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NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

MAY 20 2022

JOHN D. HADDEN
CLERK

SCHUCK FARMS, LLC, a Texas Limited Liability Company,

Plaintiff/Appellant,

vs.

MARC TURICCHI and FRANCINE TURICCHI, Husband and Wife,

Defendants/Appellees.

Case No. 118,385

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APPEAL FROM THE DISTRICT COURT OF
ATOKA COUNTY, OKLAHOMA

HONORABLE PAULA INGE, TRIAL JUDGE

AFFIRMED

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Yale, Oklahoma
For Plaintiff/Appellant

Shannon Reasor
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Atoka, Oklahoma
For Defendants/Appellees

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Schuck Farms, LLC, appeals the denial by the district court of certain claimed damages resulting from Schuck being forced to seek specific performance of a contract for real property. On review, we affirm the challenged decisions of the district court.

BACKGROUND

In January 2016, Schuck Farms (Schuck), paid Marcus and Francine Turicchi $10,000 for a two-year option to purchase 927 acres of ranch land. On April 27, 2017, Schuck exercised this option, tendering $200,000 down in escrow against a purchase price of $2,000,000. The Turicchis did not respond to Schuck's exercise of the option.[1] On June 30, 2017, Schuck filed an action asking the court to order specific performance of the agreement. The Turicchis did not respond and the court entered default judgment in favor of Schuck on October 10, 2017.

Schuck did not immediately attempt to enforce this judgment for specific performance. However, some nine months later, Schuck filed a "Motion to Set Closing Date and Compel," stating that Schuck had "completed the title work" but that "Defendants have not responded." The motion asked the court to "set a hearing date to facilitate closing" and to compel the Turicchis' attendance. The Turicchis finally appeared, and, on October 9, 2018, the court entered an order compelling the closing. The court reserved the question of any damages and attorney fees for later disposition.

In January 2019, Schuck filed a motion seeking such damages and attorney fees. The motion sought several different categories of damages occasioned by the delay in closing and attorney fees. Trial on the question of damages was held on May 24, 2019. On October 8, 2019, after post-trial

[1] Testimony at trial indicated that Mr. Turicchi had suffered some health problems in 2017-18, and may have been inattentive to business in that period.

briefings, the court awarded damages as follows: $15,000 for lost hunting lease payments, $1,600 for the loss of pecan harvest income, and $1,528 for property taxes Schuck paid during the Turicchi's occupancy. The order states that "all other damages sought by the Plaintiff" were denied, including:

a. Interest earned on the $200,000.00 deposited when the option was exercised;
b. Change in financing costs;
c. Holder grazing lease
d. Repair to Barns and Home
e. Overgrazing; and
f. Cost of filing for forcible entry and detainer

The court also denied Schuck's claim of attorney fees. The court entered a judgment for Schuck for $18,828.[2] Schuck now appeals, arguing that the trial court should have awarded additional damages and attorney fees.

STANDARD OF REVIEW

Claims for specific performance are of equitable cognizance. *Lewis v. Sac & Fox Tribe of Oklahoma Hous. Auth.*, 1994 OK 20, 896 P.2d 503. In a case of equitable cognizance, a judgment will be sustained on appeal unless it is found to be against the clear weight of the evidence or is contrary to law or established principles of equity. *Laubenstein v. Bode Tower, L.L.C.*, 2016 OK 118, ¶ 9, 392 P.3d 706. The damages contested here arise from the suit for specific performance. "Where the right to damages is dependent upon the establishment of the equitable right of specific performance, damages are also reviewed by the equitable standard." *Mooney v. Mooney*, 2003 OK 51, ¶ 47, 70 P.3d 872. The

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[2] We note that the sum of $15,000, $1,600, and $1,528 is $18,128, not $18,828, as awarded by the court. No party appeals the judgment on this basis, however.

question of whether a party is statutorily entitled to an attorney's fee presents a question of law which we review *de novo*. *Finnell v. Seismic*, 2003 OK 35, ¶ 7, 67 P.3d 339.

ANALYSIS

A. Damages in a Suit for Specific Performance

Published cases specifically involving the award of damages that arise as the consequence of a party having to seek an order for specific performance appear to be quite rare. One case that does comment specifically upon this issue is *Smith v. Owens*, which held: "When specific performance is granted of a contract to convey real property, the court will enforce the equities of the parties in such manner as to put them as nearly as possible in the position they would have occupied had the conveyance been made when required by the contract." 1963 OK 187, ¶ 0, 397 P.2d 673 (syllabus of the Court). We will examine the trial court's denial of each claim of damages, pursuant to our equitable standard of review, and with this goal in mind.

(1) Interest Earned on the $200,000 Deposited When the Option Was Exercised.

Smith v. Owens did award interest as part of a specific performance order. The *Smith* court was quite clear, however, that this interest was not awarded as *damages*. The court found that interest on the unpaid balance was *part of the contract*, and hence was required as part of any specific performance of the contractual terms. We find no record of any contractual interest provided for here. We find the trial court's decision denying interest was not against the clear weight of the evidence or contrary to law.

(2) Changes in Financing Costs

Schuck argued that it would have been able to obtain financing of $1,600,000 of the purchase price at a better rate in October 2017 than it could in October 2018, and the difference in financing costs constituted damages here. The evidence presented by Schuck was a letter from Solutions North Bank of Lenora, Kansas. The letter stated it was written in response to a request to "determine the increased cost of financing a land purchase due to rate increase over the last year." It opined that the Wall Street Journal prime rate had increased by one percent between October 2017 and October 2018, and, as a result, the cost of borrowing $1,600,000 over 10 years would have increased by $93,199.

We are doubtful that such damages can be awarded in the absence of any contractual agreement to compensate a buyer for a change in interest rates. Further, we find the letter is problematic as evidence in a number of ways. The court admitted it against a hearsay objection on the grounds that it was a "business record" of Schuck. Title 12 O.S.2011, § 2803, provides a hearsay exception for:

> 6. A record of acts, events, conditions, opinions or diagnosis, made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record, all as shown by the testimony of the custodian or other qualified witness ...

We find no credible evidence that Schuck had a *regular business practice* of seeking letters from banks detailing changes in the cost of borrowing a specific amount between two consecutive years. The letter is obviously an *opinion*

solicited in aid of litigation rather than a record kept in the course of regular business practice. Even assuming that the document was admissible as a business record, however, it only comments on the general cost of borrowing in the period under discussion. We are directed to no testimony by Schuck as to what lending terms it was actually offered in 2017, or on what terms it actually borrowed in 2018. Nor do we find any indication that such damages were contemplated by the parties in the contract. We find no error in the court's decision regarding compensation for changes in interest rates.

(3) Overgrazing

Schuck claimed that 220 acres of the grassland needed to be re-seeded because of overgrazing, at a cost of $97,970. Marcus Turicchi testified that the condition of the grass was due to drought, not overgrazing, and that his experience with the property was that the grass would "come back" on its own in a more seasonable year. He also testified that he believed that one Sally Holder was responsible for any grazing damage because she had leased the property to graze her cattle and had failed to supply sufficient supplemental hay pursuant to that agreement.[3] The matter was one of contradictory testimony for the trial court to resolve. The trial court's decision not to award damages for the purposes of re-seeding was not against the clear weight of the evidence.

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[3] Ms. Holder is a cousin of Lenus Schuck, who is an owner of Schuck Farms. It appears that during one period of time Ms. Holder was acting on her own behalf when dealing with Mr. Turicchi, but later was acting on Schuck's behalf as an agent or pursuant to a power of attorney.

(4) Holder Grazing Lease

Schuck provided evidence in the form of printouts of reports from Oklahoma State University's "Oklahoma Cooperative Extension Service" that grazing rights were generally worth $23 per acre, per year in the area. Lenus Schuck testified that he had therefore expected to make $23,000 through leasing grazing rights in the time between exercising his sale option and the time he actually gained possession of the property.[4]

Marcus Turicchi testified that he had previously leased grazing to Lenus Schuck's cousin, Sally Holder, for $500 per month for "eight or ten months." Sally Holder testified that she had leased between 200 and 250 acres of grazing from Turicchi. She also testified that some fifty percent of the property was wooded. Marcus Turicchi testified that Sally Holder had access to 400 acres under the lease, but that only 200-250 were clear grassland, the rest being wooded, and sixty percent of the property was "timber and river."

Though it may have been familiar knowledge to the parties and the court, we are directed to no record explanation whether the fifty to sixty percent of the property occupied by "timber and river" is usable as grazing land or possibly commands a rate of $23 per acre. The only clear fact appears to be that the

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[4] Mr. Schuck's testimony was not clear as to either how many months of grazing income he expected to receive, or whether the entire property could command $23 an acre as grazing land, or only part of it. The figure of $23,000 could be derived by assuming the entire 1000 acre property could be rented for one year, or that 500 acres of it were usable for grazing, and could have been rented for two years. Schuck filed seeking specific performance on June 30, 2017 and received default judgment on this request in October 10, 2017, but did not attempt to enforce this judgment until July 2018. It received an "order compelling closing" on October 9, 2018.

property at one time actually generated $500 per month of grazing income for ten months, totaling an income of $5,000.

It was the trial court's role to weigh the competing evidence, namely, Schuck's claim that 220 acres of the grassland that could be used for grazing needed to be re-seeded because of overgrazing, against Turicchi's testimony that the grass was in poor condition because of an extended drought, and that it was not suitable for grazing Holder's cattle without additional hay. This testimony indicates that $5,000 may not have been a possible income in this specific period. Further, the $23 per acre figure was a general estimate for this type of land in this area and not based on any specific inspection of the condition of the property in question. Based on the foregoing, the trial court's decision not to award this item of damages was not against the clear weight of the evidence.

(5) Repair to Barns and Home

Sally Holder, now an agent for Schuck under a power of attorney, testified that she was familiar with the condition of the property in 2017, and that, based on her experience in managing a ranch, the house had subsequently suffered damages that would cost $2,000 to repair, and a barn has suffered damage to the sheet metal that would cost between $2,000 and $3,500 to repair. No bids, or any documentary evidence supporting these figures, were introduced at trial. However, Ms. Holder agreed that she had an opportunity to see the exterior of the out buildings before filing a forcible enter and detainer (FED) against the Turicchis and had sought only $600 in damages as part of the FED. She was

somewhat equivocal at trial as to what the $600 was for, eventually attributing it to "winterizing expenses."[5]

Mr. Turicchi testified that he knew of no damage to the house, and testified repeatedly that "no damage was done to the outdoor buildings." However, he appeared to agree that two holes had accidently been put in the side of a barn by a forklift after the exercise of the option, although he could not say exactly when.

The question is whether it was "against the clear weight of the evidence" for the court to refuse to award damages for this injury. There was a clear dispute of fact as to damage to the house and the dent in the side of the barn. Marcus Turicchi did testify that the damage to sheet metal caused by a forklift occurred after the option was exercised. We find, however, that the trial court could have determined that any damage was either (1) a normal incident of operating the property rather than compensable damage caused by delay, or (2) not supported by sufficient evidence. Accordingly, the refusal to award these damages was not against the clear weight of the evidence.

(6) Cost of Filing for Forcible Entry and Detainer

Sally Holder testified that "a forcible entry and detainer was filed in this case." We find no record of an FED in this case, Atoka County Case No. CJ-2017-36. The Turicchis' trial exhibit 2 indicates that the FED was actually filed on November 8, 2018 as Atoka County Case No. SC-2018-99. Lenus Schuck

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[5] The basis under which "winterizing expenses" could be sought in an FED action was not explained at trial.

testified that serving this petition cost $108. The docket sheet for the small claims case indicates that the FED was stricken on November 27, 2018, without judgment. Shuck states that, nonetheless, it was "necessary" to file the FED to "get possession of the place" because he was "unable to get into the house or obtain possession of the property."

The docket sheet for the FED shows two notations. One states that service was incomplete on November 19. The other indicates that the case was "stricken" without decision on November 27. Marcus Turicchi testified that he had paid $600 after the FED was served, although he was not sure if it was paid to Schuck or Sally Holder, or exactly what it was for. We find it likely that some agreement was reached before the FED was heard, and the case was dismissed before any hearing was held.

Even if we assume (without agreeing) that, although there was no basis for costs in the FED case, it is still proper to seek the same costs as "damages" in a specific performance case, the question of whether this expense constituted damages caused by having to seek an order for specific performance was one for the trial court. We find no error in its exercise of discretion here.

B. Attorney Fees

A litigant's right to recover attorney fees in Oklahoma is controlled by the American Rule. *Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2000 OK 55, ¶ 46, 11 P.3d 162. The American Rule "provides that courts are without authority to award attorney fees in the absence of a specific statute or a contractual provision allowing the recovery of such fees, with certain exceptions."

Id. "Statutes allowing the award of attorney fees are strictly construed." *Comanche Nation of Oklahoma ex rel. Comanche Nation Tourism Ctr. v. Coffey*, 2020 OK 90, ¶ 24, 480 P.3d 271. We find no independent contractual basis for fees here. The statutory bases for fees relied on by Schuck are 23 O.S.2011, §§ 27, 69, 70, and 71, and 12 O.S.2011, § 940.

Title 12 O.S. § 940A provides prevailing party fees as costs in "any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action." In *Edwards v. Walden*, 1979 OK 74, 595 P.2d 445, the Oklahoma Supreme Court generally disapproved of the theory that a party can seek, and obtain, specific performance, but then categorize the specific performance claim as a different type of claim for fee purposes. *Edwards* found that, as the trial court awarded the appellee "judgment based upon her prayer for specific performance of the contract," it was not proper to also allow appellee attorney fees under a theory that the case was one of an "account stated" under 12 O.S. § 936. *Id.* ¶ 9. It appears the same principle should apply to fees under § 940.

Further, we find no indication that § 940 provides fees for obtaining a grant of specific performance. Schuck's claims for damages due to "repair to barns and home" and "overgrazing" may fall within the category of negligent or willful injury to property, but these claims were denied, and hence Schuck was not a prevailing party.[6] We find no error in the trial court's denial of fees pursuant to § 940.

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[6] These claims would also pose a substantial apportionment problem, as the majority of attorney time appears to have been related to claims other than property damage.

Title 23 O.S. § 27 provides that:

> The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith the difference between the price agreed to be paid, and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land.

Section 27 deals with damages for a *breach of an agreement to convey, i.e.*, a refused conveyance, not damages associated with an order for *specific performance*, *i.e.* a consummated conveyance. It is obvious that a party who obtains specific performance cannot also recover "the price paid" as damages. The remedy of "the price paid" provided by § 27 and the remedy of specific performance are clearly exclusive. Even if other parts of this statute do apply in the case of specific performance, as Schuck argues, we find no indication in any case law, published or unpublished, that attorney fees are included as part of "expenses properly incurred in examining the title and preparing the necessary papers." Title 23 O.S. § 27 has not been interpreted as a *fee statute* since it was enacted in 1910, and we will not do so here.

Title 23 O.S. §§ 69, 70 and 71 deal with the measure of damages for failure of a tenant to give up the premises (double rent); for willfully holding over real property by a tenant after the end of his term (double the yearly value of the property); and for forcibly ejecting or excluding a person from possession (three times the detriment caused). We find no indication that the Turicchis legally became "tenants" at some time during this case or that any forcible ejection occurred. None of these statutes provides any facial basis for fees.

Finally, although an FED action is fee-bearing pursuant to 12 O.S.2011, § 1148.9, the FED action was stricken. Hence, there was no prevailing party to seek fees. Thus, the trial court was without any basis to award fees via contract or statute. Its award denying fees is affirmed.

CONCLUSION

For the reasons stated above, we find no error in the district court's order limiting Schuck's damages or denying attorney fees. Accordingly, the judgment is affirmed.

AFFIRMED.

BARNES, J., concurs, and WISEMAN, P.J., concurs in part and dissents in part.

WISEMAN, P.J., concurring in part and dissenting in part.

I concur with the Majority on its resolution of the issues under review except as to the questions of property damage and attorney fees. Apparently the Turicchis continued to occupy the property after the closing ordered by the court. Damage occurred to the property during this time period, including damage to the barn that Turicchi in his testimony did not dispute. The parties in Section 5 of their 2015 Option to Purchase agreed that the Turicchis as grantors would "bear the risk of loss" as to the residence and outbuildings on the property during their continued possession following closing.

The Majority states that Sally Holder, Schuck's agent, "had an opportunity to see the exterior of the out buildings before filing a forcible entry and detainer . . . against the Turicchis and had sought only $600" in the FED action. My concern is that the evidence reveals no correlation between these two facts.

According to the transcript, Holder was asked if she "had a chance to inspect the property to file a forcible entry and detainer" to which she responded, "No." (Tr., p. 109, line 25 – p. 110, line 2). She further explained that although she had the ability to go on the property, she did not have the opportunity to go into the barns because "I wasn't allowed—I mean, you couldn't—I mean, [Turicchi] would not let you . . . . when you made effort to go there, you couldn't do it. He would not allow that." (Tr., p. 115, ll. 7 – 15). All she was allowed to see was the exterior of the buildings, but it is not clear from what distance or perspective. When asked on cross-examination if damage to the outside of the barns was included in the $600 figure, Holder answered, "No, sir." (Tr., p. 116, line 21 – p. 117, line 1.) She clearly explained that the damage to the outside of the barns was not included in that $600 figure—that figure was for expenditures she made to help secure the property when the Turicchis moved out. This was "to get everything winterized" to prevent further damage and "to put locks and things on there" to prevent unauthorized entry. (Tr., p. 117, ll. 9-18.) The $600 figure does not represent her estimate of the damage to the outbuildings or to any interior which she had not been allowed to inspect.

Lenus Schuck in his trial testimony stated that the FED was filed to get access to the property and at the time of its filing, he had not had a chance to figure out what his damages in the case would have been. And Turicchi himself could not remember what he paid $600 for. Nothing in the trial testimony ties this $600 figure to actual physical damage to the property.

After reviewing the transcript, I conclude the trial court incorrectly denied Schuck's claim for damages to the property, both inside and out, caused by the previous owners, as anticipated in their Option to Purchase agreement. I would reverse the property damage issue and remand for further proceedings. If the Turicchis reimbursed Schuck $600 to resolve the FED claim[7] for these security items resulting in striking the hearing (not dismissing the case), this should be clarified on remand.

Because the undisputed evidence shows entitlement to compensation for property damage, I would reverse and remand this issue to the trial court for a determination of the appropriate amount of compensation. This would also entitle Schuck to attorney fees on the property damage claim pursuant to 12 O.S.2011 § 940, a further issue to be addressed on remand. I therefore respectfully concur in part and dissent in part.

May 20, 2022

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[7] In my view, Schuck is also entitled to the $108 filing fee for having to file the FED action to remove the Turicchis from the property.