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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

LAWRENCE E. WOLF and
RUTH M. WOLF,

Plaintiffs/Appellees,

vs.

DUSTIN PETERSON and
ANDRA ERBAR,

Defendants/Appellants.

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Case No. 121,625

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE NATALIE MAI, DISTRICT JUDGE

AFFIRMED

T. Carter Steph
STEPH LAW FIRM
Oklahoma City, Oklahoma

For Plaintiffs/Appellees

Maria Tully Erbar
MARIA TULLY ERBAR, P.C.
Oklahoma City, Oklahoma

For Defendants/Appellants

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Defendants, Dustin Peterson and Andra Erbar (hereinafter, “defendants” or “sellers”), appeal the district court’s grant of summary judgment in favor of plaintiffs Lawrence and Ruth Wolf (hereinafter, “plaintiffs” or “buyers”). Upon review, we find that the district court properly granted summary judgment in favor of plaintiffs and thereby affirm.

BACKGROUND

On August 5, 2022, the defendants entered into a contract to sell a certain residential lot in Oklahoma City to the plaintiffs. The plaintiffs agreed to buy the property for \$319,000 and pay an earnest money deposit of \$3,200. The earnest money was deposited with a local title company, to be held and applied at closing.

The contract—the standard form contract provided by Oklahoma Real Estate Commission (OREC) (1-1-2022 version)—provided that the buyers had ten days from the time reference date—August 8, 2022—to inspect the property. The buyers performed their inspections and submitted a *Notice of Treatments, Repairs and Replacements* (“TRR”) to the sellers on August 15, 2022.¹ The TRR required the following: appliances to be removed, grounding of gas piping in the attic, reduction of purchase price to \$314,000 “in lieu of any other repairs,” modification of date of closing, and modification of the date of occupancy.

On August 16th, prior to the sellers having responded to the TRR, the buyers apparently got cold feet. They submitted, also via email, a *Notice of Cancellation and Release of Contract and Disbursement of Earnest Money*, all also on standard OREC forms. The email explicitly stated that the previously delivered TRR was revoked.

¹ In fact, they sent two TRRs. Both parties proceed as though the second TRR amended the first. For purposes of this appeal, we also make this presumption. All references herein are to the second TRR.

Nevertheless, three days later, the sellers signed and submitted a version of the buyers' TRR in which all but one term—that related to the gas piping—was struck through. The buyers added text stating, “Not TRR item,” next to all the struck-through terms. Additionally, they added another text box—inserted over and completely obscuring the space supplied for buyers to sign and accept sellers' modifications—that stated “TRR items not amended.”

The buyers never approved the changes the sellers made to the TRR and, again on August 24th, they resubmitted the cancellation and release to the defendants via email. The sellers never signed the cancellation or agreed to the return of the earnest money.

A month later, the buyers sued the sellers, seeking return of their earnest money. The sellers answered, generally denying all of plaintiffs' allegations and raising counterclaims for anticipatory repudiation, breach of contract, and tortious breach of contract.

The buyers filed a motion for summary judgment, alleging that the contract was properly cancelled or, alternatively, the parties did not enter into a written TRR agreement, resulting in the automatic cancellation of the contract and return of the earnest money. The court agreed on both points, finding that “the TRR was revoked by the email from the [buyer's] realtor to [sellers] with the Notice of Cancellation attached” and that “[e]ven if the TRR was not revoked there was no written agreement reach within the seven (7) day time period required in the Purchase Agreement because the [sellers] opted to make changes to the TRR that were not accepted by the [buyers].” Ultimately,

the court granted summary judgment in favor of the buyers, both on their claim for the earnest money and as to all sellers counterclaims. Sellers filed a motion to reconsider that was denied. Sellers appeal both orders.

STANDARD OF REVIEW

“Summary judgment is proper only when the pleadings, affidavits, depositions, admissions or other evidentiary materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Davis v. Leitner*, 1989 OK 146, ¶ 9, 782 P.2d 924, 926. Although a trial court considers factual matters when deciding whether summary judgment is appropriate, its ultimate decision is purely legal, “whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions.” *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. “On appellate review, all inferences and conclusions to be drawn from the underlying facts contained in the record should be viewed in the light most favorable to the party opposing the motion for summary judgment.” *Rose v. Sapulpa Rural Water Co.*, 1981 OK 85, ¶ 2, 631 P.2d 752, 754.

ANALYSIS

This appeal presents two distinct legal questions. First: were the buyers permitted to revoke their TRR and then cancel the contract? Second, even if the cancellation was ineffective, did the contract perish by its own terms for failure to agree to a TRR within seven days? Because resolution of the second question readily disposes of this appeal, we address that question first.

It is undisputed that the parties entered into a standard, OREC contract for the sale of residential real estate. The contract contains specific provisions regarding the procedures for inspections and the TRR. It reads in its relevant part:

Buyer or buyer's broker, if applicable, within 24 hours after expiration of the time period referenced in Paragraph 7A of the Contract, shall deliver to Seller, in care of the Seller's Broker, if applicable, a copy of all written reports obtained by Buyer, if any, pertaining to the Property and Buyer shall select one of the following:

- a. If, in the sole opinion of the Buyer, results of Investigations, Inspections, or Reviews are unsatisfactory, the Buyer may cancel the Contract by delivering written notice of cancellation to the Seller, in care of Seller's Broker, if applicable, and receive refund of Earnest Money.

OR

- b. Buyer, upon completion of all Investigations, Inspections, and Reviews, waives Buyer's right to cancel as provided in 7C2A above, by delivering to Seller, in care of Seller's Broker, if applicable, a written list on a Notice of Treatments, Repairs, and Replacements form (TRR form) of those items to be treated, repaired or replaced ... that are not in working order (defined as the system or component functions without defect for the primary purpose and manner for which it was installed. Defect means a condition, malfunction or problem, which is not decorative, that will have a materially adverse effect on the value of a system or component).
- i. Buyer and Seller shall have 7 days (7 days if blank) after the Seller's or Seller's Broker, if applicable, receipt of completed TRR form to negotiate the Treatment, Repair, or Replacement items. If a written agreement is reached, seller shall complete all agreed Treatments, Repairs, or Replacements prior to the closing date. ***If a written agreement is not reached within the time specified in this provision, the Contract shall terminate and the Earnest Money returned to the Buyer.***

Doc. 1, *Petition*, Exhibit A, pg. 3 (emphasis supplied).

The trial court held that “[e]ven if the TRR was not revoked there was no written agreement reached within the seven-day time period required in the Purchase Agreement because the Defendants opted to make changes to the TRR that were not accepted by the Plaintiffs.” We agree. Although the sellers claim that the version of the TRR they submitted back to the buyers was “not amended” because certain terms the buyers included were “not proper TRR terms” and therefore would not require subsequent buyer approval, we find that the parties failed to reach a written agreement as required by the contract. Although the contract does state what types of items are expected to be listed as TRR items, and it is clear that some of the items buyers listed on the TRR do not qualify, we find nothing in the contract prohibits buyers from putting “non-TRR” items on their TRR list, and nothing would prohibit sellers from agreeing to those items, should they so choose.² We hold that where a seller makes *any* revisions to a TRR, a buyer’s assent to those amendments must be obtained before the contract can move forward. Crossing any items off the list, even if they are believed by the seller to be “non-TRR” items, is undeniable evidence of a lack of agreement. Where no agreement is reached, “the Contract shall terminate and the Earnest Money returned to the Buyer.” The trial court’s judgment in favor of the plaintiffs was therefore correct.³

² Indeed, had the seller signed the buyers’ submitted TRR without amendment, we would be required to answer the first question.

³ The sellers also raises several allegations of error regarding the court’s denial of their anticipatory repudiation and tortious breach of contract counterclaims. However, we find that these arguments fail because the contract was automatically cancelled by its own terms when the parties failed to reach an agreement as to the TRR within the specified time. At any point during the TRR negotiation period, the sellers could have accepted the

AFFIRMED.

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

HIXON, J., concurring specially:

I concur with the Majority opinion but write specially to further address sellers' counterclaim for breach of contract based on anticipatory repudiation. I agree that we need not decide whether Plaintiffs could revoke the TRR and cancel the contract in this case. However, seller's argument is that the Notice of Cancellation was, in itself, a breach of the terms of the purchase agreement, allowing them to treat the contract as breached at that time. It is unnecessary for us to decide if the contract could be cancelled because sellers did not actually treat the contract as breached, but instead submitted a revised TRR for Plaintiffs' consideration. Their claim for breach of contract thus held no merit under the undisputed facts of this case.

"[W]here a party to a bilateral contract repudiates the contractual obligation to perform a required act in the future, the other party to the contract may treat the contract as then breached and immediately pursue a remedy for breach of the contract." *Bourke v. W. Bus. Prod., Inc.*, 2005 OK CIV APP 48, ¶ 12, 120 P.3d 876. However, if one party has repudiated the contract, it "must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue[s] to urge or demand a compliance with

buyers' TRR as written or made an effort to negotiate an agreement in good faith. Instead, the sellers submitted a unilaterally altered TRR and acted as if they had reached an agreement with the buyers. All the sellers' arguments fail on these undisputed facts.

the contract it is plain that he does not understand it to be at an end.” *Oklahoma Tax Commission v. Fortinberry Co.*, 1949 OK 75, ¶ 23, 207 P.2d 301. “Before one may rely upon a repudiation of an executory contract he must accept it as such and treat the contract as at an end.” *U.S. Potash Co. v. McNutt*, 70 F.2d 126, 130 (10th Cir. 1934). “If he fails to do that, ‘he keeps the contract alive for the benefit of the other party as well as his own.’” *Id.* (quoting *Roehm v. Horst*, 178 U.S. 1 (1900)).

After submission of Notice of Cancellation, sellers did not immediately treat the contract as breached and pursue remedy. In fact, they took no legal action until Plaintiffs sued to recover their earnest money. Rather, sellers sought Plaintiffs’ agreement to a revised TRR, which plainly indicated that sellers continued to urge performance under the purchase agreement. Thereafter, as noted in the Majority opinion, the parties failed to reach an agreement under the TRR and the contract terminated. The trial court did not err in granting judgment to Plaintiffs on this claim.

May 28, 2024