

RENDERED: MARCH 25, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002349-MR
AND
NO. 2009-CA-002407-MR

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

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 06-CI-02301

NICHOLAS M. NIGHSWANDER;
CHERYL L. NIGHSWANDER;
ROBERT E. SANDERS; SHIRLEY
L. SANDERS; AND ROBERT E.
SANDERS, TRUSTEE OF THE
HARDEBECK GRANDCHILDREN'S
TRUST

APPELLEES/CROSS-APPELLANTS

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

VANMETER, JUDGE: Lamar Advantage GP Company, LLC (“Lamar”) appeals, and Nicholas Nighswander, et al.² (collectively referred to as “Nighswander”) cross-appeals, from the judgment of the Kenton Circuit Court dismissing Lamar’s complaint and adjudging Nighswander to be the owners of a billboard and supporting structure. For the following reasons, we reverse the judgment and remand.

In 1964, Queensgate Investment Company (“Queensgate”) leased a portion of real estate along Interstate 75 (“I-75”) in Covington, Kentucky from Andrew and Ruth Derks in order to erect and maintain a billboard which would be used to promote a Holiday Inn, operated by Riverfront Investment Company (“Riverfront”). The billboard was erected by Whiteco Industries, Inc. (“Whiteco”), predecessor-in-interest of Lamar, which entered into an agreement with Riverfront stipulating that Whiteco was the owner of the billboard, and would lease the billboard to Riverfront for a monthly fee. In 1977, Ruth Derks conveyed title to the real estate on which the billboard was situated to Raymond and Hilda Hardebeck. In 1978, the Hardebecks agreed to a six-year lease which granted Riverfront the right to maintain the billboard in its location, and remove the billboard upon termination of the lease.

¹ Senior Judge Ann O’Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Cheryl Nighswander, Robert Sanders, Shirley Sanders, and Robert Sanders, Trustee of the Hardebeck Grandchildren’s Trust.

In 1981, the City of Covington (“City”) initiated a condemnation proceeding to acquire the Hardebecks’ property along I-75 for the purpose of expanding a city park. Riverfront and White Advertising International Company, a subsidiary of Whiteco, filed a motion to intervene in the action, asserting ownership of the billboard. The Hardebecks’ counsel represented to the court and Riverfront that the Hardebecks would not be asserting ownership to the billboard, and thus the trial court denied Riverfront’s motion. Following the condemnation proceeding, the Hardebecks executed a quitclaim deed conveying their property to the City.

In 1983, the City entered into a lease with Riverfront to maintain the billboard in its previous location, wherein the parties noted that the billboard was Riverfront’s property and that Riverfront maintained the right to remove the billboard at the end of the lease. Upon learning that the location of the billboard could jeopardize the funding needed to expand the city park, the City excluded a small parcel of property on which the billboard was located from the projected park expansion plans. Since the excluded parcel would no longer be used for a public purpose, the Hardebecks filed suit against the City asserting the right to repurchase the excluded property. In 1995, the City conveyed the excluded parcel back to the Hardebecks. In the same year, the Hardebecks conveyed their property to Nighswander.

In 1996, Nighswander and Whiteco entered into a 10-year lease agreement which granted Whiteco the right to maintain the existing billboard. During the duration of that lease, Lamar acquired all of the outdoor advertising business and

assets of Whiteco. In December 2005, Nighswander notified Lamar that the 1996 lease would expire the following year, and at that time they would seek an increase in monthly rent and renegotiation of other lease terms. Lamar objected and informed Nighswander that if an agreement could not be reached to continue the 1996 lease under its terms, it would remove the billboard. Nighswander then asserted ownership of the billboard and threatened to file criminal charges should Lamar attempt to remove it. Lamar filed this action seeking a declaratory judgment as to the ownership of the billboard. Nighswander filed a counter-claim seeking the same.

Following a bench trial, the trial court entered a declaratory judgment in favor of Nighswander, holding the billboard was a permanent fixture belonging to the owner of the real estate, rather than a trade fixture that is removable by the tenant at the end of the lease. The court based its determination on the fact that the billboard was affixed to the real estate by nine poles which were cemented into the ground, and that if the billboard were removed the property would be useless. The court concluded that the intent of the parties was unclear and therefore not determinative.

On appeal, Lamar argues the trial court erred by concluding the billboard was a permanent fixture, rather than a trade fixture. We agree.

A trial court's factual findings are reviewed under a clearly erroneous standard. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005) (citations omitted). Such findings are not clearly erroneous if supported by substantial

evidence. *Id.* (citations omitted). Substantial evidence is evidence that “has sufficient probative value to induce conviction in the mind of a reasonable person.”

Id. (citations omitted). The trial court’s conclusions of law are reviewed *de novo*.

Id. (citations omitted).

The term trade fixture is used to “describe property which a tenant has placed on rented real estate to advance the business for which it is leased and which may, as against the lessor, be removed at the end of the tenant’s term.”

Bank of Shelbyville v. Hartford, 268 Ky. 135, 138, 104 S.W.2d 217, 218-19 (Ky.

1937) (citation omitted). In other words, “[a] trade fixture . . . is an article annexed by the lessee to the real estate to aid him in carrying on his trade or business on the

premises.” *Id.* at 138, 104 S.W.2d at 219 (citation omitted). Conversely, “[a]

permanent fixture is properly fixed to the realty so that it becomes a part or parcel of the realty, giving the owner of the realty the same rights to it as the soil itself.”

Tarter v. Turpin, 291 S.W.2d 547, 548 (Ky. 1956) (citation omitted).

To determine whether an article is a permanent fixture or a trade fixture, courts look to three factors:

First, annexation to realty, either actual or constructive; second, adaptation or application to the use or purpose that the part of the realty to which it is connected is appropriated; and third, the intention of the parties to make the article a permanent accession to the freehold with title to the article in the one owning the freehold.

Batson v. Clark, 980 S.W.2d 566, 573-74 (Ky.App. 1998) (citation omitted).

Generally, the controlling factor is the intention of the parties. *See Am. Rolling Mill Co. v. Carol Mining Co.*, 282 Ky. 64, 67, 137 S.W.2d 725, 727 (Ky. 1940).

Intention can

be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made; which, obviously, suggests that the other tests are really part of this comprehensive test of intention, and that they derive their chief value as conspicuous evidence of such intention.

Doll v. Guthrie, 233 Ky. 77, 79, 24 S.W.2d 947, 948 (Ky. 1929) (citation omitted).

With regard to a dispute between landlord and tenant, “the greatest latitude and indulgence is given to the claim that fixtures attached to the realty by the tenant remain personal property.” *Batson*, 980 S.W.2d at 574 (citation omitted).

Here, the trial court erred by finding the 1996 lease, the most recent written agreement between the parties, did not clearly express the intent of the parties regarding ownership of the billboard. The 1996 lease specifically refers to the billboard as “Lessee’s [Whiteco] sign structure(s).” The parties further agreed that Nighswander could not remove or move the billboard, and Whiteco assumed responsibility to maintain, repair, and replace the billboard. Contrary to the trial court’s reading, the 1996 lease contains evidence of the parties’ intent to treat the billboard as a trade fixture owned by Whiteco.

Additionally, the trial court erred by finding the 1978 lease did not grant Riverfront with the right to remove the billboard, and that the City asserted ownership rights in the billboard. Both the 1978 lease and the 1983 lease with the City conspicuously grant Riverfront the right to remove the billboard at the termination of the lease. Since intent is the controlling factor to determine whether an article is a permanent fixture or trade fixture, and the law favors a finding that an article is a trade fixture as between landlords and tenants, these factual errors require this court to reverse the trial court's decision that the billboard was a permanent fixture to the real estate.

On cross-appeal, Nighswander argues the trial court erred by not holding the City acquired the billboard during the condemnation proceedings. We disagree.

The record reveals that prior to the condemnation proceeding, the Hardebecks and Riverfront entered into a lease that referred to the billboard as Riverfront's property and granted Riverfront the right to remove the billboard. Additionally, after the condemnation proceeding, the City entered into a lease with Riverfront which stated, in part, "[t]he advertising sign and supports are and shall remain Lessee's [Riverfront] property." This suggests that the billboard was not a permanent fixture at the time the real property was condemned, and moreover, that the City claimed no ownership to the billboard after the condemnation. Accordingly, the trial court did not err by refusing to hold the billboard was owned by the City and sold to the Hardebecks along with the real estate in 1995.

Next, Nighswander maintains that the statute of limitations expired for any claim brought by Lamar regarding ownership of the billboard. We disagree.

Nighswander alleges the applicable statute of limitations began to run no later than October 15, 1982, the date on which Riverfront and Whiteco, as predecessor-in-interest to Lamar, moved to intervene in the condemnation action. Generally, “statutes of limitations begin to run when the relevant cause of action accrues.” *Lexington-Fayette Urban County Gov’t. v. Abney*, 748 S.W.2d 376, 378 (Ky.App. 1988) (citations omitted). The record indicates Lamar first learned of Nighswander’s claim of ownership to the billboard during the correspondence concerning renegotiation of the lease in 2005. Riverfront and Whiteco were specifically informed by the Hardebecks in 1982 prior to the condemnation proceedings, that the Hardebecks were not claiming ownership to the billboard. We find nothing in the record to suggest the cause of action accrued prior to the 2005 correspondence between Nighswander and Lamar.

The order of the Kenton Circuit Court is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/
CROSS APPELLEE:

Shawn M. Young
Cincinnati, Ohio

BRIEF FOR APPELLEES/
CROSS APPELLANTS:

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

Nicholas M. Nighswander, *Pro se*

Florence, Kentucky

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

Paul J. Dickman
Covington, Kentucky