

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002142-MR

HENRY SIZEMORE, JR.;
COY SIZEMORE; AND
RUTH PHILLIPS

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 99-CI-00036

HENRY SIZEMORE, SR.

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

*** **

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: Henry Sizemore, Jr., Coy Sizemore, and Ruth Phillips (collectively appellants) bring this appeal from a June 5, 2000, judgment of the Knox Circuit Court. We affirm in part and reverse and remand in part.

In January 1999, appellee, Henry Sizemore, Sr. (Henry, Sr.), brought a quiet title action in the Knox Circuit Court. He and his late wife, Sophia, owned real estate as joint tenants with right of survivorship. Before her death, and unbeknownst to Henry Sr. Sophia individually and as power of attorney for Henry,

Sr. conveyed the real estate to Henry, Jr. In his complaint, Henry, Sr., alleged that he did not sign the power of attorney to Sophia, thus, the conveyance was invalid. His daughter, appellant, Ruth Phillips (Ruth), sought to intervene in the action. She claimed ownership to part of the property by oral agreement. On May 16, 2000, the circuit court granted Henry, Sr.'s motion to dismiss Ruth's intervening complaint. On May 18, 2000, the circuit court entered partial summary judgment in favor of Henry, Sr. The circuit court concluded that appellant, Coy Sizemore's subsequent attempt to deed to Henry, Jr. the properties of Henry, Sr. was null and void. A jury trial ensued upon the single issue of whether Henry, Sr. had **signed** the power of attorney which Sophia cited as her authority to execute the deeds to Henry, Jr. The jury returned a verdict in favor of Henry, Sr. This appeal follows.

Appellants contend that the jury's verdict is not supported by the evidence and is contrary to law. The power of attorney to Sophia was allegedly signed by Henry, Sr. with his mark, an "X." This "X" was notarized by a notary public who is the wife of Henry, Jr. The power of attorney was dated October 31, 1989. On July 22, 1993, Sophia, individually and as power of attorney for Henry, Sr., executed and delivered to Henry, Jr. two deeds conveying the properties at issue. These deeds were not recorded until January 7, 1999, two days after Sophia's death. Upon learning of the recordation of the deeds, Henry, Sr. asserted that he did not sign the power of attorney to Sophia, maintaining that the "X" was not his mark.

Appellants argue the circuit court committed error by allowing the jury to determine whether Henry, Sr. actually signed his name with the "X" upon the power of attorney to Sophia. More specifically appellants allege that the notary's certification on the document is conclusive of the issue as appellee's complaint does not allege fraud in obtaining the certificate. Appellants believe such omission to be fatal and cite us to Kentucky Revised Statutes (KRS) 61.060 for the proposition that fraud must be alleged in order to attack the validity of the power of attorney. We have reviewed the complaint of Henry, Sr. and think it can be reasonably construed as alleging fraud in the obtainment of the power of attorney. See Universal C.I.T. Credit Corporation v. Bell High Coal Corporation, Ky., 454 S.W.2d 706 (1970). In sum, we are of the opinion that the complaint was sufficient to raise the allegation of fraud. Id.

Appellants also allege the circuit court committed error by entering partial summary judgment. Specifically, appellants contend that the circuit court erred as a matter of law in setting aside the deeds executed by Coy while acting as power of attorney for Henry, Sr. It appears that Henry, Sr. executed a general power of attorney to his son, Coy, on February 4, 1999. The power of attorney expressly provided that it would become effective only upon the disability of Henry, Sr. On April 5, 1999, Henry, Sr. executed another power of attorney to Coy. On September 3, 1999, Henry, Sr. revoked the April 5, 1999, power of attorney to Coy and recorded the revocation. On October 22, 1999, Coy executed a deed attempting to re-convey to Henry, Jr.

the property previously conveyed by Sophia. Coy relied upon the April 5, 1999, power of attorney as his authority to convey the property on behalf of his father, Henry, Sr. Upon learning that the April 5, 1999, power of attorney had been revoked, Coy executed a deed of correction to Henry, Jr. for the same property. In this deed, he cited the February 4, 1999, power of attorney as his authority to convey the property on behalf of his father. On October 27, 1999, Henry, Sr. also revoked the February 4, 1999, power of attorney.

Upon the above uncontroverted facts, it is clear that Coy did not possess authority to convey the property in question to Henry, Sr. The April 5, 1999, power of attorney was revoked on September 3, 1999, well before Coy executed the October 1999 deed to Henry, Jr. Thus it cannot be relied upon to sanction the conveyance.

Furthermore, the February 4, 1999, power of attorney specifically provided that it would only become effective upon the disability of Henry, Sr. As such, the February 4, 1999, power of attorney likewise cannot be relied to sanction the conveyance. Hence, we are of the opinion that summary judgment was appropriate as a matter of law. Simply stated, Coy lacked legal authority to convey his father's real estate to his brother on October 22, 1999; neither the February 1999 power of attorney nor the April 1999 power of attorney provided such authority for the conveyance.

Appellants lastly assert that the circuit court committed error by dismissing the intervening complaint of Ruth.

In the order dismissing the complaint, the circuit court went directly to the merits and specifically concluded that:

Ruth Phillips contends that there was an oral agreement between her and her parents, for Ruth Phillips to purchase the disputed property. Further, Ruth Phillips states that she has made numerous payments to Henry Sizemore, Sr. and that she has received a receipt for payment in full from Henry Sizemore, Sr.

KRS 371.010 requires contracts for the sale of real estate must be in writing and signed by the party to be charged therewith. No action can be brought to charge any person upon the contract for the sale of real estate that is not in writing.

In this case Ruth Phillips has not produced a written agreement to support the agreement between Ruth Phillips and Henry Sizemore, Sr. and Sophia Sizemore for the sale of real estate. Therefore, the Petitioner's motion to dismiss the Intervening Defendant is **sustained**.

Initially, we are of the opinion that Ruth had a right to intervene in the action under Ky. R. Civ. P. (CR) 24.01(1), which states, in relevant part, as follows:

(1) Upon timely application anyone shall be permitted to intervene in an action ... (b) when the applicant claims an interest relating to the property . . . which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

In the case at hand, Ruth claimed an interest in the property at issue and no other litigant adequately represented her interest; thus, CR 24.01 grants Ruth the right to intervene in the action. We also believe that the circuit court prematurely dismissed Ruth's complaint upon the merits.

Generally, an oral contract to convey real estate is unenforceable under the statute of frauds. KRS 371.010. A recognized exception to this rule is where one of the parties to the oral agreement has fully performed thereunder. In such instance, the oral contract may be enforced or the party may be entitled to appropriate equitable relief. See Waters v. Cline, 121 Ky. 611, 85 S.W. 209 (1905), Doty's Adm'rs v. Doty's Guardian, 118 Ky. 204, 80 S.W. 803 (1904), Jones v. Comer, 25 Ky. Law Rep. 773, 76 S.W. 392 (1903).

In sum, we believe that the circuit court must determine whether there existed an oral contract for conveyance of real estate to Ruth, and whether Ruth completely performed under said contract. If the circuit court answers both questions in the affirmative, Ruth would be entitled to specific performance of the oral contract and conveyance of the disputed property. If the circuit court finds that an oral contract existed, but Ruth did not fully perform thereunder, the circuit court then may determine Ruth's possible entitlement to equitable remedies, such as repayment of consideration, if any. However, if the circuit court finds that no oral contract existed, Ruth would be entitled to nothing. Upon the whole, we hold that the circuit court prematurely dismissed Ruth's complaint.

For the foregoing reasons, the judgment of the Knox Circuit Court is affirmed in part and reversed and remanded in part for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Kenneth M. Boggs
Barbourville, Kentucky

BRIEF FOR APPELLEE:

V. Katie Gilliam
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