

STATE OF TENNESSEE, ET AL.,)	
PLAINTIFF,)	APPEAL NO.
V.)	01A01-9604-CH-00178
WAYNE BURNS AND JOHNNIE S. DANIELS,)	
DEFENDANTS,)	
AND)	CHANCERY COURT NO.
JOHNNIE S. DANIELS,)	91-717-I
DEFENDANT/PETITIONER/APPELLEE,)	
V.)	
WAYNE BURNS,)	
RESPONDENT,)	
AND BETTY BRENT d/b/a)	
BRENT BONDING COMPANY,)	
RESPONDENT/APPELLANT.)	

<p>FILED</p> <p>November 20, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
--

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE DAVIDSON COUNTY CHANCERY COURT

AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, CHANCELLOR

JOE P. BINKLEY
First American Center
Suite 2395
315 Deadrick Street
Nashville, Tennessee 37201

MARK A. ELLMORE
Suite C, 388 Harding Place
Nashville, Tennessee 37211
ATTORNEYS FOR RESPONDENT/APPELLANT
BETTY BRENT d/b/a BRENT BONDING COMPANY

JOSEPH F. ROSENBERG
Dale, Rosenberg & McLean
221 Fourth Avenue North, 5th Floor
P.O. Box 198258
Nashville, Tennessee 37219-8258
ATTORNEY FOR DEFENDANT/PETITIONER/APPELLEE
JOHNNIE S. DANIELS

REVERSED AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

This is an appeal by appellant, Betty Brent d/b/a Brent Bonding Company,¹ from a decision of the chancery court which found that appellee, Johnnie S. Daniels, had properly redeemed the property purchased by Brent at a delinquent tax sale and which voided a quitclaim deed from Daniels to Wayne Burns. The facts out of which this matter arose are as follows.

In 1986, Daniels and Burns entered into an oral agreement. According to their agreement, Daniels agreed to convey his property located at 2900 12th Avenue South, Nashville, Tennessee to Wayne Burns. In exchange, Burns agreed to obtain a loan from First American National Bank for Daniels who had bad credit. The parties then agreed that Burns would retain \$5,000.00 of the loan proceeds and reconvey the property to Daniels.

Daniels conveyed the property to Burns on 2 September 1986, and Burns applied for the loan. The bank paid \$4,000.00 to satisfy a prior lien, but refused to disburse any other funds. Oddly though, the bank recorded a deed of trust listing the principal amount as \$35,631.11.² Thereafter, Burns and his wife disappeared, and no one has been able to locate them since. Burns never paid any of the property taxes. Daniels paid the taxes in 1986, 1987, and 1988, but was unable to pay the taxes thereafter.

The State of Tennessee filed an action on behalf of the Metropolitan Government of Nashville and Davidson County seeking

¹ Initially, Dorris Brent participated in the litigation. Later, the parties entered into an agreed order substituting Betty Brent d/b/a Brent Bonding Company ("Brent") as the movant. Finally, the court allowed Brent to intervene as a party. For simplicity's sake, we will refer to the actions of both of these persons as the actions of Brent.

² Brent seems to agree to the fact that the bank only disbursed \$4,000.00.

to recover unpaid county property taxes on the 12th Avenue property from Burns.³ The State obtained a default judgment against Burns. Thereafter, the court entered an order requiring the clerk and master to sell the property to the highest bidder at a public auction on 6 January 1993. On that day, Brent purchased the property for \$10,000.00. On 1 March 1993, the chancery court entered a final decree confirming the sale.

Nearly eleven months later, Daniels, through Title Escrow, Inc., paid \$6,022.27 into the chancery court on behalf of Burns for the redemption of the property. On 16 March 1994, Brent filed a motion to set aside the redemption claiming that Wayne Burns did not exist. In response, Daniels filed an affidavit of a woman who claimed she had leased a house to Burns and copies of the Deed of Trust signed by Burns. On 26 April, the court entered an agreed order allowing Daniels to intervene. Thereafter, the court held that Daniels had a right to redeem the property and denied Brent's motion to set aside the redemption. Brent then filed a motion to reconsider.

On 2 May 1994, Daniels filed a petition to quiet title against Burns.⁴ Daniels requested the court declare the quitclaim deed conveying the property to Burns void as having been obtained by fraud and/or for failure of consideration. On 15 July 1994, Daniels filed a motion for a default judgment against Burns. Thereafter, Brent filed a motion to intervene and attached an answer to Daniels's petition. Daniels filed a response to Brent's motion to intervene and a motion to dismiss Brent's answer or to strike her affirmative defenses.

³ *State v. Delinquent Taxpayers*, Chancery Court No. 91-717-I.

⁴ Daniels did not file this petition as a separate action. Instead, the petition became part of *State v. Delinquent Taxpayers*, Chancery Court No. 91-717-I.

On 18 August 1994, the court addressed the outstanding motions and took the following actions: 1) it granted Brent's motion to reconsider and vacated the 10 May 1994 order; 2) it granted Daniels' motion for a default judgment against Burns pending an evidentiary hearing; 3) it granted Brent's motion to intervene; and 4) it denied Daniels' motion to dismiss Brent's answer, but reserved ruling on the alternative motion to strike affirmative defenses. The court later agreed to allow Brent to assert the affirmative defenses of laches, statute of limitations as to breach of contract, and unclean hands. On 28 March 1995, Daniels filed a motion to amend the pleading to conform to the evidence. He claimed that the evidence would establish that he held title to the property by adverse possession.

On 22 June 1995, the chancery court entered a memorandum opinion. The court concluded as follows:

Brent asserted the affirmative defenses of statute of limitations for breach of contract, fraud, unclean hands and laches to Daniels' Petition to Quiet Title.

Brent's rights, as purchaser of the property at the Chancery Court sale, were subject to the statutory right of redemption of any party who had a legal or equitable interest in the property. Daniels had a sufficient interest in the property to redeem the property. See Tenn. Code Ann. § 67-1-1420(b).

Brent failed to prove by a preponderance of the evidence that its affirmative defenses were a bar to Daniels' right to redeem the property and to quiet title to the property as to Burns.

Daniels had continuously, openly and adversely possessed the subject property from September 2, 1986, the date of the Quitclaim Deed to Wayne Burns, to the present date, a period of more than seven (7) years. See Tenn. Code Ann. § 28-2-101.

The Court further finds that Daniels' Petition to Quiet Title is sustained by a preponderance of the evidence. A default judgment was previously entered against Burns for his failure to file a response to the Petition to Quiet Title. Therefore, the Quitclaim Deed . . . is void.

On 7 August 1995, Brent filed a notice of appeal as to this judgment. Brent also filed a notice of filing statement of evidence in lieu of transcript which Daniels opposed. On 29 March 1995, the parties filed an agreed statement of evidence.

Brent presented six issues for this court to review. Read together, the six issues question the validity of the chancery court's entire order. Rather than address Brent's issues individually, we will address the issues as we deem appropriate.

We review the findings of fact in this case pursuant to Rule 13(d) of the Tennessee Rules of Appellate Procedure. Thus, the findings are accompanied with a presumption of correctness and this court will not reverse those findings unless the preponderance of the evidence is otherwise. Tenn. R. App. 13(d). In addition, we review conclusions of law de novo with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993); *Presley v. Bennett*, 860 S.W.2d 857, 859-60 (Tenn. 1993).

I. Did Daniels Have an Interest in the Property?

Although the court held that Daniels was a person entitled to redeem the property and cited a statute, it did not clearly state the basis of its conclusion. In addition, the court held that Daniels had proven the allegations in his complaint by a preponderance of the evidence. Daniels relied on the same theories, fraud, failure of consideration and adverse possession, to establish that he was a person entitled to redeem the property and that the quitclaim deed to Burns was void. Thus, the issue for this court in regard to both the redemption and quiet title actions is whether Daniels had a legal or equitable interest in the property as a result of fraud, failure of consideration, or adverse possession. It is the opinion of this court that Daniels failed to prove by a preponderance of the evidence that he held either a legal or equitable interest in the land.

A. Fraud

Despite the fact that the chancellor found that Daniels supported his claims by a preponderance of the evidence, there is little evidence in the record. There is no transcript of the hearings before the court or of depositions. The minimal evidence included the quitclaim deed from Daniels to Burns, the Deed of Trust executed to First American National Bank, and the parties' agreed statement of evidence. The statement contained the procedural history of the case, the rulings made in the court's orders, and statements of the testimony given by Daniels and Robert B. Young.⁵

Daniels argued that Burns fraudulently induced him to convey the property to Burns by representing to Daniels that he would reconvey the property back to Daniels after obtaining the loan and deducting \$5,000.00. This court has set forth the elements of fraud as follows:

Actions for fraud contain four elements: (1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, and (3) an injury caused by reasonable reliance on the representation. The fourth element requires that the misrepresentation involve a past or existing fact or, in the case of promissory fraud, that it involve a promise of future action with no present intent to perform.

Dobbs v. Guenther, 846 S.W.2d 270, 274 (Tenn. App. 1992). Fraud is never presumed. **Piccadilly Square v. Intercontinental Constr. Co.**, 782 S.W.2d 178,184 (Tenn. App. 1989). The party asserting fraud must prove the fraud by a preponderance of the evidence. **Id.**

Contrary to the decision of the chancery court, it is the opinion of this court that the evidence in the record fails to establish fraud. There is no evidence that Burns intentionally

⁵ Mr. Young was an attorney who testified for Daniels. In essence, Mr. Young testified that prior to 1976 he worked as a loan officer at First American National Bank and that the method used by Burns and Daniels to obtain a loan would not have been improper when Young was a loan officer.

misrepresented a material fact, that Burns knew he was going to leave and that the loan would not be approved, or that Burns did not intend to reconvey the land to Daniels. Instead, the evidence tends to show that Daniels and Burns entered into an oral agreement which Burns breached for some reason. There is no evidence of why Burns left town. Moreover, there is no evidence that Burns gained anything other than title to the property. This in itself does not appear to have been much of a gain to Burns who failed to ever pay any taxes on the property. Basically, there was no evidence to preponderate in favor of any conclusion. Thus, it is the opinion of this court that Daniels failed to satisfy his burden of proof as to the issue of fraud.

B. Failure of Consideration

The recital of the quitclaim deed states that the consideration paid for the conveyance was one dollar. Daniels, however, contends that there was additional consideration which failed. It is the law in Tennessee that a "grantor is estopped by the recital in his deed from denying the consideration expressed, yet he is not estopped from showing there was another consideration other than the one expressed in the deed" *Whitaker v. McMinn County*, 491 S.W.2d 844, 846 (Tenn. 1973). A party may establish the existence of such other consideration by parol evidence. *Id.*

"Failure of consideration is in fact simply a want of consideration." *Lloyd v. Turner*, 602 S.W.2d 503, 509 (Tenn. App. 1980) (quoting *Farrell v. Third Nat'l Bank*, 20 Tenn. App. 540, 548, 101 S.W.2d 158, 163 (1937)). It is possible to have a partial failure of consideration; however, such a claim will not be grounds for rescinding the contract unless the partial failure

affects the "whole contract and defeat[s] the object of the contract" *Id.*

It is the opinion of this court that Daniels failed to allege facts sufficient to state a claim for failure of consideration. To explain, there were two separate transactions in this case. First, Daniels agreed to convey the property to Burns and Burns agreed to obtain a loan for the benefit of Daniels. Second, Burns agreed to reconvey the property to Daniels in exchange for \$5,000.00. Thus, the consideration for the initial conveyance was obtaining a loan. It is Daniels contention that there was a failure of consideration because Burns failed to obtain the loan. To the contrary, however, there is evidence that the bank disbursed \$4,000.00 to the benefit of Daniels.⁶ Because there was some consideration received by Burns, there could not have been a complete failure of consideration.

Thus, we must determine whether Daniels alleged and proved a claim for partial failure of consideration. As previously stated, a court may only rescind a deed when the partial failure of consideration affects the contract in its entirety. In this case, neither this court nor the trial court could properly make this determination because there was no evidence or any allegations as to an essential element of the contract. Specifically, Daniels failed to allege or prove the amount of the loan Burns was to obtain. It could have been \$4,000.00 or \$40,000.00. Because we do not know the amount of the loan the parties intended Burns to obtain, we can not determine whether there was a partial failure of consideration. Thus, it is the

⁶ In his petition to quiet title, Daniels alleged that he "received no funds or other consideration from Burns from the transfer." Nevertheless, he then alleged that his "only benefit was the payment of approximately \$4,000.00 paid by First American National Bank to satisfy the prior lien against the subject property."

opinion of this court that Burns failed to state a claim for failure of consideration and failed to satisfy his burden of proof as to partial failure of consideration.

C. Adverse Possession

It is Daniels' final contention that he holds title to the land because he has adversely possessed the land pursuant to Tennessee Code Annotated section 28-2-101.⁷ "Adverse possession is never to be presumed, but all of its elements must be proved." *Panter v. Miller*, 698 S.W.2d 634, 636 (Tenn. App. 1985). In fact, "every presumption [is] in favor of the holder of legal title." *Blankenship v. Blakenship*, 658 S.W.2d 125, 127 (Tenn. App. 1983). "The adverse possessor has the burden of establishing by clear and positive proof such adverse possession as will bar the real title." *Whitworth v. Hutchison*, 731 S.W.2d 915, 917 (Tenn. App. 1986).

In order to prevail under Tennessee Code Annotated section 28-2-101, the claimant must establish two elements: adverse possession and assurance of title. TENN. CODE ANN. § 28-2-101(a) (1980). In order to adversely possess the land, the possession must be exclusive, actual, adverse, continuous, open, and notorious. *Whitworth*, 731 S.W.2d at 917. In addition, the

⁷ This section provides as follows:

§ 28-2-101. Adverse possession - State conveyances. - (a) Any person having had, by himself or those through whom he claims, seven (7) years' adverse possession of any lands, tenements, or hereditaments, granted by this state or the state of North Carolina, holding by conveyance, devise, grant, or other assurance of title, purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title.

(b) No title shall be vested by virtue of such adverse possession, unless such conveyance, devise, grant, or other assurance of title shall have been recorded in the register's office for the county or counties in which the land lies during the full term of said seven (7) years' adverse possession.

TENN. CODE ANN. § 28-2-101 (1980).

claimant must possess the land for the prescriptive period. *Id.* In this case, the prescriptive period is seven years. TENN. CODE ANN. § 28-2-101(a) (1980). As to the assurance of title, the claimant must prove that the assurance of title was recorded in the register's office during the seven year prescriptive period. *Id.* §28-2-101(b).

It is clear that Daniels has possessed the land for seven years. He conveyed the property to Burns on 2 September 1986. He operated his business on the property before the conveyance, after the conveyance, and at the time of filing his petition. Nevertheless, it is not necessary for this court to determine whether Daniels' possession was adverse, because he failed to allege or prove that he held the land under an assurance of title properly recorded for the prescriptive period.

II. Was Daniels Entitled to Redeem the Property?

A. Which Statute to Apply?

Initially, we must determine which statute is applicable under the facts of this case. The chancery court relied on Tennessee Code Annotated section 67-1-1420(b) to determine whether Daniels properly redeemed the property. It is the opinion of this court, however, that this is the incorrect statute.

To explain, part 14 of title 67, chapter 1 applies "to every public tax . . . levied under the provisions of any existing or hereafter enacted law which is codified in this or any other title and is collectible by the commissioner of revenue." TENN. CODE ANN. § 67-1-1402(a) (1994). The commissioner and the

department have numerous powers and duties, but the collection of county property taxes is not one of them. *See id.* § 67-1-102. It is the duty of the county trustee to collect all county property taxes. *Id.* § 67-5-1801(a). Moreover, each month and once a year, the county trustee pays over the amount of county property taxes collected to the county executive, not the commissioner of revenue. *Id.* § 67-5-1902. Because the commissioner of revenue does not collect county property taxes and because the reason for the tax sale was delinquent county property taxes, part 14 of title 67, chapter 1 does not apply to this case.

It is the opinion of this court that the appropriate statutes are Tennessee Code Annotated sections 67-5-2701 through 67-5-2706. Chapter 5 of title 67 deals solely with property taxes and part 27 covers only redemptions. In addition, the Public Acts of 1991 provided that this section would apply to all sales of real property for delinquent taxes held on or after 4 June 1991. 1991 Tenn. Pub. Acts ch. 470 § 5.

B. The Provisions of Title 67, Chapter 5, Part 27

In order to redeem property under part 27, three requirements must be satisfied. First, the person attempting to redeem the property must be a "person[] entitled to redeem property." TENN. CODE ANN. § 67-5-2701 (1994). This requirement is less inclusive than the one found in the statute relied on by the chancery court. *See id.* § 67-1-1420(b). Second, the person attempting to redeem the property must pay "moneys to the clerk as required by § 67-5-2703 . . . within one (1) year after entry

of an order of confirmation of the tax sale by the court."⁸ The third requirement is that the person attempting to redeem the property must pay the appropriate sum to the clerk. The appropriate amount equals the sum of the following values: 1) "the amount paid for the delinquent taxes, interest and penalties"; 2) "court costs and any court ordered charges"; and 3) "interest at the rate of ten percent (10%) per annum computed from the date of the sale on the entire purchase price paid at the tax sale." *Id.* § 67-5-2703.

There is no dispute that Daniels paid the \$6,022.27 to the clerk and master within one year of the entry of the order confirming the sale to Brent. There is, however, a dispute as to whether Daniels was a proper party to redeem the property. Moreover, there is an issue raised by Brent as to whether Daniels paid the appropriate amount of money to the clerk in order to redeem the property.

C. Was Burns entitled to redeem the property?

I. In his own name?

Given the results of the above discussion, it is clear that Daniels was not entitled to redeem the property. "[P]ersons entitled to redeem property' includes any person who owns a legal or equitable interest in the property sold at the tax sale and creditors of the taxpayer having a lien on the property." TENN. CODE ANN. § 67-5-2701 (1994). It is the opinion of this court that Daniels failed to establish that he held either a legal or

⁸ TENN. CODE ANN. § 67-5-2702(a) (1994). In addition, this section requires that the person attempting to redeem the property file "any statement required by § 67-5-2703(b) within one (1) year after entry of an order of confirmation of the tax sale by the court." *Id.* The problem with this requirement lies in the fact that the General Assembly deleted § 67-5-2703(b) in 1992. 1992 Tenn. Pub. Acts ch. 850 § 1.

equitable interest in the property. Moreover, Daniels did not allege that he was a creditor of Burns who had a lien on the property.

ii. Acting on Behalf of Burns?

Throughout the proceedings Daniels asserted that even if he could not redeem the property in his name he could redeem it on behalf of Burns. In fact, the record is clear that Daniels did not attempt to redeem the property on his own behalf. Instead, he attempted to redeem it on behalf of Wayne Burns. The receipt from the clerk evidencing the payment of the monies states that the clerk received the money from "Title Escrow Inc. for Wayne Burns." Also, Daniels was not a party to the action until 26 April 1994, nearly four months after he paid the money to the clerk. Prior to that time, Daniels did not assert any individual interest in the land, that is, he asserted only the interest of Burns. Finally, the agreed statement of facts filed by the parties states: "Pursuant to the statutory provisions of T.C.A. Section 67-1-1420 and [the] equitable right of redemption afforded Wayne Burns, Title Escrow, Inc. . . . caused to paid into the Court \$6,022.27 for the redemption of the property on behalf of Wayne Burns." Thus, it is clear that Daniels attempted to redeem the property through Title Escrow, Inc. on behalf of Wayne Burns.

The record is void of any evidence of the basis upon which Daniels acted on behalf of Burns. Clearly, there was no agency relationship or other type of fiduciary arrangement such as a power of attorney. In addition, there is nothing in Tennessee Code Annotated section 67-5-2701 which allows a person to redeem

property on behalf of the taxpayer.⁹ It is the opinion of this court, that Daniels could not act on behalf of Burns without authority from Burns to do so. There is no evidence of such authority. Thus, Daniels may not act on behalf of Burns. Had the General Assembly intended the statute to allow persons to redeem property on behalf of debtors it could have specifically stated so as it did in Tennessee Code Annotated section 67-1-1420(b)(1).

D. Whether Daniels Paid the Appropriate Sum?

It is Brent's contention that the redemption statutes require a person attempting to redeem property to pay the clerk the price paid at the tax sale plus any other lawful charges. Although, the court finds this to be an intriguing issue, it is not properly before the court. A review of the record reveals that Brent never raised this issue in the chancery court. Moreover, although Brent requested payment from Daniels for other lawful charges, she never requested the difference between the amount paid by Daniels and the purchase price. Because Brent raised the issue for the first time on appeal, Brent waived the issue. We do note, however, that had Daniels been entitled to redeem the property Brent would not have lost any of the money paid to purchase the property. Although Daniels did not pay the price paid by Brent at the tax sale, Tennessee Code Annotated section 67-5-2704 requires the clerk to return to Brent the purchase price plus interest and any lawful charges which the court finds were paid by Brent in order to preserve the value of the property. TENN. CODE ANN. § 67-5-2704(a) (1994).

III. Conclusion

⁹ In contrast, Tennessee Code Annotated section 67-1-1420 (b)(1) specifically provides that a person may redeem property on behalf of an owner of real property sold as provided in §§ 67-1-1414 to -1418.

For the foregoing reasons, it is the opinion of this court that Daniels was not entitled to redeem the property and that the court should have dismissed Daniels' petition to quiet title instead of granting him a default judgment. Thus, the decision of the chancery court is reversed and remanded for any further necessary proceedings. Costs are taxed to defendant/petitioner/appellee, Johnnie S. Daniels.

SAMUEL L. LEWIS, JUDGE

CONCUR:

HENRY F. TODD, P.J., M.S.

BEN H. CANTRELL, J.