RENDERED: NOVEMBER 6, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001249-MR

DEBBIE BAIRD — APPELLANT

v. — APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE DAVID WILLIAMS, JUDGE
ACTION NO. 12-CI-00021

BRADLEY IRVIN; SANDRA IRVIN;
SCOT BAIRD; GOLDEN RULE-WILSON
REAL ESTATE AND AUCTION #1, LLC;
AND CHRISTOPHER B. WILSON — APPELLEES

AND — NO. 2014-CA-001250-MR

SCOT BAIRD — APPELLANT

v. — APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE DAVID WILLIAMS, JUDGE
ACTION NO. 12-CI-00021

BRADLEY IRVIN; SANDRA IRVIN;
DEBBIE BAIRD; GOLDEN RULE-WILSON
REAL ESTATE AND AUCTION #1, LLC;
AND CHRISTOPHER B. WILSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND VANMETER, JUDGES.

COMBS, JUDGE: Scot and Debbie Baird appeal the order of the Adair Circuit Court which granted summary judgment to the appellees, Bradley and Sandra Irvin.[1] After our review of the record and the law, we affirm.

In April 2011, the Irvins put their property up for auction. The Bairds became aware of it through an online advertisement indicating that the property consisted of approximately 123 acres -- but also indicating that a new survey was in progress. Along with the land, the property included a "custom brick house, creek, barns, shop and [two] tracts of timber."

The Bairds travelled from their home in LaRue County to Adair County in order to view the property. They made two visits – one in October and one on November 4, 2011, the day before the auction. During their visits, the Bairds spoke with the Irvins, their auction broker, and the surveyor who was conducting the new survey. None of them was able to provide an exact statement as to the boundaries of the property. A creek ran along a portion of the property, but none of the parties knew whether the boundary included the creek or stopped at the bank. All parties told the Bairds that a final survey was in progress and that it would define the boundaries.

[1] The summary judgment also applied to Golden Rule-Wilson Real Estate and Auction #1, LLC. However, it is not a party to this appeal.

The auction was held on November 5, 2011. Before the auction commenced, attendees were given a bidders packet informing them that a new preliminary survey had determined a reduced acreage of 107.6 acres. It also stated that the final certified survey had not been completed.

In spite of not having the final survey, the Bairds submitted the winning bid of $400,000. With the six-percent buyer's premium, the price was $424,000. The Bairds signed a contract to purchase and tendered a check in the amount of $42,400 (ten percent of the purchase price).

The day after the auction, the Bairds informed Golden Rule and the Irvins that they would not be purchasing the property. They stopped payment on the tendered check. The Irvins filed a complaint February 2, 2012, seeking specific performance of the contract. After lengthy proceedings and discovery, the Irvins filed a motion for summary judgment on February 10, 2014. The trial court granted the motion on June 13, 2014. This appeal followed.

We first address the Irvins' threshold argument that the Bairds did not designate the record pursuant to Kentucky Rule[s] of Civil Procedure (CR) 76.01. Therefore, they claim that we may not include it in our analysis and must assume that the record supports the decision of the trial court. *See Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Although we are unable to find a designation of record in the record on appeal, we extend some leniency to appellants acting *pro se*. *See Miller v. Commonwealth*, 458 S.W.2d 453 (Ky. 1970). This Court has held that we will consider an appeal in spite of

noncompliance in the designation of record when there has not been a motion to dismiss the appeal. *Beaver v. Beaver*, 551 S.W.2d 23, 24 (Ky. App. 1977). The Irvins do not claim that they were unable to brief the issue because of a lack of access to the record, but they do complain about the improper designation. Nonetheless, they rely on that very record and cite to it numerous times in their brief. We do have the record, and we do not perceive any prejudice caused by the deficiency. We have elected to overlook the deficiency in the appeal and to consider its merits in spite of the noncompliance as to designation.

We must first address the Bairds' preliminary argument that Adair County was not the proper venue in which the action should have been brought. While there is possibly some merit to this argument, the Bairds have waived their objection because lack of venue is a defense that must be raised in a timely fashion. *Jaggers v. Martin*, 490 S.W.2d 762, 763 (Ky. 1973). Although the Supreme Court did not specifically define *timely*, it recently held that a challenge to venue has been waived after "parties had made numerous appearances and discovery had already been taken." *Gibson v. Fuel Transport, Inc*., 410 S.W.3d 56, 63 (Ky. 2013). The case before us commenced on February 2, 2012. The record shows that the Bairds tendered the answer to their complaint, conducted motion practice, and participated in discovery before filing a motion on September 18, 2012, to challenge venue. Therefore, they have waived the defense of venue, and we shall not address it on appeal pursuant to the reasoning of *Gibson*, *supra.*

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 482 (Ky. 1991). The movant must prove that no genuine issue of material fact exists, and he "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*.

The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). However, in order to overcome a motion for summary judgment, the non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*. *See also* CR 56.03. On appeal, our standard of review 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). Because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Cmty. Servs., Inc*., 210 S.W.2d 188, 189 (Ky. App. 2006).

Several of the Bairds' substantive arguments essentially amount to a claim that the trial court improperly considered the evidence in finding an absence of any genuine issues of material fact. The Bairds and the Irvins entered into a contract to purchase. The Bairds rescinded the contract, and the Irvins filed an action for

specific performance; *i.e*., seeking to enforce and mandate the completion of the contract to purchase.

It has long been settled that the grounds for rescinding a contract are: "fraud, mistake, misrepresentation, total or partial incapacity of the parties to contract, duress or overreaching, illegality, or some defect or insufficiency of the property, or title thereto . . . ." *Norton v. Norton*, 294 S.W. 191, 192, 219 Ky. 612 (Ky. 1927) (*quoting Utterback v. Houser*, 213 S.W.191, 184 Ky. 789 (Ky. 1919)). "It is elementary that a contract may not be rescinded unless the non-performance, misrepresentation or breach is substantial or material. The court does not look lightly at rescission, and rescission will not be permitted for a slight or inconsequential breach." *Evergreen Land Co. v. Gatti*, 554 S.W.2d 862, 865 (Ky. App. 1977) (*cited by Payne v. Rutledge*, 391 S.W.3d 875, 880 (Ky. App. 2013)).

In arguing that there are material questions of fact that should have precluded entry of summary judgment, the Bairds basically rely on an allegation of fraudulent misrepresentation by the Irvins. In order to state a cause of action for fraudulent misrepresentation, the claimant must satisfy six elements:

> (1) that the declarant made a material representation to the plaintiff; (2) that this representation was false; (3) that the declarant knew the representation was false or made it recklessly; (4) that the declarant induced the plaintiff to act upon the misrepresentation; (5) that the plaintiff relied upon the misrepresentation; and (6) that the misrepresentation caused injury to the plaintiff.

Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544, 549 (Ky. 2009).

The Bairds assert that the Irvins intentionally misled them regarding the boundary lines of the property. They contend that if they had known that the property line stopped on the banks of Sulphur Creek, they would not have entered into the purchase contract. However, nothing in the record indicates that the Irvins, their surveyor, or their auction broker ***ever*** represented to the Bairds that the property included land beyond the banks of Sulphur Creek.

The Bairds have referred several times to the initial advertisement of the Irvins' property, which listed a creek as part of the property. However, it is a matter of record that the Bairds testified in their depositions that they visited the property twice and repeatedly asked about the boundaries. The Irvins, their surveyor, and the auction broker consistently informed the Bairds that a new survey was **in progress**. The advertisement and the bidding packet distributed at the auction both clearly stated that a final survey had not been completed. The Bairds testified that at the time of the auction, they did not know what the boundaries were. Nonetheless, they bid a purchase price of $400,000, and they entered into a contract which plainly indicated that the subject property consisted of "Tract[s] 1-7 plus all timber of the Bradley and Sandra Irvin Farm Division ***as shown by new survey***." (Emphasis added). The Bairds also testified that they were aware that the new survey was not complete. They cannot claim that they were provided with false information regarding the boundary lines.

This Court has held that when there was a question concerning the terms of a sale between parties, the plaintiff's failure to "take steps to make any further

inquiry" supported the court's finding that there were no issues of fact as to fraudulent representation. *Hidden Hills v. Parrish*, 28 S.W.3d 864, 867 (Ky. App. 2000). A bad bargain does not render a contract unenforceable. *See Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001). The Bairds testified that they sought additional information from the county PVA office but that they did not receive definitive answers. They exercised their own judgment and entered into a contract to purchase property with undetermined boundaries – perhaps a bad bargain, but still an enforceable contract. We are compelled to affirm the trial court's grant of summary judgment on this issue.

The Bairds' next argument is that the award of specific performance was improper. We disagree.

Specific performance must be utilized cautiously and should be awarded only in cases in which no fraudulent or illegal conduct occurred. *West Ky. Coal Co. v. Nourse*, 320 S.W.2d 311, 314 (Ky. 1959). The trial court awarded specific performance to the Irvins in reliance on *Morgan v. Wible*, 236 S.W.2d 472 (Ky. 1951)[2]:

> The rule is that the remedy of specific performance is a mutual one between the vendor and the vendee and it is well-settled that the vendor in a contract for the sale of land, when fully able, ready and willing to comply with his contract, may obtain a decree of specific performance of the contract in his own favor although the relief is a recovery of money. . . . While the remedy of specific performance is one which rests within the discretion of the chancellor, yet whenever the contract concerns real

[2] The trial court in its order and the Irvins in their brief refer to this case as *Wible v. Moore*. It also pieced together quotes from the case out of order. We have corrected the citation.

> estate, is certain in its terms and is capable of being enforced without hardship to either party, it is ***as much a matter of course*** for the chancellor to decree specific performance as for a court of law to award damages for its breach.

Id. at 568-69. (Internal citations omitted).

We agree that specific performance was appropriate. The Irvins have been ready, willing, and able to convey the property to the Bairds without hesitation. The Bairds have not shown any fraudulent or illegal conduct on the part of the Irvins, and they have not expressed what -- if any -- hardship they would suffer by performing the terms of the agreement. In the absence of concealment, fraud, misrepresentation or deception on the part of the seller, who also being ignorant of the actual lines of his tract, the buyer is bound by the terms of the transaction. *Hull v. Cunningham's Ex'r,* 15 Va. (1 Munf.) 330, 337 (1810). The trial court ordered that if the Bairds do not perform, the property will be sold at a Master Commissioner's auction. Therefore, in reality, the Bairds are not being forced to pay for the property. The Bairds have not provided us with any legal authority or any equitable basis which would require us to reverse the decision of the trial court.

We shall now turn to the Bairds' remaining arguments. First, they claim that the trial court gave improper weight to the complaint that they made to the Board of Auctioneers regarding Golden Rule. They object to the court's speculations that they were motivated solely by "buyer's remorse" when they filed their complaint with the Board of Auctioneers. However, we cannot determine any basis to

discern the relevance of this contention. It has no bearing on the issues of fraud, recession, or specific performance.

The Bairds did not preserve their remaining arguments. CR 76.12(4)(c)(v) requires "a statement with reference to the record showing whether the issue was properly reserved for review and, if so, in what manner" at the beginning of an argument. The purpose of this rule of preservation is to show this Court where the trial court had been given the "opportunity to correct its own error before the reviewing court considers the error itself." *Hallis v. Hallis,* 328 S.W.3d 694, 696-97 (Ky. App. 2010). Our Supreme Court has emphasized the importance of preservation: "[i]t goes without saying that errors to be considered for appellate review ***must*** be precisely preserved and identified in the lower court." *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986). (Emphasis added). The preservation rule is designed to promote judicial efficiency by sparing the reviewing court a lengthy search of the record. *Mullins v. Ashland Oil, Inc*., 389 S.W.3d 149, 153 (Ky. App. 2012).

As we acknowledged, litigants acting *pro se* are granted some degree of leniency in procedural compliance. In this case, however, the Bairds demonstrated an understanding of the civil rules as they stated in their brief: "Review of the issues presented herein was preserved for review by this Court by means of the timely filing of Appellant's Motion to Alter, Amend, or Vacate under CR 59.05." We have carefully examined the motion, and the Bairds did not raise their remaining arguments within it. The record is lengthy, consisting of sixteen

volumes and nearly three thousand pages in addition to several depositions and video recordings. Therefore, we have not reviewed the merits of the unpreserved claims. *See Hallis, supra*.

Accordingly, we conclude that the grant of summary judgment and the award of specific performance were not erroneous. We affirm the Adair Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Scot Baird, *pro se*
Debbie Baird, *pro se*
Elizabethtown, Kentucky

BRIEF FOR APPELLEES:

Theodore H. Lavit
Cameron C. Griffith
Lebanon, Kentucky