IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 13, 2012

HAROLD MARTIN v. JAMES TAYLOR MILSTEAD AND DANA UNDERWOOD MILSTEAD

Appeal from the Chancery Court for Warren County
No. 10490 Larry B. Stanley, Jr., Chancellor

No. M2011-01984-COA-R3-CV - Filed April 30, 2013

Purchaser of land brought action to recover damages for shortage in acreage and road frontage of property purchased; sellers contended that sale was in gross rather than by acre. Trial court determined that there was a discrepancy between the amount of land both parties thought was being sold and the amount determined by a survey to have been sold, and that sellers did not own land which would provide access to the property; accordingly, it granted purchaser judgment for the discrepancy in the amount of land conveyed. Discerning no error, we affirm the judgment.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M. S., and FRANK G. CLEMENT, JR., J., joined.

John P. Partin, McMinnville, Tennessee, for the appellants, James Taylor Milstead and Dana Underwood Milstead.

Thomas O. Bratcher, McMinnville, Tennessee, for the appellee, Harold Martin.

OPINION

James and Dana Milstead, sellers of farmland in Warren County, appeal a judgment entered against them in favor of Harold Martin, purchaser of the property, for a deficiency in the amount of acreage.

The facts salient to this appeal are not disputed and were found by the trial court as follows:

> That the Plaintiff, Harold Martin, agreed to buy a farm located on Bybee Branch Road from Defendants for two hundred thousand dollars ($200,000.00). The Plaintiff and Defendant, James Milstead, each believed at the time of the making of the contract that the farm on Bybee Branch Road contained 66 acres. The Plaintiff never communicated any price per acre to the Defendant James Milstead. The Defendant James Milstead intended to sell the farm in its entirety for two hundred thousand dollar ($200,000.00), and not by the acre. The Plaintiff believed he was buying sixty-six (66) acres from Defendants. The Plaintiff drew a handwritten contract to purchase the property that read, "I have sold to Harold Martin 66 akers (sic) of land for 200,000 the 8-8-07," and was signed by both parties. The Plaintiff did not have the property surveyed prior to purchase. A survey of the property performed after the sale revealed the property consisted of fifty nine (59) acres. Further, the Defendants never owned the strip of land adjacent to the property purchased by Plaintiff.

On the basis of those findings, the court concluded that there was no meeting of the minds due to a mutual mistake as to the amount of acreage; that Mr. Milstead intended that the sale be in gross, while Mr. Martin intended that the sale be by the acre; and that Mr. Milstead warranted that the property contained sixty-six acres. The court granted Mr. Martin judgment for $18,000. The Milsteads appeal.[1]

I. Standard of Review

Generally, the interpretation of a contract is a question of law, subject to *de novo* review. *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006); *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). When a contract is ambiguous and it is necessary to consider extrinsic evidence to properly interpret the contract, the issue becomes a mixed question of law and fact. *Allstar Consulting Grp. v. Trinity Church & Christian Ctr.*, No. W2006-00272-COA-R3-CV, 2007 WL 120046, at *3 (Tenn. Ct. App. Jan. 18, 2007). Therefore, while the underlying facts are reviewed under a *de novo* standard with a presumption of correctness, the legal conclusion arising from those facts is reviewed *de novo*,

[1] Plaintiff also sued for damages alleging that a strip of land which provided access to the property to Pioneer Haven Road was not conveyed, thereby blocking road access; the trial court held that Plaintiff was not entitled to any relief because Defendants never owned the strip of land adjacent to the property purchased by Plaintiff. The disposition of that claim is not at issue on appeal.

without such a presumption. *Id*. (citing *Newcomb v. Kohler Co.*, No. W2005-02161-COA-R3-CV, 2006 WL 2535396, at *28 (Tenn. Ct. App. Sept. 5, 2006)).

The interpretation of contracts is governed by well-settled principles. "[T]he cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention as best can be done consistent with legal principles." *Petty v. Sloan*, 277 S.W.2d 355, 360 (Tenn. 1955). Stated another way, "[t]he central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002). We ascertain the parties' intention from what was "actually embodied and expressed in the instrument as written." *Petty*, 277 S.W.2d at 361.

II. Discussion

The sole issue presented is whether the court erred in holding that the sale was by acre and not in gross; the parties do not dispute the relevant facts or contend that the facts as found by the court are not supported by the preponderance of the evidence. In resolution of this issue, the following language from *Faithful v. Gardner*, 799 S.W.2d 232 (Tenn. Ct. App. 1990) is instructive:

> In determining whether a sale is in gross or by the acre, the intention of the parties controls and thus must be given effect. The contract of sale, and not the deed, determines whether the sale is by the acre or in gross.
>
> After preliminary negotiations and oral conversations are concluded and a contract is reduced to writing that is clear and unambiguous, there is a conclusive presumption that the parties have reduced their entire agreement to writing, and that any parol agreement is merged in the written contract. Testimony of prior or contemporaneous conversations for the purpose of altering, contradicting, or varying the terms of the written instrument are incompetent and inadmissible. However, where there is any ambiguity in the contract as to whether or not the sale is by the acre or in gross, extrinsic evidence has been held admissible as an aid in ascertaining the true intent of the parties.
>
> In addition, there are several factors that have been recognized as having a bearing on the court's determination of whether or not a sale of real estate is by the acre or in gross. One of the most important facts to be considered is the way in which the purchase price is stated in the contract. A contract in which the price is expressed as a lump sum as opposed to a price

per acre (or per unit) tends to show a sale in gross. Another factor to be considered in determining whether the sale is in gross or by the unit is the way in which the quantity of land is specified in the contract. As noted in 77 Am. Jur. 2d *Vendor and Purchaser* § 99 (1975):

> Where land is described by certain monuments, lines, and courses, and also as containing a certain quantity, the words expressing the quantity are not ordinarily to be considered as a covenant that the land contains such quantity, but are to be taken as merely descriptive. Thus, a sale in gross will be inferred where the contract particularly designates the property by name, by courses and distances; by metes and bounds, the most common form of description; or by reference to a plat, plan, blueprint, government survey, or prior deed, patent, or grant.

A final factor to indicate the type of sale is whether or not the contract provides for a survey or the parties subsequently agree to a survey.

Faithful, 799 S.W.2d at 235–36 (citations omitted).

While the contract in this case stated a lump sum for the property, the contract also specified the quantity of land being purchased as 66 acres. Mr. Martin, who was involved in the business of buying and selling land, testified that he "always" gives $3,000 per acre for whole farm land; that he prepared the contract based on Mr. Milstead's representation as to the number of acres comprising the farm; and that the sale price of $200,000 equated to the purchase price of $3,000 per acre.[2] Mr. Milstead testified that he believed that he had "65 to 66" acres in the property and told Mr. Martin that was the acreage; that there was no discussion regarding a price per acre; and that Mr. Martin declined to have the property surveyed.

As noted in *Faithful*, the contract determines whether the sale is by the acre or in gross; factors to be considered in determining whether the sale is in gross or by the acre include the way in which the quantity of land is specified in the contract and the way in which the purchase price is stated. We are persuaded that, under the facts and evidence presented, the mention of specific acreage in the contract at issue was intentional and this factor compels us to conclude that the sale was to be by acre. Significant in our determination are the facts that no other designation of the property (e.g, the Milstead farm

[2] Mr. Martin explained that when he and Mr. Milstead first discussed the farm, Mr. Milstead represented that the farm was 66.2 acres and that the difference between $198,000 (66 acres x $3,000 per acre) and the purchase price of $200,000 was for the difference between 66 acres and 66.2 acres.

or the like) was used and that the property description in the closing statement prepared by Mr. Martin's broker and signed by Mr. Milstead stated "65.2 acres," rather than another designation. In addition, we do not find that the fact that the contract states a lump sum amount is in conflict with our determination that the sale was to be by the acre.

Accordingly, we affirm the decision of the trial court.

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RICHARD H. DINKINS, JUDGE