IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

TERRY M. HIGHTOWER and wife,	**)**	
VICKIE L. HIGHTOWER,	**)**	
	)	
Plaintiffs/Appellees,	**)**	**Madison Chancery No. 48206**
	)	
VS.	**)**	**Appeal No. 02A01-9509-CH-00199**
	)	
TERRY LYTLE and wife,	**)**	
JILL A. LYTLE,	**)**	
	)	
Defendants/Appellants.	**)**	

FILED

December 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY
AT JACKSON, TENNESSEE
THE HONORABLE BILLY JACK GOODRICH, CHANCELLOR BY DESIGNATION

JAMES BELEW WEBB
FLIPPIN, COLLINS, HUEY & WEBB
Milan, Tennessee
Attorney for Appellants

JOHN VAN DEN BOSCH, JR.
Jackson, Tennessee
Attorney for Appellees

AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

DAVID R. FARMER, J.

HOLLY KIRBY LILLARD, J.

This appeal arises from a lease-purchase agreement executed by the parties on

January 1, 1991. Thereafter , on October 9, 1991, the Hightowers and the Lytles signed a land sales agreement in which the Plaintiffs agreed to sell and the Defendants agreed to buy the subject residential property located in Humboldt, Tennessee. Under the terms of the agreement, the closing date was to be on or before June 9, 1992. The sale of the property was never completed, and the Plaintiffs filed suit against the Defendants on August 18, 1993 seeking a court order to require the Defendants to vacate the property, to restore Plaintiffs to possession of the property, and to award Plaintiffs damages in this action. After a bench trial, the chancellor, by order entered March 17, 1995, directed Defendants to arrange for financing according to the terms of the original lease agreement and held that such should be obtained within sixty days of February 7, 1995. The chancellor further ordered the Defendants to pay damages to the Plaintiffs in the amount of $2,000.00. For the reasons stated hereafter, we affirm the judgment of the court below.

FACTS

On January 1, 1991, the Plaintiffs and the Defendants signed a lease agreement which provided that the Defendants would lease a certain property located at 233 Fairway Boulevard in Humboldt, Tennessee to the Plaintiffs for no longer than six months. Under the lease agreement, the Defendants were to pay $521.00 per month in rental payments and were given the opportunity to purchase the property within the six month rental period provided that the Defendants obtained their own financing and paid all closing costs. The lease agreement stated that the Defendants had paid a security deposit of $260.00 and stated that if the Defendants decided to purchase the property, the Defendants would have to pay an additional sum of $1,240.00. The lease agreement provided that either party could terminate the agreement for any cause upon forty-five days notice to the other party.

On October 9, 1991, the Plaintiffs and the Defendants signed a second contract--a sales agreement. The sales agreement stated that the purchase price of the property was $1,500.00 plus the assumption of an outstanding VA mortgage payable to the Fireman's Fund Mortgage Corporation. The outstanding VA mortgage had a balance of $54,820.00 as of July 18, 1991. The closing date set forth in the sales agreement was

June 9, 1992. The sales agreement stated that if the Defendants were unable to purchase the property through no fault of their own, then the Plaintiffs would pay the Defendants the value of any improvements that the Defendants had made to the property. The Defendants paid $1,240.00 to the Plaintiffs upon the signing of the sales agreement in October 1991. With the $1,240.00 added to the $260.00 that the Defendants paid to the Plaintiffs upon the signing of the lease agreement in January of 1991, the Defendants paid the $1,500.00 required by the sales agreement.

In the trial upon this matter the Defendant, Terry Lytle, testified that six or seven months after the signing of the lease agreement, he called the Plaintiff, Terry Hightower, requesting that the Plaintiff provide him with a loan assumption package. The Defendant, Terry Lytle, testified that he asked the Plaintiff, Terry Hightower, on more than one occasion for a loan assumption package. The Defendant, Terry Lytle, further testified that the Plaintiffs never provided him with a loan assumption package and never told him about a $300.00 loan assumption fee. The Defendant, Jill Lytle, testified that the Defendants delivered a written request for a loan assumption package to the Plaintiffs along with a rent check. Jill Lytle further testified that she heard her husband request a loan assumption package from the Plaintiff several times over the phone. She also testified that the Plaintiffs never gave them a loan assumption package, nor did the Plaintiffs inform them of a $300 assumption fee.

The Defendants' testimony was controverted by the Plaintiff, Terry Hightower, who testified that he had never heard of any request by the Defendants for a loan assumption package. The Plaintiff testified that in May or June of 1991 he told the Defendant about a loan assumption package. The Plaintiff stated that the Defendant was not interested in the loan assumption package because of the ten percent interest rate under the package and because of the $300.00 assumption fee. The Plaintiff, Vickie Hightower, testified that she never heard nor saw a request by the Defendants for a loan assumption package. She further testified that the Plaintiffs informed the Defendants of a loan assumption package as well as a $300.00 assumption fee, and the Defendants stated that they were

not willing to pay the $300.00 assumption fee.

The Defendant, Terry Lytle, testified that his attorney requested through the Plaintiffs' attorney a payoff amount of the Plaintiffs' mortgage on the property. He testified that the Plaintiffs never provided him with a payoff amount for the mortgage on the property. He further testified that he first applied for a loan during May of 1992 at First Tennessee Mortgage. The Defendant testified that First Tennessee Mortgage turned him down for the loan because the Plaintiff did not provide him with the loan payoff amount on the property. The Defendant testified that he went to Central State Bank and requested a loan in order to purchase the property, and Central State Bank, likewise, turned him down for the loan because he could not provide the bank with the loan payoff amount on the property. Because the Plaintiffs did not provide him with the payoff amount for the mortgage on the property, the Defendant stated that he was not able to obtain a loan in order to buy the property.

In August of 1992, the Defendants monthly rental payments increased from $521.00 per month to $535.00 per month due to increased insurance premiums on the property. The Defendants reimbursed the Plaintiffs $150.00 for increased insurance premiums on the property.

The Defendants made certain improvements to the property during the time that they were in possession of the property. The improvements include the following: an addition to a deck, an addition to a fence and an added gymnasium. The Defendant, Terry Lytle, testified that he spent a total of $4,873.48 for improvements upon the property. He stated that the added value to the property resulting from their improvements totaled $17,500.00.

On June 29, 1992, the Plaintiffs wrote a letter to the Defendants giving them thirty days notice either to buy or vacate the property by August 1, 1992. Because the sale of the property did not occur on or before August 1, 1992 and because the Defendants did

not vacate the property, the Plaintiffs filed suit in chancery court on August 18, 1993 in order to oust the Defendants from the property, restore possession of the property to the Plaintiffs and to receive an award of damages as a result of the Defendants' actions.

In May of 1993, the Plaintiffs attempted to refinance their home at a lower interest rate. The Plaintiffs were unable to refinance the mortgage on the property because the Plaintiffs were not in possession of the property and were not able to dispossess the Defendants of the property. On May 11, 1993, the Plaintiffs wrote the Defendants a letter demanding possession of the property within thirty days. On June 20, 1994, the Plaintiffs attempted to purchase another home. The Plaintiffs were unable to purchase another home because the Plaintiffs were not able to pay two mortgage payments.

On June 1, 1994, the Plaintiffs notified the Defendants by letter that their rental payment of $535.00 per month had been increased to $1,000.00 per month. The Defendants never paid this increase in rent to the Plaintiffs.

LAW

There are two issues before the court:

1) Did the chancellor err in ordering the Defendants to pay the Plaintiffs $2,000.00 in damages?

2) Did the chancellor err in ordering the Defendants to obtain their own financing when the sales agreement signed by the Plaintiffs and the Defendants provided that the Defendants would assume the Plaintiffs' mortgage?

We first consider whether the chancellor erred in ordering the Defendants to pay the Plaintiffs $2,000.00 in damages. T.R.A.P. 13(d) guides us in our standard of review in this case:

> Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.

In the present case, the testimony of the Plaintiffs and the Defendants regarding whether the Defendants were willing to purchase the property in question and assume the Plaintiffs' mortgage is conflicting. Implicit in the chancellor's ruling is the finding that the Defendants breached the sales agreement by failing to purchase the property and by failing to assume the Defendants' mortgage on the property. The record is replete with evidence of losses the Hightowers incurred as a result of the Lytle's breach of contract. Paramount among these losses is their inability to obtain financing to purchase another home due to the outstanding indebtedness which has not been assumed or otherwise satisfied as a result of Defendant's breach of contract. Because the evidence does not preponderate against the chancellor's finding, we affirm the chancellor's award of damages to the Plaintiffs in the amount of $2,000.00.

We next consider whether the chancellor erred in ordering the Defendants to obtain their own financing when the sales agreement signed by the Plaintiffs and the Defendants provided that the Defendants would assume the Plaintiffs' mortgage. The purpose of assessing damages in a breach of contract action is to place the nonbreaching party in the same position he would have been had the contract been performed, but the nonbreaching party is not to profit from the breach. Hiller v. Hailey, 915 S.W.2d 800, 805 (Tenn.App. 1995); Lamons v. Chamberlain, 909 S.W.2d 795, 801 (Tenn. Ct. App. 1993); Hennessee v. Wood Group Enterprises, Inc., 816 S.W.2d 35, 37 (Tenn.App.1991); Action Ads, Inc. v. William B. Tanner Co., 592 S.W.2d 572 (Tenn.App.1979). Because the chancellor found that the Defendants materially breached the sales agreement by failing to purchase the property and by failing to assume the Plaintiffs' mortgage on the property, the court was justified in ordering the Defendants to perform in a manner that would make the nonbreaching party whole.

In its March 17, 1996, order, the trial court ordered that:

> ....
> 1. The Defendant shall arrange for immediate financing to purchase the real estate ... and that such financing shall be done within sixty (60) days of February 7, 1995.
> ....

We do not find that the Chancellor's order is contrary to the express terms of the contract. The order does not preclude Defendants from assuming the existing mortgage. The order merely permits the Defendants to seek other forms of financing in order to perform the contract. It appears to the Court that the trial court's order simply formalizes the prior practice of the parties. It is somewhat disingenuous for Defendants to complain about the remedy imposed by the trial court when they themselves had sought previously the same benefit. Mr. Lytle admitted at trial that he had attempted to secure financing from both First Tennessee Mortgage and Central State Bank after execution of the sales agreement rather than to assume the existing loan on the property. Testimony at trial also established that Mr. Hightower knew of Lytle's attempts to secure alternate financing and acquiesced to his attempts. Accordingly, it appears to this Court that the trial court simply adopted the interpretation of the agreement manifested by the conduct of the parties in their dealings with one another and that he fashioned his remedy accordingly.

The order of the trial court is hereby affirmed. Costs on appeal are taxed to Defendants, for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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FARMER, J.

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LILLARD, J.