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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000792-MR
&
NO. 2007-CA-000856-MR

VANESSA DALE CARR,
FORMERLY VANESSA ADAMS — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 96-CI-00071

JAMES LEON ADAMS — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,[1] SENIOR JUDGE.

STUMBO, JUDGE: Vanessa Carr appeals and James Leon Adams cross-appeals from Findings of Fact, Conclusions of Law, Judgment and Order of the Bracken Circuit Court in an action to distribute proceeds from the sale of marital property.

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

Vanessa maintains that the circuit court erred in setting aside a 1997 dissolution judgment ordering the sale of a parcel of real property. James argues that he is entitled to full reimbursement for funds he spent on the parcel between 1997 and 2007. For the reasons stated below, we affirm the judgment on appeal.

Vanessa and James were divorced by way of a decree of dissolution rendered in 1997. On March 27, 1997, the Bracken Circuit Court rendered Findings of Fact, Conclusions of Law and Judgment ruling that each party had a 50% interest in a parcel of marital real property situated in Bracken County, Kentucky. At the time of dissolution, the parties agreed that the value of the parcel was $42,000. The court determined that the parties collectively had a 14.564% equity interest in the parcel, or 7.282% per person. It noted that the parties agreed to allow their adult daughter, Lonnie Jo Adams (now Kiskaden), to live on the parcel until she was married in June, 1997.

By apparent agreement of the parties, they disregarded the 1997 judgment as it related to the sale of the parcel. Instead of selling the property as ordered by the circuit court, they allowed Lonnie Jo and her new husband to continue living on the property after June, 1997, with the apparent stipulation that the daughter would pay $300 per month in rent "when she could." Testimony was later adduced that when Lonnie Jo had paid $39,000, the property would be deeded to her.

Lonnie Jo and her husband continued to live on the parcel over the years that followed. During that time, James paid off the mortgage balance

($35,882.94 at the time of separation), as well as all taxes and insurance in the amount of approximately $7,000. He also spent several thousand dollars in upkeep and other expenses related to maintaining the property. Over that same period, Lonnie Jo paid $3,150.00 in rent, and Vanessa paid nothing toward the mortgage, taxes or insurance.

On October 12, 1997, James filed a "Motion to Compel Signing of Deed" in Bracken Circuit Court. He noted therein that Lonnie Jo resided in the house since the parties' divorce, and that he had made all payments on the parcel during that time. He further stated that Lonnie Jo had the financial means to purchase the parcel, was a ready and willing buyer, and that Vanessa would not transfer title unless she received a sum equaling one-half the equity in the parcel. James argued that since the value of her interest in the parcel was only $3,614 at the time of dissolution, it would be inequitable for her to receive a full one-half interest in the net proceeds at sale. He sought an order compelling Vanessa to sign a general warranty deed, and an order that she receive only the equity to which she was entitled at the time of dissolution since she had contributed nothing to reducing the debt on the parcel since that time.

The matter proceeded in Bracken Circuit Court. On October 12, 2006, the court rendered its Findings of Fact, Conclusions of Law, Judgment and Order which form the basis of the instant appeal. After recognizing the March 27, 1997, judgment ordering the sale of the parcel (with which the parties failed to comply), the court examined the current value of the parcel and the parties'

respective contributions thereto. It found that James was solely responsible for having eliminated the debt on the parcel. It further found that Lonnie Jo had paid approximately $3,150 in rent to James, and that Vanessa has made no financial contribution other than loaning money to Lonnie Jo to pay for replacement windows, which Lonnie Jo had subsequently repaid.

The court went on to find that Vanessa had inquired from Lonnie Jo how much longer it would be before Lonnie Jo paid off the mortgage, apparently having been estranged from Lonnie Jo and not knowing that Lonnie Jo had made minimal contributions. It also found that though Vanessa never asked James if Lonnie Jo had been paying rent, James allowed Vanessa to believe that Lonnie Jo was making payments.

The court ordered the parcel sold for $60,000, an amount to which the parties had previously agreed. It found that each party was entitled to his or her 7.282% equity stake that existed at the time of dissolution, and that James was awarded the remaining 85.43% interest in the proceeds due to his unreimbursed proceeds over the last ten years. And finally, the court rejected James' argument that he was entitled to compensation for his out-of-pocket expenses on the parcel, plus interest. It found that "husband should be penalized somewhat and his ultimate reimbursement decreased somewhat due to husband managing the property and allowing wife to believe payments were made by daughter." In sum, the parties each were to receive a percentage of the equity equaling their percentage interest at the time of dissolution, with James receiving the balance

based on his sole contribution to eliminating the debt and maintaining the parcel over the intervening ten year period. This appeal followed.

Vanessa now argues that the circuit court erred in failing to award to her a 50% interest in the $60,000 sale proceeds. She maintains that the court improperly set aside the 1997 judgment ordering an equal division of the sale proceeds, and that no proper motion was made to relieve the parties from compliance with that judgment. She argues that an unequal division of the proceeds effectively deprives her of her investment in the real estate. She also maintains that since the parties did not agree to modify the 1997 decree, that judgment is still binding and directs that the sale proceeds should be divided equally. Vanessa also contends that the court erred in failing to find that James misappropriated rent paid by Lonnie Jo. She seeks an order reversing the judgment on appeal and directing the $60,000 sale proceeds to be equally divided. In the alternative, she claims entitlement to one-half of the rent payments which went uncollected by James.

We have closely examined the record and the law, and find no basis for concluding that the circuit court erred in its disposition of the sale proceeds. The March 27, 1997, Findings of Fact, Conclusions of Law and Judgment expressly stated that the "marital property shall be divided equally with each party being awarded 50% of same. . . . The real estate . . . shall be sold . . . and the net proceeds shall be divided equally between the parties." At that time, each party was entitled to one-half of the equity in the parcel, or approximately $4,369.

Though that sale order was ignored by the parties, nothing in the record operates to amend or otherwise render it without effect.

The question then becomes whether the circuit court properly ruled that James is entitled to all proceeds representing the reduction in debt and increased value of the parcel subsequent to the 1997 judgment. KRS 403.190, which addresses the disposition of marital property and requires a division "in just proportions," has no bearing on this issue as the increase in value occurred after the parties' marriage was dissolved. Rather, the issue is whether the circuit court properly divided the proceeds as between two co-tenants.

The division of sale proceeds as between two co-tenants is a question of fact. *Schott v. Citizens Fidelity Bank and Trust Company*, 692 S.W.2d 810 (Ky. App. 1985).

> "[W]e regard the issue of the trial court's determination of [the co-tenants'] respective interests in the proceeds from the commissioner's sale as essentially one of fact. Consequently, CR 52.01 limits the scope of our review to an examination of whether the trial court's determinations are clearly erroneous on the basis of not being supported by substantial evidence."

Id., citing *Black Motor Co. v. Greene,* 385 S.W.2d 954 (Ky. 1964). Substantial evidence is defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 414 (Ky. 1998).

The facts - as they relate to this issue - are undisputed. Evidence was adduced, which Vanessa did not rebut, that James was solely responsible for

retiring the debt on the parcel, as well as paying for all taxes, insurance, upkeep and out-of-pocket expenses for the period between 1997 and 2007. This testimony and documentary evidence, which includes both the testimony of James as well as copies of checks, constitutes substantial evidence in support of the circuit court's findings and conclusions on this issue. Since James was solely responsible for eliminating the debt and maintaining the parcel, the circuit court properly concluded that he was entitled to the sale proceeds in excess of the equity existing at the time of entry of the March 27, 1997, judgment.

Vanessa also contends in the alternative that the circuit court erred in failing to enter an award to her representing one-half of the $300 per month in rent that Lonnie Jo was to pay each month, multiplied by approximately 120 (i.e., 12 months per year for 10 years). She argues that James improperly allowed her to incorrectly believe that Lonnie Jo was making rent payments each month when Lonnie Jo was actually making very few rent payments, and that this breached James' obligation to keep her informed and forms a basis for the award sought. In contrast, James notes that he has spent over $59,073 out-of-pocket on the parcel over 10 years above the $3,150 in rent paid by Lonnie Jo, and that Vanessa's claim of entitlement to half of this sum merely represents her "convoluted thinking" on this issue.

James properly notes that Vanessa has not shown that this argument was raised below nor preserved for appellate review as required by CR 76.12(4)(c)(v). An appellant "will not be permitted to feed one can of worms to

the trial judge and another to the appellate court." *Edwards v. Hickman*, 237 S.W.3d 183, 191 (Ky. 2007), quoting *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976). We may summarily affirm where the appellant fails to show that an issue was properly preserved for review. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004).

Nevertheless, we have considered Vanessa's argument on this issue as if it were preserved, and find no error. Vanessa acknowledges that "there is no enforceable agreement between the parties" on the issue of rent. Furthermore, Lonnie Jo testified that she agreed to pay rent only "when she could," which resulted in her payment of only $3,150 in rent over the course of a decade. As such, James' purported receipt of almost $60,000 in rent over that same period is illusory. Vanessa's claim of entitlement to half of this sum is not persuasive.

On cross-appeal, James contends that he is entitled to full reimbursement of the money advanced for the joint ownership of the property, and not just the sum calculated by the trial court's formula. Specifically, he states that he spent $55,922.83 on the parcel subsequent to the dissolution, and that he is entitled to reimbursement of that sum before the remaining equity is divided between the parties. He further claims that if Lonnie Jo is a debtor (for unpaid rent), she is a debtor to the co-tenancy and not either James or Vanessa individually.

We find no error on this issue. While the circuit court could have rendered an award using James' methodology, it was not clearly erroneous to

enforce the 1997 judgment (by reaffirming the division of equity set forth in that judgment) and to award all of the residual proceeds to James. The court placed the parties in the same position they would have been in had they complied with the 1997 order to sell the parcel, and then awarded to James all of the equity which subsequently accrued since he was solely responsible for that accrual. This award is equitable on its face, and the findings supporting it are based on substantial evidence of record. The instant proceeding would not have arisen but for the parties' mutual decision to ignore the 1997 order to sell the parcel, and to supplant it with a purported agreement which was not reduced to writing, was not filed in the record and upon which the parties cannot now agree. Having reviewed the totality of the record, as well the factual and legal basis for the circuit court's ruling, we find no error.

For the foregoing reasons, we affirm the Findings of Fact, Conclusions of Law, Judgment and Order of the Bracken Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT/
CROSS-APPELLEE:

Benjamin R. Harter
Butler, Kentucky

BRIEF FOR APPELLEE/
CROSS-APPELLANT:

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