RENDERED: DECEMBER 24, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001804-MR

RENA SINGLETON — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 13-CI-00214

LINDA G. POLLOCK,
EXECUTRIX OF THE ESTATE OF MARY BARHAM
APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KRAMER[1] AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellant, Rena Singleton, appeals the summary judgment issued by the Meade Circuit Court on October 15, 2013, determining that Singleton could not enforce an option agreement written into a deed. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

[1] Judge Joy A. Kramer, formerly Joy A. Moore.

On January 19, 1996, Mary Barham, now deceased, conveyed to Singleton, by deed, 175.585 acres of real property. The deed was recorded in deed book 382, page 12 of the Meade County Clerk's Office. The purchase price was $267,877.50. A clause in the deed provided as follows: "Party of second part has the option to buy adjoining land and barns for $1500.00 per acre."

Mary Barham died on November 20, 2012, and Appellee, Linda G. Pollock was appointed as Executrix of her estate. Barham left all of her real property equally to her four children – Linda Gail Pollock, William F. Barham, Marjorie A. Preston, and Patrick A. Barham. Singleton sent a letter on May, 2, 2013, to Pollock seeking to exercise the option to purchase. Pollock denied the request, asserting that the option was unenforceable.

Singleton filed a complaint to enforce the option pursuant to the Kentucky Declaratory Judgment Act, codified at KRS 418.040.[2] In response, Pollock argued that the description of the option as a "covenant," was incorrect, and asserted the affirmative defenses of laches, unconscionability; additionally, Pollock asserted that the option lacked the essential legal elements recognized in Kentucky to make the option binding upon her, and that the option was a personal agreement which did not extend beyond the respective lives of the parties.

[2] KRS 418.040 provides that:

> In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

Pollock then filed a motion for summary judgment. On October 15, 2013, the Meade Circuit Court entered judgment in favor of Pollock. Therein, the court held that the subject option was void for lack of the necessary formal requisites recognized under Kentucky law, and that the option was personal to the parties, namely Mary Barham and Singleton, and did not extend to Barham's heirs upon her death. It is from that order that Singleton now appeals to this Court.

On appeal, Singleton argues that the court below erred in granting summary judgment. Particularly, she takes issue with the court's determination that the "contract" between herself and Barham was terminated upon Barham's death. Singleton asserts that it is only contracts which require personal performance by the party who has died which are terminated upon death, and that the option *sub judice* was not such a contract. Singleton asserts that Pollock is as capable to perform the duties of the option contract in the same manner that Barham herself would have done had she been alive. Singleton further argues that the court below erred in relying upon *Central Bank and Trust Co. v. Kincaid*, 617 S.W.2d 32 (Ky. 1981), in finding otherwise. Accordingly, she urges this Court to reverse the order of the court below granting summary judgment to Pollock.

In response, Pollock argues that the court properly granted summary judgment. She asserts that the trial court properly ruled that the subject option was void for lack of the necessary formal requisites recognized under Kentucky law, and further, that the trial court properly ruled that the subject option was personal to the parties and did not extend to the heirs of Mary Barham. In support of that

argument, Pollock relies upon the holding of our Kentucky Supreme Court in *Kincaid*, *supra*, which we shall discuss herein, *infra.*

Prior to addressing the arguments of the parties, we briefly set forth our standard of review when reviewing the decision of a trial court to grant summary judgment. We note that pursuant to CR 56.03, the judgment sought 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. Further, it is the well-established law of this Commonwealth that summary judgment is appropriate when it appears that it would be impossible for the non-moving party to produce evidence at trial warranting judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 483 (Ky. 1991).

The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try. *See Steelvest, supra,* citing *Bonded Elevator, Inc. v. First National Bank of Louisville,* 680 S.W.2d 124 (Ky. 1983); *Hill v. Fiscal Court of Warren County,* 429 S.W.2d 419 (Ky.1968); *Williams v. Ehman,* 394 S.W.2d 905 (Ky. 1965); and *Rowland v. Miller's Adm'r,* 307 S.W.2d 3 (Ky. 1956).

Thus, on appeal, we are asked to determine whether the trial court correctly found that there were no genuine issues as to any material fact. *Lewis v. B & R Corporation,* 56 S.W.3d 432, 436 (Ky. App. 2001), *quoting Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03. Further, evidence must be viewed in a light most favorable to the party in opposition and the moving party must be entitled to judgment as a matter of law. *Lewis, supra, citing Steelvest, Inc. v. Scansteel Service Center, Inc., Id.* at 480-82.

In order to successfully oppose the motion, the nonmoving party must come forward with some affirmative evidence that a genuine issue of material fact exists. *Lewis, supra.* Our standard of review on an order of summary judgment is *de novo,* and is limited to questions of law. *Blevins v. Moran,* 12 S.W.3d 698, 700 (Ky. App. 2000). We review this matter with these standards in mind.

As our courts have previously held, not all options are enforceable contracts. In order to be valid, an option contract must contain an offer and acceptance, full and complete terms, and consideration. *Cuppy v. General Acc. Fire & Life Assur. Corp.*, 378 S.W.2d 629, 632 (Ky. App. 1964); *Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). Further, our courts have held that time is to be regarded as of the essence of options. *Kenton Coal & Oil Co. v. Petroleum Exploration*, 154 S.W.2d 556, 559 (Ky. App. 1941). An option has long been recognized not as a sale but as a right to exercise a privilege. *Three Rivers Rock Co. v. Reed Crushed Stone*, 530 S.W.2d 202 (Ky. App. 1975).

Sub judice, Singleton did not attempt to exercise the option at issue until May 2, 2013, which was more than seventeen years after the date of the option and over five months after the date of Mary Barham's death.

Below, it was within the discretion of the trial court to construe the subject deed as a matter of law, and to gather the intention of the grantor from the four corners of the instrument. *Phelps v. Sledd*, 479 S.W.2d 894 (Ky. App. 1972). We believe that the court below properly reviewed the deed and determined that the option lacked full and complete terms, and that it was not, in any event, exercised in a timely manner.

Furthermore, we note that upon review, it is clear that the option did not indicate that it was intended to be binding upon the heirs or assigns of either party. As noted by our Kentucky Supreme Court in *Kincaid*, *supra*, "There is a strong tendency to construe an option or preemption right to be limited to the lives of the parties, unless there is evidence of a contrary intent." *Kincaid* at 34 (quoting *Kuhfeld v. Kuhfeld*, 292 N.W.2d 312 (S.D. 1980)).

Upon review of the record and applicable law, we are in agreement with the court below that if the parties to the option had intended to bind their respective heirs and assigns, they should have indicated same in the language of the option. Moreover, from a practical standpoint, we note that if the subject option were allowed to stand without a termination date and were it considered to be binding upon the heirs and assignees of both parties, it would be an option of perpetual duration thus limiting the heirs and devisees from ever selling the

property. We are, accordingly, in agreement with the decision of the court below to grant summary judgment, and we affirm.[3]

Wherefore, for the foregoing reasons, we hereby affirm the October 15, 2013, order of the Meade Circuit Court granting summary judgment, the Honorable Bruce T. Butler, presiding.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Alec G. Stone
Brandenburg, Kentucky

Harry B. O' Donnell, IV
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stephen G. Hopkins
Hardinsburg, Kentucky

[3] Concerning this issue, we note that Singleton argues that Pollock did not present an argument concerning the Rule Against Perpetuities to the court below, and urges this Court to remand this matter to the court below for a determination of that matter if we find it to be an issue. As this is a matter of law, and as this Court is entitled to affirm a correct finding by the trial court even if for different reasons, we decline to do so. *See Friend v. Rees*, 696 S.W.2d 325 (Ky. App. 1985).