

RENDERED: December 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000311-MR

MARK SMITH AND
DEBRA SMITH

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 03-CI-008456

LAVONDA J. HENRY AND
WASHINGTON MUTUAL BANK, FA

APPELLEES

OPINION
AND ORDER DISMISSING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The buyers in a contract to purchase real estate sued the seller for specific performance or a return of the down payment, etc., after the buyers initially defaulted by not closing within one year. The trial court found the buyers were in default and dismissed. Even though the order was made

final and appealable, we believe it was interlocutory.

Therefore, we dismiss the appeal as having been taken from a nonfinal order.

On June 22, 2001, Mark and Debra Smith (buyers) entered into a "Sale and Purchase Contract" (purchase contract) with Lavonda Henry (seller) for the property described as 3005 Talisman Road, Louisville, Kentucky, for a total purchase price of \$113,000.00. According to the purchase contract, the buyers were to pay \$3,000.00 cash, with a balance of \$108,000.00 [sic] to be financed by "Contract for Deed for a period of one (1) year from the date of this contract, at that time buyers will obtain permanent financing and close in approximately one (1) year or sooner at the buyer's [sic] discretion. [sic] loan to be amortized over a term of 30 years with interest at fixed rate of 7.25% per annum, with monthly payments of \$__--____. . . ." and "Seller is responsible for all taxes and insurance on the structure for the term of the Contract for Deed." The only other check on this form contract was for prorating the taxes between buyers and seller to date of deed. The date for possession is blank and there are no monthly payments specified.

Sometime after signing the purchase contract, the buyers, with the seller's consent, took possession of the property and began making a monthly payment to the seller. The year (set in the purchase contract) for closing came and went

without anything happening towards the purchase. Meanwhile, the buyers continued to retain possession and continued to make a monthly payment. When the buyers failed to make the August 2003, payment, the seller/landlord brought a forcible detainer action against the buyers/tenants, and received a "guilty" verdict which meant the buyers/tenants were to be evicted.

On September 26, 2003, after being evicted, the purchasers filed suit against the vendor seeking specific performance, damages for loss of equity, wrongful eviction, and punitive damages. The complaint also joined two mortgagees, Washington Mutual Home Loans, Inc. and Fleet National Bank. The vendor's answer alleges that the purchaser's default rendered the contract null and void but does not address the rights to the \$3,000.00 down payment. The counterclaim was for unpaid rents from the landlord/tenant relationship, and claims setoffs for the \$3,000.00 due to damage caused by the purchasers. Washington Mutual Bank, successor to Washington Mutual Home Loans, Inc., filed an answer acknowledging its mortgage and also that it is successor to Fleet Mortgage Corporation and its mortgage. In a counterclaim, Washington Mutual requested foreclosure because according to the terms of the mortgages, a transfer of the property calls for payment in full of the mortgages. A separate foreclosure action (02-CI-04904) was dismissed.

Both the vendor and the purchasers moved for summary judgment. The trial court granted summary judgment in favor of the vendor, holding that under the purchase contract, the purchasers had one year to perform, that this was not a contract for a deed or land installment contract, and that the buyers were actually tenants at will that could be evicted upon nonpayment of rent. The court then dismissed in a final order entered February 9, 2004, without addressing the counterclaims, including the mortgagees' claims. The notice of appeal filed February 12, 2004, does not include the mortgagee. An amended notice of appeal filed March 2, 2004, does list Washington Mutual Bank as successor mortgagee.

On appeal, the appellants contend they were buyers under a land installment contract or a contract for a deed which requires a foreclosure action rather than a forcible detainer action. Appellants are partially correct. We see two contracts, a written contract to purchase land, and a subsequent oral lease to take possession. As the appellee correctly points out, the purchase contract does not provide for the buyers to take possession before closing, and there are no provisions for monthly payments before closing. The purchase contract is simply that, a contract to purchase for \$113,000.00, closing to be at the buyers' convenience up to one year, with taxes and insurance to be prorated at time of the closing. The purchase

contract does not allow the buyers to take possession before closing nor does the purchase contract require a monthly finance charge pending closing. The buyers taking possession prior to closing, for a monthly fee, has to be pursuant to an understanding with the seller which is separate from the purchase contract, and in the nature of rent for a landlord/tenant relationship. Credit, if any, out of the monthly payment toward the purchase price, was governed by the unwritten landlord/tenant relationship, not the written purchase contract. That being said, actions involving interest in realty belong in circuit court. KRS 23A.010; KRS 24A.120(1)(a). Actions for forcible entry and detainers belong in district court. KRS 383.210.

The question to be resolved in this case is what happens when the parties to the purchase contract do not close? The purchase contract does not set forth either party's remedies so we have to consult vendor/purchaser law which "is the body of equitable doctrines, principles, standards and rules which govern contracts for the sale of land."¹ Contracts involving the sale of land are a little different from contracts involving the sale of goods, and other contract principles because each parcel of land is considered "unique"² by law. Generally, there are three remedies to consider if one or the other of the parties

¹ III American Law of Property, § 11.1 (A.J. Casner ed 1952)

² III American Law of Property, § 11.68 (A.J. Casner ed 1952)

was not able to close: damages, specific performance, and rescission.³

The problem we have in this case is half a judgment. The trial court's ruling finds the buyers in default and then dismisses the complaint. If we accept the judgment as denying specific performance, we still need to deal with the \$3,000.00 down payment. See CR 42.01. The down payment is so intertwined with the purchase contract that it has to be dealt with if specific performance is denied. Who defaulted is just part of the claim. CR 54.02 does allow a judgment on multiple claims be entered and made final as to a single claim, with the right language being added. This would allow the mortgagee's interest, the wrongful eviction claim, etc., to be decided later. However, the specific performance claim is one claim. The court either grants and applies the \$3,000.00 toward the purchase price, or denies and returns or credits the \$3,000.00 down payment for something. The \$3,000.00 down payment is such an integral part of the specific performance claim that the failure to dispose of it renders the judgment interlocutory because there is no final adjudication of the single claim. Including the "magic words" does not make it final and appealable. See Francis v. Crouse Corp., Ky. App., 98 S.W.3d 62 (2002).

³ III American Law of Property, § 11.66 (A.J. Casner ed 1952)

For the foregoing reasons, the summary judgment order by the trial court was interlocutory and will not become final until the trial court decides what remedy it will apply upon denying specific performance. Therefore, the final judgment is vacated and this appeal is dismissed as being from a nonfinal order.

ALL CONCUR.

ENTERED: December 30, 2004

 \s\ Wil Schroder
JUDGE, COURT OF APPEALS

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