

RENDERED: AUGUST 9, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000394-MR

GARY RISNER

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIMBERLY CHILDERS, JUDGE
ACTION NO. 14-CI-00384

SCOTTIE MCCARTY AND
COMMERCIAL BANK

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, LAMBERT, AND SPALDING, JUDGES.

LAMBERT, JUDGE: Gary Risner has appealed from the February 23, 2018, judgment of the Magoffin Circuit Court dismissing his claim against Scottie McCarty related to the ownership of a farm. Finding no error, we affirm.

The subject of the present dispute is an approximately 1000-acre farm in Magoffin County that was conveyed to Risner by his parents in 1970. In 1991,

Risner began a large marijuana cultivation and distribution enterprise on the property. Concerned that the farm would be subject to forfeiture due to his illegal activities, Risner conveyed the property to H. B. Arnett, who in turn conveyed the property to another individual. In 1996, Risner was indicted and later convicted on drug-related charges, and upon his release from prison, he had the property conveyed back to him by Arnett in March 2011 through a series of conveyances for a purchase price of \$50,000.00. By deed dated a few days later, Risner conveyed the same property to McCarty for a purchase price of \$110,000.00. It is the conveyance to McCarty that is at issue in the present case.

In December 2014, Risner filed a complaint against McCarty, alleging that pursuant to an oral agreement in 2011, McCarty had given him two personal loans in the amount of \$95,000.00 and \$72,000.00, for which Risner was to repay him the amount of \$1,000.00 per month. Risner claimed that as collateral for the loans, he executed a general warranty deed to McCarty on March 4, 2011, rather than executing a mortgage on the property. Risner made payments to McCarty pursuant to the agreement and paid the property taxes. McCarty refused to cash more recent payments, claiming that there was no loan agreement or land contract between them. Therefore, Risner requested a declaratory judgment establishing that a loan repayment agreement or land contract existed relating to the property

that provided that he would get the deed to the property back upon repayment of the full amount of the loans pursuant to their agreement.

McCarty filed an answer disputing Risner's allegations, raising such defenses as his failure to name all parties (including Commercial Bank, which held mortgages on the property) as well as the statute of frauds. In addition, McCarty filed a counterclaim against Risner, alleging that he (McCarty) had spent in excess of \$100,000.00 in improvements on the subject property. In the event that the court determined that a loan agreement or land contract existed between them, McCarty requested a judgment against Risner in the amount that the improvements increased the fair market value of the property. In his response, Risner stated that the cost of the improvements was added to the loan amount. Risner also moved to amend his complaint to add Commercial Bank as a defendant, which the court granted. McCarty had executed two mortgages to Commercial Bank for a loan in 2013.¹

Risner essentially claimed that after borrowing a large sum of money from McCarty, he gave McCarty the deed to the farm with the express

¹ In December 2017, the circuit court entered a summary judgment ruling that Commercial Bank's recorded mortgages were valid and enforceable liens against McCarty's interest in the property and had priority over any interest Risner might have. Risner did not appeal from this order, and he has not made any arguments related to Commercial Bank in his appellate brief. While Commercial Bank filed an appellee brief, we have no need to review any additional information related to that party as no issue as to the summary judgment has been alleged in this appeal.

understanding that the property would be re-conveyed to Risner when the loan was paid off. He made notations on the checks to McCarty stating “land payment” or similar language, which McCarty endorsed and cashed. After they had a falling out, McCarty renounced the oral agreement and denied one had existed. On the other hand, McCarty’s version of the events was that he had purchased the subject property, and due to their close relationship, he permitted Risner to continue to live on the property for the rest of his life for a monthly rental amount of \$1,000.00. Risner was permitted to keep the coal royalties and farming profits from the property.

A bench trial was held in January 2018, after which the court directed the parties to tender proposed judgments. The court ultimately entered a judgment on February 23, 2018, in favor of McCarty, dismissing Risner’s claims and determining that McCarty owned the subject property in fee simple absolute. The court did not find that any loan agreement or constructive trust existed between the parties as Risner argued. This appeal now follows.

Our standard of review is set forth in *Barber v. Bradley*, 505 S.W.3d 749, 754 (Ky. 2016), as follows:

As this is an appeal from a bench trial, our standard of review is set forth in Kentucky Rule of Civil Procedure (CR) 52.01. Under CR 52.01, the trial court is required to make specific findings of fact and state separately its conclusions of law relied upon to render the court’s judgment. Further, those “[f]indings of fact, shall

not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR 52.01. In fact, “judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court.” *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004) (quoting *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)).

“If the trial judge’s findings of fact in the underlying action are not clearly erroneous, *i.e.*, are supported by substantial evidence, then the appellate court’s role is confined to determining whether those facts support the trial judge’s legal conclusion.” *Commonwealth v. Deloney*, 20 S.W.3d 471, 473-74 (Ky. 2000). However, while deferential to the lower court’s factual findings, appellate review of legal determinations and conclusions from a bench trial is *de novo*. *Sawyers v. Better*, 384 S.W.3d 107, 110 (Ky. 2012).

With this standard in mind, we shall review Risner’s arguments on appeal.

For his first argument, Risner asserts that the trial court improperly adopted, with the exception of the addition of one word, the proposed judgment submitted by McCarty, thereby abandoning its duty to make independent findings. In support of this argument, Risner cites to this Court’s opinion in *Retherford v. Monday*, 500 S.W.3d 229, 232 (Ky. App. 2016), in which we stated, “[t]he practice of adopting prepared findings of counsel as those of the court has been highly disfavored not only by CR 52.01 but by case law as well.” However, we went on to state,

A return to the more rigorous and scrupulous compliance with CR 52.01 as discussed in [*Callahan v.*

Callahan, 579 S.W.2d 385 (Ky. App. 1979),] would appear to be the preferred precedent in cases involving families and children. In *Keifer v. Keifer*, 354 S.W.3d 123 (Ky. 2011), our Supreme Court mandated in clear and admonitory language that CR 52.01 and applicable sections of KRS Chapter 403 must receive absolute compliance, advising trial courts “that it is their duty to comply with the directive of this Court to include in all orders affecting child custody the requisite findings of fact and conclusions of law supporting its decisions.” *Id.* at 125. *Keifer* emphasizes the overarching gravity of this process: “Consideration of matters affecting the welfare and future of children are among the most important duties undertaken by the courts of this Commonwealth.” *Id.* at 125-26.

Retherford, 500 S.W.3d at 232-33 (footnote omitted). We note that the case at bar is not a family law case, but rather addresses real property.

McCarty, on the other hand, cites to *Prater v. Cabinet for Human Resources, Commonwealth of Ky.*, 954 S.W.2d 954, 956 (Ky. 1997), in which the Supreme Court of Kentucky addressed this issue:

First, Appellant claims the trial court failed to make independent findings of fact as required by CR 52.01. He bases this allegation on the fact that the trial court adopted the Cabinet’s proposed findings of fact without correction or change. The trial court requested both parties to submit proposed findings of fact, which both did. It is not error for the trial court to adopt findings of fact which were merely drafted by someone else. *Bingham v. Bingham*, Ky., 628 S.W.2d 628 (1982).

In the present case, the parties submitted proposed judgments at the direction of the circuit court, which opted to adopt McCarty’s proposal. We find no error or abuse

of discretion, especially in a case with a complicated factual pattern such as this one.

Furthermore, we hold that the circuit court's judgment is supported by substantial evidence of record. Risner disputes the circuit court's decision to give little credibility to his and Arnett's testimonies. He argues in his brief that

McCarty was just as involved in any election fraud as Risner and therefore just as guilty as Risner. The only difference is that McCarty betrayed his mentor in order to receive a misdemeanor and a 'get out of jail free' card where Risner was sentenced to thirty [30] months in the federal penitentiary. This tells more about the character of Risner than McCarty.

In *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003), the Supreme Court instructed that "[r]egardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, 'due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses' because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." (Footnotes omitted.)

Related to Arnett's testimony, the court found his testimony as to an inaccurate statement of consideration in the deed to be truthful because it was against his interest. However, the court noted it was "greatly troubled" by Arnett's refusal to answer questions regarding the terms of the transaction and his invocation of his Fifth Amendment rights against self-incrimination. The court

ultimately concluded that it had “no choice but to attach very little credibility to [Arnett’s] testimony regarding the nature of the transactions between [him] and Risner.”

Regarding Risner’s testimony, the court made several findings as to his credibility, including:

19. The Court finds that Risner’s practice of engaging in criminal activities and using Deeds of Conveyance which contain false information in an attempt to avoid forfeiture of property and/or negative tax consequences further erodes Risner’s credibility as a witness in this matter. This is particularly true when Risner seeks to prove an agreement and transaction which, if true, would be virtually identical to the prior illicit transactions he readily admits to orchestrating.

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33. Risner also asserted his Fifth Amendment rights against self-incrimination during the course of cross-examination and chose not to testify with regard to inquiries related to his prior land dealings involving the same property which is the subject of this litigation. When the Court considers the nature of the prior transactions with Mr. H. B. Arnett, as well as Mr. Arnett’s invocation of his Fifth Amendment rights on the very same subjects, the Court has no choice but to seriously question the truthfulness of Risner’s testimony on any matter related to the transactions with McCarty. The Court finds Mr. Risner’s exhibits have very little credibility with regard to his sworn testimony. During the course of his testimony he acknowledged a history of attempting to circumvent the law through conveyances of this very property, all in order to further his criminal enterprises. He also testified prior to invoking his Fifth Amendment rights against self-incrimination that the

consideration clauses of various deeds were factually inaccurate, and that the purpose of those Deeds of Conveyance was not to convey the property, but rather to accomplish some other type of transaction not described in the documents. As will be discussed more fully herein below, the Court finds Risner's refusal to answer questions by asserting his Fifth Amendment right against self-incrimination with regard to matters directly related to his history with real estate transactions greatly and negatively affects the Court's view of Risner as a credible witness. The Court finds Risner has shown substantial contempt for the truth and has intentionally attempted to mislead this Court.

We find no reason to invade the province of the circuit court to judge the witnesses and its decision to find Risner and Arnett to be lacking in credibility.

Next, Risner argues that the circuit court erroneously concluded that the notations on the checks to McCarty were ambiguous. Risner contended that he had a land contract with McCarty and that the funds McCarty spent to improve the property were in reality loans to Risner, which he would pay back to McCarty at a rate of \$1,000.00 per month without any interest. McCarty's version was that he was permitting Risner to live on the property for a rental payment of \$1,000.00 per month. Risner paid McCarty by personal check and began including "land payment" in the notation section as well as a balance due amount. McCarty believed these notations referenced the rental payments and balances due to him for excess royalties. The court found that "if the language used in the memo section of each check was intended to describe the purpose of the payment (which

is likely) the language used is ambiguous and open to interpretation.” It found that based upon the testimony and exhibits, “a reasonable interpretation of the memo language written on the checks is that the payment made was for the use of the land, not for the purchase of the land.”

To decide this issue, we must address the law of contract interpretation.

Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties. Absent an ambiguity in the contract, the parties’ intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms. Generally, the interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to *de novo* review. However, once a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues and construction of the contract become subject to resolution by the fact-finder.

Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 385 (Ky. App. 2002) (citations omitted).

In the present case, we agree with McCarty that based upon the circumstances of this case, there certainly was an ambiguity regarding the

notations on Risner's checks to McCarty. The notation "land payment" did not indicate that a sale had occurred or the terms of an alleged agreement, and the varying amounts of the checks and the balance due amounts only led to further questions as to the nature of the payments. Based upon the circuit court's findings related to Risner's credibility, we find no error in its decisions to find that an ambiguity existed and to construe the interpretation of the checks in McCarty's favor. In addition, we find no merit in Risner's argument that the "land payment" notation was binding on McCarty.

Next, Risner argues that the Statute of Frauds does not apply to invalidate the alleged oral agreement between him and McCarty because the canceled checks and receipts satisfied the writing requirement, citing *Chin v. Chin*, 494 S.W.3d 517 (Ky. App. 2016), and *Phelps v. Ham*, 273 S.W.2d 814 (Ky. 1954). We disagree with Risner's argument, and we hold that the circuit court did not err in determining that the checks were not sufficient to establish that a sale had occurred or that an oral agreement for a land contract or loan even existed. The court held:

[T]he Court is convinced that a sale of the property occurred between the parties which provided that McCarty would pay Risner \$110,000.00 in exchange for the simple title to the property. Afterwards, Risner would be permitted to reside on the property and use it for farming purposes so long as he paid McCarty \$1000.00 per month and utilized the royalty and wheelage monies derived from the property to pay ad

valorem taxes, property insurance and to maintain and improve the property. Any monies remaining after these items were paid were to be forwarded to McCarty. . . . [T]he Court is not convinced that the agreement described by Risner occurred, therefore the statute of frauds is not implicated.

We also reject Risner’s argument that the consideration set forth in the deed should be impeached pursuant to Kentucky Revised Statutes (KRS) 371.030 or that parol evidence should be permitted to establish that the deed was intended to secure an indebtedness.

Finally, Risner contends that there was a constructive trust between him and McCarty based upon their close relationship before they had a falling out in 2014 related to the election and that McCarty would be unjustly enriched if he prevailed. “Constructive trusts are ‘raised by equity in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.’” *Terrill v. Estate of Terrill*, 217 S.W.3d 858, 861 (Ky. App. 2006) (quoting *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985)). In *Keeney v. Keeney*, 223 S.W.3d 843, 849 (Ky. App. 2007), this Court addressed such trusts as follows:

When legal title to property has been acquired or held under such circumstances that the holder of that legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. *Middleton v. Beasley*, 186 Ky. 252, 216 S.W. 591, 592 (1919) (citations omitted). Constructive trusts are created by the courts “in respect of property which has

been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.” *Hull v. Simon*, 278 Ky. 442, 128 S.W.2d 954, 958 (1939); *see also, O’ Bryan v. Bickett*, 419 S.W.2d 726, 728 (Ky. 1967). “The fraud may occur in *any form of unconscionable conduct*; taking advantage of one’s weaknesses or necessities, or in any way violating equity in good conscience.” *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985) (emphasis added), *citing St. Louis and S.F.R. Co. v. Spiller*, 274 U.S. 304, 47 S.Ct. 635, 71 L.Ed. 1060 (1927). In fact, a court exercising its equitable power may impress a constructive trust upon one who obtains legal title, “not only by fraud or by violation of confidence or of fiduciary relationship, but *in any other unconscientious manner*, so that he cannot equitably retain the property which really belongs to another[.]” *Scott v. Scott*, 183 Ky. 604, 210 S.W. 175, 176 (1919) (emphasis added). Similarly we have said that a constructive trust may be imposed where title is taken under “circumstances of circumvention [or] imposition[.]” *Middleton*, 216 S.W. at 592.

In addition, we confirmed in *Keeney* “that Kentucky courts have required the party seeking the imposition of a trust to establish a ‘confidential relationship’ with the party upon whom the trust is to be imposed.” *Id.* at 849. “All of these considerations are factual in nature to be determined by the trier of fact whose findings will not be disturbed by this court unless the conclusion could not reasonably have been drawn.” *Id.* at 850.

The circuit court concluded that while it was “convinced that at the time of the execution of the Deed of Conveyance between the parties and for a substantial period of time thereafter the parties viewed one another as they would a

close relative[,]” it could not conclude that a constructive trust existed because Risner failed to establish that McCarty would be unjustly enriched if he retained the property. Risner contends that McCarty would be unjustly enriched because he paid \$110,000.00 for property that held a purported value of \$512,000.00. The court pointed out that Risner had paid either \$200,000.00 or \$50,000.00 to Arnett to purchase the property back from him less than a week before he sold it to McCarty. And Risner received more than money in exchange for the property, as McCarty was permitting him to reside on the property for the rest of his life for \$1,000.00 per month and to use the land for farming and agricultural purposes. Furthermore, Risner failed to establish that the agreement to return the property to him even existed based upon McCarty’s testimony as well as the testimony of the attorney who drafted the deed of conveyance at their direction. Attorney Allen testified that he prepared the deed as requested by both parties and that he would have prepared the document as containing a mortgage or land contract provision if so requested. Accordingly, we hold that the circuit court did not abuse its discretion or commit any error in determining that a constructive trust did not exist in this case.

For the foregoing reasons, the judgment of the Magoffin Circuit Court is affirmed.

SPALDING, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS IN RESULT ONLY.

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