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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001532-MR

JOHN MORAN AND
SCARLETT MORAN

APPELLANTS

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, SPECIAL JUDGE
ACTION NO. 11-CI-00168

PEOPLES BANK OF KENTUCKY, INC.;
FRANK O. HINTON;
VELDA GAIL HINTON; AND
COMMUNITY TRUST BANK

APPELLEES

AND

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FRANK O. HINTON AND
VELDA GAIL HINTON

APPELLANTS

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 13-CI-00051

PEOPLES BANK OF KENTUCKY, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND MAZE, JUDGES.

MAZE, JUDGE: These consolidated appeals concern the allegedly fraudulent conveyance of property during efforts by Peoples Bank of Kentucky (hereinafter “Peoples Bank”) to obtain and enforce a lien. Observing no error in either trial courts’ decision to grant summary judgment, we affirm.

Background

In 2010, Peoples Bank filed suit against Frank and Velda Hinton (hereinafter “the Hintons”) as guarantors on a loan after the principal debtor filed for bankruptcy. The trial court ordered the parties to mediation, which yielded an Agreed Judgment between the parties. Pursuant to the terms of the Agreed Judgment, the Hintons would pay Peoples Bank \$405,000 plus interest until paid in

full. Payment was due on or before April 22, 2011. Peoples Bank filed the Agreed Judgment with the trial court on April 28.

However, three days before payment was due under the Agreed Judgment, the Hintons conveyed all of the property except their residence to their son-in-law, John Moran. The deed, which Moran recorded the same day, listed \$150,000 as the consideration given for the property. Moran wrote the Hintons a personal check for \$150,000; however, the Hintons never cashed or deposited this check. During discovery, the Hintons disclosed another agreement between themselves and Moran seemingly executed on the same day as the deed. This second agreement, which referenced the \$150,000 Moran was to give under the deed, provided additional “consideration” in the form of the Hintons’ retention of income on leasing and rental agreements derived from the property. Though notarized, the parties did not record this second agreement along with the deed.

After the April 19, 2011 conveyance, Peoples Bank filed a second suit against Moran and the Hintons alleging fraudulent conveyance of the property and seeking to invalidate the deed. Peoples Bank later filed a foreclosure action against the Hintons, the second case before us in these consolidated appeals.

During discovery on the fraudulent conveyance claim, the parties took the depositions of Frank Hinton and John Moran. The following testimony concerning Moran’s \$150,000 check arose from Frank Hinton’s deposition:

COUNSEL: So there was no money in the bank –
HINTON: (Interrupting) Well, not enough, so...

COUNSEL: There wasn't enough money in the bank to cover the check?
HINTON: Yeah.
COUNSEL: Okay. And who told you there wasn't enough money in the bank?
HINTON: Well, they did.
COUNSEL: I'm sorry?
HINTON: Whoever I – whoever the check was on told me that.
COUNSEL: Okay. Well, the check was on John Moran.
HINTON: Okay.
COUNSEL: And are you saying the Mr. Moran told you there wasn't enough money in the bank to cover the check?
HINTON: So we thought we'd just hold it a while instead of tearing it up.
COUNSEL: So you've never tried to deposit the check?
HINTON: No.

....

COUNSEL: Okay. All right. So is it – am I correct in understanding, that the land was deeded over –
HINTON: (Interrupting) Uh-huh (affirmative).
COUNSEL: -- to Mr. Moran, but there's been no money paid for that land?
HINTON: No money.

Likewise, in his deposition testimony, Moran stated that he had intended to obtain a loan from Community Trust Bank to fund the purchase, but the loan never materialized due to Peoples Bank's commencement of this suit.¹ Moran testified, in pertinent part, as follows:

COUNSEL: ... And as we sit here today, you haven't paid any money for that farm, have you?

¹ The deposition testimony of Brian Clark, a loan officer for Community Trust Bank who worked with Moran to secure the loan, was that Community Trust Bank did not actually complete the loan process because it learned of Peoples Bank's suit "and that there was a problem with the transfer of the property from the Hintons to Dr. Moran."

MORAN: No, because the actions of Peoples Bank stopped the mortgage.

COUNSEL: Okay. And I understand that testimony about how all that came about here today. So you have a piece of property that's in your name that you don't have cash money in there, whether it be your own money or money that you borrowed. Correct?

MORAN: At the present time that's correct.

On August 5, 2013, the trial court entered a brief order granting Peoples Bank's November 2012 motion for summary judgment on its fraudulent conveyance claim. Nine days later, the trial court in the separate foreclosure action granted summary judgment to Peoples Bank and entered an order of sale on the Hinton's property. Hinton and Moran now appeal from both orders.

Standard of Review and the Summary Judgment Standard

The standard of review governing an appeal of a summary judgment is well-settled. Since a summary judgment involves no fact-finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

“The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In essence, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Therefore, we will find summary judgment

appropriate only “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR² 56.03.

Analysis

With the above standard in mind, it is our task to review the trial courts’ respective orders granting Peoples Bank’s motions for summary judgment. We take up the claim of fraudulent conveyance first, as its resolution may inform our analysis and conclusion concerning the enforceability of Peoples Bank’s judgment and lien.

In disputing Peoples Bank’s claim that the Hintons fraudulently transferred property addressed in the Agreed Judgment, the Hintons assert that several material facts remain at issue. They cite the “general doctrine of Kentucky law” that “the owner of property, though he be greatly indebted or even insolvent, may sell it and give good title to a *bona fide* purchaser despite his creditors, up to the time when they shall acquire a lien.” *Linn v. Brown*, 182 Ky. 287, 289 (1918) (citation and internal quotations omitted). Said owner need only convey his property “for valuable consideration and in good faith[.]” *Id.* The Hintons contend that Moran gave fair consideration for the property under the terms of the deed and the unrecorded agreement concerning lease and rental income. The record does not support the Hintons’ argument.

² Kentucky Rules of Civil Procedure.

Moran gave no actual consideration in acquiring the property described in recorded deed. When the parties transferred the property and signed the recorded deed on April 19, 2011, Moran tendered a personal check for \$150,000 to the Hintons. However, the Hintons never negotiated the check; and according to Frank O. Hinton's own deposition testimony, the Hintons and Moran understood that the bank would not honor the check due to insufficient funds. Moran's deposition testimony, while offering an explanation for the lack of sufficient funds, nevertheless acknowledged that he never actually paid the Hintons for the property he received.

Applicable Kentucky law³ states, in pertinent part,

Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate without valuable consideration therefor, shall be void as to all his then existing creditors, but shall not, on that account alone, be void as to creditors whose claims are thereafter contracted, nor as to purchasers from the debtor with notice of the voluntary alienation or charge.

KRS 378.020. The record unequivocally shows that Moran never gave the Hintons the consideration named in the deed.⁴ Therefore, neither a claim of good faith nor

³ On March 20, 2015, Kentucky's General Assembly approved legislation which repealed and replaced the statute relating to fraudulent conveyances effective January 1, 2016. *See* FRAUDULENT TRANSFERS—DEBTORS AND CREDITORS, 2015 Kentucky Laws Ch. 37 (SB 204). Hence, the statute in effect at the time of the conveyance in this case, Kentucky Revised Statutes (KRS) 378.010, *et seq.*, controls.

⁴ Moran and the Hintons point to the second notarized but unrecorded agreement between them stating the additional consideration of rental and leasing rights to the Hintons. However, this agreement was not included or recorded along with the deed. Additionally, it cannot be said that the Hinton's retention of leasing and rental income to which they were already entitled constituted a "legal right to which he would not otherwise have been entitled." *Charles T. Creech, Inc. v. Brown*, 433 S.W.3d 345, 352 (Ky. 2014), quoting *Phillips v. Phillips*, 171 S.W.2d 458 (Ky. 1943).

an assertion of value or circumstances salvaged the conveyance from voidance under the above statute. The conveyance, as it affected Peoples Bank's rights, was void as a matter of law. This fact entitled Peoples Bank to summary judgment.

As a result of the trial court's correct conclusion that Peoples Bank was entitled to summary judgment on its claim of fraudulent conveyance, the property reverted to the Hintons' legal possession. Therefore, as a matter of law, Peoples Bank was entitled to enforce the Agreed Judgment and its lien against the property. It follows that the trial court's grant of summary judgment in Peoples Bank's second action to enforce its lien did not constitute clear error.

Conclusion

We agree that Peoples Bank was entitled to judgment as a matter of law in both cases before the trial court. Therefore, the Fleming Circuit Court's respective judgments of August 5, 2013, and August 14, 2015, are affirmed.

ALL CONCUR.

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