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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001818-MR

TERRY MALIN AND NANCY MALIN APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NOS. 02-CI-00078 & 02-CI-00091

DEWAYNE JONES AND RHONDA JONES;
DAVID TRAVILLIAN AND DONNA TRAVILLIAN;
AND CUMBERLAND VALLEY NATIONAL BANK, APPELLEES

AND NO. 2004-CA-001863-MR

DEWAYNE JONES AND RHONDA JONES,
HIS WIFE APPELLANTS

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 02-CI-00078 & 02-CI-00091

HUGHES BENNETT AND
ESSIE JEAN BENNETT; AND
TERRY MALIN AND NANCY MALIN APPELLEES

OPINION
AFFIRMING IN PART
AND REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: BARBER,[1] JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.[2]

BARBER, JUDGE: These appeals originate from rulings of the Laurel Circuit Court regarding a parcel of real property. Appellants, Terry and Nancy Malin, appeal the trial court's dismissal of their claims against Appellees/Cross-Appellants, Dewayne and Rhonda Jones; Appellees, David and Donna Travillian; and Appellee, Cumberland Valley National Bank. The Joneses appeal the dismissal of their claims against the Bennetts.

This is the second time this matter has been before our court.[3] However, we dismissed the prior appeals as interlocutory and remanded accordingly. Following remand, the trial court entered a final order in this matter. It is from this order and all interlocutory orders to which the parties appeal. We first examine the complex history behind these appeals.

BACKGROUND

On December 19, 1995, the Joneses purchased a parcel of property from the Bennetts to build a service station and

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[1] Judge David A. Barber completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Senior Judges Joseph R. Huddleston and Lewis G. Paisley, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[3] The case numbers of the prior appeals are 2003-CA-002671-MR; 2004-CA-000283-MR; 2004-CA-000295-MR; and 2004-CA-000384-MR.

convenience store.[4] The parties also signed an Option to Purchase Real Property (Option) that same day.[5] It is from this document which the controversy first arose.

The Bennetts later sold a parcel of property to the Travillians in April 1996. The Travillians sold their property to the Malins in March 1997. In 2001, the Malins entered into a written contract to sell their home to a third party. A title examination by the third party's lender concluded there was a title defect due to the Option.

In an effort to resolve the matter without litigation, the Malins' attorney contacted the Joneses' attorney to request a release of the Option for $500.00.[6] The Joneses' replied they would release their Option for $2,500.00.[7] The Malins' then asked the Travillians to pay them $2,500.00 in lieu of a suit for breach of warranty.[8] The Travillians declined. The Malins' sale fell through and they were forced to continue paying the mortgage on a home they no longer lived in. Litigation followed shortly thereafter.

PROCEDURAL HISTORY

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[4] The deed was recorded on January 2, 1996.

[5] The Option was recorded on January 31, 1996.

[6] The letter was dated September 24, 2001.

[7] The letter was dated September 28, 2001.

[8] The letter was dated October 3, 2001.

The Bennetts were the first to file suit in this matter on January 22, 2002, in case number 2002-CI-78. They sued the Joneses requesting the trial court to declare the Option null and void. The Joneses responded with a counterclaim against the Bennetts claiming damages from the Bennetts' failure to abide by the Option before selling several other pieces of property.

A second suit was filed by the Malins against the Joneses, the Travillians, and the Bennetts on January 24, 2002, in case number 2002-CI-91. They claimed the Option was void on its face, was a slander to their title, and constituted interference with contract and prospective advantage. The Malins claimed the Travillians breached their covenant of general warranty and failed to defend the title to the property. As to the Joneses, the Malins claimed they were extorting them and interfering with their contract and prospective advantage. Lastly, the Bennetts allegedly continued to sell real estate to third parties after exercising the Option to the Malins' detriment. The Travillians responded with a counterclaim against the Malins claiming their suit was frivolous because the Option was void on its face. They also cross-claimed against the Bennetts seeking indemnification. The Joneses responded with a crossclaim against the Bennetts for injuries resulting

from the Bennetts' alleged failure to abide by the Option.[9] In an effort to simplify the record, the trial court consolidated both claims into 2002-CI-78.

Following consolidation, the Malins filed a Verified First Amended Complaint. The amended complaint added Cumberland Valley National Bank as a defendant. The Bank had given the Malins the mortgage to purchase the property from the Travillians in 1997. The Malins sought to impute any negligence on behalf of the title attorney to the Bank.

There were several orders entered throughout the proceedings. Two of these orders are the primary focus of these appeals. The first is an interlocutory summary judgment order entered June 13, 2003. The other is the Order Amending Amended Judgment and Order Overruling Other Motions (Final Order) entered August 20, 2004. The Final Order incorporated several prior orders, specifically the orders entered on December 3, 2003; January 12, 2004; and February 16, 2004.[10]

The June 13, 2003 interlocutory order granted summary judgment to the Travillians on all claims against them. The reasoning of the trial court in awarding summary judgment was

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[9] The Joneses' crossclaim was nearly verbatim of their counterclaim filed against the Bennetts in 2002-CI-78.

[10] The August 20, 2004 order contained a typographical error which referenced the February 16, 2004 order as the February 7, 2004 order.

that the Option did not apply to the parcel of property at issue.

The December 3, 2003 order granted summary judgment to the Bennetts and Malins declaring the Option void. The Malins' claims against the Bank were dismissed. It also dismissed the Malins' claims against the Joneses for the reasons set forth in the June 13, 2003 order.

The January 12, 2004 order amended the December 3, 2003 order[11] by dismissing all claims against the Bennetts, i.e. the Malins' claims; the Joneses' counterclaim and crossclaim; and the Travillians' crossclaim. It also directed the Master Commissioner to make a notation on the recorded Option that it was adjudged null and void. The February 16, 2004 order amended the January 12, 2004 order by deleting the term "with prejudice" from the dismissal of the Travillians' crossclaim against the Bennetts.[12]

SCOPE OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a

[11] Paragraphs 1-4 of the January 12, 2004 order are restated verbatim as paragraphs 2-6 in the Final Order.

[12] The order also stated that the Travillians' crossclaim would not be held in abeyance.

matter of law. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 704 (Ky.App. 2004), (citing Palmer v. International Assoc. of Machinists, 882 S.W.2d 117, 120 (Ky. 1994)). The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 705, (citing Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991)). The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent summary judgment. Hallahan, supra, 138 S.W.3d at 705. The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor. Id., (citing Commonwealth v. Whitworth, 74 S.W.3d 695, 698 (Ky. 2002)).

In order for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. Motorists Mutual Insurance Co. v. Grange Mutual Casualty Co., 149 S.W.3d 437, 439 (Ky.App. 2004), (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id., (citing CR 56.03). The focus should be on what is of record rather than what might be presented at trial. Hallahan, supra, 138 S.W.3d at 705, (citing Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999)). Our court need not defer to the trial court's decision on summary judgment and shall review the issue *de novo* because only questions of law are involved. Id.

LEGAL AUTHORITIES AND ANALYSIS

It is well-known that the construction, as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court. Bank One, Pikeville v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, 901 S.W.2d 52, 55 (Ky.App. 1995), (citing Morganfield National Bank v. Damien Elder & Sons, 836 S.W.2d 893, 895 (Ky. 1992)). Thus, our review of the Option shall be *de novo*.

The Option reads, in pertinent part,[13] as follows:

> That in consideration of the joint promise of the parties herein, and upon execution of this agreement, receipt of which is hereby acknowledged, said

[13] The only portions omitted were the introductory paragraph, the legal description of the parcel purchased by the Joneses, and the signature section.

> [Bennetts] agree to give unto the [Joneses], the first option to purchase or lease any property owned by the [Bennetts] on Connley Road and Hwy. 229 being the same properties obtained by the [Bennetts] herein, by Deed Book 403 page 581 and Deed Book 258 page 600 both of record in the Laurel County Court Clerks Office, London, Kentucky.
>
> Further the [Bennetts] shall not lease or sale [sic] to any person or entity, for the purpose of a service station/store, nor shall [Bennetts] operate themselves a service station/store on any surrounding property they own on Connley Road or on Hwy. #229.
>
> The [Joneses] ha[ve] heretofore purchased from the [Bennetts] a certain parcel or tract of land for the consideration price of $137,500.00, and being a portion of that certain property of the [Bennetts] as recorded in Deed Book 258, page 600 and [Deed Book] 403, page 581, and the [Joneses] tract as described below:
>
> . . . .
>
> Should the said Option to Purchase be exercised, the property taxes assessed for said property shall be prorated between the [Joneses] and [Bennetts] herein, for that period of ownership in the tax year of purchase.
>
> It is hereby understood that this contract shall be binding on the [Bennetts] herein and their heirs and assigns.

The Joneses argue that the Option is not an option to purchase, but a right of first refusal. In the absence of ambiguity, a written instrument will be enforced strictly according to its terms. Frear v. P.T.A. Industries, Inc., 103

S.W.3d 99, 106 (Ky. 2003), (citing O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891, 893 (Ky. 1966)). In such cases, a court will interpret the contract's terms by assigning the language its ordinary meaning and without resort to extrinsic evidence. Id., (citing Hoheimer v. Hoheimer, 30 S.W.3d 176, 178 (Ky. 2000)).

Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. Cantrell Supply, Inc. v. Liberty Mutual Ins. Co., 94 S.W.3d 381, 385 (Ky.App. 2002), (citing Hoheimer v. Hoheimer, 30 S.W.3d 176, 178 (Ky. 2000)). The fact that one party may have intended a different result is insufficient to construe a contract at variance with its plain and unambiguous terms. Id., (citing Green v. McGrath, 662 F.Supp. 337, 342 (E.D.Ky. 1986)).

The Option uses the words "option to purchase" throughout with no mention of a right of first refusal. We must construe the language used in its ordinary meaning. Frear, supra, 103 S.W.3d at 106. Even if the Joneses intended to obtain a right of first refusal, their attorney drafted the Option without using such language. The Joneses should not receive a benefit from their attorney's mistake at the Bennetts' expense. See Bennett v. Dudley, 391 S.W.2d 375, 377 (Ky. 1965).

Based on the foregoing, we believe the Option is, in fact, an option to purchase granted by the Bennetts to the Joneses.

The Malins, Travillians, and Bennetts each argue that the Option is void in its entirety for multiple reasons, including violation of the rule against perpetuities, lack of consideration, and no time limits established. The Joneses argue the Option is valid and enforceable; therefore, their claims against the Bennetts should not have been dismissed. We first examine the rule against perpetuities.

Options related to real property are subject to the rule against perpetuities. Three Rivers Rock Co. v. Reed Crushed Stone Co., Inc., 530 S.W.2d 202, 208 (Ky. 1975). The rule against perpetuities is that no interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. KRS 381.215.

The Option clearly states it is applicable to the Bennetts and their heirs and assigns. However, the Option did not state it applied to the Joneses' heirs and assigns. This silence indicated that the signatories intended that the Option was personal to the Joneses only. See Central Bank & Trust Co. v. Kincaid, 617 S.W.2d 32, 34 (Ky. 1981). As a result, the Option would terminate when both of the Joneses had passed away.

Therefore, the Option does not violate the rule against perpetuities because it would vest, if at all, within the Joneses' lifetimes. We now turn to the other issues raised by the parties related to the Option.

An option to purchase real property is a contract giving the optionee the privilege of purchasing it if he elects to take it within the time stated in the option. Miller v. Hodges, 215 S.W.2d 99, 100 (Ky. 1948), (citing Ross-Vaughan Tobacco Co. v. Johnson, 206 S.W. 487 (Ky. 1918)). However, not every agreement or understanding rises to the level of a legally enforceable contract. Kovacs v. Freeman, 957 S.W.2d 251, 254 (Ky. 1997).

The general requirements for any contract are offer and acceptance, full and complete terms, and consideration. Cantrell Supply, Inc. v. Liberty Mutual Insurance Co., 94 S.W.3d 381, 384 (Ky.App. 2002).

The first requirement of an enforceable contract is offer and acceptance. From the face of the Option, there was an offer and acceptance between the parties evidenced by the Joneses' and Bennetts' respective signatures.

The second requirement is that the contract terms must be full and complete. There are no time limits of any kind in the Option. This goes against the very definition of an option, i.e. a contract giving the optionee the privilege of purchasing

it if he elects to take it **within the time stated in the option**. Miller, supra, 215 S.W.2d at 100 (emphasis added). The document is also incomplete on how to exercise the option. We believe the Option lacked full and complete terms.

Consideration is the final requirement for an enforceable contract. Typically, where an agreement is founded solely upon reciprocal promises, the contract is wanting in consideration. Pace v. Burke, 150 S.W.3d 62, 65 (Ky.App. 2004), (citing David Roth's Sons, Inc. v. Wright & Taylor, Inc., 343 S.W.2d 389, 390 (Ky. 1961)). However, it is possible to have sufficient consideration based solely upon the mutual promises of the parties. An offer, though without consideration, if accepted within the time limit and before withdrawal by the optionor, becomes obligatory upon all parties to the option after acceptance, and it is thereafter supported by the consideration of the mutual promises. Ford v. McGregor, 234 S.W.2d 493, 495 (Ky. 1950), (quoting Klatch v. Simpson, 34 S.W.2d 951, 953 (Ky. 1931)). In other words, an option is not binding as a contract where there is no consideration, unless it is accepted within the time limit and before the offer is withdrawn. Id., (quoting Combs v. Turner, 200 S.W.2d 288, 289 (Ky. 1947)).

The Joneses argue that they paid a premium price for the lot purchased from the Bennetts in order to get the Option.

However, the Option states that the consideration was the joint promises of the parties, i.e. the Joneses and Bennetts. It also states the lot was purchased for consideration of $137,500.00 with no mention of a premium being paid to receive the Option.[14] We do not believe there was any cash paid for the Option when the Joneses purchased the parcel.

The Option states the consideration is the mutual promises of the Bennetts and Joneses. As stated earlier, it is possible to have sufficient consideration with only mutual promises. However, that exception is not applicable in this instance. We believe the Bennetts' suit against the Joneses to declare the Option void effectively withdrew the Option prior to acceptance by the Joneses to exercise. Thus, there was no consideration.

Based on the foregoing, we believe the Option is unenforceable due to incomplete and vague terms, as well as, a lack of consideration. Therefore, the trial court did not err when it dismissed the Joneses' claims against the Bennetts.

Even assuming the Option is valid, we still do not believe it applies to the property at issue. The plain language of the Option stated that it applied to all property owned by the Bennetts on "Connley Road and Hwy. 229." All parties agree

[14] The deed between the Joneses and the Bennetts also made no mention of this alleged arrangement. The deed was attached as Exhibit A to the Joneses' Answer and Counterclaim filed February 14, 2002.

that the Malins' property does not lie on Connely Road or Highway 229.

In their Answer and Counterclaim[15] filed February 4, 2002, the Joneses stated the following in their counterclaim against the Bennetts:

> 1. That on that same date, the [Joneses] entered into an Option to Purchase Real Property from the [Bennetts] in which the [Bennetts] gave to the [Joneses] the first option to purchase or lease any property owned by them on Conley Road and Highway 229, a copy of said option is attached hereto as Exhibit "B".
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> . . . .
>
> 5. That the [Bennetts] and the [Joneses] clearly intended to protect the [Joneses] place of business, the property upon which had been purchased from the [Bennetts], from any competition of property owned by the [Bennetts] on Conley road and Highway 229.

Moreover, in the Joneses' Objections to Motions for Summary Judgment,[16] the affidavit of Dwayne Jones was attached, which provided, in relevant part: "It was the understanding of the Affiant that the Bennetts would offer any property they had to sell **on Hwy. 229 or Conley Road** (sic) to him prior to selling to any third party." (Emphasis added.)

It is difficult to conceive that the Joneses truly believed that the Option would have been applicable to all of

[15] Filed in 2002-CI-78.

[16] Objections filed May 2, 2004.

the Bennetts' property, including property not located on Highway 229 or Connley Road, particularly in light of the foregoing. Therefore, we believe the Option, even presuming its validity, would not have been applicable to the Malins' property. We now examine the remaining arguments in these appeals.

The Malins argue that the trial court erred when it awarded summary judgment to the Travillians. The Travillians did not breach any of the warranties provided in their deed to the Malins because the Option was unenforceable.[17] Even assuming the Option's validity, it was not applicable. Therefore, we do not believe the court erred in granting summary judgment to the Travillians against the Malins.

The Malins also argue that the trial court erred when it awarded the Joneses summary judgment because the Joneses never made a motion for summary judgment. The Malins are correct that the Joneses never filed a motion for summary judgment with the trial court.

A trial judge is authorized to grant summary judgment in favor of a party who has not requested it. Storer Communications of Jefferson County, Inc. v. Oldham County Board of Education, 850 S.W.2d 340, 342 (Ky.App. 1993), (quoting

[17] The Malins also argue in their appellate brief that a constructive eviction occurred because of the Option. This claim was never made in the Malins' Complaint or Verified First Amended Complaint. Therefore, it will not be addressed in this opinion.

Collins v. Duff, 283 S.W.2d 179 (Ky. 1955)). This authority is limited to those specific situations where a motion for summary judgment has been made by some party to the action, the judge has all of the pertinent issues before him at the time the case is submitted and where overruling the movant's motion for summary judgment necessarily would require a determination that the non-moving party was entitled to the relief asked. Id., (quoting Green v. Bourbon County Joint Planning Commission, 637 S.W.2d 626, 630 (Ky. 1982) and Collins v. Duff, 283 S.W.2d 179, 183 (Ky. 1955)).

This was not the situation before the trial court. The trial court dismissed the Malins' claims against the Joneses based upon the reasoning of a prior summary judgment order granted to the Travillians. The instant case presents a unique situation in that a fellow defendant made a motion for summary judgment, received it, and the trial court later granted summary judgment *sua sponte* to a co-defendant who failed to file a motion for summary judgment.

We do not believe granting summary judgment to the Joneses would automatically be in error if a summary judgment motion was properly made. We believe it was improper for the trial court to remove an important step, i.e. the filing of a motion, from the procedural process. Therefore, we believe the

trial court erred when it dismissed the Malins' claims against the Joneses *sua sponte*.

The Malins lastly argue the trial court erred when it awarded summary judgment to the Bank. The trial court found that the Malins did not have a valid claim against the Bank for the alleged negligence of the title opinion attorney. The trial court also found that the Bank did not breach its fiduciary duties to the Malins.

The Bank argues the Malins never made a breach of fiduciary duty claim against them. The Malins argue that such a claim can be inferred from their Verified First Amended Complaint[18].

However, the Malins filed a motion to amend their Verified First Amended Complaint to include claims for "breach of fiduciary duties and breach of contract."[19] At motion hour,[20] Malins' counsel clearly stated that he would not know if there was a claim for breach of fiduciary duties until he saw a title opinion requested from the Bank. Based on this, we do not believe the Malins intended their Verified First Amended

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[18] The Bank was not a party in the original complaint.

[19] Motion filed March 11, 2003.

[20] Motion hour held on June 6, 2003. Originally noticed for May 2, 2003, but pursuant to Order entered May 5, 2003, the May 2, 2003 hearing was rescheduled for June 6, 2003.

Complaint to include a breach of fiduciary duty claim against the Bank.

Further, no orders were ever entered allowing the Malins to amend their First Amended Complaint. No second amended complaint was filed or even tendered to the trial court. We believe the trial court erred when it granted summary judgment on an issue not properly before it. Therefore, we vacate the trial court's dismissal of the Malins' breach of fiduciary duty claim against the Bank. We now turn to the remainder of the Bank's summary judgment.

We note the Bank never filed a motion for summary judgment against the Malins, but it did file a motion to dismiss based upon the statute of limitations.[21] When matters outside the pleadings are considered in ruling on a motion to dismiss, the motion is converted to one for summary judgment. See Bowlin v. Thomas, 548 S.W.2d 515, 516 (Ky.App. 1977) and Commonwealth v. Kentucky Central Life Ins. Co., 746 S.W.2d 565, 566 (Ky.App. 1987).

In March 1997, the Malins signed a preliminary title opinion. The pertinent portions of the document are as follows:

> 7. Search has been made for LOAN purposes only, and not a sale, and technical title defects may have been disregarded for loan purposes, which would not be approved for a sale.

[21] The motion was filed on April 23, 2003.

. . . .

CONCLUSION

The undersigned attorney does not in any way or fashion given an opinion concerning title or certify title to the loan applicants herein or on behalf to the loan applicants herein, but is merely giving his opinion of title to the lender in aiding the lender in making a credit decision as to whether to loan the money on the collateral (real estate) offered as security by the loan applicants herein. **It being understood that if the loan applicants are seeking an opinion of title concerning marketability or merchantability of the real estate they should make arrangements with an attorney of their own choosing for such an opinion**. . . .

Loan applicants should be aware that certain defects in title which affect the merchantability or marketability of the collateral (real estate) are sometimes overlooked for lending purposes that may not be overlooked for selling or buying purposes. . . .

This opinion concerning title is . . . for loan purposes only and may not be relied upon by anyone other than said lender for any purpose whatsoever.

(Emphasis added.)

The Malins' signatures appear at the bottom of the same page as the Conclusion section.

As stated earlier, we believe the Option to be unenforceable and, even if valid, inapplicable to the Malins' property. This conclusion coupled with the noted sections of the preliminary title opinion, leads us to believe summary

judgment on behalf of the Bank was appropriate because no genuine issue of material fact existed.

CONCLUSION

We affirm the summary judgments awarded to the Malins and Bennetts declaring the Option void and to the Travillians declaring the Option inapplicable to the property. We affirm the trial court's dismissal of all claims against the Bennetts[22] and the dismissal of the Malins' claims against the Bank. We vacate that portion of summary judgment based on a breach of fiduciary duties by the Bank to the Malins because it was not properly before the trial court. We vacate the trial court's *sua sponte* award of summary judgment to the Joneses against the Malins and remand for further proceedings.

ALL CONCUR.

[22] The trial court dismissed the Joneses' counterclaim and crossclaim against the Bennetts; the Malins' claims against the Bennetts; and the Travillians' crossclaim against the Bennetts.

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