

RENDERED: JANUARY 9, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001830-MR

VF RENTAL PROPERTIES, LLC

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 11-CI-008069

MATTHEW FOY AND
JENNIFER FOY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

COMBS, JUDGE: VF Rental Properties, LLC, appeals from an order of the Jefferson Circuit Court granting summary judgment to Matthew and Jennifer Foy. The summary judgment was entered based upon legal conclusions drawn by the circuit court. After a review of the material facts, the circuit court determined that

the Foys did not breach a duty to exercise ordinary care to prevent foreseeable injury to adjacent real property and that the nuisance claims asserted by VF Rental Properties against the Foys could not be maintained as a matter of law. After our review, we affirm.

In July 2010, the Foys' tenant was arrested for manufacturing methamphetamine at the Foys' residential property on South Fourth Street in Louisville. The ingredients and apparatus for the manufacturing operation were immediately seized and removed from the premises. The house was condemned as a health hazard by government officials. Notices were posted at the front door and on one of the two back doors warning of the potential health hazard presented by the production of methamphetamine on the premises. No trespassing signs were also posted at the property.

The record before the trial court indicated that the Foys kept the house locked after it was condemned and that they did not enter the property before it was destroyed by fire several months later. Matthew Foy indicated in his deposition that he drove by the property occasionally – perhaps once each month – in order to check on it. He also noted that he and Jennifer worked outside at the property clearing leaves and debris in September 2010.

In December 2010, the Foys received an inordinately large utility bill for service to the property. The spike in electricity supplied to the vacant house caused them to be suspicious about activity at the property. They decided to have electric service discontinued.

However, before a call was made to Louisville Gas and Electric, the property was destroyed by a fire that broke out in the early morning hours of December 20, 2010. The property adjacent to the Foys' rental house – owned by VF Rental Properties – was also damaged by the fire. As a result of the extensive damage, both houses were eventually demolished.

Fire investigators were not able to determine the cause of the fire. Nevertheless, in his affidavit, Sergeant Jason Sanders of the Louisville Fire & Rescue Arson Bureau opined that the fire originated in the living room and was ignited “by an unauthorized third party’s careless cigarette or an unattended candle.” The Foys were never suspected of causing the fire. Apart from December’s utility bill, there was no evidence to suggest that they were aware that anyone was entering into the condemned property. However, testimony from witnesses living in the neighborhood indicated that at various times after the condemnation, the premises were being entered or occupied in some manner by a trespasser or trespassers.

On December 15, 2011, VF Rental Properties filed a negligence action against the Foys. It alleged that the Foys had failed to take action to evict their tenants and to secure the premises to prevent entry by others who continued to conduct illegal and abnormally dangerous activity at the property. VF Rental Properties also alleged that the Foys’ failure to prevent illegal and abnormally dangerous activity upon the premises and their failure to secure the abandoned

property constituted both a public and a private nuisance. The Foys answered the complaint against them and denied the allegations.

On April 10, 2013, following a period of discovery, the Foys filed a motion for summary judgment. They argued that they had no duty, as a matter of law, to protect adjacent property from the unforeseeable damage caused by a trespasser to their property where they had taken every reasonable step to prevent the trespass. They argued furthermore that VF Rental Properties could not establish causation, a required element of the negligence claims. Finally, the Foys argued that VF Rental Properties could not establish that it had suffered the loss and enjoyment of its property as a result of the claimed nuisance. After a hearing, the trial court granted the Foys' motion. This appeal followed.

Upon our review of the trial court's summary judgment, we must decide whether the court correctly determined that there are no genuine issues as to any material facts and that the moving party is entitled to judgment as a matter of law. Kentucky Rule[s] of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

On appeal, VF Rental Properties first argues that the trial court erred by granting summary judgment with respect to its negligence claims. It contends that a genuine issue of material fact remains with regard to whether the Foys breached their duty of care by failing to secure the premises to prevent squatters

from occupying the residence. We do not agree that the Foys breached a duty of care owed to the adjacent property owner. Thus, entry of summary judgment was proper.

To recover under a claim of negligence, the plaintiff must prove that the defendants owed a duty of care to the plaintiff; that the defendants breached that duty; and that the breach was the proximate cause of the plaintiff's damages. *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209 (Ky. App. 2007). In general, each person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury. *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328 (Ky. 1987).

The nature of the Foys' duty of care to the adjacent property owner is the primary focus of this appeal. The critical question is one of foreseeability; *i.e.*, whether the loss of the house belonging to VF Rental Properties as a result of a fire at the condemned property was reasonably foreseeable. Foreseeability varies with varying circumstances, and the care required under the circumstances is proportionate to the danger involved. *Waldon v. Housing Authority of Paducah*, 854 S.W.2d 777 (Ky.App. 1991). Where an intervening criminal act is not a reasonably foreseeable consequence of a defendant's negligence, the defendant is generally relieved from liability for his negligent acts or omissions. *See Wheeler v. Andrew Jergens Co.*, 696 S.W.2d 326 (Ky. 1985).

While there was testimony from witnesses to indicate that the Foys' condemned rental property was being entered or occupied by a trespasser or

trespassers, there is no evidence to suggest that the trespasser or trespassers were able to access the property as a result of the Foys' failure to exercise reasonable care to prevent their entry or an injury caused by their illegal use of the property. There is no evidence to indicate that the condemned property was not adequately secured and posted with signs warning against entry. The evidence showed that the Foys did not abandon the property. They worked to clear the lawn, and they continued to check the condition of the premises periodically. There was absolutely no evidence to indicate that the property stood open, that it was easily accessible to vagrants, that it was littered with flammable debris, or that it remained a fire hazard following removal of the methamphetamine production apparatus. Under these circumstances, it is not reasonable to conclude that the Foys failed to exercise ordinary care to prevent injury – foreseeable or otherwise – to the neighboring property owner.

Furthermore, VF Rental Properties failed to establish the cause of the fire at the Foys' property. Although it was surmised that the fire originated in the living room of the property and that it was ignited by a cigarette or an unattended candle left by a vagrant, the fact remains that fire investigators never established an official cause of the fire. So, regardless of the issue of duty of care, there is no evidence that the Foys' acts or omissions proximately caused the alleged injury. As discussed above, there is no evidence that combustible materials were left upon the premises or that it was reasonably foreseeable that anyone with bad intentions would be tempted to break into secured property condemned by authorities and

properly marked as such. Furthermore, if it is assumed that the fire was caused by the negligence of unknown persons entering upon the Foys' premises, we are persuaded that this intervening criminal act superseded any negligent acts or omissions committed by the Foys as the fire was not a reasonably foreseeable consequence of any negligence ascribed to them. *NKC Hospital, Inc., v. Anthony*, 849 S.W.2d 564 (Ky. App. 1993). For these reasons, the Foys cannot – as a matter of law – be deemed liable for the loss alleged by VF Rental Properties. *House v. Kellerman*, 519 S.W.2d 380 (Ky. 1974).

Next, VF Rental Properties contends that the trial court erred by concluding that it could not establish that the Foys had created a public and/or private nuisance at their property. We are not persuaded that the trial court erred on this issue.

On appeal, VF Rental Properties argues that the Foys created both a public and a private, temporary nuisance by abandoning their rental property to vagrants once it had been contaminated by methamphetamine; that it suffered a loss as a result of that nuisance; and that the extent of its loss should be determined by a jury. Since VF Rental Properties presented no material evidence to show that the Foys' use of their property from July 2010 till December 2010 interfered with VF Rental Properties's use and enjoyment of its premises, it could not show the existence of an actionable nuisance.

It is commonly accepted that the measure of damages for maintenance of an alleged temporary nuisance is the depreciation of the rental value of the

affected property. *See Brumley v. Mary Gail Coal Co.*, 246 S.W.2d 148, 151 (Ky. 1952). VF Rental Properties presented no evidence tending to show that its rental income was diminished by the condition of the Foys' rental property. In fact, the evidence tended to show to the contrary. We conclude that the trial court did not err in granting summary judgment with respect to the nuisance claims.

We affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward Alan Brutscher
Louisville, Kentucky

BRIEF FOR APPELLEE:

Berlin Tsai
Joseph P. Hummel
Louisville, Kentucky