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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001265-MR

HARGUS AND HELEN HARRIS — APPELLANTS

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 02-CI-00014

BILLY R. WINKLER AND
MARY JANE WINKLER — APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: Billy and Mary Jane Winkler commenced this action alleging fraud and breach of warranty against Hargus and Helen Harris. The Harrises contend that the circuit judge was required to recuse himself; that the court erroneously considered extrinsic evidence; that they did not receive notice of the motion for summary judgment; and that the court erred when it awarded attorney's fees, surveyor's fees, and fencing costs. We affirm in part and reverse in part and remand.

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The property involved was sold by Bobby and Judy Isaacs to the Harrises, who in October 1993, sold it to the Winklers. However, the Isaacses continued to own the adjoining property. Following a dispute concerning the boundary line between the two parcels of property, the Winklers filed an action to determine its precise location. Following a bench trial, in January 2001, the court entered judgment in favor of the Isaacses.

On January 24, 2002, the Winklers filed the present action alleging that the Harrises committed fraud and breached the warranty of title when they conveyed the disputed property. The Harrises, pro se, timely answered. Nothing further happened in the case until October 2002, when the Winklers filed a motion for summary judgment. After the Harrises did not respond, summary judgment was entered on December 19, 2002, finding that the Harrises breached the warranty of title. There were no findings made with regard to the elements of fraud.[2] The Harrises did not file a motion to set the judgment aside until December 1, 2003; relief, therefore, if granted, must be based on one of the grounds set forth in CR 60.02.[3] The Harrises allege that they did not receive notice of the motion for summary judgment, and that relief is justified.

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[2] United Parcel Service Co. v. Rickert, 996 S.W.2d 464 (Ky. 1999).

[3] Kentucky Rules of Civil Procedure.

The Harrises' answer to the complaint states their address as "224 Lincoln Avenue, Irvine, Kentucky 40336". The motion was mailed to the Harrises at that stated address. After the original notice was returned with the notation that there was no such address, a new certificate of service was filed stating it was mailed to "123 Lincoln Avenue, Irvine, Kentucky 40336".

Under CR 56.03, a motion for summary judgment must be served at least 10 days before the time fixed for the hearing. CR 5.02 provides the method of giving legal notice and provides that service, when required, shall be made upon a party not represented by counsel "by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court." And the rule further states that service is "complete upon mailing." Completed service does not require that the notice be actually received but only that it be mailed to a stated proper address.[4] Where, however, it is established that the notice was not mailed to the proper last known address the court is without authority to act summarily. "A notice mailed to an incorrect address and not received by the addressee is not in compliance with CR 5.02."[5]

[4] Benson v. Benson, 291 S.W.2d 27 (Ky. 1956).
[5] McAtee v. Wigland of Louisville, Inc., 457 S.W.2d 265 (Ky. 1970).

The last known address for the Harrises was as stated in their answer filed just eight months prior to the filing of the motion for summary judgment and the notice was mailed to the precise address that service of summons was executed. There was strict compliance with CR 5.02. Under the circumstances, the Harrises can not successfully argue the failure to receive actual notice as grounds for relief. Finding no other basis asserted by the Harrises sufficient to justify granting relief from the judgment, the judgment on the liability issue is affirmed.

A bench trial was held on the issue of damages and the Winklers were awarded $367.70 representing the difference in the value of the property the Harrises warranted to convey to them and the value of the parcel actually conveyed. This is a proper measure of damage in a breach of warranty case.[6] The Harrises contend that this is, however, the exclusive element of damage recoverable in a breach of warranty case and that the court erred in awarding additional sums for surveying, a fence constructed on the disputed property, and attorney's fees. We find the case law is to the contrary and that the Winklers are entitled to recover any reasonable amount lost as a result of the failure to convey the warranted title.

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[6] Ralston v. Thacker, 932 S.W.2d 384 (Ky.App. 1996).

In Finucane v. Prichard[7] the Finucanes sought to recover damages from their warrantor for the diminished value of the property and for expenses incurred in improvements made on the property that was later discovered to be owned by another party. The court permitted both elements of damage stating that the cost of improvements can be recovered unless there is a showing of actual notice of the error in the conveyance or bad faith in making the improvements.[8] The court in this case properly awarded the Winklers the costs of the survey and the fence since both are reasonable losses incurred as a result of the breach of warranty.

The court also awarded the Winklers $2,410 in attorney's fees. The Harrises correctly point out that attorney's fees are not recoverable by either party unless provided for by statute or contract.[9] However, it is the rule in Kentucky and elsewhere that if the warrantor had notice of an action challenging title as warranted, the warrantor can be liable for the necessary costs and expenses incurred in defending title, including a reasonable attorney's fee.[10] The transferor, by means of the warranty deed, guarantees that the property is free from encumbrances and that he will warrant and

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[7] 811 S.W.2d 348 (Ky.App. 1991).

[8] Id. at 350.

[9] White v. Sullivan, 667 S.W.2d 385 (Ky.App. 1983).

[10] Wilson v. McGowand, 192 Ky. 565, 234 S.W. 17, 18 (1921).

defend the title against all lawful claims.[11] When the transferee is forced to defend the title, the guarantee is breached and the warrantor is responsible for the expenses, including attorney's fees, in defending the title. There is no contention that the Harrises were not aware of the Winkler's prior suit. In fact, Hargus testified in that action. The Winklers are entitled to recover reasonable attorney's fees incurred as a result of their unsuccessful attempt to establish that they are the true owners of the disputed property as warranted by the Harrises.

Although the Winklers are entitled to attorney's fees incurred as a result of the action against the Isaacses, they are not entitled to attorney's fees as a result of bringing the action for breach of covenants in the warranty deed. Being merely an action for breach of warranty of title and not for failure to defend as guaranteed, a request for attorney's fees is subject to the general rule that they are not recoverable.[12] Billy Winkler testified that he sought a total of $2,410 in attorney's fees which amount included fees charged as of January 19, 2004. Final judgment in the Winkler v. Isaacs case was entered on January 31, 2001. So it appears that at least a

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[11] Rieddle v. Buckner, 629 N.E.2d 860 (Ind. 1994); See Rauscher v. Albert, 145 Ill.App.3d 40, 99 Ill. Dec. 84, 495 N.E.2d 149 (1986).

[12] Id.

portion of the amount awarded by the trial court includes attorney's fees incurred in the breach of warranty case. Because the Winklers are entitled only to attorney's fees incurred in the action against the Isaacses, we remand this case to the trial court to make an award in accordance with the law.

The Harrises, for the first time, argue to this court that the trial judge was required to sua sponte recuse from the case because, as a practicing attorney, he prepared certain deeds to the property at issue. However, these facts were never brought to the trial judge's attention and no motion to disqualify was presented. Absent a showing that a basis for recusal was brought to the trial court's attention, the issue is not subject to this court's review.[13]

This judgment is affirmed in part and reversed in part. The case is remanded for a determination of the amount of attorney's fees.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Dean
Irvine, Kentucky

BRIEF FOR APPELLEE:

Rodney G. Davis
DAVIS & NEAL, P.S.C.
Richmond, Kentucky

[13] Commonwealth v. Carter, 701 S.W.2d 409 (Ky. 1985).