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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001089-MR

JEFFERY PERKINS — APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
ACTION NO. 08-CI-00302

DELBERT COX; ADDLYN COX;
AND STEWART ADVANCED
LAND TITLE, LTD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

ACREE, CHIEF JUDGE: Jeffrey Perkins requests reversal of the Pendleton Circuit Court's order reforming the deed for real property which he purchased from Delbert and Addlyn Cox. We affirm.

I. Background

In 2006, Delbert and Addlyn Cox bought 1.57 acres in Pendleton County with the intention of developing it. A survey of the property was conducted, and the Coxes divided it into two lots. Lot A consisted of .69 acres, and the Coxes built a new home upon it. Lot B consisted of .88 acres. The Coxes tore down an existing home on Lot B; they intended to build a new one, but have never undertaken that task. Neither the survey nor the plat reflecting division of the property was recorded; however, the Coxes did notify the county clerk that they had assigned the lots two distinct addresses for purposes of emergency services.

The home on Lot A was listed for sale, and the Multiple Listing Service (MLS) Report represented that the property consisted of .69 acres. The real estate agents involved in the listing and sale of the property were aware of the correct acreage.

In April of 2008, Perkins viewed the home. He claims to have been given no information concerning the amount of land which accompanied the house. Instead, he assumed the property included the entire plot purchased by the Coxes in 2006. More specifically, he testified that he did not know the number of acres upon which the home sat, but that he had an understanding of the lot size based on his visual assessment of the property; he believed the boundaries of the lot extended "from neighbor to neighbor."[1] Prior to closing, Perkins never saw the

[1] Since there was no longer a home on Lot B, it appeared to Perkins that the nearest neighbor's property lay beyond Lot B.

MLS Report or any other document representing the acreage or boundaries of the property for sale, and his realtor never discussed these matters with him.

Perkins made an offer to purchase the home, and after some negotiation, the Coxes accepted. The contract of purchase identified the address assigned to Lot A, but did not designate the acreage or boundaries of the property.

Stewart Advanced Land Title (Stewart Title) conducted a title examination prior to closing. Because the Coxes had not recorded the division of Lots A and B, Stewart Title employees believed the 1.57-acre plot remained intact. A deed was prepared reflecting that the entire 1.57 acres was being transferred from the Coxes to Perkins.

At closing, the parties signed a number of documents which they admitted to not having read closely, including the inaccurate deed.

Several weeks after closing, the Coxes realized the deed had conveyed the entire property and not just Lot A. They filed suit in the Pendleton Circuit Court on October 28, 2008, seeking to reform the deed on the basis of mutual mistake.

Following a bench trial, judgment was entered in favor of the Coxes. The circuit court was persuaded that the deed had been the product of mutual mistake and ordered reformation.[2]

[2] The Coxes also identified Stewart Title as a defendant in their complaint, wherein they alleged the deed had been negligently prepared. The circuit court determined the title company had not performed its duties negligently and absolved it of liability. Perkins' notice of appeal names Stewart Title as an appellee, but neither party to the real estate transaction has presented an argument concerning the portion of the order which addresses the title company. Stewart Title argues in its appellee's brief that Perkins and the Coxes have therefore waived any argument which would give rise to liability in Stewart Title. We agree and will not disturb the portion of the circuit court's order which concerns Stewart Title.

Perkins appealed. He asserts three potential bases for reversal of the circuit court's order of reformation: (1) the parol evidence rule and merger doctrine should have barred consideration of any evidence outside the deed; (2) there was no mutual mistake; and (3) the Coxes' unilateral mistake does not warrant reformation.[3]

II. Discussion

A deed may be reformed when clear and convincing evidence supports a finding that "there was a valid agreement and that the written agreement failed to express the intent of the parties due to a mutual mistake." *Sroka-Calvert v. Watkins*, 971 S.W.2d 823, 829-30 (Ky. App. 1998). Whether a mutual mistake occurred is a question of fact which may be disturbed only when it is not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "The test of whether evidence is 'substantial' is whether taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62, 64 (Ky. 1970) (citation, quotation, and parenthetical statement omitted).

Evidentiary matters are reviewed for abuse of discretion. *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994).

a. Parol evidence and the merger doctrine

[3] Perkins has raised another argument for the first time in his reply brief concerning the admissibility of evidence which may have been privileged or otherwise inadmissible. "The reply brief is not a device for raising new issues which are essential to the success of the appeal[,]" and so we will not consider it. *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979); *Catron v. Citizens Union Bank*, 229 S.W.3d 54, 59 (Ky. App. 2006).

Perkins argues the parol evidence rule and the merger doctrine should have barred consideration of all evidence extrinsic to the deed. We disagree.

As a general matter, "the merger doctrine provides that upon delivery and acceptance of a deed, the deed extinguishes or supersedes the contract for the conveyance of the realty," *Jackson v. Mackin*, 277 S.W.3d 626, 628 (Ky. App. 2011) (citation omitted). As another general matter, "[a]bsent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co*., 94 S.W.3d 381, 385 (Ky. App. 2002) (citation omitted).

But where a party has asserted mutual mistake, the merger doctrine does not apply, and parol evidence may be admitted to ascertain the parties' true intentions. *Jackson*, 277 S.W.3d at 628; *Ingram v. Ingram*, 283 S.W.2d 210, 212 (Ky. 1955).

The circuit court's consideration of evidence extrinsic to the deed was not erroneous.

b. Mutual mistake

A party seeking reformation of a written instrument due to mutual mistake must satisfy three elements: "First, it must show that the mistake was mutual, not unilateral. Second, the mutual mistake must be proven beyond a reasonable controversy by clear and convincing evidence. Third, it must be shown that the parties had actually agreed upon terms different from those expressed in the written instrument." *Abney v. Nationwide Mut. Ins. Co.,* 215 S.W.3d 699, 704 (Ky. 2006) (citations, quotations, and parenthetical statements omitted).

The evidence of mutual mistake was unequivocal. The Coxes had in fact listed the home and .69 acres, and that was all that was offered for sale. Perkins mistakenly believed the entire 1.57-acre plot accompanied the home at all times relevant to the transaction. His mistake was unilateral until the deed was signed at closing. At that time, the Coxes mistakenly signed an instrument which identified the wrong acreage. Both parties mistakenly entered into the transfer of 1.57 acres.

It is also apparent that the parties actually agreed to terms of sale different than those expressed in the deed. As the circuit court found, the contract of purchase identified the address of Lot A; Perkins made no offer to purchase Lot B because Lot B was not available for sale. The acreage of Lot A was plainly identified on the MLS Report. That Perkins failed to ascertain the precise boundaries or proper acreage of the property he was purchasing does not mean that the parties failed to agree to the sale of Lot A.

The circuit court's finding of mutual mistake was supported by substantial evidence, and reformation was the appropriate remedy.

c. Unilateral mistake

Because we have concluded the order on appeal was proper on the basis of mutual mistake, we will not address Perkins' argument concerning unilateral mistake.

III. Conclusion

The circuit court's finding that the deed was the product of mutual mistake was supported by substantial evidence, and so we affirm.

ALL CONCUR.

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