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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001297-MR

DAN D. STEWART AND
BETSY STEWART — APPELLANTS

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 08-CI-00453

JOHN C. SLUSHER AND
JAMES R. GOLDEN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

ACREE, JUDGE: Appellants, Dan D. Stewart, Jr. and Betsy Stewart, seek reversal of the Knox Circuit Court's order granting summary judgment in favor of the Appellees, John C. Slusher and James R. Golden, for damages and interest

resulting from the Stewarts' lease to a third party of mineral interests in land they previously agreed to convey to Slusher and Golden. The Stewarts also seek reversal of the circuit court's denial of their motion for summary judgment to collect $50,000 from Slusher and Golden allegedly owed as consideration for the option to purchase the land. We affirm the judgment.

Facts and procedure

On August 2, 2004, the Stewarts entered into a contract with Slusher and Golden giving them the option of purchasing real property in Knox County. The option contract "grant[ed] to BUYER [Slusher and Golden] the exclusive option to purchase all of the former D. D. Stewart property owned by STEWART in the Kentucky counties [wherein situated] including, without limitation, all of the property inherited by Stewart from D. D. Stewart as an heir at law or devisee . . . ." (Real Estate Purchase Option). The option price was $50,000, to be credited against the agreed upon purchase price of $800,000 or forfeited if the option was not exercised. Slusher and Golden tendered the option price by check on August 4 or 5, 2004. The option period extended only until November 30, 2004.

Almost immediately, the Stewarts had a change of heart; they decided both the agreed-upon option price and the purchase price were too low and wanted out of the option contract. On August 23, 2004, Slusher and Golden filed a declaration of rights action to enforce the option contract.

The next day, through a real estate agent, the Stewarts returned the $50,000 check. Then they answered the complaint arguing the option contract was invalid

because they had repudiated it immediately after they signed it and because it lacked substantial consideration. Eventually, both parties to the declaratory judgment action filed motions for summary judgment.

On May 22, 2006, before the circuit court ruled on these motions, the Stewarts leased the mineral rights in the subject property to Chaos Coal, LLC. Part of the consideration paid by Chaos Coal was an advance royalty payment of $125,000. Slusher and Golden filed a second lawsuit against the Stewarts, *i.e.*, the instant action, seeking the $125,000 royalty payment on the ground that selling the mineral rights constituted a breach of the option agreement.

Returning to the first action, on September 11, 2006, the circuit court granted summary judgment in favor of Slusher and Golden, declaring the option contract binding and enforceable, and allowing them 120 days from that date to exercise the option. Slusher and Golden did exercise the option within that period of time, but the Stewarts declined to convey the property until they exhausted their right to appeal the circuit court's September 11, 2006 order and judgment. The circuit court entered an order preserving the rights of all parties.

This Court affirmed the circuit court's September 11, 2006 order and judgment in the first action in *Stewart v. Slusher*, No. 2006-CA-001980-MR, 2007 WL 3227567 (Ky. App. November 2, 2007), *disc. rev. denied* November 19, 2008 (hereafter "*Stewart v. Slusher I*"). On November 19, 2008, our opinion in *Stewart v. Slusher I* became final. On January 10, 2009, in consideration for the payment at closing of $800,000 and by special warranty deed, the Stewarts finally conveyed

the subject property to Slusher and Golden, less the mineral rights previously leased to Chaos Coal. The Stewarts kept the $125,000 royalty advance from Chaos Coal pending resolution of this second civil action.

Slusher and Golden, in the case *sub judice*, claimed "they are entitled to damages in the amount of $125,000 to offset the purchase price by the amount of value lost owing to the mining activities of the defendants' lessee." They filed a summary judgment motion to that effect. The Stewarts filed a counterclaim and summary judgment motion to collect the $50,000 payment for the option they had returned in August 2004.

The circuit court granted summary judgment in favor of Slusher and Golden and awarded them the $125,000 royalty payment plus 8% interest. Additionally, the circuit court denied the Stewarts' counterclaim for $50,000. This appeal followed.

The Stewarts raise three issues on appeal. First, they challenge the summary judgment in favor of Slusher and Golden and the award of $125,000 for breach of the special warranty deed. Second, they argue the trial court abused its discretion by awarding 8% interest on the damages. Finally, they seek reversal of the judgment denying them recovery of the $50,000 option payment.

Standard of review

Because there are no disputed issues of fact, both the grant of summary judgment in favor of Slusher and Golden, as well as the denial of

summary judgment to the Stewarts, are reviewed *de novo*. *See Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Award of $125,000 in damages to Slusher and Golden

The Stewarts present a two-fold challenge to the grant of summary judgment in favor of Slusher and Golden. Not only do they argue that application of the law to the undisputed material facts of this case fail to establish their liability to Slusher and Golden, they also claim the circuit court applied the wrong measure of damages. We consider each argument in turn.

The Stewarts' liability

Citing *West Kentucky Coal Co. v. Nourse*, 320 S.W.2d 311 (Ky. 1959), the circuit court held that the mineral lease the Stewarts granted to Chaos Coal was, during the term of the lease, an encumbrance upon the property. Because the term of the mineral lease extended until four months after the property was conveyed to Slusher and Golden, the encumbrance was a breach of the special warranty deed at the time of transfer, and the circuit court so held. We do not disagree with this analysis.

However, this explanation is not fully satisfactory. We cannot ignore the fact that if the mineral lease had terminated four months sooner, unencumbered title would have been conveyed and there would not have been a breach of the special warranty deed. Nevertheless, Slusher and Golden still would have had a cause of action based on their complaint, based on the argument they presented for summary judgment, and based on the uncontroverted facts of the case.

While agreeing with the circuit court that the Stewarts breached the special warranty deed, we conclude that they also breached the option contract and permitted voluntary waste to be committed on the property. In instances where a circuit court is correct in its ruling as in this case, an appellate court, reviewing questions of law *de novo*, can affirm, even though it may cite other legal reasons than those stated by the trial court. *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009).

We begin our analysis by dispossessing the Stewarts of an erroneous premise upon which several of their arguments are based. While it is true that Slusher and Golden did not, in a technical sense, exercise the option within the timeframe established in the option contract itself, the delay was not of Slusher and Golden's own choosing. The Stewarts' unsuccessful attempt to repudiate the option contract and their resistance to Slusher and Golden's efforts at judicial enforcement made exercise of the option impossible until *Stewart v. Slusher I* became final in late 2008. To quote the circuit court,

> The [Stewarts] argue that [Slusher and Golden] lacked sufficient interest in the subject property to be entitled to the sum of $125,000. . . . In refusing the tender of the consideration for the option, the [Stewarts] deprived [Slusher and Golden] of their contractual right to exercise the privilege to purchase the land, thereby also depriving them of the ability to acquire an interest in the property to which they would otherwise have been entitled under the contract.

(Order, entered June 10, 2009, pp. 8-9). Citing *20th Century Coal Co. v. Taylor*, 275 S.W.2d 72 (Ky. 1955) ("One party may not successfully accuse the other of

failure to perform when the former does not permit the performance"), the circuit court held that the Stewarts "are estopped from later pointing to the fact that [Slusher and Golden] failed to exercise the option" within the option period set out in the contract itself. (Order, p. 9). We find no error in this ruling.

As we interpret it, the effect of the circuit court's ruling is that Slusher and Golden obtained an equitable interest in the property when they filed their declaratory rights action on August 23, 2004.[1] The option contract itself describes the nature of that equitable interest; Slusher and Golden acquired an equitable interest in "*all* of the former D. D. Stewart property owned by [and] *including, without limitation, all of the property* inherited by [the] Stewart[s] from D. D. Stewart as an heir at law or devisee . . . ." We know the Stewarts do not dispute having inherited the property in fee, including the mineral interests, because they conveyed those mineral interests to Chaos Coal. Nor do the Stewarts dispute that Chaos Coal depleted the land of certain minerals that were there when they executed the option contract, but were gone when they conveyed the property.

The Stewarts *could have* reserved the mineral interests to themselves by excepting that portion of their fee simple ownership in mineral rights from the option contract.

> An estate in fee in land carries with it all metals and minerals thereunder, *unless the metals and minerals are excepted in the conveyance* . . . .

[1] We do not intend to imply that filing a declaratory judgment action will, in every case, create an equitable interest in real property; we limit this interpretation to the facts of this case.

> Minerals in place are land. They are subject to conveyance. . . . The owner of land may convey a surface estate in fee in it, and reserve to himself an estate in fee in the minerals, or any particular species of them; in which case the vendee holds a distinct and separate estate in the surface or soil, and the vendor holds a distinct and separate estate in the minerals.

Terteling Bros., Inc. v. Bennett, 287 S.W.2d 607, 608 (Ky. 1956) (internal quotation marks and citation omitted; emphasis supplied). However, they clearly failed to reserve those mineral rights.

By granting a mineral lease to Chaos Coal that extended beyond the date title was conveyed to Slusher and Golden, the Stewarts, as the circuit court held, did cloud that title, thereby breaching the special warranty deed. But, by allowing Chaos Coal to actually remove coal, the Stewarts also permitted voluntary waste with regard to the property, making it impossible to convey at closing what they promised to convey in the option contract.

"Waste" in its various forms is defined, consistent with Kentucky jurisprudence, in BLACK'S LAW DICTIONARY, *waste* (9th ed. 2009). Quoting Peter Butt, *Land Law* 114 (2d ed. 1988), BLACK'S gives us this more specific definition of "Voluntary waste."

> This involves some positive act of injury to the property, diminishing its value for the person next in succession; it is a deliberate and active change to the property. Examples are altering the character of premises by demolishing internal walls and fittings or *opening and working a mine on the land* . . . .

BLACK'S LAW DICTIONARY, *waste* (9th ed. 2009) (emphasis supplied).

We conclude that the circuit court was correct to find the Stewarts liable to Slusher and Golden. In addition to the circuit court's conclusion that liability was based on a breach of the special warranty deed, we conclude that the Stewarts were liable for committing waste on property equitably owned by Slusher and Golden and breached the option contract by failing to convey the property as described in the option contract.

Nevertheless, the Stewarts argue that reversal is justified for several reasons. First, they argue that the eventual conveyance by special warranty deed of the remainder of the property, or the merger doctrine, prohibited Slusher and Golden from claiming a right to recover based on the mineral lease. Second, they argue that the doctrines of *res judicata* and issue preclusion require reversal. We disagree.

The fact that the property was conveyed by special warranty deed does not affect the claim under the option contract. The Stewarts' position is that the special warranty deed did convey the very same property described in the option contract, including the mineral rights. It did not. Some of those rights had already been conveyed by lease to Chaos Coal. Furthermore, the Stewarts were obligated to forever warrant and defend that the property they purported to sell was in fact what was sold. As stated in Kentucky Revised Statutes (KRS) 382.040,

> A covenant by a grantor, "that he will warrant specially the property thereby conveyed," or words of like import, or the words "with special warranty," in any deed, have the same effect as if the grantor had covenanted that he, his heirs and personal representatives, would forever

> warrant and defend the property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of the grantor and all persons claiming by, through, or under him.

KRS 382.040. Chaos Coal could have claimed, and perhaps did claim, through the Stewarts as lessors, the right to the coal on the property. The Stewarts previously promised to convey that right to Slusher and Golden. Therefore, this argument fails.

The argument that the merger doctrine defeats the claim under the option contract also fails. The merger doctrine generally holds "that all prior statements and agreements, both written and oral, are merged into the deed . . . ." *Borden v. Litchford*, 619 S.W.2d 715, 717 (Ky. App. 1981). However, there are exceptions including "fraud, mistake, or contractual agreement[s] clearly not intended to be merged into the deed." *Miller v. Hutson*, 281 S.W.3d 791, 795 (Ky. 2009) (quoting *Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC*, 182 S.W.3d 529, 532 (Ky. App. 2005) (citation omitted)). Before the deed was executed, Slusher and Golden had already filed suit on their claim under the option contract, thereby preserving it. This is a strong indicator they did not intend their right to enforce the option contract to be merged into the deed.

If the Stewarts intended to extinguish a claim, *already preserved and being prosecuted*, by conveying the property by deed and then claiming the doctrine of merger to escape liability, they were not successful. This argument would require that we find a waiver of that preserved claim. A waiver is generally defined as "an

intentional relinquishment or abandonment of a known right[.]" *Moore v. Commonwealth*, 556 S.W.2d 161, 162 (Ky. App. 1977) (citing *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). There is no evidence that Slusher and Golden waived the claim they were pursuing simply because they accepted a deed compelled by *Slusher v. Stewart I*.

We are also unpersuaded by the Stewarts' arguments based on the doctrines of *res judicata* and issue preclusion. The doctrine of *res judicata* operates to preclude repetitious actions. *Napier v. Jones*, 925 S.W.2d 193 (Ky. App. 1996). In order to apply *res judicata*, there must be (1) identity of the parties between the two actions, (2) identity of the two causes of action, and (3) the prior action must have been decided on its merits. *Id.* at 195. Claim preclusion, a subpart of *res judicata*, "bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action." *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998). "In short, the rule of *res judicata* does not act as a bar if there are different issues or the questions of law presented are different." *City of Louisville v. Louisville Professional Firefighters Ass'n*, 813 S.W.2d 804, 806 (Ky. 1991) (quoting *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970)).

The issue in *Stewart v. Slusher I* was whether the option contract should be enforced. The issue in the case *sub judice* was whether the Stewarts breached the option contract and what is the proper measure of damages. We will acknowledge that if *Stewart v. Slusher I* had been resolved in favor of the Stewarts, the issues in

the case now before us would be precluded. However, that is not the case. The doctrines of *res judicata* and issue preclusion are inapplicable.

Finally, our conclusion that the circuit court effectively recognized that Slusher and Golden had an equitable interest in the property when they filed their declaratory judgment action on August 23, 2004, makes untenable the Stewarts' argument regarding the doctrine of equitable conversion. That argument is that operation of the doctrine cannot relate back prior to the actual exercise of the option. To the extent the circuit court relied on that doctrine, the Stewarts' argument is moot and any equitable conversion doctrine analysis begins when Slusher and Golden acquired the equitable interest in August 2004.

The circuit court correctly found the Stewarts liable to Slusher and Golden.

Award of $125,000 in damages to Slusher and Golden – Measure of Damages

The Stewarts also argue that "the $125,000 Advance Royalty payment has no relevance to any concept of 'damage' recovery[.]" We disagree.

The measure of damages for breach of contract is "that sum which will put the injured party into the same position he would have been in had the contract been performed." *Hogan v. Long*, 922 S.W.2d 368, 371 (Ky. 1995) (quoting *Perkins Motors, Inc. v. Autotruck Federal Credit Union*, 607 S.W.2d 429, 430 (Ky. App. 1980)). "Damages for breach of an option to purchase land are determined by the same rule as that applied in an action for breach of the contract for the sale of land itself." 77 Am.Jur.2d, Vendor and Purchaser § 553. Typically, when less property is conveyed than was promised, the measure of damages is the

difference in the value of the property with and without the shortage. *See Kramer v. Mobley*, 309 Ky. 143, 216 S.W.2d 930, 933 (1949). While that measure is routinely applied when the shortage is measured in acreage, *see, e.g., Evergreen Land Co. v. Gatti*, 554 S.W.2d 862, 864-66 (Ky. App. 1977), we have not found a Kentucky case in which this measure of damages was applied under these or similar circumstances.

Additionally, neither party to this appeal has cited a Kentucky case that addresses the measure of damages under such circumstances even though our General Assembly certainly recognizes a cause of action in favor of a vendee when a vendor permits waste to be committed on the property to be conveyed. KRS 381.380[2] ("If a vendor or tenant of land commits any waste thereon, after he has sold his interest in it, but while he remains in possession, he shall be liable to the party injured for damages."). Without citing this statute or its predecessor, ancient Kentucky opinions indicate that the legal principle encompassed by the statute has been a part of our common law for a long time. *See, e.g., Marsh v. Current*, 6 B.Mon. 493, 493-94, 496, 1846 WL 3166, *1-*2 (Ky. 1846); *and Durrett v. Simpson's Representatives*, 3 T.B.Mon. 517, 521, 1826 WL 1338, *4-*5 (Ky. 1826);[3] *see also*, *Berry v. Walker*, 9 B.Mon. 464, 1849 WL 3483 (Ky. 1849)

[2] Our research reveals that neither KRS 381.380 nor its predecessor statute, Kentucky Statutes § 2331 (which can be traced back earlier than 1798), has ever been cited in any Kentucky decision or any opinion rendered by a federal court.

[3] *Marsh* can be summarized by the following excerpt: "In 1845, Current commenced this action on the case, against Marsh, alleging in his declaration the commission by him, of various acts of waste and destruction upon the land [not specified in the opinion] which he had sold and conveyed to the plaintiff, and while the same was in the possession of the defendant, and subsequent to the contract of sale and exchange, and before the delivery of the possession thereof and the conveyance to the plaintiff. . . . [T]he only inquiry is, whether the plaintiff was entitled

(vendor "committing waste, by cutting and selling the timber" between the acquisition by vendee of equitable interest in property and actual conveyance).

This approach – treating a vendor's conduct similar to that engaged in by the Stewarts as committing waste – is among a variety of alternative approaches taken by courts in other jurisdictions where "purchasers, in addition to having been awarded damages in actions premised upon waste, have prevailed in fraud and trespass actions as well as breach of contract cases." Annotation, *Measure of damages where vendor, after execution of contract of sale but before conveyance of property, removes part of property contracted for*, 97 A.L.R.3d 1220 § 2[a] (1980 & 2011 Supp.) (footnotes omitted). Notably, many of the cases discussed in the annotation cited recognized the problem of simply measuring damages by the difference in the fair market value of what was purchased and what was conveyed. An early, and perhaps still the best, description of the problem can be found in *Worrall v. Munn*, 8 Sickels 185, 53 N.Y. 185, 1873 WL 12143 (N.Y. 1873).

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to relief in this form of action. . . . [Once the plaintiff-vendee's] title [wa]s perfected . . . there [wa]s no longer any doubt or uncertainty, whether he will be or [wa]s injured by the waste committed. The injury is already sustained and we see no reason why the defendant, the wrong doer, should not be held responsible for it, and in this form of action. Although it might not have been the only remedy, it very clearly appears to us to be an appropriate one, and we should not hesitate to sustain it, unless controlled by some arbitrary rule of law, of which we are not aware." *Marsh*, 6 B.Mon. at 493-94, 496, 1846 WL 3166 at *1-*2. In *Durrett*, the vendor, between the time vendee acquired an equitable interest in the property and the time title was transferred, removed a system of pipes previously installed to bring running water from a spring to the improvements on the property. The Court said, "If waste be committed, between the contract and the time for making the conveyance and delivering possession, by vendor or his tenants, vendor must tender compensation with the possession and deed, otherwise vendee may refuse them. . . . Here the injury must be held to arise, indirectly at least, from the act of the vender, and he ought not, therefore, to be permitted to compel the vendee to bear the loss." *Durrett*, 3 T.B.Mon. at 521, 1826 WL 1338 at *4-*5.

Faced with circumstances similar to those presented here, New York's highest court in *Worrall* initially considered that

> the deterioration in the value of the land would be an appropriate method of fixing the amount of the injury. In some cases it would be the only way in which compensation for waste could be given[. For example, i]f the soil, having no value separated from the land, was stripped from it, so as to render it [the land] unproductive and unfit for the use to which it was applied, the diminished value of the land would be the only adequate measure of compensation.

Worrall, 53 N.Y. at 190, 1873 WL 12143 at *3. Then, the court reconsidered. What if the reverse situation is presented to a court as, in fact, it was presented in *Worrall*? What if the vendor stripped land of a resource that, unlike the soil considered in the first example, was valuable in and of itself, but the removal of which made little difference in the land's value?

> Cutting a few trees on a timber tract, or taking a few hundred tons of coal from a mine, might not diminish the market value of the tract, or of the mine, and yet the value of the wood or coal, severed from the soil, might be considerable. The wrong-doer would, in the cases instanced, be held to pay the value of the wood and coal, and he could not shield himself by showing that the property from which it was taken was, as a whole, worth as much as it was before.

Id.

For this reason, the New York court concluded that "the diminished value of the land is not the exclusive measure of relief for an injury in the nature of waste committed by" the vendor between the time the vendee acquires an equitable interest in the property and the time the property is actually conveyed. *Id.* In a

proper case, "a vendee will also be entitled to recover the value of the materials removed." Annotation, 97 A.L.R.3d 1220 at § 3[a] (citing *Worrall*); *see also*, *Rock v. Belmar Contracting Co.*, 141 Misc. 242, 252 N.Y.S. 463, 465 (N.Y. Sup. 1930) ("the value of the thing separated from the realty is the measure of damages where it has a value after removal and the land has sustained no material injury because of the removal"). The case before us is such a case.[4] We believe the reasoning is sound and the remedy consistent with our jurisprudence. *See Merriwether v. Bell*, 22 Ky.L.Rptr. 844, 58 S.W. 987, 988 (1900) (conversion action in which defendant mistakenly removed sand from lot adjacent to his own; "measure of damages is not the damage to the lot by the excavation, or what it would cost to fill it up, but the value of the sand converted").

In their complaint, Slusher and Golden sought as damages "the sum of $125,000.00 *plus any additional amounts* realized by the [Stewarts.]" (Emphasis supplied). However, the circuit court awarded only "the principal amount of $125,000, plus prejudgment interest[.]" Because Slusher and Golden did not file a cross-appeal to protect their right to seek more than was awarded, they are limited

[4] *See also May v. Muroff*, 483 So.2d 772, 772 (Fla. App. 4 Dist. 1986)("seller improperly sold fill from the land in question to a third party for $240,000. The purchaser claims that $240,000. We agree he should be entitled to it"). Also, at least one jurisdiction has determined that "This reasoning [expressed in *Worrall*] does not depend for its soundness on the holding of a property interest, as distinguished from a contractual interest, by the plaintiffs. Nor is it punitive; it merely deprives the defendant of a profit wrongfully made, a profit which the plaintiff was entitled to make." *Laurin v. DeCarolis Const. Co., Inc*., 372 Mass. 688, 363 N.E.2d 675, 678-79 (Mass. 1977). Similarly, applying the same reasoning, a federal court said, "It makes no difference in this case whether that instrument was an option or a contract of sale. In either event, it was the duty of plaintiff to maintain the property in its then condition. He had no right to commit waste by stripping the land of timber upon it. Upon the exercise of an option the rights of the parties relate back to its date." *McCarroll v. Newsham*, 278 F. 4, 7 (5th Cir. 1922).

to that amount and cannot recover any other royalty payments the Stewarts may have received while they were the title owners of the property.

We conclude that the $125,000 advance royalty payment would not have exceeded the value of the coal removed. Therefore, under these circumstances, the award of the $125,000 advance royalty was a proper measure of damages.

Award of prejudgment interest

The Stewarts' challenge to the award of prejudgment interest warrants little discussion. The trial court awarded Slusher and Golden 8% interest on the $125,000 award. The trial court properly looked to *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136 (Ky. 1991), and *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440 (Ky. 2005) for the tests to determine if the damages were liquidated and determined that they were.

"The longstanding rule in this state is that prejudgment interest is awarded as a matter of right on a liquidated demand, and is a matter within the discretion of the trial court or jury on unliquidated demands." *3D*, 174 S.W.3d at 450. We need not consider whether the circuit court correctly determined that the demand was liquidated. If it was liquidated, the circuit court had no discretion and properly awarded interest at the statutory rate of 8%. KRS 360.010. If the demand was unliquidated, making the award of prejudgment interest a matter of discretion with the circuit court, we conclude that, in this case, awarding interest at the maximum permissible rate was not an abuse of discretion. As the court noted, the Stewarts

intentionally created a defect in title "after two years of litigation in the initial declaratory action, and recorded [that defect in the form of a mineral lease] just two months prior to the judicial determination of the [option] contract's enforceability." Allowing the Stewarts to retain any portion of the royalty payment, including the value of its use, would result in a windfall to them.

We note that the circuit court's order and summary judgment does not state when prejudgment interest began to accrue. Slusher and Golden requested in their motion that they receive "interest from May 22, 2006, when the [Stewarts] received the funds." Because this date is after the date marking Slusher and Golden's acquisition of their equitable interest in the coal, that date is the correct one on which prejudgment interest began to accrue.

The Stewarts' counterclaim for $50,000

Finally, the circuit court found, and the record supports the finding, that Slusher and Golden paid the entire purchase price of $800,000 at the closing. Therefore, the circuit court did not err in finding against the Stewarts on their counterclaim for an additional $50,000. The Stewarts' argument is simply that the $50,000 given as consideration for the option contract should not apply toward the purchase price of the property, because the option was not exercised before midnight on November 30, 2004.

Having already concluded that the Stewarts thwarted any effort by Slusher and Golden to exercise the option, we can find no merit in this argument. "[I]t is the general principle of law that he who prevents a thing from being performed

should not avail himself of the nonperformance he has occasioned[.]" *Bryant v. Jones*, 255 Ky. 606, 75 S.W.2d 34, 38 (1934). The Stewarts breached the option contract; awarding them an additional $50,000 would be allowing them to profit from their own wrongdoing. For that reason, we find no error in the circuit court's denial of the Stewarts' claim.

Conclusion

Our *de novo* review of these summary judgments causes us to conclude that the Knox Circuit Court correctly ruled that there were no genuine issues of material fact and properly awarded judgment as a matter of law in favor of Slusher and Golden on their claim for damages in the amount of $125,000 with prejudgment interest thereon at 8%. We also conclude that the Knox Circuit Court correctly found no genuine issues of material fact and properly ruled that the Stewarts are not entitled to recover the option price beyond that already paid as part of the purchase price.

For all of the foregoing reasons, the judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

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