

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000173-MR

DEBRA PITNEY AND TRAVIS PRENTICE

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 06-CI-002618

8635, INC. F/D/B/A REAL
ESTATE SOLUTIONS, LLC

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND MOORE, JUDGES, BUCKINGHAM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Debra Pitney and Travis Prentice appeal from a summary judgment granted to 8635, Inc. f/d/b/a Real Estate Solutions, LLC, in which the Jefferson Circuit Court found that no material issue of fact existed with regard to Real Estate Solution's claim for damages for unpaid rent. For the reasons set forth herein, we affirm.

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On April 20, 2004, Real Estate Solutions entered into a lease agreement with Debra Pitney and Travis Prentice, who were allegedly acting on the behalf of Amstar Mortgage. Under the terms of the agreement, Pitney and Prentice agreed to lease the property known as 2300 Hurstbourne Village Drive, Suite 200, Hurstbourne Village Office Condominium, Louisville, Kentucky. The lease was to begin on May 1, 2004, and expire on April 30, 2005, and Pitney and Prentice agreed to pay rent in the amount of \$200.00 per month. Real Estate Solutions agreed to pay all utilities for the leased premises.

Also on April 20, 2004, an addendum to the lease was orally agreed upon, in which Pitney and Prentice agreed to rent additional space for \$340.00 a month, for a total rent amount of \$540.00 per month. Further, Pitney and Prentice agreed to pay the utilities associated with the leased premises beginning on June 1, 2004. This addendum was signed by Real Estate Solutions, but not by Pitney or Prentice on behalf of Amstar. However, Pitney and Prentice began complying with the terms of the oral agreement and paid rent accordingly per its terms.

When the terms of the leasehold agreement expired, Pitney and Prentice continued to occupy the leased premises as a holdover tenant pursuant to KRS 385.695. As such, they became month to month tenants and were responsible for paying rent on a monthly basis. According to the answer filed on their behalf, Pitney and Prentice gave notice that they would vacate the premises by October 1, 2005. This notice was sent to Real Estate Solutions on September 1, 2005. However, Real Estate Solutions claims it never received such notice and in fact filed a petition for writ of forcible entry and detainer in the Jefferson District Court in February 2006. On

February 3, 2006, the court entered a judgment in favor of Real Estate Solutions in forcible detainer. On March 8, 2006, a deputy sheriff executed said judgment and set out Pitney and Prentice's personal property from the leased premises.

Subsequently, Real Estate Solutions filed the present action seeking to recover monies due under the lease agreement, unpaid rent, utilities, late fees, costs and attorney fees in the amount of \$4,572.05, plus interest. Real Estate Solutions filed a motion for summary judgment, which was supported by an Affidavit of Harvey James, the Secretary-Treasurer of Real Estate Solutions, indicating that it did not take possession of the premises from Pitney and Prentice until March 8, 2006. It alleged that Pitney and Prentice were responsible for paying rent until such time as it vacated the premises. On or about September 12, 2006, Pitney and Prentice filed a response to Real Estate Solution's motion for summary judgment, however their response and affidavit were never certified as having been sent to Real Estate Solutions' counsel. Further, the response made no mention of Pitney, Prentice, or Amstar vacating the premises and delivering the keys to Real Estate Solutions on October 1, 2005.

On November 28, 2006, the Jefferson Circuit Court granted Real Estate Solutions' motion for summary judgment and awarded it \$4,572.05, plus pre-judgment interest and post-judgment interest. Subsequently Pitney and Prentice filed a motion to alter, amend, or vacate the judgment of the court, which was denied. This appeal followed.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916

S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. We are mindful that “[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Pitney and Prentice first argue that the trial court incorrectly applied the doctrine of res judicata to determine that the issue had been resolved between the parties in the prior forcible detainer action. They argue that in that action, the issue litigated was whether Real Estate Solutions was entitled to possession of the real estate after giving notice to vacate. They argue that the issue here is whether Real Estate Solutions is entitled to money for unpaid rent.

We find Pitney and Prentice’s interpretation of res judicata to be misguided. The trial court did not decline to rule on the motion for summary judgment by applying res judicata, instead it found that the underlying forcible detainer action provided proof that the District Court had previously made a factual determination that as of March 2006, Pitney and Prentice were in possession of the premises and accordingly owed rent. In so doing, the court simply found that no material issue of fact existed regarding the unpaid rent because a court had previously found Pitney and Prentice to be in possession of the property during the time in question. Accordingly, Pitney and Prentice’s claim that they vacated in October 2005 did not create a material issue of fact and the trial court properly granted summary judgment to Real Estate Solutions.

Pitney and Prentice argue that the trial court’s reliance on the judgment in forcible detainer is further undermined by jurisdictional issues. They argue that the

Jefferson District Court did not have personal jurisdiction over them in the forcible detainer proceeding and accordingly the circuit court should not have considered that judgment in the motion for summary judgment. This argument, however, is improperly before this Court as this appeal pertains to the summary judgment granted to Real Estate Solutions on November 28, 2006, not the forcible detainer order entered by the Jefferson District Court on February 3, 2006. Therefore we decline to address whether or not the Jefferson District Court had jurisdiction in the forcible detainer action.

Pitney and Prentice also argue that because they signed the lease in a representative capacity on behalf of Amstar, they cannot be personally liable for the unpaid rent. As Real Estate Solutions argues, Pitney and Prentice never raised the personal capacity issue with the trial court and therefore the issue is not properly before the court. Pitney and Prentice state that the issue was preserved for review by the arguments on the summary judgment motion and the pre-hearing statement. However, this court is unable to find any argument in the motions for summary judgment pertaining to capacity and accordingly find that the issue was not properly raised before the trial court. We have long held in Kentucky that an issue not raised in the circuit court may not be presented for the first time on appeal. *Gabow v. Commonwealth*, 34 S.W.3d 63, 75 (Ky. 2000), *habeas granted on other grounds*, *Gabow v. Deuth*, 302 F.Supp.2d 687 (W.D.Ky. 2004); *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1999); *Ruppee v. Commonwealth*, 821 S.W.2d 484 (Ky. 1991), *overruled on other grounds* by *Lovett v. Commonwealth*, 103 S.W.3d 72 (Ky. 2003); *Tamme v. Commonwealth*, 973 S.W.2d 13, 33 (Ky. 1998).

Pitney and Prentice alternatively argue that if we find the issue unpreserved we should address it as palpable error under CR 61.02. Reversing a judgment based on palpable error requires this Court to determine that a manifest injustice has resulted from an error which affects the substantial rights of a party. See 61.02. We do not find this to be the case. Therefore, we find the issue unpreserved and evading review.

The judgment of the Jefferson Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Henry K. Jarrett, III
Louisville, Kentucky

BRIEF FOR APPELLEE:

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