

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003120-MR

UNITED GRAFIX INCORPORATED d/b/a
Tri-State Outdoor Advertising
Company, Inc.

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
CIVIL ACTION NO. 97-CI-00161

GLENN HOUSE; OSCAR GAYLE
HOUSE; and BAXTER BLEDSOE, Jr.

APPELLEES

OPINION

REVERSING AND REMANDING

* * * * *

BEFORE: BUCKINGHAM, HUDDLESTON and SCHRODER, JUDGES.

BUCKINGHAM, JUDGE. United Grafix Incorporated, d/b/a Tri-State Outdoor Advertising Company, Inc. (United Grafix) appeals from an order of the Laurel Circuit Court granting summary judgment to Glenn House, Oscar Gayle House, and Baxter Bledsoe, Jr. The controversy concerns a billboard originally erected and owned by United Grafix, which the circuit court found to be abandoned. We conclude that the trial court erred in granting summary judgment and, therefore, reverse and remand.

In 1958, Wilma Poynter acquired property located adjacent to Interstate 75 in London, Kentucky. In 1970, United Grafix executed a lease with Poynter and erected a billboard on the Poynter property. In 1986, United Grafix and Poynter entered into a new lease for the billboard site. Under the terms of the lease, United Grafix was to pay annual rent of \$400.00 for a five-year term beginning on May 31, 1986. The lease provided United Grafix with an option to extend the lease for an additional five years, following the expiration of the first five years. Thereafter, the lease was to operate on a year-to-year basis "under the same terms and conditions, unless either party serves written notice of termination on the other party not less than 30 days prior to the end of such term or additional term."

Poynter died sometime prior to 1990, and United Grafix was notified by her estate's attorney that future rental payments should be forwarded to the estate's executor. United Grafix mailed the rental payments to the executor through 1993. The 1993 check was endorsed in favor of, and cashed by, "House Brothers," a business operated by Glenn House and his brother, Cloyd House. No further rent was paid to either the Poynter estate or to House Brothers in any year after 1993.

The Poynter property had been purchased by Glenn House and Cloyd House¹ on July 22, 1992. United Grafix contends that it was first notified of the transfer on March 11, 1996, when it

¹ Cloyd House died prior to the filing of this case. Appellee Oscar Gayle House is the executor of the estate of Cloyd House.

received a letter from Glenn House.² The letter stated, "[i]f you want to continue with your sign on House Bros[.] property formily [sic] Wilma Poynter Leas [sic] No. CB-22[,], you should contact me at once." United Grafix contends that upon receiving the letter, it attempted to contact House, but was unsuccessful.

In the meantime, House leased the billboard to Bledsoe, and Bledsoe allegedly spent \$10,000 to repair and improve it. On December 10, 1996, United Grafix mailed a letter to House offering to execute a new lease for the billboard site. On December 11, 1996, Bledsoe sent a letter to United Grafix informing it that he had worked out an agreement to lease the location from House, and that it was the position of Bledsoe and House that the billboard had been abandoned and that they, House and/or Bledsoe, were the rightful owners of the billboard. On December 12, 1996, United Grafix sent a letter to House stating that it would like to confer with him in person concerning the sign and the rentals. House apparently rejected this proposal and assumed the position that United Grafix had abandoned the billboard and no longer owned it. Throughout this time, United Grafix claims that it continued to lease the billboard to Curry Oil Company and collect rent on it.

In February 1997, United Grafix filed a complaint in Laurel Circuit Court seeking a declaratory judgment that it was the owner of the billboard and therefore entitled to immediate possession of it. The appellees filed an answer contending that

² The appellees allege that there had been earlier notifications.

they believed United Grafix had abandoned and given up any and all rights or interests in the billboard. After summary judgment motions were filed by the parties, the trial court entered an order granting summary judgment in favor of the appellees.

In order to qualify for summary judgment, the movant must 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 Rule of Civil Procedure (CR) 56.03. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. The record must be viewed in the light most favorable to the party opposing the motion for summary judgment, and all doubts are to be resolved in its favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant. Id. at 483, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

The first question concerns the circumstances under which the lease came to an end. The appellees contend that the lease expired on its own terms, and we agree. One provision in the lease stated as follows:

After the expiration of the term of this lease, the lease shall continue in force from year to year under the same terms and conditions, unless either party serves written notice of termination on the other

party not less than 30 days prior to the end of such term or additional year.

Since the first five-year term of the lease commenced on May 31, 1986, then the second five-year term commenced on May 31, 1991, and ended on May 30, 1996, due to its expiration. As House served a written notice on United Grafix on March 11, 1996, which was more than thirty days prior to the end of the term, and since United Grafix neither paid the rent in advance nor took other steps to cause the lease to remain in force, the lease expired by its terms. This lease provision did not require written notice by certified mail.³

The trial court further held that United Grafix had, as a matter of law, abandoned the billboard. We disagree. The terms of the lease provided that "all materials, structures, equipment and other works placed upon the leased premises shall remain the property of Tri-State and may be removed by Tri-State at any time."

"In order to establish an abandonment of property, there must be a showing of actual acts of relinquishment, accompanied with the intention to abandon." Elk Horn Coal Corp. v. Allen, Ky., 324 S.W.2d 829, 830 (1959); Stinnett v. Kinslow, 238 Ky. 812, 38 S.W.2d 920 (1931); Sandy River Coal Co. v. Champion Bridge Co., 243 Ky. 424, 48 S.W.2d 1062 (1932). "There is no presumption in law of abandonment or of intention to

³ Although United Grafix had previously defaulted under the lease by failing to pay rent, the lease was not terminated due to default since United Grafix was not given written notice of its default by certified mail so that it could cure such default.

abandon. The burden is upon him who sets up abandonment to prove the same by clear, unequivocal and decisive evidence." Elk Horn Coal Corp., supra at 831. "[A]bandonment of property is an intentional surrender or relinquishment of a claim or right to the property. There must be a concurrence of intention and an act manifesting that intention." Harper v. Johnson, Ky., 294 S.W.2d 928, 930 (1956); Sandy River Coal Co., supra; Rice v. Rice, 243 Ky. 837, 50 S.W.2d 26 (1932).

Viewing the evidence in the light most favorable to United Grafix, there is not clear, unequivocal, and decisive evidence that it ever surrendered or relinquished its claim to the billboard or that it ever manifested an intention to do so. Though the appellees allege that United Grafix manifested an abandonment of the billboard by its failure to pay rent on the billboard site, nevertheless, United Grafix was leasing advertising space on the billboard to Curry Oil Company and was collecting rent on it. United Grafix contends, and we must accept this contention in reviewing a motion for summary judgment, that it continued to collect rent from Curry Oil Company through October 1996 and that its rental collections ceased only when Bledsoe approached Curry Oil Company and represented that United Grafix no longer owned the billboard.

Inasmuch as United Grafix had an active lease on the billboard and was generating rental income on the billboard, the trial court erred in concluding as a matter of law that the billboard had been abandoned. To the contrary, United Grafix's

active lease disproves that it had an intention to abandon the billboard.

The trial court's decision that the billboard had been abandoned relied on Coleman v. Owens, Ky., 254 S.W.2d 341 (1953). Coleman concerned whether a tenant was entitled to remove a coal loading ramp from leased premises following the expiration of the lease and considered right of removal issues, beyond the general abandonment rules discussed above, in a landlord-tenant context. Coleman states that

[t]he right to remove improvements does not end on the expiration date of the lease. Necessarily, the lessee is allowed a reasonable time within which to effect the removal. . . . What is considered a reasonable time may vary according to the facts and circumstances of each case. A given period may be considered reasonable under one situation but may be unreasonable under another.

Id. at 342. Under Coleman, therefore, the issue is whether United Grafix failed to remove, or to seek removal of,⁴ the billboard within a "reasonable time" following the expiration or termination of the lease. That is a fact issue, and the trial court erred in making this determination as a matter of law.

For the foregoing reasons, the order of the Laurel Circuit Court granting summary judgment to the appellees is reversed, and this case is remanded for trial on the issue of abandonment.

SCHRODER, JUDGE, CONCURS.

⁴At this juncture, United Grafix seeks only to remove the billboard. It does not seek to continue to lease the billboard site.

HUDDLESTON, JUDGE, CONCURS IN PART AND DISSENTS IN PART
BY SEPARATE OPINION.

HUDDLESTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I agree with the circuit court that United Grafix Incorporated did not remove its billboard within a reasonable time after the termination of its lease and, as a matter of law, abandoned the improvements. Therefore, I dissent from that portion of the Court's opinion that holds otherwise. I concur in the balance of the opinion. I would, therefore, affirm the summary judgment in its entirety.

BRIEF AND REPLY BRIEF FOR
APPELLANT:

Jennifer S. Nicholson
London, Kentucky

BRIEF FOR APPELLEES:

Larry G. Bryson
London, Kentucky