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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000612-MR

STANLEY BURKEEN; AND
HIS WIFE, SENA BURKEEN — APPELLANTS

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 07-CI-00225

GEORGE MCKINNEY; AND
HIS WIFE, BONNIE MCKINNEY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; HARRIS,[1] SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Stanley Burkeen and Sena Burkeen appeal from a judgment of the Marshall Circuit Court involving the conveyance of real property. The Burkeens argue that the trial court erred as a matter of law by granting specific

[1] Senior Judge William R. Harris 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.

performance to George McKinney and Bonnie McKinney because: (1) no written description of the property was made a part of the contract; and (2) there was no evidence to establish that damages at law would have been an inadequate remedy. After reviewing the record and briefs, we affirm.

In October 1993, the Burkeens agreed to sell the McKinneys a parcel of land containing two acres and a mobile home. The parties placed stakes to mark the boundaries of the property to be conveyed. The parties prepared a written document entitled "Mobile Home and Land Contract," which reflected the agreement between the parties. This writing was never signed by the parties. The writing simply described the property as two acres "marked off to both the agreement and satisfaction of the parties" and the mobile home was described as a "1992 Ardmore, three bedroom, 1 ½ bath[.]" The payment terms for the land were $2,000.00 as a down-payment and $120.00 per month for 48 months. The McKinneys took immediate possession of the mobile home and property. The mobile home was financed through Regions Bank, with the understanding that title would be conveyed by the Burkeens when the McKinneys completed payment on it.

The McKinneys paid the down-payment in three installments concluding on November 9, 1993. The first land payment was made on November 2, 1993. The McKinneys continued to make the monthly land payments. The Burkeens provided a signed receipt for each payment containing the phrase "land payment." However, in May 1997, the Burkeens sent the McKinneys a letter

stating that land payments and mobile payments were merely rental payments and demanded that the McKinneys vacate the property by June 3, 1997. Nevertheless, the McKinneys continued to make the monthly payments and continued to receive receipts with the notation "land payment." The receipt for the 48th land payment was dated September 30, 1997, and contained the phrase "last land payment." No action was taken to remove the McKinneys from the property until 2005. The McKinneys continued to make payments on the mobile home to Regions Bank and the last payment was completed in 2007 at which time the Burkeens transferred title to the mobile home.

The Burkeens filed a forcible entry and detainer action in the Marshall District Court. The McKinneys filed a counterclaim seeking declaratory relief regarding the existence and enforceability of the contract. The case was removed to Marshall Circuit Court. The court held a bench trial. At the trial, the Burkeens conceded that they initially agreed to sell the land and mobile home to the McKinneys. However, the Burkeens believed that the contract was null and void because it was not signed. Nevertheless, the Burkeens explicitly waived any reliance on the statute of frauds defense. The trial court ultimately found that the McKinneys were entitled to specific performance and directed the Burkeens to convey the property to them. This appeal followed.

The Burkeens first argue that the trial court erred by granting specific performance because no written description of the property was made a part of the

contract. In support of this argument, the Burkeens cite and rely heavily upon *Blair v. Combs,* 288 Ky. 428, 156 S.W.2d 465 (1941).

In *Blair,* our highest Court reversed the grant of specific performance where extrinsic evidence was necessary to determine the boundaries of the property to be conveyed. The description held to be inadequate to support the grant of specific performance was as follows "a one-half acre tract so as to form a square or as near a square as possible, on the South side of the County Road of Carrs Fork so as to face onto and adjoin said Carrs Fork County Road, and directly opposite the old store-house building of the defendant, Henry Blair." *Id.* at 466. The Court held that "[s]pecific performance of a contract to convey land will not be enforced unless from the description contained in the writing a stranger can determine the boundary sought to be conveyed." *Id.*

However, in the more recent case of *Mahaffey v. Wilson,* 317 S.W.2d 888 (Ky. 1958), the Court further elaborated upon the requirement of the adequacy of a description. "The governing principle with respect to the adequacy of a description is that the written instrument must contain *sufficient data to identify the property*, so that no question can arise as to the intention of the parties concerning the subject matter." *Id.* at 889 (emphasis in original). "The well-established rule in this state is that, if a writing contains such a description of or reference to the land as that it may be identified by parol evidence, it will be sufficient. It is not essential that the paper itself shall contain such a description of the land as that it may be identified or exactly located by the mere reading of the paper." *Id.* at 890

(quoting *Posey v. Kimsey,* 146 Ky. 205, 142 S.W.703, 705 (1912)). The Court found the following description was adequate: "The Moonlight Drive-In Theatre Described as Follows: Said drive-in Theatre is located at Milltown, on Highway No. 11 about one mile from Booneville, Kentucky." *Id.* at 899. The Court also explained what it determined was the "somewhat ambiguous language" contained in *Blair.*

> In *Blair v. Combs*, 288 Ky. 428, 156 S.W.2d 465, 466, the opinion states:
>
> > 'Specific performance of a contract to convey land will not be enforced unless from the description contained in the writing a stranger can determine the *boundary* sought to be conveyed.' (Our emphasis)
>
> This language could be construed to mean that the writing must show the boundary lines of the property. Obviously this was not intended. None of the cases cited in support of the statement, nor any of the numerous cases with which we are acquainted, have ever suggested such a doctrine. By 'boundary' was meant nothing more than a specific domain or territory bound by limits. It is a colloquial expression synonymous with 'tract'.
>
> Such a construction of that term was made clear in the case of *McNamara v. Marcum*, 290 Ky. 625, 162 S.W.2d 205. There it was stated that the term 'boundary' did not mean metes and bounds. Therein we said, at page 208 of 162 S.W.2d:
>
> > 'But where the description in the writing is sufficient to determine what *tract of land* was meant by the parties to the contract, specific performance will be enforced although it may be necessary to resort to parol or documentary evidence to determine

> the metes and bounds of the tract.' (Our emphasis).

Id. at 890.

In this case, the writing described the property as two acres "marked off to both the agreement and satisfaction of the parties" and the mobile home was described as a "1992 Ardmore, three bedroom, 1 ½ bath[.]" We conclude that this description is legally adequate because it contains sufficient information to determine what tract of land was being sold and there is no question as to the intention of the parties. The trial court also properly used parol evidence to determine the metes and bounds description of the tract.

Next, the Burkeens argue that the trial court erred by granting specific performance because the McKinneys did not establish that damages at law would be an inadequate remedy.

In *Kuntz v. Peters*, 286 Ky. 227, 150 S.W.2d 665, 667 (1941), the former Court of Appeals stated:

> It is scarcely necessary to say that the remedy of specific performance is one of the many extraordinary ones created by equity to meet the deficiencies in remedies provided by strictly legal procedure and it is not available where the complaining party had an adequate remedy at law. Furthermore, the relief sought is one resting largely in the discretion of the court (but not an arbitrary one), and is cautiously administered. But in any event the burden of proof is on the plaintiff seeking specific performance to prove his right thereto, which is thus stated in the text in 25 R.C.L. p. 335, § 157: "In suits for specific performance the general burden of proof, as in other cases, rests on the plaintiff. Not only must he prove the existence of the contract and its terms, but he must

> show a full and complete performance on his part or an offer of such performance."

The Burkeens misconstrue the requirement of the inadequacy of a remedy at law. Inadequacy of a remedy at law is not an element to be proven such as the existence of a contract and full performance. Rather, it is simply a preliminary question for the court before the specific performance can be granted. Although, the trial court did not explicitly find that the damages at law were inadequate, its grant of specific performance constituted an implicit finding to that effect. Moreover, the Burkeens did not a file a motion for more specific findings. Kentucky Rules of Civil Procedure (CR) 52.02 would have authorized the Burkeens to make such a motion. Their failure to do so precludes us from considering whether the trial court erred by failing to make findings concerning whether the McKinneys had an adequate remedy at law. CR 52.04; *Vinson v. Sorrell*, 136 S.W.3d 465, 471 (Ky. 2004). The McKinneys proved the existence of the contract to convey real estate. The McKinneys proved that they abided by its terms. They took immediate possession of the property and made payments in full on the land and mobile home. The McKinneys have resided on this land for over 15 years. Damages at law would be inadequate in these circumstances. The trial court did not abuse its discretion by granting specific performance.

Accordingly, the trial order of the Marshall Circuit Court entered on March 13, 2009, is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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