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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001582-MR

CONCRETE PRODUCTS, INC — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR, JUDGE
ACTION NO. 06-CI-00159

HUGH DELK and LOLA DELK — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND MOORE, JUDGES.

CAPERTON, JUDGE: Concrete Products, Inc. (Concrete Products), which is owned and operated by David Poore (Poore), appeals the June 22, 2006, order of the Hon. James L. Bowling of the Bell Circuit Court which granted Hugh and Lola Delk's (Delks) motion for summary judgment. On appeal Concrete Products claims that the court erred in granting summary judgment in favor of the Delks for a multitude of reasons. We disagree with Concrete Products and therefore affirm the order of the Bell Circuit Court.

The Delks at the time of the proceedings owned approximately 41 acres in Bell County which Concrete Products leased. As the name implies, Concrete Products

operated a concrete processing plant on the leased property. The lessor-leassee relationship dates back to the original lease signed in the year 1991 between the Delks and Atlas Concrete Company, Inc. This lease was assigned to Concrete Products on February 24, 1995, without any changes or amendments in favor of Concrete Products. The original term expired on March 31, 1996. Two five-year extensions were granted with the lease then expiring on March 31, 2006.

Negotiations between Mr. Delk and Mr. Poore to renew or extend the lease began in the spring of 2005. According to Poore, he sent Delk the first lease draft in May 2005, which Delk rejected by not responding. Poore contacted Delk afterwards and claims to have learned that Delk did not want such a complicated lease. Poore then sent Delk a second lease draft in October 2005. This draft was also ignored. Poore next contacted Delk on November 4, 2005. Poore claims that this phone conversation resulted in an extension on the lease for six (6) months should Delk decide to sell the property. Poore explained to Delk that the concrete business was difficult to move and six (6) months would be necessary to accomplish same. Permits from the state were required in addition to finding a new location and moving. Poore also claims that in this conversation it was agreed that Delk would notify Poore if Delk successfully sold the property. Poore sent Delk a letter dated November 9, 2005, which allegedly set out the agreement.

Delk tells quite a different version of events. He claims that the first proposed lease from May 2005 was so ridiculous in its terms that he did not reply. Delk asserts that he never received the October 2005 lease. As to the November 4, 2005, conversation, Delk maintains that there was no agreement to a six (6) month extension,

only that he would look into it. Delk's attorney notified Poore in two different letters dated December 16, 2005, and February 9, 2006, that the lease would not be renewed or extended.

In September 2005, CJ May entered into an option to purchase the property from Delk. The closing was to occur April 1, 2006, immediately after Concrete Products was to have vacated. As Concrete Products refused to vacate on March 31, 2006, the option to purchase had to be extended. As of the date of filing of the complaint on April 3, 2006, the deal had yet to go through due to the holdover tenancy of Concrete Products.

The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Thus, summary

judgment is proper only “where the movant shows that the adverse party could not prevail under any circumstances.” *Id*.

However, “a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.” *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). The trial court's focus should be on what is of record rather than what might be presented at trial. *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724 (Ky. 1999).

Given the standard of review, we shall address each of Concrete Products eight arguments on appeal.

First, Concrete Products argues that the Delks are not the real party in interest as the property was controlled by CJ May. Concrete Products directs the Court’s attention to statements made by Delk at his deposition. There Delk stated that he did not have the power to authorize a six (6) month extension on the lease since he had signed an option with CJ May. Concrete Products is mistaken. The signing of an option to purchase does not create a foregone conclusion that transfer of ownership will occur. *See Greater Louisville First Fed. Sav. and Loan Assoc. v. Etzler*, 659 S.W.2d 209, 211 (Ky. App. 1983). The record title holder is obligated to deliver free and clear title upon the exercise of the option and clearly retains power to do so. When the complaint was filed, the option to purchase held by CJ May had yet to be exercised. The Delks were still the record title holders and, as such, are the real party in interest.

Second, Concrete Products argues that summary judgment was improper since discovery was in its early stages. At the time of the motion for summary judgment, which was filed after the twenty-day restriction found in CR 54.01, three depositions had already been taken. Concrete Products claimed that at least two more depositions were needed, those of CJ May and Mike Bowling, May's attorney. While summary judgment was granted within a few months, three key depositions were taken. Prior to granting summary judgment, discovery need not actually be completed as long as a suitable opportunity to do so was available. *Hollins v. Edmounds*, 616 S.W.2d 801, 804 (Ky. App. 1981). Concrete Products has failed to allege any potential material facts to support their claims that would be provided by additional discovery. The mere "hope that something will come to light in additional discovery is not enough to create a genuine issue of material fact." *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 572 (Ky. App. 2005). As such, there was no error in granting the summary judgment.

Third, Concrete Products argues that the motion for summary judgment was not timely filed. Under CR.56.03, the motion must be filed at least ten days prior to the hearing. Additionally, CR 4.01 requires a three-day extension for service by mail. Concrete Products contends that the service of a June 1, 2006, motion via mail for a June 12, 2006, notice was insufficient and thus the court should not have heard the matter. Concrete Products objected to the hearing date but did supply a full brief to the trial court prior to the hearing. This brief eloquently presented Concrete Products' position and beautifully detailed their legal arguments. On appeal, Concrete Products has presented this Court with almost the same brief that was submitted to the trial court.

The ten-day notice requirement may be waived absent a showing of prejudice. *Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc.,* 649 S.W.2d 415 (Ky.App. 1983). Concrete Products has not shown it has suffered prejudice. Further, the additional time between the two brief due dates has not resulted in any substantial changes to the brief indicating little, if any, additional time was needed in preparing the brief. As such, it was proper for the trial court to go ahead with the summary judgment motion.

Fourth, Concrete Products argues that the Statute of Frauds has no application to this matter. It is the position of Concrete Products that the six (6) month extension of the lease was capable of being performed within the year and as such falls outside the statute of frauds, KRS 371.010. Similarly, arguments five, six, and seven are that the cases Delk cites do not support their position, summary judgment is disfavored, and oral contracts are valid. Concrete Products contends that material facts were in question which precluded summary judgment and that a jury should have been empaneled to decide the existence of the oral contract.

Delk argues that Concrete Products' holdover tenancy is wrongful as there was neither a written nor oral extension of the lease for six (6) months or otherwise. Delk argues that the original lease for a term of five (5) years was required to be in writing and thus any oral agreement would violate the statute of frauds. Delk argues that Poore had notice of the impending sale and notice that the lease would not be extended by the letters of December 16, 2005, and of February 2006, which clearly evidence that no extension was agreed to by Delk; that Delk's real estate agent had surveyors on the property in the winter of 2005 which resulted in Poore's having notice

of the impending sale; and the contemplated May 2005 lease prepared by Poore explicitly mentions that a sale of the land by Delk was contemplated.

While the existence of a contract is the province of the jury in Kentucky, the construction of a contract and the determination of its legal effect are judicially determined. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997) and *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). It has long been held that oral contracts are valid and enforceable unless the statute of frauds precludes their enforcement. *Motorists Mut. Ins.* at 445 and *Bennett v. Horton,* 592 S.W.2d 460 (Ky. 1979). In addition, "[w]here a contract is required by the Statute of Frauds to be in writing, a subsequent agreement which changes its terms must also be written and signed by the party to be charged to be enforceable." *Cox v. Venters*, 887 S.W.2d 563, 566 (Ky.App. 1994).

Concrete Products produced the November 9, 2005, letter from Poore to Delk as representative of the terms of the oral agreement. The letter reads as follows:

> Dear Hugh,
>
> Let this serve as a letter of understanding between us regarding our conversation last Friday (11-4-05).
>
> It is my understanding that you have entered into negotiations to sell the property which we (Concrete Products)presently have under lease from you. Should you be successful in selling the property while still under lease and because of our long term relationship, you agree to make a six (6) month extension provision allowing Concrete Products six (6) months in which to move its operation. This six (6) months will commence after proper notice by certified mail to our address. [address omitted]
>
> This option will terminate with the expiration of the present lease term. If the sale of the property fails to develop by the end of the year, I would expect to have our new lease in place by the 1st of the next year.

> Hugh, thank you for your understanding and cooperation.[1]

The language of the letter bases the six (6) month extension on the original written lease. The original lease for a period of five (5) years was required by the Statute of Frauds to be in writing. *See* KRS 371.010. If we take Concrete Products' position that this was an extension of the original lease, then the letter modifies the original lease's terms of five (5) years to five and half (5 ½) years and calls the modification an extension. *Cox* requires a modification of the original written contract to also be in writing and signed by the parties. The letter of November 9, 2005, is neither signed by Poore nor Delk. Therefore, the trial judge correctly determined that summary judgment was appropriate as the statute of frauds precluded enforcement of this alleged oral agreement.

If we take a different view of the November 9, 2005, letter, we arrive at the conclusion that by the terms of the letter no contract was formed. The letter's language is one of a mere offer to modify an existing contract with explicit terms contained in the letter for method of acceptance, proper notice by certified mail to Concrete Products at a specified address, and expiration of the option which, if not exercised, then expires at the end of the current lease. Proper notification under the terms of the letter never occurred by the expiration date of the current lease terms. Delk's only notice to Poore was two letters from his attorney that he refused to extend the lease. Therefore, acceptance never occurred. In addition, Delk had not actually sold the property; selling the property was a condition precedent in the letter to the extension of the lease. Therefore, the option to modify the contract was never accepted, which meant no new

[1] Strangely, Poore did not sign his own letter.

contract was formed nor was there a modification of the existing contract. *See Venters v. Stewart,* 261 S.W.2d 444 *(*Ky. 1953). The trial judge properly concluded that the original lease had expired without being renewed or extended.

The eighth and last argument of Concrete Products is that its counterclaims, particularly that of promissory estoppel were prematurely dismissed. Promissory estoppel can be invoked when a party reasonably relies on a statement of another and materially changes his position in reliance on the statement. *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.,* 113 S.W.3d 636, 642 *(*Ky. App. 2003).

In the case sub judice, Concrete Products failed to show how it *reasonably* relied on a statement of Delk. Even if Delk had made a verbal reassurance that he would either look into an extension, as Delk claims, or that Concrete Products would not be tossed out on the street, as Poore claims, Concrete Products had ample notice of Delk's intention not to extend the lease. Concrete Products received two letters, one in December and the other in February, which explicitly refused to extend or renew the lease. It is hard to see how Concrete Products then reasonably relied on an alleged promise by Delk for a six (6) month extension.

Summary judgment was properly granted as there were no material facts in dispute and the moving party was entitled to judgment as a matter of law. Therefore, we affirm the order granting summary judgment by the Hon. James L. Bowling of the Bell Circuit Court.

ALL CONCUR.

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