

RENDERED: AUGUST 16, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000328-MR

THIRTEEN STREET DEVELOPMENT, LLC

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 11-CI-01957

AM&W, INC., AND
MALCOLM CHERRY

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Thirteen Street Development, LLC, appeals from a Warren Circuit Court order granting a motion to dismiss filed by AM&W, Inc. and Malcolm Cherry, individually (“AM&W”). AM&W also filed a motion to dismiss the appeal which was passed to the merits panel. Having reviewed the record, we grant the appellees’ motion to dismiss.

This appeal concerns the right to receive proceeds from the lease of a cellular telephone tower, which is located at 927 Payne Street in Bowling Green, Kentucky. In 2003, AM&W, which then owned the Payne Street property, executed a lease agreement allowing Cingular to place the tower there in exchange for monthly royalties. Lewisburg Bank subsequently foreclosed on the property and filed a declaratory action in Warren Circuit Court, asking it to discontinue AM&W's receipt of the tower lease payments on the grounds that Lewisburg Bank had a priority interest in the property.

The Warren Circuit Court entered an order on August 7, 2008, which held that AM&W was entitled to continue collecting the cellular telephone tower lease payments, even though it no longer owned the real property. The order stated in pertinent part that

[a]ny purchaser of the property being foreclosed on must necessarily be advised of AM&W's continued right to receive such payments, and AM&W, Inc.'s right regarding the cell tower lease payments shall survive even after the mortgaged property is foreclosed upon and sold. Any successor in interest to the foreclosed property shall take same subject to AM&W's continued rights of receipt of these lease payments.

Following the foreclosure, Thirteen Street bought the property from Lewisburg Bank on December 19, 2008, and proceeded to notify the cellular telephone company that there had been a change in ownership and requested receipt of future lease payments. Cingular made approximately three payments to Thirteen Street before being advised that it had to make the payments to AM&W

pursuant to the Warren Circuit Court order. Since April 2009, AM&W has continued to receive payments from the lease of the tower.

On December 2, 2011, Thirteen Street filed a complaint in Warren Circuit Court, seeking a declaratory judgment granting it the cellular telephone tower lease payments. AM&W filed a motion to dismiss. On January 26, 2012, the circuit court, citing its prior order of August 7, 2008, granted the motion to dismiss, on the grounds that Thirteen Street knew that the property was sold subject to the existing ground lease agreement and that the tower was conspicuous, open and obvious. Thirteen Street filed a notice of appeal on February 14, 2012.

On April 5, 2012, while the appeal was pending, American Bank & Trust Company initiated a foreclosure proceeding on the Payne Street property. The foreclosure action was referred to the Warren County Master Commissioner, who arranged for the sale of the property. His report of sale and statement of account was approved by the court on July 31, 2012.

Thus, by virtue of the foreclosure action, the Payne Street property is no longer owned by Thirteen Street; it now belongs to Vulcan Investments, LLC, according to a deed that was recorded on September 18, 2012. The records of the Kentucky Secretary of State show that Thirteen Street was officially dissolved on September 11, 2012.

On October 1, 2012, AM&W moved to dismiss the appeal, on the grounds that Thirteen Street did not have standing because its interest in the

property was foreclosed upon and sold by the Master Commissioner. It also argued that Thirteen Street as an entity simply no longer exists.

In response, Thirteen Street argues that lack of standing is not grounds for dismissing an appeal under Kentucky Rules of Civil Procedure (CR) 76.34(6)(a), which provides that an appeal may only be dismissed if it is not within the jurisdiction of the appellate court or because it has not been prosecuted in conformity with the civil rules. But we do lack jurisdiction to decide this appeal, because we do not have the power to render advisory opinions. Thirteen Street admits that it is seeking an advisory opinion as to whether subsequent purchasers of land once owned by Thirteen Street are bound by the Warren Circuit Court order awarding the appellees ownership of the cellular telephone tower lease payments.

This Court has repeatedly reaffirmed the proposition that it has no jurisdiction to decide issues which do not derive from an actual case or controversy. Ky. Const. § 110, *In Re Constitutionality of House Bill No. 222*, 262 Ky. 437, 90 S.W.2d 692 (1936) (“Power to render advisory opinions conflicts with Kentucky Constitution Section 110 and thus cannot be exercised by the Court”). Recently, in *Philpot v. Patton*, Ky., 837 S.W.2d 491, 493 (1992), we reiterated that “[o]ur courts do not function to give advisory opinions, even on important public issues, unless there is an actual case or controversy.”

Commonwealth v. Hughes, 873 S.W.2d 828, 829-30 (Ky. 1994).

“The classic occurrence which necessitates a court’s abrogation of jurisdiction for mootness is a change in circumstance in the underlying controversy which vitiates the vitality of the action.” *Id.* at 830. That change in circumstance

in the case at bar is the fact that Thirteen Street has ceased to exist and no longer owns the property on which the cell phone tower is located. Even if, as Thirteen Street argues, the dismissal of this appeal will force Vulcan to file a new complaint subjecting the appellees to another lawsuit, it does not alter the fact that we have lost jurisdiction over this appeal. “[A]n appellate court is required to dismiss an appeal when a change in circumstance renders that court unable to grant meaningful relief to either party.” *Medical Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008) (citing *Brown v. Baumer*, 301 Ky. 315, 321, 191 S.W.2d 235, 238 (1945)).

Thirteen Street also contends that it maintains a current interest in the case, claiming it is still owed the lease payments AM&W received from approximately April 2009 to July 31, 2012. Thirteen Street no longer exists, however, even if its former principal officer, Kelly Thomas, is the principal officer and organizer of Vulcan. Thirteen Street could have filed a motion to substitute its apparent successor in interest, Vulcan, as a party to this appeal under CR 76.24(b), but failed to do so.

For the foregoing reasons, the motion to dismiss is hereby
GRANTED.

ALL CONCUR.

ENTERED: August 16, 2013

/s/ Joy A. Moore
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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