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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2002-CA-000493-MR

SL HOTEL DEVELOPMENT, LLC APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE
ACTION NO. 00-CI-04005

GOLDEN RANCH DEVELOPMENT, LLC;
RAY DESLOOVER; JOHN REVEL;
BRUCE MCINTOSH APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, McANULTY, JUDGES.

McANULTY, JUDGE: SL Hotel Development, LLC (SL) appeals from an order of the Fayette Circuit Court granting summary judgment to Golden Ranch Development, LLC (Golden Ranch). On appeal SL raises two issues: 1) whether the trial court erred in finding that SL breached the terms of the contract with Golden Ranch; and 2) whether Golden Ranch anticipatorily breached the contract with SL, thus suspending performance by SL. We reverse and remand.

Pursuant to Kentucky Rules of Civil Procedure (CR) 56.03, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The standard of review of a trial court's granting of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). Where the relevant facts are undisputed and the dispositive issue becomes the legal effect of those facts, our review is de novo. Western Coca-Cola Bottling Co., Inc. v. Revenue Cabinet, Ky. App., 80 S.W.3d 787, 790 (2001). In the case sub judice, both parties admit that there is no material fact to be resolved. Both assert that they are entitled to judgment as a matter of law.

The undisputed facts are as follows. On June 1, 1999 SL entered into a Purchase Agreement with Select Properties, Inc. and Stanford Realty, Inc. (hereinafter referred to as Stanford) for the purchase of real property located on New Circle Road in Lexington, Kentucky (Stanford contract). The purchase price was $2,225,000. There were four tenants on the

property with leases and at least one of the leases required 24-month's notice to the tenant before cancellation of the lease. Closing was to take place no later than 90 days after execution of the contract. However, a series of addendums extending the closing date were executed. On January 24, 2000 an addendum to extend closing to February 15, 2000 was signed by the owner of Stanford, Timothy Diachun. The addendum was never signed by John Owen, the owner of SL. Closing on the property never took place.

On December 24, 1999, SL entered into a Purchase and Sale Agreement with Golden Ranch, whereby Golden Ranch agreed to purchase a smaller tract of the Stanford property (Golden Ranch contract). The purchase price was $900,000. As required by the contract, Golden Ranch deposited $5,000 and a non-interest bearing note for $195,000 with Gibson Realty. The note was guaranteed jointly and severally, personally and unconditionally by Ray DeSloover, John Revel, and Bruce McIntosh. Closing was to take place on or before February 15, 2000.

The following letter, dated February 11, 2000 was sent from Michael R. Eaves, counsel for Golden Ranch to Bill Arvin, Senior, counsel for SL:

> Speaking for my clients, we still wish to buy the property but have become convinced that Mr. Owen will not be able to deliver possession of it, free of the claims of the existing tenant. Based upon the lease I have

> seen, the tenant has a continued right to occupancy of the premises for three or four more years, absent being bought out of its lease. Quite obviously, my clients want the property for the construction of a restaurant and are not interested in paying a million dollars simply in order to collect rent from the existing tenant.
>
> My clients have spent several months negotiating with Mr. Owen, only now to discover that a deal with him may not be possible. As I said, they remain interested in purchasing the property. The terms under which they are interested in purchasing the property are reflected in the last contract I proposed, a copy of which I believe I sent you. If Mr. Owen wishes to sell the property, we need to meet here in Richmond, face to face, and discuss it. Absent that, I see nothing more than a continuing stream of negotiations and delays, while still having no assurance that we would ever have a deal. My clients are tired of negotiating and are only interested in an agreement. Please advise.

On February 17, 2000, SL noticed Golden Ranch that it was in default for its failure to close on February 15, 2000. The letter stated, as a remedy for this default, SL would accept the earnest money as liquidated damages and requested that Golden Ranch direct Gibson to deliver the $200,000 earnest money to SL. When Golden Ranch failed to do so, SL filed the suit, which is the subject of this appeal, asking for judgment against Golden Ranch, Ray DeSloover, John Ravel, and Bruce McIntosh in the amount of $195,000, together with post-judgment interest at the rate of 12%. SL also requested judgment against Golden

Ranch, requiring that Golden Ranch direct Gibson to release the $5,000 earnest money.

Both parties filed motions for summary judgment. SL argued that Golden Ranch was required to close on or before February 15, 2000, that it had 30 days before closing to notify SL of any failures of contingencies in the contract and that Golden Ranch failed to provide said notice. SL also argued that its agreement to deliver possession was not absolute, and, more specifically, that, under the contract terms, SL had thirty days after closing to get the tenant to vacate the premises. SL pointed out that the contract provided for a penalty of $5,000 per month rent if SL failed to do so.

Golden Ranch argued that SL's contract to purchase the property from Stanford expired on January 14, 2000 and, as a result, SL had no rights to the property and could not perform under their agreement. Golden Ranch asserted that they did give notice of failed contingencies in a letter dated January 10, 2000, as required by the agreement. Golden Ranch also argued that they were not obligated to perform until SL could convey marketable title.

The trial court granted the Golden Ranch motion for summary judgment and denied SL's motion, finding that the purchase and sale agreement between SL and Stanford expired on January 14, 2000, and that as a result, SL was unable to perform

as of that date. The trial court concluded that the closing of the sale and purchase agreement between SL and Stanford was a prerequisite to the agreement entered into between SL and Golden Ranch. The trial court further concluded that Golden Ranch was not obligated to give the thirty-day notice requirement under the agreement because any such notice would have been irrelevant. The trial court, relying on Jackson v. Lamb's Ex'r, 299 Ky. 505, 186 S.W.2d 9 (1945), determined that Golden Ranch was not required to perform until SL could convey a good and marketable title.

Based on the facts in this case, we believe the trial court erred in its determination that Golden Ranch was entitled to summary judgment as a result of SL's failure to obtain title as of January 14, 2000.

"It is not essential that the vendor of land be able at the time he enters into the contract for its sale to convey a perfect title in order to make the contract valid, since it is competent for him to acquire the title afterwards, or clear encumbrances thereon and render himself able to convey a perfect title at the time he is called upon by his contract or by the law to do so." Guill v. Pugh, 311 Ky. 90, 223 S.W.2d 574 (1949). Golden Ranch does not refute SL's claim that Golden Ranch was aware that SL did not actually own the property it

contracted to sell. The contractual requirement, in pertinent part is as follows:

> 4.1 Title at Closing. At closing an unencumbered, marketable title to the Property shall be conveyed to Purchaser by deed of general warranty with the usual covenants . . .

This contract clearly called for SL to deliver title at closing, not before. Obviously, since Golden Ranch knew that SL had not yet acquired the property when it entered into the contract to purchase, it could have negotiated a contract whereby SL was required to provide proof of title at some date prior to closing. Its failure to do so is fatal to its claim. By the express terms of the contract, SL was not required to convey title until closing.

Golden Ranch relies upon the testimony of Timothy Diachun, the owner of Stanford, that SL's last contract extension to purchase the property expired on January 14, when SL did not execute the extension offer of January 24, and failed to cause the transfer of the earnest money deposit by January 26, a condition precedent to that last extension. Be that as it may, we are not called upon to determine whether SL breached its contract with Stanford. The continued extensions, and Diachun's testimony establish that Diachun was hopeful that a deal with SL might still be worked out. The letter notifying SL that it was in default on the Stanford contract was dated February 9, 2000.

This letter still gave SL five days to cure the default and close on the property. Whether SL would or could have done so is not established, in that on February 11 Golden Ranch sent the letter which SL believed was an anticipatory breach of the contract by Golden Ranch. Because this letter was an anticipatory breach, as discussed later in this opinion, SL was relieved of its obligation to purchase property for which it believed it no longer had a buyer.

The trial court's reliance on Jackson is misplaced. It is true that "a vendee cannot be required to perform his part of a contract unless the vendor can convey a good and marketable title." Jackson, 299 Ky. at 509, 186 S.W.2d at 11. However, the vendor is not required to perform until the contract or law requires it. Guill, 311 Ky. at 92, 223 S.W.2d at 575. Under the terms of the contract, SL had until closing to convey title, and therefore could not have breached the contract with Golden Ranch when it failed to obtain title on January 14.

Because the trial court concluded that SL had breached the Golden Ranch contract by failing to obtain title, it never addressed the issue of whether Golden Ranch anticipatorily breached the contract, relieving SL from its duty to purchase the property.

Golden Ranch claims that sometime after the execution of the contract, it became aware of the leases. However, the

contract provides for the removal of the tenants and Golden Ranch does not refute the claim that it was aware of the tenants on the property. John Owen, owner of SL, testified that Golden Ranch had been provided with copies of the leases and that it inspected the leases prior to signing the contract. Golden Ranch does not specifically refute that claim, but rather asserts that the February 11 letter was notification to SL of a title defect, represented by the leases. The basis of Golden Ranch's claim is that, while they were aware of the tenant, at closing they were entitled to title free of the leases, per section 4.1 of the contract. We first note, that the February 11 letter states that Golden Ranch was concerned about SL's ability to deliver possession, not title free of the leases. Golden Ranch takes the position it was merely attempting to settle a dispute over conflicting portions of the contract, and that the parties were free to "reach an agreement regarding their differing opinions as to what their Contract required." SL argues that the contract language is clear and that Golden Ranch had negotiated its protection as to possession into the contract. We agree.

The two provisions Golden Ranch contends were in dispute are as follows:

> 4.1 Title at Closing. At closing an unencumbered, marketable title to the Property shall be conveyed to Purchaser by

> deed of general warranty with the usual covenants such as any national title company will insure, free and clear of any and all liens, leases, tenancies and encumbrances except (a) such liens and encumbrances as Purchaser may specifically approve . . .
>
> 4.2 Other Terms and Conditions.
>
> a. Present tenant to be vacated from property no later than 30 days after closing; however, all contingencies are to be removed before notification to tenant. Notification to and vacating of tenant shall be only by the Seller. If tenant is still occupying the property after closing, Purchaser shall grant Seller a limited power-of-attorney, for the purpose of vacating present tenant from the property. Seller and Purchaser agree that if present tenant has not vacated the property by 30 days after closing, Seller will pay to Purchaser a $5,000 (Five Thousand Dollar) monthly penalty for each full month, after 30 days past closing, that tenant continues to occupy the property. Any partial month occupied by tenant shall be prorated daily. Seller also agrees that purchaser shall be entitled to any and all rents from tenant, starting at closing.

In construing a contract, the court will give effect, if possible to the intention of the parties. Black Star Coal Corp. v. Napier, 303 Ky. 778, 199 S.W.2d 449 (1947). If the contract contains inconsistent clauses, they should be reconciled if possible. Id. However, we have no right to make a contract for the parties or revise the agreement while professing to construe it. State Farm Mut. Auto Ins. Co. v. Hobbs, Ky., 268 S.W.2d 420 (1954).

It is clear that Golden Ranch was, at the very least, aware that there was a tenant on the property. Even if it was not given copies of the leases before signing the contract, in performing its due diligence, it would have become aware of the existence of the leases. Golden Ranch makes no claim of fraud or misrepresentation as to the leases. The problem for Golden Ranch is one of timing. Section 4.2 (d) of the contract specifically required that Golden Corral approve the property as an acceptable restaurant location by January 15, 2000. Further, Section 10.4 of the contract required that all communication, including notices, be in writing. While there is nothing in the record to establish the date that Golden Corral first objected to the leases, the first written communication in the record as to the leases is the February 11 letter, nearly a month after the January 15 deadline for approval by Golden Ranch.

Golden Ranch argues that a letter dated January 10, 2000 was notice that it was not approving the property. While this is factually true, the letter of January 10 did not mention the leases but raised issues of parking spaces, signage and rear access. Golden Ranch never asserted that it was entitled to cancel the contract based on the issues raised in the January 10 letter, but rather relied only on the issue of the leases. We believe that this is a clear indication that Golden Corral was either aware of the leases and had second thoughts about them or

failed to perform its due diligence before the January 15, 2000 deadline. In either case, Golden Ranch was not entitled to insist that SL renegotiate the contract. The February 11 letter establishes that this is what Golden Ranch was attempting to do. The letter states, in pertinent part, "The terms under which they are interested in purchasing the property are reflected in the last contract I proposed, a copy of which I believe I sent you." For all its claims to the contrary, Golden Ranch was not attempting to clarify the terms of their existing contract, but rather was attempting to substitute a new contract in its place.

The contract clearly provided for a remedy in the event the tenant could not be removed within 30 days of closing. Golden Ranch agreed under the terms of the contract, to a $5,000 a month penalty to be paid by SL and any and all rents from the tenant, starting at closing. Golden Ranch had no right to insist that SL renegotiate these terms.

Golden Ranch also argues that the February 11 letter is not an anticipatory breach, because the letter states that it was still interested in purchasing the property. An anticipatory breach requires unequivocal words or conduct evidencing an intent to repudiate the contract. Brownsboro Road Restaurant, Inc. v. Jericco, Inc., Ky. App., 674 S.W.2d 40, 42 (1984). The letter of February 11 was an unequivocal statement by Golden Ranch of its intent to repudiate the contract unless

SL agreed to a new contract, on Golden Ranch's terms. Since Golden Ranch refused to perform the contract as written, SL had the right to suspend its performance. Dalton v. Mullins, Ky., 293 S.W.2d 470, 476 (1956).

For the foregoing reasons the judgment of the Fayette Circuit Court granting summary judgment in favor of Appellees is reversed and the matter is remanded to the circuit court for an order granting summary judgment in favor of Appellant, SL Hotel Development, LLC.

ALL CONCUR.

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