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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002890-MR

LANA RUE BRADEN (NOW WILSON) APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 1986-CI-000122

PAUL E. BRADEN APPELLEE

AND NO. 1998-CA-003014-MR

PAUL E. BRADEN CROSS-APPELLANT

v. CROSS-APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 1986-CI-000122

LANA RUE BRADEN (NOW WILSON) CROSS-APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: The parties, Lana Wilson (formerly Braden) and Paul Braden, were divorced by decree entered October 17, 1986. They are before this Court for the second time to contest the effect and meaning of the property settlement incorporated in that decree. In appeal no. 1998-CA-002890, Lana challenges that

portion of the Rockcastle Circuit Court's October 29, 1998, judgment denying her claim for interest on Paul's obligation to pay her for her share of the marital residence. Paul, appealing separately from the same judgment (1998-CA-003014), contends that the trial court gave him too little credit for payments made in satisfaction of his obligation and failed to justify its conclusions with sufficient findings. We are not persuaded by Paul's contentions regarding the evidence. We agree with Lana, however, that the trial court misconstrued the property settlement's interest provisions. Accordingly, in Paul's appeal we affirm, and in Lana's we reverse and remand.

The property settlement at issue provides in pertinent part as follows:

> (2) It is agreed by Lana Rue Braden that Paul E. Braden shall keep the house and lot now belonging to the parties, 1111 Circle Drive, Corbin, Kentucky. Lana Rue Braden agrees to convey all her right, title and interest in and to said property to Paul E. Braden; and, Paul E. Braden agrees to execute a second mortgage on said property to Lana Rue Braden in the sum of $45,000.00, payable over ten years with 8% interest thereon. Paul E. Braden further agrees to pay the existing first mortgage to First Federal Savings & Loan Association of Pineville, Ky. Paul E. Braden further agrees that if he shall at any time sell the house and lot, that the balance due on the second mortgage to Lana Rue Braden will be paid off in a lump sum. If Paul E. Braden does not sell the house within three years, he will, upon request of Lana Rue Braden, pay off the remaining balance of $45,000.00 mortgage.
> (3) Paul E. Braden agrees to execute an unsecured promissory note to Lana Rue Braden in the sum of $35,000.00 in addition to the second mortgage on the above property, payable over ten years with 8% interest thereon; and, further agrees to carry life insurance in the amount of $35,000.00 with

> Lana Rue Braden as the beneficiary thereon until said note is paid.

In July 1995, Lana brought suit to enforce these provisions. She alleged that Paul had ceased making payments in October 1993. She sought the full principal balance outstanding under both clauses plus accrued interest. Paul maintained that the property settlement had been nullified. Lana, it appears, had resumed living with Paul and their daughter at the Circle Drive residence in December 1987 and had continued to do so until late 1989 or early 1990. During that period Lana had not asserted any right under the agreement, and apparently she and Paul had contemplated having their divorce annulled. Based on these facts, the trial court ruled that Paul and Lana had mutually renounced the agreement, and thus that it was no longer enforceable.

On appeal, this Court reversed. Distinguishing between post- and pre-decree attempts to reconcile, the Court noted that entry of a divorce decree vests the parties' rights and obligations thereunder and that decrees are not to be deemed modified absent a showing of mutual intent clear enough to satisfy the requirements of CR 60.02. No express modification, written or oral, had been alleged, and the attempted reconciliation, which had never been more than tentative and had ultimately failed, did not, the Court ruled, provide a sufficient basis for inferring that intent. The Court's order duly became final (1996-CA-000699-MR; discretionary review denied, 1997-SC-800 (01/15/98)), and upon remand, Lana renewed her suit to have the agreement enforced.

The contest in the trial court thereupon shifted from the agreement's viability to its consequences. Paul maintained that Lana assumed a duty under the agreement to deed her interest in the Circle Drive property to him and that her performance of that duty conditioned his duty to pay her. Since she had never delivered a deed, his duty had remained executory, and no debt had arisen upon which interest could accrue. An award of interest, therefore, at least on the $45,000.00 portion of his obligation, was inappropriate. The trial court agreed: "[N]o interest should be allowable until such time as a deed is tendered." It is from this portion of the trial court's judgment that Lana appeals.

Paul correctly asserts that property settlements such as his and Lana's are subject, when deemed not contrary to public policy, to the ordinary rules of contract interpretation. KRS 403.180(5); Shraberg v. Shraberg, Ky., 939 S.W.2d 330 (1997); Gray v. Gray, Ky. App., 745 S.W.2d 657 (1988). There is also some support in our case law for the position Paul urges. In Bryant v. Jones, 255 Ky. 606, 75 S.W.2d 34 (1934), the former Court of Appeals observed that, "as a general rule, the purchaser is to be charged with interest from the time the purchase money should have been paid under the terms of the contract." 75 S.W.2d at 37. In that case, a vendor of realty had promised to convey an abstract of title and general warranty deed in exchange for the purchase price. Under those express terms, the Court ruled, the purchaser was not to pay the purchase price until the abstract and deed had been delivered. The vendor proved unable

to establish his title and to make the required delivery, and thus the purchaser's obligation to pay interest had never arisen, despite the fact that he had occupied the property at the time the contract had been entered and had since obtained title by adverse possession.

Absent such an ultimate failure to perform by the vendor, however, and unless the contract expressly provides otherwise, possession by the vendee ordinarily gives rise to the vendor's entitlement to interest despite inconsequential delays in perfecting the transaction. Wells v. Barnett, Ky., 474 S.W.2d 882 (1972); Miller v. Cavanaugh, 99 Ky. 377, 35 S.W. 920 (1896). *See also* "Annotation: Rights as between vendor and vendee under land contract in respect of interest," 25 ALR2d 951 (1952) (as supplemented 1996 and 1999); 77 Am. Jur. 2d *Vendor and Purchaser* §§ 307-312 (1997).

In more general terms, the *Restatement (2nd) of Contracts* (1981) expresses the pertinent rules as follows.

> § 225. **Effects of the Non-occurrence of a Condition**
> (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
> (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
> (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.
>
> § 238. **Effect on Other Party's Duties of a Failure to Offer Performance** Where all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each

> party's duties to render such performance that the other party either render or, with manifested present ability to do so, offer performance of his part of the simultaneous exchange.

As Paul correctly notes, it is common in real estate transactions for the parties to promise to exchange a deed for payment or for a promise to pay (a note) and for the performance of those promises to occur simultaneously. Under the *Restatement* provisions just quoted, therefore, his duty to pay and Lana's duty to execute a deed were mutually conditioned on the other's performance or sufficient offer of performance. *See* Mercer v. Federal Land Bank of Louisville, 300 Ky. 311. 188 S.W.2d 489 (1945); Breckinridge County v. Beard, 233 Ky. 823, 27 S.W.2d 427 (1930).

In comment *a* to § 238, the *Restatement* observes that

> [w]here the performances are to be exchanged simultaneously under an exchange of promises, each party is entitled to refuse to proceed with that simultaneous exchange until he is reasonably assured that the other party will perform at the same time. If a party actually performs, his performance both discharges his own duty (§ 235(1)) and amounts to the occurrence of a condition of the other party's duty (§ 237). *But it is not necessary that he actually perform in order to produce this latter effect. It is enough that he make an appropriate offer to perform, since it is a condition of each party's duties of performance with respect to the exchange that there be no uncured material failure by the other party at least to offer performance.* Circumstances significant in determining whether a failure is material are set out in § 241. Such an offer of performance by a party amounts to the occurrence of a condition of the other party's duty to render performance, although

> it does not amount to performance by the former. Until a party has at least made such an offer, however, the other party is under no duty to perform, and if both parties fail to make such an offer, neither party's failure is a breach. . . . When it is too late for either to make such an offer, both parties are discharged by the non-occurrence of a condition. A failure to offer performance can be cured, if an appropriate offer is made in time (§ 242). . . . [emphasis added].

The question is not, therefore, as Paul maintains, whether Lana performed her promise by tendering a deed, which she concedes she has not done. The questions rather, are whether she has appropriately offered to make a deed, and, if not, whether her failure to do so in these circumstances was sufficiently material to suspend Paul's duty to perform. We are not persuaded that the circumstances of this case justify Paul's reliance on Lana's purported failure to tender a deed.

First, the agreement does not expressly provide that *Lana* is to tender a deed. It provides rather that she will convey her right, title and interest in the property. Lana testified without contradiction that she has been ready from the day the property settlement was entered to sign a deed. Her impression, however, was that Paul, who is a lawyer and who oversaw the drafting of the property settlement, was to prepare the deed along with the mortgage that he was to give to her in exchange. Paul never took those steps, and Lana did not force the issue. She remained ready, however, as Paul apparently knew, to execute a deed at any time. Nothing that contradicts this testimony appears in the record. We thus believe that Lana has adequately offered to perform, and that Paul's failure to perform

is not excused by the alleged non-occurrence of a condition precedent.

Even if Lana be deemed to have failed to offer performance, moreover, by failing to draft her own deed and to proffer it, the failure in these circumstances was immaterial. Section 241 of the *Restatement (2nd) of Contracts* (1981) addresses this point:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonable expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Applying these factors in the order presented, we may observe the following:

(a) Paul has not alleged the loss of any benefit from the delay in completing the transfer of the real property. Lana had surrendered possession of the house to Paul even before entry of the property settlement, and since then has apparently posed no obstacle to Paul's either transferring it or encumbering it, provided of course that he first pay her or give her the agreed upon mortgage.

(b) Paul, having not been injured, has no need of compensation.

(c) Lana, on the other hand, has suffered a significant loss: the

loss of the use of the money Paul agreed to pay her. As compensation for that loss, Paul agreed to pay interest. A finding at this late date that he is to be excused from interest payments would thus entail a large forfeiture for Lana.

(d) No reason has been suggested to doubt Lana's assurances that she will deliver a deed as soon as Paul is willing to perform his part of the settlement.

(e) The record provides no reason to think that Lana has not behaved in good faith and with fairness. On the contrary, it appears that Lana has refrained for several years, for Paul's sake and the sake of their children, from insisting that Paul comply with the settlement despite a certain amount of resulting hardship to herself. In these circumstances, Lana's alleged failure to proffer a deed cannot be said to have borne materially on the parties' agreement and thus does not discharge any portion of Paul's duty to pay interest. *Cf.* Wells v. Barnett, *supra.*

Accordingly, we reverse that portion of the judgment denying Lana's claim for interest and remand for a new judgment recognizing that claim.

As appellant in his turn, Paul maintains that the trial court failed to give him credit for amounts he has paid toward the satisfaction of his $80,000.00 total obligation. At the hearing on these matters, Lana presented a payment summary, which she claimed showed the entire amount Paul had paid her pursuant to their agreement broken down by year. Much of the hearing involved testimony concerning the payment amounts reflected on that summary, and the trial court incorporated the summary

without change in its findings of fact. Following trial, Paul moved pursuant to CR 52.02 and CR 52.04 for additional findings on these disputed amounts and now objects to the trial court's failure to provide specific reasons for rejecting his claimed payments. He also suggests that the trial court's adoption of Lana's payment summary violates its duty to make independent findings. We are persuaded by none of these contentions.

Paul is correct, of course, to the extent that he insists that the trial court is required independently to assess the evidence and to make findings based on that assessment. Delegations of the duty to make findings of fact, even the appearance of delegating that duty, has been consistently criticized. Callahan v. Callahan, Ky., 579 S.W.2d 385 (1979). Where it is clear, however, that the trial court's adoption of a document prepared by a party is a consequence of, rather than in lieu of, the court's independent assessment of the evidence, the adoption is not improper. Bingham v. Bingham, Ky., 628 S.W.2d 628 (1982). That is the case here. The trial court's findings, of which Lana's summary is only a part, clearly indicate the court's belief that Paul did not present a preponderance of evidence on any of the disputed payments. The adoption of Lana's payment summary, then, as a convenient recapitulation of the court's findings, was not improper.

Paul is also correct that CR 52 requires that there be sufficient evidence to support the trial court's findings and that the trial court (preferably before but definitely after a proper request that it do so) make all the findings necessary to

support its conclusions. Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997). This latter is not a requirement, however, that the trial court explain its credibility determinations or its weighing of the evidentiary facts. Lawson v. Loid, Ky., 896 S.W.2d 1 (1995); Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982). It is a requirement, rather, that there be a finding on all the elements underlying the legal conclusion at issue so that a reviewing court can understand and assess that conclusion. Eiland v. Ferrell, *supra*. Here, the trial court satisfied these requirements.

The enforceability of the property settlement having been upheld during the previous appeal, Paul was presumptively liable for $80,000.00 plus interest from the date the settlement was entered. Payment is an affirmative defense to this liability, the burden of proving which was Paul's. CR 8.03; George v. Vaughan, 308 Ky. 439, 214 S.W.2d 386 (1948). Paul testified that he made certain payments, that Lana converted to her own use one of his bank accounts and the proceeds from an insurance policy, and that he gave Lana certain shares of stock. He presented literally no documentary support for these assertions. The only extrinsic evidence he proffered was the initial, unverified estimate by Lana's counsel of the payments he had made during 1987. This estimate was more than Lana now admits. Lana testified, on the other hand, that Paul did not make some of the payments he claimed, that her initial estimate had proved wrong, and that the bank account and insurance policy proceeds had been used for repairs to Paul's house. She admitted

that Paul had given her the stock certificate, but explained that, because the shares were not properly transferred, she had never become the beneficial owner. She documented the payments she admitted having received and described circumstances in her relationship with Paul which could be thought to account for his refusal to abide by the settlement. The trial court found that Paul had made the payments Lana documented and reduced his liability accordingly. It indicated that Paul had not borne his burden of proof on his additional claims. These findings, which are complete and not clearly erroneous, are supported by substantial evidence of probative value. They are to be upheld, therefore, on appeal. Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986); Rogers v. Kasden, Ky., 612 S.W.2d 133 (1981).

In sum, the parties' property settlement included what was in essence a loan to Paul of $80,000.00. The loan, which was partially secured by Paul's house, was to bear interest of 8% from the date the settlement was entered and was to be repaid in no more than ten years. Paul does not deny that he has enjoyed the full benefit of his share of the settlement. Nor does he deny that since entry of the settlement Lana has been willing and able to execute a deed transferring her interest in the marital residence to him. Lana's failure to make and proffer a deed, a failure which Paul could have had corrected at any time, has not materially affected Paul's interest. We are persuaded, therefore, that Lana's failure does not provide grounds for relieving Paul of his obligation to pay Lana the full value of her loan.

We are also persuaded that the trial court did not clearly err in determining the extent to which Paul has satisfied his obligation to repay the loan. Although, as is so often the case following a divorce, the parties differed, sometimes painfully so, in their recollections and interpretations of the facts, there was substantial evidence to support all of the trial court's findings, which in turn fully justified its conclusions. For these reasons, in appeal no. 1998-CA-002890 we reverse the October 29, 1998, judgment of the Rockcastle Circuit Court to the extent that it denied Lana's claim for interest. We remand for a new judgment that awards interest in full. In all other respects we affirm. In appeal no. 1998-CA-003014, we affirm the same judgment, subject to the partial reversal just ordered.

ALL CONCUR.

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