IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

February 28, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

JAMES HAROLD HORNE	)	No. E1999-00141-C0A-R3-CV
	)	
Appellee,	)	
	)	
v.	)	Appeal As Of Right From
	)	WASHINGTON COUNTY
RICHARD D. PHILLIPS and wife NANCY J. PHILLIPS,	)	CHANCERY COURT
	)	
Appellants/Defendants.	)	G. RICHARD JOHNSON, CHANCELLOR

Bob McD. Green, Johnson City, Tennessee for the Appellants, Richard D. Phillips and Nancy J. Phillips.

Paul J. Sherwood, Johnson City, Tennessee for Appellee, James Harold Horne.

REVERSED AND REMANDED SWINEY, J.

OPINION

Appellee James Harold Horne ("Horne" or "Plaintiff") brought suit in the Washington County Chancery Court for specific performance of a contract for the sale of real estate against Appellants Richard D. Phillips and Nancy J. Phillips ("Phillips" or "Defendants"). The Phillips had executed a written document to convey land and a house in Washington County to Horne, and had accepted a $1,000.00 cash deposit toward the purchase price of $45,000.00. The Phillips decided not to sell to Horne, and attempted to return the deposit. Horne insisted that the Phillips carry

through with the sale as set forth in the document, and subsequently filed his Complaint. By Answer, the Phillips averred that the document was not a valid contract, alleging fraudulent inducement, no mutuality of obligation, and no consideration for the sale. After trial, the Chancellor found in favor of Horne, and entered a decree ordering specific performance of the document. It is from this final judgment that the Phillips appeal. For the reasons set forth below, we reverse the ruling of the Trial Court.

BACKGROUND

For the background of this cause of action, we adopt the findings of fact set out in the Judgment of the Trial Court:

> Plaintiff, James Harold Horne, was shopping for a house and had trouble finding one in his price range. He became aware of Defendants' real property, described herein, and he went on the property and was welcomed by the Defendants. After some conversation among the parties, the Plaintiff conducted some inspection thereof, walking to the property lines and looking in the basement, at least. Thereafter the parties negotiated, as a result of which Defendant Richard Phillips wrote out in longhand an agreement for the sale of the property which was made Exhibit 1 to the Complaint and filed in evidence, and which all three parties signed. The Defendants, Richard Phillips and wife, Nancy Phillips, agreed to hold the property until they received the deed from the mortgage company at which time they proposed to close the transaction on payment of $44,000.00 to them by the Plaintiff, James Harold Horne. Mr. Horne gave a down payment of $1,000.00 and a separate receipt for that was written by Mr. Phillips and delivered to Mr. Horne. Mr. Phillips wrote on the receipt that it was "for deposit on property at 1542 Highway 81 South," dated it October 18, 1997, the same date as the agreement, and both Defendants, Richard Phillips and Nancy Phillips, signed the receipt, as they did the agreement.

Shortly after Mr. Horne left the premises of the Phillips, the Phillips became suspicious about the relationship between their neighbor, Mr. Cochran (to whom they did not want to sell), and Mr. Horne. Mr. Horne emphatically denied any relationship between himself and Mr. Cochran, and the Defendants offered no proof of such a relationship. Instead, they freely admitted that they had suspicions and had assumed that Mr. Horne represented Mr. Cochran, but that they had no proof.

> After agreeing to sell the property to the Plaintiff, the Defendants changed their minds and decided not to sell it to him. Thereafter, they attempted to return his $1,000.00 deposit to him and he declined to take it, whereupon they left it at his attorney's office when his attorney was not there. Upon its return to them by registered mail, they refused to accept it. It now reposes in the hands of the Court Reporter.

Plaintiff filed suit for specific performance of the document at issue on December 23,

1997. On February 10, 1999, Defendants filed their Answer, apparently just before trial got under way. The record does not disclose what, if anything, transpired from a procedural standpoint between the filing of the Complaint and the trial date some thirteen months later. After hearing the testimony of the parties and reviewing the pleadings and exhibits thereto, the Judgment of the Chancellor was filed February 23, 1999, finding the document executed by the parties to form a valid and enforceable contract between Plaintiff and Defendants, with no fraud or misrepresentation in the negotiations, supported by valid consideration and mutuality. The Chancellor decreed specific performance of the sale, with a detailed description of the property at issue and instructions for the execution and delivery of the deed by Defendants upon payment of the $45,000.00 by Plaintiff. It is from this Judgment that Defendants have appealed.

DISCUSSION

Defendants present the issue in this appeal as, "[w]hether or not the trial court erred in finding a valid, enforceable contract where there was no mutuality of obligation or remedy between the parties." To support this allegation of error, Defendants rely on one particular paragraph of the document executed by Defendants and Plaintiff. "The only issue on appeal is the meaning and effect of the second clause of the Agreement providing for the return of the Appellee's One Thousand Dollar ($1,000.00) deposit upon his request to cancel the Agreement."

Our standard of review of the Chancellor's interpretation of the contract at issue is *de novo*, with no presumption as to the correctness of the findings of the Trial Court. *Eyring v. East Tennessee Baptist Hosp.*, 950 S.W.2d 354, 358 (Tenn. Ct. App. 1997). The hand-written document attached to the Complaint below, spelling and grammatical errors intact, reads:

> Oct, 18, 1997
>
> This is to state that James Harold Horne has paid a deposit of $1000 to Richard & Nancy Phillips for the purpose of purchasing property at 1542 Hwy 81 South Tract #81 on County ledger.
>
> The $1000 deposit will be refunded to Mr. Horne if he wishes to cancel sale agreement.

> We will hold property for Mr. Horne until deed is recieved from Mortgage Company by Richard & Nancy Phillips.
>
> The purchase which includes Refrigerator, Range and blinds will conclude with payment of $44,000 at the time deed is recieved by Phillips.

The signatures of Richard Phillips, Nancy Phillips and James H. Horne appear below the text on the contract. The related receipt reads, "Receit [sic] of $1000 from James Horne by Richard Phillips for Deposit on Property at 1542 Hwy 81 South," is dated October 18, 1997, and bears the signatures of Richard Phillips and Nancy Phillips.

The parties do not dispute that Defendants drafted the documents at issue, that the signatures on both documents are genuine, or that Plaintiff paid $1,000.00 cash to Defendants on October 18, 1997. "[T]he rule is well settled that 'the contract, where ambiguous, will be construed most strongly against the party who drew it.'" *State ex rel. Com'r, Dept. of Transp. v. Teasley*, 913 S.W.2d 175, 179 (Tenn. Ct. App. 1995). However, this purported contract is not ambiguous. The plain wording of the second paragraph of the contract, (hereinafter, "the cancellation clause"), supports Defendants' position that the agreement fails for lack of mutuality of obligation and consideration. The cancellation clause of the contract provides for the return of the $1,000.00 paid by Plaintiff to Defendants, should Plaintiff "decide to cancel the sale agreement." Construed by the plain wording of the agreement, the cancellation clause creates a unilateral right in Plaintiff to cancel the sale with no resulting consequences to Plaintiff. The Trial Court erred in finding that this clause had no effect on the mutuality of obligation through lack of consideration on the part of Plaintiff.

> Consideration is a necessary ingredient for every contract, but mutuality of obligation is not unless lack of mutuality will leave one party without consideration for his or her promise. That portions of a contract may apply to one party but not to others has no bearing on the mutuality of parties' obligations as long as consideration exists and all parties are bound to honor the contract.

Dobbs v. Guenther, 846 S.W.2d 270, 276 (Tenn. Ct. App. 1992).

Consideration does not exist in this contract. Plaintiff acknowledges his unilateral right to cancel the agreement and demand the deposit back under the plain wording of the cancellation clause, but argues he cured this problem because he waived this right when he filed suit

for specific performance. Plaintiff is in error. Plaintiff in this document committed to do nothing other than to give himself the choice to purchase or not to purchase property as he wished. Plaintiff was not bound to honor the contract, and this failure of consideration caused the purported contract to be void from the time it was drafted. "The contract may be rescinded if the failure of consideration was such an essential part of the contract that it defeats the very object of the contract or concerns a matter of such grave importance that the contract would not have been executed had that default been contemplated." *James Cable Partners, L.P. v. City of Jamestown*, 818 S.W.2d 338, 344 (Tenn. Ct. App.1991). This cancellation clause creates failure of consideration in that Plaintiff could cancel the agreement and recover the $1,000.00 "deposit" at any time without any obligation to Defendants, while Defendants had no similar right to cancel their obligation to Plaintiff. Plaintiff was never obligated to do anything under this document. If Plaintiff exercised his unilateral right to cancel the sales agreement, the only option available to Defendants was to refund Plaintiff his $1,000.00 and look for a new buyer. Plaintiff was never ". . . bound to honor the contract" as Plaintiff was never obligated to complete the purchase as he had the unilateral right the cancel the contract and get his money back. This lack of mutuality of obligation left Defendants without any consideration for their promise to sell the property.

As the document at issue is not an enforceable contract, we reverse the ruling of the Trial Court and remand this cause of action for further proceedings, if any, consistent with this Opinion.

CONCLUSION

The ruling of the Trial Court is reversed, and this cause remanded for further proceedings as necessary, if any, consistent with this Opinion. Costs of this appeal are taxed to Appellee, James Harold Horne.

D. MICHAEL SWINEY, J.

CONCUR:

_____
HOUSTON M. GODDARD, J.

_____
HERSCHEL P. FRANKS