

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000038-MR

BARBARA LAKE

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 05-CI-00137

KURT W. WARTNER AND
GAIL C. WARTNER

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

ACREE, JUDGE: Barbara Lake appeals the Mercer Circuit Court's order denying her motion for attorney fees. We affirm.

Lake sold real property to Kurt and Gail Wartner in Mercer County. After the closing, the Wartners discovered they could not board horses on the property as they had planned, and that the property lines were not where they had believed them to be before closing. The Wartners filed a civil action against Lake and others asserting a variety of claims including mistake, misrepresentation, and breaches of duty, contract, and warranty. The circuit court granted summary judgment in favor of Lake and the other defendants and dismissed the Wartners' complaint.

Lake filed a motion for an award of attorney fees based on section 19 of the real estate sales and purchase contract which says in its entirety

19. DEFAULT: In the event of default, the parties may pursue all available legal remedies. Should a default occur and legal action is instituted, the prevailing party shall be entitled to recover costs, including a reasonable attorney's fee. In the event the BUYER defaults, this clause shall operate as an assignment to the broker(s), who would have received a commission, of the SELLER's right to recover damages from the BUYER in an amount equal to such commission. Should legal action be instituted to collect under this assignment, the Broker(s) shall be entitled to receive all costs, including a reasonable attorney's fee. The parties further agree that such assignment shall survive both this CONTRACT and any release or waiver which is not signed by the Broker(s).

The circuit court denied Lake's motion for attorney fees because there was no default in relation to this contract. We agree.

The sole purpose of a real estate sales and purchase contract is to memorialize two mutual promises: (1) the seller's promise to convey real property to the buyer; and (2) the buyer's promise to pay a sum certain in exchange for that conveyance. The "default" to which section 19 refers is the failure of either the seller or the buyer to perform the contract consistently with those two promises. That is the nature of real estate sales and purchase contracts.

This is also clear by reading the section as a whole for it provides a means by which the professionals who brokered the transaction may still collect their commission from the buyer if he defaults and fails to close. When a buyer defaults, the broker is still entitled to – and the seller remains obligated to pay – a commission. Buyer and seller agree in section 19 to an assignment to the broker of the seller's claim for damages against the buyer if the buyer fails to go through with the closing, though only to the extent of that commission and the costs of collecting it.

Finally, all grounds for recovery by either Lake or the Wartners merged into the deed at the time of closing, with the exception of fraud claims. *Yeager v. McLellan*, 177 S.W.3d 807, 809-10 (Ky. 2005). Consequently, the Wartners' claim could not have been based on the sales and purchase contract. That contract had been fully performed. The Wartners' claims, other than their fraud claim, were necessarily based on the deed.

In summary, because the purpose of a real estate sales and purchase contract is to accomplish the conveyance of real property, and because all the parties' contractual duties under that contract were performed at closing, there was no default under this contract. Consequently, section 19 is inapplicable and unavailable as a basis upon which Lake may recover her attorney fees and costs.

Therefore, we affirm the order of the Mercer Circuit Court denying Lake's motion for attorney fees and costs.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bradley S. Guthrie
Harrodsburg, Kentucky

BRIEF FOR APPELLEES:

Kenneth W. Humphries
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