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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001909-MR

MAXWELL F. MCDADE, III

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 00-CI-00043

MARVIN E. ALEXANDER AND
UNION PLANTERS BANK OF
KENTUCKY, N. A.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND TACKETT, JUDGES.

TACKETT, JUDGE: Maxwell McDade appeals from the judgment of the Fulton Circuit Court, which granted summary judgment in favor of auctioneer Marvin Alexander and Union Planters Bank of Kentucky, in an action for rescission of a contract for the sale of real estate purchased at absolute auction. McDade argues that the contract should be rescinded due to a mistake among the parties as to the location of a building which was believed to be on the property and subsequent surveys revealed it was not. McDade

argues that he would not have purchased the property if he realized that the building, the former Our Place Restaurant, was not on the property, and that he bargained for the purchase of the restaurant but did not receive it. The circuit court granted summary judgment in favor of Alexander and Union Planters on the ground that McDade had released Alexander from all liability, and that Union Planters was not a party to the sale and may retain the proceeds it received, as it was a creditor of the property owner, Ron Moss. McDade appeals, arguing that summary judgment was improper. We affirm.

The property in question was sold at absolute auction to satisfy the debt of Ron Moss to Union Planters. The bank sent a copy of the property description to Alexander, and Alexander used that description in the contract with Moss to sell the property at auction. Neither the bank, nor Moss, nor Alexander, nor McDade had the property surveyed prior to closing. A survey performed by McDade after the property was sold revealed that the restaurant was not located on the 1.4 acre lot that was sold at the auction. McDade filed his action seeking rescission of the contract. Summary judgment was entered and this appeal followed.

On appeal, McDade makes much of the fact that the circuit judge at one motion hour expressed the opinion that "I don't think anybody's going to get a summary judgment out of

this." However, it must be noted at the outset that opinions expressed prior to ruling on the motion for summary judgment have no bearing on the question of whether summary judgment was properly granted. The court is fully entitled to change its mind once all relevant information about the facts and the law is heard and considered.

McDade's argument can be summarized as follows: it is inequitable to allow the auctioneer and bank to keep the proceeds of the sale, when McDade believed that he was buying the restaurant and not just 1.4 acres of empty land. At times, McDade's argument seems to be couched in terms of fraudulent misrepresentation, but he stops short of accusing Alexander and Union Planters of acting with the knowledge that they were advertising one thing and selling something else entirely. McDade's argument, however, must fail because of the provisions of the contract between the parties, in which McDade released the auctioneer from any liability for mistakes in the description of the property, and assumed the responsibility of verifying the boundary lines prior to closing. By the provisions of the contract, McDade had 30 days prior to closing to verify the boundaries and the validity of title, and agreed that it was his responsibility to do so. Having thus failed to act to protect his own interest, he may not now seek to avoid the provisions of the contract. As McDade is not entitled to

rescission of the contract, likewise he may not seek a return of proceeds of the sale paid to Union Planters or the fee paid to Alexander.

For the forgoing reasons, the judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis L. Null, Jr.
*Law Offices of Null, Thomas,
Samson & Paitzel*
Mayfield, Kentucky

BRIEF FOR APPELLEE MARVIN E.
ALEXANDER:

Daniel S. Stratemeyer
Boehl, Stopher & Graves
Paducah, Kentucky

BRIEF FOR APPELLEE UNION
PLANTERS BANK OF KENTUCKY,
N.A.

Mark C. Whitlow
*Whitlow, Roberts, Houston &
Straub*
Paducah, Kentucky