RENDERED: JULY 17, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001110-MR

GARY COX AND REBECCA COX — APPELLANTS

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE HENRY S. JOHNSON, JUDGE
ACTION NOS. 12-CI-00143 & 13-CI-00286

FRANK PENNINGTON AND MARY PENNINGTON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Appellants appeal from a final judgment of the Harlan Circuit Court which held that Appellees were entitled to specific enforcement of a land contract. The judgment also held that Appellants were not entitled to foreclose on or rescind the contract and that there was no evidence the parties entered into an oral agreement. We find no error and affirm.

On December 31, 2007, the parties entered into a written land contract. The contract was for the sale of land owned by Appellants for the sum of $157,371.57. This sum represented the remaining balance on the mortgage Appellants had on the property. The property contained a commercial building in which a restaurant had been operated. The contract stated that Appellees would pay the Home Federal Bank in Harlan, Kentucky, the sum of $1,604.52 on or before the 13th day of each month. Home Federal Bank was the bank that held the mortgage to the land in question. The contract also contained other requirements that are subject to this appeal. The contract stated that Appellees agreed to pay all property taxes, to maintain fire insurance on the property with Appellants named as the beneficiaries on the policy, and to not place any other structure on the property without prior approval of Appellants.

Appellants alleged that on the same date, they also entered into an oral contract with Appellees. Appellants claimed that Appellees agreed to pay them $90,000 for the appliances and other inventory contained in the building. The alleged oral agreement was for $2,500 a month until the full $90,000 was paid. Appellees denied that any such oral agreement was made; however, the appliances and inventory were left in the building. Appellees argued that Appellants agreed to leave the appliances and inventory in the building because they wanted to cut all ties and walk away from the property.

On August 3, 2011, Appellants' attorney sent Appellees a letter stating that Appellees had defaulted on certain provisions in the land contract and

that Appellants intended to reclaim their property. The letter stated that Appellees had made late payments to the bank, paid property taxes late, did not maintain proper fire insurance, and placed a mobile trailer on the land without prior approval. It is undisputed that Appellees made some late payments on the land contract, paid some of the property taxes late, put a mobile trailer on the land without prior approval, and obtained fire insurance, but did not name Appellants as beneficiaries. Appellants also alleged that Appellees paid them $23,700 on the oral contract and thereafter stopped making payments.

On August 29, 2011, a fire occurred at the property in question. Appellees received two payouts from their insurance company, one for the building and one for the inventory and items inside the building. The money received for the building was given to the Home Federal Bank and put toward paying off the mortgage.

On February 14, 2012, the attorney for Appellees sent Appellants a letter stating that his clients wished to pay the remaining balance on the land contract and have Appellants sign the deed to the property over to them. The land contract stipulated that Appellees could pay off the balance early without any penalty. Appellants refused to sign the deed. On March 13, 2012, Appellees filed a complaint in the Harlan Circuit Court requesting specific performance of the land contract.

After some discovery, Appellants filed a foreclosure action on May 16, 2013. Appellants claimed that Appellees had breached some of the terms of

the land contract and had stopped making payments on the oral contract. Appellants sought a judicial sale of the property.

The two cases were consolidated and a bench trial was held on December 17, 2013. On June 6, 2014, the trial court entered its final judgment. The court found that even though some payments were made late, Appellees were current in their payments at the time the complaint for foreclosure was filed. The court also found that any violations of the land contract by Appellees were minor and not grounds for foreclosure or rescission. The court held that Appellees were entitled to specific performance of the land contract and that upon the payment of the full balance, Appellants were ordered to execute a deed of conveyance.

As to the issue of the oral contract, the court found that Appellants had not proven the existence of such an agreement. The court went on to hold that even if such an agreement existed, it would violate the Statute of Frauds because its terms could not have been performed within one year. This appeal followed.

> As noted, the trial court conducted a bench trial in this action. Accordingly, our review is based upon the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure (CR) 52.01. CR 52.01 states that "[f]indings of fact shall 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." A reversible error arises when there is no substantial evidence in the record to support the findings of the trial court. *M.P.S. v. Cabinet for Human Resources,* 979 S.W.2d 114 (Ky. App. 1998). Of course, we review issues of law *de novo. Caesars Riverboat Casino, LLC v. Beach,* 336 S.W.3d 51 (Ky. 2011).

Slone v. Calhoun, 386 S.W.3d 745, 747 (Ky. App. 2012).

On appeal, Appellants argue that the trial court erred in granting Appellees specific performance, erred in not allowing a judicial sale, and erred in finding that no enforceable oral contract existed.

The landmark case in this jurisdiction which governs land contracts is *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979). In that case, the Kentucky Supreme Court held:

> When a typical installment land contract is used as the means of financing the purchase of property, legal title to the property remains in the seller until the buyer has paid the entire contract price or some agreed-upon portion thereof, at which time the seller tenders a deed to the buyer. However, equitable title passes to the buyer when the contract is entered. The seller holds nothing but the bare legal title, as security for the payment of the purchase price. *Henkenberns v. Hauck*, 314 Ky. 631, 236 S.W.2d 703 (1951).
>
> There is no practical distinction between the land sale contract and a purchase money mortgage, in which the seller conveys legal title to the buyer but retains a lien on the property to secure payment. The significant feature of each device is the seller's financing the buyer's purchase of the property, using the property as collateral for the loan.
>
> Where the purchaser of property has given a mortgage and subsequently defaults on his payments, his entire interest in the property is not forfeited. The mortgagor has the right to redeem the property by paying the full debt plus interest and expenses incurred by the creditor due to default. In order to cut off the mortgagor's right to redeem, the mortgagee must request a court to sell the property at public auction. See Lewis, Reeves, How the Doctrine of Equitable Conversion Affects Land Sale Contract Forfeitures, 3 Real Estate Law Journal 249, 253 (1974). See also KRS[1] 426.005, 426.525. From the proceeds of the sale, the mortgagee recovers the amount owed him on the mortgage, as well as the expenses of

[1] Kentucky Revised Statute.

> bringing suit; the mortgagor is entitled to the balance, if any.

Id. at 382-83.

In the case at hand, one of the appellants, Mrs. Cox, testified that Appellees were current in their payments. She also testified that the only reason Appellants were bringing the foreclosure action is because Appellees would not honor the oral contract. The trial court found that Appellees were current in their payments on the land contract before the foreclosure action was initiated. This finding is uncontested and therefore not clearly erroneous. We agree with the trial court that a foreclosure, or judicial sale, was not appropriate in these circumstances.

The trial court also held that rescission was not called for because Appellees' breaches of the contract were immaterial. We agree. "It is elementary that a contract may not be rescinded unless the non-performance, misrepresentation or breach is substantial or material. The [C]ourt does not look lightly at rescission, and rescission will not be permitted for a slight or inconsequential breach." *Evergreen Land Co. v. Gatti*, 554 S.W.2d 862, 865 (Ky. App. 1977). The breaches of the land contract in this case were immaterial. Appellants received the money they bargained for and were in no way injured by Appellees breaches.

Before the foreclosure action was filed, Appellees were current on all their payments, including property taxes. In fact, the last late payment was in August of 2011. There were no late fees or penalty charges owed. In addition, the mobile trailer had been removed from the property. Also, even though Appellees did not

name Appellants as beneficiaries to the fire insurance policy, Appellants were still protected by the policy. *See Estes v. Thurman*, 192 S.W.3d 429, 431-32 (Ky. App. 2005) where the Court held that "[f]irst, it is not necessary that one be named as an insured in an insurance policy in order to be entitled to policy proceeds. Second, a named insured under a policy is not entitled to recover more than the value of his or her insurable interest." (Citations omitted). Here, Appellees put the insurance proceeds from the building toward the mortgage. Any breaches by Appellees were immaterial and were not grounds for rescission.

Even though this issue was not discussed by the trial court, we believe it is worth mentioning that Appellants waived all arguments regarding Appellees' breaches. Appellees made late payments on the land contract the first few months after the agreement was entered into. Appellees were also late on the first property tax payment they were obligated to pay. Appellants, however, continued accepting their monthly payments and did not put them on notice of their intent to regain possession of the property for over three years. In addition, after Appellants' attorney sent the default letter in August of 2011, Appellants waited 21 months before bringing a foreclosure action. During this time Appellees were continuing to make payments on the land contract.

"It is possible, of course, for a party to waive his right of rescission by treating the contract as still in force after he knows of the breach of warranty." *Chaplin v. Bessire & Co.*, 361 S.W.2d 293, 297 (Ky. 1962). In the case of *Allen v. Bates*, 498 S.W.2d 120 (Ky. 1973), the parties entered into a similar land contract

to the one at issue. The Allens sought specific performance on their option to purchase the land at issue, but the Bates refused to comply due to the Allens making late payments. The Bates attempted to cancel the contract due to late payments, but thereafter accepted additional payments. The Court stated that "[m]ost jurisdictions seem to hold and we have so held that one who later accepts payment for rental accruing after an attempted cancellation waives the right to cancel because of the late payments." *Id*. at 122 (citations omitted). In the case at hand, Appellants were aware of breaches of the land contract in 2008, but continued to treat the contract as if it were still in full force and effect.

As to the alleged oral agreement, we agree with the trial court that even if such an agreement existed, it would violate the Statute of Frauds. KRS 371.010(7) states:

> No action shall be brought to charge any person . . . [u]pon any agreement that is not to be performed within one year from the making thereof . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent.

Mrs. Cox testified that Mr. Pennington agreed to pay her $2,500 a month until he had paid a total of $90,000. It would take 36 months, or 3 years, to pay the full amount. In order to be enforced, this agreement should have been in writing.

Based on the foregoing reasons, we affirm the judgment of the Harlan Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Johnnie L. Turner
Danny Lee Lunsford, Jr.
Harlan, Kentucky

BRIEF FOR APPELLEES:

Karen S. Davenport
Harlan, Kentucky