

RENDERED: JANUARY 11, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000747-MR

BRADLEY WEISS AND CETTY WEISS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 09-CI-06294

ROBERT WALKER

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Bradley and Cetty Weiss appeal from a Summary Judgment in favor of Robert Walker in Walker's action seeking damages for breach of a real estate sales contract. The Weisses contend that the entry of Summary Judgment was improperly rendered because material issues of fact remain for adjudication. We find no error, and accordingly affirm the Summary Judgment.

Robert Walker owned a parcel of real property situated in Woodford County, Kentucky. On April 15, 2004, Walker executed a real estate sales contract in which he agreed to transfer title to the Weisses. An addendum to the contract provided that Walker would construct a 12 foot gravel access road with ditches and drainage, as well as connections for city water, electricity and phone services. The addendum provided that the work would be completed by November 1, 2004, and required the Weisses to pay a \$15,000 “tap-on fee” for the utility installation.

According to allegations in the record, the Weisses relied on Walker’s promised completion date and began the process of contracting for the construction of a new home on the parcel. They would later allege that construction of the home could not commence until the gravel road was completed. They would also maintain that Walker failed to complete the improvements in a workmanlike manner and in conformity with local regulations, resulting in the Weisses being unable to construct the home and being forced to sell the property.

On November 24, 2009, Walker filed the instant action against the Weisses in Fayette Circuit Court seeking damages for breach of the real estate sales contract. Walker alleged that he completed the improvements on or before July 27, 2005, and that the Weisses failed to make payment of the \$15,000 in accordance with the contract. In response, Cetty Weiss filed with the Fayette Circuit Court a *pro se* document styled “REBUTTAL”, wherein she denied that Walker had completed the gravel road on time and in a workmanlike manner. She further alleged that Walker destroyed a portion of a pre-civil war stone wall and removed

50 hardwood trees, that the gravel road was not initially constructed in conformity with building codes, and that Walker's failure to complete the terms of the contract resulted in the Weisses being unable to construct a home.

After discovery was conducted, Walker moved for Summary Judgment arguing that the Weisses failed to file an Answer in conformity with the Civil Rules. He also maintained that the Weisses' first answers to Interrogatories failed to admit or deny essential elements of Walker's action, and that the Weisses failed to respond at all to the second Interrogatories and Requests for Admissions propounded on April 28, 2010. The Weisses moved for a Default Judgment, alleging that the Rebuttal constituted a counterclaim upon which they were entitled to a judgment.

Upon considering the motions, the circuit court rendered two Orders on March 23, 2011. The first granted Walker's motion for Summary Judgment, and ordered an award of \$15,000 plus interest in the amount of \$7,921.01. The second Order denied the Weisses' motion for a Default Judgment. As a basis for the denial, the court determined that Cetty Weiss's Rebuttal did not constitute a Counterclaim. This appeal followed.

The Weisses now argue that the circuit court erred in sustaining Walker's motion for Summary Judgment. They contend that genuine issues of material fact remain for adjudication, including whether Walker completed the gravel roadway and other improvements in accordance with the sales contract and whether those improvements were made in conformity with local codes. The Weisses note that

the contract contains language demonstrating that time was of the essence, and that Walker's failure to complete the improvements in a timely manner constituted a breach of the contract. They argue that when the record is viewed in a light most favorable to them as the non-movants pursuant to *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), Summary Judgment was not warranted and the circuit court erred in failing to so find.

In sustaining Walker's motion for Summary Judgment, the circuit court implicitly found that Cetty Weiss's Rebuttal, in conjunction with the Weisses' limited response to the first Interrogatories and failure to respond to the second Interrogatories and Requests for Admissions, constituted a basis for finding that no genuine issues of material fact remained for adjudication.¹ We find no error in this conclusion.

While Walker's motion for Summary Judgment addressed the alleged insufficiency of Cetty Weiss's Rebuttal, the corpus of his argument centered on his claim that the Weisses failed to respond to the second set of discovery (request for admissions) filed on April 28, 2010, thereby admitting the allegations set out therein. Request No. 3 sought an admission from the Weisses that the improvements set out in the contract addendum, including water, underground utilities and roadway, were completed in their entirety on or about July 27, 2005. Request No. 4 sought an admission that the value of the admissions exceeded

¹ The Fayette Circuit Court did not expressly set out the basis of its Order of Summary Judgment. The Order did state, however, that the court reached its conclusion "having considered the parties' Memoranda and oral arguments" in which Walker argued that the "Rebuttal" and failure to adequately respond to discovery justified Summary Judgment.

\$15,000. It appears from the record that the Weisses failed to respond to this discovery.

CR 36.01(2) provides that “[e]ach matter of which an admission . . . is admitted unless within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection[.]” Thus, by failing to answer the request, the allegations contained in the second set of Walker’s discovery were admitted by the Weisses by operation of the civil rules. That is to say, the Weisses’ failure to deny the request for admissions was itself a tacit admission that the water connection, underground utilities and roadway were completed on time and were valued at or above the contract price of \$15,000.

This admission goes to the heart of Walker’s cause of action, in which he alleged that the Weisses breached the addendum by failing to tender \$15,000 upon completion of the improvements. It is noteworthy as well that even after retaining counsel, the Weisses did not respond to the second set of discovery, nor was additional time sought under CR 36.01. On appeal, the Weisses contend that genuine issues of material fact remain for adjudication, and that as such the entry of Summary Judgment was unwarranted. Based on the totality of the record, including the operation of CR 36.01, we cannot conclude that genuine issues of material fact remain for adjudication.

Summary judgment “shall be rendered forthwith 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.” CR 56.03. “The record must be viewed 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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to the Weisses and resolving all doubts in their favor, we cannot conclude that the trial court erred in determining that there were no genuine issue as to any material fact and that Walker was entitled to a judgment as a matter of law.

The Weisses also argue that their Rebuttal constituted a Counterclaim, upon which they were entitled to a Default Judgment. In rejecting this argument, the trial court determined that the Rebuttal did not constitute a Counterclaim. We find no error with this conclusion. The Weisses’ Rebuttal is not a pleading in

conformity with CR 7.01, does not set forth a claim for damages and is not properly characterized as a Counterclaim. Additionally, the very language of the Rebuttal demonstrates that it is not a Counterclaim, as the Weisses state therein that “if Mr. Walker continues to insist on this frivolous suit, *we will have to counter* on our behalf for damages to the property and a loss of use of said property, and the inability of completing the function that the property was purchased for.” (Emphasis added). In both form and function, the Weisses’ Rebuttal does not assert a claim for damages against Walker and is not properly characterized as a Counterclaim, and the trial court did not err in so ruling. We find no error.

For the foregoing reasons, we affirm the Summary Judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Adam C. Riley
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas M. Todd
Lexington, Kentucky