RENDERED: JANUARY 23, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001137-MR

MICHAEL BICKEL, ADMINISTRATOR
W/W/A ESTATE OF KENNETH BICKEL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CI-001545

SANDRA RAE HALEY;
SHERRI KAY WILSON;
AND STEPHEN LEE THURMAN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, MAZE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Antenuptial agreements, like other contracts, are subject to rules of construction and enforcement, and parties may waive, or be estopped from, enforcement of terms or conditions. The issue we must resolve in this case is whether the Jefferson Circuit Court erred in declining to enforce certain provisions

in an agreement when one spouse, prior to his death, failed or declined to enforce those provisions for over ten years. We hold that the trial court did not err and therefore affirm.

I. Factual Background.

Kenneth Bickel and Norma Thurman entered into an antenuptial agreement ("the Agreement") prior to their 1996 marriage. While both owned separate residences, they agreed that Kenneth would move into Norma's home at 6410 Gabriel Drive (the "property") after the marriage. In preparation, Kenneth had a garage constructed on the property to house various items of personal property. The garage was a permanent improvement to the property, although the Agreement reflected it was owned by Kenneth, not Norma. To that end, the parties agreed Kenneth's property included "[f]ree-standing Garage located at 6410 Gabriel Drive—estimated fair market value of $12,000.00." Similarly, they agreed Norma's property included "[r]eal property and improvements located at 6410 Gabriel Drive, Louisville . . . (exclusive of the free-standing garage located upon this real property)."

About eleven years after they were married, in 2007, Norma decided to convey the property to herself and her three children, Sandra Rae Haley, Sherri Kay Wilson and Stephen Lee Thurman, as joint tenants with right of survivorship. A general warranty deed was executed conveying the property, inclusive of improvements. Kenneth joined as a Grantor in the deed, conveying "any interest

he may possess in and to the subject property and improvements by virtue of his marriage to Norma Bickel."

Kenneth died on February 10, 2009. Initially, Norma and Kenneth's six sons, his heirs at law, signed a petition to dispense with administration, claiming no will to probate and minimal assets. In 2010, however, Michael and Anthony Bickel, two of Kenneth's sons, filed an action in Jefferson Circuit Court claiming entitlement to the garage. Norma filed a CR[1] 12.02 motion to dismiss based on a lack of standing since neither son was the administrator of Kenneth's Estate. In response, Michael filed a petition with the district court to have himself named administrator of the estate. The district court denied Michael's motion to have himself appointed administrator, but did appoint the Public Administrator. The Public Administrator, however, refused to join as a party plaintiff in the circuit court action. This initial action was dismissed without prejudice.

In May 2011, Michael again petitioned the district court for appointment as Administrator with will annexed (W/W/A) of Kenneth's estate, offering for probate a newly discovered holographic will. The will does not appear to have a date. As may pertain to the garage, the will contains a terse reference, "Norma & Mike have a deal on the garage." Despite Norma's objections, the district court entered an order admitting the will to probate and appointing Michael as Administrator W/W/A. Norma died in October 2011. Michael then filed, in 2012, a complaint against Norma's children, the owners of the property by virtue

[1] Kentucky Rules of Civil Procedure.

of the 2007 deed. Michael specifically asserted that the Agreement gave Kenneth an equitable interest in the property, and claimed an equitable lien for the fair market value of the garage as indicated in the Agreement ($12,000) plus interest since Kenneth's death until paid.[2]

Norma's children filed a motion to dismiss the action for lack of subject matter jurisdiction, or alternatively to dismiss for failure to state a claim upon which relief can be granted. Because the motion and Michael's response contained matters outside the pleadings, the trial court treated the motion as one for summary judgment. CR 12.03; CR 56. The Jefferson Circuit Court granted Norma's children's motion for summary judgment for two reasons. First, Kenneth failed to establish his ownership or create an equitable interest in the garage, therefore, his personal representative cannot now attempt to create or claim such a right. Second, the 2007 deed transferred any and all interest Kenneth might otherwise have had in the garage as a matter of law. This appeal follows.

II. Standard of Review.

The appellate standard of review of a summary judgment is whether the trial court "correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. Summary judgment is appropriate where the movant shows that the adverse party could not

[2] Following Norma's death, her children placed the property on the market for sale. Since this action constituted a cloud on their title, the parties agreed to escrow $15,000 from the proceeds of any sale to satisfy Michael's claim in the event he prevailed. The property sold in July 2012.

prevail under any circumstances." *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). "Because summary judgments involve no fact finding, [an appellate court] will review the circuit court's decision *de novo*." *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014) (quotations and citation omitted).

III. Issues on Appeal.

Michael argues that the Agreement created an equitable lien in favor of Kenneth or his Estate to the extent of the value of the garage, set at $12,000 in the Agreement. Michael argues that the Opinion and Order should be reversed and the case returned to the trial court with the instruction to enter judgment in favor of the Estate of Kenneth Bickel, in the sum of $12,000.

Kentucky's highest court has recognized that "[e]quitable liens are of two kinds: those that arise from a contract which shows an intention to charge property with a debt or obligation, and those which are implied by a court of equity out of general considerations of right and justice." *Best v. Jenkins*, 260 S.W.2d 653, 655 (Ky. 1953) (citations omitted). The Agreement undoubtedly created some sort of interest in favor of Kenneth. The Agreement, Paragraph 9, however, explicitly recognized Kenneth's right to insist on a conveyance of some sort to secure his interest in the garage, stating:

> Each party agrees to execute and acknowledge or join as a party in executing and acknowledging any instrument which may be requested by the other for the purpose of transferring any of the individual and separate property of the parties as described hereinabove . . . or

> for the purpose of divesting any claim, or curtesy or dower rights, inchoate or otherwise, and/or interest in or to said property under any statutes now or hereafter in force in the Commonwealth of Kentucky in said separate and individual property. Further, each party shall take and deliver to each other any and all other instruments which may be necessary to effectuate the purposes of this Agreement.

As pointed out by Norma's children, the exact nature of that instrument to secure an interest in an apparently attached garage on a residential lot is difficult to fathom. In light of the trial court's and our resolution of this case, however, we do not need to make that determination.

Although subject to court review for unconscionability, *e.g.*, *Lane v. Lane*, 202 S.W.3d 577, 578-79 (Ky. 2006), antenuptial agreements, like other contracts, are subject to the usual rules of interpretation. Louise E. Graham, James E. Keller, 15 Kentucky Practice, Domestic Relations Law, 3d ed. (Thompson West, 2008), § 1:14. We hardly need authority to note that "[a] party may waive or relinquish rights to which he is entitled under a contract, and having done so may not reverse his position to the prejudice of another party to the contract." *Stamper v. Ford's Adm'x*, 260 S.W.2d 942, 943 (Ky. 1953). In another context, reviewing enforcement of a construction contract, Kentucky's highest court held "where the parties to the contract proceed throughout the performance of the contract without reference to the provisions in the contract, they may be held to have waived the provision[.]" *Green River Steel Corp. v. Globe Erection Co.*, 294 S.W.2d 507, 511 (Ky. 1956).

Michael cites *Tile House, Inc. v. Cumberland Federal Sav. Bank*, 942 S.W.2d 904 (Ky. 1997); *Estes v. Thurman*, 192 S.W.3d 429 (Ky. App. 2005); and *Bolen v. Bolen*, 169 S.W.3d 59 (Ky. App. 2005), as support for his claim of an equitable lien. These cases, however, do not compel a different result. The Kentucky Supreme Court recognized in *Tile House* that "equity aids one who has been vigilant and will refuse relief to one who has been dilatory . . . or who has slept on his rights." 942 S.W.2d at 906 (citations omitted). As noted by the trial court, Kenneth had over ten years to establish his ownership in the garage. We agree with the trial court that Kenneth's failure to exercise his contractual right for such a long period of time was a waiver of the right.[3]

Whatever claim Kenneth may have had to the garage, moreover, was lost when Kenneth joined in the conveyance of the property to Norma's children. The deed expresses in clear and unequivocal terms that Kenneth conveyed "any interest he may possess in and to the subject property and improvements by virtue of his marriage to Norma Bickel." Michael's argument that the language evidences intent to convey something other than Kenneth's interest in and to the property is contrary to all rules of construction and interpretation. By statute, "[u]nless a different purpose appears by express words or necessary inference, every estate in land created by deed . . ., without words of inheritance, shall be deemed a fee simple or such other estate as the grantor . . . had power to dispose

[3] We do not hold that a personal representative of a decedent's estate may never enforce the terms of an antenuptial agreement.

of." KRS[4] 381.060(1); s*ee, e.g., Clay v. McNabb*, 286 Ky. 751, 753, 151 S.W.2d 1027, 1028 (1941) (holding that statute requires doubts as to character of estate to be resolved "in favor of a fee simple title[]"). The policy behind this statute is to stabilize land titles and favor vested estates. *Weller v. Dinwiddie*, 198 Ky. 360, 248 S.W. 874 (1923).

Kenneth's ability to join in the deed to convey his interest in the property to Norma and her children, furthermore, is supported by the terms of the Agreement. Paragraph 7 of the Agreement states:

> Each party reserves the right to devise or bequeath to the other such property as he or she deems proper. Nothing herein shall be deemed to constitute a waiver by either party of any devise or bequest that the other party may choose to make to him or her by Will or codicil. . . . **The provisions of this Agreement shall not prevent either party from making additional inter vivos gifts to the other party.**

(Emphasis added). Far from proscribing Kenneth from transferring any of his assets to Norma, this provision clearly indicates the spouses contemplated that might occur.

Finally, Michael claims that Kenneth's holographic will, discovered and submitted for probate some two years after his death, provides support to his claim of interest in the garage or property with the terse provision, "Norma & Mike have a deal on the garage." Unfortunately, Michael does not indicate how or where this issue was preserved.

[4] Kentucky Revised Statutes.

A reviewing court will not consider any argument on appeal that has not been preserved in the trial court. *Am. Founders Bank, Inc. v. Moden Invs., LLC*, 432 S.W.3d 715, 721 (Ky. App. 2014). Under CR 76.12(4)(c)(v), "[t]he organization and contents of the appellant's brief shall [include]: . . . at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." While we could dispense with the appeal entirely by striking Michael's brief, we have tended to ignore this failure when the record is not voluminous and preservation is clear from the face of the record. *Moden*, 432 S.W.3d at 721. This record is not large, but we have been unable to ascertain where or how this argument was preserved. Certainly, the trial court did not address it in any of its orders. Thus, we decline to address this claim further.

IV. Conclusion.

Ultimately, we agree with the trial court that Kenneth waived his right to enforce whatever interest he may have had in the garage or property by his inaction over the course of his marriage with Norma. Further, that interest, such as it was, ceased to exist upon the execution of the deed. Kenneth willingly and voluntarily conveyed any and all interest he may have had in Norma's property to her children by the general warranty deed he joined in as Grantor.[5]

[5] As an aside, we note that the same attorney who prepared the Antenuptial Agreement also prepared the deed by which Norma and Kenneth conveyed the property to Norma's children. The Agreement, Paragraph 12, stated that "[Norma] specifically waives her option to retain an attorney to represent her in this matter." The implication is that the attorney was Kenneth's counsel.

For the foregoing reasons, the Jefferson Circuit Court's Opinion and Order is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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