

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002071-MR

P. G. RAITHATHA, PSC
d/b/a THE MCKEE MEDICAL
CENTER

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 99-CI-00166

MICHAEL DURBIN AND
TERRI DURBIN; AND
MOUNTAIN AFTER HOURS
CLINIC, PSC

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE: Dr. P.G. Raithatha, PSC d/b/a The McKee
Medical Center (hereinafter "Raithatha"), appeals from an order
of the Jackson Circuit Court dismissing the action of Michael
Durban and Terri Durban ("the Durbins") to take possession of a
parcel of commercial property and recover past-due rent, as well

as, Raithatha's counterclaim seeking specific performance. For the reasons stated herein, we affirm.

The Durbins own a parcel of commercial property situated in McKee, Kentucky. On October 18, 1996, the parties executed an agreement, the terms of which provided that the Durbins would lease to Raithatha the commercial property for a period of one year. The lease automatically renewed. Prior to entering into the lease, Raithatha apparently had been renting the parcel without a lease agreement, or under a prior agreement. During the period prior to October 18, 1996, Raithatha allegedly had been paying to the Durbins rent in the amount of \$1000 per month. According to the Durbins, when they signed the lease they were not aware that Raithatha had written the amount of \$100 per month rent rather than \$1000 per month rent. The terms of the lease also provided that Raithatha could sublease the parcel without notice.

Mountain After Hours Clinic, PSC, (hereinafter "the Clinic") was incorporated in 1997. On January 1, 1998, P.G. Raithatha, PSC, was sold to the Clinic, and Raithatha (in his individual capacity) undertook the role of a shareholder and director of the Clinic.

The Durbins filed the instant action on August 11, 1999, alleging the non-payment of rent by Raithatha and seeking possession of the parcel. Raithatha filed an answer and

counterclaim seeking specific performance of the lease. The Clinic was made a party defendant to the Durbins's claim as they did not know at the time of the filing whether the Clinic had any legal interest in the parcel as a sub-lessee. An amended complaint subsequently was filed. The record indicates that discovery commenced in late 2001 and concluded in February, 2003.

On August 11, 2003, the Durbins and the Clinic entered into an agreed order dismissing all claims. The order was accepted and rendered by the trial court. Thereafter, the Durbins filed a motion to dismiss the action as against Raithatha. The motion was sustained on September 3, 2003, and this appeal followed.

Raithatha now argues that the trial court erred in sustaining the Durbins's motion to dismiss the action as against him. He maintains that the dismissal of the Durbins's action had the effect of dismissing his counterclaim for failure to state a claim. He states, through counsel, that he was not given notice of the Durbins's motion to dismiss the claim against the Clinic, and contends that the order dismissing his counterclaim should be reversed and the matter remanded for adjudication of the counterclaim.

Raithatha has not preserved this argument for appellate review, and has not complied with CR 76.12(4)(c)(v).

It states,

The organization and contents of the appellant's brief shall be as follows: . . .
(v) An "ARGUMENT" conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

Errors to be considered for appellate review must be precisely preserved and identified in the lower court. Skaggs v. Assad, By and Through Assad, Ky., 712 S.W.2d 947 (1986), citing Combs v. Knott County Fiscal Court, Ky., 141 S.W.2d 859 (1940). The failure to comply with CR 76.12(4)(c)(v), taken alone, forms a sufficient basis for affirming the circuit court on this claim of error. Skaggs, supra.

In the matter at bar, Raithatha did not file a response to the Durbins's motion to dismiss him from the action, nor did he move to alter, amend or vacate the order of dismissal. Even if it is true that he received no notice as to the dismissal of the Clinic as a party defendant, he clearly was noticed as to the motion to dismiss the remainder of the action and of the order from which he now appeals. Even so, he gave

the trial court no opportunity to correct its alleged error. It can hardly be said that the issue Raithatha now raises was preserved below. Absent a showing of palpable error, which is not present herein, issues may not be raised for the first time on appeal. McGinnis v. McGinnis, Ky., 920 S.W.2d 68 (1995), citing James v. Webb, Ky.App., 827 S.W.2d 702 (1991).

For the foregoing reasons, we affirm the order of the Jackson Circuit Court dismissing the action.

ALL CONCUR.

BRIEF FOR APPELLANT:

Wayne P. Cook
Lexington, KY

BRIEF FOR APPELLEES, MICHAEL
AND TERRI DURBIN:

Kendall Robinson
Booneville, KY

ATTORNEY FOR APPELLEE,
MOUNTAIN AFTER HOURS CLINIC,
PSC:

John E. Hinkel, Jr.
Lexington, KY