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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001515-MR

BILL KAELIN AND
MARY BETH WHELAN — APPELLANTS

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 07-CI-00079

LAMAR SMITH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; HARRIS,[1] SENIOR JUDGE.

ACREE, JUDGE: Appellants seek reversal of the Meade Circuit Court's denial of their motion to vacate the jury verdict and judgment, their motion to alter, amend, or vacate the court's summary judgment, and their motion for judgment *non*

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

obstante veredicto. Because the circuit court did not err in entering judgment or in denying these motions, we affirm.

On February 27, 2007, Appellee Lamar Smith filed a verified petition for declaratory judgment and temporary and permanent injunctions against Appellants William Kaelin and Mary Beth Whelan. Smith amended his complaint on August 7, 2007, alleging conversion of certain timber he had cut. Smith alleged he had contracted with Kaelin's brother, Joseph Kaelin, to cut and remove timber from Joseph Kaelin's property, which property was adjacent to property owned by Appellants. This contract was reduced to writing and Smith paid to Joseph Kaelin the consideration for the timber.

Smith's complaint further alleged he entered into an oral agreement with Appellant Kaelin to store on his property the timber he had cut from Joseph Kaelin's property. Appellants' answer to the complaint admitted that the timber in question was owned by Smith.[2] They also admitted that sometime in the summer of 2006 they agreed to allow Smith to place his timber on their land. They did not, however, allege any affirmative defenses or state that they owned the timber in question, nor did they file a motion to dismiss the claim.

On December 6, 2007, Smith filed a motion for summary judgment as to liability. To support his motion, Smith attached a letter from William Kaelin which contained language indicating that the timber belonged to Smith. He also

[2] Specifically, Appellants admitted to the allegation in the complaint stating "Respondents, Bill Kaelin and Mary Beth Whelan (a/k/a Mary Kaelin) . . . allowed Smith to place and store *his cut timber* on the Respondent's property . . . ."

included Appellants' response to interrogatories that indicated that the timber was his and that Appellants did not allow Smith to remove the timber. Appellants' response to the motion for summary judgment did not include any supporting affidavits or any other supporting evidence. Instead, their response simply alleged that Smith had waited too long to remove the timber and therefore his right to remove the timber had ceased. The circuit court granted summary judgment in favor of Smith on the issue of Appellants' liability for conversion of his timber. The issue of damages proceeded to trial.

After a jury trial on damages, Appellants filed three motions: a motion to vacate the jury verdict and judgment; a motion to vacate, alter, or amend the trial court's grant of summary judgment as to liability; and a motion for judgment notwithstanding the verdict. These motions were denied. On appeal Appellants allege the trial court abused its discretion by granting the motion for summary judgment, that the jury's verdict was excessive and unsustainable, and that the trial court's failure to prohibit the admission of certain evidence to which the Appellants raised no objection constitutes palpable error under Kentucky Rules of Civil Procedure (CR) 61.01, 61.02, and the Kentucky Rules of Evidence (KRE) 103(e). We are unpersuaded by any of these arguments.

It is clear that many of the issues raised and arguments presented in this appeal were not properly preserved for review. Appellants' arguments center on two of the trial court's rulings that Appellants now assert constituted reversible

error – the grant of summary judgment and the admission of testimony by Mr. Stovall, Smith's expert witness to the value of the timber.

Appellants present two arguments as to why the grant of summary judgment was improper and, consequently, why their motion to vacate, alter or amend that judgment should have been granted. First, they claim that summary judgment as to Whelan was improper because she was not married to William Kaelin and thus could not have exercised dominion and control over the property. Second, they argue that summary judgment was improper because there were genuine issues of material fact.

Appellants failed to meet the summary judgment motion sufficiently to prevent its grant. "It has long been recognized that a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). Smith presented evidence he owned the timber and that Appellants were preventing him from reclaiming his property.[3] Appellants' response to summary judgment did not contain any affidavit to refute the evidence Smith presented. Therefore, Smith's motion was sustainable as a matter of law. *Id.* ("Hubble did not meet that burden in the opinion of the circuit judge. Therefore the motion of Johnson for summary judgment was sustainable as a matter of law.").

[3] Specifically, Smith submitted the contract for purchase of the timber as well as a statement from his verified complaint referring to *his timber*. As noted, this portion of the complaint was admitted in Appellants' verified response as was the portion indicating that they did not allow Smith to remove the timber.

Furthermore, Appellants' failure to properly present evidence in support of their response to summary judgment is not sufficient for a finding of manifest injustice or palpable error. *See Burns v. Level*, 957 S.W.2d 218 (Ky. 1997) (palpable error must result from action taken by the court rather than from an act or omission by attorneys or litigants).

It was not until Appellants filed their CR 59.05 motion to vacate, alter or amend the summary judgment that they presented arguments contradicting Smith's summary judgment motion. However, these arguments were not based on newly discovered evidence. "A party cannot invoke [CR 59.05] to raise arguments and introduce evidence that could and should have been presented during the proceedings before the entry of the judgment." 7 KENTUCKY PRACTICE, RULES OF CIVIL PROCEDURE ANNOTATED at 541 (6th ed. 2005).

Appellants' assertion that Whelan could not have exercised dominion and control over the timber because she was not Kaelin's wife should have been raised prior to the entry of judgment. However, a motion to dismiss was never filed. Nor was this argument presented to the court at any time prior to the motion to vacate, alter, or amend. Appellants claim that Whelan's due process rights were violated despite the fact that she was properly notified regarding the proceedings. Further, she signed her name as Mary Kaelin on more than one occasion and was referred to as Mary Kaelin by her own counsel during the trial on damages.

In addition to the procedural errors associated with this claim, Appellants present no legal authority supporting the concept that, before Whelan

can exercise dominion and control over personal property, she must own the real property where it is located. Such a concept is not logical. The tort of conversion only requires the exercise of dominion and control over the property of another. *State Auto. Mut. Ins. Co. v. Chrysler Credit Corp.*, 792 S.W.2d 626, 627 (Ky.App. 1990) (citing *Illinois Cent. R.R. Co. v. Fontaine*, 217 Ky. 211, 289 S.W. 263 (1026)). We do not deem it necessary to burden this opinion with citation to cases in which conversions occurred on real property owned by someone other than the converter.

Appellants also argue the trial court failed to consider several material issues of fact that should have precluded summary judgment. They primarily assert that Smith no longer had an ownership interest in the timber. While Appellants now present theories as to why Smith did not own the logs when they exercised dominion and control of them, Smith's lack of ownership was an affirmative defense they never raised in their response to the petition or at any time before the summary judgment as to liability was entered. Their failure to assert the affirmative defense constitutes their waiver of it. CR 8.03 (affirmative defenses must be specifically pled); *see also Vogler v. Salem Primitive Baptist Church*, 415 S.W.2d 72, 74 (Ky. 1967) (ownership issue must be set out in the answer or it is waived).

Appellants' CR 59.05 motion and now their brief to this Court both include their argument that summary judgment was improper because they were gratuitous bailees and thus could not be liable for conversion pursuant to *Hargis v.*

Spencer, 71 S.W.2d 666, 666-70 (Ky. 1934). However, this case is distinguishable from *Hargis*. In *Hargis* the defendant was asked to hold money for the plaintiff and the money was stolen. *Id.* The court in *Hargis* discussed the amount of care a gratuitous bailee must exercise to prevent the property from being stolen or destroyed. If some third party had stolen Smith's timber, we might have found *Hargis* persuasive, but those are not the facts of this case. We have no doubt that conversion can be accomplished by a gratuitous bailee. *Parson v. Insurance Co. of Tex*., 307 S.W.2d 190, 190 (Ky. 1957).

The arguments regarding summary judgment must fail. The circuit court did not err in granting judgment. Appellants' failure to seek dismissal of the claim against Whelan, to set forth affirmative defenses, and to present any evidence responsive to Smith's summary judgment motion – their own errors and not that of the trial court – cannot be reviewed for abuse of discretion or palpable error. *See Burns*, 957 S.W.2d 218 (Ky. 1997). We cannot make the circuit court responsible for failing to consider arguments and facts that, despite being known to Appellants, were never presented to the court prior to the entry of judgment.

Next, Appellants contend that the testimony of Mr. Stovall regarding the value of the timber was improperly considered by the jury. To this end they aver that *Smith's counsel* committed reversible error by presenting such evidence[4] and that, as a result, the jury's verdict was excessive and unsustainable, being reached only as a result of their passion and prejudice.

[4] We believe the Appellants, in fact, are arguing that the *trial court* committed reversible error by admitting such evidence, but that is not how it is characterized in the brief.

The measure of damages in conversion is the fair market value of the property at the time of conversion. *State Auto. Mut. Ins. Co.*, 792 S.W.2d at 627. "Fair market value" represents the price that a willing seller will take and a willing buyer will pay for property, neither being under any compulsion to sell or buy. *Central Ky. Drying Co., Inc. v. Commonwealth*, 858 S.W.2d 165 (Ky. 1993). Timber is personal property. An individual who is familiar with personal property can testify as to its value even if they are not experts. *Svea Fire & Life Ins. Co. v. Walker*, 247 Ky. 273, 56 S.W.2d 967, 967 (1932).

Appellants argue that Mr. Stovall's testimony was not proper because he was not an expert. They argue that his testimony was improper because he simply made an offer to buy the timber prior to the alleged conversion. But Appellants never objected to his testimony, either at his deposition or at trial, nor did they file motions *in limine* regarding Mr. Stovall's testimony. Objections regarding the sufficiency of evidence are not timely when raised for the first time in post-judgment motions. *Bartley v. Loyall*, 648 S.W. 2d 873, 874 (Ky.App. 1982). However, Appellants contend that this issue is reviewable under CR 60.01 for substantial injustice.

Mr. Stovall is an experienced timber buyer. He began to determine the value of the timber in December of 2006. He made several visits to determine the value of this specific timber and he prepared an invoice. This invoice was the basis for his determination of the value of the timber located on Appellants' land. This was the value he offered to pay for the timber in question. Mr. Stovall had

personal knowledge of the timber and was a willing buyer. The fact that Mr. Stovall's valuation of the timber was made prior to the conversion and the value was also the basis for a bid made to Smith, did not result in substantial injustice to the Appellants. Recovery for conversion is determined by proof of the fair market value of the property converted at the time of conversion. *Nolin Production Credit Ass'n v. Canmer Deposit Bank*, 726 S.W.2d 693, 704 (Ky.App. 1986). Logically, we should never expect that a valuation could be conducted at the very moment the conversion takes place. Consequently, absent proof that the timber lost value between Mr. Stovall's offer and the moment of Appellants' conversion of the timber (such as by deterioration, fire, changing market conditions, etc.), it is difficult to conceive of a fairer valuation.

Appellants also contend that the jury's verdict was entered "in complete disregard of . . . the trial court's instructions." This is simply not the case. The jury's award did not exceed either the evidence presented or the maximum amount set forth in the instructions. The jury is not precluded from giving the maximum amount when they believe it is appropriate.

Furthermore, there is no indication that the circuit court abused its discretion in allowing the jury verdict to stand or that the jury verdict was excessive and resulted from prejudice. Appellants' assertion that the testimony of Smith's witness, Mr. Stovall, regarding his wife's cancer set the stage for passion and prejudice is without merit. This testimony was relevant simply to explain why Mr. Stovall was not present to testify in person but testified instead by videotape.

Appellants did not object to the testimony in any event. Concluding that the jury's sympathy for Mr. Stovall's wife impacted its verdict, thereby causing the jury to allow greater damages to Smith, is not logical.

Indeed, Appellants do not explain how testimony heard by the jury resulted in prejudice. They simply repeat the argument that the jury was swayed by certain testimony to which they asserted no objection. In summary, the jury's verdict is supported by substantial evidence and there is nothing in the record from which we can draw any inference that it resulted from passion or prejudice.

Appellants also indicate, as a ground for reversing, that "Appellee's counsel committed reversible error by his misleading of the Appellants on the issue of evidence for damages and the repeated references to hearsay and other inapplicable statements that were made by the Appellee's expert [Mr. Stovall]." We interpret this argument as an assertion that Appellee's counsel made improper comments regarding the evidence during closing argument. However, as no objection was made during that closing, and as Appellee's counsel appears to have made reference only to evidence that was admitted without objection by Appellants, we find it impossible to conclude that the trial court committed error.

For the foregoing reasons, the decision of the Meade Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dwight Preston
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BRIEF FOR APPELLEE:

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