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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001305-MR

MAXINE S. FELIX — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, SPECIAL JUDGE
ACTION NO. 97-CI-00289

LYKINS ENTERPRISES, INC.;
FUEL STOP REAL ESTATE COMPANY
A/K/A FUEL STOPS REAL ESTATE COMPANY;
DAVID O. LYKINS; FUEL STOPS, INC.;
AND WILLIAM T. ESHAM — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: This is an appeal from an order and final judgment entered by the Mason Circuit Court concerning a lease agreement and an option to purchase a parcel of commercial real

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

estate located in Brown County, Ohio. We vacate and remand for an order dismissing the action.

In August 1988, Florida resident, H. Lee Felix (now deceased), and his wife, Maxine S. Felix, executed a lease agreement as the lessor with Lykins Enterprises, Inc., a Kentucky corporation, with respect to a truck-stop located in Aberdeen, Ohio. The initial term of the lease was due to expire on August 31, 1989, but the lessee was granted the option of extending the lease for a period of eight years.

In September 1988, the lease was assigned by Lykins Enterprises, Inc., to Fuel Stops, Inc., an Ohio corporation. On February 10, 1989, Fuel Stops, Inc., sent the Felixes written notice of an intent to extend the term of the lease through August 31, 1997.

The lease agreement also provided the lessee with an option to purchase the property during the term of the lease. Section 17 of the lease provides, in part, as follows:

> **OPTION TO PURCHASE** Lessee shall have an exclusive option at any time during the initial terms of this Agreement, and during the extension term if exercised by Lessee, to purchase the Leased Premises, including real estate, fixtures, and all improvements thereon other than said mobile home, for the purchase price of $200,000. . . .In order to exercise its option to purchase under this paragraph, Lessee shall notify Lessor of Lessee's intention to purchase not less than thirty days prior to expiration of the initial term, or thirty days prior to

> expiration of the extension term of this Agreement. The closing of such purchase shall be on a business weekday prior to the expiration of the current Agreement term, but not less than thirty days after notice given by Lessee unto Lessor of such closing date. The closing shall be at the law offices of Royse, Zwigart, Kirk & Brammer, unless otherwise agreed by the parties. This option to purchase shall . . . automatically expire upon the expiration of the initial terms of this Agreement, or later upon expiration of the extension term of this Agreement if extended by Lessee . . . .

In November 1996, David Lykins, president of both Lykins Enterprises, Inc., and Fuel Stops, Inc., contacted the Felixes' attorney, Susan Brammer, of Royse, Zweigert, Kirk & Brammer. At that time, Lykins was attempting to arrange a sale of the leased premises to a third-party, Mid-Ohio Petroleum Company ("Mid-Ohio"). In order to facilitate the sale, Lykins asked Brammer to prepare a deed transferring the leased premises from the Felixes to an Ohio general partnership identified as Fuel Stops Real Estate Company. Lykins notified the Felixes by mail that Fuel Stops, Inc., had assigned the lease agreement, including the option to purchase, to Fuel Stops Real Estate Company. Brammer prepared the deed as requested, mailed the deed to the Felixes in Florida, and forwarded a copy to Lykins for his review. On November 25, 1996, the Felixes executed the deed prepared by Brammer.

Several days later, Brammer received a copy of correspondence from Lykins addressed to Mid-Ohio advising that the proposed sale of the leased property to Mid-Ohio had been cancelled. A closing was subsequently re-scheduled for a date in January 1997, but Lykins unilaterally cancelled this date apparently because Mid-Ohio had backed out of the transaction.

On August 8, 1997, Lykins mailed a letter to Brammer indicating that he "would like to close on the Felix property in Aberdeen, Ohio this week, or no later than August 18." The letter was prepared on the letterhead of Fuel Stops, Inc., and was signed by Lykins as president of Fuel Stops Real Estate Company. The letter was copied to Terry Teegarden, the Felixes' son-in-law, in Ohio. By certified letter dated August 12, 1997, the Felixes' attorney advised Lykins that any notice of an intent to exercise the option to purchase the leased premises had not been timely given by the lessee.

In the meantime, H. Lee Felix had died, and Maxine Felix filed a declaratory judgment action in Mason Circuit Court on December 1, 1997, naming Lykins Enterprises, Inc., as defendant. Felix sought a determination that the parties' lease agreement had expired by its terms, that the defendant had failed to exercise its option to purchase the leased premises, and that Lykins Enterprises, Inc., occupied the premises solely on a month-to-month tenancy.

On December 17, 1997, Lykins Enterprises, Inc., filed a motion to dismiss the action. In the motion, Lykins Enterprises, Inc., denied that it was a real party in interest, explaining that the lease had been assigned first to Fuel Stops, Inc., and then to Fuel Stops Real Estate Company. Moreover, an action brought by Fuel Stops Real Estate Company against Felix demanding specific performance was already pending before the Court of Common Pleas of Brown County, Ohio. Lykins Enterprises, Inc., contended that the Ohio court provided the proper venue for a resolution of the dispute between the parties.

Felix amended her complaint on December 12, 1997, to add Fuel Stops, Inc., and Fuel Stops Real Estate Company as defendants in the Mason County action. Over Felix's objection, the Kentucky action was ordered stayed pending a decision by the Ohio court.

On May 26, 1999, the Ohio court denied the motion for summary judgment of Fuel Stops Real Estate Company. In its lengthy order, the Ohio court concluded that there were numerous material questions of fact with respect to whether the lessee had validly and unequivocally exercised the option to purchase the Aberdeen truck-stop.

Included in the record before us are several other documents from the Ohio court proceedings indicating that the

parties remained actively involved in the Ohio litigation. Nevertheless, upon Felix's motion, the Kentucky action was eventually restored to the active docket of the Mason Circuit Court in February 2003.

On September 10, 2003, Felix filed a motion for summary judgment in the Mason County action. She argued that only Fuel Stops, Inc., could exercise the option to purchase and that the option had not been properly exercised under the express terms of the lease agreement. The lessees responded with a cross-motion for summary judgment. They contended that the Felixes had timely, actual notice of the intent of Fuel Stops Realty Company to exercise the option to purchase and that the Felixes had initially participated diligently in facilitating efforts by the lessee to consummate a closing. Following a hearing, the trial court concluded that Fuel Stops Realty Company had properly exercised the option to purchase on a timely basis. Felix was ordered to transfer the Aberdeen property by deed to Fuel Stops Realty Company within sixty (60) days. This appeal followed.

On appeal, Felix contends that the trial court erred by granting summary judgment since the lessee failed to comply with the lease terms governing the exercise of the option to purchase. She argues that Ohio law controls and that it requires strict compliance with the technical requirements of an

option to purchase. The lessees contend that Kentucky contract law applies and that they were entitled to summary judgment since the evidence shows that they exercised the option to purchase "unequivocally, repeatedly, and in an on-going fashion, to multiple agents of [the Felixes]." Brief at 11.

In general, Kentucky prefers to apply its own laws over those of another forum. Custom Products, Inc. v. Fluor Daniel Canada, Inc., 262 F.Supp.2d 767 (W.D.Ky. 2003). "'[U]nder Kentucky law, any significant contact with Kentucky is sufficient to allow our law to apply.'" Id. at 773 (citing Bonnlander v. Leader Nat'l Ins. Co., Ky.App., 949 S.W.2d 618, 620 (1996). However, that preference is not absolute:

> although this principle should generally dictate the outcome there are occasions when a careful examination of the facts reveals that the case's actual connection to Kentucky is simply too remote to justify applying Kentucky law.

Id. at 771. It will not suffice to prove just any contact with Kentucky. See Bonnlander, 949 S.W.2d at 620.

It is clear that there are no significant contacts in this case to justify the application of Kentucky law to resolve the dispute. Felix is a Florida resident and all of her activities (as well as those of her deceased husband) occurred in Florida. Teegarden, Felix's son-in-law and purported agent,

is an Ohio resident. The lessee is an Ohio partnership, and the leased premises are located entirely in Ohio.

We believe that the trial court should have dismissed Felix's action under the doctrine of *forum non conveniens* after it became aware that Ohio had already assumed jurisdiction of this matter. While the court may well have had proper jurisdiction of the case, it had both a right and a duty to consider the doctrine of *forum non conveniens* and to decline jurisdiction if appropriate. See Williams v. Williams, 611 S.W.2d 807 (Ky. App. 1981).

Kentucky has no interest in this action. It bears no significant relationship to the parties, to the transaction, or to the *res*. There is no possibility that any public policy important to Kentucky will be articulated or subverted. Finally, the Ohio courts provide an adequate alternate forum for the resolution of the dispute. We are confident that the parties will receive a fair hearing before the courts of Ohio where the case in counterpart is being litigated.

We believe that the Mason Circuit Court erred in accepting jurisdiction in this case. Accordingly, we vacate the summary judgment and remand for an order dismissing.

GUIDUGLI, JUDGE, CONCURS.

MILLER, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MILLER, SENIOR JUDGE, DISSENTING: The majority reverses and remands for dismissal under the doctrine of *forum non conveniens* in light of a pending litigation in Ohio. The majority reasons that dismissal is appropriate as Ohio is the more convenient forum. Because I believe that Mason Circuit Court was a proper forum for the consideration of this case, and the circuit court had no obligation to defer to Ohio as a preferable forum, I would affirm on the merits.

I am unaware of any authority for dismissal of an action in one jurisdiction simply because the same litigation is pending in another jurisdiction which might be considered a more convenient forum. As I understand the law, a forum court may, in its discretion, abate an action as a matter of comity, but it may never dismiss an action as barred by litigation pending in another state.[2] The doctrine of *forum non conveniens* has no application. Accordingly, I respectfully dissent.

The law in this area is succinctly stated in Brooks Erection Co. v. William R. Montgomery & Associates, Inc., 576 S.W.2d 273 (Ky.App. 1979). In Brooks, two Missouri companies had a falling-out over a construction contract. Brooks filed an

[2] Lykins moved to dismiss the Kentucky case in deference to the Ohio case. While the trial court did not grant the motion to dismiss, it did abate the motion for a time in deference to the earlier filed Ohio case. I have no qualms with abatement as a matter of comity, and, indeed, it is a practice generally favored. See Brooks Erection Co. v. William R. Montgomery & Associates, Inc., 576 S.W.2d 273 (1979).

action in Missouri. Montgomery subsequently filed an action in Webster Circuit Court of Kentucky. Brooks asked the Webster Circuit Court to abate the Kentucky case on the grounds of the former action in Missouri. The circuit court declined to do so. In affirming, upon appeal, it was stated as follows:

> We think that the law is well settled that a second action based on the same cause will generally be abated where there is a prior action pending in a court of competent jurisdiction Within [sic] the same state, between the same parties, involving the same or substantially the same subject matter and cause of action, and in which prior action the rights of the parties may be determined and adjudged. This principle has been clearly enunciated in Delaney v. Alcorn, 301 Ky. 802, 193 S.W.2d 404 (1946), and in Akers v. Stevenson, Ky., 469 S.W.2d 704 (1970).
>
> However, a different problem arises when the prior action is pending in another state. The law in this instance is best set out in an annotation contained in 19 A.L.R.2d 305, in which we find the following statement:
>
> > This principle, however, does not hold true in the case of a pending action in another jurisdiction, it being uniformly held that the pendency of another action in another jurisdiction, though between the same parties and upon the same cause of action as the one subsequently instituted at the forum, is not a bar or ground for abatement of the later action at the forum. This is true even though a foreign court in which the prior action was commenced had complete jurisdiction of the parties and of the action.

> Also in 21 C.J.S. Courts s 548, cited with approval in Wilson v. Wilson, Ky., 511 S.W.2d 201 (1974), we find the following:
>
> > The pendency of an action in the courts of one state or country is not a bar to the institution of another action between the same parties and for the same cause of action in a court of another state or country, nor is it the duty of the court in which the latter action is brought to stay the same pending a determination of the earlier action, even though the court in which the earlier action is brought has jurisdiction sufficient to dispose of the entire controversy. Nevertheless, sometimes stated as a matter of comity, not of right, it is usual for the court in which the later action is brought to stay proceedings under such circumstances until the earlier action is determined . . .
>
> Thus, we find that the general law, as hereinabove stated, is that there is no duty upon the court to grant a plea of abatement where a prior action has been filed in another state but that it is discretionary only. This principle has been set out in the cases of Salmon v. Wootton, 39 Ky. Reports (9 Dana) 422 (1840), and Davis v. Morton, Galt & Co., 67 Ky. Reports (4 Bush) 442 (1868). (Emphasis added).

Id. at 275.

The rule is neither unsound nor unreasonable. All cases should reach the same correct result wherever the forum. The law of the forum governs procedure only. The substantive law is always that applicable given the nature and circumstances of the case. If the nature and circumstances of the case

dictate that the law of a particular jurisdiction applies, it will be so applied wherever the action is pending. Thus, this action pending in the Mason Circuit Court is subject to the same substantive law as if pending in Ohio, should the principles of conflict of laws so dictate.

In summary, courts always apply the procedural law of the forum. Moreover, courts apply the substantive law of the forum unless there exists a conflict with the substantive law of another jurisdiction having some relationship to the matter in controversy, in which latter case the court will apply the substantive law of the jurisdiction having the most significant relationship.

In Lewis v. American Family Insurance Group, 555 S.W.2d 579 (Ky. 1977), involving a contract dispute, Kentucky expressly adopted the "most significant relationship" test as set forth in Restatement (Second) of Conflict of Laws, § 188 (1971), which provides as follows:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.[3]
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts

[3] Section 6 generally provides that a court "will follow [the] statutory directive of its own state on choice of law."

> to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Felix does not argue that this matter should be tried in Ohio. Well she should not as she is the one who selected Kentucky as the forum. Her argument is that Ohio law should be applicable and, if so applied, she, not Lykins, would be entitled to summary judgment.

Felix has not persuaded me that Ohio law differs from Kentucky. This is a simple contract action pertaining to the waiver of a notice provision contained therein. The law

throughout the various jurisdictions is rather uniform on the issue presented.

In any event I am of the opinion that the circumstances are such that Kentucky is the state of most significant relationship to the transaction. The Lykins business operations have their origin and existence in Kentucky. A Kentucky law firm handled the transaction on behalf of the Felixes. Essentially the only connection with Ohio is the location of the premises. Perforce, I think Kentucky law applicable.

Under Kentucky law I am of the opinion that the written notice provision in the exercise of the option was waived. The common definition of a legal waiver is that it is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon. Waiver may be expressed or inferred from a failure to insist upon recognition of the right or conformance with the condition. Barker v. Stearns Coal & Lumber Co., 291 Ky. 184, 163 S.W.2d 466, 470 (Ky. 1942). Upon the whole of this case, I think waiver clear as a matter of law.

Having determined that there was a valid exercise of the option, for the sake of completeness, I further note that Mason Circuit Court had the authority to order Felix, over whom

it had personal jurisdiction, to convey the Ohio property to Lykins. Fall v. Eastin, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 (1909); Becker v. Becker, 576 S.W.2d 255 (Ky.App. 1979).

For the foregoing reasons, I would affirm the decision of the Mason Circuit Court.

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ORAL ARGUMENT FOR APPELLANT:

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