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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000239-MR

B.G. DUNNINGTON REVOCABLE TRUST
BY B.G. DUNNINGTON, TRUSTEE — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 12-CI-00273

JERRY SHAW, INDIVIDUALLY;
JERRY M. STEARNS, INDIVIDUALLY;
AND JERRY SHAW AND JERRY M. STEARNS
FORMERLY D.B.A. WALNUT CREEK PROPERTIES
AND TIMBER, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Appellant appeals from a judgment of the Wayne Circuit Court which found in favor of Appellees in a dispute over the amount of land conveyed by a deed. We find no error and affirm.

B.G. Dunnington is the trustee of the B.G. Dunnington Revocable Trust. Walnut Creek Properties, LLC was a limited liability company and its only members were Jerry Shaw and Jerry Stearns. On June 11, 2009, Walnut Creek purchased two tracts of real property in Wayne County for $190,000. Walnut Creek then spent $30,000 to $40,000 improving the property. The deed for these two tracts of property described it in metes and bounds, but also listed an acreage amount. The deed stated that there were 237 acres, "more or less," in total for the two tracts of land. Walnut Creek did not perform a survey either before or after purchasing the property.

After Walnut Creek finished the improvements to the land, Dunnington approached Stearns and inquired about purchasing the property. Dunnington requested that Walnut Creek perform a survey prior to the purchase, but Walnut Creek declined. Stearns stated Dunnington would have to purchase the property "as is." Walnut Creek agreed to sell the property to the Dunnington Trust for $250,000. The deed which transferred the property to the Dunnington Trust used the same descriptions as the deed Walnut Creek received. Dunnington did not perform a survey prior to purchasing the land.

Approximately 10 months after the purchase, Dunnington hired a land surveyor to survey the property. The surveyor discovered that while the metes and bounds descriptions were correct, the acreage amount was incorrect. The surveyor found that the property only had 196.09 acres as opposed to the 237 listed in the deed. This resulted in a 40.91, or 17.26%, acreage deficiency. After finding this

discrepancy, Dunnington asked the Appellees to adjust the sale price. Appellees declined and Dunnington brought the underlying suit.

Dunnington argued that the discrepancy in the acreage listed in the deed breached the general warranty contained in the deed. Dunnington also claimed that he was entitled to an adjustment of the sale price because of the 10% Rule as described by the case of *Manning v. Lewis*, 400 S.W.3d 737 (Ky. 2013). A bench trial was held on April 16, 2014. The trial court ultimately found in favor of Appellees. This appeal followed.

This Court reviews a trial court's decisions regarding issues of law *de novo*. *Monin v. Monin*, 156 S.W.3d 309, 315 (Ky. App. 2005). Also, this Court is

> entitled to set aside the trial court's findings only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 353-354 (Ky. 2003)(citations omitted).

We will first address Dunnington's argument regarding the 10% Rule. The 10% Rule is

> an equitable doctrine that holds that where relief from a sale is sought because of a deficiency in acreage, and the deficiency is greater than ten percent of the stated acreage, relief will be granted if at the time of the conveyance the parties are ignorant of the deficiency or the buyer is deceived by misrepresentations of the seller as to the quantity of land.

Manning v. Lewis, 400 S.W.3d 737, 740 (Ky. 2013)(citations omitted). The 10% Rule will only apply if the land transaction falls into one of four categories.

> [a.] First—Sales strictly and essentially by the tract, without reference in the negotiation or in the consideration to any estimated or designated quantity of acres.
>
> [b.] Second—Sales of the like kind, in which though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description and under such circumstances or in such manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how-much-soever [sic] it might exceed or fall short of that which was mentioned in the contract.
>
> [c] Third—Sales in which it is evident from extraneous circumstances of locality, value, price, time and the conduct and conversations of the parties, that they did not contemplate or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency.
>
> [d.] Fourth—Sales which, though technically deemed and denominated sales in gross, are, in fact, sales by the acre, and so understood by the parties.

Id. (citation omitted).

> These categorizations are important because they determine the applicability of the 10% Rule. Land sale contracts belonging to either of the first two classes, whether executed or executory, should not be modified when there has been no fraud. However, if a contract falls in one of the later two classifications then it may be reformed if the deficiency is based upon fraud or mistake, and the deficiency is as much or more than 10% of the agreed upon acreage.

Id. at 740-41 (citations omitted).

The trial court in this case found that the 10% Rule did not apply. We agree. Dunnington argues that the transaction at issue falls under the third category. Appellees claim that the transaction falls under either the second or third category.

The transaction at issue sold land by the tract, but also mentioned the number of acres for descriptive purposes. This would allow the transaction to fit in the second category; however, as stated in *Manning*, there would need to be fraud for the transaction to be modified. Here, Dunnington specifically stated that Appellees did not defraud him. Since there was no evidence of fraud, the 10% Rule cannot be applied.

As for the third categorization, we will need to look at the specific circumstances of the deal to determine if there should be a modification. The trial court found that due to the "conduct and conversations" of the parties, the 10% Rule would not apply. We agree. The parties to this transaction were experienced land purchasers who had done business with each other before. The trial court even described this as an "arms length" transaction. In addition, Dunnington received the exact land he purchased. The metes and bounds description was not

erroneous. Also, Appellant does not bring to our attention any evidence that the purchase price of $250,000 was too high considering the type of land and its location. Finally, the trial court believed the testimony of Stearns that Dunnington agreed to buy the land "as is." The trial court did not err in finding that the 10% Rule did not apply to this transaction.

Dunnington also argues that the error in acreage violated the general warranty found in the deed. We disagree. "In this Commonwealth, a general warranty encompasses the covenant of seisin, covenant of right to sell, covenant of freedom from encumbrances, covenant of quiet enjoyment, and covenant of warranty of title." *Ralston v. Thacker*, 932 S.W.2d 384, 387 (Ky. App. 1996)(citations omitted).

> A covenant of seisin is generally regarded as a covenant of title. In making the covenant of seisin, a grantor warrants that the grantor is seized of the estate the deed purports to convey, both in quantity and quality. The covenant of seisin is the grantor's promise that he or she owns the property interest he or she purports to convey to the grantee.

21 C.J.S. Covenants § 16 (footnotes and citations omitted).

> In making the covenant of the right to convey, a grantor guarantees that the grantor has the legal right to convey the estate the deed purports to convey. The covenant of the right to convey is the grantor's promise that he or she has the power and authority to transfer the interest to the grantee.

21 C.J.S. Covenants § 17 (footnotes and citations omitted).

> The covenant against encumbrances is implied from the words "grant" or "convey" in a deed, and its purpose

> is to warrant that title to the land is not encumbered. Pursuant to the covenant against encumbrances, a grantor obligates himself or herself either to clear up any encumbrances that may be discovered or to indemnify the grantee.

21 C.J.S. Covenants § 18 (footnotes and citations omitted).

> The covenant of quiet enjoyment, or quiet and peaceable possession, is contained in a covenant of warranty in a deed. According to the covenant of quiet enjoyment, a grantor warrants that the grantee may possess and quietly enjoy the land. The covenant of quiet enjoyment is the grantor's promise that the grantee's possession will not be disturbed by any other claimant with a superior lawful title.

21 C.J.S. Covenants § 19 (footnotes and citations omitted).

> The covenant of warranty is an assurance or guarantee of title, or an agreement or assurance by the grantor of an estate that the grantee and his or her heirs and assigns will enjoy it without interruption by virtue of a paramount title and that they will not, by force of a paramount title, be evicted from the land or deprived of its possession. The general effect of a covenant of warranty is that the grantor agrees to compensate the grantee for any loss which the grantee may sustain by reason of a failure of the title which the deed purports to convey, or by reason of an encumbrance on the title.

21 C.J.S. Covenants § 21 (footnotes and citations omitted).

In the case at hand, none of the above covenants were violated. Although the number of acres was incorrect, it was only used for descriptive purposes. This was not a sale of land by the acre; it was the sale of tracts. The metes and bounds description prevails over a description given by acres. *Forrester v. Terry*, 357 S.W.2d 308 (Ky. 1962); *Dotson v. Fletcher*, 171 Ky. 589, 188 S.W. 642 (1916).

Dunnington received the land he bargained for; therefore, the covenant of seisin was not violated. Also, there was no evidence presented that Walnut Creek was not the legal owner of the land it conveyed to the Dunnington Trust (covenant of right to convey); that there were any encumbrances on the land (covenant against encumbrances); that there were any other parties with a superior right to title of the land (covenant of quiet enjoyment); nor that the Dunnington Trust is likely to be evicted from the land (covenant of warranty of title).

For the foregoing reasons, we affirm the judgment of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

David M. Cross
Albany, Kentucky

BRIEF FOR APPELLEES:

Ralph D. Gibson
Somerset, Kentucky