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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000705-MR

C & B, INC., NOW M & H, INC. APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CI-01758

WMC CORPORATION APPELLEE

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

BEFORE: BUCKINGHAM, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: C & B, Inc. has appealed from a summary judgment wherein the Franklin Circuit Court ruled that it was liable to WMC Corporation for breach of a contract. C & B claims the trial court erred by not granting its motion for summary judgment on the grounds that WMC failed to perform its obligations under the contract. C & B also argues that the trial court abused its discretion in awarding WMC an attorney's fee in the amount of $30,000.00. Having concluded that there is no genuine issue as to any material fact and that WMC is entitled to summary judgment

as a matter of law and that the attorney's fee award was not an abuse of discretion, we affirm.[1]

On July 21, 1997, C & B and WMC entered into a real estate sales and purchase agreement, whereby WMC agreed to purchase a 1.851-acre tract of land adjacent to the Best Western Inn located at the intersection of US 60 and Chenault Road in Franklin County, Kentucky, for the sum of $500,000.00. WMC intended to develop a Microtel Hotel on the property. The relevant portion of the Agreement stated:

> 4. This Agreement is subject to and contingent upon BUYER being able to obtain all necessary zoning and building permits from any and all governmental agencies to construct and operate a motel and obtain permits to construct interstate and property signage.
>
> 5. Should BUYER be unable to obtain the necessary permits and approvals required by Paragraph 4 hereinabove which is adequate for BUYER's intended use within one hundred twenty (120) days after the final execution by all parties, then this Agreement may be canceled by either party, in writing, and all rights and duties hereunder terminated. In this event, the Deposit shall be returned to BUYER by SELLER within five (5) days of cancellation.
>
> . . .
>
> 9. Possession of the Property shall be delivered with fee simple, general warranty deed to BUYER at closing and clear of all options, easements, or tenancies, and additionally SELLER warrants that there are presently no existing tenancies, options, or

[1]This case has been heard with C & B, Inc. now M & H, Inc., Bobby Matthews & Charles Hunter v. WMC Corp. 2000-CA-001650-MR, which this Court also affirmed.

> easements (to Frankfort Inn Associates or others) upon or affecting the Property other than those reported in writing to BUYER. The parties agree that all property taxes shall be prorated to the date of the Deed.
>
> 10. At closing an unencumbered, marketable title to the property shall be conveyed to BUYER by deed of general warranty with the usual covenants such as any national title company will insure, free and clear of all liens and encumbrances except (a) such liens and encumbrances as BUYER may specifically approve and (b) easements of record and all restrictions of record as to the use and improvements of the property. Should the title to the property appear defective, SELLER shall have ten (10) days after receipt of notice from BUYER of such defect or defects within which to remedy same at the cost of the SELLER. If the parties to this Agreement desire that any term of this Agreement survive the closing and transfer of deed to BUYER, an agreement must be executed prior to closing acknowledging such an intent.

As can be seen from the above paragraph 9, the parties recognized the possibility that a problem might exist with respect to a potential interest held by Frankfort Inn Associates. On April 18, 1985, the Franklin County Development Corporation had deeded property located at the intersection of US 60 and Chenault Road to Frankfort Inn Associates, a Kentucky General Partnership. On July 31, 1985, Frankfort Inn Associates had conveyed 1.815 acres of this property to Cornelison Enterprises, a Kentucky General Partnership. This conveyance was subject to the terms and provisions of a real estate contract, a copy of which was attached to the deed to Cornelison Enterprises. Paragraph 11 of the 1985 contract included language that led to

the controversy which resulted in the present litigation. It stated:

> In the event that the Operator [of the restaurant] at any time fails to renew the aforementioned lease, the Buyer [Cornelison Enterprises] hereby grants to the Seller [FIA] the right to purchase the Property or lease the premises upon terms to be mutually agreed upon. In the event that mutually agreeable terms cannot be reached, or if the Seller or its assignee, if any, ceases to operate the adjacent motel, then the Buyer shall be free to utilize the Property in any manner and shall be able to sell, alien, or convey the Property free and clear of any encumbrance otherwise created or imposed by this Contract of Sale.

On May 12, 1992, Cornelison Enterprises conveyed the 1.815 acres to C & B with the prior knowledge of Frankfort Inn Associates. This same property later became the subject of the July 1997 Agreement between C & B and WMC. According to C & B, in October of 1997, nearly three months after the execution of the Agreement but prior to closing, WMC began to express concern about the restrictions included in paragraph 11 of the 1985 contract. In an attempt to resolve the situation, C & B contacted Frankfort Inn Associates and inquired whether it claimed any rights under the 1985 contract. On November 12, 1997, Frankfort Inn Associates responded in a letter, stating in pertinent part:

> FIA would now like to exercise its right to purchase the Property in accordance with the rights retained in the Contract. Assuming C & B, Inc. is prepared to satisfy its contractual obligations, FIA agrees to reimburse your client for the price it paid for the Property plus interest. If such is

not satisfactory, FIA is prepared to consider any good faith alternative offer to resolve this matter. At any rate, FIA believes that a sale of the Property should not occur without its rights and interests in the Property being properly addressed.

On November 14, 1997, WMC wrote a letter to C & B, stating in pertinent part:

> Please be advised that I am in receipt of the copy of correspondence dated November 12, 1997, from attorney Bruce Clark on behalf of Frankfort Inn Associates regarding the property located at 40 Chenault Road, Frankfort, Franklin County, Kentucky.
>
> Pursuant thereto, it is painfully obvious to all concerned that there exists a cloud in your client's title to the subject property, which impedes its ability to convey fee simple, marketable title.
>
> Pursuant to paragraph 10 of the aforereferenced contract and on behalf of my client, we are putting you and your client on notice of the defect in the marketability of the title of your client's property inasmuch as Frankfort Inn Associates is claiming an option to purchase the subject property. Frankfort Inn Associates has asserted that its claim to purchase the property is prior and superior to my client's contractual interest therein.
>
> Pursuant to paragraph 10 of the subject matter contract, your client shall have ten (10) days after receipt of this notice in which to remedy same, the costs of any such remedies to be borne by your client. We recognize that the ten (10) day time period is likely unrealistic in this specific instance. That being the case, we are willing to extend the contingency period from November 18, 1997 to on or before January 30, 1998, in order to allow you to eradicate the cloud on this title by way of legal process or what ever [sic] other means available and advisable to you and your client.

Given the representations and warranties given by your client to mine in paragraph 9 of the Contract, wherein Seller specifically warranted there were presently no existing options to Frankfort Inn Associates or others upon [sic] affecting the property, it is our position that the leniency in time to cure this cloud is more than generous on our behalf. We stand ready, willing and able to complete and fulfill all the terms and conditions of the subject matter contract which apply to our client. However, it is obvious that your client cannot deliver unencumbered marketable title to this property at this time.

I submit to you the case of Bailey v. Conley, 26 S.W. 391, 1894. Therein, the Court stated in part that. . .

> ". . . title. . ., if defective, he (seller) should be given a reasonable time in which to perfect it, and should be required to perfect it (emphasis added), if he can do so." . . .

It has been our position all along that your client has a duty to exhaust reasonable remedies to eradicate a cloud on the subject property. Obviously, the cloud exists and we feel that a declaratory judgment action in the Franklin Circuit Court would be an appropriate remedy to once and for all extinguish this cloud. However, your proposal for Frankfort Inn Associates to initiate a declaratory judgment action in Franklin Circuit Court would be acceptable to our client, again, with the caveat that the contingency period deadline of November 18, 1997 be extended to on or before January 30, 1998. Also, if in the event Frankfort Inn Associates would be successful in such an action, this letter would place you and your client upon notice of our intent to hold your client liable for all of our expenses and costs pursuant to paragraph 14(b) of the subject matter contract. Obviously, if you are able to obtain a release without the need for court action, that would be acceptable to

> our client and at that time we would be ready, willing and able to close.

C & B responded by letter dated November 17, 1997, wherein C & B rejected WMC's proposal for an extension of time to perform and its request that C & B take corrective action. C & B stated that it rejected WMC's proposal because WMC had "long known that Frankfort Inn Associates claimed an interest in the property." C & B also informed WMC that the contract would expire on its terms on November 18, 1997, unless WMC confirmed in writing by said date that it intended to purchase the property. On November 21, 1997, C & B wrote a letter to WMC claiming that the July 21, 1997 Agreement was terminated.

The parties' Agreement included a paragraph that dealt with the remedies for termination of the Agreement. Paragraph 14(b) stated:

> If the sale and purchase of the Property is not closed because of refusal or default of the SELLER, the BUYER, at its sole election, may seek either to enforce specific performance of the SELLER's obligations hereunder, seek damages, or receive a refund from SELLER of its earnest money. In any of the foregoing events, SELLER shall be responsible for BUYER's cost, including legal fees, for enforcing its rights hereunder.

On November 26, 1997, WMC filed suit against C & B relying, in part, on paragraph 14(b) of the Agreement. On April 9, 1998, the trial court entered a summary judgment on the issue of liability in favor of WMC. In its order, the trial court stated in pertinent part:

> This Court, after reviewing the record and hearing arguments of counsel, hereby determines that there are no genuine issues of material fact and that this matter is strictly a contract dispute which involves the interpretation of two separate terms of the contract. As such this matter is appropriate for decision by the Court.
>
> It is the opinion of this Court that the seller, C & B Inc., failed to comply with paragraph #9 of the contract and did not deliver a general warranty deed to the property without an existing option to Frankfort Inn Associates. There is no question from the record that Frankfort Inn Associates, through counsel, indicated that it was exercising an option which it had retained in an original sale on July 9, 1985. C & B was unable to provide WMC with any assurance that Frankfort Inn Associates would not attempt to enforce this option once WMC had purchased the property.
>
> C & B maintains that it was allowed to terminate the contract pursuant to paragraph #5 of the contract since WMC had not received a final construction permit for the intended property within the 120 days called for by the contract. There is nothing in the record to indicate that C & B gave any notice of its intent to exercise it [sic] right of cancellation prior to its inability to clear the option on the property. The record further indicates that WMC had acquired the necessary permits and approvals during the negotiation process and was ready to close assuming that C & B could deliver the required deed at the time of closing.[2]
>
> It is apparent from the record that C & B attempted to exercise its cancellation pursuant to paragraph #5 when it could not deliver the property as required by the contract under paragraph #9.

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[2]At a hearing on C & B's motion to amend, the trial court acknowledged that WMC did not have all of the necessary permits in place, but rather that WMC had filed for the permits and they would be forthcoming.

After the issue of damages was presented to a jury on December 15, 1998, the Franklin Circuit Court on March 1, 1999, entered a final judgment awarding WMC $75,000.00 in damages and $30,000.00 in attorney's fees. This appeal followed.

C & B's first claim of error is that Frankfort Inn Associates did not hold a valid option, whereby any interest that it was attempting to assert in the subject property did not render the property unmarketable. Whether title to real estate is marketable is a question of law for the court.[3] Accordingly, our review of the trial court's ruling that C & B's title was unmarketable is de novo. The first step in our analysis is to determine the standard for marketability.

> A title is marketable if it meets the reasonable judgment standard applied by the courts. If a reasonable person--knowing the facts about seller's title including chain of title, encumbrances against it and any opposing claims of ownership--would accept the title without hesitation, then the title is marketable [footnote omitted].
>
> To be unmarketable, the title does not need to be defective in fact. It is enough if the status of sellers's title would create a reasonable doubt affecting the property's value or pose an unreasonable risk of litigation attacking the title. When the marketability of title is challenged, the equitable principle involved is that a purchaser may not be compelled to take a conveyance when there is a reasonable

[3]Oliver v. Wyatt, Ky., 18 S.W.2d 403, 407 (1967). See also Bethurem v. Hammett, 736 P.2d 1128, 1132 (Wyo. 1987)(citing Wilfong v. W.A. Schickedanz Agency, Inc., 85 Ill.App.3d 333, 406 N.E.2d 828, 40 Ill. Dec. 625, (1980); Myerber, Sawyer & Rue, P.A. v. Agee, 51 Md.App. 711, 446 A.2d 69 (1982)).

> probability that it will be subjected to litigation[4] [footnote omitted].

When a title is burdened by an option to purchase, the buyer may reject the title as unmarketable.[5] C & B argues that Frankfort Inn Associates did not have a valid option and that the trial court erred in ruling that C & B failed to satisfy paragraph 9 of the Agreement. This argument is premised on the rule that an option does not exist if there is not a definite time for exercising the option.[6] While this is a correct statement of the rule, Frankfort Inn Associates in its March 12, 1997 letter to C & B certainly expressed its belief that it had a valid option.

Furthermore, paragraph 9 of the Agreement specifically mentions that title should be delivered clear of any option. From our review of the record, we must agree with the trial court that there is no factual basis to support any finding other than a finding that if WMC had completed the transaction as scheduled it would have placed itself at risk for a lawsuit by Frankfort Inn Associates. We believe a determination as to the marketability of the property's title must turn on the significance of the threat of litigation by Frankfort Inn Associates.

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[4]Milton R. Friedman, Contracts and Conveyances of Real Property 1-6 (4th ed. 1984).

[5]David A. Thomas, Real Property § 91.09(a)(3), p. 45-6 (Thomas ed. 1994).

[6]Bennett v. Dudley, Ky., 391 S.W.2d 375 (1965).

The trend in recent case law is that the threat of litigation alone is sufficient to make a title unmarketable if the danger of litigation is apparent and real, not merely imaginary or illusory.[7] The Court of Special Appeals of Maryland has stated, "[m]arketability is not concerned with the results of litigation, only with its likelihood."[8] Although Kentucky has not directly addressed this issue, the former Court of Appeals stated:

> When a contract for the sale of land is executory, its true nature is such that the court recognizes the right of the purchaser to insist upon a title so clear of defects that there is no reasonable doubt as to its validity and no reasonable basis for apprehension of danger of litigation with regard to it.[9]

Based on the undisputed material facts of record, we hold as a matter of law that WMC has sufficiently shown that Frankfort Inn Associates had asserted an interest in the subject property which gave WMC a reasonable basis to be apprehensive that litigation would result from its purchase of C & B's property.

C & B's second claim of error is that the trial court erred in denying its motion for summary judgment based on WMC's failure to obtain the necessary permits as required by paragraphs 4 and 5 of the Agreement. C & B's central argument is that the

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[7]Industrial Comm'n v. McKenzie County Nat'l Bank, 518 N.W.2d 174 (N.D. 1994); Sanders v. Coastal Capital Ventures, Inc., 370 S.E.2d 903 (1988).

[8]Myerberg, 51 Md.App. at 717.

[9]Massey v. Fischer et al., Ky., 245 S.W.2d 594, 596 (1952).

specific contract language states that the "Agreement may be canceled by either party" if the buyer was "unable" to obtain the necessary permits within 120 days of final execution of the Agreement.

It is undisputed that WMC had failed to secure all of the necessary permits within 120 days of the execution of the Agreement. However, the record indicates that WMC had applied for all of its permits and was corresponding with the Department of Housing, Buildings and Construction on the steps WMC needed to take to have its project comply with state regulations. Furthermore, we agree with the trial court's ruling that while paragraph 5 states that either party may cancel the Agreement if the buyer fails to acquire the necessary permits, the only reasonable interpretation of the Agreement is that this provision was inserted solely for the protection of the buyer, WMC. Moreover, the record does not show that prior to WMC's raising the issue of the option that C & B had expressed any concern that WMC was not moving forward with sufficient progress in its effort to obtain the necessary permits. It seems clear to this Court that C & B did not raise any objection to WMC's non-compliance until WMC expressed a concern about Frankfort Inn Associate's potential interest in the subject property. Therefore, we hold that WMC did not breach the Agreement by its failure to have all of the permits secured at the time the Agreement was canceled.

C & B's final claim of error is that the trial court abused its discretion by awarding WMC an attorney's fee $30,000.00. Paragraph 14(b) of the Agreement stated:

> If the sale and purchase of the Property is not closed because of refusal or default of the SELLER, the BUYER, at its sole election, may seek either to enforce specific performance of the SELLER's obligations hereunder, seek damages, or receive a refund from SELLER of its earnest money. In any of the foregoing events, SELLER shall be responsible for BUYER's cost, including legal fees, for enforcing its rights hereunder [emphasis added].

"It is well settled that the decision whether to award costs and attorney's fees to a party is within the sound discretion of the trial court and its decision will not be disturbed on appeal absent an abuse of discretion."[10] The record indicates that the trial court was given a detailed summary which outlined the time expended by the attorney and the fees incurred by WMC. WMC's attorney's fees totaled over $34,000.00, and the trial court awarded WMC $30,000.00. We are unpersuaded by C & B's argument that there is any significance to the fact that the jury awarded only $75,000.00 in damages. Clearly, the purpose of paragraph 14(b) was to allow WMC to be reimbursed for the attorney's fees it incurred "for enforcing its rights" under the Agreement regardless of the amount of the damages awarded.

[10] Giacalone v. Giacalone, Ky.App., 876 S.W.2d 616, 620-621 (1994)(citing Gentry v. Gentry, Ky., 798 S.W.2d 928 (1990); and Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975)).

For these reasons, the summary judgment and the final judgment of the Franklin Circuit Court are affirmed.

BUCKINGHAM, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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