

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003185-MR

DOUGLAS L. ANDERSON;
MICHAEL ALEXANDER ANDERSON;
PATRICIA ANDERSON;
PAULETTE ANNABELLE ANDERSON;
ROBERT B. ANDERSON;
FREDERICK BAILE;
SHARON A. ANDERSON BAILE;
CHARLES F. BINFORD, EXECUTOR
OF THE ESTATE OF ARFET
HORNBECK HODGE;
FRANK E. BINFORD, JR.;
ETHEL HORNBECK BURKHOLDER;
WILLIAM RAY BURKHOLDER;
JEANETTE HORNBECK DOWELL;
BARBARA FELDMAN;
LEONARD FELDMAN;
RUTH HORNBECK HOLST;
LUCH HORNBECK;
JOYCE MANUEL;
ANN M. MCKAIG;
ANN M. MCKAIG, JR.;
JOSEPH REID;
LAURINE REID;
ELEANOR YOUNG; AND
JAMES YOUNG;

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 94-CI-001755

STANLEY EARL HORNBECK;
LINDA HORNBECK; AND
ROBERT C. FURR

APPELLEES

OPINION

REVERSING AND REMANDING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. Douglas L. Anderson, et al., appeal from an order of the Jefferson Circuit Court granting the motion of Stanley Earl Hornbeck, et al., to compel the closing of a real estate purchase agreement. We reverse and remand.

This action was originally filed in 1994 by multiple parties seeking to bring about the sale and division of a 60 acre parcel of real property located in Jefferson County, Kentucky. The parties ultimately settled the action by entering into an agreement which provided that one group of title holders, namely Douglas L. Anderson, et al., (hereinafter referred to as "Sellers"), would sell their interest in the parcel to the remaining group of title holders, namely Stanley Earl Hornbeck, et al., (hereinafter referred to as "Buyers"). The settlement agreement provided in relevant part that the purchase price would be \$373,000 and that time was of the essence. The numerous signatures required to bring about the settlement were obtained in 1994 and 1995.

One of the sellers, James Hornbeck ("James"), filed for Chapter 7 bankruptcy in 1994. On November 17, 1995, the bankruptcy court entered an order approving the trustee's motion to sell James' interest in the parcel. Thereafter, the Sellers' attorney, Walter Collins ("Collins"), began posting a series of correspondences to the Buyers seeking to arrange a closing date.

The first of these letters was posted on or about

October 10, 1995, and other letters followed through October, 1996. The letters, which are contained in the record, sought to bring about a closing, and expressed Collins' frustration at the Buyers' apparent unwillingness to move forward on the matter. Ultimately, Collins concluded that the Buyers no longer wished to purchase the parcel, and Collins advised the Buyers that the Sellers would begin seeking a third-party purchaser. In mid-to-late 1996, the Sellers apparently located a new purchaser.

In October, 1995, the circuit court dismissed the instant action for lack of prosecution. The Sellers, through counsel, responded by filing a motion to revive. In support thereof, Collins filed an affidavit stating in relevant part as follows:

"In summary, affiant [Collins], having once believed, in good faith, that there was an agreement between plaintiffs and defendants concerning settlement of this action, has now, with reluctance, come to conclusion that said settlement is no longer in effect, and that plaintiffs [Sellers] must proceed with this action." Collins then withdrew as counsel for all Sellers except the bankruptcy trustee and Lucy Hornbeck. The motion to revive was granted, and the matter proceeded in circuit court.

On January 22, 1997, the Buyers filed a motion in Jefferson Circuit Court seeking to compel a closing of the settlement agreement and sales contract. The motion went before the commissioner for a recommendation to the circuit court.

Upon considering the matter, the commissioner concluded that the Buyers had breached the sales agreement by failing to

close, but that the breach was waived by an October 17, 1996 letter from Collins to the Buyers. The matter then moved to the circuit court, which agreed with the commission that the sales contract had been breached, but opined that the breach had not been waived. An order to that effect was entered on January 9, 1998.

The Buyers then filed a motion seeking reconsideration. Attached to the motion was the affidavit of Buyers' counsel, and a second affidavit of Collins which contradicted his affidavit tendered with the motion to revive. Collins' second affidavit stated in relevant part that he believed the Buyers had not breached the sales contract. Specifically, Collins stated that the delay in closing was a result of 1) James' bankruptcy, 2) the Buyers' need to arrange financing, and 3) the April 10, 1996 death of one of the Sellers, namely Margaret Binford, which raised additional issues of law. Collins would later state that he had not examined the first affidavit before signing it, and would not have signed it had he read it.

In response to the motion to reconsider, the Sellers also tendered an affidavit of real estate agent, William H. Simpson ("Simpson"). Simpson stated therein that Collins advised him in early 1996 that the settlement was no longer viable and that the property could be sold to another buyer.

The circuit court found Collins' second affidavit persuasive. On March 18, 1998, it rendered an order finding that Collins, as the Sellers' agent, had no intention of voiding the sales contract and had sent the series of threatening letters

merely to attempt to bring about a closing. The court found that the Buyers had not breached the contract, and granted their motion to compel a closing. The Sellers' subsequent motion to amend, alter or vacate was denied, and this appeal followed.

The primary issue for our consideration is whether the circuit court committed reversible error in granting the Buyer's motion to compel a closing. Specifically, the Sellers maintain that the Buyers did not attempt to close the real estate contract in a reasonable period of it, and in so doing breached the agreement. They also argue that the order compelling the sale should be set aside since it is based on repudiated testimony. Lastly, they argue that the circuit court erred in rendering what amounts to a summary judgment because the evidence is conflicting as to whether the Buyers acted in a timely fashion to bring about a closing. In sum, the Sellers seek reversal of the order compelling a sale and reinstatement of the January 9, 1998 order denying the motion to compel.

In response, the Buyers first argue that the Sellers failed to serve in a timely fashion their CR 59.05 motion to alter, amend or vacate, thus depriving this Court of jurisdiction to consider their appeal. They also maintain that the order on appeal was entered pursuant to a motion to enforce a settlement, not a motion for summary judgment, and is guided not by Steelvest but by the discretion of the trial court. Lastly, they argue that they did in fact attempt a closing in a reasonable period of time in light of the title defects and delays brought about by the Sellers.

We have closely studied the record, the law, and the arguments of counsel, and must conclude that the record does not adequately reveal the essential underlying facts necessary for the full appellate review to which the parties are entitled. The dispositive question, as we see it, is whether the Buyers' alleged failure to close in a timely manner constituted a breach of the settlement agreement or, conversely, whether the delay in closing was necessary and justified in light of the bankruptcy proceeding, title problems, or other legitimate roadblocks to the closing. The record, in its present form, is not sufficient for determining whether the circuit court acted properly in resolving this question in favor of the Buyers.

In attempting to address this question, we are presented only with the following: 1) assertions of fact presented in the briefs but not supported by the record; 2) two volumes of pleadings and supportive material, and 3) Collins' letters and affidavits, some of which are contained only in the briefs. As the Sellers note, no depositions were taken and no trial or other fact-finding action was conducted. Though hearings were conducted, they addressed motions which were secondary to the issue at bar.

The question of whether the court properly found that no breach occurred can be answered only by examining the actions of the party accused of the breach. See generally, Bennett v. Stephens, Ky. 293 S.W.2d 879 (1956). We know little of that conduct save what the parties assert in their briefs, and as such we cannot determine whether the circuit court reached the correct

result. The order on appeal does not address the Buyers' conduct, instead relying only on Collins' affidavit which concluded that the conduct constituted a breach. Collins' opinion, though perhaps relevant, is not dispositive of the Sellers' assertion that the Buyers failed to perform in a timely manner.

We need not address the question of whether the order on appeal should be characterized as a summary judgment, or, as the Buyers argue, should be guided only by the sound discretion of the trial court. The record is insufficient for appellate review irrespective of how the order on appeal is characterized.

As for the Buyers' contention that the Sellers failed to serve in a timely fashion their CR 59.05 motion to alter, amend or vacate, thus depriving this Court of jurisdiction to consider their appeal, we find no error. Service was accomplished on or before March 27, 1998, which is within the window of opportunity provided for under CR 59.05.

Lastly, the Buyers argue that all necessary parties to the appeal are not before the Court. They note that Margaret Binford ("Binford") died in 1996 during the pendency of the circuit court proceeding, and argue that the Buyers have improperly failed to revive her interest in the name of her estate. The Buyers maintain that rather than substitute the estate as a party, the Sellers merely began adding to the pleadings the names of Binford's children and her executrix, Ann M. McKaig ("McKaig"). The Buyers argue that the appeal must be dismissed since all necessary parties are not before the court.

CR 25.01(1) provides that:

If a party dies during the pendency of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. If substitution is not so made the action may be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party, and, together with the notice of hearing, shall be served on the parties as provided in Rule 5, and upon persons not parties as provided in Rule 4 for the service of summons.

The "period allowed by law" to which CR 25.01(1) directs us is set forth in KRS 395.278. It states that, "[A]n application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party."

The Kentucky Supreme Court has held that the one-year period set forth in KRS 395.278 operates as a statute of limitations and therefore is ". . . mandatory and not subject to enlargement." Hammons v. Tremco, Inc., Ky., 887 S.W.2d 336 (1994). The Court stated in Hammons at p. 338 as follows:

If a motion to revive the action and to substitute the successor or personal representative of the deceased party is not made within the prescribed time, the action may be dismissed as to the deceased party. CR 25.01(1). The word "may," as it appears in CR 25.01(1) does not allow for discretionary dismissal but provides for an exception in those instances in which the right to have the action dismissed has been lost, such as by waiver, estoppel, or consent. Snyder v. Snyder, Ky. App., 769 S.W.2d 70 (1989). Therefore, when considered together, KRS 395.278 and CR 25.01(1) require that when a plaintiff dies any action pending on the part

of the deceased plaintiff must be revived by the decedent's successor or personal representative within one year, and the successor or personal representative must be substituted as the real party in interest. Although an opposing party may, by its action, lose the right to require the timely revival of an action, a party cannot, by such action, confer personal jurisdiction over a successor or personal representative who has not appeared or been substituted as a party. Mitchell v. Money, supra. Likewise, jurisdiction could not be conferred over dependents who had not asserted their rights to survivors' benefits and moved to be substituted as parties to the action.

It is uncontroverted that the Buyers did not revive Binford's interest in the name of the executrix. On remand, we direct the circuit court to address this failure in light of the above-cited authority.

For the foregoing reasons, we reverse the order of the Jefferson Circuit Court and remand the matter for further findings of fact consistent with this opinion, and for an examination of the Buyers' failure to revive Binford's interest.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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No brief filed by Appellee,
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