RENDERED: MARCH 25, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000429-MR

CHARLES R. VANHOOSE; ALICE FAY VANHOOSE;
WILLIAM C. VANHOOSE; GINGER VANHOOSE;
SUZIE JANE VANHOOSE DELONG;
GERLAD DELONG; and CHARLES R. VANHOOSE,
WILLIAM C. VANHOOSE, and
SUZIE JANE VANHOOSE DELONG,
d/b/a COAL RUN PROCESSING — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 08-CI-01180

CITY OF PIKEVILLE, KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

LAMBERT, SENIOR JUDGE: Appellants appeal from the February 10, 2009, findings of fact, conclusions of law, and judgment of the Pike Circuit Court which denied their motion to enforce a purported settlement agreement.

The underlying controversy stems from the Appellee's attempt to condemn, and thus acquire, certain real property of the Appellants for a project which involved widening a road and adding a sidewalk. The project, known as the Thompson Road project, was funded by the State Transportation Cabinet (Cabinet), which had set a cap on the amount that could be paid for the purchase of property acquired for the project. That cap could not be exceeded without approval from the Transportation Cabinet.

Ross Anderson, an employee of the City of Pikeville's engineering firm, Summit Engineering, was authorized to negotiate for the acquisition of properties, including the property of the Appellants, on behalf of the Appellee. Two offers were extended to the Appellants for the acquisition of their property, and the offers were rejected. After several meetings between Mr. Anderson and the Appellants, an oral agreement seemed to have been reached. As a result of that agreement, Mr. Anderson drafted a letter addressed to himself, to be signed by Appellants, with instructions to Mr. Anderson to complete the transaction with the Transportation Cabinet. In effect, Mr. Anderson structured the letter as an offer from Appellants to the City of Pikeville with recognition that Transportation Cabinet approval would be necessary. That letter was dated October 24, 2007.

On June 19, 2008, the City's attorney addressed a letter to Appellants advising that the property had been reappraised and inquiring whether the Appellants would be interested in settling for the new appraised amount. Appellants failed to respond to the letter but later testified that they were not interested in accepting the new offer.

On August 22, 2008, Appellee filed a petition seeking to condemn the property owned by the Appellants. The trial court appointed three commissioners to view the property and file a report determining the fair market value of the property. The Commissioners' report was filed on September 4, 2008. On October 3, 2008, Appellants filed a motion to dismiss and objection to the right of petitioner to condemn property and a motion to enforce settlement. A hearing was held, and on February 9, 2009, the trial court's findings of fact, conclusions of law, and judgment was entered. That judgment denied the Appellants' motion to enforce settlement and their motion to dismiss. The judgment also granted the Appellee's motion for an interlocutory judgment which was entered in conjunction with an interlocutory order giving the Appellee the right to condemn the property of the Appellants. This appeal followed.

Appellants' first argue that an offer was made by the City of Pikeville through its authorized agent, Ross Anderson, which the Appellant landowners accepted by executing the October 24 letter prepared by the city's agent. That letter, signed by Appellants, states in relevant part:

> We are agreeable with pursuing closure on the above right-of-way transactions based on the following conditions: [conditions regarding entrances, size of right-of-way, and acquisition prices]. The value assigned to each parcel is as follows: [parcel specifics]. Please proceed with arranging the necessary documentation to complete this transaction with the Transportation Cabinet.

The enforcement of agreements between parties for the sale or lease of real property is governed by the Statute of Frauds, which is, in pertinent part:

> No action shall be brought to charge any person . . . [u]pon any contract for the sale of real estate, or any lease thereof for longer than one year . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing *and signed by the party to be charged therewith*, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence.

KRS 371.010 (emphasis added).

Appellants argue that the written memorandum required by the Statute of Frauds need not be signed by one other than the vendor and that delivery and acceptance by the purchaser renders it enforceable. In support of this argument, Appellants cite to *Chaney v. Nolan*, 387 S.W.2d 308 (Ky. 1964). The facts of *Chaney* are as follows: the Nolands were negotiating to sell a portion of their property to the Chaneys. An amount was agreed upon and the Chaneys paid the Nolans $250 towards the $3,000 purchase price. The agreement and down payment were evidenced by a receipt. Thereafter, the Nolans refused to sell the property when they discovered that they would not continue to receive their full

tobacco base for the portion of the property they were retaining. Although a deed had been prepared by the Chaneys for the Nolans execution, it was never signed by Mrs. Nolan. The Court concluded that the deed was insufficient to satisfy the Statute of Frauds because it was not signed by Mrs. Nolan. *Chaney*, 387 S.W.2d at 310.

The facts of *Chaney* seem scarcely relevant or on-point. Unlike the parties in *Chaney*, the documents reflect that in this case the parties were still in the process of negotiating a sale price for the property. Whatever Mr. Anderson represented orally to Appellants, as to an agreement, neither the City of Pikeville nor the Cabinet signified its written assent to the transaction. The October 24 letter was merely a partially executed agreement to pursue the transaction and a request by Appellants to obtain the approval of the transaction through the Transportation Department. Although the letter outlines values of the property, it fails to indicate that those are the amounts for which the property is to be purchased. Instead, the language of the letter indicates that the Appellants are agreeable to pursuing an agreement with the city and acknowledge that the transaction must be completed by the Transportation Cabinet. Finally, although the letter was delivered to the City, the offer it presented, if any, was never accepted. And, no money changed hands. From the foregoing, we conclude that the October 24 letter from the Appellants to Appellee failed to meet the requirements of the Statute of Frauds.

Appellants' second argument is that Appellee negotiated in bad faith with Appellants when it withdrew its negotiated offer reflected in the October 24

letter. For the reasons stated above, we do not agree that the October 24 letter was an offer made by Appellee to Appellants. The letter was executed by the Appellants, not Appellee. Accordingly, this argument is without merit.

Appellants' final argument is that they were entitled to a jury trial on their motion to enforce the purported settlement agreement. However, the only basis they offer in support of this argument is case law indicating that summary judgments are not favored. Appellants indicate that the trial court's refusal to grant their motion to enforce settlement is, in essence, a summary judgment against them. As outlined above, Appellants failed to show the possibility that an enforceable agreement existed between the parties. Accordingly, it appears impossible for Appellants to have presented any evidence at trial that would have warranted a judgment in their favor. *See Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). As such, there was no error in the trial court's denial of the Appellants' motion to dismiss and its refusal to enforce the alleged settlement agreement.

For the foregoing reasons, the February 10, 2009, findings of fact, conclusions of law, and judgment of the Pike Circuit Court are affirmed.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I am compelled to file a dissent in this case, which I find to be rather disturbing. The Appellants negotiated in good faith with Ross Anderson, authorized specifically by the City of Pikeville to act as

its agent in acquiring the properties at issue. In his capacity as authorized agent, Mr. Anderson drafted the letter and gave instructions that it be addressed to him and be signed by the Appellants.

The City of Pikeville now seeks to disavow its authorization of Mr. Anderson as its agent, arguing that the Statute of Frauds has not been fully satisfied. I disagree. The Appellants duly executed the letter to Anderson, a letter that he himself drafted. The Statute of Frauds has been fully satisfied.

The issue may be one of offer and acceptance. However, since the facts establish that Mr. Anderson dictated the terms of the offer, his acceptance of his own terms should clearly be implied; or at the very least, he/the City should be estopped from denying them.

I would remand this case with directions that judgment be entered in favor of the Appellants. At the very least and in the alternative, they are entitled to proceed to trial. I agree with them that the judgment against them amounted to a summary judgment prematurely rendered since multiple issues of material fact appear to abound in this case.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE:

Russell H. Davis, Jr.
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