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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000859-MR

MARGARET N. JEWETT
d/b/a WALNUT HALL LIMITED — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 02-CI-03440

FRED W. HERTRICH III
and LEWIS ARNO — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, Chief Judge; TACKETT and VANMETER, Judges.

COMBS, CHIEF JUDGE. The appellant, Margaret N. Jewett, d/b/a Walnut Hall Limited (Walnut Hall), appeals from a summary judgment granted to Fred W. Hertrich III and Lewis Arno (Hertrich and Arno) by the Fayette Circuit Court on April 10, 2003. At issue is a letter from Alan J. Leavitt, President and General Manager of Walnut Hall. The letter gave Hertrich and Arno the right to cancel their purchase of two shares in a horse syndicate as an exception to the terms of a syndicate agreement.

They contended that it also released them from their obligation to procure mortality insurance as required under a separate purchase agreement. The trial court agreed with their contention and accordingly entered summary judgment in their favor. We hold that the letter did not relieve Hertrich and Arno of the obligation. Therefore, we vacate and remand.

Walnut Hall is a standardbred horse farm in Fayette County. Hertrich and Arno are partners who own and breed horses. They jointly own numerous stallion shares. In early 2002, they entered into negotiations with Walnut Hall to participate in a stallion syndicate. The stallion, Western Shooter, was two years of age at that time and was still racing. The breeding of the horse was not to begin until he had finished his racing career at the age of three in December 2002.

Two documents governed the formation, financing, and operation of the stallion syndicate: the Purchase Agreement and the Syndicate Agreement. Under the terms of the Purchase Agreement, ownership of Western Shooter was divided into 120 shares costing $40,000 each. Buyers were required to make a down payment of $10,000 per share at the time that the Purchase Agreement was executed -- to be followed by annual payments of $10,000 plus interest for the next three years. Walnut Hall retained a security interest in each share.

The Syndicate Agreement appointed Walnut Hall as the general manager of the syndicate. Its duties included the collection, banking, and distribution of the breeding fees to the owners; the issuance of mating certificates; and boarding and veterinary care for Western Shooter.

Acting in their partnership capacity, Hertrich and Arno decided to purchase two shares in the syndicate for a total of $80,000. However, before making the $20,000 down payment, Hertrich and Arno conveyed to Leavitt, the General Manager of Walnut Hall, their fear that Western Shooter might not perform well in his last year of racing and that his value as a stud might be reduced accordingly. In order to allay their concerns, Leavitt agreed that Hertrich and Arno would be permitted to cancel their share purchase at any time in the year prior to Western Shooter's retirement. Leavitt memorialized their agreement in a letter of January 15, 2002, that stated as follows:

> This is to confirm our understanding that **on or before January 15, 2003, you have the right to cancel your purchase of two shares in Western Shooter and receive a full refund of the $20,000 paid for the first installment.** If you do elect to cancel your purchase, you will have no further obligation to Walnut Hall Ltd., and no further rights of any kind to Western Shooter.
>
> **In the event you do not elect to cancel your purchase of the two Western Shooter shares**

> **on or before January 15, 2003, you will then be obligated to all the terms and payments of the Western Shooter Syndicate Agreement.** You shall also owe Walnut Hall Ltd. an additional $2,000, which shall be immediately payable. (Emphasis added.)

Upon receipt of this letter, Hertrich and Arno made their first installment payment of $20,000 and executed the Western Shooter Syndicate Agreement and the Purchase Agreement on February 8, 2002. The Purchase Agreement contained the following provision:

> 11. MORTALITY INSURANCE – The Buyer agrees that upon Closing he will obtain and maintain full equine mortality insurance on the Horse with the Seller named as loss payee in an amount no less than the amount of the unpaid balance. In the event of death of the Horse, Seller shall be entitled to receive a sum equal to the unpaid balance of principal. The aforesaid sum shall be paid to Seller upon receipt from the insuring entity or on the next scheduled principal payment date, whichever is sooner, notwithstanding any absence of or delay in payment for any reason by the insurer. In the event of death and payment by Buyer to Seller pursuant to the foregoing provision prior to payment by an insurer, Seller agrees to assign all right, title and interest Seller has to the aforesaid insurance policy to the Buyer. Buyer will deliver to Seller upon Seller's request, either a fully paid policy or policies of such insurance duly endorsed to reflect Seller's security interest therein or a certificate of such insurance with evidence of such endorsement. Buyer shall provide to Seller on the yearly anniversary date of Closing a certificate from the insurer evidencing the continuation of such insurance. Nothing in this Agreement

> prohibits the Buyer from obtaining whatever insurance on the Horse he deems appropriate.

Sadly, Western Shooter died unexpectedly in late March of 2002. Hertrich and Arno had not yet obtained the mortality insurance described in Paragraph 11 of the Purchase Agreement.

On April 2, 2002, Leavitt sent a letter to Hertrich and Arno demanding full payment of the remaining balance due on their shares. It stated as follows:

> The tragic death of Western Shooter nullifies our agreement to repurchase your two shares as it is superseded by paragraph 11 of the Western Shooter Purchase Agreement. That clause, as you know, required you as purchaser to obtain full mortality insurance in our interest as seller for the unpaid balance on your shares.
>
> In this connection, I furnished your name to Tom Cunningham at the time of your purchase in case you wanted to place the required coverage with him. For the record, he called, left a message, but did not hear from you.
>
> In any case, the $60,000 balance owing on your two shares is now due and payable, and I would appreciate your prompt attention to it.

In a letter to Leavitt dated April 5, 2002, Hertrich and Arno cancelled their purchase pursuant to the terms of the January 15 letter, requested the return of their first installment payment, and contended that the January 15 letter had released them from the obligation to obtain mortality

insurance. While their letter repeatedly referred to Paragraph 11 of the **Syndicate** Agreement, the Paragraph 11 to which they referred is actually contained in the **Purchase** Agreement. Their letter stated in relevant part as follows:

> Lew [Arno] and I were greatly saddened by the loss of Western Shooter. As you know, this was just one of the myriad risks that we had expressed concern about in purchasing a stallion share in a horse who had not yet had his three-year-old campaign. This concern led directly to our January 15, 2002 Agreement with you allowing us the right to cancel our purchase of two shares in Western Shooter and to receive a full refund of the $20,000 first installment. The Agreement allows us to cancel the purchase for any reason, at any time, prior to January 15, 2003, making Paragraph 11 of the Western Shooter Syndicate Agreement moot. Since we had an unfettered right to cancel our purchase, there was no liability to you until after January 15, 2003, and then only if we did not cancel our purchase. While Paragraph 11 of the Syndicate Agreement applies to all other syndicate members, our January 15th Agreement with you, which is unique, is clearly the controlling instrument. Therefore, please consider this letter our official notice of our election to cancel our purchase of Western Shooter shares. Upon receipt of this letter, please forward our refundable first installment of $20,000[.]

On August 26, 2002, Hertrich and Arno filed suit in Fayette Circuit Court, seeking the refund of their $20,000 down payment in accordance with the terms of the letter of January 15, 2002. Unaware of the action of Hertrich and Arno, Walnut Hall filed suit two days later. On September 17, the parties

filed a joint motion to consolidate the cases and to re-caption Walnut Hall's complaint as a counterclaim against Hertrich and Arno. The lawsuits were consolidated on October 2, 2002. On February 20, 2003, Hertrich and Arno filed a motion for summary judgment. On March 7, 2003, Walnut Hall filed its motion for summary judgment on its counterclaim. Following a hearing, the circuit court entered summary judgment for Hertrich and Arno, awarding them $20,000 with interest from the date of the judgment. This appeal by Walnut Hall followed.

A summary judgment is used "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Paintsville Hosp. Co. v. Rose, Ky., 683 S.W.2d 255, 256 (1985), citing, Roberson v. Lampton, Ky., 516 S.W.2d 838, 840 (1974). The circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480(1991)(citations omitted). On appeal, the standard of review 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) citing CR[1] 56.03.

The parties do not dispute the facts of this case, and they also agree that the letter of January 15 was a binding agreement. Therefore, our only determination must be whether the circuit court erred in ruling that Hertrich and Arno were entitled to judgment as a matter of law. "[T]he construction of a contract is a matter of law for the court to decide." Pearson ex rel. Trent v. National Feeding Systems, Inc., Ky., 90 S.W.3d 46, 49 (2002). "In the absence of ambiguity a written instrument will be strictly enforced according to its terms." Mounts v. Roberts, Ky., 388 S.W.2d 117, 118 (1965).

Walnut Hall argues that the January 15 letter excepted Hertrich and Arno from the terms of the Syndicate Agreement in granting them the right to cancel their purchase of the syndicate shares at any time prior to January 15, 2003. **Until and if** they exercised that option, however, they were bound in all other respects by the terms of the Purchase Agreement -- including Paragraph 11. We agree.

> Two common and fundamental rules of construction of contracts are that words shall be accorded their ordinarily used meaning unless the context requires otherwise and a contract shall be construed more strongly against the party who prepared it.

[1] Kentucky Rules of Civil Procedure.

Bays v. Mahan, Ky.App., 362 S.W.2d 732, 733 (1962). When given their ordinary meaning and even construed more strongly against Walnut Hall, the terms of the January 15 letter cannot be interpreted to excuse Hertrich and Arno from their obligation to procure insurance under the Purchase Agreement.

The January 15 letter unambiguously stated that "you have the right to **cancel your purchase** of two shares in Western Shooter and receive a full refund of . . . the **first installment.**" These words clearly signify that a purchase was intended. Accordingly, Hertrich and Arno made the first installment payment of $20,000 as consideration in compliance with the terms of the Purchase Agreement, executing both the Purchase Agreement and the Syndicate Agreement.

Hertrich and Arno argue that the letter of January 15, the Syndicate Agreement, and the Purchase Agreement together form one single agreement. They contend that under the terms of the letter, they had purchased only a future right to buy the syndicate shares. Therefore, they believe they could not and would not have been bound by the terms of the Purchase and Syndicate Agreements unless their deadline for cancellation (January 15, 2003) had passed without their having exercised their right to cancel. They claim that the first installment payment of $20,000 did not indicate that a purchase had taken

place because they were guaranteed a refund if they chose to cancel. In summary, all the rights and obligations of the parties -- including those described in Paragraph 11 -- were contingent upon a decision to cancel up to January 15, 2003.

Hertrich and Arno rely on Shuttleworth v. Kentucky Coal, Iron & Development Co., Ky., 60 S.W.534 (1901), in support of their argument that the letter had the effect of suspending the effectiveness of the contract until January 15, 2003.

In Shuttleworth, three individuals (Allen, Parmenter, and a trustee, Patterson) held options to purchase land. In one document, Allen and Patterson transferred one-half of their interest in the options to Myer and Harman. In a second document, executed simultaneously, the transfer was made contingent on Patterson's acceptance within the following six months of Myer's offer to build a railway on the land. Harman subsequently assigned his interest to Givens and Shuttleworth -- without informing them of the terms of the second document. Before the six months elapsed, Patterson sold the land on which he owned the option to a New York corporation, advising Myer that he had elected not to accept the railway offer. Givens and Shuttleworth sued to gain title and possession of the land, arguing that their interest was not subject to Patterson's refusal of the railway offer.

The Court of Appeals held that the two documents executed by Allen, Patterson, Myer, and Harman constituted one agreement and that, therefore, the interest of Givens and Shuttleworth in the land options was subject to the contingency pertaining to the railway proposal as contained in the second agreement.

Hertrich and Arno claim that there are two parallels between Shuttleworth and the case before us. First, they argue that their agreement with Walnut Hall was contingent because they had reserved the unconditional right to cancel the agreement at any time. We disagree. In Shuttleworth, the agreement was not to become effective unless Patterson accepted the railway construction offer. As the court observed in Shuttleworth, Allen and Patterson

> only had an option to purchase the land in dispute within a prescribed time. **No part of the purchase money due the original vendors had been paid** . . . . the only interest Harman and Myer ever had was a contingent one, which, under the terms of the contract, did not ripen into anything of value.

Id. at 537. (Emphasis added). By contrast, Hertrich and Arno had accepted an offer and consummated the purchase transaction with no further action pending on their part to render it effective. They were bound by the terms of the executed contract until such a time as cancellation occurred. By virtue

of the consideration of the $20,000 down payment and the execution of the Purchase and Syndicate Agreements, Hertrich and Arno had purchased and were title holders of two shares in Western Shooter. They undeniably owned a present interest of two shares in Western Shooter -- not merely an inchoate right in the form of an option to acquire the shares in the future. "A true option . . . transfers nothing but a mere right to acquire an interest, not the ownership of nor any interest in the property itself." Greater Louisville First Fed. Sav. and Loan Assoc. v. Etzler, Ky. App., 659 S.W.2d 209, 211 (1983) quoting 77 AM.JUR.2d *Vendor and Purchaser* § 27 (1975). Reservation of the right to cancel a contract cannot be equated legally with transforming an executed contract into an executory contingency agreement.

The second arguable parallel to Shuttleworth involves that court's treatment of the two documents (the first transfer followed by the second contingency agreement) as one contract, subjecting the final transferees to the terms of the contingency as to the railroad issue. Hertrich and Arno argue by analogy that the Syndicate Agreement and the Purchase Agreement should be similarly construed as one document so that reference to the Syndicate Agreement in the January 15 letter would automatically implicate and incorporate the Purchase Agreement. Therefore, the letter's language suspending their obligations under the

Syndicate Agreement until January 15, 2003, would also serve to release them from any obligations under the Purchase Agreement. They contend that any other interpretation (as urged by Walnut Hall) erroneously renders the Syndicate Agreement and the Purchase Agreement contradictory to one another.

An agreement may have distinguishable parts that control distinct issues and that become effective at different times without being internally inconsistent or contradictory. We believe that the documents at issue were wholly separate, addressing discrete aspects of the transaction and containing separate sets of rights and obligations with respect to those varying interests. The Purchase Agreement governed the sale of the shares; the Syndicate Agreement governed the management of the syndicate. The provision in the letter that the Syndicate Agreement would be binding on Hertrich and Arno after January 15, 2003, is consistent with the fact that the syndicate was not to begin its management operation until the horse had finished racing –- even though the actual purchase of the shares occurred a year in advance of his retirement. Additionally, there is absolutely no indication in the text of either agreement that they were to be considered a single document so as to render one synonymous with or dependent upon the other. They dealt with separate matters and were executed individually.

When Hertrich and Arno attempted on April 5, 2002, to exercise their right to cancel their shares after Western Shooter's death, they did not absolve themselves of their obligation to procure the mortality insurance. That obligation had already been incurred by them on February 8, 2002, when they executed the Purchase Agreement. Walnut Hall argues that in failing to procure the mortality insurance, Hertrich and Arno committed a material breach of the contract and that, therefore, they are not entitled to enforce the refund provision. We agree.

> No principle in the law of contracts is better settled than that the breach of an entire and indivisible contract in a material particular excuses further performance by the other party and precludes an action for damages on the unexecuted part of the contract.

O'Bryan v. Mengel Co., Ky. 6 S.W.2d 249, 251 (1928).

We vacate and remand for entry of a judgment consistent with this opinion.

ALL CONCUR.

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