ARKANSAS COURT OF APPEALS

DIVISION III
No. CA09-47

MIKE KILLOUGH and BETTY KILLOUGH APPELLANTS V. AUDREY FARMER and JOHN ROGERS APPELLEES	**Opinion Delivered** June 17, 2009 APPEAL FROM THE JOHNSON COUNTY CIRCUIT COURT, [NO. CV-2007-162] HONORABLE JAMES D. KENNEDY, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Appellants Mike Killough and Betty Killough (Killoughs) appeal the October 9, 2008 order from the Johnson County Circuit Court denying their motion for summary judgment and granting appellees'—Audrey Farmer and John Rogers—amended motion for summary judgment. They also appeal the circuit court's November 10, 2008 order granting appellees' motion for attorney's fees. On appeal, the Killoughs argue that the circuit court erred in denying their motion for summary judgment, in granting appellees' amended motion for summary judgment because material issues of fact exist, and also, that the resulting award of attorneys' fees was in error. We affirm.

Facts & Procedural History

This case initially arose out of Farmer falling behind on her payment to Regions Bank on real property located in Johnson County, Arkansas. Negotiations for the sale of that property occurred between Farmer and both Rogers and the Killoughs. On September 17, 2007, an offer and acceptance to purchase the property for $80,000 was signed by Farmer and Rogers in the presence of a notary. On October 10, 2007,[1] an offer and acceptance to purchase the property for $95,000 was signed by Farmer and the Killoughs, which contained the following handwritten provision: "[t]his offer is contingent upon John Rogers $80,000 offer being denied." On November 10, 2007, another offer and acceptance to purchase the property for $80,000 was signed by Farmer and Rogers. The Killoughs filed a verified complaint for specific performance and a *lis pendens* on the property November 14, 2007, alleging that the first offer and acceptance between Farmer and Rogers had expired and that Farmer was contractually obligated to sell the property to them.

It is undisputed that on December 28, 2007, a warranty deed was executed and the property in question was transferred from Farmer to Rogers. On January 16, 2008, Farmer filed a motion for summary judgment, arguing the contingency had not occurred, as evidenced by the transfer of the property to Rogers pursuant to a warranty deed dated December 28, 2007, recorded in Johnson County Record Book 2007-36 at pages 387-88.

[1]This document is not dated - this date is merely alleged by the Killoughs.

On June 19, 2008, the Killoughs file a motion for summary judgment and third amended complaint, pleading statute of frauds. On July 24, 2008, Farmer and Rogers filed an amended joint motion for summary judgment.

A hearing regarding whether the case was ready to be decided on the pleadings was held on July 28, 2008. At that time the parties agreed to submit the case on the pleadings, but the circuit court specifically allowed the parties their full time under Rule 56 to file a response and reply to the July 24, 2008 amended motion for summary judgment.

On August 15, 2008, the Killoughs filed a reply to the amended motion for summary judgment, including affidavits from Mike Killough, Betty Killough, and Teresa Humble (the witness to the offer-and-acceptance signing by the Killoughs and Farmer). Exactly ten days later, on August 25, 2008, Farmer and Rogers filed affidavits regarding the extension and actions by Regions Bank, as well as a joint response to the Killoughs' response to their amended motion for summary judgment. On September 9, 2008, the Killoughs filed an additional reply to "Response to Plaintiffs' Reply," that was filed on or about August 1, 2008.

The circuit court issued a letter ruling on October 3, 2008, denying the Killoughs' motion for summary judgment and granting Farmer's and Rogers's motion to release *lis pendens* and amended motion for summary judgment, with an order to that effect being filed on October 9, 2008. The circuit court specifically found that "there exists no dispute as to any genuine issue of material fact as it is clear that Mr. Rogers'[s] offer was not denied and

that title was transferred by Warranty Deed from the Defendant to John Rogers." Motions and orders regarding the award of attorney's fees were also filed by the parties and circuit court. The Killoughs filed a timely notice of appeal.

Standard of Review

In reviewing a grant of summary judgment, the issue of whether the evidence raised disputed issues of material fact is reviewed de novo by the appellate court. *See Allen v. Allison*, 356 Ark. 403, 155 S.W.3d 682 (2004). Specifically, in *Benton County v. Overland Development Co., Inc.*, 371 Ark. 559, 268 S.W.3d 885 (2007), our supreme court reiterated the well established standard of review used in reviewing the grant of summary judgment:

> Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. Once a moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appeal, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts.

Id. at 564, 268 S.W.3d at 888-89. Stated another way, a party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories 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 judgment as a matter of law on the issue set forth in

the party's motion. *See* Ark. R. Civ. P. 56(c)(2) (2007). The burden of proving that there is no genuine issue of material fact is upon the moving party. *Windsong Enters., Inc. v. Upton*, 366 Ark. 23, 233 S.W.3d 145 (2006). On appellate review, we must determine whether summary judgment was proper based on whether the evidence presented by the moving party left a material question of fact unanswered. *Id.* This court views the proof in the light most favorable to the party resisting the motion, resolving any doubts and inferences against the moving party, to determine whether the evidence left a material question of fact unanswered. *Id.*

Procedural Issue

Before addressing the merits of their arguments, the Killoughs point out what they deem a "procedural irregularity." A hearing was held on July 28, 2008, at which time it was agreed that the case would be submitted on briefs. On August 25, 2008, both Farmer and Rogers filed affidavits. The Killoughs assert that the submission of additional supporting evidence for a motion for summary judgment after the time for serving a reply without leave of court is improper under Arkansas Rule of Civil Procedure 56(c)(1), which provides:

> (c) Motion and Proceedings Thereon.
>
> (1) The motion shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, depositions, answers to interrogatories and admissions on file, and affidavits. The adverse party shall serve a response and supporting materials, if any, within 21 days after the motion is served. The moving party may serve a reply and supporting materials within 14 days after the response is served. For good cause shown, the court may by order reduce or enlarge the foregoing time periods. *No party shall submit supplemental supporting materials after the time for serving a reply, unless the court orders otherwise.* The court, on its own motion

> or at the request of a party, may hold a hearing on the motion not less than 7 days after the time for serving a reply. For good cause shown, the court may by order reduce the foregoing time period.

(Emphasis added.) Additionally, the Killoughs submit that the affidavits contain hearsay statements of an unidentified representative of a non-party, Regions Bank, that would not be admissible in evidence. They assert that this violates Arkansas Rule of Civil Procedure 56(e), which provides:

> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Finally, the Killoughs claim that there are no *material* statements in the affidavits that are uncontradicted by affidavits by them or previous admissions of the parties.

In her affidavit, Farmer contends that it was necessary for her daughter-in-law to release her dower interest. In the original complaint, however, the Killoughs alleged that Farmer was the sole owner of the property, and Farmer admitted that fact in her answer. The Killoughs state that they might have elected to take their chances with any alleged dower interest that might have been claimed by the daughter-in-law. Additionally, the Killoughs maintain that Farmer told them that she owed over $90,000 to Regions Bank, but there was

no proof presented as to how much over that amount she actually owed. They claim that a question of fact remained as to whether the $95,000 they offered to pay would have satisfied the debt to Regions Bank. If it would have, the sale could have gone through regardless of how Regions Bank's officers might have felt about them. And, unlike Farmer's agreement with Rogers, there was no provision in the offer and acceptance between Farmer and them that obliged them to accept any less than clear title regardless of how much Farmer may have owed Regions Bank.

The Killoughs acknowledge that it is unclear whether the circuit judge placed any weight whatsoever on these belated affidavits. They ask that for purposes of this court's consideration of the case, however, that the affidavits be given no weight whatsoever.

A decision on whether to grant a continuance on a summary-judgment motion in order to grant additional discovery under Arkansas Rule of Civil Procedure 56(f) is a matter of discretion with the circuit court, and under Arkansas Rule of Civil Procedure 56(e), the circuit court may permit affidavits to be supplemented by further affidavits. *See Hamilton v. Allen*, 100 Ark. App. 240, 267 S.W.3d 627 (2007). While neither was specifically requested, the circuit judge explicitly stated during the July 28, 2008 hearing that the Killoughs had time to file an amended answer to Farmer's and Rogers's amended motion for summary judgment filed on July 24, 2008. He also stated that if he needed to "file a response to it, then by the end of the month I'll assume I have all of this, and the Court can rule on it. Does that sound fair?" The Killoughs' attorney then asked, "[s]o I will have my full time and

then you'll give him [Farmer's and Rogers's attorney] like ten days?" To which the circuit judge replied, "Yes, standard time." And the Killoughs' attorney replied, "[v]ery good. Okay, Judge."

The Killoughs filed their "answer"—titled "Reply to Brief of Defendants Filed Approximately July 25, 2008 and Reply to Amended Motion for Summary Judgment," including attached affidavits from Mike Killough, Betty Killough, and Teresa Humble on August 15, 2008. Farmer and Rogers filed a joint response to that document on August 25, 2008—along with the affidavits in question. Subsequently, the Killoughs filed an additional reply to that response on September 9, 2008. We hold that there is no merit to the Killoughs' challenge to the affidavits that were filed in response to their pleadings, which were authorized by the circuit court during the July 28, 2008 hearing.

Discussion

I. Killoughs' Motion for Summary Judgment

The Killoughs initially contend that summary judgment should have been granted in their favor, indicating that they take into consideration the standard of review, refer only to their undisputed testimony, and give the benefit of all inferences to Farmer and Rogers. They assert that they sufficiently supported their motion for summary judgment with the appropriate supporting documents to make a *prima facie* case of entitlement to summary judgment. It then became incumbent upon Farmer and Rogers to meet proof with proof,

responding with admissible material and responsive evidence. The Killoughs maintain that Farmer and Rogers failed to do so.

The Killoughs rely on their proof that Farmer signed an offer and acceptance with them on October 10, 2007. They acknowledge that the contract contained a handwritten condition—"This offer is contingent upon John Rogers $80,000 offer being denied." The Killoughs maintain that the meaning of the condition was ambiguous, but that it was later explained by parol evidence offered by them. They claim that "the" question in this appeal is whether that condition occurred. If Rogers's $80,000 offer to purchase the property in question was "denied," then Farmer was obliged to sell the property to them for $95,000.

The Killoughs cite *C. & A. Construction Co., Inc. v. Benning Construction Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974), in support of their contention that the conditional language of the contract contains a patent ambiguity. They assert that it is obvious from the face of the contract that something must be added in order for the circuit court to understand it. They go so far as to say that the conditional language is "completely meaningless" without looking outside the four corners of the contract between Farmer and themselves. They claim that parol evidence is admissible—"indeed indispensable"—to explain the writing. *Id.*

The Killoughs claim to have provided such evidence in their complaint and affidavits, which assert that the conditional language meant that Regions Bank would have to agree to accept John Rogers's offer in full satisfaction of Farmer's obligations within thirty days of the execution of that original September 20, 2007 offer and acceptance. They contend that

only two "offer and acceptance" documents could constitute a "John Rogers $80,000 offer," the one signed on September 20, 2007, and the one dated November 10, 2007. The Killoughs submit that the first offer and acceptance failed as a matter of law, and the second could not have been the one referred to in their October 10, 2007 offer and acceptance with Farmer—because it had not yet come into existence.

Again, the Killoughs request that the court not consider the affidavits of Farmer and Rogers, but allege alternatively that they do not create a question of fact. Farmer denies that she told the Killoughs that the Rogers offer had been denied, which the Killoughs claim would create a question of fact, and if relied upon, would prevent them from being entitled to summary judgment. However, they claim that under the undisputed facts of the case, it was not necessary for Farmer to tell them that the Rogers offer had been denied because it had failed as a matter of law upon the expiration of thirty days. Accordingly, they do not rely on that portion of their testimony for support. Instead, they rely on the language of the only agreement between Farmer and Rogers in existence on October 17, 2007, and argue the condition occurred on that date *as a matter of law*. They claim that Farmer's affidavit does not offer an alternative interpretation of the meaning of the condition and accordingly that she failed to meet proof with proof.

They point to the assertions in Farmer's and Rogers's affidavits that "the original offer [of September 17, 2007] was extended," "under the same terms and conditions, with no other changes," and "[n]o other conditions were changed." The Killoughs argue that the affidavits

cannot overcome the legal effect of the conspicuous changes in the terms of the two documents. They maintain that the subsequently-filed affidavits are contrary to the plain language of the two offer and acceptance documents. Without citation to supporting authority, the Killoughs claim that because the documents are not identical, the latter is not an extension of the former, but is, as a matter of law, a new contract. As such, the Killoughs reiterate that the only "John Rogers $80,000 offer" in existence at the time the Killoughs executed the offer and acceptance with Farmer was denied. As a result, their position is that the new November 10, 2007 offer and acceptance between Farmer and Rogers is irrelevant because Farmer was already obliged to sell the property to them at the time it was executed.

In contrast, Farmer and Rogers point out that the September 17, 2007 offer and acceptance language in question, "Seller shall vacate the property and deliver possession to Buyer on or before 30 days—Currans Abstract to close," does not indicate delivery of possession thirty days from date of contract, or thirty days from closing, or thirty days from some other specific event. Typically, the possession of property does not occur until some time subsequent to the closing of the transaction. Here, there was no deadline for the closing or the expiration of the offer. Additionally, it is undisputed that the offer and acceptance was duly accepted by both parties and provides for a "reasonable time" for Seller to furnish title insurance and meet any objections to the title insurance.

Farmer and Rogers assert that the reasons for the extension document executed on November 10, 2007, was to confirm the agreement between them. Regions Bank needed the

contract to be more current because it was taking longer than expected to get approval to release the collateral for less than was owed on the debt. The purchase price remained the same, as did the other material provisions of the agreement. They also note that the November 10, 2007 offer and acceptance did *not* contain a provision that the previous offer had been denied.

We hold that the Killoughs failed to prove that the "30 days" language in the September 17, 2007 offer between Farmer and Rogers triggered the "denial" of Rogers's offer as a matter of law. At a minimum here, there is a question as to whether the November 10, 2007 offer between Farmer and Rogers was an extension. Admittedly, the documents are not identical, but our review indicates that there were no material changes in terms or conditions, and any changes that were made were agreed to by both Farmer and Rogers and were appropriately modified by the signed writing between them. Accordingly, we affirm the denial of the Killoughs' motion for summary judgment.

II. Grant of Farmer's and Rogers's Motion for Summary Judgment

For purposes of this argument, the Killoughs suggest that the circuit court missed the issue. They assert that the relevant legal question was not whether Farmer issued a warranty deed to Rogers, but whether she was contractually obligated to issue it to the Killoughs instead. They maintain that Farmer's signing the deed over to Rogers does not prove that the condition was not met, rather, it proves that she breached her contract with them.

Again, the Killoughs focus on what the language of the contract meant, and refer back to the argument in the previous section. They explained what they thought the condition meant, and if it did in fact mean what they said, the condition was met by the end of the day on October 17, 2007.[2] To the extent Farmer denied under oath, in her affidavit, that the condition was timely met, she did nothing more than create a disputed question of fact—which means her motion for summary judgment should have been denied.

The Killoughs correctly point out that the initial burden is on the movant for summary judgment to establish entitlement to that remedy. They maintain that Farmer and Rogers failed to do so because the evidence submitted in support of their motion does not address whether the condition occurred. Moreover, they claim that Farmer and Rogers failed to address the meaning of the conditional language contained in Farmer's offer and acceptance with the Killoughs. The Killoughs maintain that all Farmer and Rogers demonstrated was that they went forward with their transaction in spite of Farmer's contractual obligation to do otherwise, specifically to sell the property to them.

They contend that the burden was on Farmer and Rogers to prove that the condition did not occur as a matter of law. Because the meaning of the language was ambiguous, the Killoughs claim that the first thing to be done was for Farmer and Rogers to explain the meaning of the language. They submit that it makes no sense to read the language with the

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[2]The Killoughs reference October 20, 2007, here and below, but the original offer and acceptance was signed on the 17th.

understanding that their contract with Farmer would only come into being if John Rogers *never* buys the property for $80,000. Rather, it implies the existence of an offer and acceptance, existing on the date of the Killough/Farmer offer and acceptance, under which Rogers would buy the property for $80,000. They maintain that when that offer and acceptance was finally produced, it contained a time limit.

They challenge Farmer's and Rogers's belated explanation that they merely extended the time for performance under the September 17, 2007 offer and acceptance with the November 10, 2007 offer and acceptance. As stated above, the Killoughs take issue with that because they maintain that the November 10, 2007 offer and acceptance was different in its terms, and was therefore a new contract as a matter of law. They acknowledge that, even as to this, there is a remaining question of fact. They remind the court that Farmer's earlier statements as alleged by them must be given their full probative force when Farmer's motion for summary judgment is under consideration. Betty Killough stated, under oath, in her affidavit, that:

> The Defendant, AUDREY FARMER, told us that there was a thirty day period which began to run on or about September 20, 2007, during which the consent of Regions was to be acquired. She also said that the consent had to make it clear that Regions would not come back on her for any unpaid balance due Regions should Regions be willing to settle for less than the full balance due it.
>
> On October 23, 2007, the Defendant, AUDREY FARMER, told us that the offeror in the first offer, JOHN ROGERS, had not been able to get Regions to accept $80,000, release their lien and forgive the balance of the debt to FARMER and so she regarded his offer as expired of its own terms and she wished to accept our offer.

The Killoughs maintain that these statements, the truth of which may not be questioned on summary judgment, conclusively deprive Farmer and Rogers of any right to summary judgment and compel this case to be submitted to a finder of fact to ascertain whether Farmer or Killough is telling the truth about this conversation.

Farmer and Rogers counter that the Killoughs—through their own words in their reply to the motion for summary judgment—acknowledge that their offer to Farmer was conditioned upon Rogers being unable to convince Regions Bank, the mortgage holder, to release its $80,000 mortgage on the property. The Killoughs state specifically in paragraph one of that pleading that,

> Replying to Paragraphs 1 and 2 of the Motion for Summary Judgment, the Plaintiffs point out that the First Amended Complaint For Specific Performance, filed November 15, 2007, *makes it clear that the Plaintiffs' offer to Defendant of $95,000 to buy the real estate was conditioned upon the Defendant's inability to get the mortgage holder to release its mortgage for the $80,000 offered by John Rogers*.

(Emphasis added.) Additionally, the Killoughs indicate in paragraph two of their original complaint for specific performance that their offer was on the condition that the offer of Rogers was "denied," and state,

> . . . by which the parties meant that the Defendant would not be able to convince Regions Bank to accept that sum in satisfaction of her mortgage debt to Regions Bank and so clear the title to be able to close with Rogers.

Although the Killoughs now want to allege that the conditional language in their offer and acceptance with Farmer is ambiguous, their own pleadings indicate that they understood what the parties meant at the time they filed these various pleadings—the language of which

is specifically lacking as to any reference to a specified time period in which the release of the mortgage had to be obtained. Practically speaking, negotiations of that nature often extend past the time parties intend. This is even more likely when dealing with lending institutions, especially large ones with corporate offices and "decision makers" that are located out of state.

Based upon our review of the pleadings and affidavits before the circuit court, we hold that evidence supports the circuit court's finding that Rogers's offer was not denied and that title was properly transferred by warranty deed from Farmer to Rogers. The Killoughs failed to meet Farmer's and Rogers's proof with proof regarding the existence of a validly executed contract. Accordingly, we affirm the grant of summary judgment in favor of Farmer and Rogers.

III. Attorneys' Fees

Attorneys' fees were awarded on the ground that Farmer and Rogers were the prevailing parties in this lawsuit. The Killoughs assert that they should not have prevailed on their motion for summary judgment and ask that the award of fees be vacated. Because we find no error in the circuit court's grant of summary judgment in favor of Rogers and Farmer, we affirm the resulting award of attorney's fees.

Affirmed.

GRUBER and GLOVER, JJ., agree.