

2012 WL 3136530 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

Thomas L. MCGINNITY and Claudia D. McGinnity, husband and wife, Plaintiffs/Appellees,

v.

Peggy J. KIRK, a/k/a Peggy Jean Kirk, a/k/a Peggy Kirk, James
Merle Kirk, and Mary Komonce, Defendants/Appellants.

No. 110212.

June 11, 2012.

Appeal from the District Court of Osage County Honorable Judge David B. Gambill

Appellants' Brief-In-Chief

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*1 Come now the Appellants, Peggy J. Kirk, a/k/a Peggy Jean Kirk, a/k/a Peggy Kirk and James Merle Kirk, and for their Brief in Chief in support of their Appeal, herein allege and state:

I. INTRODUCTION

This matter is appealed from the Journal Entry of Judgment filed November 18, 2011 in which the district court found Appellants breached the terms of the Contract for Deed and granted judgment for Appellees. The Court also found for Appellees on Appellants' counterclaims and ordered the title be quieted in and to Appellants' claims.

Appellants Peggy Kirk and James Kirk fell in love with a 2-story house built in 1883, which was owned by Buel Neece. It sat off the road on about 1/2 an acre within Neece's 145 acre tract. The Appellants purchased the home from Mr. Neece through a Contract for Deed in October, 1987. See Defendants' Tr. Exhibit 1. The home had not been lived in for approximately seven (7) years prior to the Appellants moving in. The monthly payment on the home was \$400.00, which the Appellants paid diligently, and there were no problems during the eleven (11) year relationship between Appellants and Neece. The Appellants made numerous improvements on the home, making it liveable and making it their home. Tr. Transcr. 181-183:24, 184-186:10 (Oct. 5-6, 2011). Then, in 1998, the Appellees herein bought 145 acres from Mr. Neece and became assignees of said Contract for Deed. Tr. Transcript 93:9-17 (Oct. 5-6, 2011). Immediately problems began to occur between the parties. Appellees offered Appellants \$15,000.00 to walk away from the Contract. Tr. Transcr. 121:18-24 (Oct. 5-6, 2011). Appellants refused as this was their home, and they had put hard work and money into making it their own. In 1999, the Appellees built a \$450,000.00 home in close *2 proximity to Appellants' home. They harassed Appellants by doing such things as shining bright lights, shooting off guns, and pounding on the fence. A mutual restraining order was put into place by the court, with the Appellants being granted an easement as to the road and water.¹

On September 24, 2004, Appellees filed Osage County District Court Case No. SC-2004-280 against Appellants for Forcible Entry and Detainer to evict them from their home. Also on September 24, 2004, Appellees filed this foreclosure suit against Appellants, alleging they had breached five provisions of the Contract for Deed, namely, 1) failing to keep property insured, 2) conveying interest in the property to Mary Komonce, Appellant Peggy Kirk's elderly mother, without written consent, 3) committing waste, 4) failing to keep all buildings and improvements in good repair, and 5) failing to begin immediate restoration, repair and improvements of the property. Most importantly, Appellees conceded in their Petition that Appellants were current on all payments due under the Contract for Deed. They also brought causes of action for forcible entry and detainer, specific performance, possession of property, quiet title, and unlawful lot split (19 O.S. §866.13), but dismissed those claims before trial. See R. at 21-47,205-206. Appellants filed a counterclaim for Breach of Contract and Abuse of Process.

A default judgment was rendered against Appellants. Appellee Claudia McGinnity bought the Appellants' home at sheriff sale and remains in possession today. The default judgment was overturned in Appeal Case No. 102,126, on December 22, 2006 and the case was remanded. The Order appealed herein is from that remanded proceeding.

As this brief will show, Appellants maintained insurance on the property at all times from 1987 until June 21, 2005. The Quitclaim Deed executed July 14, 1999, which added Appellant *3 Peggy Kirk's mother, Mary Komance, as a joint tenant in the equitable ownership interest of the property, did not assign or convey ownership from Appellants. Appellees' claim as to the quitclaim deed issue is time barred by the 5 year statute of limitations. Contrary to Appellees' claims regarding waste and failing to make improvements, Appellants did restore such things as plumbing, the septic system, certain floors, and windows on the 100 year old home. Regardless, and most importantly, waste is not a legal basis for foreclosure as the Appellees would have received the full purchase price and therefore incur no damages and any waste by Appellants was only to their detriment.

Appellants paid their monthly payments under the Contract for Deed for their home until they were court ordered to vacate their home by the end of June, 2005. The Appellees admit that Appellants were current on all financial payments due under the Contract for Deed at the time of the filing of their lawsuit to recover possession of the real property in question. Appellee Thomas McGinnity admitted in the non-jury trial which was held October 6th and 7th, 2011, Appellants were current on all payments after Appellees' suit was filed until Appellants were court ordered out of their home May 31, 2005. Tr. Transcr. 105:3-11 (Oct. 5-6, 2011).

II. STANDARD OF REVIEW

In cases of equitable cognizance, an appellate court is not bound by the reasoning of the trial court or by its findings, but will examine the whole record, consider and weigh the evidence, and if the law and facts warrant, will affirm the judgment if the trial court reached the correct ultimate solution. A judgment will be sustained on appeal unless it is found to be against the clear weight of the evidence or contrary to law or established principles of equity. *Harrell v. Samson Resources Company*, 980 P.2d 99 (1998 OK 69). A clear examination of the whole record reveals there is no basis for a finding of a judgment for the Appellee quieting title.

*4 As a general matter, an **abuse** of discretion review standard includes Appellate examination of both fact and law issues. (*Christian vs. Grey*, 65 P.3d 591, 608) and **abuse** of discretion occurs when the ruling being reviewed is based upon an erroneous legal conclusion or there is no basis in the evidence for the decision. *Fent vs Oklahoma Natural Gas*, 27 P.3d 477, 481; *Abel vs. Tisdale*, 619 P.2d 608, 612. Reversal for **abuse** of discretion is proper if a trial judge makes a clearly erroneous conclusion and judgment against reason and evidence.

Further, when an assigned error is one of law, a de novo review standard applies, *Christian, supra*, and a non-deferential, plenary and independent review of the trial court's ruling is required. *Samman vs. Multiple Injury Trust Fund*, 33P.3d 302, 305, and Note 5.

III. ARGUMENTS AND AUTHORITIES

PROPOSITION NO. I: The Trial Court erred in finding that the Appellants breached the terms of the Contract for Deed and that said breach was material.

The trial court found the Appellants had breached the terms of the Contract for Deed based upon Appellees allegations that Appellants had breached 5 provisions on the deed, namely, 1) failing to keep property insured, 2) conveying interest in the property to Mary Komonce, Appellant Peggy Kirk's **elderly** mother, without written consent, 3) committing waste, 4) failing to keep all buildings and improvements in good repair, and 5) failing to begin immediate restoration, repair and improvements of the property. Although Appellants maintain that they did not breach the five provisions, even if these breaches did occur, none justify the cancellation of the contract as Appellees would have received all the consideration and benefits for which was bargained for in the Contract for Deed. Therefore, Appellees have no damages because the Appellants would have become the owners of the property.

***5 A. Waste/Repair or Failure to Repair or Maintain Property is not a basis for Foreclosure of a Contract for Deed.**

Of the five provisions Appellees claim Appellants breached in the Contract for Deed, three of them include waste upon the property, specifically; committing waste, failing to keep all buildings and improvements in good repair, and failing to begin immediate restoration, repair and improvements of the property. The Trial Court erred in its finding that the Appellants breached the terms of the Contract for Deed based upon these allegations.

The Supreme Court of Oklahoma found in *Phillips v. Hill*, 1976 OK 108,555 P.2d 1043, that waste is not a basis for foreclosure of an interest in real property where the party allegedly committing waste was to be the owners of the property. At the district court

trial, Appellees stipulated they were not seeking money damages for waste, but were alleging waste as a basis for foreclosure. See Stipulation, R. at 221-223. There is no dispute and Appellees do not allege that Appellants were not current on their payments and, in fact, they paid the monthly payments, even after suit was filed against them for foreclosure and continued to make their payments until they were evicted in June, 2005, even though, at some point, Appellees began rejecting their payments. Tr. Transcr. 95:8-9 (Oct. 5-6,2011). (After this suit was filed, appellants made 10 payments, five were accepted, five were rejected). In fact, Appellants made sure the homeowner's insurance was paid for 17 years, that the taxes were paid for 17 years, and that the payments were made on the home for 17 years, upwards of \$80,000.00 in payments.

Beside the fact that during in the approximately 17 years the Appellants occupied their home, they did repairs to their home, including plumbing, septic system, certain floors, and windows, and *6 that Appellees did not become assignees of the Contract for Deed until 1998, and were unaware of the condition of the house before Appellants took possession of the home, or the improvements they made during the eleven years before Appellees became assignees, failing to restore and occupy a dwelling on the property was rejected as a grounds for foreclosure because the sellers cannot sustain any damage when they are paid in full.

In *Phillips*, the Oklahoma Supreme Court held as a matter of law, that waste cannot be a basis for forfeiture in a lease which contained an option to purchase and that the alleged breach for committing waste could not cancel defendant's rights to exercise its option to purchase the real property. The Court further held that it was improper for plaintiffs to be granted immediate possession of the property under the terms of the lease and thereby defeat plaintiffs right or option to purchase the real property. In determining that waste cannot be the basis for foreclosure of a contract or for defeating or forfeiting a purchase, the court held there was a substantial distinction between (a) a rental agreement and (b) a rental agreement that contains an option to purchase. The latter reflects that the lessee will become the owner of the property. In a standard rental agreement, the landlord/owner will get his/her property back and therefore is entitled to have his property returned in the same basic condition it was. In a purchase option situation, the owner will receive the entire purchase price of the property under the contract so "will sustain no property damages because defendant will become the owner of the property." *Id.*

The Supreme Court held in *Phillips* that,

"The contract in the case at bar gave a right of re-entry to plaintiffs upon the occurrence of either of two classes of circumstances, but contained no specific language relating to cancellation of the lease or forfeiture of the option to purchase. The first grounds for re-entry gave plaintiffs the right of re-entry in the event defendant committed or permitted waste resulting in damage to the leasehold estate.

*7 We have already shown that plaintiffs will sustain no property damage because defendant will become the owner of the property....plaintiffs have not and cannot sustain any damage resulting therefrom. Also, even if defendant, as alleged, failed to restore and occupy the dwelling situated on the property, although said dwelling was best suited for such purpose, using it instead to store wet oats, plaintiffs have not and cannot sustain any damage as a result thereof.

The other grounds for re-entry gave plaintiffs the right of re-entry in case of any default in the payment of rent as required by the contract. There is no evidence defendant was ever delinquent in the payment of rent or that such payments were untimely made. Defendant tendered all unaccrued rentals and the purchase price of the property. Plaintiffs will receive all the consideration and benefits for which they bargained. There is simply no breach of any covenant which would justify cancellation of the lease and forfeiture of the option to purchase."

As stated above, there is no dispute between the parties that Appellants were current on their payments when this suit was filed against them. They attempted to continue making their payments throughout litigation, and same were eventually rejected by the Appellees. If Appellants were allowed to continue making their payments, their home would have been paid off in 2008.

The *Phillips* case involved a lease with an option to purchase. The case at hand is a Contract for Deed, which, under Oklahoma statutes, shall be treated as a mortgage, which further solidifies Appellants' position that waste is not a legal basis for foreclosure.

B. Appellants did not fail to maintain insurance coverage.

Appellees argue Appellants breached the terms of the contract for deed because they failed to maintain homeowners insurance coverage on the property. This is completely false. Appellants maintained insurance coverage on the home with the same insurance carrier from 1987 until June 21, 2005. See Def' s Trial Exhibit 56.

Bobby Johns, insurance agent with Oklahoma Farm Bureau Mutual Insurance Company testified that Appellants maintained insurance coverage on the property with them from inception of *8 the Contract for Deed through June 21, 2005. ² Tr. Transcr. 51:15-18 (Oct. 5-6, 2011). Mr. Johns testified the amazing reasons for the issuance of non-renewal was that the trees and grass were overgrown, the fence was in disrepair, and there were cars blocking the drive. Tr. Transcr. 43: 6-13 (Oct. 5-6, 2011).

Appellants, the policy holders, were never made aware of these issues, nor were they made aware that if those issues were resolved, they could be reinsured. It is important to note the Appellees insure their \$450,000.00 home with Mr. Johns, through Oklahoma Farm Bureau Mutual Insurance Company. The Appellees were informed in advance of the nonrenewal, and in September, 2004, Appellees were notified by Mr. Johns that the policy could be renewed by resolving these issues. Before completing their research as to new insurance, Appellees were ordered to leave their home May 31, 2005. Appellee admitted the property was insured when he filed the foreclosure suit. Tr. Transcr. 103:15-25, 104:1-3 (Oct. 5-6, 2011). Either way, the evidence shows that Appellants maintained homeowner's insurance on the property.

C. Appellants' conveyance to Mary Komonce.

On July 14, 1999, a Quitclaim Deed was executed to include Mary Komonce as a joint tenant along with Appellants. Ms. Komonce is the **elderly** mother of Appellant Peggy Kirk. See Def's Trial Exhibit 12. Appellants provide care to Ms. Komonce in their home. The intended purpose of the deed was to include her as a joint tenant in the equitable ownership interest, so that she would have a home if something happened to the Appellants. This Quitclaim Deed did not assign, convey or impact the Appellants' obligations under the Contract for Deed in any way. Appellants did not assign *9 or convey ownership in the property. The intended purpose for the Quitclaim Deed was so that, if Appellant passed, her mother would have a home. Tr. Transcr. 66:21-25, 67:1-20 (Oct. 5-6, 2011).

Appellees filed their suit against the Appellants on September 24, 2004, claiming, among other things, that Appellants executed this deed without their express consent, thereby breaching the Contract for Deed. As mentioned above, the Quitclaim Deed was executed on July 14, 1999, more than five (5) years before the foreclosure suit was filed. This claim against the Appellants is barred by the 5 year statute of limitations. [12 O.S. §95\(1\); *Abboud v. Abboud*, 2000 OK CIV APP 116, 14 P.3d 569, 572.](#) In *Abboud*, the court stated that the contract for deed was a mortgage and a breach of that agreement carries with it a statute of limitations of 5 years.

PROPOSITION NO. II: The Trial Court erred in quieting the title in and to Appellees against any claim of the Appellants.

The trial court found that Appellants breached the Contract for Deed, therefore ordered the title to the property in question quieted in and to Appellees. The trial court erred in that the provisions of the Contract for Deed Appellees utilized to claim Appellants had breach the contract are void under Oklahoma law.

[Oklahoma Statute Title 16 Section 11A](#) reads,

“All contracts for deed for purchase and sale of real property made for the purpose or with the intention of receiving the payment of money and made for the purpose of establishing an immediate and continuing right

of possession of the described real property, whether such instruments be from the debtor or the creditor or from the debtor to some third person in trust for the creditor, **shall to that extent be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.** No foreclosure shall be initiated, nor shall the court allow such proceedings, unless the documents have been filed of record in the county clerk's office, and mortgage tax paid thereon, in the amount required for regular mortgage transactions.”

*10 *Emphasis added.*

It is undisputed that under mortgage foreclosure law, a seller is not entitled to possession of the property until and unless the court has confirmed the sheriff's sale at which time a writ of assistance may issue to grant plaintiff or an owner possession of the premises. 12 O.S. §686.

“In Oklahoma, when the contract for deed was properly executed, equitable title to the real property passed to Buyers. Sellers retained only the bare legal title.” *Resolution Trust Corporation v. Sudderth*, 1993 OK CIV APP 53, 854 P.2d 375. *See also State Life Ins. Co. v. State ex rel., Kehn*, 135 P.2d 965 (Okl. 1942).

It is clear that Oklahoma Law requires a Contract for Deed to be treated as a mortgage, and proper procedures must be followed along those guidelines. Since, under Oklahoma law, the contract for deed is in a fact a mortgage, some of the terms contained within the contract are not enforceable and would be void as a matter of law. For one, landlord/tenant remedies are not available under mortgage foreclosure laws, and therefore those void provisions cannot be relied upon.

PROPOSITION III.: The Trial Court erred in finding in favor of Appellees and against the Appellants as to Appellants counter-claims of **abuse of process and breach of contract.**

A. **Abuse of Process Counterclaim was meritorious.**

The Trial Court erred in finding in favor of Appellees and against the Appellants as to Appellants *counter-claim* of **abuse of process** as it is clear the Appellees utilized a forcible entry and detainer suit to try to gain immediate possession of the mortgaged real property from the Appellants, the mortgagors, which is unlawful, and relied upon untenable claims of “waste’ and other claims to foreclose the Contract for Deed. On the same day the Petition was filed in this case, Appellees also filed a forcible entry and detainer suit against the Appellants, understanding that they were a mortgage *11 holder of, under law, a mortgage. Tr. Transcr. 108-111:5 (Oct. 5-6, 2011).

It is against Oklahoma law to use forcible entry and detainer actions of a mortgage or contract for deed to “foreclose” on an owner of mortgaged property. 12 O.S. §1148.3, *Bledsoe v. Peters*, 1924 OK 256, 224 P.2d 288, *Whale v. Pearson*, 1949 OK 176, 208 P.2d 552.

At the October, 2011 trial in this matter, Appellee Thomas McGinnity admitted he knew in 2004, at the time of filing both actions on the same day, that was the mortgage holder of the contract for deed. Tr. Transcr. 11:2-5 (Oct. 5-6, 2011). This is, by law, **abuse** of process, when the legal process is being used to attain something that would not otherwise be attainable. *Myers v. Ideal Basis Industries, Inc.*, 940 F.2d 1379 (10th Cir. 1991); *Greenberg v. Wolfberg*, 1994 OK 147, 890 P.2d 895.

It is not necessary, in **abuse** of process scenerios, that the action be without probably cause or with malice. *Id.* **Abuse** of process is in essence, using a legitimate process for an illegitimate purpose. *Neal v. Pennsylvania Life Ins. Co.*, 1970 OK 13, 480 P.2d 923. This is precisely what Appellees did in 2004. They tried to used their forcible entry case to evict the Appellants for their mortgaged home.

Since, under Oklahoma law, the contract for deed is to be treated as a mortgage, the terms of this contract for deed that Appellees are alleging were breached by Appellants are void as a matter of law. Through the Forcible Entry and Detainer case Appellees brought against the Appellants on the same as this case was filed, Appellees utilized landlord/tenant remedies what are not available through Oklahoma mortgage foreclosure laws to, in essence, evict Appellants.

B. Breach of Contract damages obvious.

Appellants, in their counterclaims against Appellees, argue that Appellees breached the contract for deed by refusing payments from Appellants, and therefore, rendering the contract void. Appellees do not deny that Appellants were current on their payments at the time of filing this action. *12 They also admit that not only did Appellants make payments, but they began making increased payment, larger then the amount due monthly. Tr. Transcr. 105:3-11 (Oct. 5-6, 2011). They also admit they began refusing five (5) payments made by Appellants after accepting five (5) post-petition filing payments. Appellants were current in their payments to Appellees, and, if they were not evicted in June, 2005, would have paid the unpaid balance of \$27,406.27 to Appellants and the property would have been paid off in late-2008.

Appellees have been allowed to keep all payments made by Appellants as so-called rental payments. It was stipulated the Appellants owed \$27,406.27 on the remainder of the Contract for Deed. Tr. Transcr. 243:14-21 (Oct. 5-6, 2011). Because Appellees breached the Contract for Deed by 1) refusing to accept Appellants' payments and 2) filing a bogus foreclosure action based upon waste, Appellants should be awarded judgment voiding any obligation to pay the \$27,406.27 on the Contract for Deed, an order entered finding the Contract for Deed fulfilled and ordering title to the Appellants home quieted in Appellants. 12 O.S. § 21. In the alternative, Appellants should be awarded a money judgment against Appellees in an amount equal to all payments Appellants have made under the Contract for Deed since its inception in the amount of \$80,000.00, or as determined in a future district court action. On the other hand, since Appellees remain in possession of Appellants' home, Appellants should be awarded a money judgment against Appellees in the amount Appellees stipulated to the value of Appellants home of \$77,500.00 plus their damages on Defendant's Trial Exhibit 59. See Court Minute (February 9, 2006), R. at 170.

IV. CONCLUSION

It is said that in the days of the wild west, the wealthy landowner would use a hired gun to run "squatters" off his land in a hail of bullets. In this case, the Appellees used a law firm to run off the *13 Appellants in a hail of causes of actions. Fortunately, for the Appellants, none of the causes of action, i.e. forcible entry and detainer or foreclosure of a contract for deed based upon waste is a legitimate basis for taking the Appellants' home from them.

Appellants pray the Court vacate the Journal Entry of Judgment filed November 18, 2011, award them judgment against Appellees for Breach of Contract and cancel any further obligation of Appellants to Appellees under the Contract for Deed, award Appellant judgment on their Abuse of Process counterclaim, and remand for a determination of damages and attorney fees and such other relief is proper.

Footnotes

- 1 Osage County Case No. CJ-2000-62.
- 2 Appellants received a Notice of Nonrenewal on or about May 5, 2004, notifying them the policy would not be renewed after June 21, 2004, with no other explanations or requests attached.