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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-001915-MR

FLOYD COUCH, JR. — APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 07-CI-00011

JOSEPH W. LAYTON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT, SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Floyd Couch, Jr., brings this appeal from a September 17, 2009, judgment of the Clay Circuit Court awarding damages of $85,600 to Joseph W. Layton for removal of timber and damage to Layton's property. We affirm.

On June 7, 1989, Mozelle Sandlin died testate in Clay County, Kentucky. Pursuant to Sandlin's Last Will and Testament, Sandlin's property,

including a 231-acre tract of real property, was devised to her grandson, Joseph W. Layton, in trust until he attained the age of twenty-one.[1] Upon Layton reaching twenty-one years old, the trust would dissolve and the property would pass in fee to him. By order entered March 1, 1996, in the Clay District Court, Joseph W. Layton's father, James Layton, was appointed substitute trustee.

Joseph W. Layton became acquainted with Floyd Couch, Jr., when Layton and his uncle were camping on the 231-acre property. Couch was interested in removing timber from the property. Despite Couch's knowledge that the 231-acre property was held in trust for Layton, Couch entered into an oral agreement with Layton to remove timber from the property. Under the oral agreement, Couch would receive 75 percent of the proceeds from the timber, and Layton would receive 25 percent. Couch proceeded to remove timber from the property over the next several years.

On August 7, 2006, some four months prior to Layton's twenty-first birthday, Couch and Layton executed a written option contract whereby Couch would purchase the 231-acre property from Layton for a total of $5,000. Pursuant to the option contract, Couch was to pay Layton $600 upon execution of the option and would pay the remaining $4,400 when Layton "reaches the age of 21 years old." Thereafter, the option contract provided that Layton would transfer the 231-acre property to Couch by deed. On August 30, 2006, Layton signed a receipt stating that he had received the final payment (a check in the amount of $300) for

[1] Joseph W. Layton was born December 2, 1985, and, thus, reached the age of twenty-one on December 2, 2006.

the purchase of the property under the option contract. Layton, however, denies actually receiving $300 upon execution of the option contract or the full $5,000 consideration stated in the option contract. Layton claimed that he only received a total of $250 from Couch under the option contract. Layton did not transfer title of the 231-acre property to Couch.

On January 11, 2007, Layton filed a complaint in the Clay Circuit Court.[2] On June 6, 2009, the matter proceeded to a bench trial. The testimony of the parties presented at trial was diametrically opposite. Layton testified that in exchange for the timber removed from the property he only received approximately $200-$400 in cash and various amounts of methamphetamine from Couch. Layton maintained that he did not receive 25 percent of the timber proceeds. Layton further stated that he did not receive full payment under the option contract either and only received a total of $250 from Couch. Couch, on the other hand, testified he paid Layton the full 25 percent of the timber proceeds under the oral agreement and the full $5,000 purchase price under the option contract.

Following a bench trial, the circuit court made detailed findings of fact and conclusion of law upon entering judgment in favor of Layton. The circuit court awarded Layton $85,600 in damages - $79,000 as compensation for the

[2] The complaint was originally filed by James Layton, as Trustee over certain real property located in Clay County, Kentucky, for the benefit of Joseph W. Layton, and Joseph W. Layton, individually. Pursuant to Floyd Couch, Jr.'s motion to dismiss, James Layton, as Trustee, was dismissed upon Layton attaining the age of twenty-one and the trust being dissolved by its terms. Joseph W. Layton, individually, remained as the only plaintiff, and the September 17, 2009, judgment was entered in favor of Joseph W. Layton.

timber removed and $8,600 as compensation for damage to the 231-acre property. This appeal follows.

We begin our analysis by noting that the circuit court tried this action without a jury. We review findings of fact made by the circuit court under the clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01. Findings of fact are clearly erroneous if not supported by substantial evidence. *Moore v. Assente*, 110 S.W.3d 336 (Ky. 2003). Substantial evidence is evidence of a probative value that a reasonable person would accept to support a conclusion. *Id.* And, we must also give deference to the trial court's opportunity to judge the credibility of witnesses. CR 52.01. We, however, review issues of law de novo.

Couch initially contends that the circuit court erred by failing to enforce the oral agreement between Couch and Layton for removal of timber and by awarding $85,600 in damages to Layton. Particularly, Couch argues that both parties testified to the existence of the oral agreement to remove timber and that under its terms, Layton was to receive 25 percent of the proceeds from the timber removed. Also, Couch points out that he testified to paying Layton the full 25 percent of the timber proceeds and presented carbon copies of six checks from Forest Products, Inc.,[3] in the name of Layton evidencing payment for the timber removed. Couch believed that the circuit court erred by failing to enforce the parties' oral agreement concerning timber removal from the 231-acre property. We disagree.

[3] The record indicates that Forest Products, Inc., purchased the timber from Couch.

Upon review of the evidence presented at the bench trial, it was uncontroverted that the oral agreement to remove timber was entered into by Layton and performance occurred under the agreement before Layton attained the age of twenty-one. Equally important was Couch's testimony that at the time he entered into the oral agreement, he knew that the 231-acre property was held in trust for the benefit of Layton and that Layton's father was the trustee.

It is well-established that legal title to real property held in trust for a beneficiary is held by the trustee. 90 C.J.S. *Trusts* § 2 (2002); 76 Am. Jur. 2d *Trusts* § 281 (2004). The beneficiary, on the other hand, merely holds equitable title to the property.

In the case at hand, the trust containing the 231-acre property was set forth in the will of Layton's grandmother, Mozelle Sandlin, and read:

> Therefore, all of my property, be it real, personal or mixed, of whatsoever nature and wheresoever located, including all property which I may become entitled to or acquire after the execution of this Will, I give, devise, and bequeath, to my grandson, Joseph W. Layton, to be held in trust for him and for his benefit until he reaches the age of twenty-one (21) years.
>
> Such Trust shall be administered by my brother-in-law, William Earl Isaac, as trustee, who shall have the most unlimited power and authority to act with such property and holdings for the benefit of Joseph W. Layton only.
>
> In the event of my death prior to my grandson reaching the age of twenty-one (21) years and during such period of time

> following my death and prior to his twenty-first (21st) birthday I instruct the trustee to use his discretion to utilize the income from this trust and the corpus thereof to see to the health, education, and welfare of my grandson, Joseph W. Layton.
>
> Upon Joseph W. Layton attaining the age of twenty-one (21) years all of my property, both real, personal and mixed, shall go directly to him in fee simple.

According to the trust's plain language, the trustee possessed the sole authority "to utilize the income for this trust and the corpus" for the benefit of Layton. Until Layton reached the age of twenty-one, he merely held equitable title to the 231-acre property and possessed no actual authority to permit removal of timber from the property. Such authority was plainly held by the trustee. Also, from Couch's own testimony, he knew the 231-acre property was held in trust for Layton and, therefore, reasonably knew or should have known that Layton did not possess the actual or apparent authority to permit removal of the timber. Therefore, the oral agreement between Layton and Couch for removal of the timber from the property was ineffective as Layton lacked authority to permit timber removal from the 231-acre property. As no valid oral agreement existed for the removal of timber, the circuit court properly valued the timber removed and awarded damages. *See Allen v. Ferguson*, 253 S.W.2d 8 (Ky. 1952). Thus, we cannot say the circuit court erred by failing to enforce the oral agreement and by awarding $85,600 in damages.

Couch next argues that the circuit court erred by failing to enforce the option contract executed on August 7, 2006, to purchase the 231-acre property for $5,000 upon Layton attaining twenty-one years of age.

The option to purchase the 231-acre property executed by Layton and Couch read as follows:

> This Option between JOSEPH W. LAYTON, party of the first and FLOYD COUCH, party of the second part.
>
> WITNESSETH: WHEREAS, the party of the first part has a certain piece of property namely, that property shown in that will from Mozelle Sandlin, to Joseph W. Layton as shown in Will Book 9 at page 140 for property on Crane Creek in Clay County being about 231 acres more or less, as shown in various deeds to Mozelle Sandlin.
>
> WHEREAS, party of the second part wish to purchase same, the parties do hereby agree as follows:
>
> (1) The purchase price shall be $5,000.
>
> (2) The party of the second part shall pay $600.00 upon the signing of this Option and agrees to pay the balance of $4,400.00 whenever Joseph W. Layton reaches the age of 21 years old and this option shall be good for a period of 90 days after Joseph W. Layton reaches the age of 21 years old. In the event Joseph W. Layton shall refuse to convey under the terms of this option Joseph W. Layton shall pay to the Buyer, the sum of $5000.00 as damages.
>
> WITNESS OUR HANDS this the 7th day of Aug., 2006.

It is well-settled that where no money is "paid for the option itself" then there is no "consideration to support the option contract." *Ford v. McGregor*, 314 Ky. 116, 234 S.W.2d 493, 495 (1950). Simply stated, an option contract to purchase real property must be supported by consideration separate from the purchase price of the real property in order to be binding upon the parties. *Id.*

In the case *sub judice*, the $600 purportedly paid when the option was executed was clearly part of the total purchase price of the 231-acre property. Pursuant to the terms of the option, the $600 paid by Couch upon execution operated to reduce the total $5,000 purchase price to $4,400. By its very terms, the option contract had no separate consideration and, thus, was not binding upon Layton. Moreover, the circuit court found credible Layton's testimony that he never received the full $5,000 consideration as provided under the option contract. In its judgment, the circuit court specifically found that "Joseph Layton was not paid the $5,000.00 as called for in the option and any amount of money he did receive from this transaction was negligible." Thus, as Couch failed to pay the full $5,000 purchase price to Layton, Couch is not entitled to conveyance of the property per the option contract. As such, we view Couch's contention that the circuit court erred by failing to enforce the option contract to be without merit.

Given the above rulings, we view Couch's remaining contentions to be either moot or without merit and we will not address them in this opinion.

For the foregoing reasons, the judgment of the Clay Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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