IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

July 28, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

SHIRLEY INEZ HALE REAGAN	)	BLOUNT COUNTY
	)	03A01-9612-GS-00406
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. JAMES R. BREWER, JR.,
	)	JUDGE
	)	
JACKSON RICHARD REAGAN	)	
	)	
Defendant-Appellee	)	AFFIRMED AND REMANDED

R. D. HASH OF MARYVILLE FOR APPELLANT

MIKE A. HICKMAN OF MARYVILLE FOR APPELLEE

OPINION

Goddard, P.J.

This is a post-divorce proceeding wherein Shirley Inez Reagan appeals a judgment of the General Sessions Court for Blount County which divested her of her one-half interest in marital property and required her former husband, Jackson Richard Reagan, to pay her the sum of $28,500.

The Trial Court, at the conclusion of counsels' opening statement, asked if they wished to introduce any proof. Counsel responded in the negative after it was stipulated that the money ordered to be paid was never presented to Ms. Reagan. Thereupon, the Trial Judge announced his determination which was memorialized in an order which provided the following:

> 2. a. The Court finds the sixty (60) days beginning September 6, 1995, to be the relevant period of time for the Defendant to have made the tender of payment to the Defendant.
>
> b. The Court finds that Defendant made tender during the relevant period of time.
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> 3. Accordingly, the original Plaintiff's Motion filed March 8, 1996, is not well taken and is hereby dismissed.
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> 4. The Defendant's Motion to Compel Closing is well taken and is hereby granted. The original Plaintiff, Shirley Inez Hale Reagan, is, therefore, divested of any right, title, or interest she may have in the real property more particularly described in the Final Decree of Divorce and in the Warranty Deed Book 553, page 807, in the Register of Deeds' Office for Blount County, Tennessee, and is vested in the original Defendant, Jackson Richard Reagan, single.
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> 5. The original Plaintiff, Shirley Inez Hale Reagan, is awarded a lien against said real property to secure payment of the sum of Twenty-Eight Thousand Five Hundred Dollars ($28.500.00) with said lien only to be released upon payment in full by the Defendant, Jackson Richard Reagan, to the Plaintiff, Shirley Inez Hale Reagan, of said sum of Twenty-Eight Thousand Five Hundred Dollars ($28,500.00) as previously ordered by the Court.
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> 6. The original Plaintiff, Shirley Inez Hale Reagan, is hereby ordered to attend any closing at the time and place set by Defendant for the purpose of Defendant securing a loan in the amount of Twenty-Eight Thousand Five Hundred Dollars ($28,500.00) to pay the Plaintiff for her interest in the real property. The original Plaintiff shall attend said closing, unless prior thereto she executes and delivers an appropriate

> Quit-Claim Deed to Defendant, when presented to her, conveying any right, title and interest she may have in the property to Defendant.

Ms. Reagan's appeal insists no evidence was introduced to justify the Trial Court's findings of fact upon which his order was predicated, and that no tender of the $28,500 was ever made in accordance with the divorce decree entered which, as pertinent to this appeal, provided the following:

> 2. The original defendant, Jackson Richard Reagan, shall have the marital property described in Warranty Deed Book 553, page 807 in the Register's of Deeds office for Blount County, Tennessee and located in district (11) eleven of Blount County, Tennessee and containing three (3) acres more or less upon his payment to the original plaintiff, Shirley Inez Hale Reagan, of the sum of $28,500.00 (Twenty-eight thousand and five hundred dollars). The original defendant has sixty days from the date of the entry of this order to tender said sum to the original plaintiff. The original plaintiff will cooperate in tendering a quit-claim deed to the defendant to facilitate transfer. In the event the original defendant cannot purchase the plaintiff's share for $28,500.00 (Twenty-eight thousand and five hundred dollars), the plaintiff shall then have a sixty day period to purchase the defendant's interest for said sum of $28,500.00 (Twenty-eight thousand and five hundred dollars). Upon tender of said amount to the defendant within the proper period of time by the plaintiff, the defendant shall execute and deliver a quit-claim deed to the plaintiff of his interest in said property. The original defendant will cooperate in tendering a quit-claim deed to the plaintiff to facilitate transfer. In the event neither party has the wherewithal to buy the other party out, the property shall be listed for sale at a mutually agreeable price with a realtor agreeable between the parties. Upon the sale of the same and payment of all outstanding indebtednesses against the same, the parties shall divide any equity realized from said sale. Upon such time as either party successfully tenders to the other the required amount for a buy out, the party so bought out shall be required to vacate himself or herself from the residence within one week of the receipt of the required amount of buy out. Each

> party is restrained from destroying or vandalizing any real or personal property awarded to the other party herein.

No formal proof was introduced,[1] but, in the words of lawyers of an earlier time, counsel "spoke it out." We will now detail pertinent comments of counsel which for the most part was undisputed.

The 60-day period for Mr. Reagan to tender the $28,500 began on September 6, 1995, the day Ms. Reagan voluntarily dismissed her appeal in the original divorce action. It was necessary for Mr. Reagan to borrow the $28,500 from a lending institution to pay Ms. Reagan and to pledge the property as collateral. By two separate letters sent to counsel for Ms. Reagan during the 60-day period, counsel for Mr. Reagan advised that his client was ready, willing and able to pay her the sum owed upon her delivering a quit-claim deed for her interest in the property to Mr. Reagan. The first letter was dated October 9, 1995, and the second October 13.

In addition, counsel for Mr. Reagan had several telephone conversations with counsel for Ms. Reagan to the same effect.

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[1] After the Trial Court announced its decision counsel for Ms. Reagan asked to enter an offer of proof by his client which the Trial Judge allowed. His order, however, specifically notes that the evidence elicited in the offer of proof was not considered in his determination.

It appears that the foregoing was considered proof by the Trial Court.

The Trial Court found and the parties agree that the 60-day period for Mr. Reagan to tender the $28,500 began on September 6, 1995, the day Ms. Reagan voluntarily dismissed her appeal in the original divorce action. It also appears that it was necessary for Mr. Reagan to borrow the $28,500 from a lending institution to pay Ms. Reagan and to pledge the property as collateral. In furtherance of his effort to raise funds, Mr. Reagan repeatedly requested Ms. Reagan to execute a quit-claim deed and to attend a closing that the deed might be delivered, a trust deed executed, and the money paid to her. Ms. Reagan steadfastly refused to do so, thwarting Mr. Reagan's ability to comply with the Trial Court's order.

While it is true Mr. Reagan never offered Ms. Reagan the $28,500 and no tender in the traditional sense[2] was ever made, he was prevented from doing so because of Ms. Reagan's intransigence. Under the circumstances of this case we believe the rule expressed by the Western Section of this Court in 2600 Poplar Associates Limited Partnership v. Goldome Credit

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[2] In Davidson v. Rogers, 471 P.2d 455, 458 (Okl.1970), the Supreme Court of Oklahoma, quoting from Am.Jur.2d, defines common law tender as follows:

> At common law, a tender of money is an unconditional offer by a debtor or obligor to pay another, in current coin of the realm, a sum not less than the amount then due on a specified debt or obligation. 52 Am.Jur.2d Tender, Sections 1 and 2. (Emphasis in original.)

Corporation, an unpublished opinion of this Court, filed in Jackson April 7, 1994, comes into play:

> It is sufficient if the party seeking to enforce the contract presents proof that he is ready, willing, and able in good faith to perform what he is required to do under the contract. 71 AM JUR.2d, **Specific Performance** 68, at 97-98; 81 C.J.S. **Specific Performance** 112, at 965. This is particularly true in disputes resolving unsettled accounts. Tender in an action for specific performance means the plaintiff has shown a willingness and ability to perform, and to do all the things that he is required to do by the contract, including a readiness to pay such amounts as may be found by the court to be due and owing. C.J.S. **Specific Performance** 112, at 965.
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> If a plaintiff can prove his willingness and ability, generally, the remedy of specific performance is available to him if he prevails. 71 AM JUR.2d, **Specific Performance** 68, at 98.

The Western Section then quoted from a Supreme Court of Alabama opinion, Hudson v. Morton, 165 So. 227 (Ala.1936):

> Certainly a tender may be excused where it is prevented by the act of the party to whom it is due. . . .
>
> Complainant had in hand funds sufficient for the redemption, and made every reasonable effort to make the tender and procure the deed, but without avail by reason of [defendant's] avoidance of any meeting that the previous agreement might be effectuated.
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> **Hudson**, 165 So. at 229.

We recognize that the foregoing case was decided under Alabama law; however, we believe the Rule enunciated is a proper one and should apply under the facts of this case.

We also note that Ms. Reagan refused to honor Mr. Reagan's request to execute a quit-claim deed because she thought the equity in the property far exceeded the $57,000 fixed by the Trial Court. This is puzzling in light of her affidavit filed in the original divorce wherein she herself represented the equity to be only $48,500.

Finally, we point out that even if we were to accept her position we would be required to remand the case for formal proof as to the determinative question. In light of the offer of proof which was substantially the same as represented by counsel in opening statements, the result below and here would be the same.

Mr. Reagan raises an issue wherein he asked that we declare the present appeal to be frivolous, as well as the prior appeal which Ms. Reagan dismissed. We decline to find the present appeal frivolous and are without authority to find the former appeal such because we have lost jurisdiction of that case.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for such further proceedings, if any, as may be necessary and collection of costs below. Costs of appeal are adjudged against Mr. Reagan and his surety.

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Houston M. Goddard, P.J.

CONCUR:

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Charles D. Susano, Jr., J.

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William H. Inman, Sr. J.