

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2006-CA-000174-MR

DONALD HAMILTON, INC.

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT  
HONORABLE REBECCA OVERSTREET, SPECIAL JUDGE  
ACTION NO. 02-CI-00294

WEISSINGER ESTATES HOMEOWNER'S  
ASSOCIATION, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND WINE, JUDGES; MILLER,<sup>1</sup> SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: Donald Hamilton, Inc., appeals from an order of the Shelby Circuit Court holding it in contempt for violating an Agreed Order entered into on June 18, 2003. The Agreed Order settled litigation between Donald Hamilton, Inc., and the Weissinger Estates Homeowner's Association by requiring Donald Hamilton, Inc., and its successors in interest, to refrain from developing Phases I through V of Weissinger Estates

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<sup>1</sup> Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Subdivision in any manner contrary to the Subdivision's Deed of Restriction. For the reasons stated below, we affirm.

The appellant, Donald Hamilton, Inc., was the initial developer of Weissinger Estates. In 2002, the appellant sought to develop a portion of the Subdivision that had originally been designated as a "green space" area. In connection with this, the appellant filed a preliminary subdivision plat in which it designated the green space area "Weissinger Estates Section V," and proposed to divide the area for residential development. The plat included a road thorough Lot 62, which was a part of Phase II of the development, to allow access to the Section V development. The Phase II plat had provided that Lot 62 would be used for residential development.

On June 12, 2002, the Homeowner's Association filed an action seeking to enjoin the appellant from developing the green space in any manner which violated the Subdivision's Deed of Restrictions. To settle the litigation, on June 18, 2003, the Homeowner's Association and the appellant entered into an Agreed Order which stated, in relevant part, as follows:

The Court, having considered an agreement between the parties, Weissinger Estates Homeowner's Association and Donald Hamilton, Inc., as witnessed by the signatures of their respective counsel below, and being otherwise sufficiently advised,

HEREBY ORDERS that the Defendant, Donald Hamilton, Inc., shall remove and/or withdraw

any applications or requests to divide or otherwise develop any lots in phases I, II, III, IV, or V of the Weissinger Estates in any manner contrary to the Deed of Restrictions of the Weissinger Estate Subdivision. The Defendant specifically agrees, on behalf of itself and any other parties who may acquire any interest in the Weissinger Estate Subdivision through it, not to develop or otherwise use lot 62 in Phase II of the Weissinger Estate Subdivision for use as a roadway or in any other fashion which would be contrary to the Deed of Restrictions for Phases I through V, of the Weissinger Estate Subdivision. The Defendant further agrees to present and file a new or amended plat to the Planning and Zoning Board, or otherwise take any and all other appropriate steps which may be needed, to consummate the intent and requirements of this Agreed Order.

On September 13, 2005, the Homeowner's Association filed a motion to require the appellant to show cause why it should not be held in contempt for failure to comply with the June 18, 2003, Agreed Order. The motion stated, in relevant part, as follows:

On or about July 25, 2005, Hamilton filed an application with the Triple S Planning Commission seeking to subdivide and develop an area of green space located within the Weissinger Estates Subdivision (the "Subdivision"). This plan proposes a road to be built between lots 73 and 74. . . . Construction of the proposed road would cause lots 73 and 74 of Phase IV of the Subdivision to be in violation of the Deed Restrictions for Phases I through V of the Subdivision. The plan that Hamilton has filed would cause these lots to violate the minimum setback requirements of Shelby County Zoning Regulation ("ZR") 810(3).

Additionally, the construction of a road between these lots would cause lot 73 to be in violation of Shelby County Subdivision Regulation ("SR") 4.303 because the driveway of lot 73 is less than the required fifty feet from the intersection of Weissinger Court and the proposed street. Finally, the proposed dead end road would be longer than one-thousand (1,000) feet, in violation of SR 4.205. Hamilton's failure to remove or withdraw this application violates the Agreed Order.

A hearing on the motion was held on October 3, 2005, at which time counsel for the parties presented arguments to the trial court. On December 13, 2005, the trial court entered an order holding the appellant in contempt of court for violating the Agreed Order of June 18, 2003. On December 21, 2005, the appellant filed a "Motion for Hearing, Motion to Make Additional and Amend [sic] Findings, [and] Motion to Reconsider, Alter, Amend and Vacate." On January 10, 2006, the trial court issued an order denying the motion. This appeal followed.

First, the appellant contends that a finding of contempt was improper because the current owner of the property, Weissinger Estates, Inc., was not joined as a party to the litigation. We disagree.

"An indispensable party is one whose absence prevents the Court from granting complete relief among those already parties." Liquor Outlet, LLC v. Alcoholic Beverage Control Board, 141 S.W.3d 378, 386-387 (Ky.App. 2004); CR 19.01. A

necessary party is one whose interest would be divested by an adverse judgment. West v. Goldstein, 830 S.W.2d 379 (Ky. 1992).

The issue presented in the Homeowner's Association's show cause motion was whether the appellant had violated the parties' June 18, 2003, Agreed Order. The absence of Weissinger Estates, Inc, from the litigation neither prevented the court from granting complete relief to the parties, nor did the trial court's ruling upon the contempt motion divest Weissinger Estates, Inc., of any interest. Accordingly, it was not necessary, in connection with the contempt motion, to join Weissinger Estates as a party to the litigation.

Next, the appellant contends that "this case has a prior adjudication and the trial court has no personal jurisdiction over the owner of the property."

The Agreed Order required Donald Hamilton, Inc. "and any other parties who may acquire any interest in the property" not to develop the Subdivision in a manner contrary to the Deed of Restrictions for Phases I through V. Accordingly, it was incumbent upon the appellant to bind any successor in interest to the terms of the Agreed Order, and if it did not, and that successor violated the terms of the Agreed Order, it follows that the appellant is in contempt. Moreover, the power of the courts to punish for contempt is one of the powers inherently belonging to the judiciary. Arnett v. Meade, 462 S.W.2d 940,

947 (Ky. 1971). "As necessary to the due exercise of their functions, it was recognized at common law, and has been from time immemorial, that courts have the inherent power to enforce their processes and orders and so to attain the ends of their creation and existence." Crook v. Schumann, 292 Ky. 750, 167 S.W.2d 836, 840 (1943). Because the issue presented in the case involved enforcement of a prior order to which appellant is a party, it follows that the circuit court properly exercised jurisdiction over the appellant.

Next, the appellant contends that there was no justiciable claim before the circuit court because "[a]t the time of the motion for rule by the Appellee, there was no application for anything before the Triple S Planning and Zoning Commission, on behalf of the Appellant." However, the Agreed Order required the appellant to "take any and all other appropriate steps which may be needed, to consummate the intent and requirements of this Agreed Order." The filing of a plat in violation of the Subdivision's Deed of Restrictions for Phases I through V, as alleged in the contempt motion, would be a violation of this provision of the Agreed Order. The Agreed Order was not limited to applications before the Planning Commission. Hence, this argument is without merit.

The appellant contends that the trial court erred by failing to conduct an evidentiary hearing. The only citation

provided by the appellant to its preservation of its request for an evidentiary hearing is its post-judgment motion to alter, amend, or vacate. However, "[a] party cannot invoke [CR 59.05] to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment." 7 Kurt A. Philipps, Jr., Kentucky Practice, CR 59.05, cmt. 6 (5th ed.1995); Hopkins v. Ratliff, 957 S.W.2d 300, 301 (Ky.App. 1997). Accordingly, the appellant's argument that the trial court erred by failing to conduct an evidentiary hearing is not properly preserved.

Finally the appellant argues that the trial court failed to make appropriate findings. We disagree. The trial court made findings sufficient to support its conclusion that the filing of the proposed plat reflects an intention to develop the Subdivision in a manner inconsistent with the Deed Restrictions for Phases I through V, and that such intention is inconsistent with the June 18, 2003, Agreed Order.

For the foregoing reasons the judgment of the Shelby Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregg Y. Neal  
Shelbyville, Kentucky

BRIEF FOR APPELLEE:

Stephen A. Houston  
Kathryn V. Eberle  
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