RENDERED: December 11, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000642-MR

D. D. ROBERTS; EDITH ROBERTS;
JOHN BILL KECK; and GLORIA KECK — APPELLANTS

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
ACTION NO. 91-CI-164

GLENN THOMAS; PHYLLIS THOMAS;
and WESTERN ADVERTISING OF
KENTUCKY, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This case for specific performance is back before us after a remand to the circuit court in order to recalculate damages for breach of contract. On remand, the circuit court reconfigured the damages and the defaulting purchasers again appeal.

In the previous opinion, this Court noted that Glen Thomas and Phyllis Thomas (the "Thomases") entered into a contract with the appellants ("R & K"), whereby R & K agreed to build a motel on the Thomases' land and to subsequently purchase said motel. After building the motel, R & K refused to purchase

the same and the Thomases filed suit for specific performance. The trial court ordered specific performance and awarded damages which R & K appealed. This Court held, "[T]he chancellor was correct in ordering specific performance." After affirming the trial court on specific performance, the Court addressed the damage award and remanded "[f]or the purpose of fixing damages consistent with Graves [v. Winer, Ky., 351 S.W.2d 193 (1961)], supra, and Kentucky Water Serv. [Co. v. City of Middlesboro, Ky., 247 S.W.2d 40 (1952)], supra, together with any other damages emanating from the breach."

On remand, the trial court noted that the motel had since been sold for $1,100,000, so that the sale price should be substituted for the earlier estimated market value. Reviewing the contract, the court found R & K obligated themselves to purchase the motel for $200,000, assume the $975,000-SBA construction loan as well as a $20,000-Econo Lodge franchise, plus all closing costs and attorney fees associated with the loan and its enforcement, with a closing by November 15, 1991.

In the court's earlier findings of fact which were not set aside, the court had found there was no Econo Lodge franchise to transfer and the value of said franchise would be $20,000. On remand, the trial court found that the motel was sold on June 28, 1996 for $1,100,000, with the proceeds being applied to paying off the SBA loan and its debt; that $125,000 of the $200,000 purchase price had been paid, leaving a balance of $75,000; that R & K was entitled to a $20,000 credit from November 15, 1991, for the value of the untransferred franchise; that the out-of-

pocket expenses by the Thomases in servicing the SBA loan totaled $242,900.88, not counting interest; and that reasonable attorney fees for the sellers amounted to $50,000.

On remand, the judgment of the trial court awarded the Thomases (sellers) $55,000 of the $200,000, plus 12% interest, from November 15, 1991, compounded annually; $242,900.88 as the unpaid balance of the SBA loan debt plus 8% interest on each expenditure until the date of judgment and then at 12% compounded annually; and $50,000 in attorney fees for the Thomases, plus costs.

R & K appeals the calculation of damages as not being in accordance with Graves, 351 S.W.2d 193 and Kentucky Water Serv. Co., 247 S.W.2d 40, as mandated by this Court in its opinion rendered January 27, 1995 (93-CA-2149-MR and 93-CA-2705-MR). Under Graves, 351 S.W.2d 195, damages for breach of a contract for the sale of land is "[t]he difference between the contract price and the actual value of the land on the date of the breach, provided the actual value is less than the contract price." (Citations omitted.)

Appellants' first argument is that the "actual value" of the land on the date of breach was not used. If fact, the Judge originally accepted the expert testimony of Rick Baumgardner that the actual value at the time of breach was $650,000. This ruling was interlocutory and after the motel was sold, long after the date of breach, the court adjusted the actual value figure to reflect the sale price which was considerably more. Appellees did not cross-appeal this issue.

Therefore, we agree that on remand, the $1,100,000 sale price was properly substituted by the trial court for actual value.

Appellants also contend that the trial court erred in calculation of credits and offsets between the parties in arriving at the contract price, specifically: the $125,000 in payments on the $200,000 purchase price; $75,000 in loan proceeds, (which were never paid to R & K,) from the SBA loan of $975,000 for construction of the motel; $375,867.17 in motel revenue distributed to the Thomases for the period between the original date of closing and date of sale; $20,000 as the value of the Econo Lodge franchise never received by R & K; and $14,000 in out-of-pocket expenses advanced by R & K to operate the motel for six months, plus interest. Clearly, appellants have not read the findings of fact and judgment after remand which were entered January 15, 1997 (attached as exhibit 3 to their brief) because, out of the $200,000 cash of the purchase price, the court found and gave credit for $125,000 in payments, (findings, paragraph A), leaving $75,000 still owed. The court then deducted the $20,000 value of the Econo Lodge franchise from the $75,000, with a balance of $55,000 due out of the original $200,000 (judgment, paragraph 1).

The trial court went on to find that the SBA debt consumed all of the net proceeds from the sale of the motel plus additional sums from the Thomases. The court then determined the net of the additional sums amounted to $242,900.88, not including interest. This net recognized that the revenues produced by the motel were not sufficient to cover operating expenses or the debt

service, resulting in supplemental payment by the Thomases. The evidence presented by Richard Callahan supports this conclusion. Therefore, the court's decision is based on substantial evidence and is not clearly erroneous. CR 52.01; Alvey v. Union Inv., Inc., Ky. App., 697 S.W.2d 145 (1985).

The $14,000 out-of-pocket expenses by R & K are rightfully their expenses as consequential damages for their breach. If the Thomases had paid those expenses, we would have added them to the final award in favor of them. Thus, R & K's paying those expenses up front merely reduces the amount of the judgment against them.

As to the $75,000 in unpaid loan proceeds from the $975,000 SBA loan, there was testimony that this money was used by the Thomases to pay closing costs and service the debt. The trial court, as finder of fact, is in a position to weigh the evidence, judge credibility, and make findings. CR 52.01; White v. Howard, Ky., 394 S.W.2d 589 (1965); Warner v. Sanders, Ky., 455 S.W.2d 552 (1970); Ironton Fire Brick Co. v. Burchett, Ky., 288 S.W.2d 47 (1956).

The appellants filed a motion to amend the January 15, 1997 judgment, which was denied except that the court did reduce the judgment to a sum certain -- $308,953.76, plus 12% interest from January 15; $50,000 in attorney fees, plus 12% interest; and $4,590.72 to the court-appointed manager of the motel. The Thomases were also given a lien on the escrow on deposit with the circuit court clerk. This February 4, 1997 order clears up the loose ends.

Appellants' next argument is that the trial court's judgment awarded interest on top of interest, based on Mr. Callahan's testimony and calculations. However, the court did not accept Mr. Callahan's figures that included the 8% interest appellants are discussing (Callahan Exhibit 5R), but instead, accepted a lower figure, $242,900.88, and specifically stated that the interest figures were to be ignored. The court did award 8% interest for each debt service payment and added that to the total judgment with 12% interest from January 15, 1997. To that extent, the interest is compounded annually, and this is the proper method of computation per KRS 360.010, KRS 360.040, and Borden v. Martin, Ky. App., 765 S.W.2d 34, 35 (1989).

Appellants contend that the liquidated damage provision of the contract should override actual damages to limit their liability. Under the January 27, 1995 opinion from this Court, the "liquidated damage clause" was discussed but the panel chose to allow actual damages, citing Kentucky Water Serv. Co. v. City of Middlesboro, Ky., 247 S.W.2d 40 (1952). Appellants cannot re-argue liquidated damages as the earlier decision is now the "law of the case." Board of Trustees of University of Kentucky v. Hayse, Ky., 782 S.W.2d 609 (1989), cert. denied, by 497 U.S. 1025, 110 S. Ct. 3273, 111 L. Ed. 2d 783 (1990) and 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 306 (1990).

Appellants' fifth argument is that the trial court erred in refusing to make specific findings of fact pursuant to CR 52.04 and in rendering findings which were clearly erroneous. Specifically, appellants ask for explanations by the court for

its findings related to out-of-pocket expenses, credits, and the testimony the court relied upon to establish the same, calculation of attorney fees, calculation of interest, and the value of the motel on the date of breach. The trial court did discuss the evidence before it and relied heavily upon Richard Callahan's "exhibit 5 R," and even attached a copy which it incorporated by reference to the findings of fact dated January 13, 1997, and entered January 15, 1997. This exhibit listed each out-of-pocket expense for servicing the SBA debt from November 15, 1991 (date of breach) through July 8, 1996 (shortly after the sale). The purchase price, closing costs, and the like used by the court were set out in the agreement, and after remand there was no question as to those figures; even the $20,000 value of the Econo Lodge franchise was decided earlier and not altered on remand. Thus, the law of the case renders further findings unnecessary. See Hayse, 782 S.W.2d 609.

Attorney fees are discretionary with the trial court and the Thomases' "exhibit G" detailed said expenses which the court reviewed and evaluated, and from which the court then picked and chose the items which would be a direct consequence of the appellants' breach. The appellants were given copies of these documents (both appendix B and exhibit G) and were permitted cross-examination. Now the appellants want the court to recap its decision as to specific items of credit and so forth, which are all included in the record. We believe the trial court has done enough under Clark Mechanical Contractors, Inc. v. KST Equipment Company, Ky., 514 S.W.2d 680 (1974). In

Clark, the Court recognized the duty under CR 52.04 to make specific findings when requested but held it was not always reversible error to decline. The Court then quoted:

> "The duty of the trial court to make findings of fact should be strictly followed. But such findings are not a jurisdictional requirement of appeal which this court may not waive. Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case. This is the situation here. Hurwitz v. Hurwitz, 78 U.S.App.D.C. 66, 136 F.2d 796, 799, 148 A.L.R. 226, 229 (1943)." Perry v. McLemore, Ky., 414 S.W.2d 141 [(1967)].

Clark, 514 S.W.2d at 682. We believe that the trial court's explanations with references to a clear record are sufficient to review the case sub judice, and additional, even duplicative, findings are not necessary.

In reviewing the record, we are of the opinion that the trial court's findings are not clearly erroneous, are supported by substantial evidence, and should be affirmed. Burke v. Hammonds, Ky. App., 586 S.W.2d 307 (1979). Appellants' argument that several findings of fact were clearly erroneous contradicts their earlier argument that there were not specific findings, which was disposed of above.

Appellants' last argument alleges error in the award of attorney fees. Again, this argument was disposed of above as to the court's findings of fact. As to the trial court's conclusions of law and judgment for $50,000, we also affirm the trial court. In the case of Harding's Adm'r. v. Harding, 132 Ky.

133, 116 S.W. 305 (1909), the Court recognized the attorney fee should be reasonable, taking into consideration the character of services rendered; time employed; size of the estate; and, the extent of the litigation. Realizing the variables peculiar to each case, and that the trial court should have a handle on these variables, the Court in Motch's Ex'x. v. Motch's Ex'rs., 306 Ky. 334, 207 S.W.2d 759 (1948), said the attorney fee should be left largely to the trial court's discretion. Martin v. Martin's Ex'rs., 311 Ky. 164, 223 S.W.2d 345, 347 (1949) added that in seeking the reasonableness of the attorney fee in probate cases, no one consideration in itself is controlling. The Kentucky Rules of Professional Conduct (KRPC) (Rules Of The Supreme Court, Rule 3.130) Rule 1.5(a) lists these factors to be considered in the determination of the reasonableness of a fee:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.

In reviewing the trial court's award of attorney fees, in light of the above, the Court is of the opinion that the final amount awarded as an attorney fees does not amount to an abuse of

discretion. Capitol Cadillac Olds, Inc. v. Roberts, Ky., 813 S.W.2d 287 (1991); Brown v. Fulton, Hubbard & Hubbard, Ky. App., 817 S.W.2d 899 (1991).

For the foregoing reasons, the judgment of the Hart Circuit Court is affirmed.

ALL CONCUR.

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