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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001019-MR

MACKADOO MAYNARD

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 08-CI-00915

THOMAS E. WILLIAMSON AND
VALERIE WILLIAMSON

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, STUMBO AND VANMETER, JUDGES.

VANMETER, JUDGE: Mackadoo Maynard appeals from a judgment of the Pike Circuit Court requiring Thomas E. and Valerie Williamson to pay him \$401 for which he is to execute a deed transferring certain real property to the Williamsons. We find no error and affirm the Pike Circuit Court's judgment.

On August 8, 1998, the Williamsons entered into a land contract with Mackadoo Maynard Sr. and Ethel Maynard, husband and wife. The Williamsons agreed to pay \$16,638 for the property at six percent interest, which the contract recited as resulting in monthly installments of \$238.48 for 120 months. The amortization in the land contract was, however, incorrect. As found by the trial court, the correct amortization was \$240 per month for 86 months. The parties agree that over the period of the contract, the Williamsons initially made three payments of \$239 and then started making payments of \$240 per month.

Mrs. Maynard predeceased her husband, and the Williamsons continued to make the \$240 per month payments to Mr. Maynard Sr. until his death in August 2001. Maynard and his sister, Elaine Schermer, as Mr. Maynard Sr.'s children and heirs-at-law, inherited the property that was subject to the land contract. The Williamsons continue to make the payments of \$240 per month to Maynard as the executor of his father's estate.

For reasons not clear in the record, Maynard began holding the checks tendered by the Williamsons in August 2002. Nine tendered checks were not cashed by Maynard, who then instituted eviction proceedings against the Williamsons for nonpayment. When the eviction action failed, he tried to cash those checks but three of them were in excess of 180 days old and the bank refused to accept such stale instruments.

During the course of the land contract, the Williamsons were never late with tendering a check for payment and none of their tendered checks were

refused by the bank except for the three that had been held in excess of 180 days by Maynard. In July 2005, the Williamsons tendered payment number 86 which, according to their calculations, was the final payment. After encountering difficulty getting Maynard and Schermer to execute an appropriate deed, the Williamsons filed this action in the Pike Circuit Court, alleging full payment under the land contract and seeking relief in the form of the execution and tender of a deed.

Both sides filed cross-motions for summary judgment. The trial court determined that because Maynard had held three checks until they would no longer be honored by the bank, the Williamsons still owed \$802 on the land contract. Schermer settled with the Williamsons prior to the trial court's entry of its judgment. By agreed order, the Williamsons paid her \$401, representing one-half of the total arrearage, and she agreed to sign a deed transferring the property to them. Maynard then filed this appeal.

On review of a summary judgment, we are not required to defer to the trial court since there are no factual issues present in the case. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Id.* (citing CR¹ 56.03).

¹ Kentucky Rules of Civil Procedure.

Maynard argues that because the Williamsons did not pay the entire amount owed on the land contract in a timely manner, they are not entitled to specific performance and he is therefore not required to execute a deed conveying the property to them. He relies on the holding in *West Ky. Coal Co. v. Nourse*, 320 S.W.2d 311, 314 (Ky. 1959), in which the court stated that “before one may obtain the benefits the contract confers upon him, he himself must perform the obligation which is imposed upon him.”

Maynard fails to consider that his actions of holding the checks caused the Williamsons to be in breach of contract. We agree with the trial court that absent his action of refusing the tendered payments, the Williamsons would not have been in breach of the terms of the land contract. As noted in *20th Century Coal Co. v. Taylor*, 275 S.W.2d 72, 74 (Ky. 1954), “[o]ne party may not successfully accuse the other of failure to perform when the former does not permit the performance.” (citations omitted).

We further note that Maynard’s proposed remedy, forfeiture of the Williamsons’ equity under the land contract, is explicitly prohibited under *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979). In *Sebastian*, the court noted that under an installment land contract, the seller retains bare legal title as a lien to secure payment, but that equitable title passes to the purchaser when the contract is entered. *Id.* at 382. The court further stated that no practical distinction exists between a land sale contract and a purchase money mortgage. *Id.* at 383. In the event of default, the purchaser’s entire equity is not forfeited, but instead the seller

must seek a judicial sale of the property by foreclosure proceedings, including the attendant right of the purchaser to redeem the property by paying the debt in full, including any interest and expenses. *Id.*

In this instance, the trial court possessed the equitable power to require the Williamsons to resubmit payment of \$401 to Maynard as being owed for the checks he held until they were stale and refused by the bank. The Williamsons having then fulfilled the terms of the land contract, Maynard was then obligated to perform under the land contract and execute the appropriate deed.

Finding no error, we affirm the Pike Circuit Court's judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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