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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001242-MR

THOMAS J. YOUNG AND
JOAN A. YOUNG APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 02-CI-02533

KENNETH JACKSON ELECTRIC, INC. APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON AND JOHNSON, JUDGES; KNOPF,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: In 1997, Tri County Farms, LLC, hired Warner Builders, LLC, to construct a residence on farmland Tri County owned straddling the border between Scott and Bourbon Counties. Warner in turn hired Kenneth Jackson Electric, Inc. (KJE), to perform the electrical work. Construction began in late 1997

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution and KRS 21.580.

and continued until some time in 1999, when financial difficulties forced Tri County to abandon the project. Thereafter, the partially completed residence apparently stood unattended until September 2001, when Thomas and Joan Young purchased it and the surrounding farm at auction from Tri County. The Youngs purchased the property "as is," but one of the October 2001 closing documents was Tri County's assignment to the Youngs of its claims, if any, "against any subcontractors and/or materialmen that provided labor and/or materials to the Property" (the "Assignment"). Pursuant to the Assignment, in June 2002, the Youngs brought contract and tort claims against KJE for damages. They alleged that KJE had billed and been paid for services it had not rendered and for electrical supplies and fixtures that it either had never furnished or had furnished and then removed from the site. By summary judgment entered April 22, 2005, the Fayette Circuit Court dismissed the Youngs' complaint. It ruled that their acceptance of the property "as is" precluded all their claims. Although we reject its reasoning, we agree with the trial court that the Youngs' breach of contract claims must be dismissed. The Youngs' tort claim for conversion, however, was not precluded by the deed, and so must be remanded for further proceedings.

In reaching its conclusion that the deed foreclosed all of the Youngs' claims, the trial court relied on *Ferguson v.*

Cussins, 713 S.W.2d 5, 6 (Ky.App. 1986), in which this Court noted the general rule that, as between seller and purchaser, when "real estate is sold in an 'as is' condition, . . . all prior statements and agreements, written and oral, are merged into the deed of conveyance, and the purchaser takes the property subject to the existing physical condition." The trial court apparently concluded that under this rule not only prior agreements between the Youngs and Tri County, but all the prior contracts relating to the residence, including KJE's, vanished into the deed. The merger doctrine does not apply so broadly. It would foreclose claims by the Youngs against Tri County concerning the condition of the property, but it does not prevent the Youngs from stepping into Tri County's shoes, via the separately executed Assignment, and asserting pre-deed claims Tri County may have had against strangers to the deed. *Sexton v. Taylor County, Kentucky*, 692 S.W.2d 808 (Ky.App. 1985) (generally, a stranger to a contract may not seek its enforcement).

Even if the merger doctrine could be validly asserted by a stranger to the deed, moreover, such as KJE here, a well established exception to the doctrine provides that where the parties so intend

> contractual obligations collateral to the transaction may survive closing and be enforced under the contract. . . . A

> collateral obligation is one that is not "deed-related." . . . Deed-related provisions are those concerning title, possession [and] quantities or emblements of the land.

Bixler v. Oro Management, LLC, 86 P.3d 843, 849 (Wyo. 2004). *See also Paine v. La Quinta Motor Inns, Inc.*, 736 S.W.2d 355 (Ky.App. 1987); *Sells v. Robinson*, 118 P.3d 99 (Idaho, 2005); *Kunker v. Isle Harbour Estates, Inc.*, 738 N.Y.S.2d 740 (N.Y.App. 2002); Annotation, "Deed as Superseding or Merging Provisions of Antecedent Contract Imposing Obligations Upon the Vendor," 38 ALR2d 1310 (1954 and supps.).

Here the parties clearly indicated their intention that the Assignment survive closing by executing it in conjunction with the deed. The Assignment is clearly collateral and not "deed-related," moreover, as it has no bearing on the title being passed, but only seeks to preserve in the Youngs, as part of their bargain, any claims Tri County may have had against the builders of the residence. The trial court erred, therefore, by ruling that claims against KJE assigned to the Youngs merged into the Youngs' agreement vis-à-vis Tri County to accept the property "as is."

This does not mean, however, that the Youngs are entitled to the relief they seek. As KJE notes, even if the Assignment survives the deed, if Tri County did not have a valid

claim to assign, then the Youngs' complaint could have been dismissed on that basis, and affirmance of the trial court's judgment would still be appropriate. KJE maintains that Tri County does not have a contract claim against it: KJE did not contract directly with Tri County, it notes, and, it asserts, Tri County was not a third party beneficiary of KJE's subcontract with the general contractor, Warner Builders. Because Tri County thus had no contract claim against KJE, it could not assign such a claim to the Youngs. We agree.

We first note that KJE did not waive this argument, as the Youngs contend, by failing to cross-appeal from the trial court's contrary conclusion that Tri County was a third party beneficiary of the Warner-KJE subcontract. A cross-appeal is necessary only if the appellee seeks relief from the trial court's judgment. If, as here, the appellee seeks merely to have the judgment affirmed, it may bolster the judgment by arguing that, in addition to the trial court's rationale, the appellee was also "entitled to the judgment on a theory that was properly presented [to] but erroneously rejected by the trial court." *Brown v. Barkley*, 628 S.W.2d 616, 619 (Ky. 1982). KJE properly presented its third-party-beneficiary theory to the trial court, and so may argue on appeal that the trial court erroneously rejected it.

Turning to the merits of KJE's argument, Kentucky law recognizes, as the trial court noted, that a third person may, in his own right and name, enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration, but only if he is an intended beneficiary of the promise and not merely an incidental beneficiary. *Presnell Construction Managers, Inc., v. EH Construction, LLC*, 134 S.W.3d 575 (Ky. 2004); *Sexton v. Taylor County*, *supra.* The distinction between intended and incidental beneficiaries is not always easy to make. On the one hand, the mere fact that the contracting parties knew that their agreement would benefit a third party is generally not enough to confer third-party-beneficiary status. On the other hand, however, it is generally not required that the third party's benefit be the sole or even principal object of the contract. *See* Eisenberg, "Third-Party Beneficiaries," 92 Colum. L. Rev. 1358 (1992). The test, rather, is whether the parties intended the promisor to assume a direct obligation to the claimed beneficiary. *Simpson v. JOC Coal, Inc.*, 677 S.W.2d 305 (Ky. 1984).

Although this test can be difficult to apply, in the construction context the prevailing rule is that a property owner is generally not a third-party beneficiary of a contract between the general contractor and a subcontractor. *Lazovitz, Inc. v. Saxon Construction, Inc.* 911 F.2d 588 (11th Cir. 1990);

Pierce Associates, Inc. v. The Nemours Foundation, 865 F.2d 530 (3rd Cir. 1989); *Restatement (Second) of Contracts* § 302 cmt. e, illus. 19 (1979); Arthur L. Corbin, *Corbin on Contracts* § 779D (1979); Melvin A. Eisenberg, "Third-Party Beneficiaries," 92 Colum. L. Rev. at 1402-1406. This is so because in the construction context both owners and subcontractors typically intend that the general contractor will insulate them from each other. *Pierce Associates, Inc. v. The Nemours Foundation*, *supra.* The parties may depart from the general rule, of course, but they will not be deemed to have done so unless that intent clearly appears in their contract. *Id.*

Here, the Youngs have suggested no reason to depart from the general rule. The mere fact that KJE and Warner knew that their agreement would benefit Tri County is not enough. There must be some indication that the parties intended to give Tri County authority to enforce their agreement. There is none. KJE's subcontract with Warner, although oral, apparently adopted many of the terms of one of the standard AIA cost-plus form contracts. Their use of this standard contract indicates that the parties anticipated the typical construction practice in which KJE would deal with Warner, not with Tri County. In these circumstances the general rule applies, and Tri County (and hence the Youngs) may not be deemed third-party beneficiaries of the KJE-Warner contract.

The Youngs' contract claims against KJE were thus properly dismissed as a matter of law, *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), but that conclusion does not end the matter. The Youngs' complaint also alleges that KJE committed the tort of conversion by appropriating for its own benefit supplies and fixtures charged to the project. This claim is potentially viable either through the Assignment, if there is evidence of such misappropriation during Tri County's ownership, or in the Youngs' own right, if there is evidence of misappropriation after the sale to the Youngs. *See Kentucky Association of Counties v. McClendon*, 157 S.W.3d 626 (Ky. 2005) (noting the elements of conversion). Because the trial court believed that all of the Youngs' claims were foreclosed by the deed, it did not address the conversion claim on its merits. As noted above, however, the Assignment of Tri County's claims survived the deed, and of course any claim for conversion arising after the sale would not be affected by the deed. As the record now stands, therefore, it does not appear impossible for the Youngs' conversion claim to prevail, and so summary judgment on that claim was improper. *Steelvest, Inc., v. Scansteel Service Center, Inc., supra.* It is necessary, therefore, to remand this matter so that the trial court may address that claim further. To the extent that the conversion claim derives from the Assignment, it will be subject

to any defense KJE would have had against Tri County. *Whayne Supply Company, Inc. v. Morgan Construction Company, Inc.*, 440 S.W.2d 779 (Ky. 1969).

In sum, although our reasoning differs from that of the trial court, we agree with its conclusion that the Youngs' breach of contract claims against KJE must be dismissed. Tri County was not a third party beneficiary of KJE's subcontract with Warner Builders, and so Tri County could not assign to the Youngs a viable contract claim. Tri County may have assigned to the Youngs a viable tort claim for conversion, however, or such a claim may have arisen in favor of the Youngs after they became owners of the property. Because that claim has not yet been addressed, the Youngs are entitled to pursue it on remand. Accordingly, we affirm that portion of the April 22, 2005, summary judgment of the Fayette Circuit Court that dismissed the Youngs' contract claims, vacate the judgment otherwise, and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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