RENDERED: JULY 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-000856-MR
AND
NO. 2012-CA-000893-MR

LAURA FULKERSON — APPELLANT/CROSS-APPELLEE

v.

MOORE PROPERTY INVESTMENTS, LLC — APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 11-CI-002310

OPINION
REVERSING IN PART, VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Laura Fulkerson appeals from a summary judgment determining her liability for past-due additional rent, declaring her notice was insufficient to exercise an option to purchase and denying her counterclaims.

Moore Property Investments, L.L.C., cross-appeals from an award of only a portion of its requested attorney fees.

Veterinarians Todd Yates[1] and Fulkerson entered into negotiations in June 2009, to rent Suite B, in a shopping center owned by Moore Property Investments. Pursuant to the proposal, the five-year lease would commence after completion of the veterinary clinic or when it opened for business. The lease included base rent of $5,000 a month and a fluctuating amount of additional rent consisting of the the clinic's leasehold percentage of common area maintenance (CAM) fees and taxes. A set monthly amount of $750 for additional rent was stated in the lease agreement, but it was subject to being adjusted after actual expenses were paid, with a deficit amount to be collected at the beginning of the year and a new set amount specified based on the prior year's expenses. The lease agreement also provided for Moore Property Investments to recover its reasonable legal fees in the event it had to retain an attorney to enforce the provisions of the lease, bring a legal action against the tenant or defend any action brought by the tenant.

Before finalizing the lease agreement, Yates and Fulkerson inquired about the amount they would have to pay in additional rent. Through an e-mail, Moore Property Investments' leasing agent, Mark G. Wardlaw, provided an estimate as follows:

[1] Yates was removed as a party to the appeal after he filed bankruptcy.

> The CAM estimate is $121.20/month for insurance, common area maintenance, etc. . . .
>
> Taxes are $627.00/ mo. Shawn just won an appeal and had the assessment lowered. That number should be good for several years.
>
> Total CAM & Taxes is therefore $748.20/mo. This comes in at $2.49/sf which is about average ($2.50 to $3.00/sf) for most shopping centers in the area.

Yates and Fulkerson planned to make significant improvements to the property to convert it into a veterinary clinic. To protect this investment, they also negotiated a lease to purchase an option agreement for Suite B for $5,000 with a purchase price of $735,126, with $1,400 from each monthly lease payment to be credited against the purchase price at closing. Under the terms of the option agreement, Yates and Fulkerson had until December 31, 2010, to exercise the option in the following manner:

> 3. NOTICE REQUIRED TO EXERCISE OPTION. Buyer/Tenant may only exercise this option to purchase by delivering written notice of intent to purchase to Seller/Landlord. Such notice must specify a closing date to occur prior to the original Termination Date set forth in the Lease Agreement or the option expiration date set forth in paragraph 1 herein above, whichever is later in time.

As the lease term was for five years after Yates and Fulkerson opened the clinic for business, there was a lengthy period of time in which the closing date could be set. The option agreement also specified Moore Property Investments could terminate the option if Yates and Fulkerson were in default of the option agreement or failed to comply with the terms and conditions of the lease agreement at the time the

option was exercised, time is of the essence in the option agreement and performance of the option agreement was not conditioned on the availability of financing. The parties agreed if the option was exercised they would "execute a Contract for Deed in form reasonably acceptable to both parties for the full purchase price[.]"

The parties signed the lease agreement and the option agreement on July 15, 2009. Yates and Fulkerson spent $183,853.67 to improve the leasehold property and planned to exercise their option to purchase the property. They consulted with their lender, who performed a title search and determined the property was not subdivided. The lender refused to set a closing date for a loan to purchase the property because Moore Property Investments did not have the current ability to convey title.

On December 22, 2010, Yates and Fulkerson sent a letter to Moore Property Investments advising they were exercising their right to purchase the property but did not state a closing date as required by the option agreement. Yates and Fulkerson orally advised Moore Property Investments that they were unable to provide a date for the closing because Moore Property Investments had taken no steps toward subdividing the property, but were ready and able to close as soon as the property was subdivided.

On January 19, 2011, Moore Property Investments revised the additional rent amount based on the amount of CAM and taxes it paid the previous year. Yates and Fulkerson were provided with a list of total maintenance costs for

2010 that totaled $41,386.71. This list included substantial amounts for electricity ($2,498.79), waste disposal ($1,353.24), water ($1,398.43), insurance ($3,518.88), lawn service ($2,565), county property tax ($17,285.48), city property tax ($2,496.14), roofing ($4,138.75) and snow removal ($4,617). It also included smaller, non-recurring charges. After the list of maintenance charges was corrected to remove the cost of roofing, their additional rent totaled $19,948.42, resulting in a deficiency of $10,948.42. The actual CAM expenses were roughly seven times higher than Moore Property Investments' estimate of CAM expenses or initial CAM fee in the lease.

In January 2011, Moore Property Investments informed Yates and Fulkerson their new additional rent amount would be $1,454.75 per month. Moore Property Investments also informed Yates and Fulkerson their notice attempting to exercise the option was invalid because it failed to provide a closing date.

Yates and Fulkerson continued to pay their $5,000 base rent and $750 in additional rent which Moore Property Investments accepted. They have not paid their deficiency amount or the increased additional rent amount, although they have placed an additional amount in escrow which they believe constitutes a reasonable increase for additional rent.

The complaint was filed on March 31, 2011. Yates and Fulkerson timely filed an answer and counterclaim.

On October 18, 2011, Moore Property Investments was granted leave to file an amended complaint. Moore Property Investments claimed Yates and

Fulkerson breached their contract by failing to pay the total amount of additional rent due, sought the deficiency amount and a declaration the option was not properly exercised, and attorney fees pursuant to the lease agreement. Yates and Fulkerson timely filed their answer.

On January 18, 2012, Yates and Fulkerson were granted leave to file an amended answer and counterclaim. In their answer, they denied breaching the lease agreement or failing to give proper notice to exercise the option and alleged Moore Property Investments breached the lease agreement and option agreement. They further alleged Moore Property Investments made material misrepresentations regarding the monthly amount of CAM and taxes, wrongfully executed an option agreement for premises it was unable to convey and, but for these inducements, they would not have entered into the lease agreement. They sought rescission and damages to recover their leasehold improvements, relocation costs, economic losses, costs and attorney fees.

On February 14, 2012, before any discovery had been conducted by Yates and Fulkerson or any discovery order had been entered, Moore Property Investments filed a motion for summary judgment without supporting affidavits. Moore Property Investments argued Yates and Fulkerson had no defense to the payment of additional rent as agreed in the lease agreement, the option agreement required strict compliance and a closing date, and there was no impossibility to fixing a closing date when the property could be conveyed as a condominium.

Yates and Fulkerson argued they were fraudulently induced to enter into the lease agreement on the basis of the (1) additional rent estimate and (2) option agreement. They argued Moore Property Investments' additional rent estimate was fraudulent because it had a historical basis for determining at least a portion of the costs based on Shawn Moore's operation of his dental practice in the shopping center and, if it had investigated any of the services the property required, it would have realized its estimate was grossly inaccurate. They argued they were assured they could effectively exercise the option agreement to purchase a subdivided, fee simple portion of the shopping complex, but Moore Property Investments made such an action impossible by failing to subdivide the property.

Yates and Fulkerson filed affidavits in which they stated the amount of the additional rent was essential to their decision to enter into the lease, they relied on the e-mail estimate of monthly additional rents when they entered into the lease, and they relied on the option agreement in entering into the lease and investing in renovating the space.

In Moore Property Investments' reply, it filed Wardlaw's affidavit stating Moore Property Investments did not have historical operating expenses from the shopping center's previous owners and had not previously leased the premises to determine an estimate of CAM expenses, so he conducted a survey of shopping centers in the area. He did not detail what these surveys entailed, whether they were of comparably sized properties or whether there were historical operating expenses for Moore's dental practice on the property prior to the lease.

The trial court granted Moore Property Investments' motion for summary judgment on all issues. The court determined Yates and Fulkerson could not establish fraudulent inducement to enter the contract because as sophisticated parties, they were in a position to negotiate a cap on the additional rent amount and knew the amount due under this provision was only an estimate that would fluctuate. The trial court found the e-mail estimate of the additional rent amount was not a material misrepresentation made with knowledge of falsity or reckless disregard for the truth.

The trial court also declared Yates and Fulkerson could not exercise the option to purchase because they failed to provide a closing date as required before the option expired on December 31, 2010. While Yates and Fulkerson attempted to excuse their noncompliance because the property was not yet subdivided and, therefore, their lender was unwilling to set a closing date, the court found this did not excuse their obligation to set a closing date or establish frustration of purpose.

The trial court awarded Moore Property Investments $8,509.20 for additional rent for 2010, $7,737.33 for additional rent for 2011, plus a 5% administrative fee per the lease, granted it attorney fees and granted it summary judgment on the counterclaims. Fulkerson appealed.

In a separate order, the trial court awarded Moore Property Investments $15,000 in attorney fees, less than half the amount requested. Moore Property Investments filed a cross-appeal.

Summary judgment should be granted "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." Kentucky Rules of Civil Procedure (CR) 56.03. "The 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); CR 56.03. Granting of a summary judgment motion "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "Absent a sufficient opportunity to develop the facts . . . summary judgment cannot be used as a tool to terminate the litigation." *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky.App. 2007).

Fulkerson argues the trial court erred by granting Moore Property Investments summary judgment dismissing her claim of fraud in the inducement based on the misrepresentation of the CAM and the option.

> In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or

made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury.

*United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). Fraud is committed by intentionally asserting false information or willfully failing to disclose the truth. *Id.* at 469.

The general rule is mere statements of opinion or prediction of future events or conduct is not sufficient to establish fraud. *Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544, 552 (Ky. 2009); *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 640 (Ky.App. 2003). There is an exception to this general rule when the opinion maker "purports to have special knowledge of the matter that the recipient does not have[.]" *Flegles*, 289 S.W.3d at 551 (quoting the Restatement (Second) of Torts § 542 (1977)).

Fulkerson argues Moore Property Investments had almost two full years of operating expenses for the complex from which to estimate CAM expenses and Moore Property Investments was in a position to reasonably know the costs of CAM and taxes. Fulkerson contends she had no similar knowledge so it was reasonable for her to rely on the estimate given.

Before summary judgment can be properly granted, the opposing party must have an adequate opportunity to discover the relevant facts to oppose the motion. *Suter*, 226 S.W.3d at 842. Given the close proximity of the motion for summary judgment to the filing of the amended complaint and amended answer and counterclaim, this case is still in a relatively early stage. Additionally, there was

no pretrial discovery order. Therefore, Fulkerson did not have an adequate opportunity to conduct discovery before the motion for summary judgment was filed.

Because Fulkerson has not yet conducted discovery and Moore Property Investments did not submit affidavits detailing the exact base of knowledge it had prior to submitting the e-mail estimating CAM expenses and taxes, it is unclear what historical data Moore Property Investments had of the cost to operate the property at the time its agent made the additional rent estimate or how the survey was conducted to estimate CAM expenses. Discovery is needed to address whether Wardlaw's estimate was false or made recklessly, or in fact was reasonable under the circumstances. Accordingly, the grant of summary judgment on this issue was premature, and we reverse. On remand, the trial court shall afford Fulkerson a reasonable time to complete discovery before considering summary judgment motions by either party.

Fulkerson argues the circuit court erred by finding she could not exercise the option to purchase because she gave notice and substantially complied and, even if the option was not properly exercised, it should be upheld under equitable considerations. We determine summary judgment should not have been granted on this issue because Fulkerson's notice was sufficient to exercise the option under the circumstances.

This resolution requires interpreting the confluence of the seller's obligation to provide a marketable title and the buyer's obligation to strictly meet

the requirements for exercising the option. Contracts to sell property require the seller to convey a marketable title in order for the buyer to be obligated to perform. *Massey v. Fischer*, 245 S.W.2d 594, 596 (Ky. 1952); *Jackson v. Lamb's Ex'r*, 299 Ky. 505, 509, 186 S.W.2d 9, 11 (1945). Similarly, option agreements contain an implied obligation to convey a marketable title even when they are silent as to the type of conveyance required. *Bldg. Indus., Inc. v. Wright Products, Inc.*, 240 Minn. 473, 476-477, 62 N.W.2d 208, 210 (1953). A seller should be prepared to convey good title or furnish evidence of good title upon exercise of the option. *Eychanger v. Springer*, 34 Colo. App. 412, 414, 527 P.2d 903, 904 (1974); *Overboe v. Overboe*, 160 N.W.2d 650, 655 (N.D. 1968). A contract to sell property is still valid where the seller is not able to convey perfect title at the time the contract is entered into, so long as the seller can tender title within the time fixed for performance. *Schmidt v. Martin*, 199 Ky. 782, 251 S.W. 999, 1001 (1923); *Nolan v. Highbaugh*, 196 Ky. 563, 245 S.W. 146, 148 (1922).

Generally, for a purchaser to have the right to purchase property pursuant to an option agreement, the option must be properly exercised in accordance to its terms and conditions. *Phelps v. Gover*, 394 S.W.2d 927, 928 (Ky. 1965). This includes complying with any express or implied time is of the essence requirement. *See Rounds v. Owensboro Ferry Co.*, 253 Ky. 301, 69 S.W.2d 350, 354 (1934) (determining time is generally of the essence in an option contract to purchase property). When time is of the essence in a contract, the failure to comply within

the time period specified makes it optional for the other party to carry out the contract. *Browning v. Huff*, 204 Ky. 13, 263 S.W. 661, 663 (1924).

However, a seller can only enforce strict requirements for the timely exercise of an option if the seller has first complied with its obligations under the option agreement. *See Phelps*, 394 S.W.2d at 928-929 (determining buyers forfeited their right to exercise the option by failing to act within the time period for exercising their option after sellers complied with their obligation by tendering the deed); *Rounds*, 69 S.W.2d at 356 (rejecting an untimely exercise of an option to renew a lease where no ameliorating circumstances excused the neglect, but discussing that equitable considerations may allow the lessee to renew a lease where the failure to timely exercise the option was caused by some act or conduct on the part of the lessor).

A delay caused by a defect in title will excuse timely performance in exercising an option by the buyer. *English v. Muller*, 270 Ga. 876, 514 S.E.2d 194, 195 (1999); *Jackson v. L.D. McReynolds, Inc*., 430 So.2d 873, 876 (Ala. 1983). A party whose conduct causes the delay waives time being of the essence. *English,* 270 Ga. at 876, 514 S.E.2d at 195. *See Erin Food Servs., Inc. v. Derry Motel, Inc.*, 131 N.H. 353, 359-361, 553 A.2d 304, 307-309 (1988) (determining optionor's delay of obtaining required subdivision prior to closing waived any requirement that time be of the essence in the optionee's completing of the closing, thus the closing only needed to take place within a reasonable period of time absent a showing another result would prejudice the optionor). Therefore, the seller's

failure to comply with its responsibilities under the contract will excuse the buyer's specific performance if the buyer was ready and able to perform otherwise, but for the seller's failure. *See Kimm v. Andrews*, 270 Md. 601, 614-615, 313 A.2d 466, 473-474 (applying this general proposition to excuse strict compliance in the exercise of an option agreement).

The parties agree Moore Property Investments has not taken any steps to subdivide the property and, thus, could not convey marketable title on the date the option was exercised. Assuming the option agreement could be satisfied by Moore Property Investments conveying title through a condominium scheme, Moore Property Investments could not convey Suite B as a condominium because it has not recorded a master deed and unit deeds for Suite A and B in accordance with Kentucky Revised Statutes (KRS) 381.815 and KRS 381.835. *See Steenrod v. Louisville Yacht Club Ass'n, Inc.*, 417 S.W.3d 234, 235-236 (Ky.App. 2013).

Under the terms of the option agreement, Yates and Fulkerson were entitled to name any closing date in their notice exercising the option up until the termination date of the lease. Therefore, they would have been within their rights to name a closing date the day after they gave notice exercising the option. However, Moore Property Investments could not have timely conveyed a marketable title if called on to do at that time even if it immediately took steps to subdivide the property.[2]

[2] We do not decide whether Moore Property Investments was obligated to subdivide the property under a condominium scheme or through a minor subdivision plat. While subdivision under a condominium scheme would undoubtedly be much faster than through a minor subdivision plot, we are confident it could not be accomplished before an immediate closing date, even though no

Moore Property Investments argues any problem Yates and Fulkerson had in being unable set a closing date because its lender would not set a closing date before the property was subdivided could be remedied by Yates and Fulkerson setting a distant closing date. It explains a distant closing date would enable Moore Property Investments ample time to subdivide and then, after it subdivided, would give Yates and Moore sufficient time to obtain financing in advance of the established closing date. Therefore, Moore Property Investments relied upon Yates and Moore setting a sufficiently future closing date so it would have time to subdivide after receiving notice of the exercise of the option, rather than being prepared to convey title as soon as the option was exercised.

Yates and Fulkerson stated their willingness and ability to close as soon as the property was subdivided. We determine Moore Property Investments' failure to subdivide was the only impediment preventing Yates and Fulkerson from setting a closing date. Therefore, the failure to subdivide the property waived Moore Property Investments' right to enforce the requirement that time was of the essence in setting a closing date in the notice exercising the option. Accordingly, on the basis of the undisputed facts before us, we deem Fulkerson's timely notice on December 22, 2010, as sufficient to properly exercise the option and reverse the

---

evidence has been presented as to how quickly either method of subdivision could be completed. We leave it to the circuit court to resolve what type of property was to be conveyed through exercise of the option agreement.

circuit court's grant of summary judgment declaring the option agreement was not properly exercised.[3]

We do not address Fulkerson's final argument that the trial court erred by allowing Moore Property Investments to collect CAM that was seven times higher than the amount represented to her on the basis of equitable estoppel because our reversing the summary judgment renders it moot. Fulkerson may raise this defense before the trial court on remand.

In light of our previous determination that summary judgment was not appropriately granted, we vacate the award of attorney fees as premature and do not consider whether the trial court erred in the amount awarded.

Accordingly, we reverse the Jefferson Circuit Court's grant of summary judgment to Moore Property Investments determining that Yates and Fulkerson are liable for past-due additional rent and declaring the notice exercising the option to purchase is void, vacate the order granting attorney fees and remand for discovery and further proceedings.

ALL CONCUR.

[3] Because Yates and Fulkerson were in compliance with the lease agreement at the time the option was exercised, it appears Fulkerson would be entitled to enforce the option agreement if the facts are indeed undisputed as to Fulkerson's ability and willingness to exercise the option immediately after giving notice, but for the failure to subdivide. Therefore, her notice would be effective to exercise the option after both parties are given a reasonable amount of time to comply with their obligations under the option agreement. However, it does not appear that Fulkerson is currently seeking specific performance of the option agreement.

BRIEFS FOR APPELLANT/
CROSS-APPELLEE:

Rebecca D. Northup
Harold W. Thomas
Louisville, Kentucky

BRIEFS FOR APPELLEE/
CROSS-APPELLANT:

Sara Veeneman
Gregory S. Berman
J. Brooken Smith
Louisville, Kentucky