RENDERED: February 27, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-3253-MR

OUTDOOR SYSTEMS, INC. — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
CIVIL ACTION NO. 95-CI-006843

COMMONWEALTH OF KENTUCKY
FINANCE AND ADMINISTRATION
CABINET ON RELATION OF
CRIT LUALLEN, SECRETARY OF
FINANCE AND ADMINISTRATION,
FOR THE USE AND BENEFIT OF
THE KENTUCKY STATE FAIR BOARD;
MARY ALICE GARGOTTO;
JEFFERSON COUNTY; and
CITY OF LOUISVILLE — APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GUIDUGLI, JOHNSON and KNOPF, Judges.

GUIDUGLI, JUDGE. Outdoor Systems, Inc. (Outdoor Systems), the lessee of property in Louisville, Kentucky, where it maintained a two-sided billboard, appeals from the entry of summary judgment, denying it a right to compensation for the taking of its alleged leasehold interest in the billboard in an eminent domain action in Jefferson Circuit Court. For the reasons stated herein, we believe summary judgment was appropriate and affirm.

In 1957, Outdoor Systems's predecessor in interest, Naegele Outdoor Advertising, constructed a large two-side billboard on property located at 226 South Second Street, Louisville, owned by Pete Gargotto. The six hundred square foot billboards were in compliance with all applicable laws when built in 1957 and the parties executed a written lease for the billboard.

Changes in the applicable zoning and signage laws have made the billboards illegal. Only by virtue of their status as pre-existing non-conforming uses under KRS 100.253 were the billboards allowed to remain. The billboards could remain indefinitely, but if removed, could not be replaced. At all relevant times from 1957 to the present, the property was utilized by the owners for three simultaneous uses: (1) a small package liquor store; (2) monthly and other periodic parking space rental; and (3) the billboards.

The Gargotto property is adjacent to the Commonwealth Convention Center in downtown Louisville. When the condemnation suit was filed, the property was owned by Mary Alice Gargotto. Ms. Gargotto testified that there had been no effort at any time, either by Outdoor Systems, or her, to renew the last written lease with Outdoor Systems which expired on January 31, 1995. Her testimony did indicate she did not initiate lease negotiations, at least in part, because of the threat of condemnation for the expansion of the Commonwealth Convention Center.

Outdoor Systems argues that the "unique situation" (i.e., the billboard as a pre-existing non-conforming use), "virtually guaranteed that but for the condemnation in this action, the leasehold interest between the landowner and Outdoor Systems would have been renewed for another 39 years." Outdoor alleges the trial court erred in granting summary judgment against it and in not allowing a jury to determine whether or not the lease would have been renewed. We disagree.

Outdoor Systems, in its brief to this Court, denies being aware of the condemnation prior to being served with a summons for the proceedings. Outdoor was served with the summons and petition for condemnation in this case on or about December 7, 1995, eleven months after the expiration of its written lease with the Gargottos in January, 1995.

In Kentucky, title acquired by condemnation is derivative, standing in place of the title as it was privately held, and clear, therefore, only insofar as the private owners have had their interests removed. Thus, the title acquired embraces only the interests of those who were made parties. Commonwealth Dept. of Highways v. Thornbury, Ky., 339 S.W.2d 728 (1966). The onus of bringing the right parties to court is on the condemnor, who institutes the proceedings in the first place. Id. at 730.

In this case, it was good practice for the condemnor to make Outdoor Systems a party to determine whether Outdoor Systems had a leasehold interest in the Gargotto property, and if so, the

value of that lease. If not, the condemnation could proceed against Ms. Gargotto, the property owner, alone.

The parties agree that the last written or express lease between them had expired by its terms on January 31, 1995. By continuing to maintain the billboard without a written lease after January 31, 1995, Outdoor Systems became a "holdover tenant." Under the terms of the most recent lease, Outdoor paid Ms. Gargotto $200 per month. Outdoor Systems argues, and we agree, that the written lease which expired on January 31, 1995, was automatically renewed for another year until January 31, 1996, pursuant to the terms of KRS 383.160(1):

> (1) If, by contract, a term or tenancy for a year or more is to expire on a certain day, the tenant shall abandon the premises on that day, unless by express contract he secures the right to remain longer. If without such contract the tenant shall hold over, he shall not thereby acquire any right to hold or remain on the premises for ninety days after said day, and possession may be recovered without demand or notice if proceedings are instituted within that time. But, if proceedings are not instituted within ninety days after the day of expiration, then none shall be allowed until the expiration of one year from the day the term or tenancy expired. At the end of that year the tenant shall abandon the premises without demand or notice, or stand in the same relation to his landlord that he did at the expiration of the term or tenancy aforesaid; and so from year to year, until he abandons the premises, is turned out of possession, or makes a new contract.

Because a new written lease wasn't negotiated between the parties, and because Ms. Gargotto did not institute proceedings to recover possession of the premises within ninety

days after the expiration of the last extension of the lease, Outdoor Systems had a legal right to continued possession of its commercial leasehold interest in the billboard for another year until January 31, 1996. KRS 383.160; Masterson v. DeHart Paint & Varnish Co., Ky., 843 S.W.2d 332, 334 (1992).

KRS 383.160(1) also controls Outdoor Systems's rights at the expiration of the first one year statutory holdover tenancy, "If without such [express] contract the tenant shall hold over, he shall not thereby acquire any right to hold or remain on the premises for ninety days after said day, and possession may be recovered without demand or notice if proceedings are instituted within that time."

There is no evidence in the record of an oral contract, agreement, or lease between the parties. Nor is there any argument that an implied contract existed, or should be found by the Court to exist, between the parties. Without a contract, Outdoor Systems had only the rights of a month-to-month holdover tenant relative to the billboards. We note that Outdoor Systems offers no excuse for failing to even attempt to negotiate a new lease prior to the condemnation.

We hold that when Outdoor Systems's holdover tenancy expired on January 31, 1996, the condemnation action, in which Outdoor Systems had been made a party by service of process the previous month, is included in the "proceedings" referred to in KRS 383.160(1), which prevented Outdoor Systems from acquiring

"any right to hold or remain on the premises" thereafter which was inconsistent with the condemnation.

Outdoor Systems continued to lease the billboard from Ms. Gargotto until March, 1996, the date of the interlocutory order granting the right to take. After the taking, Outdoor Systems leased the billboard directly from the Commonwealth for five months until August 1, 1996. These facts, including the month-to-month rental from the Commonwealth of the billboard from April until August 1996, did not give Outdoor Systems any right to hold or remain on the property after August 1996, and therefore, no right to compensation for the condemnation of that property.

Because of our holding, it is not necessary to address other issues raised by appellant which are moot. The summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE, COMMONWEALTH OF KY. FINANCE & ADMINISTRATION CABINET ON RELATION OF CRIT LUALLEN, SECRETARY OF FINANCE AND & ADMINISTRATION:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE, MARY ALICE GARGOTTO:

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