ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

THE CALVERT COMPANY and CALVERT INVESTMENT COMPANY, a limited partnership,

Plaintiffs/Appellees,

vs.

ANTOINETTE CALVERT; ANTOINETTE CALVERT 2006 GST EXEMPTION RESIDUARY TRUST; ALLISON STREET DICKEY; ALLISON STREET 1983 GRANDCHILDREN'S TRUST; ERIN STREET BABER and ERIN STREET 1983 GRANDCHILDREN'S TRUST,

Defendants and Third-party Plaintiffs/Appellants,

vs.

S. WHITFIELD LEE,

Third-Party Defendant/Appellee.

Case No. 120,823

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ANTHONY L. BONNER, JR. TRIAL JUDGE

AFFIRMED

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OPINION BY STACIE L. HIXON, JUDGE:

Defendants and Third-Party Plaintiffs Antoinette Calvert, Antoinette Calvert 2006 GST Exemption Residuary Trust, Allison Street Dickey, Allison Street 1983 Grandchildren's Trust, Erin Street Baber, and Erin Street 1983 Grandchildren's Trust (collectively, the "Calverts") appeal the grant of a Motion to Enforce Settlement Agreement in favor of Plaintiff, the Calvert Company and Third-Party Defendant, S. Whitfield Lee and Calvert Investment Company (collectively, the "Lees").

Both parties sought to enforce a settlement agreement dividing jointly held oil and gas properties into two separate "tranches" to be held individually by each

party. The Calverts claim to have discovered after the fact that their chosen tranche is not of equal value to that of the Lees because title to numerous properties in the tranche was defective. They moved to enforce the agreement by reallocating the property. The Lees moved to enforce the same agreement, arguing the Calverts were obligated to accept the properties in their tranche and to deed to the Lees their selected properties, as agreed. The record is devoid of evidence supporting the Calverts' contention that title to any property in their tranche was defective or the difference in value between the tranches. We affirm the trial court's grant of the Lees' countermotion to enforce the agreement.

BACKGROUND

This action arises from a dispute between two sisters, Antoinette Calvert and Virginia Lee, regarding numerous oil and gas properties obtained by their father in West Virginia. The properties were previously held by the Calvert Investment Company ("CIC"), and operated by CIC's general partner, the Calvert Company ("TCC"). The individual parties in this action were limited partners in CIC. Third party S. Whitfield Lee apparently served as operator.

In 2010, CIC apparently deeded these properties to its individual limited partners, according to their ownership interests.[1] In 2010, CIC and TCC filed a

[1] The deeds at issue are not contained in the record, though both parties acknowledge this fact in briefing.

Petition for Declaratory Judgment against the Calverts. The Calverts counter-claimed, and also sued S. Whitfield Lee. Essentially, the respective parties accused one another of breach of fiduciary duties, breach of the limited partnership agreement, and/or mismanagement. They entered into a settlement agreement in 2011 ("2011 Agreement"). Pursuant to that Agreement, the Calverts and the Lees agreed to divide the properties among themselves in accord with their respective ownership interests of 46.7975% and 53.2025% so that they would no longer hold joint ownership.

Thereafter, the parties attempted to divide the properties. The trial court entered an Order appointing Daniel T. Reineke as a special master to report to the court of the practicality and feasibility of dividing the West Virginia properties. Reineke evaluated or appraised the properties and prepared a final report, dividing the properties into two "tranches" of more or less equal value.[2] In 2017, the parties modified the 2011 Agreement through another settlement, which the trial court approved by Order of October 2017 ("2017 Agreement"). There, the parties agreed that the Lees would receive Tranche 1 of the properties listed in Reineke's report and the Calverts would receive Tranche 2.[3]

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[2] The 2011 Agreement contained provisions to address the fact that the Calverts owned less than 50%, through a payment to or offset of monies owed to them by the Lees. These provisions are not at issue in our resolution of this appeal and are not further discussed.

[3] The parties also agreed in the 2017 Agreement, however, that Reineke's report did not comply with the 2011 Agreement or the Order appointing him and should not be approved.

The 2017 Agreement provided that the properties were to be conveyed and assigned such that the Calverts had no claim to properties in Tranche 1, and the Lees would have no claim to the properties in Tranche 2. Each party agreed to accept a quit claim deed or assignment of the other's party's interest in the properties in their respective tranches and wells "'as is' and 'where is' and without warranty of any kind." However, the transfer of these properties by quit claim deed does not appear to have ever been completed.

On March 22, 2022, the Calverts filed a Motion to Enforce the trial court's order of October 26, 2017 and the attached Agreements, requesting that the trial court reallocate or redistribute the property between Tranche 1 and Tranche 2. They contended that the families had begun to investigate the properties and discovered that some of the properties included in Reineke's list were not owned by CIC when they were previously deeded to the individual limited partners in 2010, resulting in a difference in value between the tranches of $1.3 million.[4] The Calverts attached no evidence showing title to those properties was defective. They relied primarily on a document called the "Reineke Report Reconciliation,"

[4] The Calverts alleged that the families had agreed Reineke's property list would be based on deeds and assignments the Lee family and prepared and filed in 2010, without "any review, consultation, inspection or approval by the Calvert family."

("Reconciliation"), which they proposed demonstrated or served as an admission that the tranches were unequal, and should be reallocated.[5]

In response, the Lees opposed the Calverts' Motion and cross-motioned for breach of the settlement agreement. The Lees denied the alleged net difference between the value of the tranches or that title was defective. The Lees argue they did not bear the burden of proving good title to the properties, and thus asserted they had not yet completed their investigation regarding title in the properties. They requested the court require the Calverts to comply with the 2017 Agreement by accepting the properties in Tranche 2 and assuming operation of its wells, and deed their interests in the Tranche 1 properties to the Lees. The Calverts again supplied no evidence that title in the properties at issue was defective.

The trial court heard arguments on the cross-Motions and issued a minute or informal ruling granting the Lees' Motion. Before a formal order was prepared, the Calverts filed a Motion to Reconsider that ruling. Therein, the Calverts again argued mutual mistake of fact as to ownership of the properties, and also asserted new arguments regarding frustration of purpose, constructive fraud and failure of consideration, claiming the 2017 Agreement was potentially void as a result. Again, the Calverts submitted no evidence, apart from the proposed Reconciliation,

[5] As addressed further below, the Lees argued they made no admissions, and objected to consideration of any proposals made as settlement negotiations.

in support of their contention that title to $1.3 million worth of property in the tranche was defective. Eventually, the trial court entered an order on October 3, 2022, memorializing its earlier ruling and directing the parties to exchange deeds to Tranches 1 and 2, but the order did not contain a ruling on the Motion to Reconsider.

Later, the parties entered into an agreed order on November 1, 2022. In that order, the parties agreed to a partial performance of the October 3, 2022 Order. Specifically, the parties were to exchange deeds for their respective tranches, except that $650,000's worth of the properties in the Lees' tranche was to be placed with the court clerk pending appeal.[6] The Order also denied the Calverts' Motion to Reconsider.

Calverts appeal.

STANDARD OF REVIEW

The Calverts appeal the grant of the Lees' motion to enforce a court-approved settlement agreement.[7] "A motion to enforce a settlement agreement is

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[6] The Lees argued on appeal that the Calverts' entry into this agreed order negates their right to appeal. However, while the trial court did deny the Motion to Reconsider through that order, the agreement reflected in that order concerned treatment of tranche properties pending appeal. While the Calverts agreed to go ahead and exchange deeds to properties that were purportedly in dispute, provisions were also made to withhold certain properties pending appeal, which plainly does not suggest the Calverts agreed the trial court should enforce the settlement agreements in favor of the Lees or had abandoned their claims.

[7] The Calverts state that they appeal the denial of their own Motion to Enforce. The denial of the Calverts' Motion did not resolve all issues in this action and was not itself

treated as a motion for summary judgment." *In re De-Annexation of Certain Real Property from City of Seminole*, 2009 OK 18, ¶ 7, 204 P.3d 87 (citation omitted). "Whether a settlement has been reached so as to conclude the action may be a question for a jury." *Id.* "However, when, as in this matter, the dispute concerns the legal effect of the relevant facts, the question is whether the party seeking enforcement is entitled to judgment as a matter of law." *Id.* (citing Rules for Dist. Cts., Okla. Stat. tit. 12, ch. 2, app., Rule 13(e) (Supp.2008)). Legal issues are reviewed *de novo*. *Id.*

The Calverts also appeal the denial of their Motion to Reconsider, filed in advance of the trial court's judgment on the Motions to Enforce. We treat that Motion as a Motion to Vacate, which was deemed immediately filed after the judgment. 12 O.S.2021, §1031.1.[8] The trial court's disposition of a motion to vacate is reviewed for an abuse of discretion. *Patel v. OMH Med, Ctr., Inc.*, 1999 OK 33, ¶ 20, 987 P.2d 1185. "An abused judicial discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Id.* When review of the district court's discretion in

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appealable. *See generally* 12 O.S.2021, §§ 681, 952, 953; Okla. S.Ct. R. 1.20. However, the grant of the Lees' cross-Motion is a final, appealable order.

[8] The Lees urge the Court to treat the Calverts' Motion as a motion for new trial, seeking to limit the issues the Calverts could raise on appeal. The Calverts' Motion does not expressly request a new trial, nor are we obligated to treat it as such. *See Kerr v. Clary*, 2001 OK 90, ¶ 7, 37 P.3d 841. Moreover, the Calverts did not raise issues on appeal which were not fairly presented in their Motion to Reconsider. We review for an abuse of discretion in either instance. Thus, the distinction is irrelevant.

denying a motion to vacate is determined by the propriety of an order granting summary judgment, the abuse-of-discretion question is determined by *de novo* review of the summary judgment order. *Reeds v. Walker*, 2006 OK 43, ¶ 9, 157 P.3d 100 (applying this standard to review of motions denying a new trial after summary judgment was granted). *Cf. Patel*, 1999 OK 33, at ¶ 20 (an order granting or denying a motion for new trial and a motion to vacate are subject to the same abuse of discretion standard of review).

ANALYSIS

The Calverts assert that the trial court erred by failing, among other things, to recognize that Reineke's property list included properties not owned by the parties and constituted a mutual mistake of material fact. The parties offer numerous arguments regarding whether a motion to enforce the settlement agreement was an appropriate vehicle to address this purported mistake, and as a corollary, whether the trial court should have enforced the settlement agreement in favor of the Lees, despite this alleged mistake. It is unnecessary to reach most of these arguments, because the Calverts presented no evidence in support of their contention that title to any of the properties at issue was defective. That failure is fatal to their appeal.

As addressed above, this appeal arises from the trial court's grant of the Lees' cross-Motion to enforce. Considered as a summary judgment, we consider

whether the Lees presented undisputed material facts which entitle them to judgment as a matter of law. In brief summary, the Lees presented as undisputed facts the terms of the 2017 Agreement. That Agreement provided, in pertinent part, that:

> The Calvert parties will receive the West Virginia properties listed by the Special Master in Tranche 2 and the Lee Parties will receive the West Virginia properties listed by the Special Master in Tranche 1. . . .
>
> ***
>
> Each party will accept a quit claim deed or assignment of the other party's interest in and to their properties and wells "as is" and "where is" and without warranty of any kind.

The Lees also asserted the Calverts had no valid reason to refuse the transfers (which were never carried out), because they agreed to accept properties by quit claim deed, without warranty, relying on the various settlement agreements and court orders, as evidenced by the 2010 Agreement. In sum, Lees' motion established a *prima facie* right to enforcement of the 2017 Agreement as requested, by requiring the Calverts accept Tranche 2 and exchange quit claim deeds to effectuate the intended transfers.

In response, the Calverts did not address the Lees' statement of proposed undisputed facts and did not dispute the terms of the Agreements. Rather, they argued that the "actual ownership of the properties described legally in the 2010 deeds. . . is the critical material fact to the Settlement Agreement." As described,

they asserted CIC did not own many of the properties at issue in 2010, which they assert ultimately comprise the disputed properties in Tranche 2.

These assertions were not supported by affidavits, testimony or other evidence in the Calverts' response to the Lees' Motion; in their own Motion to Enforce; or any subsequent response or reply. Particularly, the Calverts proposed as undisputed fact in their own Motion that they discovered after entering into the 2011 Agreement that many of the properties used to create the list for and divide the tranches were not owned by CIC when they were transferred to the limited partners and had been sold many years earlier, causing a net difference in the value of the tranches of approximately $1.3 million. However, the Calverts supplied no evidence in support, other than the Reconciliation.

The Reconciliation is a chart apparently created by the Calverts[9] which purports to set out the value of missing properties in Tranche 2. It is unsworn, and unaccompanied by affidavit or testimony. Supporting documents referenced in the Reconciliation are not included in the record. While not clear, the Reconciliation appears to reference proposals by the Lees to equalize the value of the Tranches. Though the Lees were not the author of this document, the Calverts contended it was evidence of their admissions, as well as the deficiency in title for numerous

[9] It was not clear from the record who drafted the Reconciliation until the hearing on the Motion to Reconsider.

properties. For their part, the Lees contended any proposed reductions were offered as settlement negotiations and should not be considered pursuant to 12 O.S.2021, § 2408, and disputed that title was defective in any property. Whether or not this is the case, which cannot be discerned from the document, nothing in the Reconciliation establishes defective title in any property within Tranche 2 or contained an admission by the Lees that title to the properties is defective.[10]

The issue of the Lees' admissions was raised again during hearings before the trial court. At the hearing on the Motions to Enforce, the Calverts contended that the Lee parties' "guy" had admitted that title was defective to certain properties. Specifically, the Calverts argued that the Lees' "man Marel . . . filed a report, and he admits $750,000 of this 1.3 million." However, the Calverts did not introduce a report or other evidence that the Lees admitted a $750,000 deficiency. To the extent the Reconciliation is the source of this assertion, it contains no such acknowledgement, and as noted above, was authored by the Calverts. Meanwhile, the Lees again objected that their discussions or proposals to resolve the case were settlement negotiations. They repeatedly advised they had not completed their investigation and could not state whether the issue of defective title in Tranche 2 was worse or better than the Calverts'.

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[10] The Lees did not attach any evidence in support of their denials that title to properties in Tranche 2 was defective. However, they were not obligated in response to the Calverts' Motion to dispute with evidence the Calverts' assertions which were unsupported.

This issue was raised yet again during the hearing on Motions to settle the journal entry and on the Calverts' Motion to Reconsider. There, the Calverts' counsel provided the trial court a summary of the Lees' admissions and read into the record a portion of an email from counsel which purportedly stated, "[w]e have checked carefully and do agree with some, but certainly not all of your expressed discrepancies." According to the Calverts' counsel, the email further stated, "[w]e are not now making a specific comprehensive proposal for tranche adjustments thinking that it would be better to try to reach an agreement of values first." The Calverts also referenced further emails from counsel which purportedly reiterated they had not completed their investigation, and were not aware of how many properties might be missing or have defective titles. None of the emails at issue and presented to the trial court were attached to any of the Calverts' filings or otherwise included in the record on appeal. At the hearing, the Lees again objected that their emails were settlement communications.[11]

As stated, a Motion to Enforce is treated as a motion for summary judgment. Once the Lees established a *prima facie* right to enforce the contract, the Calverts

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[11] Notably, counsel for the Lees stated during the hearing on the motion to reconsider, "It is totally irrelevant that during the time when we were trying to work out yet another deal maybe what we'd call a third settlement, there were discussions about, well, you know, were there properties that were missing from tranche two? Well, yeah, maybe there were. Were there properties missing from tranche one? Oh, yeah, that's possible too. Do you know how much they are? No. Because it doesn't make any more sense today than it did back in 2010 for us to spend the money to figure that out." In context, counsel's suggestion that "maybe" there were properties missing does not appear to be an admission.

were obligated to show, by materials included with their response, that there was a genuine dispute of material fact. *See Seitsinger v. Dockum Pontiac Inc.*, 1995 OK 29, ¶ 7, 894 P.2d 1077; 12 O.S.2021, § 2056(E).

Additionally, "[t]he appellant bears the burden of presenting the appellate court with a record to support issues raised." *Smith v. Baptist Found. of Okla.*, 2002 OK 57, ¶ 27, 50 P.3d 1132. Even if the trial court considered the emails in its ruling, they are not before us. Based on the limited excerpts read by the Calverts' counsel, the Court is unable to ascertain whether those emails were admissible, were potentially designated as settlement discussions, or, in context, could be considered admissions by the Lees. This Court will not presume error from a silent record. *Hamid v. Sew Original*, 1982 OK 46, ¶ 6, 645 P.2d 496.

The Calverts' statements at the hearing on the Motion to Settle are thus insufficient to establish an admission by the Lees, or a genuine dispute of fact as to whether title to any property was defective, or the amount of the deficiency in value between the tranches. They supplied no other evidence which supported that contention. The trial court did not err by granting the Lees' Motion to Enforce the Settlement Agreement and did not abuse its discretion by denying the Calverts' Motion to Reconsider, as a Motion to Vacate.

CONCLUSION

The Lees demonstrated they were entitled to enforcement of the 2017 Agreement, requiring the Calverts to accept the properties in Tranche 2 by quit claim deed, and deed their interests in the properties in Tranche 1 to the Lees. Though the Calverts argued the Agreement should not be enforced because the Tranches were unequal in value, they presented no evidence in support of that contention. Their arguments that the Lees admitted to the deficiencies, or the extent thereof, are likewise unsupported by the record. We affirm the trial court's Order of October 3, 2022, and the denial of the Motion to Reconsider (or Motion to Vacate) contained in the Agreed Order of November 1, 2022.

AFFIRMED.

HUBER, P.J., concurs, and BLACKWELL, J., concurs specially.

BLACKWELL, J., concurring specially:

While I agree with the Court's opinion resolving this case, I write separately to offer my opinion as the merits of the dispute.

In my view, even assuming the inequity the Calverts allege between the two tranches were proven, the trial court correctly granted the Lees' motion to enforce. As the Lees correctly note, the parties' agreements do not address what is to happen if the special master's division of the property at issue—for any reason—

was unequal. The matter is simply not addressed in any of the relevant contracts. Nor does any agreement between the parties allow for any due diligence period or warranty of title of any kind. The Calverts effectively asked the court below to insert such provisions into the agreements after they discovered that tranche two—*the tranche the Calverts themselves selected*—was less valuable then all parties apparently believed at the time of execution. If the Calverts wanted such a guarantee they were required to have obtained it prior to entering into the agreements, not after. In this family matter, perhaps it is the morally right thing for the Lees to acquiesce and equalized the tranches. But the law does not require it.

Nevertheless, because I view the Court's opinion as having fully considered, and properly affirmed, each of the trial court's orders under review, I concur.

January 24, 2024