RENDERED: JANUARY 15, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001471-MR

THIRTEEN STREET DEVELOPMENT,
LLC, and VULCAN INVESTMENTS, LLC — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 14-CI-00887

AM&W, INC., and
MALCOM CHERRY, INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND KRAMER, JUDGES.

KRAMER, JUDGE: Thirteen Street Development, LLC, and Vulcan Investments, LLC, appeal a judgment of the Warren Circuit Court summarily dismissing a declaratory action they filed against the above-captioned appellees. Upon review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The focus of this matter is the right to lease payments from a cell tower that is situated on property located at 927 Payne Street in Bowling Green, Kentucky.

By way of background, appellees Malcom Cherry and AM&W, Inc. (collectively "Cherry") formerly owned this property and sold it to American Machine & Welding[1] and its principal, Mark Pape. Pape and Cherry agreed in their negotiations that Cherry would continue to retain the right to receive lease payments from the aforementioned cell tower. The Lewisburg Banking Company financed Pape's purchase and took a first mortgage to secure its loan. Cherry took a second mortgage, as Cherry also financed part of Pape's purchase. Ultimately, Pape and his corporation defaulted on their note and declared bankruptcy, and Lewisburg foreclosed in Warren Circuit Court, civil action number 08-CI-840.

In the course of Lewisburg's foreclosure action, a dispute arose as to the rights of Cherry to continue receiving cell tower lease payments. Resolving this dispute, the Warren Circuit Court entered an order and judgment on August 7, 2008, holding in relevant part:

> IT IS THEREFORE ORDERED AND ADJUDGED as a matter of fact and law that despite the Plaintiff's [Lewisburg's] priority interest in the mortgaged property, the Defendant, AM&W, Inc. [Cherry] is entitled to continued receipt of the cell tower lease payments. Any purchaser of the property being foreclosed on must necessarily be advised of AM&W's continued right to

[1] AM&W, Inc. (Cherry's company) and American Machine & Welding (Pape's company) are separate and distinct entities.

> receive such payments, and AM&W, Inc.'s rights regarding the cell tower lease payments shall survive even after the mortgaged property is foreclosed upon and sold. Any successor in interest to the foreclosed property shall take same subject to AM&W's continued rights of receipt of these lease payments.

This judgment became final, and Lewisburg Bank did not appeal or otherwise contest it.

Thirteen Street Development ("TSD") then purchased the 927 Payne Street property on December 19, 2008. At the time of the purchase, TSD was aware that the property was being sold to it subject to Cherry's rights specified in the Warren Circuit Court's August 7, 2008 judgment. Nevertheless, TSD later sued Cherry in Warren Circuit Court in case number 11-CI-1957, claiming that it, not Cherry, had the right to receive the cell tower lease payments.

Cherry subsequently moved to dismiss TSD's complaint in 11-CI-1957, citing the above-referenced language from the Warren Circuit Court's August 7, 2008 judgment entered in the prior litigation. On January 26, 2012, the Warren Circuit Court dismissed TSD's complaint based upon the above-referenced language from its August 7, 2008 judgment, explaining "The Plaintiff herein, as the successor to Lewisburg Banking Company's ownership of the property in issue, took this property subject to AM&W's continued right to receive cell tower lease payments."

TSD appealed from the January 26, 2012 order, but its appeal was dismissed by this Court. The Kentucky Supreme Court later denied discretionary review.

Afterward, the 927 Payne Street property went into foreclosure and was sold at a Master Commissioner's sale to Vulcan Investments in July, 2012. Prior to the sale, the Master Commissioner informed all prospective purchasers, including Vulcan, that the rights to the cell tower lease payments were not being acquired by the purchaser and that the rights to these lease payments would remain with Cherry. Nevertheless, Vulcan (along with TSD) later sued Cherry in Warren Circuit Court in case number 14-CI-00887, claiming that they, not Cherry, had the right to receive the cell tower lease payments. Incidentally, Vulcan and TSD are both owned either in whole or in part by the same individual, Kelly Thomas.

Cherry subsequently moved to dismiss Vulcan's and TSD's complaint in 14-CI-00887, citing the above-referenced language from the Warren Circuit Court's August 7, 2008 judgment entered in 08-CI-840, pointing out that both Vulcan and TSD had knowledge of the judgment, and asserting that Vulcan's and TSD's action amounted to an unauthorized collateral attack. And, on September 2, 2014, the Warren Circuit Court recited substantially all of the facts noted above and granted Cherry's motion based, once again, upon the above-referenced language from its August 7, 2008 judgment. The circuit court further stated:

> The facts have not changed. The law has not changed. This Court ruled back on August 7, 2008 that Cherry and AM&W were entitled to the cell tower lease payments in

> issue. This Court made the exact same ruling again on January 26, 2012. [TSD] knew all this when it purchased the property. Vulcan knew it when it purchased the property. Kelly Thomas is a principal member of both entities, and the record further reveals that the Master Commissioner announced at these sales that cell tower rights were not being conveyed.

Vulcan and TSD now appeal the Warren Circuit Court's September 2, 2014 order.

STANDARD OF REVIEW

Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). Therefore, we operate under a *de novo* standard of review with no need to defer to the trial court's decision. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citation omitted). Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a 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*, 807 S.W.2d at 480.

ANALYSIS

On appeal, Vulcan and TSD argue that because they were not parties to the 08-CI-840 litigation and because they believe the circuit court's August 7,

2008 judgment in that matter was legally erroneous, they should not be bound by that judgment.

However, it is undisputed that Vulcan and TSD had actual knowledge of the circuit court's August 7, 2008 judgment and the limitation it placed upon Lewisburg's title to the real property at issue in this matter (*i.e.*, that Lewisburg's title did not include the cell tower lease payments, and that Cherry and AM&W retained the right to receive those payments). Vulcan and TSD therefore purchased the 927 Payne Street property subject to that limitation and are bound by it. *See Rice v. Merritt*, 274 S.W.2d 378, 379 (Ky. 1955) ("[A] subsequent purchaser with notice acquires title subject to the same equities as the party from whom he purchased."). Moreover, even if the August 7, 2008 judgment was legally erroneous, it remains valid and binding until properly set aside. *See Wides v. Wides*, 300 Ky. 344, 188 S.W.2d 471, 473 (Ky. 1945).

Alternatively, Vulcan and TSD argue that they should not be prohibited from re-litigating exactly the same issue the circuit court resolved in the August 7, 2008 judgment (*i.e.*, whether Cherry and AM&W are entitled to the cell tower lease payments in issue). To that end, they urge that Kentucky Rule of Civil

Procedure (CR) 60.02[2] provides them with a basis for setting aside the August 7, 2008 judgment through a collateral attack.

This argument also lacks merit. Vulcan and TSD have never argued (and the record gives no indication) that the circuit court's August 7, 2008 judgment is void. Below, they never cited CR 60.02 or any of its enumerated grounds for setting aside a judgment as the basis for their action.[3] Moreover, their only point of contention with the August 7, 2008 judgment—that it was legally erroneous—is a point of contention that could have been raised in a direct appeal of that judgment by their predecessor-in-interest, Lewisburg. And, as stated in *Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 507 S.W.2d 183, 186 (Ky. 1974):

> In those instances where grounds . . . for relief under a 60.02 motion are such that they were known or could have been ascertained by the exercise of due diligence prior to the entry of the questioned judgment, then relief

[2] In full, CR 60.02 provides:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

[3] The first and only time Vulcan and TSD have invoked CR 60.02 as basis for their action was in their reply brief in this appeal, which was improper. *See Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979) ("The reply brief is not a device for raising new issues which are essential to the success of the appeal.").

> cannot be granted from the judgment under a 60.02 proceeding. Relief afforded by a 60.02 proceeding is extraordinary in nature and should be related to those instances *where the matters do not appear on the face of the record, were not available by appeal or otherwise, and were discovered after rendition of the judgment without fault of the party seeking relief*.

(Emphasis added.)

CONCLUSION

We find no error in the circuit court's decision to dismiss. The litigation instituted in this matter by Vulcan and TSD amounted to an unauthorized collateral attack upon a prior, final judgment. As such, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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