

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001476-MR

THOMAS A. POST

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 07-CI-00171

LEE BRICK COMPANY, LLC

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: COMBS, DIXON, AND LAMBERT, JUDGES.

COMBS, JUDGE: Thomas R. Post appeals from an order of the Woodford Circuit Court that granted summary judgment to the appellee, Lee Brick Company, LLC (hereinafter “Lee Brick”). Having reviewed the facts and circumstances surrounding the appeal, we vacate and remand.

There are no disputed issues of fact. However, there is serious confusion between two corporate entities (Lee Brick and Lee Masonry) having deceptively similar names – resulting in equally serious legal consequences.

Lee Masonry Products, Inc., d/b/a/ Lee Brick and Block (hereafter “Lee Masonry”), sold synthetic stone products to Post for use on his property, “the castle,” in Lexington. Lee Masonry’s performance with respect to delivery of the synthetic stone was satisfactory. There has been no assertion that the product was defective or imperfect in any way. Lee Masonry is **not** a named party to this appeal.

Post engaged a mason to install the synthetic stone at his property. Post has alleged that the mason’s installation was defective in many respects. The mason is not a party to this appeal.

On May 17, 2007, Post filed the underlying civil action against the appellee, “Lee Brick Company, LLC, *also d/b/a Lee Brick & Block,*” and against the mason. He asserted several causes of action against them, including breach of contract, breach of warranty under Kentucky's version of the Uniform Commercial Code (UCC)(Kentucky Revised Statutes (KRS) Chapter 355, *et. seq.*), negligent misrepresentation, and common law negligence.

On June 7, 2007, Lee Masonry filed an answer – even though it had not been named as a defendant. A legal stranger to the case, Lee Masonry disclaimed any association whatsoever with the defendant Lee Brick. However, Lee Masonry admitted that it had sold and delivered to Post a quantity of synthetic stone. It also

admitted that its representative had visited Post's property to collect payment for the product delivered and to inquire whether Post wanted to purchase additional quantities of the goods.

On September 24, 2008, the Woodford Circuit Court provided notice to the parties that the action would be dismissed on November 12, 2008, for lack of prosecution. On November 7, 2008, Post filed a notice of deposition and a request for production of documents. On November 12, 2008, counsel for Post filed an affidavit seeking to show good cause as to why no action had been taken in the matter for more than a year. The court did not dismiss the case.

In February 2010, Post filed a motion for leave to amend his complaint pursuant to the provisions of Kentucky Rule[s] of Civil Procedure (CR) 15.01. In his motion, Post explained that Lee Brick had adopted the assumed name "Lee Brick & Block" on May 17, 1999. The registration had expired on May 17, 2009, after the synthetic stone had been supplied to Post's property. In October 2009, he asserted, Lee Masonry also adopted the name "Lee Brick & Block."

Post's motion to amend was granted in April 2010. In the amended complaint, Post alleged that Lee Brick and Lee Masonry were jointly and severally liable. Lee Masonry filed a timely answer denying any liability.

On December 16, 2010, Lee Masonry filed a motion for summary judgment, arguing that it had fully performed its contractual obligations; that it had made no warranty or representations concerning the skill level or performance of the mason; and that it had not been negligent in any way.

In March 2011, Post filed a memorandum in opposition to the motion of Lee Masonry. Post explained that Lee Masonry's representative, Buddy Bennett, was on his premises "for two reasons: to receive payment from Post and observe the stone installation and to secure approval for sale and delivery of additional stone." Plaintiff's Memorandum in Opposition at 2. Post argued that Lee Masonry was responsible under the doctrine of negligent misrepresentation and provisions of the UCC for its failure to inform Post or his contractors of the proper method of installing the synthetic stone. "Bennett visited the site on numerous occasions, saw the improper application of the stone, and did nothing but sell Post more stone that he knew would be improperly installed." *Id.* at 12. In his sur-reply in opposition to the motion for summary judgment, Post conceded that there were no genuine issues of material fact as to any of the facts underlying his claims. . . ."

On June 14, 2011, the Woodford Circuit Court entered an opinion and order granting summary judgment. However, the court erred in misidentifying Lee Brick (instead of Lee Masonry) as the party who had filed the motion for summary judgment. The court concluded as a matter of law that "there was no duty owed by *Lee Brick & Block* to inform Mr. Post that the stone was not being applied correctly nor was there even the capability of being negligent since the representative did not possess the knowledge to make such a representation." Order at 4. (Emphasis added). The court concluded as follows: "Defendant Lee Brick Company LLC's Motion for Summary Judgment is GRANTED. . . ." Order at 5. It appears that the court intended to rule substantively in favor of Lee

Masonry but that it named Lee Brick instead. Again, Lee Brick had **not** filed the motion for summary judgment. But the judgment nonetheless was entered in its favor.

On June 17, 2011, Lee Brick filed a motion requesting the court to amend the judgment to include the necessary finality language. The motion was granted, and the order was amended to include the required language on July 19, 2011. In its order, the court misidentified Lee Masonry as the party that had filed the motion to amend its order.

On August 16, 2011, Post filed a notice of appeal. He then named Lee Brick as the sole appellee.

In his brief, Post identifies the single appellee as “Lee Brick and Block, LLC.” While he concedes that the case turns primarily upon legal issues, Post argues that an issue of fact remains concerning Lee Masonry’s representative, Bennett: *i.e.*, what he knew or should have known about the proper method of installing the synthetic stone. He contends that the question of what Bennett should have known was one for expert testimony.

In its brief, Lee Brick agrees that Lee Masonry sold synthetic stone to Post but notes that Lee Masonry is not a party to the appeal. Lee Brick argues that “Lee Masonry was a mere vendor of the product and visited the construction site only to make sure that Mr. Post had enough product on hand.” Brief at i. Lee Brick denies that Lee Masonry had any obligation to ensure that the synthetic material

was properly applied at Post’s premises and defends the summary judgment entered in Lee Brick’s favor.

This matter has come before us as a procedural morass. The misidentification, blending, and overlapping of entities and motions constitute a virtual legal counterpart of *A Midsummer Night’s Dream* – but without the whimsy and charm of Shakespeare. While the party in whose favor summary judgment was entered, Lee Brick, is also the appellee, the analysis of the underlying legal questions concerns -- exclusively -- the separate activities of Lee Masonry. And, as we have noted, Lee Masonry is **not a party** to this appeal.¹ Based upon the strength of the trial court’s underlying conclusions, we would be inclined to affirm. However, in light of the bizarre circumstances creating a confusion that we cannot unravel, it would be an exercise in futility to affirm or to reverse. Since none of the arguments presented either below or on appeal focuses on the claims actually asserted against Lee Brick, we have no basis upon which to affirm the judgment entered in its favor. Because the summary judgment against Post and in favor of “Lee Brick Company” has no procedural foundation and appears to be the result of misidentification of parties, we vacate the summary judgment and remand this matter to the circuit court for further proceedings and clarification.

ALL CONCUR.

¹ “A notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court. It places the named parties in the jurisdiction of the appellate court[.] Therefore, the notice of appeal transfers jurisdiction to the Court of Appeals **of only the named parties.**” *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky.1990) (Emphasis added.). We have no jurisdiction over entities not named as parties to the appeal.

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