

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000461-MR

RODNEY HEATON AND
MARGARET HEATON

APPELLANTS

APPEAL FROM CALDWELL CIRCUIT COURT
v. HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 02-CI-00163

NANCY COLEMAN, ADMINISTRATRIX OF
THE ESTATE OF GEORGE C. COLEMAN

APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellants, Rodney and Margaret Heaton, (the Heatons), appeal from the judgment of the Caldwell Circuit Court. We affirm the circuit court's ruling in part, and reverse in part.

The Heatons entered into an agreement with George Coleman, now deceased, for the purchase of a tract of real estate for the sum of \$150,000.00. The Heatons allege that the agreement stated that they would make payments in annual

installments of \$15,000 to Mr. Coleman for the duration of his life, and that upon his death, they would be granted a deed in fee simple to the subject property. The agreement provided that any balance due and owing upon Mr. Coleman's death would be waived. The agreement also stated that farm implements and farm equipment were granted to the Heatons as consideration for the life interest in the property given to George Coleman by the Heatons. The Heatons state that they made payments pursuant to the agreement. A deed of conveyance between Coleman and the Heatons was issued and recorded in Caldwell County. The deed was dated December 5, 1996.

The Heatons assert that at some point prior to his death, Mr. Coleman's daughter, Appellee, Nancy Coleman (Coleman), convinced him to attempt to set aside the agreement. The record shows that Mr. Coleman filed a civil action against the Heatons, arguing that the agreement should be set aside on the grounds that he did not have the capacity to enter into the agreement at the time it was executed. An agreement was reached between the parties, and the parties executed a settlement agreement. The settlement agreement ratified the land sale contract. The settlement agreement modified the payment terms to hold that following the death of Mr. Coleman, the Heatons would have one year to pay the entire balance due. The settlement was entered into on October 21, 1999. That

settlement expressly stated that "[t]he existing contended promissory note is otherwise voided." The settlement agreement further specified that the farm implements and the trailer [mobile home] on the property being sold to the Heatons belonged to George Coleman. The Heatons signed in agreement to the terms of the settlement.

A second settlement agreement was entered into by the parties on October 2, 2000. That settlement agreement provided that the Heatons would provide George Coleman with a bill of sale for a mobile home which was located on the property at issue. The mobile home would be conveyed in fee simple to Coleman at the time the bill of sale was provided. The agreement stated that upon Mr. Coleman's death, the mobile home should be removed from the property within five days by Mr. Coleman's heirs. The agreement was silent as to any remedy the Heatons would have if the mobile home was not removed from the land in a timely fashion. The Heatons claim that if the heirs failed to remove the home within the six-day period stated in the settlement agreement, the mobile home would remain on the property and belong to the Heatons. No such provision is found in the record, and the Heatons refer to no authority supporting their interpretation of the document.

Mr. Coleman passed away on May 14, 2001. No heir removed the mobile home during the six days following Mr.

Coleman's demise. The Heatons allege that Mr. Coleman's heirs came on the property as late as sixty days after Mr. Coleman passed away, and removed not only farm equipment belonging to Mr. Coleman's estate, but many additional items of farm equipment which belonged to the Heatons. The Heatons assert that the Coleman heirs wrongfully removed the trailer after sixty days. The Heatons allege that these actions constitute a material breach of the parties' agreement and waive any claim the Colemans may have under the contract.

Nancy Coleman, as Administratrix of the Estate, filed suit against the Heatons for \$90,000.00, the unpaid balance remaining at the time of Mr. Coleman's death. The Heatons refused to pay the sums due. The Heatons claimed that the agreement had been breached by the Coleman heirs and that they were no longer bound by its terms. The trial court found that the Coleman heirs had a right to remove the farm equipment from the property and ruled that the removal was in accordance with the settlement agreement. The trial court did state the Coleman heirs had breached the settlement provision requiring them to remove the trailer within six days, but held that this breach did not void the agreement between the parties, or affect the Coleman heirs' ownership of the mobile home. The trial court also found that the Colemans were still entitled to full payment for the land. The trial court entered an order ruling:

That the Plaintiff, the Estate of George C. Coleman, is granted judgment against the defendants, Rodney Heaton and his wife, Margaret Heaton, jointly and severally, in the sum of \$90,000 plus interest from May 14, 2002.

The court did not address the claims raised by the Heatons regarding the alleged wrongful taking of various items of farm equipment. This claim was not formally made as part of the action below, and therefore was not before the trial court.

The Heatons contend that the trial court erred by failing to enforce the contract as written. They argue that the contract required the mobile home to be removed within six days. They argue that the contract also limited the farm equipment that the heirs could remove from the property. The Heatons argue that the court must not alter the unambiguous terms of a contract. First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829, 835 (Ky.App. 2001). The Heatons claim that the court's actions in permitting the Colemans to claim the mobile home, the farm equipment, and the balance due at the time of Mr. Coleman's death were reversible error. It is well settled under Kentucky law that "ordinary rescission of an executed contract for non-performance or breach will not be allowed for a slight or casual breach of the contract." C.C. Leonard Lumber Co. v. Reed, 236 S.W.2d 961, 962 (Ky. 1951). The breach complained of

by the Heaton's was clearly insufficient grounds for setting aside an executed agreement.

The record contains two separate settlement agreements between the parties. These properly executed documents alter and amend the terms of the original contract. A written document, particularly one agreed to and executed by all parties, may change the terms of a contract. Cox v. Venters, 887 S.W.2d 563, 566 (Ky.App. 1994). The terms of those settlement agreements permit the actions taken by the Coleman heirs. The settlement agreements were binding contracts, and the court enforced them as written. Frear v. P.T.A. Indus., 103 S.W.3d 99, 105 (Ky. 2003). The trial court's ruling must be affirmed unless it has been shown to be clearly erroneous. CR 52.01. A trial court's factual findings are "not clearly erroneous if supported by substantial evidence." Cole v. Gilvin, 59 S.W.3d 468, 472 (Ky.App. 2001). We find no reversible error in the court's enforcement of the Colemans' claim to the real property, mobile home, and farm equipment.

The trial court also ruled that:

The plaintiff (Appellee herein) has filed a *lis pendens* Notice of record on August 1, 2002, which encumbers the property which is the subject matter of this litigation. The plaintiff is awarded execution on the subject property by virtue of the *lis pendens* notice.

The court ruled that any deficiency remaining after the sale of the property would remain the responsibility of the Heatons.

The Heatons argue that the court was without authority to order a sale of the property based solely upon a *lis pendens*. They assert that the Coleman heirs had no lien or interest in the property permitting such a sale. They argue that the most the Colemans were entitled to was a judgment for the unpaid balance due. The Heatons contend that a *lis pendens* is not a lien granting the holder an interest in land, and that the court improperly treated it as such. The Colemans argue that the court's order requiring a sale of the property should be upheld.

A *lis pendens* is:

A notice, recorded in the chain of title to real property, to warn all people that certain property is the subject matter of litigation and that any interests acquired during the pendency of the suit are subject to its outcome.

Greene v. McFarland, 43 S.W.3d 258, 260 (Ky. 2001). A *lis pendens* is not a lien on real property. Strong v. First Nationwide Mortgage Corp., 959 S.W.2d 785, 789 (Ky.App. 1998).

A *lis pendens* does not grant the individual filing the document any additional rights to the property. Leonard v. Farmers & Traders Bank, 605 S.W.2d 770, 773 (Ky.App. 1980). As the Heatons note, a *lis pendens* does not give the person filing the claim any right to the property until a judgment is filed in her

favor. Stahl v. St. Elizabeth Med. Center, 948 S.W.2d 419, 424 (Ky.App. 1997).

The law holds that the effect of a *lis pendens* "is to keep the subject matter of the litigation within the control of the court." Cumberland Lumber Company v. First & Farmers Bank of Somerset, Inc., 838 S.W.2d 403, 405 (Ky. 1995), citing Roberts v. Cardwell, 154 Ky. 483, 157 S.W. 711 (1913). The *lis pendens* filed by the Coleman heirs protected their right in the property until the judgment was entered in their favor. At that point, the law required the Colemans to file a judgment lien and to make a claim to the property before requesting a judicial order of sale. The trial court could not mandate a sale of the property to fulfill the debt owed until such a lien was filed, and a motion requested an order of sale was made.

After a judgment was entered in favor of the Colemans, the court held that the Colemans' claim, and the notice provided by the *lis pendens*, required a sale of the land to satisfy the Heatons' remaining financial obligation. In the absence of a judgment lien on the property and a formal request for sale of the land, no sale could be ordered. The record shows that the terms of the agreement entitle the Coleman heirs to the complete unpaid balance within a year following Mr. Coleman's death. The agreement does not specify that the land must be sold to fulfill that debt.

KRS 426.720 holds, in relevant part, that "a final judgment for the recovery of money or costs . . . shall act as a lien upon all real estate in which the judgment debtor has any ownership interest. . . ." As a general rule, a party holding a judgment must file a judgment lien and demand a sale of the property before the land can be required to be sold. Redondo Construction Co. v. United States, 157 F.3d 1060, 1068 (6th Cir. 1998).

In the present case, the Colemans simply filed a *lis pendens* and relied on that as requiring a sale of the property. The Colemans failed to file a formal lien on the land. A *lis pendens* "brings neither the parties nor the property before the court." Bonnie Braes Farms, Inc. v. Robinson, 598 S.W.2d 765, 766 (Ky.App. 1980). The trial court lacked jurisdiction to order a sale of the property. For this reason, that portion of the judgment ordering a sale of the property to satisfy the amount of the judgment is null and void, and is hereby reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard L. Walter
Paducah, Kentucky

BRIEF FOR APPELLEE:

Alan C. Stout
Marion, Kentucky