

RENDERED: OCTOBER 21, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000434-MR

BRESTER HOMES OF KENTUCKY, LLC;
BRESTER DEVELOPMENT COMPANY, LLC;
JOE BRESTER AND CAROL BRESTER

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 13-CI-00269

KENTUCKY BANK

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JONES, AND NICKELL, JUDGES.

JONES, JUDGE: This action arises out of an opinion from the Franklin Circuit Court granting Appellant's Motion for Summary Judgment based on a theory of unjust enrichment. For the reasons more fully explained below, we affirm.

I. Background

Around 2007, the Appellants, Brester Homes of Kentucky, LLC; Brester Development Company, LLC; Joe Brester; and Carol Brester (collectively referred to herein as “Brester”) began developing a residential subdivision in Frankfort, Kentucky. To fund the project, Brester executed three notes with Kentucky Bank. All three promissory notes were secured by underlying real property. These included a promissory note executed on or about January 17, 2007, for \$182,784.98 (“Note 1”), a promissory note executed on or about January 17, 2007, for \$190,795.02 (“Note 2”), and a promissory note executed on or about May 15, 2008, in the amount of \$190,795.02 (“Note 3”).

The purpose of Notes 2 & 3 was to fund the development and installation of utilities on the property.¹ In order to extend cable, water and electric service to new developments in Frankfort, Kentucky, developers such as Brester enter into Extension Agreements with the Frankfort Plant Board. In exchange for a series of payments, “Utility Deposits,” the Frankfort Plant Board extends and makes certain utility services available to the new development. Upon completion of the development and the issuance of certificates of occupancy to new, permanent owners, the Plant Board issues refunds, “Utility Refunds,” to the developer per developed lot in an amount set out in the applicable Extension Agreement. All Utility Refunds must be properly requested within ten years of the

¹ Note 1 was a general construction note; only a small portion of it was used to fund the installation of utilities.

date of execution of the Extension Agreements or they are forfeited to the Plant Board. In this case, in accordance with the promissory notes, Kentucky Bank made deposit payments directly to the Frankfort Plant Board for the installation of utilities on Brester's development.

Brester defaulted on the loans before the development was finished. As a result, Kentucky Bank filed suit against Brester in Franklin Circuit Court, Case No. 08-CI-01816 ("Foreclosure Action"). Kentucky Bank alleged that Brester had defaulted on each of the three notes (as well as on other notes not relevant to this appeal) and sought to foreclose on the real property. The parties executed a settlement agreement ("Agreement") on February 4, 2009. Section One of the Agreement stated that the Agreement was "made as a compromise between the parties hereto for the complete and final settlement of their claims, differences, and causes of action against each other with respect to the dispute described below." Section Two of the Agreement, entitled "Statement of Dispute" provides:

On October 31, 2008, Kentucky Bank filed an action against Brester in the Franklin Circuit Court in Franklin County, Kentucky ("Franklin Action"), assigned case no. 08-CI-01816 ("Complaint").

The parties hereto now desire to reach a full and final compromise and settlement of all matters between them and all causes of action arising out of the Complaint and the facts and claims as set forth or which might have been set forth concerning those facts and claims by them against the other in the aforesaid Franklin Action.

Pursuant to the terms of the Agreement, Brester agreed to execute a deed transferring the subject property to Kentucky Bank in exchange for dismissal of

Kentucky Bank's foreclosure and related deficiency claims. The Agreement did not directly address the utility deposits.

After Kentucky Bank acquired the property, it completed the development and sold the lots. When certificates of occupancy were issued, the Frankfort Plant Board became obligated to issue refunds.² Kentucky Bank maintained that the refunds should be issued to it. Brester disagreed. Ultimately, Kentucky Bank filed this action seeking a declaratory judgment that the right to the refunds was transferred to it when Brester conveyed all of its "right title and interest" in the real property to Kentucky Bank.

Before the circuit court, both parties argued the Agreement was dispositive. Kentucky Bank asserted that the right to the utility deposits was part of the "title and interest" in the real property, and therefore, was transferred to it along with the land. Brester asserted that the utility deposits were apart from land, and therefore, did not transfer with it. Nevertheless, Brester asserted that Kentucky Bank waived its right to seek any further relief based on Section Nine of the Agreement, entitled "Entire Agreement." That provision states:

This Agreement (together with the Agreed Order of Sale and Deeds) embodies the entire agreement of the parties hereto respecting the subject matter. There are no promises, terms, conditions, or obligations other than those contained in this Agreement and the Agreed Order and the Deeds. This Agreement, the Agreed Order of Sale and the Deeds supersede all previous communications, representations, or agreements, either verbal or written between the parties hereto relating to the matters involved herein. If any provision of this

² The amount at issue is in excess of \$135,000.00.

Agreement is found invalid or unenforceable, this Agreement will be construed as if the invalid or unenforceable provision was omitted and the remaining provisions will not be affected thereby.

The circuit court first determined that the utility deposits were beyond the scope of the Agreement, and therefore, not covered by it. However, the circuit court determined that Kentucky Bank should receive the refunds because Brester would be unjustly enriched if allowed to retain the right to the refunds.

This appeal followed.

II. Analysis

A. Settlement Agreement

A settlement agreement is a contract between the parties. *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 105 (Ky. 2003). Like other contracts, the scope of the agreement is determined primarily by the intent of the parties as expressed within the four corners of the instrument. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002).

We agree with the circuit court's interpretation of the Agreement. As set forth in Sections One and Two, the purpose of the Agreement was to settle the dispute between Kentucky Bank and Brester as related to Brester's default. While the utility deposits might be tangentially related to the real property, they were not at issue as part of that dispute. Indeed, at the time the Agreement was signed, it

was impossible to know whether the right to receive those deposits would ever materialize.³

B. Unjust Enrichment

Kentucky Bank did not assert the remedy of unjust enrichment. However, the trial court found that the remedy of unjust enrichment remains available to the court when all of the elements of unjust enrichment have been proven. *See Rose v. Ackerson*, 374 S.W.3d 339, 343 (Ky. App. 2012) ("A party's failure to assert the existence of unjust enrichment does not serve to make it nonexistent. As long as the trial court determines that the elements are present, it is not precluded from making the legal conclusion that unjust enrichment exists.").

There are three elements that a party must meet in order to prevail on a claim of unjust enrichment: (1) a benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention without payment for its value. *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009). The trial court considered the three elements and made findings consistent with those elements. Given the facts of this case, we cannot conclude that the trial court erred in using its equitable powers to rule in Kentucky Bank's favor based on a theory of unjust enrichment.

III. CONCLUSION

³ Kentucky Bank relies on *Williams' Adm'r v. Union Bank & Trust Co.*, 143 S.W.2d 297 (Ky. 1940) to support its assertion that the right to utility deposits was transferred with the land. *Williams'* involves the right to receive oil royalties following a transfer that was silent about that issue. We do not believe that the right to the utility deposits is synonymous with rights to oil royalties as the court in *Williams* was careful to observe that the oil was considered a part of the real estate itself.

Accordingly, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR

BRIEF FOR APPELLANTS:

Taft A. McKinstry
Christopher Colson
Lexington, Kentucky

BRIEF FOR APPELLEE:

Shannon M. Johnson
Sannie Overly
Paris, Kentucky