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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000244-MR
AND
NO. 2003-CA-000274-MR

RICHARD ELAM and KATHERINE ELAM — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, SPECIAL JUDGE
ACTION NO. 95-CI-00289

RANDY BICKNELL — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING APPEAL NO. 2003-CA-000244-MR,
REVERSING AND REMANDING CROSS-APPEAL NO. 2003-CA-000274-MR

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Richard Elam and Katherine Elam (the Elams) bring Appeal No. 2003-CA-000244-MR from a January 24, 2003, judgment of the Woodford Circuit Court. Randy Bicknell brings Cross-Appeal No. 2003-CA-000274-MR from the same judgment. We affirm Appeal No. 2003-CA-000244-MR and reverse and remand Cross-Appeal No. 2003-CA-000274-MR.

The controversy of this action is centered upon property consisting of fifty acres located on Shyrock Ferry Pike in Woodford County, Kentucky. The property was originally owned in fee by the Elams. The only access to the property is by a private bridge that crosses Grier's Creek. In 1986, the Elams deeded a ten acre portion of the property to James Greer (Greer deed). In order to effectuate the transaction, the Elams hired an engineer to survey and divide off the ten acres from the remaining 40 acres. The Elams retained an express easement over the bridge and road for ingress and egress to the remaining 40 acres.

In 1994, the Elams deeded the remaining 40 acres to Bicknell (Bicknell deed). In the Bicknell deed, the description of the conveyed property merely recited the description of the fifty acres excepting therefrom the ten acres previously conveyed by the Greer deed. Sometime thereafter, Bicknell became concerned as to the proper boundaries of his and of Greer's properties. Thereupon, Greer and Bicknell agreed to have the property surveyed according to the descriptions contained in their deeds in order to determine the proper boundary lines of their respective properties. The survey showed that the boundary line of the properties ran directly through Greer's home. According to the Elams and Greer, the property description of the ten acres supplied by the surveyor

contained in the Greer deed was erroneous and failed to represent the parties' agreement concerning the boundaries of the ten acres. Most importantly, the description failed to include Greer's house, the road and the bridge.

In 1995, James Greer, Peggy Greer (collectively referred to as the Greers) and the Elams filed a complaint against Bicknell. They alleged the Greer deed contained a mutual mistake as to the description of the ten acres conveyed therein. Further, it was contended that the Bicknell deed likewise contained an error in the description of the property conveyed therein. Specifically, the Elams and the Greers maintained that "[t]he description of the real property as it exists presently not only fails to encompass the acreage intended by the parties, but further, fails to fully encompass the residence of the Plaintiffs, James E. Greer, II and Peggy Tolson Greer." The Greers and the Elams sought reformation of both deeds.

Bicknell answered and counterclaimed against the Greers and the Elams. Bicknell specifically alleged the Greers had trespassed upon his property. He also claimed the Elams breached the covenant of general warranty as provided in the Bicknell deed. Specifically, Bicknell contended:

> Plaintiff[s] Richard L. Elam and Katherine H. Elam breached their Covenant of General Warranty to Defendant by filing the present

> action in which the Plaintiffs Richard L. Elam and Katherine H. Elam allege a mistake exists in their description of the real property conveyed by the Deed. Plaintiffs Richard L. Elam and Katherine H. Elam are seeking in the present action to rescind the Deed and to execute a new Deed containing less real property and road frontage than was originally conveyed to Defendant.

Eventually, the Greers, the Elams, and Bicknell entered into a settlement agreement and release. Therein, the Greers, the Elams, and Bicknell agreed to settle all disputes except "the counterclaim of Bicknell against the Elams for breach of the Covenant of General Warranty." Pursuant to the settlement agreement, deeds of correction were entered into by the parties which reflected the Elams and the Greers understanding of the correct boundary lines.

Thereafter, Bicknell made a motion for summary judgment upon the issue of whether the Elams breached the covenant of warranty and covenant of seisin. In support thereof, Bicknell argued the parties admitted that the legal description provided by the surveyor in the Greer deed was in error, and as a result, Bicknell was constructively evicted from a portion of the property conveyed by the Bicknell deed.

The circuit court granted summary judgment in favor of Bicknell upon the legal issue of breach of the deed covenants, and submitted the issue of damages to the jury. The jury returned a verdict in the amount of $18,043.56. The circuit

court ultimately awarded Bicknell total damages of $24,589.25, which included $18,043.56 in property value diminution, $6,250.27, in prejudgment interest, and $295.42 in costs. These appeals follow.

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The Elams argue the circuit court erroneously granted summary judgment. Specifically, the Elams contend the circuit court improperly concluded the covenant of warranty of title contained in the Bicknell deed was breached. We disagree.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. The Elams argue that material issues of fact exist that precluded entry of summary judgment upon the issue of whether the covenant of warranty of title in the Bicknell deed was breached. We disagree.

The covenant of warranty of title has been fluently described as:

> The covenant of warranty is an agreement by the grantor that upon failure of the title which the deed purports to convey, he will make compensation in money for the loss sustained. It is an assurance or guarantee of title, or an agreement or assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy it without interruption by virtue of a paramount title, and that they shall not, by

> force of a paramount title, be evicted from the land or deprived of its possession.

20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 48 (1995). Covenant of warranty of title is a prospective covenant and thus, is broken only by eviction under paramount title. In some cases, constructive eviction, rather than actual eviction, is sufficient to support an action for breach of the covenant of warranty. A constructive eviction is said to occur where a grantee must yield possession to one asserting paramount title.

In this case, the Elams essentially contend that Bicknell was not constructively evicted from the property because the parties were "laboring under a mistake as to the boundary lines of the property to be conveyed . . . ." The Elams assert that they have presented substantial evidence that both parties (the Elams and Bicknell) were aware of the correct boundary lines of the forty acres conveyed by the Bicknell deed.

It is well established that although a grantee knew at the time of the conveyance that the grantor did not have good title to the land conveyed, the grantee may still maintain an action for breach of the covenant of warranty. Commonwealth v. Rice, Ky. App., 411 S.W.2d 471 (1966). Even where the grantee knew that the boundaries of the conveyed property were incorrect leading to a shortage of acreage, such knowledge does not prevent the grantee from maintaining an action for breach of the

covenant of warranty of title. Lashley v. Lashley, 205 Ky. 601, 266 S.W. 247 (1924). Accordingly, Bicknell's alleged knowledge of the mistaken property description does not preclude him from maintaining an action for breach of the covenant of warranty.

Additionally, the Elams argue that where a mutual or unilateral mistake occurred as to the description of property in a deed, the proper remedy is to have that deed reformed or rescinded, rather than seeking damages for breach of the covenant of warranty of title. We disagree.

Where an action exists upon mutual mistake as to a material element in the deed and upon a breach of the covenant of warranty, we are convinced that the grantee may pursue **either** rescission of the deed or an action for damages upon the breach of covenant of warranty. 21 C.J.S. Covenants § 51 (2004). As such, we believe that Bicknell may properly pursue an action for damages based upon breach of the covenant of warranty.

The Elams next contend the circuit court committed reversible error by admitting into evidence Bicknell's expenses related to constructing a new bridge. It appears Bicknell submitted into evidence expenses he incurred for constructing a new bridge over the creek in order to access his property. The expenses totaled $7,918.56.

The Elams contend expenses associated with improvement of the property are not recoverable because "[t]he testimony of

record in this case shows, by everyone's admission that Bicknell at least knew of the error in the deeds prior to and during his expenditure of monies on the bridge." In support thereof, the Elams cite to Finucane v. Prichard, Ky. App., 811 S.W.2d 348 (1991). In Finucane, the Court held a grantee may recover the costs for the "enhanced value" of the land by reason of improvements thereupon, absent a showing of actual notice of the error in the conveyance or of actual bad faith in making the improvements. Even if the circuit court erred in admitting this evidence, we are of the opinion that such admission constituted harmless error. See Ky. R. Civ. P. (CR) 61.01.

Bicknell claimed damages for lost property value in the amount of $20,250.00 and entered evidence to that effect by expert testimony. The jury's award of $18,043.56 is well within the amount Bicknell claimed as lost property value. As such, the jury's verdict was within the range of damages supported by properly admitted evidence. See Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 791 F. 2d 1356 (9th Cir. 1986). Accordingly, we are of the opinion that any error in admitting evidence of Bicknell's expenses related to construction of the new bridge was harmless.

The Elams lastly argue the circuit court erred in instructing the jury upon damages. The circuit court instructed the jury to determine "as of August 26, 1998[,] what is the

difference, if any, between the fair market value of the 40.55 acre tract of property conveyed to Randy Bicknell in 1994 and the 40.55 acre tract he now owns?" The Elams contend this instruction does not reflect the law in Kentucky upon the proper measure of damage in a breach of covenant of warranty action. The Elams maintain the proper measure of damages is "that portion of the original purchase price which represents the value, at the time of conveyance, of the part of the land lost by the breach, together with interest from that time."

We, however, note the Elams failed to indicate to this Court in what manner the above argument was preserved for our review. In fact, it appears the Elams did not object to the jury instructions and failed to submit alternative instructions. It is recognized that a party's failure to object to a jury instruction waives that issue for appellate review. CR 51(3); Div. of Parks v. Hines, Ky., 316 S.W.2d 60 (1958). As such, we are of the opinion the Elams have waived any objection to the jury instruction.[1]

Cross-Appeal No. 2003-CA-000274-MR

Bicknell argues the circuit court erred by failing to award him reasonable attorney fees. In a breach of covenant of warranty action, Bicknell claims that an award of attorney fees

[1] We note the Elams did not ask this Court to review the alleged error in the jury instruction under the palpable error standard of Ky. R. Civ. P. 61.02.

is proper, and the circuit court abused its discretion by failing to award same.

A covenant of warranty carries with it an obligation that the grantor will defend and protect the title against lawful claims. 20 Am. Jur. 2d Covenants, Conditions and Restrictions § 53 (1995). Where the grantor had notice of an adverse claim and failed to defend title, attorney fees are an appropriate element of damage in a breach of covenant of warranty action. Gaines v. Poor, 3 Met. 503, 60 Ky. 503 (1861).

In this case, the grantor (the Elams) undeniably had notice of the claim against the grantee (Bicknell) as the Elams and the Greers instituted the action. While the circuit court certainly has discretion in the amount of attorney fees to be awarded in a breach of covenant of warranty action, we think it mandatory that the circuit court award a reasonable attorney fee to the prevailing grantee where the grantor had notice of the claim asserted against the grantee's title. See Rieddle v. Buckner, 629 N.E.2d 860 (Ind. 1994). Moreover, we observe the grantee may only recover reasonable attorney fees associated with defending his title and may not recover attorney fees associated with the breach of covenant of warranty action asserted in the counterclaim. From review of the record, any fees incurred in defense of Bicknell's title would have ended at the time of settlement on August 26, 1998.

Upon remand, we direct the circuit court to determine a reasonable attorney fee Bicknell incurred in defense of his title prior to August 26, 1998, and to award same to Bicknell.

For the foregoing reasons, the judgment of the Woodford Circuit Court is affirmed in part, reversed in part and remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEES:

David A. Franklin
Paul D. Gudgel
McCoy, West, Franklin & Beal
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEES:

David A. Franklin
McCoy, West, Franklin & Beal
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT:

W. Keith Ransdell
Lexington, Kentucky