

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001683-MR

JEFFREY MILBURN KRIEG

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 15-CI-001148

ROBERT MICHAEL PFEISTER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

MAZE, JUDGE: Appellant, Jeffrey Krieg, appeals from an order of the Jefferson Circuit Court dismissing his counterclaim and granting judgment for Appellee, Robert Pfeister in a declaratory action to quiet title to real property. Krieg asserts that the trial court erred in finding for Pfeister because issues of fact remain surrounding an alleged oral agreement to convey a partial interest in the property to him.

We observe no error in the trial court's dismissal of Krieg's counterclaim, as no genuine issues of material fact remain. Therefore, we affirm.

Background

The facts of this case are largely undisputed. Appellant, Jeffrey Krieg (hereinafter Jeffrey), and his late sister, Donna Stull, are the children of the late Dorothy Krieg. In 2005, Dorothy conveyed her home to Donna by general warranty deed. Dorothy passed away in 2008. In 2011, Donna placed the home in the joint ownership of herself and her husband, Appellee, Robert Pfeister (hereinafter "Robert"). The deed granted both Donna and Robert right of survivorship, and when Donna passed away in 2011, Robert took sole legal title to the home. However, Robert – and Donna until her passing – actually resided in Shelby County, and Jeffrey lived at the home which is the subject of this case.

On March 10, 2015, Robert filed a petition for declaration of rights seeking possession of the home and asserting that Jeffrey had no legal right to possession.¹ Attached to the petition was a copy of the quitclaim deed placing the property in Donna's and Robert's joint ownership. With his answer, Jeffrey asserted a counterclaim based upon his averment that a verbal agreement had existed between himself, Donna, and Dorothy that Jeffrey would receive a half interest in the home. He sought judgment awarding him this half interest because, according to him, the alleged agreement predated, and therefore invalidated, Dorothy's 2005 transfer to Donna. Jeffrey attached to his answer and counterclaim

¹ It appears from the record that this followed some effort between Robert, Jeffrey, and others to reach an agreement concerning sale and possession of the home.

proof of expenses he incurred for the property, an unsigned last will and testament of Dorothy's, and copies of emails between himself, Robert, and others – presumably family members – which Jeffrey asserted as proof of the “understanding” regarding his interest in the home.

On August 19, 2015, Robert filed a motion to dismiss Jeffrey's counterclaim for failure to state a claim and for judgment in Robert's favor. In an October 6, 2015, order, the trial court granted Robert's motion, holding that Kentucky's Statute of Frauds deprived Jeffrey of any legal claim to the property based upon a verbal agreement. The court further held that, even if there was an agreement, Dorothy rescinded it when she deeded the property to Donna in 2005. Accordingly, the trial court entered judgment in Robert's favor and dismissed Jeffrey's counterclaim. Jeffrey now appeals.

Standard of Review and the Summary Judgment Standard

Robert's motion was one to dismiss Jeffrey's counterclaim pursuant to CR² 12.02(f) and for judgment in his favor. However, the trial court expressly stated in its order that it would treat the motion as one for summary judgment, as the court had considered matters outside the record. We shall do the same; and, as a trial court's ruling on summary judgment requires no findings of fact, the question is exclusively one of law, and our review is *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

² Kentucky Rules of Civil Procedure.

“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.” CR 56.03.

Analysis

Jeffrey argues that the trial court incorrectly applied the Statute of Frauds to the testamentary gift he alleges Dorothy granted him. He also argues that the trial court’s dismissal of his counterclaim was premature, as it deprived him of the opportunity to conduct discovery.³ We address these arguments in-turn.

Kentucky’s Statute of Frauds provides that

[n]o action shall be brought to charge any person: ... (6)
Upon any contract for the sale of real estate, or any lease
thereof for longer than on year[] ... unless the promise,

³ Jeffrey also asserts that Dorothy’s conveyance to Donna was an implied trust for the benefit of himself and Donna’s heirs. However, he raises this argument for the first time on appeal. “[I]t is the accepted rule that a question of law which is not presented to or passed upon by the trial court cannot be raised here for the first time.” *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461, 466 (Ky. 1955). The existence of an implied trust is such a question, and we shall not consider it when the trial court did not also have the opportunity to do so.

contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith...

KRS 371.010. Jeffrey argues that the alleged agreement was not for the “sale” of the home, but for a gift of a half interest in it. For purposes of the law, this is a distinction without a difference.

“[A]n alleged oral contract for the conveyance of real estate is within the statute of frauds.” *Bennet v. Horton*, 592 S.W.2d 460, 462 (Ky. 1979), citing *Head v. Schwartz’ Ex’r*, 304 Ky. 798, 202 S.W.2d 623 (1947). Therefore, the Statute of Frauds renders the alleged oral contract between Dorothy and Jeffrey unenforceable, and Jeffrey’s counterclaim thereby becomes unsustainable as a matter of law.

Even if the Statute of Frauds did not apply, or even if there was a writing memorializing the alleged verbal contract, we agree with the trial court and with Robert that Dorothy’s conveyance of the whole property to Donna in 2005 rescinded Dorothy’s agreement with Jeffrey. “It is hornbook law that a donor may revoke his intended gift any time prior to delivery and acceptance.” *Leasor v. Bailey*, 714 S.W.2d 156, 158 (Ky. App. 1986), citing *Aetna Ins. Co. of Hartford, Connecticut v. Eblen*, 266 Ky. 548, 99 S.W.2d 710 (1936). The trial court was correct that Dorothy’s transfer of the subject property to Donna in 2005 constituted rescission or revocation of any prior promise or agreement benefitting Jeffrey.

Jeffrey's counterclaim fails as a matter of law, and Robert was entitled to judgment in his favor.

Jeffrey next claims that the trial court wrongfully granted Robert's motion before affording Jeffrey the opportunity to conduct discovery concerning the existence of the verbal agreement with his mother. On this subject, it is important to remember that the trial court treated Robert's motion to dismiss as a motion for summary judgment. CR 12.02 states that in such situations, CR 56 applies, and "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Specifically, Jeffrey asserts that the trial court deprived him of "the opportunity to present witness testimony ... or the signed Last Will & Testament of Dorothy Krieg...." He argues that both items of evidence would have "give[n] weight" to the existence of a verbal agreement. However, as we have already stated, the existence of a verbal contract would have no legal effect. Admission or discovery of this evidence could not change the fact that Jeffrey's counterclaim lacked a legal footing. Any such agreement was either unenforceable under the Statute of Frauds or rescinded when Dorothy transferred title to Donna.

Furthermore, Jeffrey filed abundant documentation with his Answer and counterclaim – documentation he claimed proved the existence of a verbal agreement. He also filed a partial and unsigned document which he asserted as his mother's last will and testament. Prior to this, the trial court granted him two extensions of time in which to answer and plead his case. Overall, the trial court

afforded Jeffrey the opportunity to place abundant evidence in the record. Despite this evidence, no genuine issue of material fact remained in dispute. Dismissal of the counterclaim was proper.

Conclusion

The nature of Jeffrey's counterclaim and the facts, both present and not present, in this case render his success on that claim impossible. Accordingly, dismissal of his counterclaim was appropriate, and Robert was entitled to judgment as a matter of law. The October 6, 2015, order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey Milburn Krieg, *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

John D. Dale, Jr.
Taylorsville, Kentucky