

RENDERED: AUGUST 10, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002046-MR

SLEEPY HOLLOW, INC.

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 10-CI-00187

ROBERT L. MCAULIFFE AND
RLM PROPERTIES, LLC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON AND LAMBERT, JUDGES.

CLAYTON, JUDGE: Sleepy Hollow, Inc., appeals the order dismissing its complaint by the Oldham Circuit Court. After the review of the record and consideration of the arguments of the parties, we affirm the decision of the trial court.

Statement of Facts

The Appellant, Sleepy Hollow, Inc., is a registered Kentucky corporation comprised of shareholders in the ownership of approximately ninety acres in Oldham County. The shareholders own single family homes at Sleepy Hollow. The Board of Directors (Board) is the elected officers and homeowners which govern the affairs of the corporation. Further, the deeds require adherence to the Articles of Incorporation, as amended, and the restrictive covenants of Sleepy Hollow. Appellee Robert McAuliffe became a shareholder of Sleepy Hollow when he purchased a home there in 1997.

At the annual meeting of shareholders on March 3, 2009, McAuliffe requested that he be allowed to transfer his property to his corporation, RLM Properties, LLC (RLM). The shareholders denied his request. McAuliffe was not allowed to vote because he was not current on his assessment. Unbeknownst to the other shareholders, McAuliffe had already transferred his property by quitclaim deed to RLM on February 25, 2009. On December 28, 2009, RLM transferred the property back to McAuliffe. Sleepy Hollow never received notice of this second transfer either. There was no dispute that McAuliffe was delinquent in paying his assessment, but a dispute arose over the amount of the delinquency. McAuliffe sought reimbursement and an offset to his assessment for making repairs to the water line, which is an obligation that rested with Sleepy Hollow. Sleepy Hollow viewed these repairs as in contravention with already existing legal arrangements regarding the water supply to the property.

On February 17, 2010, Sleepy Hollow filed a complaint pursuant to the Kentucky Revised Statutes (KRS) 378.030 and 271B.6-270. It alleged that McAuliffe and RLM had committed a fraudulent real estate transaction, had violated their restrictive covenants, failed to pay dues and assessments for the year 2008 and had listed certain individuals on the internet as residents of Sleepy Hollow. An answer and counterclaims were filed for unjust enrichment, wrongful initiation of civil proceedings, abuse of process, infliction of emotional distress, punitive damages and sanctions. The Appellees also filed a motion to disqualify Sleepy Hollow's counsel and a motion to dismiss.

An amended complaint was filed on March 31, 2010, seeking a Deed of Correction, damages for annoyance and mental suffering, punitive damages and sanctions to which the Appellees filed a reply. Sleepy Hollow filed a motion to abate McAuliffe's direct communication with it and sought a bench trial, while the Appellees sought a jury trial. The parties engaged in discovery. On October 15, 2010, the trial court granted McAuliffe and RLM's motion to dismiss the complaint. The trial court did not take any action regarding the motion to abate communications or the motion to disqualify Sleepy Hollow's counsel. The court dismissed Sleepy Hollow's action in its entirety, but allowed McAuliffe and RLM's counterclaim to remain. This appeal followed.

STANDARD OF REVIEW

The motion to dismiss was filed pursuant to Kentucky Rules of Civil Procedure (CR) 12.02. A court may consider matters outside the pleadings when

ruling on a motion to dismiss; therefore, we must treat the motion as one for summary judgment. The appellate court must determine whether the trial court erred by concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Scifres v Kraft*, 916 S.W.2d 779 (Ky. App. 1996). In *Paintsville Hosp. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), the Kentucky Supreme Court held that for summary judgment to be proper the movant must demonstrate “that the adverse party [cannot] prevail under any circumstances.” With that standard in mind, we review the decision of the trial court.

ANALYSIS

Sleepy Hollow presents the following five arguments on appeal:

(1) the trial court erred in dismissing the complaint pursuant to KRS 378.030 and KRS 271B.6-270; (2) the trial court failed to comprehend that the plaintiff had asserted contractual rights to which it was entitled to go to trial; (3) the trial court failed to award Sleepy Hollow the injunctive relief requested in its complaint; (4) the court erred in dismissing the claim for the unpaid assessments/dues on jurisdictional grounds; (5) and the court erred in dismissing further common law tort claims.

McAuliffe first argues that pursuant to CR 76.12(4)(c)(v), Sleepy Hollow’s arguments did not contain a statement with reference to the record showing whether the issue was properly preserved for review. Whether to strike the appellants brief for non-compliance is discretionary with the Court. Since the record is not voluminous and preservation is clear from the face of the record, we will not strike the brief. *Simmons v Commonwealth*, 232 S.W.3d 531, 533 (Ky.

App. 2007), and *Cornette v Holiday Inn Express*, 32 S.W.3d 106, 108 (Ky. App. 2000). Therefore, we will address each issue presented.

Sleepy Hollow argues that McAuliffe's quitclaim deed to RLM violates KRS 378.030. That statute reads:

Any party aggrieved by the fraudulent conveyance, transfer or mortgage of real property may file a petition in equity against the parties thereto or their representatives or heirs, alleging the facts showing his right of action, alleging the fraud or the facts constituting it and describing the property. When this petition is filed a lis pendens shall be created upon the property described, and the suit shall progress and be determined as other suits in equity and as though it had been brought on a return of nulla bona.

The trial court found that KRS 378.030 was inapplicable to the facts in this case. Further, it held a fraudulent conveyance under KRS 378.010 is one made with the intent to delay, hinder or defraud creditors, purchasers or other persons. The trial court found that McAuliffe was not one of those persons. Also, there was no indication that there was any transfer due to a pending lawsuit, failure of consideration or other "badge of fraud." *Magic City Coal & Feed Co. v Lewis*, 164 Ky. 454, 175 S.W. 992 (Ky. 1915).

Sleepy Hollow cites *United Parcel Service Co. v Rickert*, 996 S.W.2d 464 (Ky. 1999), which established the six elements of fraud which must be proven by clear and convincing evidence. McAuliffe argues that CR 9.02 requires that in pleading fraud, "the circumstances constituting fraud or mistake shall be stated with particularity." However, a review of the complaint and the amended

complaint reveal that fraud was not pled with “particularity.” McAuliffe violated the by-laws, but he did not commit fraud. We agree with the trial court’s analysis.

Sleepy Hollow also argues that when McAuliffe executed the quitclaim deed, he transferred shares of Sleepy Hollow in violation of KRS 271B.6-270. We again agree with the trial court that if any shares were transferred by way of the quitclaim deed, this was cured when RLM deeded the property back to McAuliffe. Further, shares could not have been transferred without approval of the Board and this approval was never given. The issue of the transfer of the property was moot by the time the complaint was filed. Even if Sleepy Hollow did not receive correspondence from McAuliffe or RLM informing it of the reconveyance, the deed was duly recorded and available for anyone to read.

The trial court denied any relief in the form of a declaration because Sleepy Hollow did not file a declaratory judgment action. The complaint requested that the property be transferred back to McAuliffe. This was done prior to the suit being filed. Although Sleepy Hollow requests a Deed of Correction, there is no evidence that the quitclaim deed from RLM to McAuliffe is invalid or does not provide the remedy sought by Sleepy Hollow.

Sleepy Hollow argues that it had contractual rights arising out of McAuliffe’s breach of the restrictive covenant because of the two transfers of the property. The trial court determined that this issue was moot because of the second transfer. Sleepy Hollow argues that the second transfer does not “moot” its claim

for damages. However, the record does not reflect any damages caused by the two quitclaim deeds.

The trial court denied injunctive relief, in part because the transfer of the property from RLM to McAuliffe had already been executed. Sleepy Hollow also requested that McAuliffe be enjoined from further unauthorized statements and actions regarding the business of Sleepy Hollow; and that three people who were listed on an internet directory website who Sleepy Hollow alleged McAuliffe claimed were shareholders. Sleepy Hollow admitted that it knew these individuals were the ex-wife of McAuliffe or blood relatives of his and did not live at Sleepy Hollow or own any shares. Further, there was no evidence that McAuliffe was responsible for these individuals being listed. Sleepy Hollow provided no proof of irreparable harm pursuant to *Maupin v Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978). Therefore, injunctive relief was appropriately denied.

The trial court correctly determined that standing alone, the unpaid dues and assessments did not meet the jurisdictional threshold of circuit court. The parties disagree on the amount due, but Sleepy Hollow contends that \$750 is the amount owed. Without any other claim going forward the circuit court no longer has jurisdiction to grant relief on this claim.

Sleepy Hollow's final argument is that its common law tort claims include "for other relief" as stated on the first page of its complaint. Presumably, this argument also includes its damages for annoyance, mental suffering, deceit and outrage (punitive damages). Sleepy Hollow provides no legal authority for a

corporation being entitled to these damages and/or any proof that it was damaged at all. Also, all of the damages requested and arguments are asserted against McAuliffe only and not against RLM. Therefore, Sleepy Hollow has abandoned its claim against RLM and has not demonstrated that it is entitled to damages from McAuliffe.

For the foregoing reasons, we hereby affirm the decision of the Oldham Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Daniel T. Taylor III
Prospect, Kentucky

BRIEF FOR APPELLEES:

C. Thomas Hectus
Louisville, Kentucky