

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001980-MR

DAN D. STEWART, JR.,  
AND BETSY STEWART

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE GREGORY A. LAY, JUDGE  
ACTION NO. 04-CI-00407

JOHN C. SLUSHER  
AND JAMES R. GOLDEN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE AND STUMBO, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: Dan D. Stewart, Jr., and his wife, Betsy, appeal from an order of the Knox Circuit Court in which the trial court granted summary judgment in favor of James R. Golden and John C. Slusher. On appeal, the Stewarts argue that the option contract, which is the subject matter of this case, was invalid because the Stewarts repudiated it

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

immediately after they signed it and because it lacked substantial consideration. Finding that the option contract was valid, we affirm.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

On August 2, 2004, James R. Golden and John C. Slusher entered into two separate property transactions with Dan D. Stewart, Jr., and his wife, Betsy R. Stewart. Pursuant to one transaction, the Stewarts executed a deed conveying to Golden and Slusher a one-third undivided interest in the mineral rights to a piece of property lying partially in Knox County and partially in Bell County. This property will hereinafter be referred to as the “Coalport Property.” Golden and Slusher paid \$75,000.00 for the mineral rights.

In addition to this transaction, the Stewarts also entered into an option contract in which they granted to Golden and Slusher an option to purchase a substantial amount of property owned by Dan Stewart that he inherited from his father. This property will hereinafter be referred to as the “Inheritance Property.” According to the terms of the contract, the consideration for the option was \$50,000.00. Additionally, the terms of the contract made it clear that the \$50,000.00 was nonrefundable; therefore, if Golden and Slusher failed to exercise the option, the Stewarts would retain the money. However, if Golden and Slusher exercised the option within the time limit, then the \$50,000.00 would be applied to the purchase price of \$800,000.00. A review of the record discloses that the Stewarts, along with Golden and Slusher, signed the option contract on August 2, 2004.

According to the Stewarts, they objected both to the option price of \$50,000.00 and the purchase price of \$800,000.00, claiming that both sums were too low. Nonetheless, as previously mentioned, they signed the option contract. A few days later, either August 4 or 5, Golden and Slusher tendered a \$50,000.00 check to the Stewarts as payment for the option contract. However, the Stewarts did not negotiate the check; instead, they returned the check to Golden and Slusher several days later on August 24, 2004.

Golden and Slusher filed suit against the Stewarts in Knox Circuit Court, seeking to enforce the option contract. In their complaint, Golden and Slusher claimed that they and the Stewarts had entered into a valid option contract regarding the Inheritance Property and that the contract was supported by consideration in the amount of \$50,000.00. Golden and Slusher claimed that they tendered to the Stewarts a \$50,000.00 check per the terms of the contract. Despite this, Golden and Slusher claimed that the Stewarts refused to acknowledge the option contract. Alternatively, Golden and Slusher pointed out that the Stewarts received and accepted \$75,000.00—the purchase price for the Coalport Property—implying that this \$75,000.00 constituted consideration for the option contract.

After being served with Golden's and Slusher's complaint, the Stewarts filed an answer denying Golden's and Slusher's allegations and claiming that there was never a meeting of the minds sufficient to form a binding contract. In addition, the

Stewarts filed a counterclaim, alleging that Golden and Slusher had slandered the title to the Inheritance Property when they filed their lawsuit.

Subsequently, the Stewarts moved the trial court for summary judgment. In this motion, the Stewarts argued that the option contract merged, via the merger doctrine, into the deed for the Coalport Property, thus, extinguishing the option contract.

Alternatively, the Stewarts argued that the option contract was not binding because there was no meeting of the minds between the parties. In addition, the Stewarts argued that an option contract is not binding, when there is no consideration for the option contract, unless the option is exercised within the time limit and before the offer is withdrawn.

*First Development Corp. of Kentucky v. Martin Marietta Corp.*, 959 F.2d 617, 621-622 (6th Cir. 1992). According to the Stewarts, they withdrew the offer without accepting Golden's and Slusher's consideration, namely the \$50,000.00. Therefore, they concluded that the option contract was not binding.

In addition to the Stewarts' motion for summary judgment, Golden and Slusher moved for summary judgment as well. Golden and Slusher argued that the merger doctrine did not apply because the option contract was a collateral agreement relating to the Inheritance Property, not the Coalport Property. According to Golden and Slusher, the Coalport Property deed and the option contract were two separate, but contemporaneous, transactions. In addition, Golden and Slusher argued that the parties negotiated an acceptable option agreement that the parties subsequently signed. Additionally, Golden and Slusher argued that the option agreement was supported by

consideration of \$50,000.00 which they tendered to the Stewarts. However, Golden and Slusher did acknowledge that the Stewarts returned the \$50,000.00. Despite that, Golden and Slusher contended that the option contract was binding and enforceable.

Furthermore, because a binding and enforceable option contract existed between the parties, Golden and Slusher argued that the Stewarts' counterclaim for slander of title was without merit.

After the parties had filed their respective motions, the trial court entered an order denying the Stewarts' motion but granting Golden's and Slusher's motion. In granting summary judgment in favor of Golden and Slusher, the trial court determined that the merger doctrine did not apply because the option contract was a collateral agreement as described in *Drees Co. v. Osburg*, 144 S.W.3d 831, 832-833 (Ky. App. 2003). According to the trial court, “[i]t would be illogical for the Option Agreement, which is enforceable after signing, to merge into the deed concerning mineral rights for another tract of land.”

Regarding the contract itself, the trial court noted that an option without consideration can be repudiated before the option is exercised. *Murphy Thompson and Co. v. Reid*, 125 Ky. 575, 101 S.W. 964, 965 (Ky. 1907). Furthermore, the trial court noted that for an option to irrevocably be binding on the owner, there must be valuable and sufficient consideration, and such consideration may be either money paid or money to be paid. The trial court stated that, “[t]he \$50,000 consideration was 'to be paid' for, and was, in fact, paid two days after the parties signed the Option Agreement.” The trial

court found that the parties had signed the option contract in exchange for \$50,000.00 in consideration; thus, the Stewarts were bound by it.

In addition to resolving the issue of the option contract, the trial court addressed the Stewarts' counterclaim that Golden and Slusher had committed slander of title by filing their lawsuit. Citing *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765, 766 (Ky. App. 1980), the trial court recognized that to support a claim for slander of title, the Stewarts must prove that Golden and Slusher knowingly and maliciously communicated a false statement which maligned the title of the Stewarts' property. Because Golden and Slusher had a genuine dispute with the Stewarts regarding the option contract, the trial court concluded that Golden and Slusher did not make any false statements, malicious or otherwise. Thus, the trial court dismissed the Stewarts' counterclaim.

## **II. STANDARD OF REVIEW**

When considering a motion for summary judgment, the trial court must view the record in a light most favorable to the party opposing the motion and must resolve all doubts in favor of that party. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). However, the party opposing the motion must present, at the very least, some affirmative evidence demonstrating the existence of a genuine issue of material fact that requires a trial. *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). The court should not grant summary judgment if any issue of material fact exists. *Steelvest, Inc.*, 807 S.W.2d at 480. We, on the other hand, must determine whether the

circuit court correctly found that no genuine issue of material fact exists and whether, as a matter of law, the moving party was entitled to judgment in its favor. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because findings of fact are not in issue, we review the circuit court's decision *de novo*. *Id.*

### III. ANALYSIS

On appeal, the Stewarts once again insist that the option contract merged, via the merger doctrine, into the deed regarding the Coalport Property thereby extinguishing the option contract. Addressing the merger doctrine, our Court explained that

[u]nder the merger doctrine, upon delivery and acceptance of a deed the deed extinguishes or supersedes the provisions of the underlying contract for the conveyance of the realty. The doctrine applies to covenants pertaining to title, possession, quantity, or emblements of the property, the covenants commonly addressed in deeds. Covenants in the antecedent contract that are not commonly incorporated in the deed, and that the parties do not intend to be incorporated, are often referred to as collateral agreements. The merger doctrine does not apply to collateral agreements.

*Dress Co.*, 144 S.W.3d at 832-833 (citations omitted). In other words, the merger doctrine only applies to the antecedent agreement to convey a particular piece of property. In this case, the Stewarts insist that the option contract, which dealt with the Inheritance Property, merged into the Coalport Property deed. However, the option contract simply was not the antecedent agreement to convey the Coalport Property; therefore, that contract cannot be merged, pursuant to the merger doctrine, into the Coalport Property deed. While the deed conveying the Coalport Property and the option

contract were contemporaneous transactions, they were separate and distinct transactions dealing with different pieces of property. Therefore, we agree with the trial court and find that the merger doctrine did not apply in this case.

In addition to the Stewarts' merger doctrine argument, the Stewarts claim that the option contract is not enforceable. Citing *First Development Corp. of Kentucky*, 959 F.2d at 621-622, the Stewarts assert that an option contract is not binding, when it is not supported by consideration, unless the option is exercised within the time limit and before the offer to sell has been withdrawn. Relying on this proposition, the Stewarts insist that as they signed the option contract, they repudiated it. Thus, they reason that a contract was never actually formed.

In *First Development Corp. of Kentucky*, 959 F.2d at 621-622, the Sixth Circuit Court of Appeals quoted *Combs v. Turner*, 304 Ky. 179, 200 S.W.2d 288, 289 (Ky. 1947), that “[i]t is well settled that an option [to purchase real property] 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.” The Sixth Circuit is, of course, correct. However, “[a]n option, to be binding upon the owner, in the sense that it is irrevocable upon him during the period for which it was given, *must be upon a valuable and sufficient consideration.*” *Murphy Thompson and Co.*, 101 S.W. at 965 (emphasis added). In this case, in accord with the terms of the option contract, Golden and Slusher were to give \$50,000.00 in exchange for the option and these funds were non-refundable. Furthermore, they, in fact, paid this valuable and substantial consideration. Despite the

Stewarts' insistence to the contrary, a valid option contract was formed when they signed it, and the fact that they returned the \$50,000.00 did not relieve them of their obligations under that contract.

Additionally, the Stewarts cite *Stamper v. Combs*, 164 Ky. 733, 176 S.W. 178, 180 (Ky. 1915), for the proposition that a party to an option contract can repudiate the contract if the party does so before the other party pays consideration for the option. According to the Stewarts, they repudiated the option contract on August 2, 2004, two to three days before Golden and Slusher paid the \$50,000.00 consideration. Thus, the Stewarts conclude that the option contract was rendered void, stripping Golden and Slusher of the authority to exercise the option.

In their brief, the Stewarts rely on *Stamper* for the proposition that they could repudiate the option contract before Golden and Slusher paid the \$50,000.00. In *Stamper*, the appellees executed a written option contract in favor of North Fork Coal & Timber Company for \$1.00, giving the company the option to purchase 300 acres of property for \$5.00 per acre. *Stamper*, 176 S.W. at 178. The *Stamper* court held that \$1.00 did not constitute substantial consideration for the option. *Id.* at 179. Furthermore, because the contract was not supported by substantial consideration, it was not binding on the appellees unless the option was exercised within the time limit and the purchase price was also tendered. *Id.* The *Stamper* court went on to state that

[t]he option being a mere offer to sell, and the contract to keep the offer open for acceptance for six months being without substantial consideration, the appellees could withdraw the offer and repudiate it at any time, by conveying

notice of their repudiation of it to the holder of it before its acceptance, and thereafter the holder would be without authority to accept or exercise it.

*Id.* at 180. Nowhere in this excerpt, upon which the Stewarts cite and rely, did the *Stamper* court hold that an owner of property could repudiate a written and signed option contract that is supported by substantial consideration prior to payment of said consideration. All that this excerpt means is that an owner can repudiate an option contract prior to the option being exercised, if that option lacks substantial consideration. The Stewarts have misunderstood *Stamper*.

To summarize, we conclude that the Knox Circuit Court correctly determined that no genuine issues of material fact existed and correctly concluded that, as a matter of law, Golden and Slusher were entitled to summary judgment.

In their brief, the Stewarts also argue that genuine issues of material fact exist regarding their counterclaim for slander of title.

In order to maintain a slander of title action in this jurisdiction, the plaintiff must plead and prove that the defendant has knowingly and maliciously communicated, orally or in writing, a false statement which has the effect of disparaging the plaintiff's title to property; he must also plead and prove that he has incurred special damage as a result.

*Bonnie Braes Farms, Inc.*, 598 S.W.2d at 766 (citing *Ideal Savings Loan & Building Ass'n v. Blumberg*, 295 Ky. 858, 175 S.W.2d 1015 (Ky. 1943) and *Hardin Oil Co. v. Spencer*, 205 Ky. 842, 266 S.W. 654 (Ky. 1924)). After reviewing the record before us, we find no evidence to suggest that, by filing their lawsuit, Golden and Slusher maliciously made any false statements regarding the Stewarts' property, nor do we find

any evidence that the Stewarts suffered any special damage.<sup>2</sup> Because the record discloses no evidence to support either element of the tort of slander of title, we conclude that the trial court properly granted summary judgment on the Stewarts' counterclaim.

For the foregoing reasons, we affirm the Knox Circuit Court's order granting summary judgment in favor of the appellees, Golden and Slusher.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott M. Webster  
London, Kentucky

BRIEF FOR APPELLEE:

Darrell L. Saunders  
Corbin, Kentucky

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<sup>2</sup> Regarding their counterclaim, the Stewarts cite and rely on Mr. Stewart's deposition, claiming that his testimony supports their argument regarding slander of title. However, because the Stewarts failed to designate that deposition, we cannot consider Mr. Stewart's testimony. Although, even if we did consider his testimony, the excerpts of Mr. Stewart's testimony cited by the Stewarts do not establish a genuine issue of material fact regarding the tort of slander of title.