

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001961-MR

DELMAR PLUMMER; SALLIE PLUMMER;
RESERVATION OMEGA, INC.

APPELLANTS

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS NICHOLLS, JUDGE
ACTION NO. 98-CI-00453

ZANE STURGILL;
HITOMI STURGILL

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUDGEL, CHIEF JUDGE; DYCHE AND MILLER, JUDGES.

DYCHE, JUDGE. Delmar Plummer, Sallie Plummer, and Reservation Omega, Inc., appeal from an order of the Greenup Circuit Court granting summary judgment to Zane and Hitomi Sturgill in a land contract dispute. Because the appellants have failed to present substantive affirmative evidence that Sallie Plummer lacked the mental capacity to enter into the land contract or that undue influence was exerted upon her in the creation of the land contract, we affirm.

On July 7, 1995, Sallie Plummer entered into a facially valid land contract with the Sturgills in which Sallie agreed to

convey to the Sturgills a parcel of real property located on Smith Branch in Greenup County, Kentucky. The agreed upon purchase price was \$25,000.00 down, followed by monthly installments of \$290.00 at 6 percent interest until the balance of the principal was paid off. The Sturgills paid the down payment and thereafter made all monthly installment payments. The land contract was duly recorded in the Greenup County Court Clerk's records.

On May 19, 1997, Delmar Plummer, the son of Sallie Plummer, acting as his mother's attorney-in-fact, conveyed the Smith Branch property to Reservation Omega, Inc., a corporation solely owned by Delmar. That conveyance certified that the fair market value of the property was \$24,000.00. Delmar contends that at the time of the transfer he was unaware of the July 1995 land contract.

On September 9, 1998, the Sturgills tendered the sum of \$6,585.73, the total unpaid balance on the property, to Delmar. Having fulfilled the obligations of the land contract, the Sturgills thereupon requested that a deed for the Smith Branch property be executed to them. Delmar refused to execute a deed.

On September 25, 1998, the Sturgills filed a complaint in Greenup Circuit Court seeking a judgment requiring the appellants¹ to convey to them a deed to the Smith Branch property. On October 15, 1998, the appellants filed their answer and counterclaim. The answer and counterclaim denied the

¹Only Sallie Plummer and Reservation Omega were named as defendants in the initial complaint. The complaint was later amended, however, to name Delmar as a defendant.

existence of a valid land contract on the basis that the contract executed on July 7, 1995, was procured by the Sturgills by exercising undue influence on Sallie Plummer, and on the basis that Sallie did not have the mental capacity to enter into a contract on July 7, 1995. Accordingly, the counterclaim sought to have the land contract declared null and void.

On November 6, 1998, the Sturgills moved for summary judgment. Following the appellants' response, on December 16, 1998, the trial court entered an order denying summary judgment and setting a discovery schedule. Subsequently, the depositions of Delmar Plummer, Sallie Plummer, and Zane Sturgill were filed into the record. On April 1, 1999, the Sturgills again moved for summary judgment; the motion was renoticed on August 6, 1999. On August 11, 1999, the trial court granted summary judgment in favor of the Sturgills. This appeal followed.

The appellants contend that the trial court erred in determining that there were no genuine issues of material fact regarding Sallie's capacity to enter into the land contract and whether undue influence or duress was exerted upon Sallie to force her to enter into the land contract. We disagree.

In order to qualify for summary judgment, the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480

(1991). Summary judgment should only be granted when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant. Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 [1985]). A party opposing a properly supported motion for summary judgment cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Steelvest, 807 S.W.2d at 482.

First we consider the trial court's granting of summary judgment regarding Sallie's capacity to enter into the July 1995 land contract.

To create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract. Stege v. Stege's Trustee, 237 Ky. 197, 35 S.W.2d 324 (1930). The test of legal capacity to contract is the ability to understand and appreciate the consequences of the particular transaction. There must be a meeting of the minds to effect assent, and there can be no meeting of the minds where either party to the agreement is mentally incapable of understanding the consequence of his acts. Johnson v. Sands, 245 Ky. 529, 53 S.W.2d 929 (1932); Everly's Adm'r v. Everly's Adm'r, 295 Ky. 711, 175 S.W.2d 376 (1943); Connors v. Eble, Ky., 269 S.W.2d 716, 718 (1954). "[U]nsoundness of mind to avoid a contract must relate to the immediate time when the contract was made." Hall v. Crouch, Ky., 341 S.W.2d 591, 594 (1960), quoting Jefferson Standard Life Insurance Company v. Cheek's Adm'r, 258 Ky. 621, 80

S.W.2d 518 (1935). "The courts will look only to the adequacy of the understanding where the validity of an act is questioned, and neither age, sickness, extreme distress, [n]or debility of the body will affect the capacity to make a contract or conveyance, if sufficient intelligence remains to understand the transaction." Hall, 341 S.W.2d at 594; Chrisman v. Quick, 174 Ky. 845, 193 S.W. 13 (1917). "[T]here is always the presumption of sanity and capacity to contract, rather than the converse." Holcomb v. Brashears, Ky., 273 S.W.2d 810, 811 (1954) citing Rose v. Rose, 298 Ky. 404, 182 S.W.2d 977 (1944). "[O]ld age does not constitute in itself incapacity to enter into a valid contract or execute a deed." Rose, 182 S.W. 2d at 978.

Mental weakness alone does not justify the annulment of a contract or deed if it is not such an infirmity as to destroy the party's power to act voluntarily and to appraise the consequences of his act. The true test is the person's capacity to understand and assent to the particular transaction in question. Collins et al. v. Isaacs, 231 Ky. 377, 21 S.W.2d 484 (1929); Hagemeyer v. First Nat. Bank & Trust Co., 306 Ky. 774, 209 S.W.2d 320, 321 (1948).

[A]lthough the grantor may be physically unable to look after his property and although his mind may be enfeebled by age or disease, yet these conditions are not sufficient to render his deed voidable, if such grantor comprehended the meaning, design and effect of his acts at the time of the deed's execution.

Newman v. Winter, 303 Ky. 841, 198 S.W.2d 502, 504 198 S.W.2d 504 (1946).

The affidavits of Sallie and Delmar Plummer executed on December 3, 1998, and subsequently filed into the record state that at the time the land contract was executed Sallie was 81 years of age, suffered from diabetes, lupus, and Parkinson's disease, and had suffered a stroke just prior to July 7, 1995, and, as a result, was in a severely weakened mental condition on July 7, 1995. These factors alone, however, fall short of the proof necessary to overturn a contract based upon lack of capacity.

Delmar's deposition provides scant, if any, support for the position that Sallie lacked the legal capacity to enter the contract. While Delmar does express an opinion that it was his understanding from his layman's review of Sallie's medical records, and from various other hearsay sources, that Sallie lacked the competency to contract, it appears that Delmar lived in Florida during the relevant time, and consistent with his lack of personal knowledge of Sallie's July 1995 mental status, Delmar testified as follows:

Q. So, is it fair to say that you yourself did not observe anything from your mother that would indicate in that time frame that she was mentally incompetent to execute a legal document?

A. That is correct.

Sallie's deposition likewise fails to present affirmative evidence that she lacked the mental capacity to enter into a contract in July 1995. In her deposition testimony, Sallie fails to even allege that she was mentally incompetent to enter into the land contract. In fact, Sallie's deposition

discloses that she had the Smith Branch property up for sale, that her son Ronnie Plummer contacted Zane Sturgill regarding the property, that Sallie was willing to sell the property to Sturgill because he was her nephew, and that her actual reason for now wanting to rescind the contract is because Sturgill intends to sell the property to persons outside the family:

Q. And then did you You say Ronnie, your son, Ronnie Plummer, contacted Zane Sturgill and told him that you had that property for sale and you didn't tell him not to do that. Then did you see Zane at some point in time then?

A. He come up.

Q. Come up to your home?

A. Yeah.

Q. What happened then?

A. We just came to deciding on a deal.

. . . .

Q. You agreed to sell him the land for twenty-five thousand dollars (\$25,000.00)?

A. Yeah.

. . . .

Q. Did you know that [Zane Sturgill] had tendered to you a check for six thousand (6,000) and some dollars which was all the unpaid balance and asked you to sign a deed for the property over to him pursuant to the land contract?

A. That's right but I wanted the farm and then he had . . . I thought he had okayed that but apparently he didn't do it because he sold it to these other people and I didn't . . . I wanted it.

. . . .

Q. So the reason you wouldn't sign a deed was because you wanted to buy it back?

A. That's right.

. . . .

Q. Okay.

A. That was why I was selling it was because I needed the money.

. . . .

Q. Had you told other people, other than your brother, John, that it was for sale? Well, of course, you told your son, Ronald, didn't you?

A. Well, I don't know if I told him or not. He just . . . he knew I was . . . I had it for sale, I guess.

. . . .

Q. You had told other people it was for sale?

A. No, I don't think I had.

Q. Don't you?

A. I just don't recall ever telling anybody out of the family it was for sale. In fact, I . . . Anybody's ask me about, I'd say I'm a saving it for one of the family and that's how come I let him have it.

Q. Because he was part of the family?

A. Right.

Q. And you agreed to sell it to Zane then because he was a member of the family?

A. Right.

Q. Okay. For twenty-five thousand dollars (\$25,000.00)?

A. We didn't have no price set on it when he got there. He came to see me and he told me what he'd give me for it.

Q. And that was twenty-five thousand (\$25,000)?

A. Yeah.

Q. And you agreed to take it?

A. Yeah.

. . . .

Q. Yeah. If he paid you the balance of what he owed you on the land contract, would you be willing to sign the deed?

A. I would have been until it all turned out the way it did and them people that's a going to move up there, I don't care for them and I . . . and that's my father's farm. We were all raised up there. We lived a quiet life.

Q. Um huh. Well you knew all of that when you signed the land contract to sell it though, didn't you?

A. Yeah, I knew it. I shouldn't have done it.

Q. You changed you [sic] mind, huh?

A. Yeah, I have. There's been some drinking up there as it is, already.

The appellants have failed to produce any competent medical testimony, or other affirmative evidence, to support their assertion that Sallie was incompetent to enter into a contract in July 1995. The evidence and testimony as developed through discovery, construed in the light most favorable to the appellants, fails to establish a genuine issue of material fact as to whether Sallie lacked the capacity to contract in July 1995, and the trial court did not err when it granted the appellees summary judgment as to this issue.

The appellants' assertion that the appellees exerted undue influence and duress upon Sallie and forced her into

entering into the land contract is similarly unsupported by affirmative evidence. In regard to the undue influence issue, Delmar testified as follows:

Q. Do you [have] any actual knowledge of any person who unduly influenced [Sallie] to get her to execute that land contract?

A. No.

Q. So, you never were present or you never heard anybody, Zane Sturgill or Hitomi Sturgill or anybody on their behalf, unduly or try to unduly influence your mother, Sally Plummer, to execute that land contract?

A. No.

As to the undue influence issue, Sallie testified as follows:

Q. Did Zane Sturgill do anything to unduly influence you to sign that land contract?

A. I'm trying to think.

. . . .

Q. Did he do anything unfair to you to cause you to sign that land contract?

A. Unfair to me?

Q. Yeah. Did he take advantage of you in anyway to get you to sign that land contract?

A. No, I don't think so.

The appellants failed to present any affirmative evidence that the appellees unduly influenced Sallie into signing the July 1995 land contract, and the trial court did not err in granting summary judgment on this issue.

The judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Pamela H. Potter
Ashland, Kentucky

BRIEF FOR APPELLEES:

Roger R. Cantrell
Greenup, Kentucky