

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000119-MR

RODNEY COOPER, AS PREVIOUS
FIDUCIARY FOR THE ESTATE OF GARY
WAYNE COOPER

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 08-CI-00830

LOIS COOPER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND CAPERTON, JUDGES; LAMBERT,¹ SENIOR JUDGE
CAPERTON, JUDGE: The Appellant, Rodney Cooper (as previous fiduciary for
the Estate of Gary Wayne Cooper), appeals the October 29, 2009, findings of fact,
conclusions of law, and judgment of the Pulaski Circuit Court and the subsequent
December 19, 2009, order of the Pulaski Circuit Court which awarded costs and

¹ Senior Judge Joseph E. Lambert, sitting as Special Judge by the assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

fees to the Appellee, Lois Cooper. On appeal, Rodney argues that the trial court failed to apply the proper law, and failed to make certain the intentions of the decedent were fulfilled. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

The decedent, Gary Wayne Cooper, passed away on November 30, 2001. On December 10, 2001, his estate was entered into probate. Rodney, Gary's nephew, was named executor of the estate. The clause in Gary's last will and testament that gave rise to this action stated as follows:

I grant unto Rodney Cooper the option to purchase my real property located at 359 Woods Edge Drive, Somerset, Kentucky, for the sum of \$165,000.00. This option shall expire if not exercised within 90 days of the appointment of the Executor of my estate. Should he exercise that option the proceeds shall be added to the residuary of the estate as set forth below. Should the option not be exercised, the property shall be sold at public option by a [sic] an auctioneer selected by my Executor with Executor having full power to execute all documents as necessary to sell and convey title to that property with the net proceeds from that sale added to the residuary of my estate as set forth below.

A residuary clause in Gary's will created a trust for all other property not specifically bequeathed, to be for the "use and benefit" of his mother, the Appellee, Lois. The clause also named Rodney Cooper as the trustee of the residuary estate. On March 7, 2002, the 87th day following his appointment as executor, Rodney executed a Notice of Acceptance of Option to Purchase the Woods Edge property. He did not tender payment of the purchase price at that time. The Notice stated that it was subject to the terms and conditions of a Real Estate Sale and Purchase Agreement executed on the same date. The Real Estate

Sale and Purchase Agreement contained the following provisions which the trial court found to alter the option to purchase clause in the Last Will and Testament:

... Should the Buyers fail to sell their current residence at 60 Misty Drive, Science Hill, Kentucky, or fail to obtain financing for the purchase of the property within 90 days of the date hereof, this contract shall be null and void and all parties released from their obligations hereunder.

...An unencumbered, good, and marketable fee simple title to the property shall be conveyed to buyer, or its successor or assign, at the option of the buyer by deed of general warranty ...

On April 25, 2002, Rodney closed on the Woods Edge property. At that time, the existing mortgage in the amount of \$89,595.77 was paid, and the amount of \$74,344.53 was deposited into the residuary of Gary's estate.

Thereafter, on December 11, 2003, Rodney sold the Woods Edge property for \$194,000.00. After repeated exceptions and motions in the district court, the action was transferred to the Pulaski Circuit Court by order entered on February 20, 2008. That order identified the issues to be contested, including both Cooper's purchase of the Wood's Edge property and general compliance with Gary's Last Will and Testament. A trial was held on June 4, 2009, and the trial court issued its findings of fact, conclusions of law, and judgment on October 29, 2009.

Therein, the trial court found that although Rodney had executed his Notice of Acceptance in a timely manner, it was limited in scope and was therefore invalid. Specifically, the court determined that when Rodney prepared and entered into a Real Estate Sale and Purchase Agreement with himself, which included terms and provisions not set forth in the Last Will and Testament, including

conditioning closing upon the buyer's ability to sell his current residence, to obtain financing, and receive good and marketable title, he violated the terms of the will and his fiduciary duties as executor and trustee of the residuary estate.

The court also provided for the payment of certain fees incurred by Lois in pursuing this claim. The court set a ceiling on those fees that would not have exceeded the executor's fee charged to the estate by Rodney in his capacity as executor. The court thus ordered damages against Rodney in the amount of \$25,000.00, in addition to fees and costs. The final accounting was filed on November 9, 2009, and an order awarding costs and fees was entered on December 19, 2009. It is from that order that Rodney now appeals to this Court.

On appeal, Rodney argues that the trial court erred in finding that his acceptance of the option to purchase the Wood's Edge Property was invalid. Rodney believes that the trial court correctly found that he timely exercised his option to purchase the property, but that it erroneously found that his acceptance and exercise of the option altered the terms of the option offer, thereby nullifying the acceptance and making the exercise of the option invalid. Rodney argues that this finding invalidated the stated intention of the testator, whom he believes clearly intended for Rodney to have the option to purchase his property.

Specifically, Rodney asserts that the court below, in making its determination, erred in relying on basic contract law as opposed to the law pertaining directly to wills. Rodney argues that the primary legal tenet to be applied in this action centers upon discerning the intent of the testator at the time

he executed the will. Rodney argues that the testator's intent was clearly to offer him an option to purchase the Woods Edge Property. Rodney reasons that if purchasing the Woods Edge property meant allowing Rodney to sell his own home in order to do so, such should be allowed, even if the manner in which he did so might be in conflict with general rules of contract interpretation. Further, Rodney argues that in any event, enforcing the exercise of the option to purchase would not harm Lois. He asserts that had he been unable to sell his home within 90 days, the property would have been auctioned, and the possibility existed that it would have been sold for less than the \$165,000.00 paid by Rodney. He further asserts that as the process unfolded, Lois was entitled to the funds deposited in the residuary estate when Rodney closed on the Woods Edge property, just as she would have been entitled to the funds from another purchaser.

Rodney also argued that the trial court erred in finding that the conditions in the Notice of Acceptance were a "significant deviation" from the terms of the offer of option to purchase. Rodney asserts that the reference to the Real Estate Sale and Purchase Agreement in the Notice of Acceptance served only to give him time to accomplish the mechanics of financing the Woods Edge property purchase and did not modify the acceptance or the terms of the offer in a material way.

In response, Lois argues that the judgment of the trial court should be affirmed, as Rodney breached his duty of loyalty and violated the terms of the option. Lois notes that the will included three options to purchase assets for a set

price and in each case provided that the option would expire if not exercised within ninety days after the day of the appointment of the executor. Lois further notes that two of those options specifically provide that if not exercised, the property would be distributed as part of the residuary. She thus argues that the will clearly indicates that she is intended to be the primary beneficiary, and that Rodney is merely a preferred purchaser to fund the trust in accordance with the terms of the option.

Lois argues that the will clearly indicates that Rodney was trusted to be the fiduciary, both as executor and as trustee for Lois, and that accordingly he had a duty to manage the estate in such a manner as to prevent his personal interest from coming into conflict with his duties as a fiduciary. Lois asserts that in this instance, Rodney had multiple fiduciary duties, as he was selling the property in his capacity as executor to himself, personally, with the provision that he would in turn have a fiduciary responsibility for the proceeds of that sale in his capacity as trustee. Accordingly, Lois argues that to manipulate and misconstrue the provisions of the last will and testament in order to personally profit from the transaction in the amount of \$29,000.00 was patently wrong. Lois asserts that Rodney entered into an agreement with himself on terms and provisions that were favorable to himself but not to the estate and its primary beneficiary. Rodney had a duty to the estate for the timely and unqualified sale of the property, this he did not do.

In addressing the arguments of the parties, we note first that as wills are interpreted under the same standards as contracts, we shall apply the *de novo* standard of review to this case. *Benjamin v. JP Morgan Chase Bank, N.A.*, 305 S.W.3d 446 (Ky.App. 2010). Further, we note that the findings of fact made by the trial court shall not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence.” *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky.App. 1999). Substantial evidence is that evidence, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable people. *Id.*, citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). We review this matter with these standards in mind.

Having reviewed the record and applicable law, we are ultimately in agreement with the court below that Rodney failed to strictly exercise the option according to its terms, ultimately invalidating his attempt at acceptance thereof and leading to a breach of his fiduciary duty. While we agree with Rodney that in interpretation of a will, the determinative factor is the intention of the testator, our courts have been clear that intention is to be determined by what the testator said in the will. *Alford v. Kentucky Trust Co.*, 293 S.W.2d 885 (Ky. 1956), and *Arnold v. Barber*, 472 S.W.2d 466 (Ky. 1971). *Sub judice*, it is clear that the intention of the testator was for Rodney to have an option to purchase the Woods Edge property. It is equally clear that said option was to be exercised within 90 days, and that if not

exercised in accordance with the will, then the property would be sold at auction and the proceeds distributed as part of the residuary. It contained no provisions for the conditions or contingencies that were included by Rodney in the Real Estate Sale and Purchase Agreement.

Although Rodney relies upon our decision in *Klatch v. Simpson*, 277 Ky. 84, 34 S.W.2d 951 (Ky.App. 1931) in support of his assertion that his modification did not alter the terms of the option in its essence, and that the subject matter of the transaction was not affected in a material way, we find *Klatch* distinguishable. *Klatch* did not involve a testamentary option established for the ultimate benefit of a third party, nor did it involve the multiple fiduciary duties inherent in the instant situation. Moreover, unlike in *Klatch*, *sub judice*, Rodney sought not only to alter the time of closing but also to create entirely new terms and conditions unexpressed by the testator.

Our law is clear that an option must be accepted according to its terms. *Phelps v. Gover*, 394 S.W.2d 927, 928 (Ky. 1965). Indeed, it is only when that privilege has been exercised in the manner provided in the agreement that it becomes a binding contract. *Carter v. Frakes*, 197 S.W.2d 436, 438 (Ky. 1946). Ultimately, whether or not the Real Estate Sale and Purchase Agreement amounted to a material modification of the acceptance or the terms of the option was a question of law for the determination by the trial court. *Sub judice*, the court determined, and we believe correctly, that the will clearly delineated the conditions upon which Rodney could exercise the option, and made no provision for a

conditional or contingent sale. The limitations added by Rodney in the Real Estate Sale and Purchase Agreement made the acceptance less than what the option required for acceptance. Thus, we believe that the court below correctly determined that Rodney's attempted acceptance of the option was insufficient to constitute a legal acceptance, as the option was not accepted according to its specific terms.

Wherefore, for the foregoing reasons, we hereby affirm the October 29, 2009, findings of fact, conclusions of law, and judgment of the Pulaski Circuit Court, and the subsequent December 19, 2009, order of the Pulaski Circuit Court, the Honorable Jeffrey T. Burdette, presiding.

ALL CONCUR

BRIEF FOR APPELLANT:

Herbert J. Smith, Jr.
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

John G. Prather, Jr.
Somerset, Kentucky