RENDERED DECEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001721-MR

PETER CLEGHORN;
ANN SALTANIS; AND
CLEGHORN-SALTANIS FAMILY TRUST — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 06-CI-00925

GEORGE HOLDER, III — APPELLEE

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

DIXON, JUDGE: Peter Cleghorn, Ann Saltanis, and the Cleghorn-Saltanis Family Trust (collectively, "Cleghorn"), appeal the Warren Circuit Court's findings of fact, conclusions of law, and judgment in favor of George Holder, III ("Holder"). We affirm.

In August 2005, Cleghorn entered into a written agreement with Holder for a like-kind exchange of real estate located in Warren County, Kentucky.[1] On October 4, 2005, the parties executed a handwritten addendum, which stated:

> It is agreed and understood by the undersigned that with respect to the exchange proposal involving the commercial building at 1412 Memphis-Limestone Rd. in Bowling Green, KY & 8550 Sentinae Chase Rd. in Roswell, GA the following terms & conditions will be added to & will modify the original exchange agreement.
>
> 1. The KY property exchanging owner will agree to pay 1% of the GA property exchanging party's origination/loan costs.
>
> 2. The GA property exchanging party will tender via wire transfer within 3 business days the sum of fifteen thousand dollars ($15,000.00) to the KY property owners' attorneys' escrow account. This amount is 100% non-refundable and is for a 30 day extension to the original exchange agreement. In the event the GA property exchanging party desires or requires an additional 30 day extension it will be granted upon the immediate payment of an additional ten thousand dollars ($10,000.00) which is also then 100% non-refundable.
>
> /s/ Peter Cleghorn
> /s/ George Holder
> /s/ Perry Poston, witness

In the months following the execution of the addendum, Cleghorn transferred a total of $95,000.00, to the escrow account of Holder's attorney. When the parties

[1] Pursuant to section 1031 of the Internal Revenue Code, 26 U.S.C. § 1031, any gain or loss on a like-kind exchange of property is not recognized for tax purposes. Cleghorn pledged property he owned in Georgia plus $850,000.00 cash, in exchange for a commercial tract owned by Holder in Bowling Green, Kentucky.

were prepared to close the real estate transaction in May 2006, they disagreed as to the purpose of the escrowed funds. Holder asserted that each monthly payment constituted consideration for extending the contract; however, Cleghorn contended that the payments constituted earnest money to be applied toward the purchase price at closing.

As a result of their dispute, Cleghorn and Holder executed two contingent promissory notes on May 31, 2006. Pursuant to the first note, the parties agreed the transaction would close and the escrowed funds would be applied to the purchase price. However, Cleghorn promised to pay Holder $95,000.00 in the event litigation over the contract in Warren Circuit Court resulted in a verdict in favor of Holder. The second promissory note contemplated a $7800.00 credit constituting 1% of Cleghorn's loan amount. Shortly thereafter, the real estate transaction was finalized.

On June 22, 2006, Holder filed a complaint seeking a judgment that he was entitled to $95,000.00, constituting the non-refundable extension fees pursuant to the October 2005 addendum. Cleghorn filed an answer and counterclaim seeking declaratory relief. On December 8, 2006, a bench trial was held where the court heard from Charlie Evans, a real estate attorney; Perry Poston, Holder's real estate agent; Cleghorn; and Holder. Following trial, the court ordered the parties to tender proposed findings and conclusions. Approximately nineteen months later, in July 2008, the court rendered its findings of fact,

conclusions of law, and judgment in favor of Holder. After Cleghorn unsuccessfully sought post-judgment relief, this appeal followed.

As an initial matter, we note that Cleghorn willfully ignores the mandate of CR 76.12(4)(c)(iv) and (v), which requires specific references to the trial record and videotape to frame the factual and procedural history of the case and support the arguments presented on appeal. In his brief, Cleghorn advises us, "in the interest of brevity[,] specific citations to the videotape record are being omitted." Since Cleghorn has chosen to disregard CR 76.12(4)(c)(iv) and (v), we will "give little credence to the arguments . . . that are not supported by a conforming citation to the record." *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006).

Cleghorn contends the court erred as a matter of law in relying on the parol evidence rule to exclude evidence of Poston's subsequent e-mail correspondence, which referenced "earnest money" payments. Cleghorn accurately points out that the parol evidence rule precludes evidence of prior negotiations where parties have reduced their agreement to an unambiguous written contract. *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343, 345 (Ky. 1970). Cleghorn asserts that, since Poston's e-mails were transmitted in the months following the execution of the addendum, that evidence was admissible to prove the intent of the parties. We disagree.

We first note that, "[t]he construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the

court." *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000). Accordingly, our review on appeal is *de novo*, without deference to the trial court's legal conclusions. *Id*.; s*ee also Spot-A-Pot, Inc. v. State Resources Corp.*, 278 S.W.3d 158, 161 (Ky. App. 2009). "'[I]n the absence of ambiguity a written instrument will be enforced strictly according to its terms,' and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (citations omitted). "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002) (citation omitted).

In the case at bar, we conclude the contract is not ambiguous. According to the plain language of the contract, the $15,000.00 payment was "for a 30 day extension to the original exchange agreement." The contract also clearly provided "an additional 30 day extension . . . upon the immediate payment of an additional ten thousand dollars ($10,000.00)[.]" We are simply not persuaded that the specific language utilized in the addendum is capable of more than one reasonable interpretation. It is well settled that "we are not permitted to create an ambiguity where none exists even if doing so would result in a more palatable outcome." *West*, 55 S.W.3d at 836, (citation omitted). Although Cleghorn disputes the parties' intent regarding the payments, "[t]he fact that one party may have intended different results . . . is insufficient to construe a contract at variance

with its plain and unambiguous terms." *Cantrell Supply, Inc.*, 94 S.W.3d at 385, (citation omitted). Based upon our review of the record, we believe the addendum is not ambiguous; consequently, the extrinsic evidence urged by Cleghorn cannot be utilized to create ambiguity. As a result, we conclude that Cleghorn paid valuable consideration for monthly extensions to the exchange agreement pursuant to the plain language of the addendum. We find no error in the court's judgment on this issue.

Next, Cleghorn alternatively argues the equitable principles of agency and estoppel precluded judgment in Holder's favor. Cleghorn opines that he relied, to his detriment, on the statements transmitted in Poston's e-mails of November 4 and December 29, 2005. As a result, Cleghorn theorizes that Holder was not entitled to recover $95,000.00, because Poston, as Holder's agent, stated the payments would apply to the purchase price at closing. We disagree.

The monthly payments from Cleghorn to Holder were governed by the written addendum. The e-mail communications from Poston were not part of the agreement, despite Cleghorn's reliance on them as extrinsic evidence. The agreement clearly contemplated monthly payments for an extension of the contract, and we have concluded that the addendum was not ambiguous. We are simply not persuaded by Cleghorn's assertion that, due to Poston's statements, judgment in favor of Holder was "manifestly unjust."

Finally, we address a procedural matter. Holder filed a motion to dismiss this appeal, arguing that Cleghorn waived his right to appeal by signing the

contingent promissory note, wherein Cleghorn agreed to be bound by the judgment of the Warren Circuit Court. On April 9, 2009, a motion panel of this Court passed Holder's motion to this panel for review. After thorough consideration, we conclude Holder's motion to dismiss is without merit; consequently, it is denied.

For the reasons stated herein, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

ENTERED: December 18, 2009

/s/ Donna L. Dixon
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANTS:

David T. Sparks
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Matthew J. Baker
Bowling Green, Kentucky