

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001771-MR

LAWRENCE M. MORTON; HOPE T. MORTON;
AND FRED E. PETERS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 09-CI-04843

CAROLYN GAGO AND VICTOR GAGO

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Lawrence M. Morton, Hope T. Morton and Fred E. Peters
appeal from an Order Denying Attorney's Fees rendered in Fayette Circuit Court.
They contend that the circuit court improperly failed to conclude that Carolyn
Gago defaulted on the parties' real estate sales contract, thus entitling the Mortons

to an award of attorney's fees. We find no error, and AFFIRM the Order on appeal.

In 2008, Carolyn Gago entered into a real estate sales contract to purchase a parcel of residential real property owned by Lawrence M. and Hope T. Morton.¹ During a general inspection of the property, Gago noticed a half-inch- to inch-wide crack at the bottom of the fiberglass swimming pool. Gago brought this to the attention of the Morton's real estate agent, Rick Queen, who also served as Gago's agent. The Mortons agreed to fix the crack prior to closing and this term was incorporated into the contract. The Mortons then hired someone to fix the crack with pool putty. After the crack was repaired, Gago signed a final walkthrough form and the parties closed on September 12, 2008.

About three months later, Gago noticed that the water level of the pool was falling. She then had the pool inspected by Swim Pro, Mid-America Pools of Cincinnati and Backyard Pools of Nicholasville. A Mid-America representative apparently told Gago that the integrity of the pool walls had been compromised because the water had leaked out. In July, 2009, Gago had the pool replaced at a cost of \$49,000.

After a series of communications with Queen and apparent attempts to resolve the issue, the Gagos filed the instant action against the Mortons, Queen and his employer, Turftown Properties, Inc., and the Morton's pool repairman. The Complaint alleged that the Mortons breached the real estate sales contract and set

¹ Victor Gago did not execute the contract, but is a party to the deed.

out fraud claims arising from the Mortons' alleged failure to fully disclose the condition of the pool and to properly repair the pool.

The matter proceeded in Fayette Circuit Court, whereupon the Mortons, Queen and Turftown Properties, Inc. moved for a Directed Verdict because of a lack of proof of causation between the leak and the pool's ultimate failure. They alleged that a latent defect, i.e., rotted timbers beneath the fiberglass sides of the pool, compromised the structural integrity of the pool and that this latent defect existed prior to closing.

On March 22, 2013, the Fayette Circuit Court rendered an Order Granting Directed Verdict. In support of the Order, the court determined that in the absence of expert testimony, the jury would be required to merely speculate as to whether the crack resulted in the damages (i.e., the full replacement cost of the pool), especially since the evidence showed that the walls of the pool had already deteriorated beyond repair.

Thereafter, the Mortons filed a motion to recover their attorney's fees from Gago. As a basis for the motion, the Mortons directed the court's attention to Paragraph 19 of the contract, which stated that upon the event of a default, and if legal action should follow, the prevailing party shall be entitled to recover from the losing party all costs and attorney's fees. The Mortons contended that Gago "defaulted" under the contract by filing a lawsuit relating to the leaking pool after she had consummated the sale at closing. Specifically, the Mortons alleged that

Gago "defaulted on Paragraph 7(d)(3), which required that the Appellee to accept [sic] the property in its 'As-Is' condition."

The Motion was heard, taken under consideration and denied on August 27, 2013. In denying the request for attorney's fees, the court determined that Gago did not default under the terms of the contract by failing to accept the parcel in "as-is" condition; therefore, the attorney fee provision of the contract was not implicated. Additionally, the court found that the contract was executed at the time of closing on September 12, 2008, and that it was a legal impossibility for Gago to "default" on the contract after it had been executed. Finally, the court found that the merger doctrine rendered the contract's attorney fee provision moot because the delivery and acceptance of the deed extinguished the provisions of the underlying real estate sales contract. This appeal followed.

The Mortons now argue that the circuit court erred in denying their motion for attorney's fees. They contend that the trial court erred in holding that the exclusive default contemplated by the agreement was default on payment or surrender of the property. The Mortons maintain that even though the primary purpose of the contract - i.e., the transfer of title - was fulfilled, the remaining terms of the contract were still a viable basis for litigation contemplated by the contract. The Mortons argue that the present litigation arose under the contract, that the contract entitles the prevailing party to recover attorney's fees, and the circuit court erred in failing to so rule.

Resolution of this issue centers on the application of Paragraph 19 of the sales contract. It states: "**Default**: in the event of default, the parties may pursue all available legal remedies. Should a default occur and legal action is instituted, the prevailing party shall be entitled to recover all costs, including a reasonable attorney's fee." The Mortons contend that Gago defaulted under the terms of the contract by failing to accept the parcel in "as-is" condition, thereby implicating Paragraph 19.

We do not find this argument persuasive. Paragraph 19 does not provide for the recovery of attorney's fees in the event of litigation. Rather, it expressly provides that the prevailing party shall be entitled to recover reasonable attorney's fees "in the event of default." It is uncontroverted, however, that the action below did not result in a Judgment that either party defaulted on the contract. Rather, Gago's Complaint resulted in a Directed Verdict in favor of the Mortons.

Where there is no ambiguity, a contract must be strictly enforced according to its terms which are to be interpreted by giving language its ordinary meaning without resorting to extrinsic evidence. *Island Creek Coal Company v. Wells*, 113 S.W.3d 100, 104 (Ky. 2003). Paragraph 19 is not ambiguous. It provides for the recovery of attorney's fees "in the event of default." The Fayette Circuit Court determined that the Mortons did not default on the contract. That determination is supported by the record, and its conclusion of law as to attorney's fees is supported by *Island Creek* and the sales agreement. We find no error.

The Mortons also argue that the circuit court erred in concluding that the merger doctrine operates to extinguish contract claims after delivery and acceptance of the deed. "[U]nder the merger doctrine, upon delivery and acceptance of a deed the deed extinguishes or supercedes the provisions of the underlying contract for the conveyance of the realty." *Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC*, 182 S.W.3d 529, 532 (Ky. App. 2005)(quoting *Drees Co. v. Osburg*, 144 S.W.3d 831, 832 Ky. App. 2003)). The Fayette Circuit Court correctly applied the merger doctrine to the facts at bar. However, as we have determined that the sales contract does not support an award of attorney's fees except in the event of default, and having found that there has been no judicial determination of a default, we hold this argument as moot.

Lastly, the Mortons maintain that the trial court's Directed Verdict in favor of the Mortons does not bar the recovery of attorney's fees, as this action arose from an allegation of default. They contend that Paragraph 19 provides that the prevailing party in an action based on default is entitled to recover attorney's fees. This is a reiteration of their first argument. Again, we cannot impose upon the clear and unambiguous contract language our subjective determination of what the parties *might* have agreed to or *could* have agreed to as it relates to attorney's fees. Rather, we must constrain our review to what the parties *did* agree to on this issue. *Island Creek Coal Company, supra*. The parties employed clear and unambiguous language that the prevailing party was entitled to attorney's fees in

"the event of default." As no default occurred, attorney's fees are not implicated and the circuit court properly so found. We find no error.

For the foregoing reasons, we AFFIRM the Order Denying Attorney's Fees of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred E. Peters
Lexington, Kentucky

BRIEF FOR APPELLEE:

James M. Mooney
Jeremy J. Sylvester
Nicholasville, Kentucky