

RENDERED: NOVEMBER 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001886-MR

LAURA GREEN, O'NEAL McCALL,
AND WILLIAM M. BURREL

APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 06-CI-00494

WATTS REALTORS AND AUCTIONEERS, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, STUMBO AND WINE, JUDGES.

STUMBO, JUDGE: This is an appeal from a judgment of the Laurel Circuit Court awarding over \$130,000 to Watts Realtors and Auctioneers. Appellants argue that the trial court failed to give credit for a \$10,000 payment made by Green to Watts Realtors. We find there was no error and affirm.

This case has previously been before a panel of this Court. We will therefore use that panel's recitation of the relevant facts.

By deed dated June 14, 2000, Green purchased from Kenneth Hibbitts an 830-acre tract of land located near Woods Creek Lake in Laurel County. On April 9, 2002, Green, with the assistance of Watts and its agent, Diana Walker, negotiated the sale of the same property to Joseph Rathburn for \$1,650,000. Rathburn paid \$200,000 down, with the balance of the purchase price being secured by a mortgage from Green. At the closing of the sale to Rathburn, insufficient funds were available to pay the realty commission earned by Watts. As a result, Green executed an undated promissory note to Watts in the amount of \$115,000. The note on its face provided for eight installment payments of principal and interest beginning on December 28, 2000, and due every six months thereafter. The first seven payments were each for \$10,000, with a final payment of \$76,243.17 due on June 28, 2004.

Green failed to make any payments after February 2003. As a result, on May 9, 2006, Watts filed an action in the Laurel Circuit Court to enforce the promissory note. Green's answer admitted that they had failed to make a payment since February 2003, but disputed the amount of indebtedness claimed by Watts. Further, Green claimed that the agreement between the parties was for the installments to be paid as Rathburn sold the lots on the property in question and made payments to Green.

Green v. Watts Realtors and Auctioneers, Inc., 2009 WL 2426600, 1 (Ky. App. 2009).

Eventually, the trial court granted summary judgment in favor of Watts Realtors finding that Green and the other appellants did not dispute the fact that they had defaulted on the note and did not dispute the amount owed on the note. Green and the other appellants appealed to this Court, arguing in part that

they had in fact disputed the amount owed on the note. They claimed Watts Realtors did not credit them for certain payments made against the note. The previous panel found that this created a genuine issue of material fact that made summary judgment inappropriate. The previous panel of this Court reversed and remanded the case to determine the amount owed on the note.

On remand, the trial court held a bench trial. At the trial, the appellants relied on the testimony of O'Neal McCall. McCall testified that he had delivered a cashier's check for \$10,000 to Diana Walker, an agent of Watts Realtors. The appellants claimed Watts Realtors did not consider this credit when bringing suit. During cross-examination, McCall could not produce a copy of the cancelled check or even name the bank upon which it was drawn. The appellants also did not call Diana Walker to testify.

After the trial, the court ordered the appellants to pay Watts Realtors \$131,612.15, plus interest, and held that the appellants failed to sustain their burden of proof as to the \$10,000 payment. The court found that there was no substantial evidence presented that the check was transferred to Watts Realtors through its agent. This appeal followed.

The appellants argue that the trial court erred in not allowing a credit for the \$10,000 payment. Watts Realtors argues that the appellants did not prove the payment was made. In a bench trial, “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR 52.01. Findings of fact

are not clearly erroneous when they are supported by substantial evidence. *Byerly Motors, Inc. v. Phillips Petroleum Co.*, 346 S.W.2d 762, 765 (Ky. 1961).

In the case at hand, the appellants argued they had paid \$10,000 toward the note. Payment is an affirmative defense. CR 8.03. Thus, it was the burden of the appellants to prove that the payment had been made, not the burden of Watts Realtors to prove there was no payment. The trial court found that the appellants failed in their burden and we agree. The testimony of McCall was the only evidence of the alleged \$10,000 payment. Diana Walker was not asked to testify about the payment, there was no corroborating documentation regarding the check, and McCall could not even remember which bank the check was drawn from. The appellants provided insufficient evidence to satisfy their burden of proof. The trial court's finding that the payment was not made is not clearly erroneous.

Based on the above, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

D. Bruce Orwin
Somerset Kentucky

BRIEF FOR APPELLEE:

John F. Kelley, Jr.
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