

RENDERED: JULY 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001446-MR

JAMES R. HIGGINBOTHAM AND
AMERICAN INSTITUTE OF
MARKSMANSHIP, LLC

APPELLANTS

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 10-CI-00726 AND 12-CI-00113

SCOTT & RITTER, INC.;
PBI BANK, INC.; JONATHAN LEBER;
CHRISTINA LEBER; TERRY L.
LEBER; COY PRESLEY MONROE;
SOUTH CENTRAL BANK, INC.;
UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE;
BARREN COUNTY, KENTUCKY;
AND HARPER'S HEATING AND
COOLING, LLC

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

VANMETER, JUDGE: American Institute of Marksmanship, LLC (“AIM”) and James Higginbotham, co-founder of AIM, appeal from the Barren Circuit Court’s order confirming the master commissioner’s recommendation that the 39.830 acres at issue be sold free and clear of AIM’s lease on the property. AIM argues that its lease should not have been held inferior to Scott & Ritter, Inc.’s mechanic’s and materialman’s lien against the property since AIM was unaware of the lien when it executed its lease, due to deficiencies in the lien statement and Scott & Ritter’s failure to file a *lis pendens* notice. Accordingly, AIM maintains the master commissioner erred by finding Scott & Ritter’s lien to be superior to its leasehold interest. For the following reasons, we affirm.

On January 19, 2010, Coy Monroe conveyed 39.830 acres of his 228-acre farm to Jonathan Leber. The deed from Monroe to Leber was not recorded until September 17, 2010. In the interim, on September 14, 2010, Scott & Ritter filed a mechanic’s and materialman’s lien against Monroe’s 228-acre tract for work performed for Leber on the 39.830 acres that Leber was developing into Cedar Ridge Shooting Academy, LLC (“Cedar Ridge”). At the time Scott & Ritter filed its lien statement, title records identified Monroe as the record property owner. The lien statement filed by Scott & Ritter asserted a lien “against certain real property located in Barren County, Kentucky, commonly known as Cedar Ridge Gun Club, 1711 Herbert Turner Road, Cave City, Kentucky 42127[.]” On September 16, 2010, Scott & Ritter filed the underlying action against Monroe,

Jonathan, and Jonathan's wife, Christina Leber, to enforce its lien. Cedar Ridge was not named a party to this action.

About a year later, on August 2, 2011, Jonathan and Christina conveyed the 39.830 acres to Cedar Ridge and recorded the deed on August 4, 2011. Also on August 4, 2011, Cedar Ridge executed a lease agreement with AIM to commercially operate a gun range on the 39.830 acres. The lease agreement was "for a term of five (5) years with two additional five (5) year options to lease at Lessees [AIM's], sole discretion[.]" Higginbotham, co-founder of AIM, was one of three employees of Cedar Ridge and was a member of the Cedar Ridge LLC.

In September 2011, Scott & Ritter recorded a partial release of its lien, resulting in the lien only encumbering the 39.830 acres, rather than Monroe's entire 228-acre tract. On November 2, 2011, Scott & Ritter received a judgment against the Lebers, Monroe, and Cedar Ridge in the amount of \$185,000 plus costs and interest. On November 14, 2011, Scott & Ritter recorded a Notice of Judgment Lien with the Barren County Court Clerk. On January 30, 2012, the court entered a judgment and order of sale of the 39.830 acres. The following day, almost six months after executing the lease with Cedar Ridge, AIM recorded it.

AIM and Higginbotham (hereinafter collectively referred to as "AIM") then filed a motion to intervene in Scott & Ritter's action and a motion to vacate the November 2, 2011, judgment and the January 30, 2012, judgment and order of sale on grounds that Cedar Ridge was not a party to the action. The trial court vacated the judgment on that basis, found Cedar Ridge to be a necessary party, and directed

the master commissioner to proceed with the scheduled hearing to determine the validity and priority of liens pertaining to the 39.830 acres.

The master commissioner determined the 39.830 acres was subject to Scott & Ritter's lien, which it found to be superior to AIM's lease, and recommended the property be sold free and clear of AIM's lease. AIM filed objections to the commissioner's report, arguing it lacked notice of the lien when it executed the lease with Cedar Ridge since the lien statement described Monroe's 228-acre tract, rather than just the 39.830 acres where Cedar Ridge is located. After considering AIM's objections, the court entered an order confirming the commissioner's report. AIM now appeals.

On appellate review, this court will not disturb the result reached by the trial court and commissioner in the absence of clear error. *Williams v. Denny*, 238 Ky. 662, 666, 38 S.W.2d 668, 670 (1931). AIM first argues that Scott & Ritter's lien should be dissolved since the description of the property in the lien statement was not "sufficiently accurate to identify it" as required by KRS¹ 376.080(1), which states, "[a]ny lien provided for in KRS 376.010 shall be dissolved unless the claimant, within six (6) months after he ceases to labor or furnish materials, files in the office of the county clerk . . . a description of the property intended to be covered by the lien sufficiently accurate to identify it, [and] the name of the owner[.]" In Kentucky, "liens are created by statute, and therefore the operation, extent, and rights created by the lien must be determined by the language of the

¹ Kentucky Revised Statutes.

statute. Kentucky adheres to the rule that statutory provisions for perfecting a lien must be strictly followed.” *3D Enters. Contracting Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005) (internal quotations omitted).

Further, “the identification of the premises must come from the description itself and is not to be eked out by extrinsic facts, and the description must be such as to exclude all other property.” *Headrick v. Waterbury*, 277 Ky. 288, 126 S.W.2d 411, 412 (1939). In *Headrick*, the court held that a mechanic’s lien identifying the wrong lot number within a subdivision was an insufficient property description and rendered the lien invalid. *Id.* In *Powers v. Brewer*, 238 Ky. 579, 38 S.W.2d 466 (1934), the court held that the property description in a mechanic’s lien statement was insufficient since it described the adjoining property belonging to the same owner instead of that on which the work had been performed. 38 S.W.2d at 470. The *Powers* court emphasized, “[i]f there appear[s] enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the exclusion of others, it will be sufficient.” *Id.* at 469 (internal quotations and citation omitted).

When Scott & Ritter filed its lien statement, title records identified Monroe as the record property owner of the 39.830 acres, which is contained within the 228-acre parcel described in the lien statement. Higginbotham, as co-founder of AIM and an employee of Cedar Ridge, clearly was familiar with the locality of the premises. And, the lien statement identified the address and commonly known

name of the property, Cedar Ridge. AIM has failed to cite any authority addressing the scenario at bar in which the lien statement contains the property subject to the lien but includes other property surrounding it. Under these circumstances, we find the description was sufficient to accurately identify the property and the master commissioner did not err by declining to dissolve Scott & Ritter's lien on this basis.

Next, AIM contends that Scott & Ritter's lien should be dissolved because Scott & Ritter filed a complaint for collection of a debt, *i.e.*, default on a contract, rather than an equitable petition, and thus never perfected its lien. AIM directs us to KRS 376.110(1) which states, “[a]n action to enforce a lien . . . shall be by equitable proceedings” and “[t]he petition shall allege the facts necessary to secure a lien, and shall describe the property charged and the interest the plaintiff seeks to subject.” Additionally, “[a]ny lien provided for in KRS 376.010 shall be deemed dissolved unless an action is brought to enforce the lien within twelve (12) months from the day of filing the statement[.]” KRS 376.090(1).

Scott & Ritter timely filed an action to collect a debt for work performed and to enforce and satisfy its lien by judicial sale of the property. Contrary to AIM's assertion, the fact that Scott & Ritter filed a suit at law, rather than a “petition,” does not contravene the notice provisions of KRS 376.110 so as to mandate dissolution of the lien. Indeed, AIM fails to cite any authority in support of its assertion. In addition, KRS 376.110 does not require the claimant to request that the matter be referred to the master commissioner – that burden lies with the clerk.

Thus, Scott & Ritter's failure to request that the matter be referred to the master commissioner does not render its lien invalid. AIM has not cited any authority which requires dissolution of the lien due to the failure of the clerk to strictly comply with KRS 376.110. We find Scott & Ritter's action was timely filed, and an equitable proceeding before the commissioner took place. Consequently, AIM's claim in this regard is without merit.

Lastly, AIM asserts that Scott & Ritter's lien should be dissolved because Scott & Ritter failed to file a *lis pendens* notice as required by KRS 382.440, which states:

(1) No action . . . commenced or filed in any court of this state, in which the title to, or the possession or use of, . . . real property, or any interest therein, is in any manner affected or involved . . . shall in any manner affect the right, title or interest of any subsequent purchaser, lessee, or encumbrancer of such real property, or interest for value and without notice thereof, except from the time there is filed, in the office of the county clerk of the county in which such real property or the greater part thereof lies, a memorandum stating:

(a) The number of the action, if it is numbered, and the style of such action or proceeding and the court in which it is commenced, or is pending;

(b) The name of the person whose right, title, interest in, or claim to, real property is involved or affected; and

(c) A description of the real property in the county thereby affected.

KRS 382.440(1).

The master commissioner found that the line of cases dealing with this issue makes clear that the absence of a *lis pendens* notice does not dissolve the lien, mortgage, or other claim, nor does it affect the priority of liens since a subsequent purchaser or lienholder can have no greater interest in the property than that of his seller or debtor. *Strong v. First Nationwide Mortgage Corp.*, 959 S.W. 2d 785 (Ky. App. 1998). Accordingly, the master commissioner held that if the mechanic's lien was valid against Leber, the lien is valid against, and superior to, subsequent interest holders despite the lack of *lis pendens* notice.

On appeal, AIM directs us to *U.S. Bank NA v. Hasty*, 232 S.W.3d 536 (Ky. App. 2007), in support of its assertion that Scott & Ritter's lien should be dissolved for failure to comply with KRS 382.440. However, we do not believe *Hasty* supports AIM's position. In that case, U.S. Bank filed a civil suit against the Hastys to foreclose on their property, after which Heights Finance filed a judgment lien against the property. *Id.* at 538. U.S. Bank then filed a *lis pendens* notice of its lawsuit. *Id.* Ultimately, the trial court entered a default judgment against the Hastys and the property was sold at a master commissioner's sale, without consideration of Heights Finance's lien. *Id.* Thereafter, U.S. Bank learned of Heights Finance's lien and sought to reopen the foreclosure proceedings pursuant to CR² 60.02 due to the failure to name Heights Finance as a party in the original action. *Id.* U.S. Bank was concerned that Heights Finance's lien had survived the foreclosure action and clouded title to the property, and sought to pass title to the

² Kentucky Rules of Civil Procedure.

property free and clear of Heights Finance's lien upon a second commissioner's sale. *Id.*

This court affirmed the trial court's denial of U.S. Bank's motion for CR 60.02 relief since "[w]ith minimal effort the bank could have discovered the judgment lien prior to the entry of a final judgment in the foreclosure action and litigated Heights Finance's judgment lien therein. As such, it had the ability to have presented its claim prior to the entry of the judgment." *Hasty*, 232 S.W.3d at 542. This court found the circumstances did not rise to the level of an extraordinary nature so as to justify CR 60.02 relief, and declined to rule on the enforceability of Heights Finance's lien as against any future property owner. *Id.* at 544.

We fail to appreciate how *Hasty* supports AIM's argument. The *Hasty* court did not address the issue at bar – whether dissolution of a mechanic's lien is required due to the lienholder's failure to file a *lis pendens* notice of its action to enforce the lien. Indeed, no mechanic's lien was ever filed in *Hasty*. Here, Scott & Ritter filed a mechanic's lien prior to filing its action to enforce the lien. With due diligence, AIM could have discovered Scott & Ritter's lien before executing its lease with Cedar Ridge, particularly since Higginbotham was employed by, and had ownership in, Cedar Ridge, and the mechanic's lien identified Cedar Ridge as the commonly known name of the property. AIM provides no authority mandating dissolution of a mechanic's lien under these circumstances.

The order of the Barren Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE
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