

ARKANSAS COURT OF APPEALSDIVISION II
No. CV-12-956TODD HIGGINBOTHAM and
ROWDY BOYS, LLC

APPELLANTS

V.

MARY G. GRAHAM

APPELLEE

Opinion Delivered June 19, 2013APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT,
EASTERN DISTRICT
[NO. CV-2011-25]

HONORABLE LEE FERGUS, JUDGE

AFFIRMED

ROBIN F. WYNNE, Judge

Todd Higginbotham and Rowdy Boys, LLC, appeal from the grant of a motion for dismissal in favor of defendant-appellee Mary Graham in a real-estate contract case. We find no error and affirm.

On March 30, 2011, appellee and her husband signed a “Real Estate Offer & Acceptance” in which they agreed to sell 157.12 acres to Jeff Carter and/or his assigns for \$157,120. The closing date was to be April 30, 2011. It is undisputed that Jeff Carter, a licensed real estate agent, assigned his rights under the contract to appellants for the sum of \$10,000. In June 2011, after appellee refused to close, appellants filed a complaint seeking specific performance of the real-estate contract.

A bench trial was held on May 30, 2012. Testifying were appellee, appellant Todd Higginbotham, real estate agent/buyer Jeff Carter, and Sanda Green, who worked for the law firm that prepared documents for Carter in connection with the transaction. Both appellee

and Jeff Carter acknowledged that the Grahams' son Michael, who was not a party to the agreement, owned a one-third interest in the property at issue in the contract, and this matter was discussed before the contract was executed.¹ According to Carter, appellee stated that her son had an interest in the property, "but that was not a problem." At the conclusion of the appellants' case, appellee moved for a directed verdict.² In response, appellants conceded that the court could not order Michael to sell his one-third interest but argued that appellee should be ordered to sell her two-thirds interest. The trial court granted the motion, and the order was entered on August 31, 2012. Appellants filed a timely notice of appeal from that order.

Our supreme court has previously set forth the standard of review when the grant of a motion for directed verdict or motion to dismiss is appealed:

In determining whether a directed verdict should have been granted, we review the evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict. Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed.

Woodall v. Chuck Dory Auto Sales, Inc., 347 Ark. 260, 264, 61 S.W.3d 835, 838 (2001) (citing *Morehart v. Dillard Dep't Stores*, 322 Ark. 290, 292, 908 S.W.2d 331, 333 (1995)). A trial

¹In 1987, appellee and her husband, Albert Grover Graham, conveyed the property at issue to their three sons as tenants in common. One son subsequently conveyed his interest back to his parents, another son died without a spouse or children, and Michael, who was married, apparently refused to convey his interest back to his parents.

²The proper motion to challenge the sufficiency of an opponent's evidence in a non-jury case is a motion to dismiss. *Rymor Builders, Inc. v. Tanglewood Plumbing Co., Inc.*, 100 Ark. App. 141, 145, 265 S.W.3d 151, 153 (2007) (citing Ark. R. Civ. P. 50(a)).

court's duty is to review a motion for directed verdict or dismissal at the conclusion of a plaintiff's case by deciding whether, if it were a jury trial, the evidence would be sufficient to present to the jury. *Woodall*, 347 Ark. at 264, 61 S.W.3d at 838. In making that determination, the trial court does not exercise fact-finding powers that involve determining questions of credibility. *Id.*, 61 S.W.3d at 838.

Specific performance is an equitable remedy that compels the performance of an agreement or contract on the precise terms agreed upon. *Union Pacific R.R. Co. v. Barber*, 356 Ark. 268, 307, 149 S.W.3d 325, 351 (2004). The essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligation. *City of Dardanelle v. City of Russellville*, 372 Ark. 486, 490-91, 277 S.W.3d 562, 565-66 (2008) (citing *Williamson v. Sanofi Winthrop Phars.*, 347 Ark. 89, 60 S.W.3d 428 (2001)). This court cannot make a contract for the parties but can only construe and enforce the contract that they have made; if there is no meeting of the minds, there is no contract. *Id.*

We hold that the trial court did not err in granting the dismissal because there was no meeting of the minds under the particular facts of this case. The parties knew that appellee did not own all of the property she and her husband purported to be selling—at most, they owned two-thirds. The parties chose not to include any provision for the very real possibility that appellee and her husband would not be able to obtain their son's interest in the property. As such, we conclude that there was no binding contract, and the circuit court did not err in granting the motion for dismissal at the close of appellants' case.

Affirmed.

PITTMAN and GRUBER, JJ., agree.

Hoskins & Harris, PA., by: *James W. Harris*, for appellants.

W. Scott Davidson, for appellees.