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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000509-MR

JANE ODOM — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 06-CI-02304

BERNARD WALT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Jane Odom brings this appeal from a February 14, 2011, Judgment of the Fayette Circuit Court awarding Bernard Walt an equitable mortgage in the amount of $66,000 in certain real property. We affirm.

Jane owned and resided on a twenty-acre farm in Fayette County (the "farm"). Nicole Walt, Barnard Walt's daughter, resided with Jane on the farm.

Both Jane and Nicole were involved in the horse industry and worked together on the farm.

Due to financial hardship and Jane being unable to make her monthly mortgage payment, Jane met with Nicole's father, Bernard Walt, and negotiated selling to him a one-half undivided fee simple interest in the farm. Upon reaching an agreement, on November 14, 2004, Jane executed and delivered a deed to Bernard conveying a one-half undivided fee simple interest in the farm, which recited that $100,000 in consideration was paid to Jane at the time of the transfer. Additionally, the parties executed a "General Partnership Agreement" (Partnership Agreement) on November 14, 2004, to create a "general partnership" to operate a horse business to be known as Willow Wood Farm. Under the Partnership Agreement, Jane was the managing partner and held a 51- percent ownership interest in the partnership.

Despite the aforementioned transactions, Jane's financial woes continued. In March 2006, without Bernard's knowledge, Jane entered into a purchase contract to sell the farm to David and Kim Clements. However, as Bernard was the record owner of a one-half fee simple interest in the farm, Jane was unable to convey good title to the Clements without Bernard's participation.

Consequently, Jane filed a quiet title action in the Fayette Circuit Court. Therein, Jane alleged that Bernard failed to pay the $100,000 consideration for the one-half undivided fee simple interest in the farm and sought to have the November 14, 2004, deed set aside. Jane maintained that any funds received by

Bernard were contributions to Willow Wood Farm Partnership. Conversely, Bernard denied the same and alleged that he paid in full the $100,000 consideration for his one-half undivided fee simple interest in the farm.

The circuit court heard this case without a jury under Kentucky Rules of Civil Procedure (CR) 52.01. In accordance therewith, the circuit court rendered Findings of Fact and Conclusions of Law. Therein, the circuit court concluded that Willow Wood Farm Partnership was never properly formed, that Bernard failed to pay the full consideration of $100,000 as set forth in the November 14, 2004, deed, and that Bernard had paid $66,000 to Jane toward the purchase of a one-half undivided fee simple interest in the farm.[1] The circuit court then declared the November 14, 2004, deed and Partnership Agreement void and awarded Bernard an equitable mortgage in the amount of $66,000 against the farm. This appeal follows.

Jane contends that the circuit court's finding that Bernard paid $66,000 in consideration to purchase an interest in the farm was clearly erroneous. Specifically, Jane asserts that the evidence overwhelmingly demonstrates that a partnership to operate a horse business on the farm existed between Bernard and herself and that the $66,000 in payments from Bernard were merely contributions to the partnership. Conversely, Bernard argues that substantial evidence supported the circuit court's findings of fact and points to Bernard's own testimony at trial.

[1] The circuit court specifically found that Bernard Walt made a $50,000 payment on October 10, 2004, and a $16,000 payment on September 21, 2004, as consideration of the one-half undivided fee simple interest in the farm.

Under CR 52.01, the findings of fact of a circuit court are reviewed under the clearly erroneous standard. A finding of fact is clearly erroneous if not supported by substantial evidence of a probative value. *Cheaney v. Wright*, 474 S.W.2d 402 (Ky. 1971). Moreover, the credibility and weight of evidence is within the sole province of the circuit court as fact-finder. *Ironton Fire Brick Co. v. Burchett*, 288 S.W.2d 47 (Ky. 1956). Also, the circuit court may both believe and disbelieve different parts of a witness's testimony.

In this case, Bernard testified that the $50,000 and $16,000 payments were not contributions to the partnership but rather were payments toward purchase of a one-half undivided fee simple interest in the farm. The evidence introduced also indicated that these two payments were in the form of checks drawn on Bernard's personal checking account and were made payable to "Jane Odom," rather than to the partnership. Bernard also testified that Jane agreed that he could make periodical payments toward the purchase of his interest in the farm, notwithstanding that the 2004 deed reflected that the consideration had been paid in full.

At the hearing, the evidence was admittedly conflicting; however, we think the evidence outlined above constitutes substantial evidence supporting the circuit court's finding that $66,000 was paid by Bernard toward purchasing the one-half undivided fee simple interest in the farm. Hence, we conclude that the circuit court's finding that Bernard paid $66,000 in consideration to purchase an interest in Willow Wood Farm was not clearly erroneous.

We now turn our analysis to the circuit court's voiding of the deed between the parties and the granting of an equitable mortgage to Bernard against the farm for the partial consideration paid in conjunction with the real estate transaction. Jane does not challenge the voiding of the deed for failure of consideration in this appeal. Accordingly, we will not address that issue other than to acknowledge that a court in Kentucky can entertain an action to cancel a deed for failure of consideration and grant appropriate relief where warranted. *Roberts v. Jiles, Ex'x*, 307 S.W.2d 171 (Ky. 1957).

Effectively, the circuit court acknowledged that the parties entered into a real estate transaction for a purchase of a one-half interest in the farm by Bernard and that he had paid at least a portion of the consideration in the amount of $66,000. Based upon the factual findings made by the circuit court, and the circumstances surrounding the transaction, the circuit court properly granted Bernard an equitable lien against the farm to the extent of the partial consideration paid. The circuit court's granting of an equitable mortgage in this case is consistent with the general rule that an equitable lien may attach against real property upon the advancement of money and may continue to exist for the duration of the debt. *See State Street Bank & Trust v. Heck's, Inc.*, 963 S.W.2d 626 (Ky. 1998). We find no error in granting Bernard an equitable lien against the farm to the extent of the partial consideration paid, given that the transaction has been set aside. Otherwise, Jane would reap a windfall at Bernard's expense.

Jane also alleges that Bernard "failed to amend his pleadings" to assert a claim under the equitable mortgage doctrine. Specifically, Jane argues:

> The trial court awarded [Bernard] an equitable mortgage on the real property owned by Jane Odom, relief which [Bernard] never sought in his Counterclaim nor in the prayer for relief in his Answer. Since the completion of the trial, the entry of the Findings of Fact and Conclusions of Law and the subsequent entry of the Judgment, [Bernard] has not moved the trial court to amend his pleadings to conform to the evidence. . . .
>
> [Jane] submits to this Court that she never once expressly consented to the trial of the issue of an equitable mortgage. As for the issue of implied consent, [Jane] contends that although she introduced the two (2) checks totaling $66,000.00 into evidence, if she thought that the issue of an equitable lien and the responsibility to repay the monies was being tried, she would have raised issues and her counsel would have asked questions of her on direct examination and on the cross examination of both [Bernard] and his daughter concerning what would have happened if the purchase price was not paid in full and what discussions took place with respect to the repayment of any monies paid towards the purchase price of the real property and whether interest thereon had agreed to be repaid. While no doubt exists that the two (2) checks are in evidence, [Jane] claims that she has been severely prejudiced by the trial court's award of an equitable lien which had not been plead by [Bernard]. . . .

Jane's Brief at 19-20. We do not believe the circuit court committed reversible error and set forth our reasoning below.

The amendment of pleadings is governed by CR 15.02, and it reads:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and

> to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Under CR 15.02, a party may seek to amend a pleading to conform to the evidence presented at trial. Nonetheless, such amendment is not mandatory. CR 15.02 provides that pleadings shall be treated as amended where issues not raised by the pleadings are tried by the express or implied consent of the parties. *Nucor Corp. v. Gen. Elec. Co.*, 812 S.W.2d 136 (Ky. 1991); *Hodge v. Ford Motor Co.*, 124 S.W.3d 460 (Ky. App. 2003). *See also* 6 Kurt A. Phillips, Jr., David V. Kramer & David W. Burleigh, *Kentucky Practice – Rules of Civil Procedure Annotated* § 15.02 (6th ed. 2012). And, it is clear that a party impliedly consents to trial on an issue where that party fails to object to introduction of evidence on the ground that it is not within the purview of the issues presented by pleadings. *Nucor Corp.*, 812 S.W.2d 136; *Hodge,* 124 S.W.3d 460. *See al*so 6 Kurt A. Phillips, Jr., David V. Kramer & David W. Burleigh, *Kentucky Practice – Rules of Civil Procedure Annotated* § 15.02 (6th ed. 2012).

In Jane's brief, she claims that Bernard's failure to amend the pleadings was preserved "by [his] failure . . . to seek an amendment of his Answer and

Counterclaim to conform to the evidence . . . ." Jane's Brief at 19. Jane also argued at oral argument that the equitable mortgage issue was not raised during the trial. However, Jane fails to aver that she objected to the evidence below and fails to cite us to such objection in the record. CR 76.12 (4)(c)(v); *see also Monumental Life Ins. Co. v. Dept. of Revenue*, 294 S.W.3d 10 (Ky. App. 2008). Without a specific objection to the admission of such evidence, the law is clear that Jane is deemed to have impliedly consented to a trial upon the issue of equitable mortgage. *See Nucor Corp.*, 812 S.W.2d 136; *Hodge*, 124 S.W.3d 460. And the trial judge, as the trier of fact, construed from the evidence that the issue had been presented for the court's consideration. Thus, we view this contention of error to be without merit.

For the foregoing reasons, the Judgment of the Fayette Circuit Court is affirmed.

NICKELL, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

VANMETER, J., CONCURRING IN PART AND DISSENTING IN PART: While I concur with much of the majority opinion, I respectfully dissent with affirming the circuit court's finding that the $16,000 payment made by Bernard to Jane on September 21, 2004, constituted partial payment for Jane's attempted transfer of an undivided one-half interest in the farm.

Appellate review of a trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. CR 52.01; *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); "'[S]ubstantial evidence' means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id.* (citations omitted). In *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972), the court stated that "the test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." (Citation omitted).

Based on our standard of review and the deference we accord the circuit court with respect to its findings of fact, I agree that we are compelled to uphold its finding that the $50,000 check written by Bernard on October 16, 2004, was a partial payment for the farm, *i.e.*, the one-half interest represented by Jane's deed to Bernard. The evidence presented to the circuit court could be interpreted as payment towards the farm or to the partnership. Thus, we defer to the circuit court's findings. With respect to the $16,000 check, however, its tender roughly coincided with the contemporaneous transfer of the mare, ***Wild Jezabel***, as evidenced by (1) Jane's endorsement of The Jockey Club registration certificate in Bernard's favor, and (2) the subsequent racing of the mare in Bernard's name. My view is that the evidence is indisputable that the $16,000 check represented full

payment for the mare, and not a partial payment for the farm. The circuit court's finding otherwise was clearly erroneous.

I agree with the majority opinion affirming the circuit court's awarding Bernard an equitable lien on the farm, but the principal amount secured by the lien should be $50,000.

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