IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 7, 2007 Session

ASHRAF KHALIL, ET AL. v. CARCAR DEVELOPMENT, INC.

Appeal from the Chancery Court for Davidson County
No. 05-262-II Carol McCoy, Chancellor

No. M2006-02422-COA-R3-CV - Filed December 21, 2007

This appeal arises from two consolidated breach of contract actions involving two separate but nearly identical residential real estate transactions. The buyers brought suit alleging that the seller breached its contracts by failing to complete construction of their homes by the closing date set out in the contracts. After the close of the plaintiffs' proof, the defendant moved for involuntary dismissal under Rule 41.02 of the Tennessee Rules of Civil Procedure, arguing that the seller's obligation to sell the homes never arose due to the buyers' failure to satisfy several conditions in the contracts. The Chancellor granted the defendant's motion for involuntary dismissal and denied the plaintiffs' motions to alter or amend. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which MICHAEL SWINEY, J., and ROSS H. HICKS, SP.J., joined.

Lawrence Hart, Nashville, Tennessee, for the appellant, Ashraf Khalil.

G. Kline Preston, Nashville, Tennessee, for the appellee, CarCar Development, Inc.

OPINION

Ashraf Khalil and Sameh Sidhom ("Buyers") separately entered into essentially identical contracts with Carcar Development, Inc. ("Seller") to purchase lots and homes to be constructed in a new subdivision, Edge-O-Lake. Both contracts had an effective date of June 12, 2003. Each contract was contingent upon the buyer's ability to qualify for a new loan. Addendum A to each contract contained additional provisions, including the following two provisions at issue in this appeal: (1) "Should this Purchase Agreement be contingent upon Loan Approval Purchaser shall provide a Lender Commitment letter within 30 days of Contract Date," and (2) "Sale subject to Final Plat approval from Metro. City and Planning Departments."

The contract with Mr. Khalil provided for a closing and possession date of November 30, 2003. The contract with Mr. Sidhom provided for a closing and possession date of December 19,

2003. On January 19, 2004, Mr. Khalil signed a contract addendum extending the closing date to April 26, 2004; Mr. Sidhom signed a contract addendum extending the closing date to May 30, 2004. On March 26, 2004, Mr. Khalil and Mr. Sidhom each agreed to another contract addendum extending their closing dates to June 25, 2004 and July 30, 2004, respectively.

Buyers were among a group of six plaintiffs who filed suit against Seller on September 20, 2004 for breach of similar contracts involving four different lots and homes in the Edge-O-Lake subdivision. The cases were severed, and four of the six plaintiffs settled with Seller. Mr. Khalil and Mr. Sidhom did not enter into a settlement.

In its answers to Buyers' complaints, Seller admitted that the parties had entered into contracts and that construction on the homes had not been completed, but denied that it was in breach of the contracts. As one of its defenses, Seller stated, "Defendant's delay in building is excused by Addendum A to the contract which states: 'Sale subject to Final Plat approval by Metro. City and Planning Departments.'"

At trial, Buyers called as a witness Mr. Johnny Carlton, construction manager for Seller during the relevant time period. During his questioning of Mr. Carlton, counsel for Buyers attempted to enter into evidence a document purported to be a subdivision plat bearing a stamp indicating approval by the Metro Planning Commission. The Chancellor sustained an objection by Seller that Mr. Carlton was not qualified to authenticate the document, so the document was not received into evidence. Counsel for Buyers then questioned Mr. Carlton as follows:

> Q. Was the, do you know, was the plat approved by the Metro Planning Commission?
>
> A. The plat was approved by the Metro Planning Commission with conditions all the way up until the time that you're issued a certificate of occupancy.
>
> Q. Do you know when the plat was approved?
>
> A. No. I do not.
>
> Q. But would you have known if you had this document?
>
> A. Well. I mean this document doesn't indicate that there is a final approval because the final approval is not done until all the water and sewer, the infrastructure, the sidewalks, et cetera, are complete. Until such time, it's not really officially approved.
>
> Q. What approval is necessary before you can pull a permit to start construction on a lot?
>
> A. The actual recording of an approved plat that will enable each lot to be issued an individual deed with the meets and bounds on each lot.
>
> Q. And when did that occur with this subdivision?

A. I don't know.

On cross-examination, questioning by counsel for Seller of Mr. Carlton included the following exchange:

> Q. Very briefly, Mr. Carlton. On either one of the lots in question today, Lot 4 and Lot 9, did either one of those receive final plat approval from Metro Government or any agency? And I mean final plat approval.
>
> A. As far as I know, they did receive final plat approval, but it was almost two years after the date that it was initiated.
>
> Q. So beyond the closing date that was agreed upon in the contract with the plaintiffs in this case?
>
> A. Yes.
>
> Q. Did the – As a construction manager at the time, and let's just make this clear, at the time that these contracts were entered into, you were the construction manager for the lots that these gentlemen have filed suit on. Is that right?
>
> A. That is correct.
>
> Q. Did CarCar ever receive a lender commitment letter?
>
> A. No.

Later on, Mr. Carlton reiterated that no commitment letter had been provided by either plaintiff.

When asked by counsel for Buyers why Seller had twice extended the contract if there was a problem about the commitment letters, Mr. Carlton stated that, "I think just probably giving them a little more time to go ahead and try to make a valid contract where we can go and start the houses and not necessarily lose the contract." Mr. Carlton further testified:

> A. We asked [for a commitment letter] on several occasions before we started this house because that is pretty much standard procedure and, for whatever reason, the stockholders decided to proceed on without a commitment letter.
>
> Q. So they decided to go ahead without the commitment letter?
>
> MR. PRESTON: Objection. That's not what his testimony was, Your Honor.
>
> A. No. We didn't. Sometimes you do spec houses. We basically looked at that as a spec house. But we were not going to do No. 4 and we never finalized No. 9 because we didn't have a commitment letter.

Buyers called Mr. Sidhom to testify at the trial. Mr. Sidhom testified that he was a licensed real estate broker in the state of Tennessee and had acted as Mr. Khalil's realtor during the transactions in question in this case. Mr. Sidhom stated that Mr. Khalil had obtained a commitment letter on Lot No. 9 and had submitted it to Mr. Sidhom. Because the document purporting to be the commitment letter was not properly authenticated, the Chancellor sustained the objection to its admission into evidence. Mr. Sidhom also testified that he had obtained a commitment letter concerning Lot No. 4, the lot he was buying. The remainder of Buyers' proof addressed the issue of damages.

At the close of the plaintiffs' proof, Seller moved for involuntary dismissal on the grounds that the evidence did not show that a lender commitment letter was received within 30 days of the execution of the contract or that final plat approval had been obtained. Seller argued that, because Buyers had not performed their obligations under the contracts, Seller had no obligation to sell them the homes. The Chancellor granted Seller's motion for involuntary dismissal. The Chancellor concluded that, construing the evidence in the light most favorable to the plaintiffs as required under Rule 41, "there is no evidence upon which the Court can reasonably infer that the Plaintiffs have sustained their burden of demonstrating that the Defendant failed to perform in accordance with the terms of the contracts."

Buyers subsequently filed a motion to alter or amend and an amended motion to alter or amend. In conjunction with the amended motion and supporting memorandum, Buyers submitted the affidavit of Roy Dale, an engineer who stated that he supervised the preparation of the final plat on Chelsea Village, Phase Six, Section Two, as well as a copy of the plat. The Chancellor denied the motion to alter or amend. This appeal followed.

On appeal, Buyers raise two issues: (1) whether the trial court erred in allowing the Seller to raise the issue of the Buyers' breach of contract at trial when the Seller's answers did not specifically allege that the Buyers had breached the contract, and (2) whether the Seller failed to meet its burden of proving its alleged defenses and offered false and misleading testimony in support of its defense relating to final plat approval.

STANDARD OF REVIEW

As set forth in *Thompson v. Hensley,* 136 S.W.3d 925, 929 (Tenn. Ct. App. 2003), "The standard of review of a trial court's decision to grant a Rule 41.02 involuntary dismissal is in accordance with Tenn.R.App.P. 13(d)." Thus, findings of fact by the trial court are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless a preponderance of the evidence is otherwise." Tenn.R.App.P. 13(d). As to legal issues, "our review is conducted 'under a pure de novo standard of review, according no deference to the conclusions of law made by the lower courts.'" *Thompson*, 136 S.W.3d at 929 (quoting *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001)).

PROPRIETY OF ALLOWING PROOF REGARDING PLAINTIFF'S BREACH

The crux of Buyers' first argument is that the trial judge erred in allowing Seller to put on proof regarding Buyers' alleged failure to satisfy two conditions of the contract: submission of a loan commitment letter within 30 days of execution of the contract and obtaining final plat approval. The Buyers correctly point out that Rule 12.08 of the Tennessee Rules of Civil Procedure provides that, with some exceptions, "a party waives all defenses and objections which the party does not present either by motion as hereinbefore provided, or, if the party has made no motion, in the party's answer or reply, or any amendments thereto." The Seller argues that the issues raised regarding the loan commitment letter and the final plat approval go to the conditions of the contract and are not defenses that must be specifically pled.

Seller's answers to the complaints specifically include a defense related to the plat approval: "Defendant's delay in building is excused by Addendum A to the contract which states: 'Sale subject to Final Plat approval by Metro. City and Planning Departments.'" This language in Seller's answers was sufficient to put Buyers on notice that the final plat approval was contested by Seller and that proof would need to be presented on that issue. Thus, under the facts presented in this case, the Court need not address the issue of whether Seller was required to specifically plead Buyers' failure to submit a loan commitment letter.

SUFFICIENCY OF PROOF UNDER RULE 41.02

Buyers further argue that Seller failed to prove its alleged defenses and offered "false and misleading testimony" regarding the final plat approval.

Since this Court has determined that Seller properly raised the issue of the final plat approval (as discussed above), we will focus our analysis upon the proof on that issue. Buyers assert that the burden of proof was on Seller to put forth evidence regarding its "defense" of no final plat approval. Under the terms of the contract, sale of the property was subject to final plat approval by the Metro Planning Commission. Final plat approval was a condition precedent to the Seller's obligation to perform under the contract. The burden of proof is generally on the party seeking to enforce a contract to prove the satisfaction of conditions precedent to the defendant's obligations. *See McReynolds v. Am. Progressive Corp.*, No. 01-A-019008CH00300, 1991 WL 24891 (Tenn. Ct. App. March 1, 1991); *Abni Joint Venture v. Kinnaird*, No. 86-292-II, 1987 WL 7968 (Tenn. Ct. App. March 19, 1987) (perm. app. denied June 8, 1987). Thus, the Chancellor properly put the burden of proof on Buyers in this case to establish that final plat approval had occurred.

At trial, no properly authenticated plat with final planning commission approval was entered into evidence. The only evidence on the issue of final plat approval was the testimony of the construction manager, Mr. Carlton. His testimony was to the effect that Seller received preliminary approval from the planning commission, but that the subdivision plat dated August 29, 2003 about which he was questioned by counsel for Buyers did not indicate final approval. Mr. Carlton further testified that final plat approval had not occurred until after the closing dates agreed in the contracts with Buyers. Thus, even if Seller had the burden of proving a defense of the absence of final plat approval, the burden was satisfied through the Buyers' witness.

This Court also notes that the Plaintiffs' witness and exhibit lists filed with the trial court on May 19, 2006 list as a possible exhibit "FINAL PLAT, CHELSEA VILLAGE, PHASE SIX–SECTION TWO, SUBDIVISION NUMBER 2003S-186U, dated June 5, 2005 (Dale & Associates)." This exhibit list suggests that the August 29, 2003 plat referenced by Buyers had not received final approval.

The trial court's order of dismissal states: "At the conclusion of the Plaintiffs' proof, the Court found that taking the strongest legitimate view of the evidence in favor of the non-moving party, and removing any conflict in the evidence by construing it in the light favorable to the non-movant, and discounting all counter evidence, that reasonable minds could not differ as to the conclusions to be drawn from the evidence and granted the Defendant's Rule 41 motion." Given the evidence in the record, this Court concludes that the evidence does not preponderate against the findings of the trial court. It cannot reasonably be inferred from the evidence that final plat approval occurred prior to the agreed closing dates.

Buyers have not specifically asserted error in the Chancellor's denial of their motion to alter or amend, but have cited an affidavit and plat submitted with that motion in support of their arguments. This Court must apply an abuse of discretion standard in reviewing a trial court's decision to grant or deny a motion to alter or amend under Rule 59.04 of the Tennessee Rules of Civil Procedure. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003). The purpose of Rule 59 motions "'is to prevent unnecessary appeals by providing trial courts with an opportunity to correct errors before a judgment becomes final.'" *Whalum v. Marshall*, 224 S.W.3d 169, 175 (Tenn. Ct. App. 2006) (quoting *Bradley v. McLeod*, 984 S.W.2d 929, 933 (Tenn. Ct. App. 1998)). Especially given the fact that Buyers had already had a hearing on the final plat issue and were not attempting to submit newly discovered evidence, we cannot find that the Chancellor abused her discretion in denying the motion to alter or amend the order of dismissal.

FRIVOLOUS APPEAL

Seller argues that Buyers' appeal is frivolous and seeks an award of attorney fees and costs pursuant to T.C.A. §27-1-122, a statute authorizing a reviewing court to award damages for an appeal that is deemed to be "frivolous or taken solely for delay." We do not find this appeal to be frivolous and, therefore, deny Seller's request for an award of attorney fees.

Costs of appeal are assessed against the Appellants, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE