RENDERED: March 4, 2005; 10:00 a.m.
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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001161-MR

A.B. McCOWAN — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 98-CI-00179

JAMES ALSIP; SOUTHEAST HAULERS, LTD.; THE ESTATE OF DEXTER SAMS (ANCIL CARTER, WHITLEY COUNTY SHERIFF, ADMINISTRATOR); DENNIS LYNCH — APPELLEES

AND

NO. 2003-CA-001223-MR

DENNIS LYNCH — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 98-CI-OO179

JAMES ALSIP; SOUTHEAST HAULERS, LTD.; THE ESTATE OF DEXTER SAMS (ANCIL CARTER, WHITLEY COUNTY SHERIFF, ADMINISTRATOR) — APPELLEES

OPINION
AFFIRMING NO. 2003-CA-001161-MR
REVERSING NO. 2003-CA-001223-MR

** ** ** ** **

BEFORE: KNOPF and TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: These appeals stem from the setting aside of a jury verdict and entry of a judgment notwithstanding the verdict on appellee James Alsip's claim for damages to his personal property in the course of the demolition of a building sharing a common wall with the building in which his business was located. The trial judge concluded that the jury had failed to follow the instructions and had rendered a verdict clearly contrary to the evidence when it indicated in its answers to instruction interrogatories that damage to Alsip's property was not foreseeable and the amount of damage sustained was zero. In the opinion granting the JNOV, the trial judge specifically found that damage to Alsip's property was a reasonably foreseeable consequence of the ultra-hazardous nature of the demolition work; that Alsip had presented un-contradicted evidence of damages amounting to $32,267.85; and that appellant A. B. McCowan and appellee Southeast Haulers were jointly and severably liable for Alsip's loss. The granting of a new trial as to the liability of appellant Dennis Lynch forms the basis of appeal number 2003-CA-001223. Because our review of the evidence adduced at trial disclosed no error on the part of the trial judge as to the granting of the JNOV or the denial of

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

McCowan's motion for dismissal of the claims against him as time-barred, we affirm the judgment in appeal number 2003-CA-001161. As to Lynch's appeal, however, we find nothing in the record that could form a basis for liability on his part, and we therefore conclude that the portion of the JNOV that grants Alsip a new trial as to Lynch must be reversed.

The facts are not complex nor in serious dispute. In 1996, A.B. McCowan purchased a building on Main Street in Corbin, Kentucky, which shared a common wall with a building owned by Betty Black and occupied by appellee James Alsip. Because of the McCowan building's deteriorating condition and the fact that bricks from the building were falling onto the adjacent street and sidewalk, the City of Corbin asked McCowan to have it torn down. With the assistance of appellant Dennis Lynch, appellee Southeast Haulers conveyed an offer to McCowan to do the demolition work for the sum of $10,000. which McCowan accepted. In the course of the demolition work, part of the McCowan building crumbled, crushing an outbuilding in which Alsip stored various pieces of equipment and other items. The building that shared the common wall was also damaged by debris from the demolition, causing subsequent rain damage to Alsip's business computer, records and other items. At the time the demolition work was performed, Southeast Haulers was solely owned by Dexter Sams, who died prior to trial. Appellee Wendall

Benge, a Southeast employee, actually performed the demolition work.

Alsip testified at trial that the value of the items damaged or destroyed in the course of the demolition work amounted to $32,267.85. When challenged on cross-examination as to the valuation placed on the property, Alsip stated that much of the documentation regarding the purchase price of the property was lost in the damage from the demolition. He also stated that he was familiar with the value of the items damaged or destroyed because he had recently purchased them or because they were items frequently used or sold as part of his business. No other evidence as to the value of the property was offered.

The jury also heard testimony from the city building inspector and the city engineer that because of the hazardous nature of the work and the fact that the McCowan building shared a common wall with the building occupied by Alsip, the city conducted a meeting as to how best to accomplish the demolition without danger to the public and the adjoining building. McCowan and Lynch both attended this meeting. The city engineer also testified that the McCowan building was in such bad condition that he would not enter the building to inspect it.

Lynch testified that his only connection with the demolition project was as a long-time friend of Dexter Sams. He stated that he had done business with Sams for a number of years

and that because Sams had had both legs amputated, he frequently would help him with errands or business transactions because of Sams' difficulty getting in and out of his car and into buildings. Lynch testified that Sams asked him to approach McCowan with an offer for Southeast Haulers to do the demolition work for $10,000. After McCowan accepted that figure, Lynch took a contract prepared by Sams and obtained McCowan's signature. Lynch stated that he attended a meeting at city hall for Sams and also picked up the check for the demolition work, but denied receiving any compensation for his efforts. Because Sams had died prior to trial, his deposition was read into evidence in which he confirmed the fact that Lynch had no interest in the demolition work. McCowan, however, testified that he dealt only with Lynch, that he had no idea Southeast Haulers was solely owned by Sams, and that because Lynch, not Sams, attended the city's meeting on the demolition, he assumed that Lynch had an interest in the project or was overseeing the demolition.

After the jury returned its verdict, the trial judge questioned them at length on the record as to how they reached the determination that the damage to the building occupied by Alsip was not foreseeable and that the damage to his property amounted to zero. He then informed the jury that he was required to declare a mistrial because their answers indicated

that they had disregarded un-contradicted evidence and failed to follow the instructions. The trial judge subsequently entered the JNOV at issue in this appeal based upon the following findings: (1) McCowan contracted with Southeast Haulers to demolish his building for the sum of $10,000.; (2) in the course of the demolition project a portion of McCowan's building collapsed upon the premises occupied by Alsip, damaging his personal property; (3) the demolition project was an ultra-hazardous activity and damage to Alsip's property was reasonably foreseeable; (4) at the time of the demolition, Southeast Haulers had no assets with which to respond in damages for the likely injuries to Alsip's property; (5) Alsip sustained damages amounting to $32,267.85; and (6) Alsip introduced evidence supporting the foregoing facts and the Defendants failed to introduce contrary evidence sufficient to create a jury question, thus removing from consideration any issue of fact upon which reasonable minds could differ. Because the liability of Southeast Haulers was imputable to McCowan, the trial judge found them to be jointly and severally liable to Alsip in the amount of $32,267.85. The trial judge also granted a new trial as to the liability of Dennis Lynch.

In appeal number 2003-CA-001661, McCowan argues that entry of the JNOV was erroneous and that the trial judge erred in denying his motion for dismissal of the claims against him as

time-barred. We find no merit in either contention. First, McCowan argues that Alsip's claim against him must be deemed to have been filed outside the statute of limitations because he was not served with summons until the statutory period had expired. Alsip maintains that the "good faith" requirement of CR 3[2] was fully met based upon the undisputed facts that summonses were issued at the time of filing the complaint and delivered to the sheriff for service. We are convinced that the fact the sheriff failed to deliver the summonses until expiration of the limitations period does not bar the action. As was clearly stated in Asher v. Bishop,[3] "[a] civil action is begun by the filing of a complaint and the issuance of a summons or warning order in good faith, CR 3, and not by the actual service of process." It thus appearing that Alsip completed in good faith all steps necessary to commence the action within the statute of limitations, the trial judge did not err in refusing to grant McCowan's motion for dismissal.

Turning now to the primary focus of this appeal, the propriety of the entry of a JNOV, McCowan asserts that there was insufficient evidence of inconsistencies in the verdict, juror misconduct or other irregularity sufficient to remove the case from jury consideration. We disagree.

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[2] Kentucky Rules of Civil Procedure 3.

[3] 482 S.W.2d 769,770 (Ky. 1972).

The trial judge offered a clear rationale for declaring a mistrial:

> In due course the jury returned a verdict which was clearly against the evidence and, upon inquiry by the court, contrary to the instructions and contrary to the jury's own findings.
>
> Under Instruction No. 4, the jury checked "no". However, all who testified about the matter including the Defendant, A.B. McCowan, testified that demolition of McCowan's building would likely cause damage to the adjoining property occupied by James Alsip. Dennis Lynch and A.B. McCowan both testified to attending a three hour meeting at City Hall in which the discussion centered about how to demolish McCowan's building without damaging the adjoining premises.
>
> Clearly the damage to Alsip's property was foreseeable as a probable result of the demolition of McCowan's building.
>
> Under Instruction No. 6 the jury answered $0.00. The Plaintiff's evidence was that he had been damaged in the sum of $32,267.85. Defendants produced no evidence which contradicted that sum. Upon inquiry, the jury informed the Court that they all agreed that James Alsip had been damaged but that they did not want A.B. McCowan or Dennis Lynch to pay those damages.
>
> The Court thus concludes that the jury failed to follow the instructions originally given them, failed to follow the additional instructions given by the Court during deliberation, returned a verdict clearly against the evidence and contrary to the jury's own determination that James Alsip had, in fact, been damaged.

A careful review of the record supports the trial judge's reasoning. The standard by which appellate courts are to review such matters was reiterated by the Supreme Court of Kentucky in Taylor v. Kennedy[4]:

> In ruling on a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motions. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

The action of the trial court fits precisely within this standard. As to whether damage to Alsip's property was foreseeable, all the evidence, including the testimony of the defendants themselves, was uniformly to the effect that McCowan's building was in very poor condition, that demolition would be extremely hazardous and that the common wall with the building occupied by Alsip's business posed a particular concern as to falling debris. Thus, on this state of the record, we have little difficulty concluding that no genuine issue of fact

[4] 770 S.W.2d 415,416 (Ky. 1985).

existed as to the foreseeability of damage to Alsip's property. Entry of the JNOV on that issue was entirely proper.

Next, concerning the amount of damages, we agree that Alsip did not present particularly strong proof as to the fair market value of the items damaged or destroyed.[5] However, despite the lack of documentation for the values placed on the items, Alsip testified that he had personally purchased the items and was familiar with the value of the items damaged or destroyed. In the absence of any contradictory evidence, we fail to discern any error in the entry of the JNOV as to the amount of damages claimed.

Finally, in light of the inherently dangerous nature of the demolition work undertaken on McCowan's building, we are in complete accord with the trial judge's conclusion that McCowan cannot as a matter of law be absolved from liability for the negligent acts of his independent contractor. Section 427 of the Restatement (Second) of Torts provides definitive support for holding McCowan liable for the acts of Southeast Haulers:

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making a contract, is subject to liability for physical harm caused to others by the contractor's failure

[5] See, Amlung v. Bankers Bond Co., 411 S.W.2d 689 (Ky. 1967), as to the proper measure of damages for destruction of personal property.

> to take reasonable precautions against such danger.[6]

The danger to Alsip's property was acknowledged by all who testified, including McCowan. Nowhere in the testimony is there evidence of "reasonable precautions" having been taken to avoid such harm.

Appellant Lynch argues in appeal number 2003-CA-001223 that the trial judge erred in granting Alsip a new trial concerning Lynch's liability for the loss. Review of the evidence adduced at trial failed to supply any legitimate basis for liability on the part of Lynch. His only relation to the demolition work was as a "go-between" for Sams who, because of his disability, was unable to handle such matters by himself. Finding no basis upon which Lynch might be liable for Alsip's loss, we are persuaded that he was entitled to a directed verdict of dismissal.

Accordingly, that portion of the judgment granting a new trial as to the liability of appellant Lynch is reversed. In all other respects, the judgment notwithstanding the verdict is affirmed.

ALL CONCUR.

[6] See also, Miles Farm Supply v. Ellis, 878 S.W.2d 803 (Ky.App. 1994).

BRIEF AND ORAL ARGUMENT FOR APPELLANT McCOWAN:

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