IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 26, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000442-DG

CENTRAL BANK — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2009-CA-001126-MR
JEFFERSON CIRCUIT COURT NO. 07-CI-011677

SUTEJ GILL, DEBORAH GILL,
JAMES DANIEL JONES,
WASHINGTON MUTUAL BANK,
AMERICAN TAX FUNDING, AND
LOUISVILLE-JEFFERSON COUNTY
METRO GOVERNMENT — APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

This appeal concerns the enforceability of a verbal stipulated agreement settling the claims of Appellees, Sutej and Deborah Gill, against Appellant, Central Bank of Jefferson County, Inc., formally known as First Bank, Inc. ("Central Bank").

The Gills and Central Bank both held separate mortgages on property located at 1524 South Fourth Street in Jefferson County, Kentucky (the "property"). The Gills' mortgage was held third in priority, while Central Bank held the superior mortgage. On December 5, 2007, the Gills instituted a foreclosure action naming, *inter alia*, the mortgagor, James Jones, and Central

Bank as party defendants. Central Bank filed a cross-claim in December of 2007. Subsequently, the Gills' foreclosure action was consolidated with a related foreclosure action in the Jefferson Circuit Court. The property located at 1524 South Fourth Street, however, is the only property at issue in this appeal.

In 2008, the Gills expressed interest in acquiring Central Bank's first priority position by purchasing its mortgage and note. The Gills maintain that Central Bank agreed to the transaction on July 14, 2008 and set a closing date of August 8, 2008. For reasons unclear to this Court, the closing failed to occur. Central Bank proceeded with obtaining a judgment and order of sale of the property, which the trial court entered on August 20, 2008. On August 26, 2008, Central Bank filed a motion for supplemental judgment in order to recoup legal fees, utility bills, and maintenance of the property.

The Gills immediately filed three pleadings in an effort to halt the judicial sale of the property and to enforce the purported July 14, 2008 agreement. First, the Gills filed an objection to Central Bank's motion for supplemental judgment. Secondly, the Gills filed a motion to set aside the judgment and order of sale. Lastly, the Gills amended their original foreclosure complaint and included a charge seeking specific performance of the July 14, 2008 agreement.

The trial court did not rule on the Gills' motion to set aside the judgment and order of sale, but referred Central Bank's motion for supplemental judgment to the Jefferson Circuit Court Master Commissioner ("Master

Commissioner"). A hearing on the matter was held on February 26, 2009. Immediately prior to the hearing, both parties once again discussed entering into a transaction whereby the Gills would purchase Central Bank's first priority position. The parties ultimately reached a verbal agreement which was recited into the record during the hearing.

The Master Commissioner filed his report on March 11, 2009 and recommended that the trial court grant Central Bank's motion for supplemental judgment per the parties stipulated agreement. In pertinent part, the report stated the following:

> Prior to the hearing, the parties and counsel engaged in negotiations, and arrived at a stipulated agreement which was then read into the record, with the Commissioner present. That stipulated agreement presumably will be reduced to writing by one of the attorneys, but in any event it is of record on tape in the Commissioner's office.

The recited terms of the agreement required the Gills to withdraw their objection to Central Bank's motion for supplemental judgment, in addition to any and all claims against Central Bank. The Gills also agreed to remit payment to Central Bank for all principal and interest on the note, all costs associated with winterization and maintenance of the property, and legal fees. In exchange, Central Bank agreed to assign to the Gills its note, mortgage, judgment and order of sale, and any anticipated future supplemental judgments. A condition of the agreement was that the Gills would not be given access to any bank files or documents with the exception of the subject note and mortgage. The parties agreed to reduce the recorded agreement to writing

and close the transaction by March 20, 2009. In the event the transaction failed to close by the deadline due to the fault of the Gills, Central Bank was entitled to seek a sale of the property by virtue of its judgment and order of sale.

Shortly thereafter, Central Bank provided the Gills with a written settlement agreement which it believed complied with the previously agreed upon terms. The Gills, however, refused to enter into Central Bank's proposed settlement agreement due to "objectionable and extremely problematic" language. While the Gills did not specify what language they found to be problematic, they later argued that the indemnification clause was the sole reason for rejecting Central Bank's proposed agreement. Consequently, the transaction failed to close by the March 20, 2009 deadline, and Central Bank went forward with scheduling a judicial sale of the property.

On March 23, 2009, the Gills filed objections/exceptions to the Master Commissioner's report. Specifically, the Gills urged the trial court to refuse the Master Commissioner's recommendation due to Central Bank's failure to enter into the agreement memorialized on the record at the February 26, 2009 hearing. Central Bank, on the other hand, insisted that the recorded agreement was merely an attempt to settle the matter and was subject to future negotiations. The trial court ruled in favor of Central Bank and entered the supplemental judgment on May 11, 2009. On the last page of the judgment, a handwritten note states: "Gills' Objections/Exceptions to

Commissioner's Report of March 11, 2009 Overruled. No meeting of the minds found." The Gills appealed the trial court's judgment and order.

Meanwhile, the property was set for auction in June of 2009. James Jones, the previous mortgagor, was the high bidder at the auction but failed to close on the property. A second auction was scheduled for April of 2010. The Gills filed a motion for emergency relief in order to halt the sale of the property, which the Court of Appeals denied. The Gills ultimately purchased the property at the April 2010 auction.

On appeal, the Court of Appeals found, as a matter of law, that the parties entered into an enforceable oral contract and were "bound by the stipulated agreement recited in the record." The Court of Appeals reversed and remanded the case back to the trial court for a determination of Central Bank's liability for breaching the agreement. Central Bank requested discretionary review.

Mootness

As an initial matter, Central Bank urges this Court to dismiss the Gills' appeal as moot. The Court of Appeals declined to address the merits of this issue. We, however, will address each argument in turn.

"A 'moot case' is one which seeks to get a judgment on a pretended controversy, when in reality there is none . . . ." *Winslow v. Gayle,* 172 Ky. 126, 188 S.W. 1059 (1916). "Unless there is 'an actual case or controversy,' this Court has no jurisdiction to hear an issue and is prohibited from producing mere advisory opinions." *Medical Vision Group, P.S.C. v. Philpot,* 261 S.W.3d

485, 491 (Ky. 2008) (citing *Commonwealth v. Hughes,* 873 S.W.2d 828, 829 (Ky.1994); Ky. Const. § 110).

Central Bank first contends that the Gills' appeal is moot due to their failure to seek relief from the trial court's judgment and order of sale, failure to pursue adjudication of their claim for specific performance, and failure to attempt to halt the first public sale of the property in June of 2009. Unlike the customary mootness arguments which this Court is usually presented with, Central Bank takes aim at the Gills' procedural and legal tactics. *See Hughes,* 873 S.W.2d at 830 ("The classic occurrence which necessitates a court's abrogation of jurisdiction for mootness is a change in circumstance in the underlying controversy which vitiates the vitality of the action."). Other than a general definition of the mootness doctrine, Central Bank provides us with no law to support its argument. Accordingly, we are not persuaded that the Gills' failure to utilize other methods of obtaining relief rendered their appeal moot. The possible remedies that Central Bank mentions are not necessary, nor are they required to be pursued in order for this Court to review the trial court's May 11, 2009 supplemental judgment order.

Central Bank also insists that the Gills' ultimate purchase of the property in April of 2010 has rendered their appeal moot. "[A]n appellate court is required to dismiss an appeal when a change in circumstance renders that court unable to grant meaningful relief to either party." *Philpot,* 261 S.W.3d at 491 (citing *Brown v. Baumer,* 301 Ky. 315, 191 S.W.2d 235, 238 (1945)). Yet, despite the Gills' subsequent purchase of the property, they still have a live

claim and they may still obtain meaningful relief from this Court. Indeed, if we are to find in favor of the Gills and enforce the verbal agreement reached and recited during the Master Commissioner's hearing on February 26, 2009, the Gills could certainly seek damages resulting from Central Bank's breach. Therefore, we decline to dismiss the Gills' appeal as moot.

Standard of Review

Central Bank next argues that the Court of Appeals erred in conducting a de novo standard of review. Since this case presents us with dense procedural facts, we find it essential to state the exact matter which is before us. Notwithstanding the Gills' arguments, we are not reviewing the trial court's judgment and order of sale, nor are we reviewing the specific performance claim which seeks to enforce the parties' supposed July 14, 2008 agreement. Instead, we are reviewing the trial court's May 11, 2009 order granting Central Bank's motion for supplemental judgment. This judgment also overruled the Gills' objection due to the court's determination that there was no meeting of the minds and no enforceable settlement agreement in place. Therefore, we must determine the correct standard for reviewing a trial court's order of supplemental judgment which summarily rules on a related issue of law.

Central Bank maintains that the trial court simply made discretionary findings deserving of deference, and that this case presents us with no issues of law. As a result, Central Bank asks us to review the trial court's determination that there was no meeting of the minds for a clear showing of abuse of discretion.

Central Bank is correct that the trial court has broad discretion in adopting the Master Commissioner's report. *See Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997). Pursuant to CR 53.05(2), "[t]he court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions." However, the trial court did not simply adopt the Master Commissioner's report; rather, the trial court made an additional legal determination that a settlement agreement was not reached due to a lack of mutual assent.

We believe in the case sub judice that whether there was a meeting of the minds and, thus, an enforceable contract is an issue of law to be determined by the court. Generally, the construction of a contract is a matter of law. *Pearson ex rel. Trent v. National Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002) (citing *Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893 (Ky. 1992)). Furthermore, the parties have presented us with no factual disputes regarding whether the agreement reached at the Master Commissioner's hearing constituted a meeting of the minds, as the entire stipulated settlement agreement is on the record. "A determination of an issue of law is [] presented where the question is one . . . where the relevant facts are undisputed and the dispositive issue thereby becomes the legal effect of those facts." *Fischer v. Fischer*, 197 S.W.3d 98, 106 (Ky. 2006) (quoting *Western Kentucky Coca-Cola Bottling Co. Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790–91 (Ky. App. 2001)). There is simply no requirement that we grant any deference to the trial court where factual findings are not at issue. *Cincinnati Insurance v. Motorists*

Mutual Insurance Co., 306 S.W.3d 69, 72 (Ky. 2010). Thusly, the Court of Appeals did not err in finding that the case presented an issue of law, thereby requiring a de novo, instead of a deferential, standard of review.

Meeting of the Minds

With the aforementioned standards of review in mind, we must determine whether the trial court was correct in concluding that the parties did not enter into a binding settlement agreement because there was a lack of mutual assent. First, we note that settlement agreements, even those not yet reduced to writing, may be found to be enforceable contracts. *Motorists Mutual Insurance Co. v. Glass*, 996 S.W.2d 437, 445 (Ky. 1997). Public policy concerns favor the acceptance and enforceability of verbal settlement agreements in order to effectuate the "administration of justice and the prompt dispatch of business . . . ." *Calloway v. Calloway*, 707 S.W.2d 789, 791 (Ky. App. 1986). Nonetheless, verbal settlement agreements, like all other contracts, must still demonstrate the requisite contractual elements—offer, acceptance, consideration, and mutual assent.

There is no doubt that a manifestation of mutual assent—also known as a "meeting of the minds"—must be present in order for an enforceable contract to be found. *Utilities Electrical Machine Corp. v. Joseph E. Seagram & Sons*, 300 Ky. 69, 187 S.W.2d 1015, 1018 (1945). In fact, a meeting of the minds is "the most essential factor" in determining the existence of a binding contract. *Id.* Logically, there can be no manifestation of mutual assent when the full and complete essential terms of the contract are not agreed upon. *See Johnson v.*

Lowery, 270 S.W.2d 943, 946 (Ky. 1954) (citing *Fisher v. Long*, 294 Ky. 751, 172 S.W.2d 545, 549 (1943); 12 Am. Jur., Contracts, Sec. 24) ("To be enforceable and valid, a contract to enter into a future covenant must specify all material and essential terms and leave nothing to be agreed upon as a result of future negotiations.").

Moreover, while it may facially appear that a settlement agreement has been reached, "other facts may show that the manifestations are merely preliminary expressions." *Dohrman v. Sullivan,* 310 Ky. 463, 220 S.W.2d 973, 975 (1949) (citing Restatement of the Law of Contracts, Vol. 1, Sec. 26). As a result, our inquiry must focus on whether "all the substantial terms of [the] contract have been agreed [to] and [whether] there is nothing left for future settlement . . . ." *Id.*

After a careful review of the February 26, 2009 hearing transcript, we believe the parties failed to mutually assent to all of the material terms of the settlement agreement, leaving at least the indemnification provision and specific consideration in dollar amounts open to future negotiations. For example, counsel for Central Bank began the hearing by stating that the parties "basically" settled the issues, thereby having "an agreement in principle." Furthermore, an exact consideration amount was not identified, although the itemized categorical fees, not in dollar amounts, were discussed. Most telling, however, is the fact that counsel for the Gills, in responding to the completion date of a written agreement, stated: "If I have any comments or

suggestions then I will get those back to you by Thursday morning. And then hopefully we can—whatever disagreements we have we can work them out . . . ." Counsel for the Gills continued by stating that it would be helpful to receive a written agreement as soon as possible so as "to avoid any controversy down the road."

The aforementioned statements of the parties lead this Court to believe that this agreement was tentative and conditioned on the parties' future assent to a final written settlement agreement. In other words, we believe the parties agreed to agree. It objectively appears that both parties were agreeing to settle, although not all of the material terms of contract had been discussed. Therefore, in light of the specific set of facts and circumstances before this Court, we find that the parties entered into a preliminary settlement agreement which failed to incorporate the complete material terms of the contract. As our predecessor Court expressly stated: "An agreement to agree cannot constitute a binding contract." *Walker v. Keith,* 382 S.W.2d 198 (Ky. 1964) (citing Williston on Contracts (3rd ed.) Vol. 1, Section 45 (page 149); *Johnson v. Lowery,* 270 S.W.2d 943 (Ky. 1954); *National Bank of Kentucky v. Louisville Trust Co.*, 67 F.2d 97 (6th Cir. 1933)). Consequently, we agree with the trial court that there was no manifestation of mutual assent.

To conclude, we find no error in the trial court's finding that the parties failed to mutually assent to all of the material terms of the verbal settlement agreement. The trial court was correct in entering the supplemental judgment in favor of Central Bank.

For the forgoing reasons, we reverse the opinion of the Court of Appeals and hereby remand this case to the Jefferson Circuit Court for reinstatement of its May 11, 2009 order overruling the Gills' objections/exceptions to the Master Commissioner's report and order of supplemental judgment.

Minton, C.J.; Abramson, Cunningham, Keller, Scott and Venters, JJ., concur. Noble, J., not sitting.

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