ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION I

CA06-1433

September 26, 2007

DAVID WATTS
APPELLANT

V.

CHARLES A. HUDSPETH and
THE ESTATE OF NOBE STILL,
DECEASED
APPELLEES

APPEAL FROM THE MARION
COUNTY CIRCUIT COURT
[CV-03-50-1]

HON. RUSSELL ROGERS,
SPECIAL JUDGE

AFFIRMED

Appellant David Watts appeals the judgment of the Circuit Court of Marion County in favor of Charles A. Hudspeth, Executor for the Estate of Nobe Still, deceased. Specifically, Watts contends that the trial court erred in finding that the lease executed between Watts and the deceased was terminated and that the option to purchase executed between Watts and the deceased was not a binding contract. We affirm.

The record in this case discloses the following undisputed facts. On March 29, 1997, the deceased, Nobe Still, entered into a written lease of 277 acres of land with Watts. Watts's wife was Still's first cousin. The lease provided in pertinent part: "I have promised David [Watts] the farm rent free for 1997 and 1998 to brush hog the pastures and fix the correl (sic) fences where they can handle the cattle." In 1998, no new agreement was executed between Still and Watts; however, Watts held over on the lease and continued to care for the property

to the satisfaction of Still. This arrangement between Watts and Still continued for five years.

On May 18, 2001, Stills, David Watts, and Wendell Watts (David's son) entered into an option to purchase that provided:

> Nobe Still hereby grants to David Watts and/or Wendell Watts an option to purchase the...premises: .... The sale will be upon the following terms and conditions:
>
> a. That the sale price be $85,000.00 cash which must be paid to the Estate of Nobe Still within 6 months of the date of his death.
>
> b. The Estate of Nobe Still will furnish evidence of title, either by abstract, certified to date, or title insurance in the amount of the sale price. When option is exercised by the Watts, title will be conveyed by a Executor's Deed with proper revenue stamps affixed.

A Memorandum for Recording option to purchase was filed May 25, 2001.

On January 8, 2003, Still died as a result of a motor vehicle accident. Still's nephew Alf Hudspeth was named the executor of Still's estate. On February 25, 2003, Watts, through counsel, mailed a letter to Hudspeth advising that he was exercising his option to purchase Still's property. Hudspeth confirmed at trial that he received this letter and forwarded it to his attorney. On February 28, 2003, Hudspeth executed a Notice to Vacate ordering Watts "to quit, surrender and deliver to [Hudspeth] possession" of the property within ten days after service of the notice. Watts was served with the notice on March 2, 2003. In response, Watts did not vacate the property. Instead, he forwarded another letter to Hudspeth, on March 12, 2003, stating that he was not in breach of the lease and that he had exercised his option to purchase.

Thereafter, Hudspeth filed an ejection lawsuit against Watts, alleging that Watts breached the lease by failing to properly maintain the farm. Hudspeth sought possession of the

property and damages for loss of rental income. Watts answered the ejection complaint claiming that he had not breached the lease agreement; therefore, the lease was still valid and enforceable. Watts filed a counterclaim for specific performance, alleging that Hudspeth breached the option to purchase in failing to deliver Watts the deed to the property.

After a bench trial, the trial court entered a judgment in favor of Hudspeth on all claims. The trial court ruled on the counterclaim first by finding that during a telephone conversation between Hudspeth and Watts, Hudspeth revoked the option to purchase and that revocation of the option occurred prior to Watts's February 25, 2003, letter to Hudspeth exercising the option to purchase. The trial court further held that the option to purchase was not supported by consideration. As such, no contract for the purchase of the property was created, and Watts was neither entitled to specific performance nor damages for breach of contract. The trial court then ruled on the ejection complaint. Although the trial court found that Watts did not breach the lease, it nonetheless granted Hudspeth relief because it found that Hudspeth terminated the lease. Therefore, the trial court found that Hudspeth was entitled to eject Watts from the property and to receive rental payments for the use of the property from the time Hudspeth terminated the lease, which the court determined to be effective August 2, 2003. A judgment was entered in favor of Hudspeth in the amount of $7,545.45 for the lost rental value of the property and $8.55 per day from March 2, 2006, until possession was given to Hudspeth.

Watts argues two points on appeal (1) that the trial court erred in finding that the lease was terminated and (2) that the trial court erred in finding that the option to purchase was not

a binding contract. The standard that we apply when we review a judgment entered by a circuit court after a bench trial is well established. We do not reverse such a judgment unless we determine that the circuit court erred as a matter of law or we decide that its findings were clearly against the preponderance of the evidence. *Heartland Cmty. Bank v. Holt*, 68 Ark. App. 30, 3 S.W.3d 694 (1999). Disputed facts and the determination of the credibility of witnesses are within the province of the circuit court, sitting as trier of fact. *Id.*

Watts's first argument is that the trial court erred in finding that the lease was terminated. Under Arkansas law, a lease may terminate by breach or when proper notice of termination is given. *In re Foote*, 277 B.R. 393 (Bankr. E.D. Ark. 2002). In the case at bar, the trial court found that Watts did not breach the lease, and this is not an issue on appeal. Instead, the trial court found that Hudspeth was entitled to relief because he terminated the lease.

The lease in question was for a fixed term from 1997 to 1998. Watts held over after 1998 until 2003, which converted Watts to a tenant "for years." *See Chappell v. Reynolds*, 206 Ark. 452, 176 S.W.2d 154 (1943). Common law provides that a hold-over tenant for years is entitled to six-months' notice of termination of the lease. *Chappell*, 206 Ark. at 452, 176 S.W.2d at 154.

In his briefs, Watts argues that based on the common-law rule, Hudspeth failed to give proper notice of the termination of the lease. However, Watts's argument is not preserved for our review on appeal. Watts's answer and counterclaim fail to allege that Hudspeth failed to give proper notice of termination. Watts failed, at trial, to argue lack of proper notice of

termination of the lease. Neither did he argue, in his directed-verdict motions, that Hudspeth failed to give proper notice of termination of the lease. Instead, Watts's pleadings and arguments were focused on the issue of breach—that the lease continued to exist because Watts did not breach it. Finally, Watts never asked for and did not receive a ruling from the trial court on the issue of whether Hudspeth gave proper notice of termination. Because we do not address for the first time on appeal issues that were not raised below, we cannot consider Watts's argument and must affirm. *Ford Motor Co. v. Ark. Motor Vehicle Comm'n*, 357 Ark. 125, 161 S.W.3d 788 (2004).

Next, Watts argues that the trial court erred in finding that the option to purchase was not a binding contract. Watts contends that he "accepted" the option to purchase prior to Still's death; that he properly exercised the option; and that there was valuable consideration for the option.

An option is merely an offer by one party to sell within a limited period of time and a right acquired by the other party to accept or reject such offer within such time. *Heartland Cmty. Bank v. Holt*, 68 Ark. App. at 36, 3 S.W.3d at 698. In order to create an option contract, valuable consideration is required; if no valuable consideration is exchanged, then the option is nothing more than an offer. *Hogan v. Richardson*, 166 Ark. 381, 266 S.W. 299 (1924); *O'Connor v. Patton*, 171 Ark. 626, 286 S.W.822 (1926). Our supreme court has stated: "[I]t is well settled in this state that an option contract based on valuable consideration does not lack mutuality, and that equity will compel the specific performance of such a contract when it has been accepted by the party seeking to enforce it." *Hogan*, 166 Ark. at 386, 266 S.W. at 300.

In the case at bar, the option to purchase was not a valid contract as it failed recite any consideration. *Hogan*, *supra*; *O'Connor*, *supra*. Further, there was no testimony at trial from any witness that monetary consideration was given for the option to purchase. On appeal, Watts claims that consideration does not have to be "a thing of pecuniary value or even reducible to monetary value," and he asserts that his consideration for the option can be found in his "actions in obtaining and recording the Memorandum of Option Contract" and his "continuing performance under the lease agreement."

While it is true that consideration does not have to be monetary or pecuniary in form, *Nothwang v. Harrison*, 126 Ark. 548, 191 S.W. 2 (1917), consideration does require some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. *Black's Law Dictionary* 306 (6th ed. 1990). Under the non-monetary/pecuniary definition of consideration, Watts has failed to demonstrate that consideration was given for the option to purchase. Clearly, the mere filing of the option does not meet this definition. And Watts's performance of his obligations under the lease agreement does not either. Without consideration, the option to purchase was not a binding contract. *Hogan*, *supra*; *O'Connor*, *supra*. Therefore, we hold that the trial court did not err in finding that the parties' option purchase was not a binding contract. Accordingly, we affirm.

Affirmed.

GLOVER and HEFFLEY, JJ., agree.