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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-21-151

Opinion Delivered April 6, 2022

COOPER REALTY INVESTMENTS, INC.
APPELLANT

V.

CITY OF BENTONVILLE, ARKANSAS
APPELLEE

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT
[NO. 04CV-19-1031]

HONORABLE JOHN R. SCOTT, JUDGE

REVERSED AND REMANDED

LARRY D. VAUGHT, Judge

Cooper Realty, Inc. ("Cooper"), appeals the Benton County Circuit Court's order granting summary judgment[1] to the City of Bentonville ("the City") on its claim for declaratory judgment. Specifically, the court entered a declaratory judgment in favor of the City stating that any prior agreements between the parties regarding the transfer of an eighty-nine-acre tract of land surrounding and including Lake Bella Vista and the Lake Bella Vista Dam merged into a subsequently executed special warranty deed, that the special warranty deed establishes all of the City's contractual requirements as to the property and the dam, and that the special warranty deed does not require the City to rebuild the damaged dam or limit the City from

[1]There were two motions for partial summary judgment, each of which acted as a motion for summary judgment on all claims against a specific party. At the hearing, the City of Bentonville moved to have the court hear the two motions together and rule on them as a single motion, which it did. Therefore, the court's order granting both motions was a final, appealable order.

completely removing it. Because the plain language of the parties' agreement regarding the City's ongoing responsibility to maintain the dam demonstrates that these provisions were not intended to merge into the subsequently executed deed, we reverse and remand for further proceedings in accordance with this opinion.

The lake and dam were constructed between 1915 and 1918. In February 2000, Cooper transferred ownership of the property to Bentonville/Bella Vista Trailblazers Association ("Trailblazers") as a gift for the benefit of the general public. Trailblazers made the property a park suitable for passive recreational use. On July 1, 2005, the mayor, on behalf of the City, and Trailblazers executed a conveyance agreement that transferred the property and the dam to the City subject to various conditions and terms in the agreement. Of particular importance to this case, the parties' conveyance agreement states that the City "shall maintain the dam and in the event of damage or destruction replace or repair the same." This requirement to maintain, replace, or repair the dam is contained in section 8 of the conveyance agreement; another part of section 8 states: "It is specifically agreed that the provisions of this Paragraph 8 shall survive closing." Similarly, sections 5, 6, 7, and 9 of the conveyance agreement contain clauses expressly stating that they also survive closing.

Cooper and Trailblazers then executed a correction limited warranty deed on August 3, 2006, and on November 21, 2006, Trailblazers executed a special warranty deed that gifted the property to the City. The special warranty deed states that the "use of the Property is further restricted and burdened and shall be used exclusively for public passive recreational activities," and if the property were ever used for any other purpose, then ownership of the property reverts to Trailblazers.

The dam was damaged by heavy rains between 2008 and 2011. The City applied for and received federal and state funding to replace the dam. In 2011, the City commissioned an environmental assessment to analyze the environmental and social impacts of "improvements to the Lake Bella Vista Dam." The City also represented the terms of the conveyance agreement as binding in its communications to other government agencies and the public.

After the City learned that costs to replace the Dam would be substantial, City personnel questioned whether the conveyance agreement was binding. In 2019, the City filed suit seeking a declaratory judgment that its obligations were defined only by the special warranty deed. The City argued that because the conveyance agreement merged into the special warranty deed, the City was not bound to maintain, repair, or replace the dam. On the other hand, Cooper argued that the conveyance agreement contained several provisions that were expressly agreed to survive closing.

The circuit court granted summary judgment to the City, determining that the conveyance agreement had merged into the special warranty deed, and as a result, only the provisions expressly contained in the deed could be enforced. Accordingly, the circuit court found that the special warranty deed does not expressly require the City to rebuild or repair the damaged dam and also that it does not limit the City from removing the damaged dam. The circuit court denied Cooper's motion for summary judgment and granted summary judgment in favor of the City. Cooper filed a timely notice of appeal.

An appellate court evaluates the appeal of a grant of summary judgment in light of the evidence presented, and the burden rests on the moving party, which was the City in this case.

Bishop v. City of Fayetteville, 81 Ark. App. 1, 7, 97 S.W.3d 913, 918 (2003). Where summary judgment was granted on a question of law, this court reviews all the pleadings and evidence de novo and gives no deference to the circuit court's ruling. *Shriners Hosps. for Child. v. First United Methodist Church of Ozark*, 2018 Ark. App. 216, at 5, 547 S.W.3d 716, 719.

It is a general principle of law that an agreement made for the sale of lands merges into a deed subsequently executed. *Croswhite v. Rystrom*, 256 Ark. 156, 162, 506 S.W.2d 830, 833 (1974). The Arkansas Supreme Court has referred to the doctrine of merger as "hornbook" law. *Id.*, 506 S.W.2d at 833. The question before us is whether Arkansas law contains an exception to the merger rule for contractual provisions or agreements that are expressly intended to survive closing and not merge into the deed.

Arkansas law recognizes exceptions to the doctrine of merger in cases involving mutual mistake of fact, misrepresentation, or the perpetration of a fraud. *Id.* Regarding these exceptions, *Croswhite* notes that "[the] presumption is that all prior negotiations merge into the instrument of conveyance," and the burden is placed on the grantee to overcome the presumption that prior contract provisions merge into a subsequently executed deed. *Id.*, 506 S.W.2d at 833.

Cooper argues that in addition to the exceptions listed above, Arkansas law also recognizes an exception for contract provisions that were intended to survive closing. Stated another way, Cooper contends that the merger doctrine does not trump the parties' express intent. Cooper relies on *Roberts v. Roberts*, 42 Ark. App. 180, 182, 856 S.W.2d 28, 29–30 (1993), in which we said that "the doctrine of merger applies in the absence of fraud or mistake, and in the absence of contractual provisions or agreements which are not intended to be merged

in the deed." *Id.*, 856 S.W.2d at 29–30. Prior to *Roberts*, the Arkansas Supreme Court set forth the rule that merger occurs only "in the absence of contractual provisions or agreements which are not intended to be merged in the deed." *Duncan v. McAdams*, 222 Ark. 143, 146, 257 S.W.2d 568, 569 (1953) (quoting 55 Am. Jur. *Vendors and Purchasers* § 327, at 756 (1943)).

The City attempts to distinguish *Roberts*, arguing that it is not controlling here because it was a divorce case involving the merger of a property-settlement agreement into a later deed. The City also argues that *Roberts* is inapplicable here because the "not intended to merge" exception has not been discussed in subsequent cases applying the other exceptions to the merger rule. Neither of these arguments allows us to ignore the plain language of *Duncan* and *Roberts*, which both clearly state that merger does not occur where the parties intended the contract provisions to survive after closing. *Duncan* and *Roberts* have not been overturned or superseded by statute.

In *Roberts*, we held that the couple's property-settlement agreement, which was later incorporated into their divorce decree, did not merge into the deed that they subsequently executed in order to carry out the terms of their agreement. The *Roberts* court specifically relied on the "not intended to merge" exception. While *Duncan* was decided on other grounds, the Arkansas Supreme Court expressly included language acknowledging the intent exception to the merger rule.

Other jurisdictions have recognized that "[w]hether or not the doctrine that a deed between the parties to an antecedent contract to convey land, imposing obligations on the vendor, will operate to supersede such antecedent contract, is sometimes controlled by whether or not the parties intended such merger to occur." Charles S. Parnell, Annotation,

Deed as Superseding or Merging Provisions of Antecedent Contract Imposing Obligations Upon the Vendor, 38 A.L.R.2d 1310 § 4, Westlaw (database updated April 2022). Moreover, 38 A.L.R.2d 1310 makes clear that in an agreement for the sale of property that includes obligations of ongoing maintenance of certain features of the property, the maintenance provisions will survive merger. For example, in *Shelby v. Chicago & Eastern Illinois Railroad Co.*, 32 N.E. 438 (Ill. 1892), the Supreme Court of Illinois held that where one consideration and inducement offered by the seller for the purchase of the land in question was the maintenance of dams in a river forming one boundary of the land, the agreement of the grantor to maintain the dams, although not incorporated in the deed, is not merged therein and remained enforceable.

Therefore, we must reverse the court's grant of summary judgment because it was based on the erroneous finding that the provisions of the conveyance agreement merged into the subsequent deed. As we have discussed above, Arkansas law recognizes the intent exception to the merger rule, and the plain language of the agreement in this case articulates an intent that the provisions regarding upkeep of the dam "shall survive closing." Moreover, the special warranty deed contains a reversion clause stating that if the property is not used for the intended purpose of public recreation, it reverts to Trailblazers, indicating that the parties intended to create ongoing obligations as to how the property could be used and managed. In addition to the intention stated in the conveyance agreement, the record reflects that the City actually performed the obligations in the conveyance agreement that were to survive closing by applying for and receiving federal and state funding to replace the dam; commissioning an environmental assessment to analyze the environmental and social impacts of "improvements to the Lake Bella Vista Dam"; and by representing the terms of the

conveyance agreement as binding in its communications to other government agencies and the public, among other things. We therefore hold that the exception to the general merger rule discussed in both *Duncan* and *Roberts* for cases involving contractual provisions or agreements that are not intended to be merged into the deed applies here.

We cannot, however, provide Cooper the full relief it has requested. Cooper asks us to reverse the grant of summary judgment and instruct the circuit court to instead enter summary judgment in its favor. However, the application of the merger rule is only one aspect of determining whether the conveyance agreement is a valid and enforceable contract.[2] In its motions for partial summary judgment, the City stated the following in a footnote:

> There are questions about whether the conveyance agreement is a valid, enforceable contract (definiteness, acceptance, meeting of the minds). While Plaintiff does not concede it generally – for purposes of this motion, Plaintiff concedes that the Conveyance agreement is a valid contract.

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[2]We note that the merger rule, while applicable specifically to contracts for the sale of property, is still an issue of contract law, not property law. *See, e.g.*, 14 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 40:41 (4th ed. 1990). We hope that this may alleviate any concern that by recognizing the intent exception to the merger rule, our decision could result in the creation of unrecorded encumbrances on property. The enforceability of a contract provision like the one at issue in this case is limited by the well-established elements of contract law. A party seeking to enforce such an agreement would still have to satisfy other general requirements, including privity of contract. While there is no Arkansas case on point, other states have explicitly held that "[t]he doctrine of merger [applies] only in situations where the parties to the land contract and the parties to the deed were the same. It does not apply in regard to persons who have no privity of contract." *City of Papillion v. Schram*, 281 N.W.2d 528, 531 (Neb. 1979). Similarly, the Oregon Court of Appeals linked the merger doctrine and the privity requirement in *Manusos v. Skeels*, 243 P.3d 491 (Or. Ct. App. 2010). Moreover, whether the conveyance agreement would be enforceable against any future bona fide purchasers is not before us. We hold only that the court erred by granting summary judgment because the provisions in the conveyance agreement regarding maintenance of the dam did not merge into the deed. The conveyance agreement, therefore, may be enforceable between the contracting parties, depending on the circuit court's analysis on remand regarding other challenges that the City has reserved regarding the agreement's validity and enforceability.

Because there are still disputed questions of fact regarding the validity and enforceability of the contract, we reverse and remand with instructions for the circuit court to proceed in a manner consistent with this opinion.

Reversed and remanded.

GRUBER and HIXSON, JJ., agree.

Matthews, Campbell, Rhoads, McClure & Thompson, P.A., by: *David R. Matthews* and *Sarah L. Waddoups*, for appellant.

Clark & Spence, by: *George R. Spence*, for appellee.