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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000577-MR
AND
NO. 2018-CA-001435-MR

MOORE PROPERTY INVESTMENTS, LLC — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 11-CI-002310

DR. LAURA FULKERSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

ACREE, JUDGE: Moore Property Investments, LLC, (Moore Property) appeals two orders entered by the Jefferson Circuit Court. The first order, entered November 22, 2017, granted, in part, the motion of Dr. Laura Fulkerson to enforce a settlement agreement resolving a property dispute with Moore Property. The

second order, entered August 29, 2018, ostensibly resolved an outstanding issue related to the settlement agreement. This Court consolidated the appeals.

In the first appeal, we affirm the circuit court. However, by separate Order entered contemporaneously with this Opinion, we dismiss the second appeal because the circuit court entered the August 29, 2018 order without jurisdiction to do so; that order is void *ab initio* and a nullity.

BACKGROUND

On July 15, 2009, veterinarians Laura Fulkerson and her business partner at the time, Todd Yates,[1] entered into a lease agreement with Moore Property. Fulkerson agreed to lease a commercial office suite, Suite B, for use as a veterinary clinic. Because Fulkerson had to make significant improvements at her own expense to accommodate a veterinary practice, she contemporaneously negotiated an ancillary Option Agreement to purchase Suite B.

When Fulkerson exercised the option, Moore Property filed a civil action against her seeking a declaratory judgment and damages for her alleged failure to pay common area expenses. The circuit court entered summary judgment in favor of Moore Property which this Court reversed. *Fulkerson v. Moore Property Investments, LLC*, No. 2012-CA-000856-MR, 2014 WL 3714373 (Ky. App. July 25, 2014). The Court of Appeals did not address the parties'

[1] Todd Yates is no longer a party to the appeal.

dispute regarding common area expenses, but held that Fulkerson adequately exercised her option to purchase Suite B. The summary judgment was vacated, and the case remanded to the circuit court for further proceedings. *Id.* at *7.

Thereafter, but before the circuit court conducted further proceedings, the parties mediated their dispute. Mediation yielded a fully executed Settlement Agreement. It said, "This Settlement Agreement (Agreement) is made this 7th day of December, 2015 by and between Moore Property Investments, LLC, Plaintiff, and Laura Fulkerson, Defendant, in full and final settlement of that lawsuit #11-CI-02310, now pending in Jefferson Circuit Court." The parties agreed to a number of issues, including certain modifications to the lease executed in 2009.

The Settlement Agreement stated the property will be divided pursuant to a condominium regime with Moore Property owning 52% and Fulkerson owning 48%. The Settlement Agreement also dealt with common area expenses, which read as follows:

> For common area expenses which are $1,000 or less, either party may select the service provider and have the work performed without prior notice to the other. For expenses for common areas which exceed $1,000, either party shall provide the other with the bid for said services prior to hiring the service provider. If the other party does not object, the proposed service provider may perform the work. If the other party objects to the bid, he or she shall provide an alternative bid within 15 days. If the parties cannot agree on the work to be performed, they shall submit their differences to Ann O'Malley Shake. If she is not available for any reason, the disputed issue shall be

> submitted to a mutually agreeable mediator. The paint color of the exterior will not be changed absent the agreement of the parties or submission to the mediator.

Additionally, Fulkerson was given $86,400 in credit toward the purchase of Suite B.

At the end of the Settlement Agreement, the parties included a clause which provides, "[t]he parties will work in good faith to memorialize the terms of this settlement and the sale in subsequent documents which will be prepared by [Moore Property's] counsel and subject to approval by [Fulkerson's] counsel. However, the Settlement Agreement is enforceable according to its terms." The parties also agreed to mutually and fully release all claims made or which could have been made in the lawsuit.

Despite these efforts, conflict ensued again. The parties were unable to resolve the language for the sale in the subsequent documents. Specifically, Fulkerson did not agree to adding language that would terminate the common area expenses section upon a future sale of Suite B (she viewed them as running with the land), and that Moore Property, because of its majority stake, could effectively make unilateral amendments to the condominium documents, giving Moore Property control of the property. In light of this new issue, Fulkerson sought additional credits against the purchase price.

Moore Property returned to the circuit court, filing a motion asking the court to find the Settlement Agreement unenforceable. Moore Property claimed the Settlement Agreement violated the statute of frauds because it did not set forth all essential terms, such as: (1) a description of the real estate; (2) purchase price; (3) title to be conveyed; and (4) whether the common area expenses run with the land.

The circuit court denied Moore Property's motion and held the Settlement Agreement was enforceable. Specifically, the court found the parties intended that the Settlement Agreement resolve disputed terms under the Option Agreement, rather than function as a stand-alone real estate purchase contract replacing the Option Agreement; *i.e.*, it was not a novation. Therefore, said the circuit court, the Settlement Agreement did not violate the statute of frauds. The circuit court also found the parties included all necessary material terms for enforcement given its purpose. Finally, the circuit court did not find Fulkerson was entitled to additional credit against the purchase price beyond what was originally agreed by the parties.

This appeal followed.

STANDARD OF REVIEW

"Interpretation of a contract is ordinarily a question of law for a court's determination. So with questions of contractual interpretation, an appellate

court reviews the lower court's findings *de novo*, with no deference to the ruling of the lower court." *Martin/Elias Properties, LLC v. Acuity*, 544 S.W.3d 639, 641-42 (Ky. 2018) (citations omitted).

ANALYSIS

Moore Property argues the Settlement Agreement is a stand-alone contract for the conveyance of real property and thus subject to the statute of frauds. KRS[2] 371.010(6). We disagree. We see no reason to disturb the circuit court's conclusion that the subject matter of the Settlement Agreement was the resolution of the parties' disputes about the Option Agreement and lease.

In construing an agreement, the objective "is to effectuate the intentions of the parties." *Cantrell Supply, Inc., v. Liberty Mut. Ins. Co*., 94 S.W.3d 381, 384 (Ky. App. 2002) (citations omitted). Here, the parties expressly stated, not once, but twice, that the Settlement Agreement was to resolve all litigation between them, clearly indicating the Settlement Agreement was "a full and final settlement" of the case. It merely relates back to the lease and Option Agreement from 2009, but that does not mean it is a contract conveying real property. It is a settlement agreement.

The statute of frauds does not apply to settlement agreements. Our courts have said that such agreements need not even be in writing to be

[2] Kentucky Revised Statutes.

enforceable. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 445 (Ky. 1997) ("It has long been the law of this Commonwealth that the fact that a compromise agreement is verbal and not yet reduced to writing does not make it any less binding.").[3] To the extent the Settlement Agreement can be interpreted as a modification of the lease or Option Agreement, a similar rule applies. "[T]he rule followed in this state [is] that a contract required by law to be in writing may be modified or rescinded by an oral agreement . . . ." *Glass v. Bryant*, 302 Ky. 236, 239, 194 S.W.2d 390, 392 (1946). Under either interpretation of the Settlement Agreement, it does not violate the statute of frauds.

Notwithstanding the inapplicability of the statute of frauds, Moore Property argues there are essential terms missing from the Settlement Agreement, making it unenforceable. We disagree.

An agreement must set forth all essential terms, and not leave them to be resolved by future negotiations. *Brooks v. Smith*, 269 S.W.2d 259, 260 (Ky. 1954). Essential terms are those without which the court is unable to determine a measure of damages in the event of a breach. *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997).

[3] The opinion in *Glass* was modified on February 18, 1999, and modified again by *Hollaway v. Direct General Insurance Company of Mississippi, Inc.*, 497 S.W.3d 733 (Ky. 2016). However, none of the modifications affect the rule that oral settlement agreements are enforceable.

Moore Property claims the description of the property and purchase price are essential terms not included in the Settlement Agreement. This claim is based on an underlying premise that the Settlement Agreement memorializes a stand-alone real estate transaction. We have already concluded, agreeing with the circuit court, that it is not. The Settlement Agreement resolves disputes over the documents memorializing the real estate transactions between the parties and nothing more. The description of the property and the purchase price are in the documents over which the parties are in dispute, but there is no dispute about what real property is being purchased or what price will be paid.

Additionally, Moore Property believes two other essential terms are missing: (1) terms stating how title is to be conveyed; and (2) terms stating whether approval of common area expenses run with the land. Again, we disagree.

Having examined the documents related to this action, we conclude that the property is sufficiently described and that, upon completion of the terms of the Option Agreement and the Contract for Deed contemplated by the Option Agreement, the nature of the title to be conveyed is a fee simple title. As this Court said in the previous appeal of this case,

> [O]ption agreements contain an implied obligation to convey a marketable title even when they are silent as to the type of conveyance required. *Bldg. Indus., Inc. v. Wright Products, Inc.*, 240 Minn. 473, 476-477, 62 N.W.2d 208, 210 (1953). A seller should be prepared to convey good title or furnish evidence of good title upon

> exercise of the option. *Eychanger v. Springer*, 34 Colo. App. 412, 414, 527 P.2d 903, 904 (1974); *Overboe v. Overboe*, 160 N.W.2d 650, 655 (N.D.1968). A contract to sell property is still valid where the seller is not able to convey perfect title at the time the contract is entered into, so long as the seller can tender title within the time fixed for performance. *Schmidt v. Martin*, 199 Ky. 782, 251 S.W. 999, 1001 (1923)[.]

Fulkerson, 2014 WL 3714373, at *5. Additionally, as stated long ago by our highest Court, if a party expresses, in a manner enforceable by the courts, his intent to convey real property, but:

> "without any stipulation as to the character of title he is to make to the grantee, he must convey with general warranty." Davis v. Dycus, 7 Bush, 6. The contract of sale in the case at bar being silent as to the character of title to be conveyed, it must be presumed, as the circuit court properly held, that the deed was to be one of general warranty.

Whitworth v. Pool, 29 Ky. L. Rptr. 1104, 96 S.W. 880, 882 (1906). The presumption of a conveyance by general warranty deed indicates the transfer of a fee simple title. *Gabbard v. Short*, 351 S.W.2d 510, 511 (Ky. 1961) ("the deeds are in the form of a deed of general warranty by which a fee simple title is conveyed").

We agree with Moore Property that it is essential that the property being conveyed be identified, but we also have no doubt that the property has been satisfactorily identified in these documents. To the extent resort to the law is necessary to assist in that identification, it is available. And finally, as the

Supreme Court reiterated not long ago, "logic, like common sense, 'must not be a stranger in the house of the law.'" *Southworth v. Commonwealth*, 435 S.W.3d 32, 45 (Ky. 2014) (quoting *Cantrell v. Kentucky Unemployment Ins. Commission*, 450 S.W.2d 235, 237 (Ky. 1970)). We conclude the circuit court employed each of these resources in deciding there was no lack of an essential term regarding the property description.

Moore Property also says the Settlement Agreement failed to include language indicating whether the common area expenses section "ran with the land." We decline to address this argument because it is not properly before this Court.

After April 11, 2018, the day Moore Property filed a notice of appeal from the circuit court's November 22, 2017 ruling, Moore Property returned to the circuit court with the first of a series of motions asking that court to "rule on whether the provision for common area expense would run with the land." (Record (R.) 806). After briefing the issue, the circuit court entered an order on August 29, 2018. That order is void.

"[I]t is the law in Kentucky that, with certain narrowly circumscribed exceptions [not applicable in this case], the circuit court is divested of jurisdiction over a case when a notice of appeal is filed[.]" *Young v. Richardson*, 267 S.W.3d 690, 695 (Ky. App. 2008). Stated in another way, "[a] notice of appeal, when

filed, transfers jurisdiction of the case from the circuit court to the appellate court." *Watkins v. Fannin*, 278 S.W.3d 637, 639 (Ky. App. 2009) (quoting *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990)). An order entered by a circuit court after a notice of appeal to the Court of Appeals is void. *Wright v. Ecolab, Inc.*, 461 S.W.3d 753, 759 (Ky. 2015) ("order was entered by a court that lacked jurisdiction over the matter, and is therefore a nullity"); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 833 (Ky. App. 2008) (order issued by a court not having proper jurisdiction is "void *ab initio* . . . is not entitled to any respect or deference by the courts" (citations omitted)).

This Court acknowledges the representation by Moore Property to the circuit court as follows:

> Pursuant to the advice of the pre-hearing officer for the Court of Appeals, the parties have agreed to submit the issue as to whether the provision for common area expenses will run with the land to the Circuit Court. . . . The pre-hearing officer has stayed the appeal pending the Circuit Court's ruling on whether the provision for common area expenses will run with the land. Once the Circuit Court has ruled on the issue, the parties may appeal the decision if they so choose and consolidate the appeals.

(R. 806-07).

We take no umbrage and cast no aspersion on any person regarding this representation. However, this Court must point out that a prehearing conference attorney has no authority to re-confer upon the circuit court the

jurisdiction it has lost by the filing of a notice of appeal.[4] We decline to consider further how this misunderstanding arose, or from whence it originated. In this we are guided by the applicable rule that says: "The comments made during the prehearing conference are confidential, except to the extent disclosed by the prehearing order . . . , and shall not be disclosed by the conference judge or conference attorney nor by counsel in briefs or argument." CR 76.03(12).

To re-confer jurisdiction upon the circuit court, this Court would have to enter an order remanding the case for that purpose. No such order, or any order that would pass as its equivalent, was entered in this case.

It is enough that we follow the substantive and procedural law that says the circuit court's August 29, 2018 order is void. As such, the appeal from that void order must be dismissed. A separate order dismissing Appeal No. 2018-CA-001435-MR is entered contemporaneously with the rendering of this Opinion.

CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court's November 22, 2017 order to enforce the Settlement Agreement.

[4] The applicable rule, Kentucky Rules of Civil Procedure (CR) 76.03(9), provides that "[a] judge of the Court of Appeals designated by the Chief Judge of the Court of Appeals" may conduct prehearing conferences. Such appointee would have no greater authority to re-confer such circuit court jurisdiction than does the prehearing conference attorney.

JONES, JUDGE, CONCURS.

K. THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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