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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002215-MR

GLENVIEW SPRINGS, LLC. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 08-CI-000660

STERLING DEVELOPMENT GROUP, LTD. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Glenview Springs, LLC (Glenview) appeals the November 14, 2008, opinion and order of the Jefferson Circuit Court granting summary judgment in favor of Appellee, Sterling Development Group, Ltd. (Sterling). In granting summary judgment, the court found that Sterling was

[1] Senior Judge Michael L. Henry 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.

not required to purchase two lots it had previously agreed to purchase because Glenview did not perform within the time allowed in the contract and did not extend the time for closing in writing. After a thorough review of the record, the applicable law, and the arguments of the parties, we affirm.

On December 13, 2005, Glenview and Sterling entered into two separate lot purchase agreements. Under the agreements, Sterling agreed to buy Lots 31 and 42 from Glenview in a residential subdivision which Glenview was in the process of developing in Jefferson County. Sterling paid a deposit of $10,000.00 on each of the two lots. The agreements, which were identical, provided that closing would occur no sooner than the date the final subdivision plat was recorded in the Jefferson County Clerk's Office, and no later than January 1, 2007, unless extended by Glenview. Both agreements included a "time is of the essence" clause and required notice to be served personally or by certified mail.

According to Glenview, during the fall of 2006, its sole member, Stephen Cox, realized that he would not be able to complete the regulatory agency approval process in time to record the subdivision plat by January 1, 2007. Glenview states that as a result, a written notice was sent to the eight lot purchasers, including Sterling, inviting them to a meeting which was to be held on September 27, 2006. Glenview further states that during the hour immediately preceding the scheduled meeting, Sterling's president, Carl Baker, called Cox and advised him that because of a scheduling conflict he would not be able to attend the meeting, and inquired as to the meeting's purpose. Glenview states that at that

time, Cox advised Baker that the lot closings would not occur until sometime in 2007. It further asserts, as set forth in Cox's sworn affidavit, that Cox also verbally updated Baker on the progress in obtaining agency approvals and the estimation of a closing date on a number of other occasions during the fall and early winter of 2006.

Ultimately, the closings did not occur by January 1, 2007, and Sterling sent a February 2, 2007, letter to Glenview, stating that the Lot Agreements had terminated due to Glenview's failure to close on the lots by the January 1, 2007, deadline. Sterling also demanded return of its two $10,000.00 deposits. Glenview refused to return the deposits, stating that it had verbally extended the closing dates. Sterling denied that Baker, or any other employee of Sterling, ever received notification, either verbal or written, that Glenview was extending the closing deadline.

Glenview then filed this action seeking to retain the $10,000.00 deposit on Lot 31, and seeking to enforce the purchase agreement on Lot 42. Sterling filed its answer and counterclaim seeking a declaratory judgment as to the two agreements and the return of its two $10,000.00 in deposits. Sterling also filed a motion for summary judgment, asserting that the statute of frauds, as codified in KRS 371.010(6), required any modification of the written contract setting forth the January 1st closing deadline to be in writing, and that the Lot Agreements themselves required all notifications, including any extensions of the January 1st deadline, to be in writing.

Glenview argued to the court below that Stephen Cox orally notified Carl Baker that closings on the lots would occur sometime in 2007. Glenview also asserted that the agreements did not require written notice, and further, that Sterling had agreed in advance that Glenview could unilaterally extend the closing dates. Baker denied that Sterling ever received verbal or written notice that the closing date would be extended.

As noted, the court below entered an opinion and order in this matter on November 14, 2008, in which it granted summary judgment in favor of Sterling. In so doing, the court found that the statute of frauds, codified at KRS 371.010(6), requires that any contract for the sale of real estate be in writing. Further, the court stated that under Kentucky law, when time is of the essence of the contract, a modification of the time of performance must also be in writing. *See Farmers Bank and Trust Co. of Georgetown, Ky. v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4 (Ky. 2005); *Specht v. Stoker*, 237 S.W.2d 78 (Ky. 1951); *Klatch v. Simpson*, 237 Ky. 84, 34 S.W.2d 951 (1931); and *Murray v. Boyd*, 165 Ky. 625, 177 S.W. 468 (1915).

The court below found that in the matter *sub judice*, there was no written extension of the closing date, and that the attempted modification by Glenview did not extend the closing date. Accordingly, the court held that Sterling was entitled to recover the deposits it paid for the two lots because Glenview did not perform within the time allowed in the contract, and did not extend the time for closing in writing. The court therefore granted Sterling's motion for summary

judgment, finding that it was not required to purchase either lot under the purchase agreements, and that it was entitled to recover the two $10,000.00 deposits which it paid to Glenview.

It is the well-settled law in this Commonwealth that when considering a motion for summary judgment, the court is to view the record in the light most favorable to the party opposing the motion, and that all doubts are to be resolved in that party's favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue of material fact exists. *Id.* The moving party bears the initial burden of showing that no issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *See Lewis*, supra, 56 S.W.3d at 436 (citing *Steelvest*, 807 S.W.2d at 482).

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found that there were not 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); Kentucky Rules of Civil Procedure (CR) 56.03. Because 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*. *Scifres,* 916 S.W.2d at 781. We review this matter with these standards in mind.

On appeal to this Court, Glenview argues that the trial court erred in holding that the statute of frauds, as set forth in KRS 371.010(6), required written notice of Glenview's extension of the closing date. In support of this argument, Glenview asserts that its extension of the closing date did not constitute a material modification of the lot purchase agreements, and asserts that Sterling had already agreed in advance that Glenview could unilaterally extend the closing dates.

Glenview further argues that even in those instances in which an extension of a closing date would require a contract modification or amendment, the statute of frauds would not require that the modification be in writing unless the extension went to the essence of the contract. Glenview relies upon *Klatch v. Simpson*, 237 Ky. 84, 34 S.W.2d 951 (Ky. 1931), in support of this assertion.

In *Klatch*, the purchaser contended that the parties had orally agreed to extend the closing date set forth in a written contract for the purchase of a house and lot. The seller denied that he had agreed to the extension, and argued that in any event, the extension would be invalid under the statute of frauds. Our Supreme Court held that the extension was not invalid under the statute of frauds because it did not go to the essence of the contract, nor did it affect the subject matter thereof (price or property description), but only postponed the closing date for a brief period of time so that the purchaser could obtain his financing.[2] Thus, Glenview argues that in the matter *sub judice*, there was no need for Glenview to

[2] As discussed further herein below, we believe *Klatch* to be distinguishable from the matter *sub judice* insofar as the parties in *Klatch* did not specify that time was of the essence upon entering into their agreement.

obtain Sterling's agreement to a modification of the contract, as Sterling had already agreed, in writing, that Glenview could unilaterally extend the closing dates. Further, Glenview argues that the contract contained no language terminating the contract unless a particular type of notice was given with respect to an extension.

In response, Sterling argues that a written contract may be orally modified only if the contract is not one that is required by law to be in writing, and notes that the statute of frauds requires contracts for the sale of real estate to be in writing and signed by the parties. In support thereof, Sterling cites to our holding in *Cox v. Venters*, 887 S.W.2d 563, 566 (Ky. App. 1994), wherein we state that when a contract is required by the statute of frauds to be in writing, a subsequent agreement which changes its terms must also be in writing and signed by the party charged to be enforceable.

As our Kentucky Supreme Court held in *Farmers Bank*, 171 S.W.3d at 8:

> If the contract is required to be in writing, evidence will not be admitted to prove a subsequent parol agreement which materially modifies the writing; that is, if the subsequent agreement is itself within the statute of frauds, and of a nature required by law to be in writing.

Citing *Murray v. Boyd*, 165 Ky. 625, 177 S.W. 468, 471-72 (1915).

Thus, as Sterling correctly notes, the dispositive question in this matter is whether extension of the closing date was a material modification. Sterling correctly asserts that if the extension of the January 1st closing deadline

materially affected the terms of the Lot Agreements, then any attempt by Glenview to postpone or extend the closing deadline must comply with the statute of frauds and be in writing.

A review of the record reveals that it is undisputed that the parties, in entering into these agreements, specified that time was of the essence. Further, our courts have held that in a contract where time is of the essence, postponement or extension of the closing date is a material change in the contract, and the statute of frauds applies. *See Farmers Bank,* 171 S.W.3d at 8.

In the matter *sub judice*, it is undisputed that the parties expressly stated their intention to make time of the essence in the performance of both agreements. Accordingly, any extension of the closing date, even if the parties agreed that the closing date could be extended, constitutes a material modification for which a writing is necessary.

Upon review, we cannot ignore the plain language of the contracts themselves, despite Glenview's arguments to the contrary. As the parties specified that time was of the essence, we believe that our jurisprudence requires any extension to be in writing. Accordingly, we affirm the trial court's finding that the statute of frauds applied to the Lot Agreements, and that the extension was a material modification of the agreements and required to be in writing.

Having so found, we need not reach the additional issue raised by the parties as to whether or not Glenview was required to provide Sterling with written notice of the extension. Accordingly, we hereby affirm the November 14, 2008,

opinion and order of the Jefferson Circuit Court, the Honorable Martin McDonald, presiding.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Jennifer Hatcher
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