

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002095-MR

GENE CASE AND IDABELLE CASE

APPELLANTS

APPEAL FROM CARTER CIRCUIT COURT
v. HONORABLE C. DAVID HAGERMAN, SPECIAL JUDGE
ACTION NO. 96-CI-00001

ISRATEX, INC., AND CARTER
INDUSTRIES, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE AND MINTON, JUDGES.

DYCHE, JUDGE: Gene and Idabelle Case appeal an order of the Carter Circuit Court granting partial summary judgment against them and a judgment awarding damages to Carter Industries, Inc.

In 1992, the Cases leased a factory building to Isratex, Inc. The lease contained a purchase provision which Isratex exercised in 1993. A new agreement was made in November 1993, setting out the terms and obligations of the sale. In 1994, the Cases brought a forcible detainer action against

Isratex that was granted by the district court. The circuit court reversed this decision finding that no landlord-tenant relationship existed between the parties.

Isratex filed for bankruptcy in 1995 and Carter Industries became its successor in interest. In 1996, the Cases filed an action alleging that the November 1993 agreement was void for failure of consideration and alternatively that Isratex was in default of its obligations under the agreement. The trial court granted partial summary judgment to Carter Industries on March 28, 2000, and entered a judgment awarding damages to Carter Industries on July 27, 2004. This appeal follows.

The Cases argue that the trial court improperly granted partial summary judgment on the failure of consideration claim because of an improper reliance on the forcible detainer proceeding. In this case, it is clear that the trial court did not rely on the prior proceeding so as to give it a res judicata effect, but merely reached the same conclusion: that the November agreement constituted a sale. Further, we find neither failure of consideration nor default upon review of the record. Summary judgment on this issue was proper.

Next, the Cases appeal from the July 27, 2004, judgment awarding \$25,001.95 to Carter Industries. The amount of damages represents the sum of payments Carter Industries made

on behalf of the Cases. The payments included ad valorem taxes, penalties, interest, utilities, and mortgage payments. The Cases argue that this award is improper because Carter Industries never filed a counterclaim for these amounts.

The trial court did not abuse its discretion by treating the claim as if it were pled because the evidence on this issue was presented without objection and was tried with the implied or express consent of the parties. CR 15.02.

The judgment of the Carter Circuit Court is affirmed.

MINTON, JUDGE, CONCURS.

BARBER, JUDGE, DISSENTS.

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