

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001013-MR

MADONNA OLIVER

APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 00-CI-00089

BRIAN HICKS
AND SHAUNA HICKS

APPELLEES

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: BARBER, HUDDLESTON, AND MILLER, JUDGES.

BARBER, JUDGE: Appellant, Madonna Oliver ("Oliver"), appeals from an entry of summary judgment in favor of appellees, Brian and Shauna Hicks ("Hicks"). We affirm.

Hicks argues that Oliver approached them to sell 25 acres of real property at \$1000 an acre. The deed of conveyance deeded 75 acres "more or less", with an exception to said conveyance of 50 acres, "more or less". Hicks purchased the tract. Following the purchase, Hicks had the property surveyed; the surveyor found only 11.72 acres in the tract. Hicks

requested a refund of \$1000 per acre for all property not received under the terms of the sale.

Oliver stated in the record that she sold the particular tract for \$25,000 without regard to the acreage of the tract. She states that the price given was not per acre and that Hicks is not entitled to a refund. Where the deed gives a certain acreage and the actual property conveyed is more than 10% less than that called for in the deed, a pro rata portion of the purchase price must be refunded, even if the property was sold by gross rather than by the acre. Kilburn v. Pierson, Ky., 169 S.W.2d 327.

Kentucky law provides that where a property description states "more or less," a deviation of up to 10% in actual acreage is allowed without penalty to either party. Wilson v. Morris, Ky., 233 S.W.2d 1049, 1050 (1921). If the shortage exceeds 10%, then the person purchasing the property shall be reimbursed for the acreage less than that conveyed by the deed. Humphries v. Haydon, supra. Where one party has paid for substantially more property than he received, the law requires a refund of a percentage of the purchase price equal to the shortfall in acreage. Kilburn v. Pierson, Ky., 169 S.W.2d 326, 327 (1943).

The surveyor's finding that the land was 53% less than that stated in the deed, being only 11.72 acres rather than 25 acres, was uncontroverted before the trial court. On appeal, Oliver argues that she did not have enough time to contest the surveyor's findings. Oliver did not make an objection to the

surveyor's acreage finding. The lack of objection below bars raising that issue before this Court.

The record contains an affidavit by Oliver stating that "The use of the language in the deed '75 acres more or less' was used in reference to identify the piece of property and was not used to detail the exact acreage being conveyed." This factual assertion is insufficient to defeat the clear showing of acreage in the deed and the fact that Hicks received less than half the acreage named in the deed. Furthermore, Kentucky law requires that where a deed contains a reference to a specific number of acres, the deed must make clear that the number of acres listed was merely "descriptive" in order for the seller to escape liability for shortfall. Humphries v. Haydon, Ky., 179 S.W.2d 895, 896 (1944). The deed in the present case contained no such limiting language.

The action was filed on May 24, 2000. The initiating complaint asserted that the property sold was far less than the acreage called for in the deed of sale. Summary judgment was entered 13 months later, on April 19, 2001. Oliver had a year to take discovery in this action. During that time she did not obtain a separate survey of the property at issue, or take steps to refute Hicks's assertions.

Oliver argues that the trial court entered summary judgment prematurely. She asserts that as only three weeks elapsed between entry of the pretrial order by the trial court and the entry of summary judgment, she did not have a chance to take discovery. The pre-trial order provided for a discovery

cut-off date of July 2, 2001. Oliver claims that she had insufficient time to complete her discovery before summary judgment was entered in April 2001. Oliver took discovery prior to entry of the summary judgment and did not dispute Hicks's statements of fact before the trial court. Where the respondent has had an opportunity to complete discovery, entry of summary judgment is not premature. Hartford Ins. Group v. Citizen's Fidelity Bank & Trust Co., Ky. App., 579 S.W.2d 628, 630 (1979).

The record contains discovery responses by Hicks, filed March 26, 2001. These responses include a copy of the survey showing the more than 13 acre shortfall. The discovery requests were served on Hicks in September 2000. Oliver objects to the late responses, but the record is devoid of any motion to compel or other attempt to request an earlier response. Oliver received answers to her discovery requests a month before entry of summary judgment but failed to refute any of the facts contained therein before the trial court. Where there is an opportunity to present evidence showing that facts are in dispute but no factual disputes are raised, entry of summary judgment is appropriate. Hoke v. Cullinan, Ky., 914 S.W.2d 335, 337 (1995).

Where there is no material issue of fact and it appears that the non-moving party will be unable to produce evidence at trial warranting a judgment in her favor, the trial court may properly enter a summary judgment. Hubble v. Johnson, Ky. 841 S.W.2d 169, 171 (1992). Oliver failed to provide any factual evidence refuting the claims made by Hicks, or to show that there was a genuine issue of material fact barring entry of summary

judgment. It was uncontroverted that the deed called for transfer of 25 acres, more or less, and that Hicks received only 11.72 acres.

The trial court's entry of summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William F. McGee, Jr.
Smithland, Kentucky

BRIEF FOR APPELLEE:

B. Todd Wetzel
Wells & Wetzel
Princeton, Kentucky