

NOTICE  
Decision filed 09/21/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 150133-U

NO. 5-15-0133

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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RICHARD G. GROSS and JUNE A. GROSS,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Madison County.
	)	
v.	)	No. 11-L-164
	)	
GARY LEE CLAXTON and DAVI DENNISSE	)	
CLAXTON,	)	Honorable
	)	Thomas W. Chapman,
Defendants-Appellees.	)	Judge, presiding.

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JUSTICE CATES delivered the judgment of the court.  
Justices Welch and Goldenhersh concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The circuit court did not err in granting the defendants' motion to enforce the parties' consent order where the plaintiffs failed to establish unconscionability or bad faith.
- ¶ 2 The plaintiffs, Richard G. Gross and June A. Gross, appeal from an order of the circuit court, granting a motion by the defendants, Gary Lee Claxton and Davi Dennisse Claxton, to enforce a consent order that was entered following a settlement of a forfeiture action, and denying the plaintiffs' motion to sell the property at a public sale. For reasons that follow, we affirm.

¶ 3 On November 1, 2004, the plaintiffs and the defendants entered into a contract for deed whereby the plaintiffs agreed to sell their vacation home at the Lake of the Ozarks to the defendants for the sum of \$300,000. According to the terms of the contract for deed, the defendants were required to tender \$10,000 in earnest money, and thereafter, make installment payments of \$1,000 per month for five years, with a final balloon payment on December 1, 2009. Sometime during the fall of 2009, the defendants determined that they could not make the final balloon payment of approximately \$276,000, as scheduled, and they notified the plaintiffs of the situation. On November 30, 2009, the plaintiffs agreed to extend the contract for deed, under the same terms, until December 1, 2010. In the months that followed, the defendants made their monthly payments, but they once again found that they could not make the final balloon payment on December 1, 2010.

¶ 4 The plaintiffs, unwilling to grant another extension, served the defendants with a notice of default and notice of intent to declare a forfeiture on December 7, 2010. The defendants were given 30 days to cure the default, but they were unable to do so. In January 2011, the plaintiffs sent notice of forfeiture and a demand for possession of the property. In February 2011, the plaintiffs filed a complaint against the defendants for breach of contract, conversion, and fraud. In May 2011, the plaintiffs filed a motion to restore to themselves immediate possession of the property, and a motion to quiet title to the property.

¶ 5 On July 11, 2011, the defendants filed a motion to compel the plaintiffs to accept a payoff of the balance due under the contract for deed and to complete the purchase of the

property. In the motion, the defendants alleged that they had obtained a noncontingent loan commitment to pay in full the balance due under the contract, that they informed the plaintiffs about the loan commitment in a letter dated July 8, 2011, and that the plaintiffs refused to accept the payoff. The defendants further alleged that they had been engaged in discussions with Gary Prewitt, a local business owner and developer about purchasing the subject property; that they had obtained a verbal agreement to sell the property to Prewitt for \$550,000; that Prewitt failed to complete the purchase after he was contacted by the plaintiffs; and that the defendants would have been able to pay off the contract on or shortly after the due date of December 1, 2010, had the plaintiffs not interfered with the negotiations. The defendants also filed a motion for leave to file a counterclaim alleging tortious interference with a business expectancy, and responses to the motions filed by the plaintiffs.

¶ 6 All pending motions were called for hearing on August 17, 2011. After considering the arguments of counsel, the court granted the defendants leave to file their counterclaim. The court then continued the hearing on the remaining motions to permit the parties to obtain the deposition of Gary Prewitt.

¶ 7 The parties reconvened for hearing and trial on October 26, 2011. Following the presentation of arguments on various pretrial matters and a lunch recess, the parties announced that they had negotiated a settlement of all issues. The terms of the agreement were recited on the record in open court, with all parties present. The agreement included contingent provisions for the method of sale and the division of sales proceeds.

¶ 8 The agreement provided that during the period from October 27, 2011, through November 30, 2011, the parties agreed to use their best efforts to sell the property without engaging the services of a real estate broker. If the property was sold during that time, the plaintiffs would receive \$275,981.10, representing the balance due under the contract for deed (contract balance), the defendants would receive proceeds of approximately \$24,018.90, and the parties would evenly share any net profit in excess of the original purchase price of \$300,000.

¶ 9 In the event that the property was not sold before December 1, 2011, it would be listed for sale with a mutually acceptable real estate broker for a period not to exceed six months. Under any broker's listing, the minimum listing price would be \$600,000, the broker's commission would not exceed 7%, and Gary Prewitt would be excluded as a purchaser from the listing. The parties agreed in advance that they would accept a *bona fide* offer of \$600,000 or more from a qualified purchaser. If, however, a *bona fide* purchaser offered less than \$600,000, both parties would have to agree to accept that offer. If the property was sold while listed by a broker, the sales proceeds would be distributed as follows: After payment of any real estate commission and the costs of sale, the plaintiffs would receive the contract balance of \$275,981.10, the defendants would receive proceeds of approximately \$24,018.90, and the parties would evenly share any net profit in excess of the original purchase price.

¶ 10 In the event that the property was not sold or under contract by the end of the six-month listing period, each party would designate an appraiser to appraise the property, and the average of the two appraisals would be considered as the "appraisal price." If the

appraisal price exceeded the original purchase price of \$300,000, the plaintiffs would receive the contract balance and 50% of the difference between the appraisal price and the original purchase price. If the appraisal price was less than the original purchase price, the plaintiffs would receive only the contract balance. If the appraisal price was less than the contract balance, the plaintiffs would receive only the appraisal price.

¶ 11 The agreement further provided that until such time as the property was sold, the defendants would continue to make a monthly payment of \$1,000 to the plaintiffs, under the terms of the contract for deed, as modified. Finally, upon approval of the consent order, all pending claims, counterclaims, and motions in this case were deemed to be resolved in full, and any claims that were not addressed were dismissed with prejudice.

¶ 12 Immediately after the terms of settlement were recited, the court placed the plaintiffs and the defendants under oath and asked a series of questions. Each party was asked whether he or she understood all terms of the settlement, and whether he or she agreed to the terms of the settlement. Each answered affirmatively. Each party was asked whether the recitation of settlement set forth all material terms of the agreement, and each replied that it did. No one had any questions about the terms of the settlement. All parties stated that they understood that by settling the case, they would not have their "day in court," and that the court would not be making any determinations regarding the facts or law. When the court asked whether the parties were making the agreement of their own free will and without force, each answered, "Yes." When asked whether any party was under the influence of drugs, alcohol, or any substance that would impair the ability to make decisions, all parties answered, "No." The court then approved the

settlement agreement, and directed the parties to prepare a formal, written consent order for the record. The "Consent Order and Judgment" was entered on January 5, 2012. It reflected all of the settlement terms that had been announced in open court. All parties and their attorneys signed the order, approving it as to form and content.

¶ 13 The subject property is situated on a peninsula at the Lake of the Ozarks. The property, zoned residential, faces the lake and is otherwise surrounded by properties owned by Gary Prewitt. Prewitt's properties are zoned residential, but they are used for business purposes. Prewitt operates a bar and grill on one parcel, and a parking lot on an adjacent parcel. Throughout the course of the litigation, both parties were aware that Prewitt was the target buyer of the property.

¶ 14 In February 2012, Prewitt submitted a written contract on the property and offered \$400,000, conditioned upon conventional financing. The defendants refused to accept the offer because it was far less than the agreed minimum listing price of \$600,000. The defendants proposed a counter offer of \$575,000. In March 2012, Prewitt submitted a new written contract offer of \$450,000, and this offer was allowed to expire. In July 2012, Prewitt submitted a written offer of \$350,000. This offer was not accepted.

¶ 15 On August 3, 2012, the plaintiffs filed a motion to vacate or modify the settlement agreement and consent order. In the motion, the plaintiffs asserted that since entry of the consent order, they had secured a number of written contract offers from Gary Prewitt, that Prewitt's offers exceeded the appraised value of the property, and that the defendants rejected each offer. The plaintiffs then alleged that the defendants entered into the settlement agreement, while fraudulently concealing their bad faith intention to reject

*bona fide* contract offers, knowing that if *bona fide* offers were rejected, a provision in the consent order would allow them to purchase the property for the appraisal price, and thereafter sell the property at a substantial profit, without having to share any profits with the plaintiffs. The plaintiffs also filed a motion for breach of the settlement agreement, and therein alleged that the defendants had acted in bad faith in rejecting Prewitt's contract offers, and also that the defendants had failed to make the monthly payments for October 2011 and February 2012. These motions were called for an evidentiary hearing on September 21, 2012, and thereafter denied.

¶ 16 On December 10, 2014, the defendants filed a motion to enforce the consent order, and requested that the court enter an order directing the plaintiffs to accept the appraisal price of \$200,000 in full satisfaction of the consent order. The defendants attached an appraisal report, dated February 28, 2013, which stated that the value of the subject property was \$200,000. The defendants also filed a supplement to the motion to enforce the settlement. The defendants alleged that they had been making monthly payments of \$1,000 to the plaintiffs as required under the consent order, and that the failure of the plaintiffs to comply with the consent order was bad faith. The defendants requested a credit against the \$200,000 payment.

¶ 17 In response, the plaintiffs argued that the appraisals obtained by the parties did not represent the true market value of the property. The plaintiffs refused to provide their written appraisal for that reason, but acknowledged that the value was around \$200,000. The plaintiffs claimed that the offers made by Prewitt reflected the true market value for the property, and that the defendants acted in bad faith in rejecting those offers. The

plaintiffs also filed a motion to sell the property at a public auction. Therein, the plaintiffs argued that the defendants had rejected four contract offers in excess of the appraisal price, that the defendants tendered the \$200,000 appraised price, but actually owed \$275,981.10 under the original contract for deed, and that a public auction would better reflect the fair market value of the property.

¶ 18 On February 19, 2015, the court heard arguments on the parties' motions, and then took the motions under submission. On March 12, 2015, the trial court issued a written order. In the order, the court found that the parties had been unable to obtain a sale of the property at the agreed sales price, and that pursuant to the terms of the consent order, each party was to obtain an appraisal, the average of which would constitute the appraisal price. The court noted that the established appraisal of \$200,000 was less than the contract balance owed to the plaintiffs, and that under the terms of the consent order, the defendants were required to pay \$200,000 to the plaintiffs. The court determined that the consent order was not procedurally or substantively unconscionable, and that there was no bad faith. The court granted the defendants' motion to enforce the consent order, denied the defendants' supplemental motion to enforce the consent order, and denied the plaintiffs' motion to sell the property at a public sale. The court directed that upon tender of \$200,000 to the plaintiffs by the defendants, the plaintiffs shall execute and deliver a warranty deed for the property to the defendants.

¶ 19 On appeal, the plaintiffs contend that the trial court erred in enforcing the consent order. The plaintiffs claim that though the settlement agreement appears mutually beneficial on its face, it is actually one-sided and oppressive. The plaintiffs also contend



that the trial court erred in finding that the defendants did not act in bad faith when they rejected the written contract offers by Gary Prewitt.

¶ 20 A consent order is a court's recording of a private, contractual agreement reached by the parties in settlement of a dispute, not a judicial determination of the parties' respective rights. *In re M.M.D.*, 213 Ill. 2d 105, 114, 820 N.E.2d 392, 399 (2004). Once entered, a consent order is generally binding on the parties and cannot be amended or varied without the consent of each party. *In re M.M.D.*, 213 Ill. 2d at 114, 820 N.E.2d at 399. There are certain recognized exceptions to this general rule. A court may vacate a consent order on the motion of only one party upon a showing of fraudulent misrepresentation or coercion in the making of the agreement, the incompetence of one of the parties, gross disparity in the position or capacity of the parties, errors of law apparent on the face of the record, or newly discovered evidence. *Thompson v. IFA, Inc.*, 181 Ill. App. 3d 293, 297, 536 N.E.2d 969, 971 (1989).

¶ 21 Consent orders may be challenged by filing a petition to vacate under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). Timely challenges should be judged by the broad equitable considerations that govern section 2-1401 petitions. *In re Marriage of Rolseth*, 389 Ill. App. 3d 969, 971-72, 907 N.E.2d 897, 900 (2009); *Thompson*, 181 Ill. App. 3d at 297, 536 N.E.2d at 971. A party seeking to set aside a consent order pursuant to section 2-1401 is required to show by a preponderance of the evidence: (1) the existence of a meritorious claim or defense in the original action; (2) due diligence in pursuing the claim or defense in the original action; and (3) due

diligence in presenting the section 2-1401 petition for relief. *In re Haley D.*, 2011 IL 110886, ¶ 58, 959 N.E.2d 1108; *Thompson*, 181 Ill. App. 3d at 299, 536 N.E.2d at 972.

¶ 22 In this case, the plaintiffs have not established that the enforcement of the consent agreement was unconscionable, or that the defendants acted in bad faith in rejecting Gary Prewitt's offers to purchase the property. According to the record, the parties engaged in considerable discussion and negotiation prior to the announcement of the settlement. The record demonstrates no showing of a gross disparity in knowledge and bargaining power between the parties. Both parties were capable of allocating risks and protecting their interests. Both parties were represented by counsel before, during, and following the negotiations for settlement. During the period of negotiation of settlement and execution of the consent agreement, the parties were aware that Gary Prewitt was the most likely buyer of the property, and that the value of the parcel to him was much greater than other potential purchasers because his property surrounded the subject property. After the terms of the settlement were recited in open court, the circuit court extensively questioned all of the individual parties to ensure that each understood the terms of the agreement, and that each willingly accepted the terms in final settlement of all issues in the case. Each party acknowledged that this was the agreement he or she wanted to enter. The terms of the settlement were then reduced to writing, and the court was presented with a detailed consent order that had been approved as to form and content by all parties and their attorneys.

¶ 23 It is apparent from the terms of the settlement and the consent order that the parties considered and provided for contingencies in regard to the market value of the

property. Contrary to the plaintiffs' contention, the parties anticipated and included in the consent order specific provisions for selling the property for less than the original \$300,000 purchase price and for less than the contract balance. The consent order specifically provided that if the property did not sell at an agreed price within the established time frame, each party would obtain an appraisal, and the average of the appraisals would constitute the appraisal price. The consent order further provided that if the appraisal price was less than the balance owed on the contract, as occurred in this case, the plaintiffs would receive the appraisal price and deliver an executed warranty deed to the defendants. The parties could have included a provision for a public auction, or some other method of valuation of the property in the event that market conditions changed and the appraisal price was less than the original purchase price or the contract balance, but they did not do so. Perhaps, both parties overestimated the actual value of this property to Gary Prewitt, or the market value to another qualified buyer. Even so, the value was a known variable to the parties when they negotiated the settlement and entered into the consent order, and that variable, with attendant risks, does not render the enforcement of the consent order unconscionable.

¶ 24 In this case, the plaintiffs failed to establish that the consent order was procedurally or substantively unconscionable. The plaintiffs have not shown bad faith on the part of the defendants in rejecting the offers that Prewitt made to purchase the property. The plaintiffs failed to establish any basis upon which to vacate the consent order. The trial court did not err in granting the defendants' motion to enforce the consent order and judgment.

¶ 25 Accordingly, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.