

RENDERED: AUGUST 27, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000725-MR
AND
NO. 2009-CA-000770-MR

DEANNA FOLEY

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM BOURBON CIRCUIT COURT
v. HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 07-CI-00205

VICKY F. BAKER

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, VANMETER, AND WINE, JUDGES.

VANMETER, JUDGE: Deanna Foley appeals from an opinion and order of the Bourbon Circuit Court granting Vicky Baker's motion for summary judgment on Deanna's action to recover money owed by Baker under the terms of a promissory

note.¹ Baker cross-appeals from that same order which also granted Deanna's motion for summary judgment on Baker's cross-claim against Deanna for money owed under the terms of a lease agreement. For the following reasons, we affirm.

In the early 1990's, Baker, her brother, Ricky Foley, and Ricky's wife, Deanna, went into the cattle business together on property owned by Baker and located at 667 Mount Sterling Road, Paris, Kentucky. Baker conveyed six acres of this property to the Foleys and in March 1993, the Foleys built and moved into a 5,000-square-foot, five-bedroom home on the property.

On March 4, 1997, the Foleys conveyed the property back to Baker by deed of record. In exchange, Baker agreed to pay the Foleys \$240,000; Baker paid approximately \$140,000, and the parties executed and recorded a five-year promissory note in the amount of \$100,000 in favor of the Foleys and a mortgage on the property in favor of the Foleys to secure the note. Simultaneously, the parties executed a lease agreement, whereby the Foleys promised to pay Baker \$5,000 annual rent to continue residing in the home located on the property.

In 2001, Baker conveyed a life estate interest in the property to Ricky by deed of record. On November 28, 2001, Ricky executed and recorded a mortgage release discharging Baker's obligation under the promissory note on the grounds that the \$100,000 had been paid in full. Ricky also executed an affidavit

¹ Hereinafter, we refer to Deanna Foley as "Deanna" and Vicky Baker as "Baker" for clarification purposes. No disrespect is intended in doing so.

stating that he released the mortgage because the \$100,000 obligation had been satisfied in full.

In 2003 and 2005, the Foleys obtained loans from Kentucky Bank and gave the bank two mortgages on the property as collateral. In the process of securing the loans, the Foleys represented to the bank that they owned the property in fee simple. Both mortgages were recorded and contain clauses stating that the property is free from all liens and encumbrances. Later on, when the Foleys decided to sell their home, Kentucky Bank realized that Ricky held only a life estate interest in the property. The Foleys claim that at this time they, too, first learned that Ricky did not hold the property in fee simple.

In July 2007, Deanna filed this lawsuit requesting that the trial court set aside the November 28, 2001 mortgage release signed by Ricky as unenforceable since it did not bear her signature and was executed without her consent, and hold Baker accountable for the unpaid balance on the promissory note. Baker filed claims against the Foleys seeking, in part, unpaid rent due under the lease agreement, and filed claims against Kentucky Bank. Further, Kentucky Bank filed claims against the Foleys to recover amounts due under the loans.

Ricky failed to appear or respond to any pleadings. The trial court entered a default judgment against him on Baker's claims and determined that Baker held a reversionary fee simple interest in the property. Kentucky Bank also received a default judgment against Ricky, and Deanna and Kentucky Bank entered into an agreed judgment deeming her interest, if any, in the property to be

inferior to that of the bank and foreclosing any interest she may have in the life estate. Kentucky Bank apparently is pursuing a court-ordered judicial sale of the life estate under its mortgages.

This matter came before the trial court on cross-motions for summary judgment. The trial court granted summary judgment in favor of Baker on Deanna's claim for money owed under the promissory note and granted summary judgment in favor of Deanna on Baker's claim for rent owed under the lease agreement. This appeal followed.

Summary judgment shall be granted only if “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR² 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482 (citations omitted).

On appeal from the grant of summary judgment, our standard of review is “whether the trial court correctly found that there were no genuine issues

² Kentucky Rules of Civil Procedure.

as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (citations omitted). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

Our analysis lends itself to addressing the claims of error Baker raises in her cross-appeal before addressing the issues Deanna raises in her appeal. Baker asserts the trial court erred by granting summary judgment to Deanna on the basis that Deanna satisfied her obligation under the lease agreement. We disagree.

The record reflects that Baker testified that when the parties executed the promissory note and lease agreement in 1997, Baker instructed her secretary to keep a ledger documenting the financial transactions between Baker and the Foleys. The ledger is styled “Note Payable Ricky and Deanna Foley on purchase at 667 Mt. Sterling Road” and reveals a beginning note balance of \$100,000, annual deductions of approximately \$5,000 for rent, and various deductions for payments Baker made to the Foleys. In considering the ledger, the trial court noted:

As to the lease agreement, the court finds that the evidence is clear that, although the Foleys made no formal payment of \$5,000 annually, the defendant Baker gave them credit each year for the \$5,000 by deducting [it] from the \$100,000 note that she was owed them. Therefore, she received, through these deductions, the moneys owed to her. The fact that the note was

subsequently released does not change the fact that her debt under the note was reduced through these deductions. Therefore Baker is not entitled to any funds under the lease agreement.

Baker maintains the trial court improperly considered the ledger since the lease agreement is unambiguous and the ledger is inadmissible extrinsic evidence. Since the lease agreement is unambiguous, she argues “the parties’ intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence.” *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky.App. 2002) (citations omitted).

The lease agreement provides as follows:

We, the undersigned [Ricky and Deanna Foley], hereby acknowledge that we will pay at least annually to Vicky L. Foley the sum of \$5,000.00 as annual rent for property located at 667 Mount Sterling Road, Paris, Kentucky. This obligation will remain in effect until terminated by all parties hereto.

However, “[w]here a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving . . . the subject matter of the contract, the objects to be accomplished, and the conduct of the parties.”” *Auto-Owners Ins. Co. v. Goode*, 294 S.W.3d 32, 36 (Ky.App. 2009) (quoting *Cantrell*, 94 S.W.3d at 385). In this case, the promissory note, mortgage, and lease agreement were executed on March 4, 1997, in conjunction with the conveyance of the property from the Foleys to Baker. However, the documents are silent with respect to the parties’ intended exchange of finances; specifically, whether formal payments of rent and money owed under the note should be made

or whether amounts owed should be deducted under a bookkeeping arrangement. Accordingly, the trial court properly admitted evidence of the ledger to explain the parties' agreement to deduct annual rental payments from the amount owed under the note in lieu of making formal payments of \$5,000 annually.

Likewise, the ledger reflects the parties' agreement to deduct various payments made by Baker to the Foleys in satisfaction of the note. The ledger shows that Baker fully satisfied the note by deducting rent and making various payments to the Foleys over the years. Accordingly, the trial court did not err by granting summary judgment to Baker and Deanna on their respective claims.³

The opinion and order of the Bourbon Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

Michael D. Kalinyak
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Leila G. O'Carra
W. Craig Robertson, III
Lexington, Kentucky

³ We note that the terms of the note are not contrary to the payment arrangement under the ledger. The note provides that accrued interest shall be payable annually beginning March 4, 1998, and continuing on the 4th day of March thereafter, until March 4, 2002, at which time the unpaid principal, together with accrued interest thereon, shall become due and payable. The note further provides that Baker shall have the privilege to prepay the note at any time and from time to time, without penalty. Since we hold that the ledger shows satisfaction of the note, we find it unnecessary to reach the merits of Deanna's claims that the trial court erred by failing to hold that the mortgage release was unenforceable and by concluding that her representations to Kentucky Bank constituted ratification of the mortgage release.