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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001923-MR

VIRGIL EVERSOLE, III, AND
COURTENAY EVERSOLE APPELLANTS

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RODERICK MESSER, SPECIAL JUDGE
ACTION NO. 05-CI-00718

CAROLE E. MCCURLEY;
CAROLE E. MCCURLEY, TRUSTEE OF
THE CAROLE E. MCCURLEY TRUST;
CAROLE E. MCCURLEY TRUST; JAMES
MCCURLEY; MARGARET EDWARDS;
AND BANK OF HARLAN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Courtenay Eversole and Virgil Eversole, III, appeal a partial summary judgment entered by the Harlan Circuit Court on September 18, 2009.

After careful review, we affirm the ultimate holding by the trial court that any partnership that existed among the parties is dissolved.

This case arises from a family dispute over properties amassed over several decades by Virgil Eversole, Sr., a Harlan County businessman who died in 1985. Besides numerous rental properties, Mr. Eversole owned about 6000 acres of real estate bearing coal, oil, gas, and timber in Harlan and Leslie Counties. Mr. Eversole was survived by three daughters: Courtenay Eversole, Margaret Edwards, and Carole Eversole McCurley, and one grandson, Virgil Eversole, III, (hereinafter "Virgil"), all parties to this action and the sole beneficiaries under Mr. Eversole's will.

From Mr. Eversole's death in 1985 to 1997, the executor of his estate managed the rental properties, collected rents and royalties, and made distributions to the four beneficiaries of the estate. From 1997 to the present, the beneficiaries continued the same practice, but under the name of "Eversole Heirs," with Brenda Eversole, Virgil's mother, taking on the administrative duties formerly handled by the executor. Brenda Eversole collects rent from commercial properties and royalties from those properties leased to mineral producers, places those monies in the "Eversole Heirs" common accounts at the Bank of Harlan, pays bills from those accounts for matters affecting the properties, and mails monthly distribution checks to the four Eversoles in this suit. Each year, partnership tax returns are prepared, sent to each beneficiary, and are filed with the Internal Revenue Service. The "Eversole Heirs" business office is maintained on Main Street in Harlan,

Kentucky, where the books and records are kept, and the "Eversole Heirs" post office address is P.O. Box 747, Harlan, Kentucky.

Prior to filing the complaint in this action, Margaret decided she could get a higher rate of return on her money in Lexington than what she was earning on the common accounts in Harlan. Thus, she came to Harlan and unilaterally withdrew approximately $40,000.00 from one of the accounts, forcing an immediate distribution of $160,000.00 to the other beneficiaries. At that point, the other beneficiaries agreed that two signatures would thereafter be required for withdrawals from the accounts.

On October 7, 2005, Margaret filed this suit against her two sisters, Carole and Courtenay, and her nephew, Virgil, for an accounting, a declaration of rights, and damages for conversion. Margaret sought 25% of the accounts, and other unspecified damages. At that time, the defendants were Carole, Courtenay, and Virgil. They answered, asserting that the monies belonged to the family partnership, which was doing business under the name "Eversole Heirs." They argued that the accounts Margaret sought to apportion are the property of the partnership and are not subject to apportionment until such time as the partnership assets are dissolved and/or all liabilities of the partnership are paid in full at the conclusion of the partnership.

Sometime thereafter, parties began approaching the family members, offering to buy out their "interests." In particular, Kentucky River Property, LLC, offered to buy out Carole and Virgil. Carole wanted to sell her portion, but Virgil

declined. However, the central issue to this lawsuit—whether the devisees of Mr. Eversole now hold his properties as tenants in common or tenants in partnership—apparently clouded title sufficiently for the putative purchaser to withdraw.

Following the purchase offer, Carole got a different attorney and essentially switched sides. Notwithstanding her initial insistence that the family members were partners and doing business for profit under the name "Eversole Heirs," Carole now argues that no partnership exists or has ever existed and that the properties are instead the sole, undivided property interests of the beneficiaries. On December 4, 2008, Carole filed a motion to intervene, asking that the Carole E. McCurley Trust and James McCurley (her husband) be joined as parties. Carole now argues that the beneficiaries of the Eversole properties own the properties as tenants in common.

Margaret and Carole (along with the trust and James McCurley) subsequently filed motions for partial summary judgment, asking that the Eversole beneficiaries be declared tenants in common, not partners. In the alternative, they asked that if a partnership was found to exist, that it be dissolved. Courtenay and Virgil filed pleadings in opposition.

The Harlan Circuit Court entered partial summary judgment in favor of Margaret and Carole, holding that as a matter of law, "no partnership exists or has ever existed" with respect to the Eversole's property because of the absence of formal partnership documents. Further, the court held that the Eversole realty cannot belong to a partnership in the absence of a written deed. Finally, the court

determined that to the extent there was a partnership, it was dissolved. Courtenay and Virgil now appeal.

In reviewing a grant of summary judgment, our inquiry focuses on "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); Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

On appeal, Courtenay and Virgil argue that summary judgment was inappropriate because genuine issues of material fact exist. While we agree with the appellants that issues of fact existed, no **genuine** issues of **material** fact existed, and thus summary judgment was appropriately granted by the trial court.

It is undisputed that in the instant case the Eversole Heirs neither had a formal partnership agreement, nor had they filed the appropriate partnership documents with the Commonwealth of Kentucky per KRS 365.015. However, Courtenay and Virgil argue that in the absence of formal written partnership documents or a partnership agreement, the intent of the "partners" controls. To a certain extent, we agree; however in the instant case it is not clear that the Heirs intended to form or maintain a partnership.

Kentucky Revised Statutes (KRS) 362.175 defines a partnership as "an association of two (2) or more persons to carry on as co-owners a business for profit and includes, for all purposes of the laws of this Commonwealth, a registered limited liability partnership." KRS 362.180 sets forth the rules for determining whether a partnership exists:

> In determining whether a partnership exists, these rules shall apply:
>
> (1) Except as provided by KRS 362.225 persons who are not partners as to each other are not partners as to third persons.
>
> (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> (a) As a debt by installments or otherwise,
>
> (b) As wages of an employee or rent to a landlord,
>
> (c) As an annuity to a widow, or widower or representative of a deceased partner,
>
> (d) As interest on a loan, though the amount of payment vary with the profits of the business,

> (e) As the consideration for the sale of a goodwill of a business or other property by installments or otherwise.

The trial court determined that the Eversole Heirs made individual decisions with respect to the property and signed all leases in their names as individuals, thus evidencing that no partnership existed. While we agree with the Heirs that signing the leases and documents in their individual names evidences nothing more than that no one partner was authorized to sign for the partnership, we ultimately agree with the trial court that whether or not a partnership existed is moot at this point.

KRS 362.300(1)(b) states that dissolution of a partnership is caused without violation of the agreement between partners by the express will of any partner when no definite term or particular undertaking is specified. A definite term or particular undertaking is something capable of accomplishment at some time. *See Fischer v. Fischer*, 197 S.W.3d 98, 102 (Ky. 2006). In the instant case, no definite term or particular undertaking was specified in any formal agreement, and the partners/heirs cannot even agree whether they were operating as a partnership or as tenants in common. Thus, the trial court properly determined that the partnership, if it existed at all, was dissolved at the will of one or more partners.

The trial court further determined that dissolution was appropriate under KRS 362.305(1)(f), which states that on application by or for a partner, the court **shall** decree a dissolution whenever other circumstances render a dissolution equitable. (Emphasis added). The trial court determined that several "other circumstances" made dissolution equitable:

(a) The parties course of conduct has been more like that of owners of undivided interests in property than a partnership, especially as it relates to the Mineral Properties;

(b) The McCurley's deeded their interest in the property to a trust. This was done without objection by any other member of the Eversole family;

(c) Each of the Eversole Heirs has been permitted to make his or her own decisions with respect to the Mineral Property at issue in this dispute;

(d) Depositing the monies into a joint account was once administratively convenient. However, that convenience has now been lost because only two members of the Eversole family deposit their revenue from leasing in the account.

(e) The *status quo* changed when first Plaintiff Mrs. Edwards and subsequently Mr. and Mrs. McCurley requested that they receive their mineral royalty monies separately and none of the other Eversole Heirs have ever objected to this change;

(f) Without dissolution, what was once administratively convenient is now an administrative and accounting nightmare;

(g) The parties are geographically diverse;

(h) The parties no longer get along very well and are engaged in litigation;

(i) Many of the rental properties are in a state of dilapidation and need to be sold to new owners who will raze or renovate them;

(j) The McCurley's wish to sell their interest in the property to a third party; and

(k) The parties are deadlocked as to whether the partnership should continue.

Thus, under KRS 362.305, numerous equitable circumstances existed to justify dissolving the alleged partnership, even if dissolution under KRS 362.300(1)(b) were not mandated.

In conclusion, even were Courtenay and Virgil able to produce evidence at trial that a partnership existed, it appears that it would be impossible for them to produce evidence at trial warranting a judgment in their favor, given the clearly applicable rules for dissolving a partnership under the above circumstances. Accordingly, we affirm the partial summary judgment entered by the Harlan Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

H. Kent Hendrickson
Harlan, Kentucky

BRIEF FOR APPELLEES CAROLE E. MCCURLEY TRUST; CAROLE E. MCCURLEY, TRUSTEE; JAMES MCCURLEY; AND MARGARET EDWARDS:

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