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MAY 14, 2008
(FILE NO. 2007-SC-0726-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001243-MR

J.R. WATTS AND LILLIAN E. WATTS

APPELLANTS

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 03-CI-01273

HARRY D. (JACK) SIMPSON JR. AND
MW DEVELOPMENT SERVICES
(MIDWEST), LLC

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

THOMPSON, JUDGE: This is an action filed by J.R. Watts and Lillian Watts (hereinafter referred to as the Watts) to specifically enforce a real estate purchase and sale contract and for damages against MW Development Services, LLC., (MW Development), Richard Taylor, the manager of MW Development,² and Harry D. (Jack) Simpson, Jr.

On June 12, 2003, the Watts entered into a real estate contract with MW Development for the sale and purchase of a certain 40 acre tract in Daviess County. The contract provided that the closing would occur on or before July 31, 2003, and that either party could demand specific performance of the agreement. MW Development paid the Watts \$212,000 as a down payment which left \$1,917,222 to be paid. According to the contract terms, if MW Development failed to close by the designated date for reasons not attributable to the fault of the Watts, MW Development would pay 8% interest on the amount due to the Watts until the date of closing.

Harry D. (Jack) Simpson, Jr. was not a party to the real estate contract. However, Simpson loaned MW Development \$212,000 for the down payment. To provide security for the repayment of the loan, Richard Taylor, as manager of MW Development, executed a promissory note to Simpson and an assignment pursuant to which MW Development assigned “all of its right, title and interest in and to” the real estate contract entered into with the Watts.

Because he was recuperating in Florida from an injury, Simpson did not see the note and assignment until June 22, 2003, when he returned from Florida to Owensboro. Upon realizing that the promissory note did not become due until August 4,

² Richard Taylor is not designated as an appellant in the notice of appeal.

2003, and that it further provided for a ten day grace period before Simpson could pursue collection or exercise his rights under the terms of the assignment, he contacted an attorney requesting an agreement granting him the exclusive right to purchase the property if MW Development defaulted on the real estate contract and the promissory note.

After the agreement was drafted, Simpson met with the Watts's son, Wayne Watts, and discussed the potential for the loss of the deposit money and the need for a fourteen day period in which he could purchase the property after any default by MW Development. The precise content of their conversation differs. Simpson states that at no time was there any conversation or agreement that he would purchase the forty acre tract while the Watts recalled that Simpson affirmatively represented that if MW Development defaulted, he would purchase the property. As a result of their discussions, the Watts and Simpson executed the prepared written agreement which states in part that:

In consideration of the respective rights of the parties, IT IS
HEREBY AGREED AS FOLLOWS:

In the event M.W. defaults on the CONTRACT and defaults on the PROMISSORY NOTE, SIMPSON is hereby granted the exclusive right, for a period of fourteen (14) days after M.W. defaults on the CONTRACT, to purchase the property described in the CONTRACT for the sum of \$2,129,222.00 in cash. Less the sum of \$212,900.00, the amount paid to WATTS as a deposit, all according to the other terms and conditions of the CONTRACT.

A copy of the real estate sales contract, promissory note and assignment were attached to the agreement and, by reference, incorporated into the agreement.

After MW Development failed to purchase the property, the Watts filed this action against MW Development, Richard Taylor, and Simpson requesting specific

performance of the real estate contract and damages. Simpson filed an answer, a counterclaim, and a crossclaim against MW Development.

Subsequently, the Watts filed a motion for court approval of a sale of the subject property to PKP 79 Co., for \$1,800,000. In January 2004, the court approved an agreed order which gave Simpson the right to purchase the property pursuant to the June 2003 real estate contract through and including February 25, 2004. The order further provided that if Simpson did not exercise his right to purchase, the Watts could sell the property to PKP 79 Co. After Simpson declined to exercise his right to purchase the property, the property was sold to PKP 79 Co. for \$1,800,000.

In April 2004, Simpson was permitted to file an amended answer, counterclaim, and crossclaim in which he pled the following affirmative defenses: estoppel; laches; release; statute of frauds; accord and satisfaction; failure of consideration; lack of privity between he and the Watts; and waiver. Additionally, Simpson affirmatively pled that any damage suffered by the Watts was the result of the breach of the contract or negligence and the Watts's failure to perform precluded any claim under the agreement between the Watts and Simpson.

On April 13, 2004, the trial court entered partial summary judgment in favor of the Watts against MW Development in the amount of \$91,605.78, representing the interest accrued on the \$1,917,222. It found, however, that there were material issues of fact with regard to the claim by the Watts against Simpson and denied their motion for partial summary judgment. In May 2004, the court entered a summary judgment against Taylor and MW Development in favor of Simpson for the sum of \$212,000 plus interest.³

³ Since MW Development is no longer an active corporation neither of these sums have been paid. MW Development is named as a party to this appeal; the Watts, however, raise no issue in

Subsequently, the Watts again filed a motion for summary judgment against Simpson and, on May 3, 2006, after reviewing the record and hearing arguments, the court denied the motion. It found that Simpson had the right, but not the duty, to exercise his rights to purchase the property under the assignment of rights from MW Development. The court further ruled that he had no duty to exercise his right during the fourteen day period provided for in the agreement with the Watts and as a result, dismissed the complaint against Simpson.

The Watts contend that the court erred when it held that Simpson had no duty to purchase the property as set forth in the real estate contract entered into between them and MW Development. Although there is no privity between the Watts and Simpson, they argue that because of the assignment contract entered into between Simpson and MW Development, Simpson is obligated to perform all of the obligations set forth in the real estate contract, including the purchase of the property.

Since the Watts sold any interest in the property that is the subject of the real estate contract, specific performance of the contract is impossible and no longer a possible remedy. The question, therefore, is whether Simpson can be held responsible for damages, including the difference with the original sale price as stated in the real estate contract between the Watts and MW Development and the interest due after default.

The interpretation of any contract requires that the court do so with the primary objective of ascertaining and effectuating the intention of the parties. *Withers v. Commonwealth, Department of Transportation, Bureau of Highways*, 656 S.W.2d 747, 749 (Ky.App. 1983). A contract must be construed as a whole giving effect to all part

regard to the judgment entered against MW Development.

and words and by assigning the language its ordinary meaning. *Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.*, 94 S.W.3d 381, 385 (Ky.App. 2002). Absent an ambiguity, the parties' intentions must be discerned from the document itself without resort to extrinsic evidence. *Id.*

Although the parties have failed to cite a Kentucky case specifically addressing the assignment of a real estate purchase contract, the law is well settled in other jurisdictions and is summarily recited in *Kneberg v. H.L. Green Co.*, 89 F.2d 100, 103 (7th Cir. 1937) wherein it is stated:

It is quite generally the law that a contract for the sale of land, which has been assigned by the purchaser, cannot be specifically enforced against the assignee, by reason of the assignment, unless the assignee has entered into a binding contract with the assignor or vendor to assume the assignor's obligations. 58 C.J. 920, and cases there cited, *Adron v. Evans*, 52 S.D. 292, 217 N.W. 397, 59 A.L.R. 954, and cases there cited; *Corbus v. Teed*, 69 Ill. 205. It is also the rule, however, that if the assignee expressly assumes the burdens of the contract or if he accepts the benefits thereof and adopts the same by seeking performance of the contract or by any equivalent act, indicative of an intention upon his part to adopt and become bound, so that he may be held impliedly to have assumed the burdens thereof, specific performance will lie against him.

In this case, there is no language in the assignment contract between Simpson and the Watts which can be reasonably construed to obligate him to purchase the property pursuant to the terms of the real estate contract between MW Development and the Watts. The purpose of the assignment was to secure the \$212,000 loan to MW Development. Thus, the assignment contract expressly states that: "As security for the above loan, First Party (MWD) hereby conditionally assigns unto the Second Party (Simpson), all of its right, title and interest in and to that certain real estate purchase

agreement” It continues to state that the assignment “shall become effective and absolute upon any default by First Party in the payment of the aforesaid note according to its terms.” The assignment, therefore, was not effective until MW Development defaulted on the promissory note, which was after the closing date stated in the real estate contract. The unambiguous language of the assignment contradicts the Watts's argument that it operated as an assignment of MW Development's obligation to purchase the property. To construe the assignment contract to have also assigned MW Development's obligation to purchase the Watts's property, would be contrary to the ordinary meaning of the language used and the intention of Simpson and MW Development. Thus, the Watts cannot assert a claim against Simpson on the basis of the assignment contract entered into between Simpson and MW Development.

The Watts contend that even if the assignment did not assign MW Development's obligation under the purchase contract, the July 31, 2003 agreement entered into between them and Simpson imposed the obligation on Simpson to purchase the property if MW Development defaulted. Although there is privity between the Watts and Simpson, we nevertheless find that the Watts's reliance on the July 2003 agreement is misplaced.

Like the assignment, the agreement unambiguously states that it is conditioned upon MW Development's default on the real estate contract. Notably absent from the agreement are any words which impose an obligation upon Simpson to purchase the property. Although the term “option” is not used in the agreement, the use of the term “right” is its equivalent. Although during the fourteen days after MW Development's

default Simpson had the right to purchase the property, he did not have the obligation to do so.

The Watts argue that they received no benefit from entering into an option agreement so that the agreement must be a purchase agreement; the benefit to both parties, however, is not difficult to recognize. If Simpson chose to exercise the option, he could protect his \$212,000 and the Watts had an interested purchaser waiting should MW Development default.

We do not, as the Watts suggest, need to engage in a construction of the agreement more strongly against Simpson, because it was drafted by his attorney. *See Boyd v. Phillips Petroleum Co.*, 418 S.W.2d 736, 738 (Ky. 1967). When, as here, the language is plain and unambiguous, the rule has no application.

Based on the foregoing, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

R. Allen Wilson
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Thomas E. Neal
Owensboro, Kentucky