

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000255-MR

MARY L. GARTNER AND
SHEPHERDSVILLE URBAN RENEWAL
AND COMMUNITY DEVELOPMENT

APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 97-CI-00358

STOUT'S FEED STORE, INC.
D/B/A STOUT'S BUILDING CENTER;
SCOTT BACHERT; AND THE
PEOPLE'S BANK OF BULLITT COUNTY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, COMBS, AND McANULTY, JUDGES.

McANULTY, JUDGE. Mary Gartner and Shepherdsville Urban Renewal and Community Development appeal from a summary judgment and order of sale entered by the Bullitt Circuit Court that awarded Stout's Feed Store, Inc. D/B/A Stout's Building Center \$7,883.20 associated with a mechanic's lien for building materials it supplied for construction on a residence. After reviewing the

record, the applicable law, and the arguments of counsel, we affirm.

In 1995-1996, the city of Shepherdsville through the Shepherdsville Urban and Renewal and Community Development Agency (Shepherdsville Urban Renewal) embarked on a plan to rehabilitate several buildings in the city, including personal residences. Whitney Construction Company participated in several of the rehabilitation projects, including that of the residence owned by Mary Gartner. In August 1996, Shepherdsville Urban Renewal obtained a mortgage from Gartner on her residence as security for a \$50,364 loan related to the rehabilitation project. Between August-October 1996, Stout's provided various building materials and supplies to Whitney Construction related to improvements made on Gartner's residence. After Stout's failed to receive payment for the materials, it filed a mechanic's lien against Gartner's realty on January 2, 1997, asserting a claim for \$7,883.20 plus interest and costs.

On May 28, 1997, Stout's filed a complaint seeking judgment against Gartner for \$7,883.20 plus interest from October 4, 1996, for the materials it had supplied to Whitney Construction as evidenced by the mechanic's lien. Stout's attached several customer billing statements as an exhibit to the complaint. Stout's also joined several other parties who had an interest in the realty by way of mortgages of record, including Shepherdsville Urban Renewal.¹ Stout's requested a judicial sale

¹ Whitney Construction declared bankruptcy prior to the filing of the complaint and the bankruptcy trustee was also named as a party in the complaint.

of the property with the proceeds being distributed among the interested parties.

On June 4, 1997, Gartner filed an answer asserting a general denial of the debt and raising the affirmative defenses of failure to state a claim, laches, and estoppel and payment. On the same day, Shepherdsville Urban Renewal filed an answer denying the claims based on insufficient knowledge and asserting a superior interest in the property based on its recorded mortgage. Both parties requested dismissal of the complaint.

On May 4, 1998, Shepherdsville Urban Renewal filed a motion to dismiss the complaint for Stout's failure to comply with the requirements of KRS 376.210 et seq. in filing its lien. On May 13, 1998, Stout's filed a motion seeking a temporary injunction prohibiting Shepherdsville Urban Renewal from disbursing any funds in its possession earmarked for the rehabilitation project on Gartner's residence. Attached to the motion was an affidavit by David Stout, vice-president of Stout's Building Center, stating his belief that the city held funds intended to be used to pay for building materials associated with the construction on Gartner's residence. Stout expressed a concern that the city would exhaust the funds through disbursements to other parties before Stout's was reimbursed. On July 15, 1998, Shepherdsville Urban Renewal filed a memorandum in support of its motion to dismiss arguing that Stout's mechanic's lien was not filed within the time constraints imposed by KRS 376.210-.250, which dealt with liens involving construction for public improvements.

On July 29, 1998, Stout's filed a response to the Agency's memorandum maintaining that the construction on Gartner's private residence did not constitute a "public improvement" for purposes of KRS 376.210 et seq. Stout's stated it had complied with the requirements of the applicable statutes, KRS 376.080 and KRS 376.010. Following a hearing, the circuit court denied the motion to dismiss stating Stout's mechanic's lien was valid because the statutes dealing with public improvements did not apply.

On September 15, 1998, Stout's filed a motion for summary judgment stating there was no factual dispute concerning the existence of Gartner's debt and its mechanic's lien. Stout's included an affidavit by Kenny Stout, the owner of Stout's Building Center, stating Gartner owed \$7,883.20 on an open account for construction materials as evidenced by the billing receipts attached to the complaint and the mechanic's lien. Shepherdsville Urban Renewal filed a memorandum opposing the motion stating genuine issues of material fact did exist concerning the validity of the alleged debt. It referred to the strict standard for summary judgment under CR 56.03 and the general denials of the debt in the appellants' answers to the complaint.

On January 14, 1999, the trial court entered an order granting the motion for summary judgment. It held that the appellants failed to carry their burden to present specific facts showing a genuine issue of material fact sufficient to rebut Stout's affidavit and evidence of the debt owed by Gartner. The

court stated that the appellants had had ample time to conduct discovery but presented no affidavits or depositions in support of its opposition to the motion. In conjunction with the order, the court entered a summary judgment and order of sale ordering sale of the realty and giving Stout's mechanic's lien priority with respect to disbursement of the proceeds. This appeal followed.

The appellants contend on appeal that the circuit court erred in granting Stout's summary judgment. The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996); Palmer v. Int'l Ass'n of Machinists, Ky., 882 S.W.2d 117, 120 (1994); CR 56.03. Because summary judgment involves only legal questions and whether there exist any disputed material facts, an appellate court need not defer to the trial court's decision and will review the issue de novo. See Scifres, 916 S.W.2d at 781; Morton v. Bank of Bluegrass, Ky. App., 18 S.W.3d 353, 358 (1999); Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997).

The pre-eminent case setting forth the standards for summary judgment is Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). In that case, the court stated that the movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary

judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 482. See also City of Florence v. Chipman, Ky., 38 S.W.3d 387 (2001); Hibbitts v. Cumberland Valley Nat'l Bank and Trust Co., Ky. App., 977 S.W.2d 252, 253 (1998). The court indicated that summary judgment should be cautiously applied and should not be used as a substitute for trial. Steelvest, 807 S.W.2d at 483. "Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted." Id. at 482 (citations omitted).

The Steelvest Court's emphasis on a stringent summary judgment standard and its use of the word "impossible" generated some confusion on the viability of the summary judgment procedure. Later cases tempered the approach to summary judgment analysis. For instance, in Perkins v. Hausladen, Ky., 828 S.W.2d 652, 654 (1992), the court reaffirmed the strict standard for summary judgment, but noted that the word "impossible" appearing in Steelvest was "used in a practical sense, not in an absolute sense." In Welch v. American Publishing Co. of Kentucky, Ky., 3 S.W.3d 724 (1999), the court said:

Since rendition of our decision in Steelvest v. Scansteel, Ky., 807 S.W.2d 476 (1991), on the question of the proper standard for deciding summary judgment motions, much attention has been given to the use of the word "impossible." Summary judgment is improper unless 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. Steelvest did not repeal CR 56 It merely stated forcefully that trial judges

are to refrain from weighing evidence at the summary judgment stage; that they are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party. Steelvest at 482-83. The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.

Id. at 729-30. See also City of Florence v. Chipman, Ky., 38 S.W.3d 387 (2001); Hoke v. Culliman, Ky., 914 S.W.2d 335, 337 (1995) ("Provided litigants are given an opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate.")

In the case sub judice, Stout's provided customer billing statements, a recorded mechanic's lien, and an affidavit to establish the debt owed by Gartner for the materials. The appellants tendered no evidentiary materials challenging the validity of the alleged debt. Instead, they relied solely on the general denials in their pleadings, the legal argument attacking Stout's compliance with recording procedures for the mechanic's lien, and the strict legal standard for summary judgment. As the trial court indicated, appellants had sufficient opportunity to develop and furnish evidence opposing the motion. We believe the trial court correctly held that the appellants failed to satisfy their burden of presenting "at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." See Hubble v. Johnson, Ky., 841 S.W.2d 169 (1992) (summary judgment proper where non-movant failed to provide

affidavit or affirmative evidence to create factual dispute); Hibbits, supra (summary judgment proper where non-movants failed to present evidence rebutting debt due on promissory note.) Thus, Stout's was entitled to summary judgment as a matter of law.

The appellants also contend that the trial court erred by finding that KRS 376.210-.250 did not apply to Stout's mechanic's lien. They admit that there is no clear definition for "public improvement" for purposes of these statutes in Kentucky law. Nevertheless, they assert that the record establishes that the construction on Gartner's property constitute a "public improvement" because of the expenditure of public funds. We disagree.

Although the remodeling work on Gartner's property was one of several urban renewal projects conducted in cooperation with the city's urban renewal agency, the work was performed on a private residence. The city agency apparently facilitated the availability of lower interest funds for the projects, but the individual property owners remained obligated to pay the amounts loaned to them to finance the construction work. The appellants have provided no evidence that public moneys were actually expended on the projects. A review of the public improvement lien statutes indicates they were directed at construction on facilities for public use, i.e., a canal, railroad, public highway, bridge, etc. The appellants' reliance on McLean County v. Meuth Carpet Supply, Ky., 573 S.W.2d 340 (1978) and Steele and Lebbey v. Ayer and Lord Tie Co., 246 Ky. 379, 55 S.W.2d 52 (1932),

is misplaced because both of these cases are distinguishable on their facts. McLean County involved remodeling the county clerk's office, which was located in a public building. Steele and Lebbey concerned construction on two bridges. In both cases, the work was performed under contracts with a governmental body. The trial court correctly held that Stout's mechanic's lien was properly filed pursuant to KRS 376.010 and that KRS 376.210 and KRS 376.220 did not apply.

The judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Mark E. Edison
Shepherdsville, Kentucky

BRIEF FOR APPELLEES:

John F. Carroll
Anne W. McAfee
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