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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002111-MR

JAMES SEIBER AND
ERMA SEIBER, HIS WIFE — APPELLANTS

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER GILL, JUDGE
ACTION NO. 99-CI-00162

JOHN A. STOVALL — APPELLEE

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

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellants, James and Erma Seiber ("Seibers") seek reversal of a judgment of the Todd Circuit Court rescinding a contract for the sale of land that they sought to purchase from the Appellee, John A. Stovall ("Stovall"). The trial court determined that there was no meeting of the minds between the parties on the number of acres described in the sales agreement. The Seibers contend that they were entitled to specific performance with an abatement of the purchase price. Finding no error, we affirm.

The parties entered into a Deposit and Sales Agreement dated July 1, 1999, which reflects that the Seibers agreed to purchase "178 Acres ∓ owned by John A. Stovall" for the total purchase price of $71,200.00. Thereafter, the Seibers learned that "it was highly questionable" that the tract contained that many acres.

On November 3, 1999, the Seibers filed a complaint in the Todd Circuit Court against Stovall. They offered to purchase what had been represented to them to be "178 plus or minus acres owned by John A. Stovall," and claimed that their offer to purchase was "based upon their reliance upon the representation . . . that the property contained 178 acres." The Seibers attached a copy of a deed of conveyance to Stovall, dated September 9, 1997; the description in Stovall's deed states that the property contains 178 acres, "more or less." The Seibers alleged that they subsequently had a title examination and review of the description of the subject property which revealed less than 100 acres. The Seibers maintained that they were "ready willing and able to purchase the 95 acres *which appear to be present* based upon the agreed upon purchase price of Four Hundred Dollars ($400.00) per acre." The Seibers requested reformation of the contract and that Stovall be ordered to convey the property to them in exchange for $38,000.00, less credit for the $5,000.00 deposit they had previously made.

On July 11, 2000, following a bench trial, the trial court entered Findings of Fact and Conclusions of Law:

> At the time the parties signed the July 1, 1999 contract, they thought the farm contained approximately 178 acres.
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> At trial, plaintiffs were of the opinion that the farm contained substantially less than 178 acres and defendant did not offer proof to the contrary.
>
> Plaintiffs were of the opinion they were negotiating for the purchase of the farm on a per acre basis and although defendant's agent (Mike Miller of Trademark Land Company) using plaintiffs' figures, computed the selling price by multiplying the number of acres (178) times $400.00 (the price plaintiffs were willing to pay per acre), the farm was actually sold in gross. This conclusion is inevitable because the contract did not contain a mechanism (such as a plan for having the property surveyed) for arriving at a per acre sales price. Furthermore, plaintiffs did not offer any evidence that such a plan had been contemplated or suggested.

The court concluded that the "Deposit Receipt and Sales Agreement" dated July 1, 1999, between plaintiffs and defendant should be rescinded because the plaintiffs and the defendant did not have a meeting of the minds on the number of acres described therein. On July 11, 2000, the court entered final judgment. On July 21, 2000, the Seibers filed a motion to vacate which was denied by order entered August 16, 2000. The Seibers filed a notice of appeal to this Court on September 5, 2000.

On appeal, the Seibers contend that they were entitled to specific performance with an abatement of the purchase price. Specific performance of a contract is not granted as a matter of right, but is a matter of the reasonable discretion of the court to be exercised according to the facts of each case. Western Kentucky Coal Co. v. Nourse, Ky., 320 S.W.2d 311 (1959).

The Seibers rely upon Harrison v. Talbot, 32 Ky. 258 (1834). In Harrison, Harrison sold a tract of land to Talbot for $6,000.00. The land was described by its boundaries and designated as containing four hundred acres. After Talbot was in possession of the land, a survey established that the boundary contained 490 acres. Talbot filed a bill in chancery to compel conveyance of the entire tract for the stipulated price of $6,000.00. Harrison contended that the sale was not by the tract in gross but by the acre at $15.00 per acre; Harrison proposed to make a title to either 400 acres for $6,000.00 or to the 490 acres for proportionate consideration. The circuit court decreed a specific execution of the contract for the entire tract of 490 acres upon full payment of the stipulated consideration of $6,000.00. The former Court of Appeals reversed and remanded with instructions to dismiss the complaint and "remit Talbot to his legal right and remedy," *unless he agreed* to take a conveyance for 400 acres for the original consideration of $6,000.00 or to take a conveyance of the entire tract on payment for the surplus at the rate of $15.00 per acre. The Court of Appeals dismissed Harrison's cross-bill "because *he cannot . . . compel a specific execution of the contract, varied or modified by parol evidence, nor otherwise than according to the import and effect of the written memorial of the sale*." Id. at 268. (Emphasis added.)

Bush v. Putty, Ky. App., 566 S.W.2d 819 (1977), cited by the Seibers, did not decide the question of whether or not

specific performance with an abatement of purchase price is a proper remedy in Kentucky. Wiedeman v. Brown, 307 Ky. 231, 210 S.W.2d 764 (1948), and Wallace v. Cummins, Ky., 334 S.W.2d 904 (1960), also cited by the Seibers, have no bearing upon whether the trial court should have ordered specific performance in this case. Wiedeman involved determination of the fair market value of a shortage discovered after a farm was conveyed. Wallace also involved a shortage discovered after a farm was conveyed. An advisory jury found that neither party knew the correct acreage of the tract, that the mention of "90 acres more or less" was made only for the purpose of description, and that the parties intended to risk the contingency of quantity. The court concluded that the statement of acreage in the contract of sale and deed of conveyance was not binding on either party. The high court affirmed, having determined that there was ample proof to support the finding that the sale was in gross.

Where there has been no meeting of the minds specific performance is not a proper remedy in Kentucky . In McGowan v. Shearer, 176 Ky. 312, 195 S.W. 485 (1917), the Court held that it was error for the circuit court to adjudge a specific performance where the parties had failed to agree upon an essential element of a contract - its subject matter. In McGowan, the would-be buyer sued to enforce specific performance of what he claimed to be a valid executory contract for the sale of a tract of land. The dispute involved the true location of a dividing line. The court held that there can be no enforcement of a contract when

the minds of the parties fail to meet upon any essential element, particularly the subject matter.

> To consummate a binding contract for the sale of land, as in the case of other contracts, there must be a meeting of the minds of the parties or mutual assent to the same thing, and all material terms and conditions of the contract, including a certainty of the subject matter, must be agreed on. [Citation omitted.] [E]quity will afford relief by rescission to either party if there was a mutual mistake, based upon ignorance or misapprehension, as to a material thing connected with the subject matter or essential in the inducement to or formation of the contract or involving the entire consideration. The mistake is so classified if the contract would not have been made had the truth been known to the parties. In relation to a sale and purchase of land a mistake as to the quantity is deemed equivalent to a mistake in the existence of a material part of the subject of the contract and an injured party is entitled to relief. [Citation omitted.]
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> . . . .
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> [T]here was no meeting of the minds on this material part of the subject matter of the contract. The transaction being executory, it is peculiarly one for the interposition of equity to rescind and restore the parties to their original status.
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> McGeorge v. White, 295 Ky. 367, 174 S.W.2d 532, 533-34.

The judgment of the trial court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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