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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-1458

BRENDA WONDER and RONNIE WONDER, APPELLANTS V. NANCY MCLEESE, APPELLEE	**Opinion Delivered** 24 FEBRUARY 2010 APPEAL FROM THE UNION COUNTY CIRCUIT COURT, [NO. CV-07-298-4] THE HONORABLE CAROL CRAFTON ANTHONY, JUDGE AFFIRMED

D.P. MARSHALL JR., Judge

When Ronnie and Brenda Wonder stopped making monthly payments to Nancy McLeese on the parties' contract for sale of two lots in El Dorado, McLeese gave notice to vacate and then filed this unlawful-detainer action. The lots had one house trailer on them when the parties made their contract, and the Wonders added another. The circuit court held a bench trial and ruled for McLeese. The Wonders appeal. We ordered re-briefing because the Wonders' abstract and addendum were deficient. *Wonder v. McLeese*, 2009 Ark. App. 558. The Wonders corrected those problems; we can now decide the merits. The issue presented is whether, in light of the parties' contract and all the circumstances, the Wonders forfeited their pre-default payments

or have an equitable interest in the property that must be foreclosed.

McLeese raises a preservation issue. She argues that the Wonders never raised the equitable-interest theory below and, even if they did, the circuit court failed to rule on it. But the Wonders' attorney argued this issue (he said the contract was a bond for title) during his opening statement at trial and again (citing various cases) in a post-trial brief. The circuit court had the benefit of that brief when it entered its final order. And although the circuit court did not expressly reject the Wonders' equitable-interest theory, it did so implicitly by enforcing the contract's forfeiture clause. The circuit court's decision that the parties made an executory contract necessarily rejected the Wonders' theory that the contract was tantamount to a mortgage; these two theories of this case are mutually exclusive. The Wonders therefore preserved this argument.

We agree with McLeese, however, that the parties' contract was not a bond for title. There were no bonds or notes to secure future payments. *E.g.*, *Williams v. Baker*, 207 Ark. 731, 734–35, 182 S.W.2d 753, 754–55 (1944). Nor is there anything about the transaction indicating an immediate conveyance of the property to the Wonders. *E.g.*, *Smith v. Robinson*, 13 Ark. 533, 539–40 (1853); *see also Pulaski Federal Savings & Loan Ass'n v. Carrigan*, 243 Ark. 317, 319–25, 419 S.W.2d 813,

815–18 (1967) (Fogleman, J., dissenting) (explaining the difference between a bond for title and an executory land contract). Instead, McLeese promised to deliver a deed conveying the property and all improvements if the Wonders satisfied the conditions precedent—making all the payments.

White v. Page, 216 Ark. 632, 226 S.W.2d 973 (1950) and similar cases control. White agreed to buy a house from the Pages. White was supposed to pay in monthly installments and had to pay the insurance, taxes, and assessments. The contract also contained a forfeiture clause. White failed to pay the insurance and taxes and eventually stopped making her monthly payments. Our supreme court held that the contract was not a bond for title, but simply an executory contract. It further held that "a purchaser's rights under an executory contract affecting real estate may be forfeited pursuant to the contract and without proceedings in law or equity." 216 Ark. at 637, 226 S.W.2d at 975. White's defaults forfeited her interest under the contract. *Ibid.*

This contract required the Wonders to make two monthly payments of $105.43 each. One of these payments went to McLeese and the other went to N.T. Rutledge, from whom McLeese was buying the property on an almost-identical contract. The Wonders made all their payments for about fifteen months. This contract contained

the following forfeiture clause:

> [I]f Buyer defaults in the payments of any of the aforesaid monthly payments and said default continues for 90 days, then all unpaid installments, shall immediately become due and payable at the option of the Seller, and Buyer agrees to vacate the premises immediately in a peaceful manner and all improvements made by Buyer shall be considered liquidated damages and the property of the Seller.

It is undisputed that the Wonders stopped paying McLeese in May 2007. They did, it was also undisputed, continue making payments to Rutledge until he stopped accepting them in August 2007. Facing this breach, McLeese did not sleep on her rights. She served the Wonders with a notice to vacate in July 2007[*] and filed this unlawful-detainer action about a month later.

At trial, the Wonders claimed that McLeese had agreed to forgive part of the purchase price if the Wonders paid the funeral expenses for Louie Wonder—McLeese's long-time boyfriend and Mr. Wonder's brother. The Wonders paid for Louie's funeral and then stopped paying McLeese. The circuit court, however, found the Wonders' claim about the funeral expenses incredible. And on appeal, the Wonders have abandoned the funeral-expenses claim, except as an

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[*]This was a few weeks before the ninety-day period expired. But the Wonders did not press this defect, and thus it was waived. *Cf. Harness v. Curtis*, 87 Ark. App. 337, 192 S.W.3d 267 (2004).

explanation for why they stopped making payments to McLeese.

The circuit court held that the parties had entered a valid buy/sell agreement, that the Wonders were in breach of that agreement, and that, because the Wonders had been in default for more than ninety days, they had to vacate the property immediately. The court thus viewed the parties' agreement as an executory contract and applied the forfeiture clause contained in it. This clause was similar to the one in *White*. The only material difference is that the *White* contract declared expressly that pre-forfeiture payments would be forfeited. *White*, 216 Ark. at 634, 226 S.W.2d at 974; *see also Abshire v. Hyde*, 13 Ark. App. 33, 35, 679 S.W.2d 214, 215–16 (1984) (pre-forfeiture payments treated as rent). This contract contained no similar statement. But this omission was not developed by the Wonders.

Was time of the essence in the Wonder-McLeese contract? It does not use those words. Neither did the contract in *White*, but the supreme court concluded that time was implicitly of the essence in that deal. 216 Ark. at 638–39, 226 S.W.2d at 976. This contract created a ninety-day window to cure missed payments. McLeese was meeting her prior obligation to Rutledge by having the Wonders pay him too. McLeese testified that she had to start making those payments during the litigation. The Wonders, on the other hand, testified that they either made or tendered all the

Rutledge payments but he refused to cash most of their checks. The circuit court made no specific findings on all of this. The undisputed fact remains that the Wonders stopped paying McLeese. In any event, the parties did not argue below about whether time was of the essence, and the Wonders do not raise this point on appeal. On the authority of *White*, *Abshire*, and like cases, we therefore conclude that the circuit court made no legal error in rejecting the Wonders' arguments and entering judgment for McLeese.

Affirmed.

ROBBINS and GLOVER, JJ., agree.