

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000403-MR

JANE FERRIELL D/B/A J. KEITH
UPHOLSTERY & DESIGN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 00-CI-005941

SALOMAN PODGURSKY

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND JOHNSON, JUDGES.

COMBS, CHIEF JUDGE: Jane Ferriell appeals from a Memorandum and Order entered by the Jefferson Circuit Court on January 28, 2005, which denied her motion for a partial summary judgment on the issue of liability in her lawsuit against Saloman Podgursky for breach of a commercial lease. The order also denied Ferriell's motion to set aside an order previously entered by the court on October 30, 2002, which eliminated various elements of the damages that she sought. Although the order of January

28, 2005, contains language certifying its finality, our review of the record reveals that it is interlocutory in nature. Therefore, we dismiss the appeal and remand for further proceedings.

From 1983 to 1998, Ferriell operated an upholstery business at property that she leased from Podgursky at 2113 Frankfort Avenue, Louisville, Kentucky. The parties utilized various written lease agreements until 1996. In 1996, Podgursky presented a lease to Ferriell that she refused to sign. After negotiations, the parties agreed to continue their arrangement on a month-to-month basis pursuant to the terms of their 1994-96 lease agreement.

In June 1998, Ferriell vacated the premises after water damage to the roof caused a portion of the ceiling to collapse. On September 14, 2000, she filed a lawsuit against Podgursky, alleging that he breached his obligations under the lease "by failing to provide safe, usable premises and peaceable possession of the premises." She sought compensatory damages for the loss sustained to her personal property and to her customers' property as well as for the injury that she claimed had resulted to her reputation and good will. She also sought damages for the interruption caused to her business as a result of the need to re-locate.

Podgursky filed a counterclaim. He alleged that Ferriell had not provided him with 30-days' notice of her intent to leave before she vacated the property. He claimed that Ferriell owed him back rent, that she caused physical damage to the property, and that she wrongfully converted certain fixtures and other personal property belonging to him.

Ferriell filed an amended complaint in which she claimed that Podgursky's failure to maintain the roof constituted "willful or wanton negligence" and "gross negligence," entitling her to punitive damages pursuant to KRS¹ 411.184. She also asserted a claim for attorney's fees pursuant to the terms of the lease.

The action was originally filed and litigated in Division Ten of the Jefferson Circuit Court. On October 30, 2002, the trial court entered an order disposing of Podgursky's motion for summary judgment. The court determined that there was no evidence to support Ferriell's contentions that Podgursky acted wantonly or recklessly with respect to his duty to maintain the rental property and that, therefore, punitive damages would not be awarded. However, it denied the motion for summary judgment on the breach of lease claim, finding the issue to be disputed.

¹ Kentucky Revised Statutes.

The court made a series of findings: that Ferriell was not entitled to punitive damages for breach of lease; that she could not recover for the damage she allegedly suffered to her reputation as a result of her landlord's breach of lease; that she could not recover damages "to reestablish her business" or moving expenses because such expenses were speculative and constituted "a cost of doing business"; and that she was not entitled to recover as damages the improvements she made to her new business premises. (Findings of Fact, Conclusion of Law and Order, entered October 30, 2002, at pp. 11-12.)

The court determined that Ferriell could present evidence of general damages; that is, the difference between the reconstituted value of the premises in a repaired condition and the diminished value of the premises at the time of the alleged breach. It also ruled that she was entitled to seek lost profits "caused by the natural result of the breach." Id.

On December 23, 2002, the court granted Ferriell's motion to reconsider its ruling to the extent that it clarified that her claims for costs and attorney's fees remained viable. Subsequent to this order, unrelated events required the trial judge to recuse himself from the case. Ferriell's claim and Podgursky's counterclaim were reassigned to a new judge.

Two years passed. The trial was continued on several occasions at the request of the parties. Ferriell obtained new

counsel, who filed a motion requesting reconsideration of the court's prior interlocutory orders. For the first time, Ferriell alleged that she was not a month-to-month tenant but that she was entitled to the status of a holdover tenant pursuant to KRS 383.160(1).

On January 28, 2005, the court entered the order before us in this appeal. Citing and relying on Ferriell's numerous acknowledgments as to the month-to-month nature of her tenancy in her deposition testimony, the order determined that the previous judge had been correct as to the characterization of the leasehold as being that of month-to-month. With respect to the issue of damages allowable, the court stated that it could find "no reason to set aside" the previous rulings. *Sua sponte*, the court then announced that the order was final and appealable, reciting the pivotal phrase, "there being no just cause for delay." This appeal followed.

Generally, this Court has jurisdiction only over final judgments and orders issued by our circuit courts. KRS 22A.020(1). Even though the parties have not questioned the finality of the order under our review, we nevertheless have an independent duty to determine whether we have jurisdiction to reach the merits of the appeal.

"A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a

judgment made final under Rule 54.02." CR² 54.01. "This court on its own motion will raise the issue of want of jurisdiction if the order appealed from lacks finality." Huff v. Wood Mosaic Corp., Ky., 454 S.W.2d 705, 706 (1970). In fact, we are required to do so. Central Adjustment Bureau, Inc. v. Ingram Associates, Inc., Ky.App., 622 S.W.2d 681, 683 (1981), citing Hook v. Hook, Ky., 563 S.W.2d 716 (1978).

Francis v. Crouse Corp., 98 S.W.3d 62, 64 (Ky.App. 2002).

CR 54.02(1) allows a trial court to finalize certain interlocutory judgments as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final[.]

Although the trial court stated that its order was final and appealable in compliance with this rule, its recitation is not necessarily determinative. Francis, supra; see also, Hale v. Deaton, 518 S.W.2d 719, 722 (Ky. 1975), and Preferred Risk Mutual Ins. Co. v. Kentucky Farm Bureau Mutual Ins. Co., 872 S.W.2d 469, 470 (1994). Rather, we must examine the record to determine whether the judgment completely disposes of at least one claim. CR 54.02.

² Kentucky Rules of Civil Procedure.

It is apparent from the procedural history of this case that there has been no order entered in this case which wholly disposes of a single claim of either party to this litigation. Although Ferriell presented three separate legal theories (breach of lease, constructive eviction, and gross negligence) for imposing liability on Podgursky and has asserted entitlement to multiple elements of damages, she has only a single claim against Podgursky as contemplated by CR 54.02 -- his alleged liability for negligent maintenance of the real property. That claim remains pending in the circuit court. It is possible that at trial, a jury might exonerate Podgursky from any liability in his role as Ferriell's landlord, rendering moot all of the issues that she has raised in this appeal. The opposite outcome is equally possible. The only other claim, Podgursky's counterclaim, also remains unresolved.

Therefore, it is hereby ORDERED that the appeal be DISMISSED as having been taken from a nonfinal order.

ALL CONCUR.

_____/s/ Sara Combs_____
CHIEF JUDGE, COURT OF APPEALS

ENTERED: January 27, 2006

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