

RENDERED: DECEMBER 2, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000369-MR

LAMAR ADVANTAGE GP COMPANY, LLC
D/B/A LAMAR ADVERTISING OF CINCINNATI

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 08-CI-02588

CITY OF COVINGTON BOARD OF
ADJUSTMENT; CITY OF COVINGTON,
KENTUCKY; NICHOLAS M. NIGHSWANDER;
CHERYL L. NIGHSWANDER; ROBERT E.
SANDERS; SHIRLEY L. SANDERS; ROBERT E.
SANDERS, TRUSTEE OF THE HARDEBECK
GRANDCHILDREN'S TRUST, AND HIS
PARTNERS

APPELLEES

AND

NO. 2010-CA-000445-MR

NICHOLAS M. NIGHSWANDER;
CHERYL L. NIGHSWANDER; ROBERT E.
SANDERS; SHIRLEY L. SANDERS; ROBERT E.
SANDERS, TRUSTEE OF THE HARDEBECK

GRANDCHILDREN'S TRUST, AND HIS
PARTNERS

CROSS-APELLANTS

v. CROSS-APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 08-CI-02588

LAMAR ADVANTAGE GP COMPANY, LLC
D/B/A LAMAR ADVERTISING OF CINCINNATI CROSS-APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Lamar Advantage GP Group, LLC (“Lamar”), appeals from an order of the Kenton Circuit Court granting summary judgment in favor of Appellees, Nicholas and Cheryl Nighswander, Robert and Shirley Sanders, and Robert Sanders as Trustee of the Hardebeck Grandchildren’s Trust (Collectively “Nighswander.”). Appellees have filed a cross-appeal challenging the jurisdiction of the lower court to entertain the matter. For the reasons stated herein, we conclude that all issues are moot and this matter should be remanded to the trial court for an order of dismissal.

The underlying dispute herein concerns the ownership of a billboard leased by Lamar and located on property owned by Nighswander.¹ In August 2006,

¹ A thorough recitation of the underlying facts is set forth in *Lamar Advantage GP Group, LLC DBA Lamar Advertising of Cincinnati v. Nicholas M. Nighswander, et al.*, 2009 CA-002349-MR

Lamar filed a declaratory judgment action in the Kenton Circuit Court, seeking a ruling that it was the legal owner of the billboard and therefore had the right to enter upon Nighswander's property for the purposes of removing it. The matter was assigned to the Third Division, Judge Gregory Bartlett.

In 2008, and while the circuit court action was pending, Nighswander filed an application with the Northern Kentucky Area Planning Commission ("Zoning Administrator") requesting a permit to replace the existing wooden billboard structure with a monopole advertising sign. Lamar alleges Nighswander represented in the application that he was the owner of the billboard. In April 2008,

Nighswander's zoning application was denied and he thereafter appealed to the City of Covington Board of Adjustment ("BOA"). On July 16, 2008, the BOA held a public hearing on Nighswander's appeal and thereafter overturned the Zoning Administrator's denial of the permit.²

On August 15, 2008, Lamar appealed the BOA's decision to the Kenton Circuit Court. The matter was assigned to the Fourth Division, Judge Patricia Summe. However, on November 25, 2009, Judge Bartlett entered a declaratory judgment in favor of Nighswander, holding that the billboard was a permanent

(March 25, 2011).

²

We would note that Lamar raises various claims with respect to the hearing, including its lack of notice of the proceeding, as well as Nighswander's failure to inform the agency that ownership of the billboard was the subject of pending litigation. However, such is not relevant or necessary to the determination herein.

fixture belonging to the owner of the real estate, rather than a trade fixture that is removable by a tenant at the end of the lease. As a result, on February 19, 2010, Judge Summe granted summary judgment in favor of Nighswander, ruling:

The Court finds that the standard for summary judgment and its purposes have been met. A decision in this case would allow the owner(s) of the billboard to use a new support structure and proceed with business. In addition, there is nothing to prevent the plaintiff from appealing the decision of this Court if it is aggrieved. The Court also finds that judicial economy will be better serviced if these cases reach a conclusion as closely in time as possible. If the Court of Appeals determines that Judge Bartlett's decision was incorrect then the defendants may have proceeded with an expensive modernization. If the Court of Appeals determines that Judge Bartlett's decision is correct then the defendants have proceeded with the rightful use of their property.

The Court finds that based on the decision in Kenton County Case #06-CI-0231 that the defendants are the owners of the billboard and therefore the plaintiff does not have standing to appeal.

The matter currently before this Court is Lamar's appeal from Judge Summe's February 2010 order. However, while the parties were still engaging in the briefing schedule, another panel of this Court reversed Judge Bartlett's decision, ruling that a 1996 lease between Nighswander and Lamar's predecessor-in-interest, Whiteco Industries, Inc., expressed the intent that the billboard be treated as a trade fixture rather than a permanent fixture attached to the real estate. As a result, the panel concluded that the trial court erred in finding that the billboard belonged to Nighswander. *Lamar Advantage GP Company, LLC D/B/A*

(March 25, 2011).

In light of the panel's finding that Lamar is the rightful owner of the billboard, we necessarily conclude that the issues raised in the instant appeal are moot. Accordingly, this matter must be remanded to the trial court for entry of an order of dismissal.

The order of the Kenton Circuit Court granting summary judgment in favor of Nighswander is reversed. This matter is remanded for entry of an order dismissal.

ALL CONCUR.

BRIEFS FOR APPELLANT/
CROSS APPELLEE LAMAR
ADVANTAGE GP COMPANY
LLC:

Timothy B. Theissen
Covington, Kentucky

BRIEF FOR APPELLEES CITY OF
COVINGTON BOARD OF
ADJUSTMENT AND CITY OF
COVINGTON, KENTUCKY:

Frank Edward Warnock
Bellevue, Kentucky

BRIEF FOR APPELLEES/
CROSS APPELLANTS:

Robert E. Sanders, *Pro Se*
Covington, Kentucky

Nicholas M. Nighswander, *Pro Se*
Florence, Kentucky

BRIEFS FOR APPELLEES/
CROSS APPELLANTS CHERYL
L. NIGHSWANDER; SHIRLEY L.
SANDERS; AND HARDEBECK
GRANDCHILDREN'S TRUST:

Paul J. Dickman
Covington, Kentucky