

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000664-MR

WILLIAM E. BOLLINGER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
ACTION NO. 96-CI-002295

BANK ONE, N.A., EXECUTOR OF THE
ESTATE OF MARSHALL M. ROYCE, DECEASED

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: This is the second appeal from findings of fact, conclusions of law and a judgment of the Jefferson Circuit Court. Under the terms of a mediation agreement, William Bollinger was granted the right to purchase a tract of land from Bank One, but the agreement was voidable if an inspection showed that the structures on the property were in "substantial disrepair." Bollinger takes issue with the trial court's finding that the structures were not in substantial disrepair.

We conclude that the trial court's factual findings were not clearly erroneous in any significant aspect. Hence, we affirm.

The facts of this action were set forth in this Court's prior opinion as follows:

In 1994, Marshall Royce executed a will which gave appellant, William Bollinger, the option to purchase a parcel of land in Anderson County on which there was a barn, a cabin, and a lake. Pursuant to the will, the purchase price was to be determined by an appraiser having certain qualifications set out in the will. Upon Royce's death, appellee, Bank One, became executor of the estate. Thereafter, a dispute arose between Bollinger and Bank One as to the appraisal and purchase price of the property. On April 18, 1996, Bollinger brought an action against Bank One alleging that Bank One wrongfully refused to convey the subject property to Bollinger pursuant to the terms of the will. Subsequently, the trial court ordered that the parties attend mediation regarding all issues in the case. As a result of the mediation, the parties entered into an agreement approved by the mediator whereby Bollinger agreed to purchase the subject property for \$74,000 by March 28, 1998. The agreement additionally provided:

Bollinger may inspect to determine if any substantial damage to structures. If structures in substantial disrepair, settlement is voidable by Bollinger.

Subsequently, Bollinger inspected the property and thereafter attempted to void the mediation agreement on the basis that structures thereon were in substantial disrepair. Specifically, Bollinger maintained that the following conditions were evidence of "substantial disrepair": the cistern was half full, possibly indicating a leak; the barn's foundation

needed repair; the barn roof needed repair and was missing in places; stress cracks in the dry wall of the house indicated problems with the roof of the house; the wood siding of the house needed treatment; and the lake depth was unusually low, possibly indicating a leak.

Bank One then filed a motion to enforce the mediation agreement. In ruling for Bank One, the trial court construed the definition of "substantial disrepair" in the parties' agreement to mean "unfit for human habitation."¹ The court found that, while the structures on the property were clearly in need of varying degrees of repair, they all remained usable. On appeal, this Court reversed, concluding that the trial court erred in construing the term "substantial disrepair" as used in the agreement to mean "unfit for human habitation." However, this Court declined to state what exactly the parties meant by "substantial disrepair", offering only that it was something less than "unfit for human habitation." Rather, this Court remanded the matter to the trial court for further findings as to the parties' intent.²

On remand, the matter was submitted to the trial court on the existing record. On March 6, 2002, the trial court rendered findings of fact, conclusions of law and a judgment in Bank One's favor. The court held that in the context of the

¹ *Citing Johnson v. City of Paducah, Ky.*, 512 S.W.2d 514 (1974).

² *Bollinger v. Bank One*, 2000-CA-001590-MR, (Not To Be Published Opinion Rendered May 25, 2001).

parties' agreement, the term "substantial disrepair" means "'in need of considerable repairs' because of *damage* to the structures." (*Emphasis original*) Based upon the evidence, the court found that the damage to the structures, while significant, did not render the structures in "substantial disrepair" as that term was used in the agreement. In a subsequent order denying Bollinger's CR 59.05 motion, the trial court explained:

Bollinger asks the Court to make a specific finding of fact, pursuant to CR 52.02 and 52.04, stating that the repair to the roof of the house constituted evidence that the structures in question were in substantial disrepair. However, the issue in this case is not whether an individual repair was substantial in the absolute sense, but whether the need for repairs, considering the property as a whole, was such that the structures were in a state of "substantial disrepair." The substantiality of a particular repair is relative, so that while a \$2000 repair on property worth \$20,000 may be substantial, the same repair on a property whose agreed value is \$74,000 represents only 2.7% of the agreed property value and is not, in itself, substantial. The Court need not, and does not, make any specific finding of fact as to the substantiality of the roof repair in and of itself. Rather, considering the property as a whole, the Court declines to vacate or alter its original finding that the structures in question were not in "substantial disrepair."

Based upon the trial court's prior rulings, the court held that the mediation agreement remained in effect, and that

Bollinger's right to purchase the property under that agreement had lapsed on March 28, 1998.³ This appeal followed.

The trial court's March 4, 2001, judgment summarizes the mediation agreement as allowing "Bollinger to terminate the sale if, upon inspection, he determined that structures on the property were in 'substantial disrepair'". Based upon this language, the dissent concludes that Bollinger's subjective evaluation and assessment of the condition of the property is controlling as long as it was objectively reasonable. However, the trial court's summary does not accurately reflect the operative provision of the mediation agreement. Furthermore, the trial court did not apply this standard, nor does Bollinger argue that it should have. Rather, the trial court made factual findings to determine whether the structures were in substantial disrepair based on an objective standard.

Bollinger does not take issue with the trial court's construction of the term "substantial disrepair", or with the trial court's analysis of the property under an objective standard. Instead, he argues that the trial court clearly erred

³ The trial court had previously found that the mediation agreement constituted a novation of Bollinger's contract claim to purchase the property and that ruling was undisturbed by this Court's prior decision. Had the trial court found that the structures were in substantial disrepair, Bollinger could have exercised his right to set aside the mediation agreement and reinstate his original contract claim. Since the trial court found that the structures were not in substantial disrepair, and the mediation agreement required Bollinger to purchase the property for \$74,000.00 prior to March 28, 1998, Bollinger's option to purchase the property has lapsed.

in finding that the structures were not in a state of "substantial disrepair."

Although the trial court noted that there was conflicting evidence regarding the state of the structures, Bollinger does not dispute the trial court's findings concerning their condition. The house roof was leaking and in need of replacement, but there was evidence that the roof had been damaged in a storm sometime after Bollinger had the property inspected. Some of the wood siding on the house was cracked and was in need of preventative maintenance. The barn foundation was crumbling and the barn roof was missing a piece of tin. The driveway was not well-maintained but was usable. The cistern was half-full, but a previous leak had been repaired. Bollinger contends that the necessary repairs to the structures are, in fact, considerable, and the trial court erred in concluding otherwise.

CR 52.01 provides in part that findings of fact shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to assess the credibility of the witnesses.⁴ Findings of fact are not clearly erroneous if supported by substantial evidence.⁵ Substantial evidence is evidence which, when taken alone or in the light of all the

⁴ See also Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

⁵ See Black Motor Company v. Greene, Ky., 385 S.W.2d 954 (1965).

evidence, has sufficient probative value to induce conviction in the minds of reasonable persons.⁶

Unfortunately, the mediation agreement did not define what the parties intended for the term “substantial disrepair” to mean. The trial court’s definition, “in need of considerable repair”, is reasonable given the common and accepted meaning of “substantial disrepair.” Nonetheless, the court’s definition still leaves open the central question in this case: when do “significant” repairs become “considerable” repairs?

Bollinger focuses on the trial court’s contrasting of the cost of the repairs to the house roof to the total value of the property. He contends that the trial court should have applied the “substantial disrepair” standard to the structures alone, and not to the property as a whole. Bollinger points out that the necessary repairs to the structures exceed ten percent of their value, and should be deemed to be considerable.

We agree with Bollinger that the trial court’s consideration of the substantiality of the necessary repairs against the total value of the property was erroneous. The mediation agreement requires a determination of whether the *structures* were in “substantial disrepair.” However, Bank One points out that the trial court made this reference in its order

⁶ Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

denying Bollinger's motion to set aside the March 6, 2002, judgment. Consequently, it contends that the reference was not necessary to the judgment, and may be disregarded as dicta. Bank One further argues that the trial court properly considered the necessary repairs in the context of all of the structures: although certain repairs might be substantial in the context of one structure, the necessary repairs to all of the structures are not substantial in light of their total value.

The necessary repairs to the structures, while undoubtedly significant, were not necessarily substantial when taken as a whole. The appraiser characterized the barn to be in poor condition, but stated that the house was in fair to good condition. Furthermore, the damage to the house roof occurred after the inspection provided for in the mediation agreement. Given the evidence, the trial court would have been authorized to find that the structures were in substantial disrepair. But the evidence was not so overwhelming as to compel that conclusion. Consequently, we find that the trial court's findings of fact are not clearly erroneous.

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

TACKETT, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I dissent as I agree with appellant that the trial court clearly erred in failing to characterize the dilapidated condition of the property as constituting "substantial disrepair." In the order from which this appeal is taken, the trial judge cited the terms of Bollinger's mediation agreement as allowing Bollinger "to terminate the sale if, upon inspection, he determined that structures on the property were in 'substantial disrepair'." (Findings of Fact, Conclusions of Law, Judgment of March 4, 2002 at p. 1). (Emphasis added).

Although the court's first opinion labored over an acceptable definition of "substantial disrepair," this second opinion reverted to the language of the mediation agreement. That language specifically deferred to Bollinger's subjective evaluation and assessment of the property: "if . . . he determined" He did so determine based on substantial evidence. His subjective determination was not objectively arbitrary or unreasonable in light of the many serious problems attendant to the property.

By its own ruling, the court should have deferred to Bollinger's definition of "substantial disrepair" instead of substituting its own appraisal and disregarding the terms of the mediation agreement that unequivocally accorded him such discretion.

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