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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002275-MR

UNITED GRAFIX INCORPORATED,
D/B/A TRI-STATE OUTDOOR
ADVERTISING COMPANY, INC. APPELLANT

v.

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

GLENN HOUSE, OSCAR GAYLE HOUSE,
BAXTER BLEDSOE, JR., BAXTER BLEDSOE,
LTD., AND UNITED SIGN, INC. APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: United Graphix, Incorporated, d/b/a Tri-State Advertising Compnay, Inc. (Tri-State) appeals from an order of the Laurel Circuit Court granting summary judgment against it. We reverse and remand for a trial of all issues.

United Graphix and it's subsidiary, Tri-State, were corporate entities formed by their owner, Gene Mullins, to acquire, build and lease billboard signs in Kentucky. In 1986, Mullins bought out the assets of a similar company which included the sign, located beside I-75 in Laurel County, which is the

subject of the present controversy. This sign was constructed in 1959 on land owned by Wilma Poynter who entered into a series of leases, which ran for five years with five-year renewals, allowing the sign to be located on her property. After Mullins acquired the sign, he continued the pattern of leases with Poynter. Their last lease was dated August 20, 1986, for a five-year term beginning May 31, 1986, with a five-year renewal option. This lease included the following provision:

> Lessor represents that he is the OWNER/LESSEE UNDER WRITTEN LEASE . . . of the premises described above and has the right to grant Tri-State free access to the premises to perform all acts necessary to carry on Tri-State's business and agrees 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.

During the term of this lease, Poynter died and Tri-State received a notification that all future payments should be made to the estate. However, Tri-State contends that it was never notified of the subsequent sale of the property by Poynter's administrator to Roland Mooney, Glenn House and Cloyd House on July 22, 1992.[1] On June 30, 1993, Tri-State issued a check payable to Poynter's estate for the amount of the annual rent. Tri-State enclosed a form letter inquiring as to estate's continued ownership of the property; however, no response was received. The check was endorsed by the estate's administrator, but made payable to "House Brothers for deposit."

[1] Cloyd House died prior to the filing of this action and his executor, Oscar Gayle House, was named as a defendant.

Due to its uncertainty over the ownership of the property, Tri-State did not issue payment for rent in 1994 or 1995. In 1996, Tri-State's form letter was returned with an undated note on the bottom which stated that House Brothers had purchased the property which was the subject of lease CB-22 and requesting that Tri-State contact Glenn House. A telephone number and a mailing address in East Bernstadt were included. House sent a letter on March 11, 1996, instructing Tri-State to contact him at the same address and telephone number previously given if it wanted to continue leasing the billboard site. Mullins alleges that he made numerous unsuccessful attempts to telephone House on Tri-State's behalf. Although the last lease executed with Poynter expired on May 31, 1996, Tri-State continued to repair the sign until that December. Moreover, advertising space was still being rented by Curry Oil Company which had rented the sign since the 1970s.

Curry Oil paid rent to Tri-State until receiving a letter on November 1, 1996 from an attorney, Baxter Bledsoe, which instructed them as follows:

> By an earlier conversation between you and I and as a result of working with Glenn House, it appears that a company by the name of Tri-State at one time owned this billboard. If you are renting from them or paying them anything by the month you should probably stop since they have no further interest in the board.
>
> We will be cleaning the board up and will put it back into active use with lights and such. If you have any desire to continue to utilize the board, we would be more than glad to work with you.

In fact, Bledsoe had already entered into an agreement, on October 15, 1996, with the Houses to lease the sign. He subsequently, assigned his interest in the lease to United Sign, Ltd., in which he was a principal. Tri-State's general counsel sent a subsequent letter to Glenn House offering to renew the lease and pay increased rent. Bledsoe responded on the Houses' behalf that he considered the sign abandoned and, having incurred repair costs, was assuming control over it. On April 29, 1997, United Sign entered into an agreement with Curry Oil to lease half of the billboard space for advertising, the other half having already been leased to Jamco Restaurants, Inc., d/b/a Arby's.

By this time, Tri-State had already brought an action seeking a declaration of rights as to the ownership of the billboard. The Houses and Bledsoe responded that the sign had been abandoned due to Tr-State's failure to remove it in a timely manner. The trial court granted summary judgment in favor of the defendants, and this court reversed and remanded the case in an unpublished opinion, 1998-CA-003120-MR. Upon remand, Tri-State was given leave to amend the complaint to seek recovery of damages for trespass, conversion, intentional interference with a contract, and loss of prospective business advantage. After discovery depositions were taken, the matter was set for trial; however, the defendants once again filed a motion for summary judgment. The trial court again granted summary judgment on the grounds that Tri-State had abandoned the sign, and this appeal followed.

Tri-State argues that the trial court erred in granting summary judgment in favor of the Houses and Bledsoe on their claims for trespass, conversion, and specific performance of the lease enabling Tri-State to remove its sign from the property. In order to obtain summary judgment, a moving party must show that there are no genuine issues of material fact. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Moreover, the record must be viewed in the light most favorable to the respondent, and summary judgment should only be granted where it appears impossible for the respondent to produce evidence at trial warranting a judgment in his favor. Paintsville Hospital Company v. Ross, Ky., 683 S.W.2d 255 (1985). As the sole ground for their motion for summary judgment, the defendants offered a statement, in response to a hypothetical question, taken from Mullins' deposition that the billboard could be removed within sixty days. The trial court based its ruling upon this statement which it incorrectly characterized as an admission by Mullins that Tri-State did not remove the billboard within a reasonable amount of time.

"In order to establish an abandonment of property, there must be a showing of acts of abandonment, 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 v. Champion Bridge Co., 243 Ky. 424, 48 S.W.2d 1062 (1932). During his deposition, Tri-State's accountant, Dale Lewis, produced work orders showing regular repairs done to the billboard through December 1996. He

also introduced invoices and checks for rent payments made by Curry Oil Company for advertising space until the end of October 1996. These payments to Tri-State only stopped after Bledsoe advised Curry Oil to discontinue them. The trial court seized on the following portion of Mullins' deposition to bolster its ruling against Tri-State:

> Q. If for whatever reason the occasion should arise, by discussion, settlement, negotiation, court order or otherwise, that you would have the right to remove your structure--the structure you claim from this property, how long would it take you to do that? Could you do it in a month or less?
>
> A. I would ask for 30 to 60 days, yes. But I would need to schedule the state to come and videotape me taking it down.
>
> Q. Why?
>
> . . .
>
> A. That's a grandfathered structure.
>
> Q. In an urban area.
>
> . . .
>
> A. It's not commercial.

(Deposition, Gene Mullins, pg. 70.) To characterize this answer to a hypothetical question as an admission that Tri-State intended to abandon the billboard is clearly erroneous.

Moreover, the trial court's decision to grant summary judgment in favor of the defendants on the grounds of abandonment flies in the face of this court's previous decision. We have already stated with regard to this issue

> Inasmuch as [Tri-State] 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, [Tri-State's] active lease disproves that it had an intention to abandon the billboard.
>
> . . .
>
> This is a fact issue, and the trial court erred in making this determination as a matter of law.

United Graphix, Inc. v. House, 1998-CA-003120-MR (2000). Consequently, the trial court's decision to grant summary judgment on an issue which this court has previously stated must be decided by a jury requires us to reverse this case and remand it for a jury trial.

In addition, Tri-State made claims for monetary damages based on intentional interference with a contract and loss of a prospective business advantage. In a tersely worded paragraph, the trial court stated that Tri-State's claims "relate to actions taken after May 30, 1996, the date the Court of Appeals ruled the lease terminated. Since the contractual relationship favoring [Tri-State] had terminated on May 30, 1996, the acts of Bledsoe and his companies after that date do not create a cause of action." This ruling ignores several factors, the first being that Tri-State continued to collect rent in exchange for posting advertisements for Curry Oil through October 1996. In addition, because Tri-State's sign is a grandfathered structure, Bledsoe's company, United Sign, would be prohibited by current zoning ordinances from erecting a replacement sign if the jury found that Tri-State had retained possession and was entitled to remove the sign. Consequently, it is not unlikely that the Houses would choose to renew their lease with Tri-State rather than lose their rental income from the sign altogether. In conclusion, we cannot

say that there were no genuine issues of material fact regarding Tri-State's additional claims; therefore, the trial court improperly granted summary judgment in favor of the defendants.

For the foregoing reasons, the judgment of the Laurel Circuit is reversed and this case is remanded with instructions to grant a jury trial on all claims.

ALL CONCUR.

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