attempt to force the sale of their land. The Appellants argue that they would never have permitted Smith into the group had they known that he would one day attempt to circumvent the purpose of the purchase and deprive them of their land, and that because of their reliance upon him in this regard, he should be equitably estopped from now using the Statute of Frauds to deprive them of their defenses.

In response to the arguments of Appellants, the Appellees argue that the deed to the parties was absolute on its face, and granted each individual or couple a one-eighth interest in the real estate. Thus, Appellees assert that any of the parties had the right at any time, pursuant to KRS 389A.030, to petition the circuit court for sale of the real estate. Accordingly, Appellees assert that no genuine issue of material fact exists and that the trial court correctly granted summary judgment and ordered sale of the real estate.

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[15] The parties concede that this second deed was actually prepared by Kenton Smith's partner at the time, Steven R. Crebessa.

[16] *See Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4 (Ky. 2005).

With respect to the alleged oral buy-sell agreement, the Appellees assert that Appellants have failed to produce evidence of same, and have merely alleged that at some point in time, some of the parties had a discussion about "getting out for what you got in it." Further, Appellees disagree with the Appellants' assertion that the Statute of Frauds is inapplicable. To the contrary, Appellees argue that an oral option to purchase real estate would clearly fall within the parameters of KRS 371.010(6). Appellees also assert that the Appellants are actually the parties attempting to enforce the alleged agreement against Appellees, and thus, the Appellees, and not the Appellants, are the parties "to be charged". In further support of this argument, Appellees note that Appellants did not raise this issue as an affirmative defense to Appellee's complaints, but instead, raised this issue in a counterclaim. Thus, Appellees argue that Appellants are not raising a defense but an action, and that accordingly the Statute of Frauds applies.

In addition, Appellees argue that pursuant to the doctrine of merger, all prior statements and agreements, both written and oral, not specifically incorporated into a deed or other instrument are a nullity that can not be relied upon by either party. *Aud v. Illinois Central Railroad Co.*, 955 F.Supp. 757 (W.D.Ky. 1997).[17]

[17] Concerning this argument, we note that the existence of an oral buy-sell agreement, as well as the time, if any, that said agreement was entered into, is a genuine issue of material fact to be argued before the court below. Accordingly, we believe arguments concerning the doctrine of merger to be more appropriately addressed by the trial court in the course of reviewing evidence on the issue of the existence of the alleged agreement, and thus, we do not address this argument further herein.

In addressing the arguments of the parties, we note at the outset that the law of this Commonwealth concerning summary judgment is clear. Summary judgment is proper where the movant shows that the adverse party could not prevail under any circumstances. *See Steelvest, Inc. v. Scansteel Service Center, Inc.* 807 S.W.2d 476, 480 (Ky. 1991). Further, a party opposing a properly supported motion for summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that a genuine issue of material fact exists. *See Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). The circuit court must view the record in a light most favorable to the party opposing the motion for summary judgment, and all doubts are to be resolved in his favor. *Steelvest, supra*. On appeal, our standard of review is whether the trial court correctly found that there were no genuine issues as to any material fact, and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

We turn first to the issue of whether or not the Kentucky Statute of Frauds, codified at KRS 371.010, is applicable to the matter *sub judice.* In so doing, we note that the KRS 371.010 states in pertinent part that:

> No action shall be brought to charge any person ...
> (6)Upon any contract for the sale of real estate, or any lease thereof for longer than one year ... unless the promise, contract, agreement, representation, assurance, or ratification or some memorandum or note thereof, be in writing and signed *by the party to be charged therewith*, or by his authorized agent. It shall not be necessary to express the consideration in writing, but it

may be proved when necessary or disproved by parol or other evidence. (Emphasis added).

We believe it is clear that in the matter *sub judice*, it was the Appellees who brought an action to force the Appellants to sell their interest in the Big Bend property, and the Appellants who are attempting to use the alleged oral buy-sell agreement as a defense to the forcible sale of that property by partition.[18] Accordingly, consistent with the position previously taken by this Court in *Midwest Mutual* and *Bullock*, *supra*, we find the Statute of Frauds to be inapplicable.

Our finding in this matter might have been different had the Appellants been attempting to force the Appellees to sell their interest in the property, "for what they had in it," on the basis of the alleged buy-sell agreement. However, the Appellees are not being "charged" to sell their interest back to the group, and are instead the individuals attempting to force the sale upon the remaining members. Thus, we find that no "action" was brought by the Appellants which might trigger the application of the statute.

Having so found, our review of the record indicates that, when viewing the evidence in the light most favorable to the Appellants, particularly, the

[18] In so stating, we acknowledge the argument of the Appellees that Appellants attempted to assert the issue of the alleged buy-sell agreement as a counterclaim. However, the Appellants motion to file a counterclaim was denied by the court below. Further, our review of the record reveals that as their Fifth Affirmative Defense, Appellants stated, "For their fifth affirmative defense, the defendants state that all of the participating owners of the subject property, including that (sic) Plaintiffs Kenton Smith and Sandra Smith, have orally agreed that acquisition of subject property was for pleasure and enjoyment in lieu of being for pecuniary reasons and for profit and that the transfers in and among the various owners have reflected this intention and agreement." Pp. 24-25.

testimony of all parties aside from Appellees themselves, and the manner in which Appellee Smith purchased his brother's share of the property, there is a genuine issue of material fact concerning the existence of the alleged buy-sell agreement. Accordingly, we find that summary judgment was not appropriate, and accordingly, we reverse.[19]

Wherefore, for the foregoing reasons, we hereby reverse the May 13, 2009 order of the Meade Circuit Court, granting the Appellee's motion for summary judgment and order of sale in a partition action for the sale of real estate pursuant to KRS 389A.030, and remand for the trial court's consideration of whether an oral buy-sell agreement existed, the effect thereof on the disposition of property at issue, and any other additional proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

J. Gregory Joyner
Louisville, Kentucky

BRIEF FOR APPELLEES:

Jessica Brown Roberts
Brandenburg, Kentucky

[19]As previously noted, the Appellants raise an alternative argument that even if we should find the Statute of Frauds to be applicable to the matter sub judice, the Appellees should be equitably estopped from using that defense, insofar as Smith was the drafter of the deed at issue. Having found the Statute of Frauds to be inapplicable in this matter, we need not address this argument herein.