

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000488-MR

POSTAL ENTERPRIZES, LLC

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 07-CI-01628

SALAS ENTERPRISES CORPORATION

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT AND VANMETER, JUDGES; AND HARRIS,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Postal Enterprizes, LLC (hereinafter “Postal”) appeals from the Fayette Circuit Court’s entry of summary judgment in favor of Salas

¹ Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Enterprises, LLC (hereinafter “Salas”). After careful review, we reverse and remand.

This case arises from a dispute regarding the use of the parking lot at the Lansbrook (formerly Donabrook) shopping center (hereinafter “Shopping Center”) located at 3501 Lansdowne Drive, Lexington, Fayette County, Kentucky. The Shopping Center was originally constructed in 1967 and was under common ownership at that time. In 1971 the Lexington Planning Commission approved a plan which divided the original parcel into two distinct parcels, now known as the Salas Parcel and the Postal Parcel. The Postal Parcel is much larger than the Salas Parcel and includes a significant majority of the parking available for the shopping center.

By deed dated March 2, 1972, Lansbrook conveyed the recently created Salas Parcel to Creekside, Inc. Lansbrook retained the Postal Parcel. The March 2, 1972, deed created a perpetual cross-parking easement allowing for use over and upon the common parking areas of both parcels for the benefit of customers and invitees of the Shopping Center. This easement, while beneficial to the Postal Parcel, was essential to the Salas Parcel because the Salas Parcel never had direct access to either Lansdowne Drive or East Reynolds Road. Therefore, without such an easement ingress and egress from the Salas Parcel would be impossible. The language of the easement was as follows:

The party of the first part retains a perpetual easement over and upon the common parking area of Lot. No. 2 herein for the use and benefit of the customers and

invitees of the tenants of Donabrook Plaza Shopping Center, their successors and assigns. Likewise, the party of the first part does hereby grant and convey unto the party of the second part, its successors and assigns, a perpetual easement over and upon the common parking area of Donabrook Plaza Shopping Center for the use and benefit of the customers and invitees of the tenants of the party of the second part. However, should either Lot No. 2 above or Donabrook Plaza Shopping Center cease to be used for business or commercial purposes, this covenant of reciprocal cross easement reserved by first party for the use and benefit of the customers and invitees of the tenants of Donabrook Plaza Shopping Center and granted to second party for the use and benefit of the customers and invitees of its tenants, shall expire and, thereafter, shall be null, void and of no effect.

As originally created by the 1971 development plan, the Salas Parcel had a southern boundary of 149.97 feet in length. A consolidation plat recorded on May 25, 1973, reduced the size of the Salas Parcel by severing a triangular piece of the property, which was then consolidated with an adjacent parcel that was developed as an apartment complex. This consolidation reduced the southern boundary of the Salas Parcel by 29.47 feet. At all times since the 1973 consolidation, the southern boundary of the Salas Parcel has been 120.5 feet. The severance of this triangular parcel eliminated six to seven parking spaces from the Salas Parcel. However, it is not disputed that the surface area of the parking lot located on the Salas Parcel has remained unchanged since 1973 and that the parking configuration has remained substantially unchanged since 1991.

Beginning in 1994, various owners of the Salas parcel expanded the size of the building and made other improvements to the lot in stages. In 1994,

682 square feet was added to the building. In 1999 and 2000, a 750 square foot dining area was added to the “Rincon Mexicano” restaurant, the business operated on the lot at that time. The expansions and additions have resulted in an increased seating capacity for the current restaurant located on the Salas Parcel.

The Lexington-Fayette Urban County Zoning Ordinance requires one parking space for every four seats in a restaurant. *LFUCG Zoning Ordinance Art. 8-16(n)*. According to civil engineer Roger Ladenberger’s calculations done at the time of the 2004 renovation, the Salas Parcel required thirty (30) spaces to comply with zoning requirements. His calculations, utilizing information provided by the owners of the Salas Parcel, state that there is seating for 119 in the current restaurant on the Salas Parcel. Additionally, his calculation confirms that all of the reconfigurations and renovations to the lot have decreased the total on-site parking from 22 to 15 spaces. Thus, it appears that beginning in 1994, steps taken by the owners of the Salas Parcel and other predecessors to increase the total seating capacity of the restaurant, coupled with the elimination of the seven spaces in 1973, resulted, at a minimum, in Salas doubling its parking needs from fifteen (15) to thirty (30) spaces and placing all of its additional needs on the property owned by Postal. In other words, Salas and its predecessors converted a lot which could fully supply all of its parking needs to one which could only fulfill those needs by utilizing fifteen spaces on Postal’s property. As originally created, the Salas Parcel required zero parking spaces on the Postal Parcel in order to satisfy the zoning ordinance.

Postal filed the instant action on April 5, 2007. Salas was served with summons and complaint on April 20, 2007, but failed to answer or otherwise defend the lawsuit. On May 11, 2009, Postal filed a motion for default judgment. Salas failed to respond to Postal's motion, and on May 25, 2007, the Fayette Circuit Court entered a default judgment granting Postal the relief it sought in its complaint. On June 4, 2007, Postal filed a motion to make the judgment final and appealable, and on June 11, 2007, the Court amended the original judgment to make it final and appealable.

On July 16, 2007, Salas filed a motion to set aside the default judgment. Postal responded to that motion arguing that there were insufficient grounds to vacate the default judgment. The Court agreed with Salas, vacated the judgment, and allowed Salas to file an answer, which was filed on August 16, 2007. On August 21, 2007, new counsel for Salas filed a motion to amend its answer for the purpose of raising affirmative defenses and asserting a counterclaim. Postal filed a written response opposing such amendment. Postal's response argued that Salas's counterclaim was obviously compulsory and should have been raised in its initial answer. Postal also argued that Salas had waived its right to assert affirmative defenses known to it by failing to include any affirmative defenses in its original answer. The trial court allowed the amendment.

The parties engaged in limited discovery and filed cross-claims for summary judgment. On February 4, 2009, the trial court entered its order finding that Postal's cause of action accrued in 1973, at the time the consolidation plat

eliminated a portion of the parking on the Salas Parcel, and accordingly Postal's claims were time-barred. On February 10, 2009, Postal filed a motion to alter, amend, or vacate. On March 5, 2009, the trial court denied such motion but indicated that its ruling might be reversed on appeal. This appeal now follows.

The standard of review on appeal when a trial court grants a motion for 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); *Palmer v. Int'l. Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment" and all doubts will be resolved in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is only proper where the "movant shows that the adverse party could not prevail under any circumstances." *Id.* at 480. Consequently, summary judgment may be granted only when "it appears impossible for the non-movant party to produce evidence at trial warranting a judgment in his favor." *Huddleston v. Hughes*, 843 S.W.2d 901, 903 (Ky. App. 1992).

Postal argues on appeal that Salas waived its right to assert a statute of limitations defense and that the trial court improperly dismissed its claims as time-barred. Because we agree with both of Postal's arguments, we reverse and remand.

Postal argued both in its response to Salas' motion for summary judgment and in support of its motion to alter, amend, or vacate the trial court's judgment that Salas had waived its right to assert a statute of limitations defense. Postal had originally obtained a default judgment against Salas. More than thirty (30) days from the entry of that judgment, Salas requested the trial court to vacate that judgment, and Postal objected. The trial court granted Salas' motion and Salas tendered its answer. That answer failed to assert any statute of limitations defenses.

The statute of limitations is an affirmative defense. CR 8.03; *Thompson v. Ward*, 409 S.W.2d 807, 808-09 (Ky. 1966). This defense must be raised in either the initial answer or in a motion to dismiss in lieu of an answer. CR 12.02. A statute of limitations defense must be pled and a failure to do so constitutes a waiver of that defense. *Commonwealth Dept. of Highways v. Chinn*, 350 S.W.2d 622, 623 (Ky. 1961).

In this case, the trial court set aside Salas' waiver by allowing it to amend its answer. Further, Salas offered no excuse for its failure to include a statute of limitations defense in its initial answer and presented no support for the extraordinary relief of setting aside its waiver. Accordingly, we conclude that Salas waived its right to assert a statute of limitations defense, and the trial court abused its discretion in excusing this waiver by allowing Salas to amend its answer to include the affirmative defense.

Even if there was no waiver before the trial court, Salas argued that Postal's claims should be dismissed because they were not brought within the fifteen-year statute of limitations period designated in KRS 413.010. That statute states that "an action for the recovery of real property may be brought only within fifteen (15) years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims." KRS 413.090(2) requires that an "action upon . . . a written contract" shall be commenced within fifteen years after the cause of action first accrued. We agree with the trial court that KRS 413.090(2) is the applicable statute, but disagree with the trial court's finding as to when the cause of action first accrued.

"A cause of action accrues when a party has the right and capacity to sue, and his right of action is not suspended until he ascertains he has a cause of action." *Creson v. Scott*, 275 S.W.2d 406, 408 (Ky. 1955). The trial court found that there was no dispute that the only reduction of parking spaces by deed occurred in 1973, and that the cause of action therefore accrued in 1973. Thus, because it did not file suit until 2007, Postal's current claims were time-barred. The problem with the trial court's analysis is that Postal's claim is not based upon the elimination of parking spaces which occurred in 1973. At the time those spaces were eliminated, Salas did not require any parking spots located on the Postal Parcel, and thus Postal was completely unaffected by the diminished parking space and plainly stated, had no reason to sue. Instead, Postal's claim is that the owners of the Salas lot have since then significantly increased their own

parking needs after having previously voluntarily eliminated the spaces on its own lot which could have enabled Salas to meet those parking needs. Postal argues, and we agree, that beginning only in 1994 did Salas take any actions that affected Postal's rights to its property and parking availability. Accordingly, 1994 is the proper trigger date, and as Postal was well within the fifteen year statute of limitations set forth in KRS 413.090(2), the trial court improperly dismissed Postal's claims as time-barred.

Accordingly, the trial court abused its discretion in allowing Salas to amend its answer and assert a statute of limitation defense. Alternatively, the trial court improperly determined that Postal's claims were time-barred as a matter of law. Thus, we reverse the Fayette Circuit Court's February 4, 2009, order dismissing Postal's claims and remand with instructions that Postal be permitted to proceed accordingly on its claims. We express no opinion as to the ultimate resolution of the underlying dispute.

ALL CONCUR.

BRIEF FOR APPELLANT:

John P. Brice
Lexington, Kentucky

BRIEF FOR APPELLEE:

John S. Talbott
Lexington, Kentucky