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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001092-MR

VENCHEL O. DENTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 13-CI-002933

ANN WAGNER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, THOMPSON AND VANMETER, JUDGES.

VANMETER, JUDGE: Venchel Denton appeals the Jefferson Circuit Court's grant of summary judgment in favor of Ann Wagner[1] regarding a contract related to real estate and for a malicious prosecution counterclaim. For the following reasons, we affirm.

[1] Co-defendant/counter-plaintiff Ralph Wagner died during the pendency of this matter, and his claims were dismissed.

I. Factual and Procedural Background.

Denton brought this action alleging that in June 2010, Ralph and Ann Wagner and he entered into an agreement "related to real estate" concerning property located at 130 N. 37th Street, Louisville, Kentucky. The agreement, signed by all parties, is styled "Lease with Option to Purchase," and contains the following clauses:

> Received from lessee, Sally and Venchel O. Denton, referred to hereafter as Tenant, the sum of $xxxx.xx [$0], which, upon acceptance of this Residential Lease With Option to Purchase, the Agreement, shall belong to the lessor of the premises, Ann and Ralph Wagner, hereafter referred to as Owner, and shall be applied as follows:
>
> - Rent for the period May 5, 2010 to November 5, 2010: $600.00
> - Security Deposit: see below (section 15)
> - Nonrefundable Option Consideration: $20,000.00
> - If the Agreement is not accepted by Owner or his agent within 15 days, the total deposit received shall be refunded. Tenant agrees to lease from Owner the premises . . . upon the following TERMS and CONDITIONS.

(original [sic]). Section 15, titled "SECURITY DEPOSIT," provides: "Tenant and Owner agreed in lieu of monetary payment that tenant would provide labor and partial materials for the purpose of bringing the property up to code and market ready." And Section 21, titled "OPTION TO PURCHASE," provides: "Tenant, upon satisfactory performance of this lease, shall have the option to purchase the real property described herein for a PURCHASE PRICE OF $65,000.00." Section 29, "ACCEPTANCE OF OFFER TO LEASE WITH OPTION TO BUY,"

provides "Tenant offers to the Property together with an option to purchase at the above conditions. If owner does not accept this offer by November 5, 2010 5 pm Eastern time, this offer shall lapse."

After signing the contract, Denton took possession of the property, and paid monthly rent at a rate of $600. In March 2013, Denton vacated the property, purportedly at Wagner's command. Denton then filed a complaint seeking damages in the form of reimbursement or specific performance of what he alleged to be a contract for the sale of real property.

Denton alleges that he paid the Wagners $10,695 in cash and further invested $16,200 in improvements, utility expenses, and "etc." to the property. Denton believed that once he spent over $50,000, the purchase price, the property would be deeded to him. After allegedly spending in excess of this amount, he sought to have title for the property passed to him. Wagner denied that her husband and she ever intended to execute this deed to Denton.

Wagner filed an answer to Denton's complaint, as well as a counterclaim for malicious prosecution and wrongful institution of civil proceedings and a motion for partial summary judgment on the initial claim. A hearing was held on the motion on January 23, 2014, and the trial court advised Denton as to the Statute of Frauds and KRS[2] 371.010. Denton argued that he had various receipts for his expenditures and the alleged improvements, which constituted a contract for the sale of real property. The trial court disagreed with

[2] Kentucky Revised Statutes.

Denton, stating in its March 10, 2014, order granting partial summary judgment that

> [c]ontracts for the purchase of real estate must be in writing to be enforceable. KRS 371.010. Here, Denton alleges the parties entered into an agreement "related to real estate". It is not in writing. Accordingly it is not enforceable. Denton relies on various receipts signed by the Wagners. They are insufficient and do not constitute a contract between the parties.

The order granting partial summary judgment did not address the Wagners' counterclaim, and the trial court ordered the parties to contact a mediator and conduct mediation within ninety days of the entry of the order.[3]

After the initial hearing and failed mediation, Wagner served Denton with additional discovery. Denton did not respond to any discovery, and Wagner moved for summary judgment on the remaining claim based on the unanswered Requests for Admission. In July 2014, the trial court sent both parties correspondence detailing the proceedings moving forward and deadlines for Denton to respond.

On January 15, 2015, the trial court granted summary judgment on Wagner's remaining counterclaim and awarded Wagner $10,000 based on Denton's failure to respond to the requests constituting admissions to all Wagner's allegations. On January 21, 2015, Denton filed, *pro se*, a motion for additional time to respond to discovery and for reconsideration, although the motion was not

[3] Denton's original counsel never responded to Wagner's letter seeking to schedule mediation; however, and although no formal motion to withdraw was filed, he verbally informed Wagner's counsel that he was withdrawing as Denton's counsel. Mediation was eventually held, but the parties were unable to agree.

formally titled as such. Shortly thereafter, Denton hired new counsel, who filed an additional motion to reconsider on January 29, 2015.

On June 23, 2015, the trial court denied the two motions to reconsider, holding that Denton provided no authority supporting a reconsideration of the summary judgment entered against him, and denying additional time to respond to Wagner's Requests for Admission. The trial court noted that it considered the first motion as one seeking additional time, and the second as a motion to reconsider, albeit filed outside the time allowed by CR[4] 59. This appeal followed.

II. Standard of Review.

CR 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists, and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). "While the Court in *Steelvest* used the word 'impossible' in describing the strict standard for summary judgment, the Supreme Court later stated that that word was 'used in a practical sense, not in an absolute sense.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Whether summary judgment is appropriate is a legal question involving no factual findings,

[4] Kentucky Rules of Civil Procedure.

so a trial court's grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.,* 319 S.W.3d 366, 370-71 (Ky. 2010).

III. Arguments.

A. Timeliness

First, we must consider whether Denton's motions to reconsider were timely under CR 59 and whether his notice of appeal was timely. The timeliness of the motions to reconsider governs whether this court has jurisdiction to consider the merits of the claim.[5] However, we consider Denton's January 21, 2015 *pro se* motion to be a motion to reconsider, which was filed within 10 days of the January 15 summary judgment order as required under CR 59.05. Although Denton then retained counsel, who filed an additional Motion to Reconsider on January 29, 2015, his *pro se* motion was timely. Therefore, the time for filing a notice of appeal did not begin until after the June 23, 2015 order denying the two motions to reconsider was entered. The notice of appeal in the instant case was filed on July 17, 2015, within 30 days of the final order, and thus is timely. *See* CR 73.02.

B. *Partial Summary Judgment on Contract Related to Real Estate*

Denton argues the trial court erred in granting partial summary judgment on the contract claim. He maintains that under both the terms of the lease and the Uniform Residential Landlord and Tenant Act, specifically KRS 383.580, after the leasehold ended, he was entitled to a refund for the remaining

[5] Neither party contests that the March 10, 2014 order is interlocutory pursuant to CR 54.02 since the motion only adjudicated the property claim. The only contested issue is whether Denton's *pro se* motion tolled the time limit for appealing the January 15, 2015 final and appealable order on the malicious prosecution counterclaim.

funds of his deposit, less any funds necessary to repair any damage caused during the tenancy. Denton also contends that once he paid and "otherwise improved the property" in excess of $50,000, this would be considered satisfaction of the purchase price, and the deed would be transferred to him. Denton alleges that he spent $10,695 cash in "numerous improvements and utility expenses, etc." while occupying the property." He further alleges that "[t]he costs of his improvements (parts, materials and labor) equals approximately $16,200.00[.]"

However, in this case, according to the terms of the lease, a monetary security deposit was not made, and thus Denton is not entitled to the statutory refund of a security deposit. Furthermore, the only contract between the parties is the lease agreement. This "Lease with Option to Purchase" creates a leasehold with an option to purchase that lapsed on November 5, 2010. Since Denton did not pay the $20,000 consideration required to exercise the option, and no offer to purchase or acceptance occurred, Denton thereby leased the property with no option to purchase. Almost three years later, Denton then tried to rely on various receipts for the cost of improvements and other expenditures outside the contract to assert that he was entitled to purchase the property. No provision in the lease provides for this type of alternate purchase option, and the Wagners did not sign or acknowledge these receipts. Without an enforceable written contract for the sale of real property, no issue remains as to Denton's option to purchase the property. The trial court did not err in granting partial summary judgment on the contract issue.

C. Summary Judgment on Malicious Prosecution Counterclaim

Finally, Denton argues the trial court erred in granting summary judgment based on his failure to respond to Wagner's Requests for Admission related to the counterclaim for malicious prosecution. He contends that summary judgment is inappropriate because the record provides material issue of fact despite these admissions.

CR 36.01(2) provides

> [e]ach matter of which an admission is requested . . . is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons upon him.

A claim for malicious prosecution generally requires six basic elements:

> (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981) (internal citations omitted). Elements (1) through (3) are satisfied by the record. In the Requests deemed admitted, both elements (4) and (5) are satisfied by Denton's admission that he knew the action was baseless but "nevertheless proceeded with maliciously

prosecuting said action" with a "willful, flagrant, and showed an indifference to and a total disregard to the rights of [Wagner]" and "without probable cause." The last element is satisfied with the admission that Wagner suffered damage to her creditworthiness, character, and reputation in the community in an amount of $10,000.

Denton relies on *Buridi v. Leasing Grp. Pool II, LLC*, 447 S.W.3d 157 (Ky. App. 2014) to assert that the trial court erred in granting summary judgment based on his failure to respond to discovery without first making a determination of prejudice. However, *Buridi* further states that

> prejudice is only one part of the equation. The trial court must also evaluate whether "the presentation of the merits of the action will be subserved" by withdrawal or amendment. It is with this part of the analysis that we have difficulty seeing how withdrawal of the matters deemed admitted would have done anything but delay the inevitable—a loss for Appellants.

Id. at 176. Similarly, although Denton may have been "prejudiced" by the admission of the discovery requests, as in *Buridi*, Denton has not shown how the outcome would be any different if the admissions were withdrawn, especially in light of the summary judgment on the contract.

Furthermore, he was given ample opportunity to respond to the Requests for Admission, and he did not do so; in fact, Denton waited nearly a year to file the motion for an extension of time. The trial court has broad discretion to allow an extension of time for discovery requests, and did not err in denying Denton's motion for time. *See Sexton v. Bates,* 41 S.W.3d 452, 455 (Ky. App.

2001) (holding that trial courts have broad, but not unlimited, discretion over the discovery process). The trial court also did not err in granting summary judgment since no genuine issues of material fact remain on the malicious prosecution counterclaim.

IV. Conclusion.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven A. Snow
Louisville, Kentucky

BRIEF FOR APPELLEE:

Karl Price
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