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NO. 95-CA-002402-MR

VANDERBILT MORTGAGE & FINANCE, INC. APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 90-CI-00102

THURMAN ANDERSON APPELLEE

AND NO. 95-CA-002516-MR

THURMAN ANDERSON CROSS-APPELLANT

v. CROSS-APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 90-CI-00102

VANDERBILT MORTGAGE & FINANCE, INC. CROSS-APPELLEE

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: JOHNSON, JOHNSTONE and MILLER, Judges.

JOHNSON, JUDGE: This case is before us a second time.[1] On remand, the Pulaski Circuit Court applied the common law doctrine of

[1] Anderson v. Vanderbilt Mortgage and Finance, Inc., 92-CA-001075-MR and 92-CA-001228-MR, rendered January 14, 1994.

rescission and rescinded the contract between the buyer and the seller due to a defect in the mobile home. We reverse and remand.

Most of the relevant facts can be gleaned from this Court's previous Opinion, from which we quote as follows:

> On March 18, 1989, Thurman Anderson (Anderson) purchased a new 1989 Southwood mobile home from Clayton Mobile Homes (Clayton). The purchase was financed through Vanderbilt Mortgage and Finance, Inc. (Vanderbilt), a subsidiary of Clayton set up for such purpose. A dispute arose as to repairs to the mobile home and Anderson ceased regular monthly payments that were due pursuant to the 1989 installment sales contract. In February 1990, Vanderbilt sued Anderson for foreclosure of its security interest in the mobile home. Anderson's defense was that Clayton had failed to make repairs on the mobile home pursuant to the contract and, therefore, any default in payment on his part was set off by Clayton's failure to make repairs. In his answer Anderson alleged that Clayton sold and financed property insurance on the mobile home; that the mobile home had been damaged; and that Clayton refused to repair the mobile home. While the litigation was pending, in June 1990, the trial court ordered that all past due and future monthly payments be paid to the clerk of the court during the litigation of this matter. Subsequently, there was much dispute as to whether Vanderbilt had made all required repairs and was therefore entitled to release of the funds held in escrow. There was also much dispute as to whether Anderson had improperly stopped payments, entitling Vanderbilt to repossess the mobile home. At the bench trial on April 30, 1991, the proof revealed, and the Pulaski Circuit Court found, that the problems with the mobile home's roof were caused by the mobile home's design and construction and not from ice storm damage. On December 20, 1991, almost eight months after the trial, Anderson moved the trial court for leave to amend his answer so he could file a counterclaim alleging violation of the Consumer Protection Act, KRS 367.170 and 367.220. The trial court denied this motion.

The trial court made various findings of fact, which were incorporated into the July 3, 1991 judgment. Under CR 52.01 we cannot say that these findings were clearly erroneous. Accordingly, we set forth some of the relevant findings as follows:

> Shortly after moving into the mobile home Anderson and his wife reported a number of defects in the mobile home and requested repairs. Clayton Mobile Homes responded with an effort to satisfy the Andersons and corrected many of the deficiencies. Among the early complaints was one of noise generated by wind flexing the metal sheets of the roof of the home. This noise is known in the mobile home industry as "roof rumble." It is apparently a common occurrence in mobile homes constructed like the one purchased by the Andersons. Although Clayton Mobile Homes now warns its customers of the existence of roof rumble, it did not do so when the Andersons' sale was made. The Andersons were not aware of the phenomenon until they began to experience it in their new home. Because the problem was first noted after an ice storm, Mr. Anderson assumed that the problem was the result of damage caused by the storm, rather than the manner in which the mobile home was designed and constructed.
>
> Clayton Mobile Homes responded to his complaint with a service call. The problem persisted in certain common windy weather conditions, not limited to extreme weather. Clayton Mobile Homes attempted to resolve the problem and to satisfy the Andersons by applying a coat of roof sealer and sand. The theory behind this repair is that the weight of the sand will prevent the flexing of the metal sheets of the roof. This repair did not work. The only corrective measure which Clayton Mobile Homes could recommend thereafter was to place heavy objects such as used automobile tires on the roof to still the metal sheets. The Andersons offered evidence to show that the proper repair would be the construction of a wooden frame and shingle roof over the structure at a cost of $2,800.00 to $3,500.00.

> The roof rumble disrupted the Andersons' peaceful enjoyment of their home because they could not hear the television or radio and could not sleep when the wind was blowing.
>
> The Andersons made the regular monthly payments as required by the contract from March of 1989 to July of 1989. After notice from the Plaintiffs of their default, they brought the payments current through December of 1989. Thereafter, payments were ordered to be made by the Court into an escrow account. After June of 1990, the Andersons vacated the mobile home and unilaterally ceased making payments to the escrow account. The reason they offered for doing so was that they could not afford to make the payment on the mobile home and at the same time pay rent to live elsewhere.

> Clayton practiced this case as a foreclosure action, seeking repossession of the mobile home, resale and a judgment on any deficiency that resulted. Anderson's answer apparently was attempting to assert as a defense lack of consideration due to Clayton's alleged failure to make repairs. The trial court concluded that the defect in the roof substantially impaired the value of the mobile home and rendered it unfit for its usual and customary purpose,and that since Clayton had been unable to correct the defect after having been given a reasonable opportunity to do so, Anderson was authorized in revoking acceptance and ceasing payments. There was some confusion in the language in the judgment; and an amended judgment resulted in dismissal of Clayton's claim for money damages owing on the contract and the return of the mobile home to Clayton.

In our previous Opinion this Court held that the Uniform Commercial Code (UCC) applied since a mobile home is a good. Under the UCC, Kentucky Revised Statutes (KRS) 355.2-608, a revocation is not effective unless the buyer communicates his revocation to the seller. It is undisputed that Anderson failed to properly revoke. Therefore, it was the holding in our previous Opinion and continues

to be our holding, that under the UCC Anderson must be deemed to have accepted the mobile home.

In its order that is presently on appeal, the trial court stated as follows:

> Unbeknownst to the Court of Appeals, during the pendency of the appeal, Vanderbilt took possession of the mobile home. It did so NOT because it had won the right to foreclose on the contract, - it had not. Vanderbilt's only authority for retaking possession of the mobile home was the Judgment of the trial court, then under appeal, which ordered re-scission of the contract, not foreclosure. By doing so, Vanderbilt destroyed Anderson's opportunity to recover damages under KRS 355.2-714, the only remedy left to him under the ruling of the Court of Appeals.

The trial court is mistaken as to this point. Through the record on appeal in the first appeal, which showed that the writ of possession was filed in the Pulaski Circuit Court on April 27, 1992, and the oral argument on the first appeal, this Court was aware that the mobile home had been repossessed by Vanderbilt and resold.

The trial court went on to say that "[n]o statute or case law need be cited as authority", for its ruling that Anderson was entitled to rescind the sales contract and recover all that he had paid to Vanderbilt. The trial court is in error. Anderson did not challenge Vanderbilt's motion for a writ of possession as required by KRS 425.012. Accordingly, and consistent with our previous Opinion, we hold that Vanderbilt properly repossessed the mobile home based upon Anderson's default in making payments, since Anderson failed to properly revoke his acceptance. Second, the law of the case doctrine requires that our previous holding be followed

by the trial court. We held previously, and we continue to hold, that the UCC provides Anderson, as the buyer, his only revocation rights; and he failed to meet the UCC notice requirement. The common law doctrine of rescission is not available to Anderson. See Lexington Mack, Inc. v. Miller, Ky., 555 S.W.2d 249, 251 (1977).

The facts in this case are similar to Galigher Trucks, Inc. v. McKenzie, Ky.App., 553 S.W. 2d 294 (1977). In that case, the buyer purchased defective trucks and the seller failed to satisfactorily repair the defect. The buyer merely parked the trucks, ceased payments, and waited for the seller to repair the trucks so they might conform as warranted. The Court pointed out that the buyer did not properly revoke acceptance or reject the trucks, and thus KRS 355.2-714(2) must apply. Id. at 295.

In Belcher v. Hamilton, Ky., 475 S.W.2d 483 (1972), a breach of implied warranty case, the Court stated that "KRS 355.2-714(2) and (3) provide the measure of damages and range of permissible recovery for breach of warranty. . . ." Id. at 485. Thus, in fashioning a full remedy for Anderson, the trial court should consider KRS 355.2-714(2) and (3), which state as follows:

> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the good accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under KRS 355.2-715 may also be recovered.

While the trial court never ruled that Vanderbilt was entitled to foreclose on the collateral, there was no factual dispute as to Anderson's failure to make his mobile home payments or his failure to give notice of revocation. Under the UCC, without proper revocation of acceptance, nonpayment by Anderson constituted a breach. Thus, as a matter of law, we hold that Anderson defaulted on paying his mobile home note and that Vanderbilt was properly entitled to repossess the mobile home and sell it in a commercially reasonable manner. Vanderbilt may recover any deficiency upon a commercially reasonable sale of the mobile home. Anderson may recover pursuant to KRS 355.2-714(2).

We stated in our previous Opinion that no additional proof was to be taken. This was in error and may have contributed to the confusion on remand. We now hold as follows:

(1) the trial court's order entered August 8, 1995, is reversed and this matter is remanded for further proceedings;

(2) Anderson did not revoke under the UCC and is not entitled to the common law remedy of rescission;

(3) Vanderbilt's repossession and resale of the mobile home shall be deemed to have occurred pursuant to a foreclosure proceeding;

(4) the trial court shall allow the submission of evidence by Vanderbilt to prove its damages resulting from Anderson's breach of contract for non-payment;

(5) Vanderbilt breached warranties and the trial court shall allow Anderson to submit evidence as to his damages as provided by KRS 355.2-714(2) and (3); and

(6) the damages proved by Vanderbilt and Anderson shall be setoff against the other to determine a net amount owed by one party to the other.

We realize that this case has become very confused. We will not attempt to place blame other than to say that there is plenty of blame to go around, and this Court accepts its share to the extent that the previous Opinion was not clear. As a point of clarification, it was the expectation by this Court following its previous Opinion that on remand the trial court would determine Vanderbilt's damages following the repossession and resale and determine Anderson's damages from the breach of warranty, and setoff the damages against each other. To the extent that our previous Opinion limited the trial court in doing this, it was in error.

JOHNSTONE, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT ONLY.

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