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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000357-MR

MIKE MACKIN — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 98-CI-00172

TOMMY R. HALL,
LINDA R. HALL,
R.C. HALL, AND
BETTY M. HALL — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

BARBER, JUDGE: The Appellant, Mike Mackin ("Mackin") seeks review of a judgment of the Boyle Circuit Court in favor of the Appellees, Tommy R. Hall, Linda R. Hall, R.C. Hall and Betty M. Hall ("the Halls"). For the reasons set forth below, we reverse and remand with directions.

We shall refer to the underlying facts only as necessary to a resolution of the issues before us. On October 30, 1997, the parties entered into a contract in which Mackin agreed to purchase the Meadow Run Apartments from the Halls for

$1,150,000.00.[1] Paragraph three of the contract provides that the buyer shall apply for a loan within ten working days of acceptance of the offer, that the closing shall take place in 90 days, but that such time shall be extended if required, not to exceed 120 days. The contract provides that further extension will be granted at $5,000.00 per month.

By late February 1998, the parties had been unable to close the sale. On February 20, 1998, C. Timothy Cone, the Halls' attorney, wrote to Mackin enclosing a list of the security deposits for Meadow Run tenants and proposing to give Mackin a check in an amount equal to the deposits as of the date of closing. In his February 20, 1998 letter, Cone states: "You indicated you would be tied up the first part of next week and that February 27 was the earliest you could close. Please let me know whether that day or March 2 is preferable, as well as a couple of specific times." Cone wrote another letter to Mackin, dated February 25, 1998, in apparent follow-up to a phone conversation about wind damage to the roof and apartments that needed appliances. In that letter Cone states: "This is to advise you that we expect to close this Friday, February 27, or Monday, March 2, at a convenient time and place." On March 2,

[1] Mackin explains that the trial court made an erroneous finding regarding the deposit. At paragraph six the contract provides for a $100,000.00 good faith deposit; at paragraph two, the Contract specifies that the deposit was to be $1,000.00. Mackin made a $1,000.00 good faith deposit. Mackin advises that this was not considered a breach by any party. The Halls do not dispute this in their brief. The deposit is not at issue on appeal. The trial court made a finding that Mackin failed to deposit $100,000.00, but that any noncompliance was waived by the Halls. The trial court"s finding in regards to the deposit is clearly erroneous. CR 52.01.

1998, Cone again wrote to Mackin. The letter, in its entirety, states:

> Tommy Hall has called me this morning and told me of your conversation with him on Saturday and your advice that Tommy and Russell are not in compliance with the agreement for the sale and purchase of the captioned property. We do not agree with that conclusion. However, we have reviewed the contract, as well, and have determined that you have failed to observe the provision of paragraph 3 with respect to an extension of a closing date. Even if that consideration had been paid, the transaction was to have been closed with 120 days from October 30, 1996. The 120th day was Friday, February 27, 1998, and the transaction failed to close. Consequently, the contract has been breached and has terminated according to its terms because of the failure to close within the specified period. The closing scheduled for this afternoon is canceled.

Mackin filed a complaint in the Boyle Circuit Court alleging that the Halls had refused to comply with the contract, had unilaterally terminated the contract, and had failed to close, "thereby constituting a breach . . . ." Mackin explains that the parties entered into a stipulation that, in the event Mackin was successful, his remedy would be specific performance of the contract with a reduction in the initial purchase price, for any duplication of costs incurred in closing the sale of Meadow Run Apartments.

On December 1, 2000, the trial court entered judgment in favor of the Halls, and dismissed Mackin's complaint. The trial court found that:

> [T]he closing was to take place within one hundred twenty (120) days of the Contract's formation, *i.e.*, on or before February 27,

> 2000, pursuant to the express terms of numerical paragraph 3 of the Contract. The Plaintiff contends that the alleged extension of the closing date to March 2, 1998, constitutes a waiver of the closing deadline under Stamper v. Ford's Administratrix, Ky., 260 S.W.2d 942 (1953). The Court finds, however, that the present case is distinguishable from Stamper because, in Stamper, the evidence was uncontroverted. Here, the Defendants made an offer to extend the closing deadline to March 2, 1998; however, the Court finds that the Plaintiff did not properly accept said offer and no specific closing date or time was ever agreed upon by the parties. The court having found that there was no acceptance of the offer to modify numerical paragraph 3 of the Contract, a novation of the Contract did not occur and the contract expired pursuant to its terms.

"A novation is a substitution of a new contract for an old one which is thereby extinguished." [Citation omitted.] Kirby v. Scroggins, Ky., 246 S.W.2d 453 (1952). This case does not involve the (attempted) substitution of a ***new*** contract. Moreover, as Mackin notes in his reply brief, the Halls did not even argue novation in their pretrial memorandum; however, "novation must be pleaded either expressly or by unequivocal implication . . . ." Id. at 455. We hold that the trial court erred as a matter of law in construing the "offer to extend the closing deadline to March 2, 1998;" as a novation which Mackin "did not properly accept."

The trial court also erred in finding that "no specific closing date was ever agreed upon by the parties." C. Timothy Cone, the Halls' attorney, wrote three letters to Mackin. The first two letters, dated February 20 and 25, 1998, proposed a closing date of either February 27 (the closing deadline,

according to the contract) or March 2, the next business day. The third letter, dated March 2, 1998, states that: "[t]he closing scheduled for this afternoon is canceled." The Halls remind us that although we may have decided the case differently, the trial court's findings must be affirmed, so long as they are supported by substantial evidence. We agree; however, "[s]ubstantial evidence is not simply some evidence or even a great deal of evidence; rather, substantiality of evidence must take into account whatever fairly detracts from its weight." Pierce v. Kentucky Galvanizing Co. Inc., Ky. App., 606 S.W.2d 165, 168 (1980). Here, the March 2, 1998 letter written by the Halls' attorney specifically refers to a closing "scheduled for this afternoon." The trial court's finding to the contrary is clearly erroneous. CR 52.01.

In the trial court, Mackin had argued that the extension of the closing date to March 2, 1998, constituted a waiver of the closing deadline under Stamper, supra. The trial court disagreed, finding Stamper "distinguishable, . . . because in Stamper, the evidence was uncontroverted." This finding is in error, because the evidence, in Stamper, was "in sharp conflict." Id. at 943.

Stamper and his wife sold their farm to Ford. The contract provided the balance of the purchase price would be paid on or before January 1, 1950. On December 2, 1949, Ford signed an option to sell the farm to Dixon, the same day. Stamper claimed that he told the Dixons his contract was with Ford and he would not make a deed to anyone else. Shortly thereafter, Dixon

discussed the sale of the farm with Stamper. The Dixons testified that Stamper said he did not care to whom he sold the farm, as long as he got his money. Jesse Dixon testified that when he told Stamper the balance of the purchase money was ready for him later that month, Stamper replied he was in no hurry and they could deed the farm anytime. Jesse Dixon also testified that he had made a diligent search for Stamper on December 31, but could not locate him.

An attorney for the appellees testified that he wrote Stamper a letter on January 3 or 4, requesting that he set a closing date. Stamper testified that following his receipt of a letter on January 10, he called the attorney advising that the contract had expired, because Ford had not closed the deal by January 1, 1950. Ford filed a suit for specific performance. The Stampers insisted that time was of the essence of the contract, and that since Ford failed to make a legal tender of the balance of the purchase price before January 1, 1950, they were not required to perform the contract. The court held that Stamper in effect agreed to waive the requirement as to time. "A party may waive or relinquish rights to which he is entitled under a contract, and having done so may not reverse his position to the prejudice of another party to the contract." [Citations omitted.] Id. at 943.

We agree with Mackin that the Halls waived their right to insist upon strict performance of the closing deadline, by virtue of their correspondence through Cone dated February 20 and 25, 1998, proposing to close on either February 27 or on March 2,

1998, after the closing deadline in the contract. Furthermore, we are not convinced that failure to close by the next business day, under the circumstances of this case, constitutes a breach of the contract.

In Bennett v. Stephens, Ky., 293 S.W.2d 879 (1956), the buyer sought specific performance of a contract to convey real estate. The sellers contended that the buyer had breached the contract of sale, by failing to pay the purchase price on the day specified for such payment. The sellers maintained that they were released from their obligation to make the conveyance. The contract provided that the sum was due and payable January 1, 1955. The parties met on January 1, 1955; however, the buyer was unable to pay the full purchase price of $2,500. The sellers did accepted a check for $500 in part payment, and it was agreed that the balance be paid during the following week. The following week the buyer was ready, willing, and able to pay the balance of $2,000; sellers returned the $500 check and refused to convey.

On appeal, the court held that:

> In the first place, the January 1st date fixed in the contract was not made such a significant date that failure of performance on that day vitiated the contract. The general rule is thus stated in 55 Am. Jur., Vendor & Purchaser, Section 110, page 586:
>
> > It is a well established general principle in equity that time is not ordinarily regarded as of the essence of contracts for the sale of real property unless it is so stipulated by the expressions thereof or it is necessarily to be so implied. In the ordinary

> case, performance of a contract for the sale of real property within a reasonable time after the time named in the contract and substantially according to the contract, regard being had to all the circumstances, is regarded in equity as sufficient.

Appellee in good faith sought to consummate the contract within a reasonable time after the date specified. In the second place, even had time been of the essence of this contract, it is clear appellants waived complete performance on January 1, 1955, when they accepted the $500 check. They relinquished their right to rely upon this provision of the agreement by consenting to a delay in full payment. Id. at 880-81.

Accordingly, the judgment of the Boyle Circuit Court is reversed and this case is remanded for entry of judgment in favor of Mackin, for specific performance of the October 30, 1997 contract, pursuant to the terms of the parties' stipulation.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ephraim W. Helton
Helton, Erwin & Sanders
Danville, Kentucky

BRIEF FOR APPELLEE:

Elizabeth S. Hughes
Gess, Mattingly & Atchison, PSC
Lexington, Kentucky