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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001095-MR

PAULA SHELLY PRICE — APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 04-CI-00180

KENNETH CALDWELL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, BARBER, AND MINTON,[1] JUDGES.

BARBER, JUDGE: This appeal arises out of a judgment by the Pendleton Circuit Court against Appellant, Paula Shelly Price (Shelly), in the amount of $85,292.65.[2] Appellee, Kenneth Caldwell (Kenneth), sued Shelly claiming various checks he had given her during the course of their brief relationship were, in fact, loans intended to be repaid by her. At all relevant times, Shelly contended that the checks were gifts.

[1] Judge John D. Minton, Jr. concurred in this opinion prior to his resignation effective July 25, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

[2] The award was to bear interest at the legal rate of 12% per annum from date of entry of the judgment.

The parties began dating in 2001 following a four-year friendship. At that time, Shelly was working as a water hauler using her own water truck. On August 25, 2001, Kenneth wrote a $998.51 check for Shelly to make repairs on her water truck. Kenneth wrote another check for $1,694.89 for Shelly to get additional repairs to her truck on October 10, 2001.[3]

On November 21, 2001, Kenneth wrote a check in the amount of $4,200.00 to Shelly. She used the check to pay off a credit card. Kenneth gave no other checks to Shelly in 2001. The parties decided to live together in the spring of 2002. They were unable to find property suitable to both of them. However, Shelly and her sister, Karen Liebisch (Karen), jointly owned a ten acre property located in Pendleton County, Kentucky.[4] An agreement was reached between Kenneth, Shelly, and Karen that Kenneth would buy Karen's equity in the home plus payoff debt owed on the windows installed in the home and on a riding lawn mower.

Kenneth gave Karen a $25,000.00 check[5] on July 5, 2002, for her equity in the house and a $4,239.84 check on August 7, 2002, for the debt owed in order to satisfy the agreement.

[3] The word "loan" was written in the memo section on both checks.

[4] Karen's two daughters also lived in the home.

[5] The check's memo section read "equity in house."

Kenneth and Shelly also agreed to each pay Karen an additional $5,000.00 if and when the property was sold.

Following this agreement, the parties agreed to refinance the debt on the home to lower the monthly payment and release Karen from the mortgage. Before the refinancing could occur, Kenneth had to pay a prior debt incurred by Shelly, a loan for her water truck. This debt was a lien on the home. Kenneth paid Farmer's National Bank $8,100.00 in September, 2002 to pay off the loan. Kenneth also contributed $40,284.21 toward the sisters' mortgage at the closing on October 2, 2002. The new mortgage signed by both Kenneth and Shelly totaled $53,500. Kenneth did not see a deed at the closing. Unbeknownst to Kenneth, Karen had signed a quitclaim deed on October 1, 2002, conveying her interest in the property to Shelly only. Following the closing, Kenneth moved into the home with Shelly.

Kenneth was unaware he was not on the deed until November 2002. At that time, he went to the Property Valuation Office to get a disability property tax exemption on the home, but was informed he was not an owner of the property. Following this incident, Kenneth was not added to the deed, but continued to pay all bills associated with the property.[6] In January 2003, Kenneth paid $765.21 to have city water run to the house and

[6] At this time, Shelly was unemployed due to a physical injury. Kenneth did not ask to be reimbursed for his payment of bills, including the mortgage, he paid until July 2004. Some of these bills were paid after Kenneth moved out of the home.

barn. Shortly thereafter, the couple split and Shelly remained in the home.

Kenneth filed suit for reimbursement from Shelly on August 17, 2004, claiming that all of the checks he had written were actually loans. He stated that in consideration of the monies loaned, Shelly promised to convey to him an undivided one-half interest in the home. A bench trial was held May 6, 2005, with only Shelly and Kenneth testifying. At the close of testimony, Shelly made a motion for a directed verdict arguing that the Statute of Frauds applied because the alleged agreement was a real estate contract or, alternatively, that the monies given were gifts.[7] The trial court overruled Shelly's motion. The trial court issued its Findings of Fact, Conclusions of Law and Judgment (Judgment) on April 25, 2005. The court found all the checks, with the exception of two not at issue in this appeal, were loans to be repaid by Shelly. Shelly now appeals to our court.

Shelly makes three arguments: (1) the trial court erred when it found that the checks were not gifts in anticipation of marriage; (2) the trial court erred when it found there was a binding oral contract between the parties; and

[7] A motion for a directed verdict under CR 50.01 is improper in an action tried by the court without a jury. Brown v. Shelton, 156 S.W.3d 319, 320 (Ky.App. 2004). In an action tried by the court without a jury, the appropriate procedural mechanism for early dismissal is found in CR 41.02(2). Id. The scope of CR 41.02(2) is narrowly limited to dismissal in favor of a defendant. Id. at 321.

(3) the trial court erred when it ruled the Statute of Frauds was not applicable. We now examine Shelly's first argument.

Shelly contends that the trial court erred when it found that the checks were not gifts in anticipation of marriage. The trial court concluded that all checks at issue in this appeal were loans made by Kenneth to Shelly.

In an action tried without a jury, the factual findings of the trial court shall not be set aside unless they are clearly erroneous. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954, 956 (Ky.App. 1964), (citing Massachusetts Bonding & Insurance Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960)). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000).

All the checks at issue in this appeal were entered into evidence. The only testimony regarding these checks came from Kenneth and Shelly. We are required to give due regard to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. In circumstances of conflicting testimony, a reviewing court may not and will not disturb the

findings of the trial court so long as it is supported by substantial evidence. Bentley v. Bentley, 500 S.W.2d 411, 412 (Ky.App. 1973), (citing Sharp v. Sharp, 491 S.W.2d 639 (Ky. 1973) and Adams v. Adams, 412 S.W.2d 857 (Ky. 1967)).

The trial court relied primarily upon Kenneth's testimony in reaching its conclusion. It could have just as easily relied upon Shelly's testimony in rendering its decision. Simply because the trial court chose not to do so does not amount to error.

We also note that in the Judgment the trial court made no specific findings related to whether the parties anticipated marriage while Kenneth wrote these checks. However, in open court, the trial court found there were no serious discussions about marriage even according to Shelly's testimony. Following a review of the record, we believe there was substantial evidence to support the trial court's finding that the checks at issue were loans rather than gifts given in anticipation of marriage. We now examine Shelly's next argument.

Shelly argues that the trial court erred in finding an oral contract for the purchase of real estate was created between the parties. Whether the parties reached an oral agreement, i.e. formed an oral contract, is a question of fact. Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99, 105 (Ky. 2003), see also Hickey v. Glass, 149 S.W.2d 535, 536 (Ky. 1941) and

Audiovox Corporation v. Moody, 737 S.W.2d 468, 471 (Ky.App. 1987). If there is sufficient evidence to show a meeting of the minds even though a party to an action denies it, then a court may be justified in finding a contract existed. George Pridemore & Son, Inc. v. Traylor Brothers, Inc., 311 S.W.2d 396, 397 (Ky. 1958). We note that an oral contract is ordinarily no less binding than one reduced to writing. Id.

In its judgment, the trial court stated, in relevant part:

> The Court finds that there was a contract between the parties wherein the plaintiff would receive a deeded interest in the property on Concord-Caddo Road in exchange for his purchase of the equity interest of Karen Liebisch, payoff of the window and mower debt, payoff of the water truck debt and pay-down on the mortgage.

As stated earlier, the factual findings of the trial court shall not be set aside unless they are clearly erroneous. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company, supra, 385 S.W.2d at 956. The only testimony received on this matter was from Kenneth and Shelly at trial. Again, we are required to give due regard to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. Following a review of the record, we believe there was substantial evidence to support the trial court's finding that an oral contract for the purchase

of real estate was created between the parties. However, this finding is not dispositive.

Shelly's final argument is that the Statute of Frauds was applicable.

The trial court found that all payments except two were loans made to Shelly.[8] Following a review of the record, we believe this finding to be supported by substantial evidence. We now determine whether these loans were subject to the Statute of Frauds.

A trial court's conclusions of law are subject to independent appellate determination. A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., 998 S.W.2d 505, 509 (Ky.App. 1999). Thus, our review of the applicability of the Statute of Frauds shall be *de novo*. See Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky.App. 1998).

We note that Shelly only argued KRS 371.010(6) was applicable to her case in her motion for directed verdict. It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court. Skaggs v. Assad, By and Through Assad, 712 S.W.2d 947, 950 (Ky. 1986), (citing Combs v. Knott County Fiscal Court, 141 S.W.2d 859 (Ky. 1940)). Also, the Court of Appeals is without authority to review the issues not raised in or decided by the

[8] The trial court found insufficient evidence to support two checks allegedly written for hay for Shelly's horses were loans.

trial court. Regional Jail Authority v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989), (citing Matthews v. Ward, 350 S.W.2d 500 (Ky. 1961)). The trial court was only given the opportunity to rule on the applicability of KRS 371.010(6). However, in the interest of justice, we reviewed all subsections of KRS 371.010 for possible applicability to her case. Upon review of the Statute of Frauds, KRS 371.010, we found no subsection applicable to the instant case.

The only subsections that were somewhat applicable to the facts of this appeal were KRS 371.010(6) and (9).[9] Kentucky Revised Statute 371.010(6) requires a writing for any contract for the sale of real estate. If Kenneth was seeking a one-half interest in Shelly's property, we would agree that the Statute of Frauds would apply pursuant to KRS 371.010(6). He would be seeking specific performance of an oral contract to purchase real estate. Clearly that would fall within the purview of the Statute of Frauds. However, that is not the situation before us. Kenneth is seeking reimbursement for personal loans made to Shelly. As such, we believe KRS 371.010(6) is inapplicable.

Kentucky Revised Statute 371.010(9) requires a writing for any contract to loan money. This subsection is applicable to loans, but only where the borrower is trying to enforce a contract to loan money. See Farmers Bank and Trust Company of

[9] KRS 371.010(6) was the subsection relied upon Shelly in her motion for directed verdict.

Georgetown, Kentucky v. Willmott Hardwoods, Inc., 171 S.W.3d 4 (Ky. 2005). In this instance, the lender is attempting to enforce a loan contract. Thus, KRS 371.010(9) is also inapplicable.

Based on the foregoing, we believe the trial court did not err. Therefore, we affirm the Pendleton Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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