

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000132-MR

B.G. PROPERTIES, INC.

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 12-CI-00467

AEP INDUSTRIES, INC.

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: B.G. Properties, Inc. (BG) brings this appeal from a December 19, 2012, Order of the Warren Circuit Court rendering summary judgment ordering specific performance of an option to purchase industrial real property. We vacate and remand.

BG owns an industrial building situated upon 19.69 acres in Bowling Green, Kentucky. AEP Properties, Inc. (AEP) and BG entered into several

agreements concerning AEP's sublease of the industrial property and AEP's option to purchase the industrial property dating back to 1990.¹

Relevant to this appeal are two agreements executed between the parties; these are (1) the Consent to Assignment of Lease and Grant of Option to Purchase entered into in 2001, and, (2) the Agreement Modifying Sublease and Option entered into in 2010.² Under the Option, Section 4 provides that the purchase price of the industrial property was to be determined by the:

4. [F]air market value based on its highest and best use, plus the value of all special features and fixtures located therein for AEP's use as an extrusion and flexible packaging manufacturing facility.

Agreement Modifying Sublease and Option at p. 4. Additionally, if AEP exercised its rights under the Option, the Option provided that the parties would initially attempt to negotiate a purchase price of the industrial property. If the parties' failed to do so, the Option then required BG to obtain an appraisal of the industrial property and deliver it to AEP. If AEP rejected BG's appraisal, the Option mandated that AEP would then obtain its own appraisal of the industrial property and deliver it to BG. Thereafter, the Option specifically provided:

If the parties are not able to agree as to purchase price based upon the two (2) appraisers, they shall then request the two appraisers to select a third appraiser The

¹ AEP Industries, Inc., is the ultimate successor-in-interest to Cello Bag Co., Inc. (Cello). The primary lease of the subject property was between the Bowling Green-Warren County Industrial Foundation and B.G. Properties, Inc. (BG), and the original sublease was between BG and Cello. BG acquired title to the property in May 2011.

² Throughout this Opinion, we will refer to the Consent to Assignment of Lease and Grant of Option to Purchase and the Agreement Modifying Sublease and Option collectively as the "Option".

appraised fair market value as established by the third appraiser shall be the purchase price and shall be final and binding on the parties.

Consent to Assignment and Lease and Grant of Option to Purchase at p. 4.

The record indicates that in August of 2011, AEP informed BG of its intent to exercise its rights under the Option, and the parties unsuccessfully attempted to negotiate a purchase price for the industrial property. Thereafter, BG obtained an appraisal of the industrial property by Harold Brantley. Brantley valued the industrial property at \$7,500,000. AEP rejected the appraisal and obtained its own appraisal from CBRE. CBRE valued the industrial property at \$3,550,000. When BG rejected this appraisal, AEP then sought to commence the process of selecting a third appraiser. However, BG claimed that CBRE's appraisal of the industrial property was not in accordance with Section 4 of the Option and that AEG breached the Option by failing to obtain an appraisal in conformity with Section 4. As a result, BG refused to cooperate in appointing a third appraiser and insisted that AEP obtain an appraisal compliant with Section 4.

AEP then filed a Complaint For Declaratory Judgment in the Warren Circuit Court. Therein, AEP claimed that BG materially breached the terms of the Option by not participating in the appointment of a third appraiser and sought to compel BG to participate in the appointment of a third appraiser. BG answered and filed a counterclaim. In the counterclaim, BG claimed, *inter alia*, that AEP materially breached the terms of the Option by failing to obtain an appraisal of the industrial property in accordance with Section 4 of the Option. In particular, BG

claimed that AEP's appraisal did not consider the highest and best use of the industrial property and the value of the special features and fixtures thereof as mandated by Section 4 of the Option.

AEP filed a motion for summary judgment seeking an order to compel BG to cooperate in appointing a third appraiser. BG opposed the motion and argued that summary judgment was premature. Therein, BG maintained, *inter alia*, that its counterclaim remained unadjudicated that AEP initially breached the terms of the Option by failing to obtain an appraisal in conformity with Section 4.

By order entered September 12, 2012, the circuit court rendered a partial summary judgment. Therein, the court ordered:

1. [BG's] motion for partial summary judgment on the issue pertaining to the selection of the third appraiser is GRANTED;
2. The parties shall appoint the third independent appraiser within seven days of the entry of this Order;
3. The appraiser shall independently appraise the subject real property to determine its fair market value based on its highest and best use, plus the value of all special features and fixtures located therein for AEP's use as an extrusion and flexible packaging manufacturing facility;
4. The appraisal shall be conducted in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP) and shall set forth in detail the basis for his/her value conclusion including but not limited to the roof;
5. The appraisal shall be completed by October 1, 2012[,] and distributed to the parties;

6. All other motions pending before the Court shall be held in abeyance at this time.

Pursuant to the September 12, 2012, order, BG and AEP selected G. Herbert Pritchett as the third appraiser. Pritchett valued the industrial property at \$3,834,000. AEP then filed a motion to compel BG to close immediately upon the sale of the industrial property at a purchase price of \$3,834,000 and to award it \$407,987.37 in rent credit due to BG's failure to comply with the Option. BG filed a response and argued that AEP was not entitled to the relief it sought; rather, BG argued that AEP breached the terms of the Option by failing to obtain an appraisal in accordance with Section 4. AEP pointed out that its counterclaims remained adjudicated. BG also maintained that Prichertt's appraisal was deficient in many respects and did not conform to the Option.

By order entered December 19, 2012, the circuit court rendered a partial summary judgment ordering BG to convey by deed the industrial property to AEP for the total purchase price of \$3,426,012.63. In so ordering, the court awarded AEP a rent credit of \$407,987.37 and deducted said sum from the third appraisal of \$3,834,000 to arrive at the purchase price of the industrial property. BG counterclaims remained adjudicated; however, the court included complete Kentucky Rules of Civil Procedure (CR) 54.02 language in the December 19, 2012, order. This appeal follows.

BG contends that the circuit court erred by rendering summary judgment ordering it to convey the industrial property to AEP for the purchase

price of \$3,426,012.63. Having reviewed the applicable law and facts herein, we conclude that the circuit court committed an error of law by rendering summary judgment ordering specific performance under the Option without initially adjudicating BG's counterclaim that AEP breached the Option.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Resolution of this appeal is dependent upon an issue of law, and our review proceeds *de novo*.

As noted by AEP in its brief and as emphasized by AEP's counsel at oral argument, this is a specific performance case. In Kentucky, the law is well-settled that specific performance of a contract will only be granted where the party seeking same has complied with all terms of the contract. *West Ky. Coal Co. v. J.D. Nourse*, 320 S.W.2d 311 (Ky. 1959); *see also Puritan Homes, Inc. v. Abell*, 432 S.W.2d 632 (Ky. 1968). And, to be entitled to specific performance compelling the sale of real property, all conditions precedent to the sale must have been complied with by the party seeking such specific performance. *25 Williston on Contracts* § 67:73 (4th ed. 2013).

In the case *sub judice*, the circuit court rendered summary judgment compelling BG to participate in the appointment of a third appraiser and then compelled BG to convey the industrial property to AEP. In so doing, the circuit court granted AEP specific performance under the terms of the Option. However,

it appears that BG's counterclaims have not been adjudicated by the circuit court; particularly, BG's counterclaim that AEP breached the terms of the Option by failing to obtain an appraisal in conformity with Section 4 of the Option.³ As previously pointed out, the Option required AEP to obtain the appraisal after it rejected BG's appraisal.

If BG's counterclaim is meritorious and AEP's appraisal does not comport with Section 4 of the Option, AEP may have breached a material term of the Option and under Kentucky law would not be entitled to the remedy of specific performance. *See Nourse*, 320 S.W.2d 311. Additionally, under the terms of the Option, the obtaining of appraisals, including AEP's appraisal, constituted conditions precedent to the conveyance of the industrial property. If AEP failed to fully comply with its obligation of obtaining an appraisal in accordance with the terms of the Option, AEP may have breached a condition precedent to the sale of the industrial property under the Option and would not be entitled to the remedy of specific performance.⁴ Hence, we conclude that the circuit court committed an error of law by ordering BG to specifically perform and convey the industrial property to AEP without initially ruling upon BG's counterclaim that AEP breached a material term of the Option by failing to obtain an appraisal in conformity with Section 4 of the Option.

³ We have searched the circuit court record on appeal and could not locate any orders of the circuit court disposing of B.G. Properties, Inc.'s counterclaims.

⁴ Although not bound by, we view the reasoning of *M. Jabbour v. Bassatne*, 673 A.2d 201 (D.C. 1996) as sound.

AEP argues that this appeal is moot because BG failed to post a supersedeas bond to preclude enforcement of the court's order entered December 19, 2012, and the subsequent transfer of the property to AEP. In *Dreamers LLC v. Don's Lumber & Hardware, Inc.*, 366 S.W.3d 381 (Ky. 2011), the Kentucky Supreme Court recently discussed the failure to post a supersedeas bond:

It has long been the law in Kentucky that “a party . . . does not need to post a supersedeas bond to take an appeal from a judgment,” though “[t]he failure to post a bond . . . leaves the party who obtained the judgment free to execute on it.” (Quoting *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 419-20 (Ky. 2005)).

Id. at 384.

In *Dreamers*, the appellant elected to pay a judgment in full where there otherwise had been no settlement or compromise of the dispute, while reserving its right to appeal. *Dreamers*, 366 S.W.3d 381. We can find no distinguishable difference in the facts of this case where the court has ordered the transfer of the property, notwithstanding that contractual disputes remain between the parties as set out in the counterclaim. To rule otherwise would effectively mean any losing party in litigation who failed to file a supersedeas bond on a judgment would lose the right to an appeal, if the judgment is enforced. That would then raise a constitutional issue not before this Court and otherwise is simply not the law in Kentucky.⁵

⁵ Every adversely affected litigant is entitled to one appeal of right in Kentucky. Kentucky Constitution Section 115. See *JP Morgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902 (Ky. 2014).

We view BG's remaining contentions of error as moot.

Accordingly, we vacate the September 12, 2012, and December 19, 2012, Orders and remand to the Warren Circuit Court. We hold that the circuit court erred as a matter of law by ordering specific performance under the Option without initially considering BG's counterclaim that AEP breached Section 4 of the Option.

For the foregoing reasons, the Orders of the Warren Circuit Court are vacated and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

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