

RENDERED: OCTOBER 24, 2008; 2:00 P.M.  
 NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001644-MR

KELLY TOLSON

APPELLANT

APPEAL FROM BREATHITT CIRCUIT COURT  
v. HONORABLE FRANK ALLEN FLETCHER, JUDGE  
ACTION NO. 06-CI-00120

KATHERINE ALLEN

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\*\* \* \* \* \*

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Kelly Tolson brings this appeal from a July 31, 2007, Summary Judgment of the Breathitt Circuit Court dismissing his complaint. We reverse and remand.

---

<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In November 2005, appellant and appellee were an unmarried cohabitating couple. On November 11, 2005, appellant purchased a mobile home for \$7,500; however, title to the mobile home was placed exclusively in appellee's name. Thereafter, appellant and appellee resided together in the mobile home.

In January 2006, appellant and appellee ended their relationship, and a dispute arose over ownership of the mobile home. Appellant filed a complaint on March 13, 2006, claiming that the parties entered into an oral agreement whereby appellee would transfer title of the mobile home to appellant if their living arrangements became unworkable. Conversely, appellee argued that the mobile home was a "gift" to her from appellant.

Appellee moved for summary judgment on July 13, 2007, on the basis that the oral agreement alleged by appellant was invalid under the statute of frauds. On July 31, 2007, the circuit court granted appellee summary judgment and dismissed appellant's complaint. This appeal follows.

Appellant contends that the circuit court incorrectly granted appellee's motion for summary judgment. Specifically, appellant contends there is a genuine factual issue regarding the existence of an oral agreement between the parties requiring appellee to transfer title of the mobile home to appellant. Appellant points to his deposition testimony as raising an issue of fact regarding the existence

of the oral agreement. Appellee counters that there was never an oral agreement and that the mobile home was a gift from appellant. Furthermore, appellee states that even if there were an oral agreement, it would be unenforceable unless reduced to writing under the statute of frauds as found in Kentucky Revised Statutes (KRS) 355.2-201.

Summary judgment is proper when there are no genuine issues of material fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. A fact is material if its existence has the potential to affect the outcome of the suit. 73 Am. Jur. 2d *Summary Judgment* § 48 (2008). Furthermore, the record is to be viewed in a light most favorable to the non-moving party. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). An appellate court must determine whether the trial court correctly found that there were no material issues of fact. *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

Appellee contends that an oral agreement to transfer title to appellant would invoke the statute of frauds under KRS 355.2-201, Kentucky's version of the Uniform Commercial Code. Therein, a contract for the sale of goods with a value greater than \$500 is unenforceable unless there is a writing commemorating the agreement. KRS 355.2-201(1). Considering the facts of this case, we are of the opinion that the alleged oral agreement to transfer title of the mobile home to appellant cannot be considered a "contract for the sale of goods" for purposes of KRS 355.2-201(1). Appellant does not claim that any money or other

consideration was to be given in return for the transfer of title. Appellant merely contends that the parties had an agreement that the mobile home would be titled in his name. Under these unique facts, we reject appellee's contention that the alleged oral agreement would be unenforceable under KRS 355.2-201(1).<sup>2</sup>

We now determine whether a material issue of fact existed that precluded entry of summary judgment. In this case, there clearly existed a factual issue regarding the existence of the oral agreement alleged by appellant. Deposition testimony of the parties paints conflicting pictures of the facts surrounding the purchase of the mobile home and the understanding of the parties. In a situation where the weight and credibility of the proffered testimony is crucial to the ultimate factual determination, summary judgment is inappropriate. *Ogden v. Employers Fire Ins. Co.*, 503 S.W.2d 727 (Ky. 1973). Thus, we conclude that the record clearly indicates the existence of an issue of material fact as to the alleged oral agreement and the circuit court erred in granting appellee's motion for summary judgment.<sup>3</sup>

In light of the above, appellant's argument that summary judgment was improper for lack of notice under CR 56.03 is moot.

---

<sup>2</sup> We do not address the issue of whether this alleged oral agreement would require a writing under any of the provisions of KRS 371.010 as it was not raised by either party.

<sup>3</sup> We also note that there may be an issue regarding whether appellant held equitable title to mobile home. *See* 30A C.J.S. *Equity* § 56 (2008).

For the foregoing reasons, the July 31, 2007, Summary Judgment of the Breathitt Circuit Court is reversed and this cause is remanded for further proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melissa C. Howard  
Jackson, Kentucky

BRIEF FOR APPELLEE:

Patrick E. O'Neill  
Jackson, Kentucky