STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Samuel P. Sommerville and
Deborah J. Corlis, Defendants
Below, Petitioners

FILED
February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-0545 (Greenbrier County 10-C-122)

Robert B. Rausenberger and
Henriette J. Rausenberger,
Plaintiffs Below, Respondents

MEMORANDUM DECISION

Petitioners Samuel P. Sommerville and Deborah J. Corlis appeal the circuit court's order granting summary judgment to the respondents. The appeal was timely perfected by counsel, with petitioners' appendix accompanying the petition. The respondents have filed a response brief, to which petitioners have filed a reply.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On June 8, 2004, respondents sold Ridges Lot No. 66 to petitioners for $650,000.00, which amount was fully paid. Almost one year later, on May 11, 2005, respondents sold Lot No. 62 to petitioners for $650,000.00. At purchase, petitioners paid $325,000.00 and respondents had petitioners execute a promissory note and guaranty agreement. On June 12, 2007, the parties entered into a second addendum to the Real Estate Purchase and Sale Agreement ("Agreement"), whereby the petitioners would have until June 12, 2008, to pay the $325,000.00 balance as well as annual interest of 8.25%. Prior to the execution of the second addendum to the Agreement, the respondents exchanged Lots 59, 61, 64, and 67 with the Greenbrier Sporting Club for Lots 104 and 107 on October 26, 2006. Thereafter, petitioners allege that the Sporting Club offered Lots 59, 61, 64, and 67 for sale "in an amount substantially less than what was sought by [respondents] for Lots 62 and 66."

Per petitioners' own admissions below, they made no interest payments after April 2010, despite failing to satisfy the Agreement. Respondents eventually filed a civil action below based upon the petitioners' breach of the second addendum to the Agreement. In response to the respondents' motion for summary judgment, the petitioners argued that the same should be denied based on equitable estoppel and the issue of good faith and fair dealing as required by West Virginia Code § 46-1-304. The circuit court noted that respondents "made broad allegations of [respondents'] trading lots to the Greenbrier Sporting Club at reduced prices some 1 ½ years after the purchase of the subject property by the [petitioners] in this matter." The circuit court found neither allegation to be substantiated by the evidence and granted summary judgment in favor of respondents.

On appeal, petitioners argue that the circuit court erred in granting summary judgment below without consideration of defenses to a negotiable promissory note, as provided by the Uniform Commercial Code ("UCC"). Petitioners argue that, as adopted in West Virginia, the UCC requires parties to an agreement to respect the duty of good faith and fair dealing, and that West Virginia Code § 46-1-103 requires the circuit court to take account of equities in a particular case. Per their argument, the May 11, 2005, promissory note in the original sum of $325,000.00 was signed by the petitioners as accommodation makers. Therefore, West Virginia law recognizes that impairment of collateral by the person entitled to enforce an instrument may give rise to a discharge to the extent of the impairment. Petitioners argue that the respondents impaired their collateral when they exchanged certain lots with the Greenbrier Sporting Club at reduced prices, thereby devaluing their collateral.

In response, the respondents argue that there has been no offer of evidence as to any connection between lot prices and the respondents having traded lots. Respondents argue that after the October 26, 2006, trading of the lots, they no longer had control or input into the pricing of those lots. Additionally, the respondents contend that petitioners have taken actions contrary to those who claim injury, having requested to change the due date of the note on June 12, 2007, some twenty months after the petitioners traded lots. As inducement to make this change, petitioners agreed to add interest to the note at 8.25%. At no time prior to entering into this new agreement did the petitioners claim injury to collateral, and they continued paying interest through March 2010. Most importantly, however, respondents argue that the lack of a verified complaint and/or affidavits causes petitioners' appeal to fail, as this Court has held that written and oral representations of counsel are insufficient to defeat summary judgment. *Parkette, Inc. v. Micro Outdoors Advertising, LLC*, 217 W.Va. 151, 156, 617 S.E.2d 501, 506 (2005). Upon review, we find petitioner's arguments unpersuasive, and decline to disturb the circuit court's ruling below.

"'A circuit court's entry of summary judgment is reviewed *de novo*.' Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)." Syl. Pt. 1, *Parkette, Inc. v. Micro Outdoors Advertising, LLC*, 217 W.Va. 151, 617 S.E.2d 501 (2005). It is true that

West Virginia Code § 46-1-304 states that "[e]very contract or duty within this chapter imposes an obligation of good faith in its performance and enforcement." However, upon review of the record, we find that the petitioners failed to provide any substantiated claims of bad faith against the respondents. As succinctly noted by the circuit court in its order, "[t]here was no evidence presented after June 12, 2007, by the [petitioners] that the [respondents] did anything to impair the [petitioners'] collateral after said date." As such, this Court finds that the granting of summary judgment was proper. As noted above, this Court has previously held that "'[s]ummary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment. [internal citation omitted]' Syl. Pt. 6, *McCullough Oil, Inc. v. Rezek*, 176 W.Va. 638, 346 S.E.2d 788 (1986)." Syl. Pt. 5, *City of Morgantown v. W. Va. Univ. Med. Corp.*, 193 W.Va. 614, 457 S.E.2d 637 (1995).

For the foregoing reasons, we find no error in the decision of the circuit court and the order granting summary judgment in favor of respondents is hereby affirmed.

Affirmed.

ISSUED: February 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh