

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002012-MR

APPCO-KY, INC.

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 04-CI-00015

OLDCASTLE MOUNTAIN MATERIALS, INC.

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

KELLER, JUDGE: This appeal involves two parcels of land in Carter County. One parcel, which was ultimately purchased by Oldcastle Mountain Materials, Inc. (Oldcastle), is subject to a restrictive covenant regarding the sale of petroleum products. We will refer to this parcel as the unimproved parcel. The other parcel, which was ultimately purchased by Appco-Ky., Inc. (Appco) benefits from that restrictive covenant. We will refer to this parcel as the improved parcel. Valley Enterprises, Inc. (the predecessor to Oldcastle) filed suit seeking to nullify the restrictive covenant. Following discovery, the trial court ordered the parties to file motions for summary judgment. The

trial court ultimately granted Oldcastle's motion for summary judgment and nullified the restrictive covenant. It is from the trial court's summary judgment that Appco appeals.

FACTS

Although somewhat confusing, the underlying facts are essentially not in dispute. On September 10, 1991, Gas & Go, Inc. purchased the unimproved parcel from Coleman Oil, Inc. (Coleman Oil) and Greg and Ann Greenhill. The deed contained a restriction stating that "[t]he use of the property conveyed herein is restricted to uses other than the sale of petroleum products" (the restrictive covenant). The restrictive covenant benefited the improved parcel, on which Coleman Oil operated a gas station/convenience store.

On March 1, 2002, Gas & Go sold the unimproved parcel to Valley Enterprises. The deed reflecting that sale contains the following language, which we will refer to as the option:

In exchange for the consideration herein described, Grantor has also granted to Grantee a right of first refusal to purchase the restrictions described hereinabove which prohibit the resale of petroleum products on the real property described herein. Therefore, in the event Grantor is presented with a bona fide purchase offer for the real property of Grantor described in Deed Book 212, Page 104 of the Carter County Clerk's Records (a property and business commonly referred to as the "Happy Mart") Grantor will first permit Grantee to purchase the aforescribed restriction for the same value offered by the original bona fide purchase offer.

The value of the restriction shall be determined by the difference between what a willing buyer will pay for the "Happy Mart" property with the restrictions in place and what the same willing buyer will pay without the restrictions in place.

Grantor shall notify Grantee of the bona fide purchase offer by certified mail. Within thirty (30) days of Grantee's receipt of such notice Grantee shall notify Grantor of its intent to accept or reject the offer. This provision shall inure to the benefit of Grantee's heirs, representatives and assigns.

Further, in the event Grantor is presented with a bona fide purchase offer for multiple business units it owns, including the real property of Grantor described in Deed Book 212, Page 104, of the Carter County Clerk's Records (a property and business commonly referred to as the "Happy Mart"), Grantor will first permit Grantee to purchase the aforescribed restriction for the same value offered by the original bona fide purchase offer or, in the alternative will, void the restriction described above and permit the resale of petroleum products on the real property described herein on the condition that all such products are first purchased from Grantor or its successors, heirs, representatives and assigns at a fair market price.

This conveyance is also made subject to all restrictions and easements which may appear of record.

The use of the property conveyed herein is restricted to uses other than the sale of petroleum products.

Coleman Oil and Gas & Go then filed for bankruptcy protection. Pursuant to an order from the bankruptcy court, Coleman Oil sold the improved parcel and other property to Hometown Convenience, LLC (Hometown), on December 12, 2002. That same day, Hometown sold the improved parcel to Appco. Neither Gas & Go nor Coleman Oil gave notice to Valley of the sale of the improved parcel to Hometown, thus depriving Valley of the ability to exercise the option to purchase the restriction. We note that, in addition to the improved parcel, Coleman Oil also sold other property that it owned. Therefore, only the second provision of the option can apply, and we will discuss only that provision.

When Valley learned of the sale, it sought relief from the bankruptcy stay to file a declaration of rights action to determine the validity of the restriction. The trial court ordered the parties to file motions for summary judgment, which they did. The trial court ultimately found in favor of Valley and, in an order setting forth no reasoning, the trial court granted Valley's motion for summary judgment. The trial court then granted Appco's motion to amend the order granting summary judgment and entered an amended order stating that the order was final and appealable. Appco then filed its notice of appeal, followed by a motion to substitute Oldcastle as a party for Valley. In doing so, Appco noted that Oldcastle purchased the unimproved parcel from Valley on February 15, 2006. Neither Valley nor Oldcastle objected to this motion, which the trial court granted. Subsequently, this Court granted Appco's motion to substitute Oldcastle for Valley as appellee.

In its brief, Appco argues that it can enforce the restrictive covenant against Oldcastle; that the option is separate from the restrictive covenant and failure to comply with the requirements in the option does not negate the restrictive covenant; and that Oldcastle is not entitled to the relief granted by the trial court, negation of the restrictive covenant. Oldcastle argues that once Coleman Oil and/or Gas & Go failed to give notice to Valley of the sale of the improved parcel, the restrictive covenant was void by operation of the agreement and unenforceable by Appco or any other person or entity. According to Oldcastle, the purchase of petroleum products portion of the option does not "run with the land" and its provisions inured only to the benefit of Coleman, not to any subsequent purchaser of the improved parcel.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). If the issues on appeal involve questions of law the trial court's actions are subject to de novo review. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); see also *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999); see also *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-519 (Ky. App. 1998) (citing *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 458 (Ky. 1964)). The parties herein do not dispute the underlying facts; however, they do dispute the interpretation and/or construction of the restrictive covenant and option. That interpretation is a question of law and is, therefore, subject to de novo review. See *Colliver v. Stonewall Equestrian Estates Assoc., Inc.*, 139 S.W.3d 521, 523 (Ky. App. 2004).

ANALYSIS

For the reasons set forth below, we hold that the trial court prematurely granted summary judgment. As noted above, summary judgment is only proper when there are no outstanding issues of fact. Based on our review of the record, we note one glaring issue of fact, that is, whether Gas & Go, the party to the deed in question, was

the same as Coleman Oil, the party that owned the improved parcel. Unless that is the case, the provisions in the option apply only to Gas & Go and its representatives, successors, and assigns; they do not apply to Coleman Oil. Therefore, that portion of the option agreement that requires Gas & Go to inform Valley of the sale of the improved parcel is not enforceable because Gas & Go did not own the improved parcel.

We recognize Oldcastle's argument that Gas & Go and Coleman Oil admitted to joint ownership of the unimproved property in their answer to Oldcastle's complaint. However, we hold that Oldcastle's interpretation of that answer is subject to dispute and resolution of that dispute is a task for the fact finder. Specifically, Oldcastle alleged in its complaint:

8.a) That Gas & Go, Inc. and/or Coleman Oil Company, Inc., were the owners of two (2) parcels of real estate in Carter County, Kentucky, located near the intersection of Interstate 64 and U.S. 60 East of Olive Hill, Kentucky. One parcel was vacant . . . and one parcel had improvements which consisted of a building and appurtenances comprising a convenience store with automobile and tractor-trailer fuel sales

As noted by Oldcastle, Gas & Go and Coleman Oil admitted to the allegations as set forth above. However, the allegations are that either or both Gas & Go and Coleman Oil owned either or both properties. Therefore, the admission by Gas & Go and Coleman Oil does not clearly establish that both Gas & Go and Coleman Oil owned both properties or either property. Because the deed in question, on its face, is between only Gas & Go and Valley, the trial court must determine whether Gas & Go could make assertions and bind Coleman to the option in the deed.

Additionally, we note that Oldcastle has offered an affidavit from Michael

B. Fox stating that:

2. Mr. Rick Yates, President of both Coleman Oil Company, Inc. and Gas & Go, Inc., negotiated the terms of the sale of the property, the restrictions imposed thereon and the option for the repurchase of restrictions, all on behalf of Gas & Go, Inc. and Coleman Oil, Inc.

3. Mr. Yates negotiated with Valley the terms and conditions of the sale of the real property on behalf of Gas & Go, Inc. He specifically negotiated the terms and conditions of the restrictions and the purchase option on behalf of Coleman Oil, Inc.

While this tends to establish that Gas & Go and Coleman Oil were acting as one, Mr. Fox's affidavit runs counter to the language of the deed for the unimproved parcel. The difference between Mr. Fox's affidavit and the language of the deed creates an issue of fact that must be addressed by the trial court.

We also note that the option agreement provides that the purchase of petroleum products to be resold on the unimproved parcel must be purchased from "Grantor, or its successors, heirs, representatives and assigns at a fair market price." Oldcastle argues that this provision was placed in the deed in order to benefit Coleman Oil by forcing anyone selling petroleum products from the unimproved parcel to purchase those products from Coleman Oil. According to Oldcastle, this provision is personal to Coleman Oil and its successors, heirs, representatives, and assigns and does not extend to any purchaser of the improved parcel. However, it is unclear from the record whether Hometown and Appco are, in fact, successors, representatives, or assigns of Coleman Oil. The fact finder must make that determination.

Finally, we note that the option states that the grantee shall “void the restriction described above and permit the resale of petroleum products on the real property described herein on the condition that all such products are first purchased from Grantor or its successors, heirs, representatives and assigns[.]” Oldcastle argues that the duty to void the restrictive covenant can be severed from the duty to purchase petroleum products from a specific provider. However, as argued by Appco, the language cited above can be interpreted to mean that the duty to void the restrictive covenant is contingent on an agreement to purchase petroleum products from a particular supplier and, absent that agreement, there is no duty to void the restrictive covenant. Again, this ambiguity in interpretation creates an issue of fact, i.e., what did the parties mean when they entered into this agreement. Therefore, the trial court must resolve this issue of fact.

CONCLUSION

For the above reasons, the circuit court’s order granting summary judgment is vacated and this matter is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

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