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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001126-MR

SUTEJ GILL AND
DEBORAH GILL — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 07-CI-011677

WASHINGTON MUTUAL BANK,
FKA WASHINGTON MUTUAL BANK, FA;
LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT; JAMES D. JONES;
AMERICAN TAX FUNDING, LLC;
AND FIRST BANK, INC., N/K/A CENTRAL
BANK OF JEFFERSON COUNTY, INC. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: STUMBO AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

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

THOMPSON, JUDGE: Sutej and Deborah Gill, husband and wife, appeal from a corrected supplemental judgment entered by the Jefferson Circuit Court overruling their objections and exceptions to a master commissioner's report. The issue presented is whether the circuit court properly concluded that the Gills and Central Bank of Jefferson County (Central Bank) did not reach an enforceable settlement of their controversy because no evidence existed as to a "meeting of the minds." Contrary to the circuit court, we conclude that the undisputed evidence is conclusive that there was a meeting of the minds and, therefore, reverse. However, further proceedings are necessary to determine Central Bank's liability.

In 2007, the Gills filed a foreclosure action seeking a sale of property located on Fourth Street in Louisville which was owned by James D. Jones.[2] In addition to Jones, the Gills named as defendants, Louisville/Jefferson County Metro Government, Republic Bank and Trust Company, Commonwealth of Kentucky, Washington Mutual Bank, American Tax Funding and Central Bank. The Gills and Central Bank were mortgage holders: Central Bank held the first lien position while the Gills held the third lien position.

The Gills allege that during the pendency of the foreclosure action, they and Central Bank negotiated regarding the Gills' purchase of Central Bank's first lien position. Specifically, the Gills sought Central Bank's assignment of its note, mortgage and, ultimately, any judgment that it obtained against Jones. The

[2] A foreclosure action was filed by Washington Mutual Bank relating to real property located at 309 Bayly Street, also owned by Jones, in which the Gills were named as defendant lienholders. Although the actions were consolidated, in this appeal only the Fourth Street property is at issue.

Gills allege that although no formal agreement was reduced to writing prior to the entry of a judgment and order of sale on August 20, 2008, they and Central Bank reached a verbal agreement. Pursuant to the agreement's terms, Central Bank agreed to assign the note, mortgage, and judgment against Jones to the Gills. As a result, the Gills obtained a title examination and a commercial appraisal.

A closing date was scheduled for August 8, 2008. However, the Gills maintain that the closing did not occur because Central Bank refused to perform. Consequently, on September 18, 2008, the Gills objected to Central Bank's pending motion for supplemental judgment and later filed a cross-claim against Central Bank seeking specific performance of the settlement agreement.

On February 26, 2009, the Gills' objections and exceptions to Central Bank's motion for supplemental judgment were presented to the master commissioner. David Mour appeared as counsel for the Gills and Deane Stewart for Central Bank. A Central Bank officer was also present. Because the colloquy at the master commissioner's hearing is pivotal to the question of whether there was a meeting of the minds, the following portion of the transcript is recited:

> SPEAKER: That's correct. Commissioner, we have reached what we call stipulation that we would like to put on the record where we basically settled the issues that are before the Court today.
>
> COMMISSIONER: Excellent.
>
> SPEAKER: And the provision of those are -- and you correct me, Mr. Mour, if you find anything not what we said -- but Mr. Gill withdraws his objection to the tendered supplemental judgment of Central Bank.

Mr. Gill withdraws all claims against Central Bank in the action.

COMMISSIONER: He withdraws his objection to your supplemental judgment. He withdraws any claim that he has against Central.

SPEAKER: Yes. He has presented, I think, in an amended pleading --

SPEAKER: Cross or counterclaim, one or the other.

SPEAKER: Yeah, cross or counterclaim, claims against the bank that are being withdrawn.

We have an agreement in principle that we intend to reduce to writing within the next week or six days, by Wednesday, which would include the following: The bank would agree to assign the existing Central Bank judgment and any future supplemental judgment to Mr. Gill, as well as the underlying note and mortgage.

COMMISSIONER: Who is your judgment against which is being assigned to Mr. Gill?

SPEAKER: Dan Jones. It is a judgment and order of sale in this action.

COMMISSIONER: All right.

SPEAKER: Neither Mr. Gill, nor his representatives, successors or assigns will have access to any bank files or be entitled to any other of the bank loan documentation.

SPEAKER: Other than obviously the note and mortgage.

SPEAKER: Yeah, note and mortgage.

COMMISSIONER: Probably have the note and mortgage in the file.

SPEAKER: Mr. Gill nor his successors or assigns, representatives, they will not seek to set aside the judgment.

COMMISSIONER: Again, referring to the --

SPEAKER: Referring to the judgment of Central Bank against Jones as may be supplemented. We anticipate it being supplemented for the additional sums that are due.

COMMISSIONER: He hasn't seen the supplemental judgment, but despite that he agrees not to seek to set that aside.

SPEAKER: We have tendered it -- (inaudible).

SPEAKER: But he is withdrawing his objection. So he gets that, as well, in other words, as part of what is going to -- so enforcement of payment against Jones by Gill would be through enforcement of the judgment and not through--

COMMISSIONER: That you're assigning to him.

SPEAKER: Yeah, that we're assigning to him, but not through some other action on the note and mortgage that are subsumed in the judgment.

The payment to Central Bank would include all principle on the note, all interest to date of closing, all costs, and -- which would include expenses of winterization and maintenance of the property at an approximate amount of -- whatever the property preservation costs that are actual disbursed costs from the bank.

SPEAKER: And prior to coming in Michael had indicated those were approximately $2,000.

SPEAKER: I'm not sure, but it's in that range.

SPEAKER: I understand.

SPEAKER: And legal fees incurred by the bank in an amount not to exceed $2,000.

SPEAKER: For me 1,500.

SPEAKER: Let's say as a max 2,000, and of course actual costs of this action, court costs.

The closing on the transfer of funds and delivery of the assignment must occur on or before March 20, 2009.

In the event that it fails to close by that date due to the fault of Mr. Gill the bank would be immediately entitled to ask for a sale of the property under its judgment.

SPEAKER: Shouldn't that be no fault of Central Bank?

SPEAKER: No fault of Central Bank.

SPEAKER: Could be a fault on (inaudible) your lender.

SPEAKER: That's true.

SPEAKER: But you're taking that risk.

SPEAKER: Obviously if it's on you guys, it's on your guys. If it's on Steve -- you-all can't control our lender, correct.

SPEAKER: You said by no fault of Mr. Gill. It could not close and not be Central Bank's fault.

SPEAKER: That's fine.

SPEAKER: If it fails to close and it's not Central Bank's fault, then it's over and we proceed with the sale, but your claims against the bank are still gone, your objection to the judgment is still gone. Central Bank is allowed to proceed after March 20.

SPEAKER: And get an order of sale.

SPEAKER: And order of sale.

SPEAKER: We don't have a sale date.

COMMISSIONER: You don't have a sale date?

SPEAKER: No, we don't have a sale date.

COMMISSIONER: There's not an order of sale already?

SPEAKER: We're trying to get a supplemental judgment for taxes and some preservation costs.

COMMISSIONER: All right. Fine. Everybody in agreement with that?

I guess I can't see you down there. You're representing Jones. You okay with all -- what's going on here?

SPEAKER: I don't think we have a yes or no vote either way.

SPEAKER: Probably not.

COMMISSIONER: No, you probably don't, but I was just being polite.

All right. Now, you're saying a closing must occur between March -- between now and (inaudible).

SPEAKER: Closing is transfer of funds from Gill to the bank for the assignment of the documents.

SPEAKER: Not a closing in the traditional sense.

COMMISSIONER: Okay. The deal between Gill and the bank has to be completed by March 20, and you're comfortable, Mr. Mour, that your client can get that done by -- Mr. Gill, you're comfortable that you can get this done by March 20?

MR. MOUR: As long as Dean gets me our -- because the bank is going to need -- his lender is going to need our agreement. And as long --

SPEAKER: I will get that to you by Wednesday, not later.

MR. MOUR: If I have any comments or suggestions then I will get those back to you by Thursday morning. And then hopefully we can -- whatever disagreements we have we can work them out by Friday and have it to his lender, which will be what -- that's -- the 5th is Friday.

SPEAKER: We will try to do that before then.

MR. MOUR: That still gives the bank 15 days, but if you can get it to me before then it would be helpful just to avoid any controversy down the road.

> COMMISSIONER: Thank you-all very much. I'm simply going to report to the judge that you have reached an agreement, that the terms of the agreement and those stipulations have been recited into the record, and that you anticipate you will have -- are you-all going to do an agreed order around this?

On March 11, 2009, the master commissioner filed a report stating that the parties appeared for a hearing on February 26, 2009, and reached a stipulated agreement. Specifically, the master commissioner stated:

> Prior to the hearing, the parties and counsel engaged in negotiations, and arrived at a stipulated agreement which was then read into the record, with the Commissioner present. That stipulated agreement presumably will be reduced to writing by one of the attorneys, but in any event it is of record on tape in the Commissioner's office.
>
> One of the provisions of the stipulated agreement is that the Court enter the Supplemental Judgment heretofore tendered by Central Bank. An earlier Judgment and Order of Sale has been signed and entered by the Court.

Based on the parties' stipulated agreement, the master commissioner recommended that the supplemental judgment be entered.

Following the hearing on February 26, 2009, Central Bank forwarded the Gills a written proposed assignment. Consistent with the stipulated agreement, Central Bank agreed to assign the Gills its interest in the note, mortgage and existing judgment. However, the Gills objected to an indemnification clause in the proposed agreement. As a result, a written settlement agreement was not executed and the property did not close on March 20, 2009.

Presented with Central Bank's failure to present a satisfactory written agreement, the Gills filed objections and exceptions to the master commissioner's

report and its recommendation that the supplemental judgment tendered by Central Bank be signed and entered. The basis for their motion was that they and Central Bank reached a binding settlement agreement as stipulated at the master commissioner's hearing. Central Bank responded that the stipulated agreement entered into the record was only an "agreement to agree" and, therefore, was not a binding contract.

After hearing counsel's respective arguments, the circuit court denied the Gills' motion to enforce the settlement agreement and permitted the judicial sale to proceed. On the corrected and supplemental judgment, the court hand-wrote, "Gills Objections/Exceptions to Commissioner's Report of March 11, 2009 Overruled. No meeting of minds found." The Gills filed a timely notice of appeal.

During the pendency of this appeal, on June 23, 2009, Jones purchased the property at public auction but, after he defaulted on his contractual sale obligations, a second sale was scheduled. With their appeal pending, the Gills filed a motion for emergency relief with this Court seeking to stay the foreclosure sale. After the motion was denied, the property was auctioned and the Gills purchased the property. Based on the facts presented, we review the circuit court's decision that there was no meeting of the minds between the Gills and Central Bank.

We review questions of law *de novo. Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet,* 80 S.W.3d 787, 790 (Ky.App. 2001). However, findings of fact will "not be set aside unless clearly erroneous, and due

regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. The issue presented is concise: Did the circuit court properly find that the Gills and Central Bank did not reach a settlement agreement at the February 26, 2009, master commissioner's hearing? Because no material issues of fact are presented by virtue of the parties' stipulated agreement, our review is *de novo*.

An agreement to settle legal claims is a contract subject to the rules of contract interpretation. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.,* 94 S.W.3d 381, 384 (Ky.App. 2002). Thus, a settlement agreement that satisfies the requirements associated with contracts, including an offer and acceptance, full and complete terms, and consideration is generally enforceable. *Id.*

Moreover, a verbal settlement agreement is binding: If the parties agree to a settlement, it is enforceable. *Motorists Mut. Ins. Co. v. Glass,* 996 S.W.2d 437, 445 (Ky. 1997).[3]

The basis for Central Bank's argument is that there were unresolved material terms of the agreement. As authority, it cites *Walker v. Keith,* 382 S.W.2d 198 (Ky. 1964), where the court stated: "To be enforceable and valid, a contract to enter into a future covenant must specify all material and essential terms and leave nothing to be agreed upon as a result of future negotiations." *Id.* at 201 (quoting *Johnson v. Lowery,* 270 S.W.2d 943, 946 (Ky. 1954)). Consistent with general contract law, the Court recited that the parties must either agree upon

[3] An exception to the general rule is contained in KRS 403.180, pertaining to property settlement agreements in dissolution of marriage actions. It is irrelevant to our discussion.

the material terms or supply a "definite method of ascertaining" the terms. *Id.* at 202. The fallacy in Central Bank's contention is that the facts and its legal conclusion are inconsistent.

We begin with the proposition that Kentucky recognizes the amicable resolution of disputes, including oral settlement agreements. As stated in *Dohrman v. Sullivan*, 310 Ky. 463, 467, 220 S.W.2d 973, 975 (1949):

> The Restatement of the Law of Contracts, Vol. 1, sec. 26, thus states the applicable rule: 'Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but other facts may show that the manifestations are merely preliminary expressions.' To state the rule less abstractly: Where all the substantial terms of a contract have been agreed on and there is nothing left for future settlement, the fact alone that the parties contemplated execution of a formal instrument as a convenient memorial or definitive record of the agreement does not leave the transaction incomplete and without binding force in the absence of a positive agreement that it should not be binding until so executed. 12 Am.Jur., Contracts, secs. 23, 25.

Subsequent jurists have emphasized the binding effect of a stipulated verbal settlement agreement. In *Calloway v. Calloway,* 707 S.W.2d 789, 791 (Ky.App. 1986), the Court cited with approval the language used in *Peirick v. Peirick,* 641 S.W.2d 195 (Mo.App. 1982). The Missouri court observed:

> In the administration of justice and the prompt dispatch of business, courts must and do act upon the statements of counsel and upon the stipulations of parties to pending causes. Where the parties have voluntarily entered into a stipulation, which appears fair and

> reasonable for the compromise and settlement of the issues of a pending cause, and where the stipulation is spread upon the record with the consent and approval of the court, as here, the parties are bound thereby and the court may, thereafter, properly proceed to dispose of the case upon the basis of the pleadings, the stipulation and admitted facts.

Id. at 196 (quoting *Hansen v. Ryan,* 186 S.W.2d 595, 600 (Mo. 1945)).

Central Bank maintains that regardless of the stipulated agreement entered into at the master commissioner's hearing, material terms to the agreement remained to be negotiated. It points out that the Gills refused to sign the written agreement that contained a third-party indemnification provision.

Central Bank's position is irreconcilable with the terms agreed to at the master commissioner's hearing. There was no discussion regarding any indemnification of Central Bank. However, the agreement included a material condition that denied the Gills access to internal bank documents. Thus, the Gills were denied any knowledge of Central Bank's acts or omissions during its business relationship with Jones. If indemnification was a provision contemplated by the parties but subject to further negotiation, the Gills agreed to potential liability to Jones without any information regarding its basis or extent. No competent attorney would recommend that a client enter into such a third-party indemnification agreement.

The parties' "minds" agreed to the assignment of the judgment, note and mortgage to the Gills. All material terms were stipulated including a definite

closing date and the payment of costs and, therefore, the parties are bound by the fair and reasonable stipulated terms of their verbal agreement.

After review of the record and arguments of counsel, we conclude that the circuit court erred: As a matter of law, the parties are bound by the stipulated agreement recited in the record. Central Bank's liability, if any, for its failure to perform the settlement agreement is to be determined by the Jefferson Circuit Court. Consistent with our directive, we reverse and remand for further proceedings.

ALL CONCUR.

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