Cite as 2012 Ark. App. 5

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-469

KENNETH BUTLER AND TINA BUTLER APPELLANTS	**Opinion Delivered** January 4, 2012
V.	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. CV-2009-1027-5]
JACQUELINE WILLIAMS AND MARCIE JOHNSON APPELLEES	HONORABLE JODI RAINES DENNIS, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellants Kenneth and Tina Butler filed this action against appellees Jacqueline Williams and Marcie Johnson, Williams's sister and asserted agent in a transaction involving a time-share in Branson, Missouri. Appellants sought to recover $3000 paid to appellee Williams, contending that it was earnest money that should have been returned to them after they rejected Williams's offer to sell them her interest in the time-share for $6000. Appellees contended that the parties entered into a binding contract for the sale of the time-share and counterclaimed for specific performance of the contract, including payment of an additional $3000 assertedly owed by appellants. The trial court found that the parties contracted for appellants to purchase the time-share, paying half of the purchase price immediately with an agreement to pay the remaining $3000 at a later date, and that appellee Williams was entitled to specific performance of the contract. This appeal followed.

For reversal, appellants argue that the trial court erred in finding that they contracted to purchase the property, that any such oral contract would in any event be unenforceable under the statute of frauds, and that the trial court erred in ordering them to specifically perform the agreement by purchasing the property. We affirm.

We first consider whether the trial court erred in finding that the parties had entered into a contract. The question of whether a contract has been formed must be determined from a consideration of the parties' intention as expressed or manifested by their actions. *Dziga v. Muradian Bus. Brokers, Inc.*, 28 Ark. App. 241, 773 S.W.2d 106 (1989). Here, there is no dispute as to the subject matter or price; the only question is whether the parties intended to enter into a binding contract immediately or whether acceptance by appellants was conditioned upon a satisfactory inspection of the property. The record shows that appellee Williams executed a quitclaim deed conveying the property to appellants on June 29, 2009. Appellants paid one-half of the purchase price on July 9, 2009, and spent several days at the time-share property beginning July 11, 2009. While in Branson, appellants purchased a different time-share from an unrelated party and, on their return, demanded that appellees return their $3000 payment, which appellants characterized as a deposit. The trial judge, who had the advantage of observing the testimony, found that the parties' intent was to create a binding contact before appellants went to Branson. The question on appeal is whether the trial court clearly erred in so finding. *Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003). On this record, giving due deference to the trial court's superior opportunity to assess

credibility, we cannot say that the trial court clearly erred in finding that the parties intended to create a binding contract at the time of the $3000 payment.

Next, appellants contend that any contract entered into was unenforceable under the statute of frauds. Arkansas Code Annotated section 4-59-101(a)(4) (Repl. 2001) requires that a contract for the sale of any interest concerning land must be in writing.[1] However, part performance by payment of a portion of the purchase money and taking possession of the premises is sufficient to take an oral contract for the sale of an interest in land out of the statute of frauds. *McKim v. McLiney*, 250 Ark. 423, 465 S.W.2d 911 (1971). Here, there is no dispute that appellants paid appellees $3000, or that appellants subsequently traveled to Branson and took possession of the property by occupying the time-share property for a number of days. We hold that these acts were sufficient to take the oral contract out of the statute of frauds. *See Johnston v. Curtis*, 70 Ark. App. 195, 16 S.W.3d 283 (2000).

Finally, appellants argue that the trial court erred in ordering specific performance of the contract. We do not agree. Where land or any estate or interest in land is the subject of an agreement, the right to specific performance is absolute. *Dickinson v. McKenzie*, 197 Ark. 746, 126 S.W.2d 95 (1939). The supreme court has repeatedly held that specific performance is an appropriate remedy for vendors of real estate, as well as for purchasers. *Bharodia v. Pledger*, 340 Ark. 547, 11 S.W.3d 540 (2000).

---

[1]Pursuant to Ark. Code Ann. § 18-14-104(a) (Repl. 2003), a time-share estate is an estate in real property and has the character and incidents of an estate in fee simple at common law.

Affirmed.

WYNNE and MARTIN, JJ., agree.

Hewett Law Firm, by: *Marceliers Hewett*, for appellants.

Neely & Guynn Law Firm, by: *Alex Guynn*, for appellees.