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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001121-MR

THE CITY OF STANTON, KENTUCKY;
PARRIS PERKINS; NANCY PERKINS;
AND ELISH BISHOP — APPELLANTS

APPEAL FROM POWELL CIRCUIT COURT
v. HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 14-CI-00017

BOARD OF ADJUSTMENT OF THE CITY OF STANTON;
KEVIN MORTON, IN HIS CAPACITY AS A MEMBER OF
THE BOARD OF ADJUSTMENT FOR THE CITY OF STANTON;
CHRIS ALLEN, IN HIS CAPACITY AS A MEMBER OF THE
BOARD OF ADJUSTMENT FOR THE CITY OF STANTON;
ROGER K. THOMAS, IN HIS CAPACITY AS A MEMBER
OF THE BOARD OF ADJUSTMENT FOR THE CITY OF STANTON;
KENNETH KIRKPATRICK, IN HIS CAPACITY AS A MEMBER OF
THE BOARD OF ADJUSTMENT FOR THE CITY OF STANTON;
PAUL MALLORY, IN HIS CAPACITY AS A MEMBER OF
THE BOARD OF ADJUSTMENT FOR THE CITY OF STANTON;
WILLIAM THOMPSON; ALLEN SPERRY; WILLIAM CROWE;
AND ANNE H. CECIL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Appellants appeal the summary judgment entered in favor of Appellees by the Powell Circuit Court. We believe that summary judgment was properly granted and affirm.

This case revolves around the zoning issues of a piece of property owned by Anne Cecil. In 1978, Dr. Sam Cecil and Mrs. Cecil acquired the property located at 225 Washington Street, Stanton, Kentucky. The property had previously been the site of a brick making plant. The Cecils converted the building into a doctor's office. The Cecils operated the doctor's office in this building until Dr. Cecil's death in October of 2009. In early 2010, Mrs. Cecil leased the building to Dr. Horsley. Dr. Horsley occupied the premises until the summer of 2011.

From the summer of 2011 until December of 2013, the property remained largely unoccupied.[1] During this time, however, Mrs. Cecil sought out other medical professionals in the hopes of leasing the building. She received inquiries about the building from Dr. Julie Kennon and Nurse Practitioner Joyce Allen. Ultimately, the premises remained empty until December of 2013. At this time, Family Business LLC, which is managed by Allen Sperry and Dr. William Crowe, leased the property to open an outpatient clinic that would treat people suffering from addiction to certain drugs.

[1] For a very short period in 2013, the building was used by a group called Women for Christ. This group would sell items and give the proceeds to charity.

The LLC managers consulted with the Mayor about what permits were needed to open the clinic. The Mayor informed them they would need a conditional use permit because the property was not zoned for this type of clinic. On December 5, 2013, William Thompson, on behalf of the LLC, applied for a conditional use permit. A section of this application required Mr. Thompson to list the property's zone classification. After consulting with a Zoning Board representative, Mr. Thompson listed the property as being zoned as "B-1", which is a general commercial zone classification. This kind of classification concerns retail stores and personal service outlets. Medical clinics are not authorized in this type of zone without a conditional permit.

The LLC, via its managers, appeared before the Zoning Board on January 2, 2014, to discuss the permit. At the meeting, the Zoning Board unanimously granted the LLC's conditional use permit. The Zoning Board also required the LLC to make certain changes to the property. The LLC immediately set about making these changes and additional cosmetic upgrades. The LLC spent approximately $90,000 doing so.

Unbeknownst to the LLC, the Zoning Board met again on January 16, 2014, and voted to rescind the LLC's conditional use permit. Then, on January 30, 2014, the City Commission authorized the filing of a lawsuit against the Board of Adjustment and the owners of the clinic. Several property owners who adjoined the clinic also joined the City's suit. The complaint filed by the plaintiffs alleged that the property in question was not actually zoned as "B-1", but was zoned as "R-

1" or low density residential. The plaintiffs argued that the Zoning Board was provided with false information and that this different classification would require the Zoning Board to reexamine the issuance of the conditional use permit.

After filing suit, the plaintiffs moved for a temporary injunction to prohibit the clinic from operating. The trial court denied the motion. The managers of the LLC and Mrs. Cecil then filed their answer to the complaint and a counterclaim. The primary argument of these defendants was that a conditional use permit was unnecessary in the first place because the property in question was used as a medical clinic for years prior to the adoption of zoning regulations; therefore, the property was grandfathered in as "nonconforming use" and could continue to be used as a medical clinic.

The parties then filed cross-motions for summary judgment. The trial court granted summary judgment in favor of Appellees by finding that the property did not need the conditional use permit, but could operate as a medical clinic due to nonconforming use. This appeal followed.

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital*

> *Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

It is undisputed that Dr. Cecil's doctor's office was established before the City of Stanton adopted zoning regulations. KRS[2] 100.253(1) states in relevant part that "[t]he lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it, may be continued, although such use does not conform to the provisions of such regulations[.]" We believe that the conditional use permit was unnecessary in this situation and that the LLC's use of this property as a medical clinic is permitted due to nonconforming use as established by KRS 100.253.

Appellants argue that Mrs. Cecil relinquished the nonconforming use because the property was vacant for an extended period of time and was not being used as a medical facility. We disagree.

> At the outset, we observe that a nonconforming use is a property right constitutionally protected. It can, however, be abandoned. In each case, the abandonment rests upon intent. While intent may be inferred from a long period of disuse, the general rule is that mere discontinuance of the nonconforming use does not in itself constitute abandonment. The circumstances surrounding each case must be considered. Our analysis of the cases in this jurisdiction leads us to conclude that discontinuance of use is but a single factor, albeit a

[2] Kentucky Revised Statutes.

> strong one, to be considered in determining intent to abandon.

Martin v. Beehan, 689 S.W.2d 29, 31 (Ky. App. 1985) (citations omitted). *See also Smith v. Howard*, 407 S.W.2d 139, 141-42 (Ky. 1966).

In the case *sub judice*, Mrs. Cecil's property had not been used as a medical facility since Dr. Horsley left the premises in the summer of 2011. Around two and one-half years passed before the LLC inquired about the property. While this is an extended period of vacancy, it is not so long that would cause us to believe Mrs. Cecil intended to relinquish or abandon the property's nonconforming use. In *Holloway Ready Mix Co. v. Monfort*, 474 S.W.2d 80 (Ky. 1968), the Court found that a rock quarry did not lose its nonconforming use status when it was vacant for seven or eight years because the owners were actively trying to find a lessee to occupy the property and use it as a quarry. As in that case, Mrs. Cecil also actively pursued medical lessees as previously discussed.

We also believe that Mrs. Cecil performed other acts that demonstrated her intention to retain the property's nonconforming use. Mrs. Cecil performed general maintenance on the property, maintained business insurance, paid the property's utilities at a commercial rate, and paid property taxes based on commercial value. In addition, she left her husband's medical records in the office in the hopes that a future doctor might make use of them. Finally, the office contained a specially constructed x-ray machine and lead-lined room which she left

in the building. These acts, along with her seeking out new medical lessees, express her intent to preserve the property's nonconforming use.

Based on the foregoing, we believe the trial court properly granted summary judgment in favor of Appellees. There were no material facts at issue in this case and Mrs. Cecil's property met the definition of nonconforming use as set forth by statutory and case law.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES ANNE H. CECIL, ALLEN SPERRY, WILLIAM THOMPSON, AND WILLIAM CROWE:

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