

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000570-MR

CATHY ROGERS and  
BEVERLY BARKLEY

APPELLANTS

v. APPEAL FROM MENIFEE CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 99-CI-00078

PHILLIP LAWSON; ROBIN LAWSON;  
BARRY LYONS; and NANCY LYONS

APPELLEES

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Menifee Circuit Court following a bifurcated bench trial in which the court found that appellants Cathy Rogers and Beverly Barkley breached their obligation to appellee Phillip Lawson under the terms of a land sale contract. Appellants argue on appeal that the trial court erred by finding that Lawson was

capable of providing marketable title, and that it erred in its calculations of damages. Finding no error, we affirm.

Appellants were unable to obtain the financing that was necessary to purchase approximately 100 acres of real property in Menifee County. Lawson, a real estate agent, agreed to purchase the property himself and sell it to appellants. The parties then entered into a land sale contract which provided that appellants would pay \$4,000 down plus \$498.92 per month for 72 months at 16% interest per annum. Thereafter, appellants took possession of the property and improved it by building a cabin and graveling the sole access road.

After a few years, appellants obtained approval for a bank loan so that they could pay Lawson the remaining sum due under the contract. Before the closing date, however, appellants received a written notice from the adjoining landowners, appellees Barry and Nancy Lyons, which stated that a recent survey indicated that appellants' cabin and road were located on the Lyonses' property. The Lyonses requested that appellants remove the structures immediately. Appellants informed Lawson, who was unable to resolve the problem by a designated date. Appellants ceased making payments under the contract at that time, but Lawson continued to communicate with them in an effort to resolve the problem. Meanwhile, the Lyonses tore down appellants' cabin, removed some trees, and

blocked appellant's access to the property. Appellants then sought reimbursement from Lawson of all sums paid under the contract plus amounts expended on the improvements to the property. Lawson responded by asking that appellants join him in an action to quiet title against the Lyonses, but appellants declined to participate and again requested reimbursement. Lawson then filed suit against appellants and the Lyonses, seeking an order directing that the property be sold due to appellants' failure to make the required payments. Lawson's complaint also sought damages from the Lyonses for trespass and destruction of property.

Appellants counterclaimed against Lawson asserting that they were ready, willing, and able to pay the balance due under the contract, but that Lawson breached the contract by failing to convey good title as allegedly required under the contract's terms. Appellants also cross-claimed against the Lyonses for interfering with their use and enjoyment of the property and destruction of property. Finally, the Lyonses counterclaimed against both appellants and Lawson in an effort to quiet title.

The proceedings were bifurcated into the separate issues of the boundary dispute and damages. With regard to the boundary dispute, the trial court found in favor of Lawson after determining that his survey was more accurate than that of the

Lyonses. The trial court therefore concluded that Lawson had not breached the land sale contract by his alleged inability to convey good title, with the result that appellants were accountable to Lawson for the withheld payments. On the issue of damages, the court ordered appellants to pay Lawson \$18,122.41, representing the amount due under the contract, plus \$9,906.92 for accrued interest. The court then ordered the property to be sold to cover these damages. The court further ordered the Lyonses to pay any deficiency appellants owed to Lawson after the sale was completed plus \$1250.00 as compensation for destroying appellants' road and cabin. In addition, the Lyonses were ordered to pay Lawson's attorneys' fees and survey costs and to reimburse Lawson for certain interest expenses he incurred. The court denied appellants' motions to alter, vacate, or amend the judgment, for additional findings of fact, and for a new trial. This appeal followed.

First, appellants contend that the trial court erred by determining that appellants breached the land contract, based solely upon its conclusion that the Lyonses' claim of ownership was without merit. They also claim that the court erred by refusing to make additional findings of fact regarding the alleged breach. More specifically, they assert that a breach occurred because, although the contract allowed them to pay the balance due under the contract at any time, and although Lawson

was then required to convey a good and sufficient warranty deed, free and clear of all liens and encumbrances, he was unable to do so when appellants were ready, willing, and able to pay. We disagree.

As an initial matter, we note that according to A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky. App., 998 S.W.2d 505, 509 (1999), "[t]he trial court's conclusions of law, . . . including its interpretation of the written contract, are subject to independent appellate determination." After reviewing the record, we are not persuaded by appellants' contention that a meritless claim by a third party renders an otherwise valid title legally unmarketable. According to 77 Am. Jur. 2d Vendor and Purchaser §163 (1997) at 233-234,

[a] conveyance or encumbrance executed by one who has no interest in the property which the vendor in a contract for the sale of land has agreed to convey, and who is a stranger to the chain of title, does not constitute a cloud upon, or affect the marketability of, the vendor's title. Nor does the recording of a notice of a claim hostile to the record title render such title defective, unless the person giving the notice is or becomes connected to the title. Titles cannot be encumbered or rendered defective by assertions of third persons, and a litigation between third persons is no more than any other assertion[.]

Moreover, although appellants were required to give Lawson an opportunity to correct the title problem within a reasonable

time, they instead refused Lawson's request to join in a lawsuit to quiet title, and they stopped making payments on the contract. See Chester A. Hicks Builder & Developer Inc., v. Caple, Ky. App., 473 S.W.2d 126, 128 (1971). Clearly, appellants were required to continue performing under the terms of the contract even if they were not necessarily required to join in Lawson's proposed action to quiet title. It follows, therefore, that the trial court correctly determined that resolution of the boundary dispute established that Lawson's title was marketable, and that as a matter of law appellants breached the land contract by failing to make the payments that were due. Given these conclusions, we cannot agree with appellants' contention that the court's findings of fact were insufficient.

Next, appellants argue that the trial court erred by awarding damages which were inappropriate under Kentucky law and which resulted in an unjust enrichment to Lawson. We disagree.

The trial court awarded Lawson the sums due under the contract, including interest calculated at the contractual rate agreed upon by the parties. The property thereafter was ordered sold. As stated in Sebastian v. Floyd, Ky., 585 S.W.2d 381, 383 (1979), "[t]he modern trend is for courts to treat land sale contracts as analogous to conventional mortgages, thus requiring a seller to seek a judicial sale of the property upon the

buyer's default." In addition, the court ordered the Lyonses to pay any deficiency that appellants owed to Lawson following the judicial sale of the property and to pay appellants an additional \$1250.00, which was the approximate amount that appellants expended on the improvements that they had made to the property. Further, appellants' argument that Lawson has been unjustly enriched by the damages award is without merit as the interest that the court ordered appellants to pay Lawson arose out of their contractual obligation to him, whereas the court ordered the Lyonses to reimburse Lawson the amount of interest that he paid to the lending institution that financed his purchase of the subject property.

Finally, we are not persuaded that the trial court abused its discretion by failing to award appellants attorney's fees or punitive damages. As noted by the court, appellants were not entitled to reimbursement for attorney's fees regarding the quiet title action since they declined to participate as plaintiffs therein. Moreover, given the trial court's determination that appellants breached the contract, they certainly are not entitled to recover attorney's fees from Lawson regarding the breach of contract issue. As noted in CSX Transportation, Inc., v. First National Bank of Grayson, Ky. App., 14 S.W.3d 563 (1999), "[a]s a general rule, in the absence of contractual or statutory liability, attorney's fees are not

recoverable as an item of damages." CSX Transportation, 14 S.W.3d at 569 (citation omitted). Further, we cannot say that the trial court abused its discretion by denying appellants' request for punitive damages, as they did not produce clear and convincing evidence that the Lyonses acted toward them with oppression, fraud, or malice. KRS 411.184(2).

The judgment of the Menifee Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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Michael A. Nickles  
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BRIEF AND ORAL ARGUMENT

FOR Philip and Robin Lawson:

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ORAL ARGUMENT FOR APPELLANTS:

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