

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001372-MR

PEMBROKE ROAD WAREHOUSES, LLC

APPELLANT

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE JOHN L. ATKINS, JUDGE
ACTION NOS. 01-CI-01762, 02-CI-01226, AND 02-CI-01467

EAGLE WAY AG, LLC d/b/a
EAGLE WAREHOUSES; PNL PARTNERS 2001, L.P.;
HOPKINSVILLE ASSOCIATED LIMITED PARTNERSHIP;
CRESTAR BANK/CRESTAR BANK, N.A.;
CHRISTIAN COUNTY, KENTUCKY;
MULLINS LOGISTICS, INC., A Kentucky Corporation;
MULLINS WAREHOUSES, LLC, A Limited Liability
Company; PENNYRILE DISTRIBUTION, INC.,
f/k/a PHILIP MULLINS COMPANY, INC.,
A Kentucky Corporation;
GENERAL TOBACCO COMPANY, INC.;
BRUCE CLINE and
CHARLES E. POWELL

APPELLEES

AND

NO. 2003-CA-001373-MR

MULLINS LOGISTICS, INC.;
MULLINS WAREHOUSES, LLC;
PENNYRILE DISTRIBUTION, INC.,
f/k/a PHILIP MULLINS COMPANY, INC.

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CHRISTIAN COUNTY, KENTUCKY;
GENERAL TOBACCO COMPANY, INC.;
BRUCE CLINE and
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APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM, JOHNSON, AND MINTON, JUDGES.

BUCKINGHAM, JUDGE: Pembroke Road Warehouses, LLC (PRW); Mullins Logistics, Inc.; Mullins Warehouses, LLC; and Pennyrile Distribution, Inc., f/k/a Philip Mullins Company, Inc.; appeal from orders and judgments of the Christian Circuit Court in a case involving the rights of a tenant and subtenants following a foreclosure action. We affirm.

The factual and procedural history in this case is very complicated. Therefore, we will set forth only such facts as are necessary to understand and resolve these appeals.

Hopkinsville Associates Limited Partnership (HA) purchased fourteen acres of property upon which two warehouses were located, and it executed a mortgage that, at the time of foreclosure, was held by PNL Partners 2001 (PNL). HA leased the property and warehouses to PRW beginning July 1, 2000, through February 28, 2002. The rental amount was \$8,000 per month, and the lease was recorded in the county clerk's office.

On December 14, 2001, PNL filed a foreclosure complaint in the Christian Circuit Court against HA after HA defaulted in its mortgage payments.¹ PRW was also named as a defendant in PNL's complaint because of its recorded lease interest. On March 18, 2002, the circuit court entered a judgment and order of sale wherein the court directed the property be sold at public auction to satisfy the indebtedness of HA to PNL. Although PRW had filed a motion seeking language that would make any sale subject to PRW's lease, no such language was included in the order. Thereafter, on April 23, 2002, PNL filed a motion to terminate the lease.²

The property was sold at public auction on May 13, 2002, for \$1.5 million. It was purchased by Bruce Cline and

¹ See 01-CI-01762.

² Without obtaining PNL's written approval, HA and PRW attempted both a lease extension and a lease modification. Through its motion, PNL sought to either terminate PRW's lease or in the alternative have PRW pay rent as provided in the original lease through the date the judicial sale was confirmed.

Charles Powell, who assigned their interest to Eagle Way Ag, LLC (Eagle Way), a company the two men had established. The purchase price was ultimately paid to MCR Properties, Inc. (MCR), which had purchased the mortgage from PNL before the sale.

On June 21, 2002, the court entered an order confirming the sale and giving Eagle Way a writ of possession to the property "as of the close of business on June 28, 2002." On June 22, 2002, PRW filed a notice of appeal with this court. The closing of the sale took place on June 25, 2002. On June 28, 2002, PRW filed a motion for a temporary injunction after Eagle Way attempted to have PRW immediately evicted from the property. The court denied the motion. PRW's appeal was later dismissed because it failed to join an indispensable party (Eagle Way) to the appeal.³

Following its purchase of the property, Eagle Way learned that the original lease agreement between HA and PRW had been subleased by PRW to Mullins Warehouses, LLC, and then assigned to Philip Mullins Company, Inc., which later changed its name to Pennyrile Distribution, Inc. Further, following the filing of PNL's foreclosure action, HA attempted to extend PRW's lease from March 1, 2002, to March 31, 2003. Eventually, Mullins Logistics was assigned the sublease, and it subleased

³ See 2002-CA-001584-MR.

the property to other tenants. None of the subleases were recorded. PRW, Mullins Warehouses, Philip Mullins Company, Pennyrile Distribution, Inc., and Mullins Logistics are all companies that were either owned or controlled by Philip Mullins.

After the order confirming the sale, Mullins Logistics, a sublessee under PRW, continued to collect the rent from other sublessees of the property. Eagle Way, as owner of the property pursuant to the public auction, filed a complaint in the Christian Circuit Court on August 22, 2002, against Mullins Logistics based on an allegation that it was being denied the right to collect the rent from the property it owned.⁴ Eagle Way further alleged that it was entitled to all rental proceeds derived from the property subsequent to June 28, 2002.

Eagle Way moved the court to enter a judgment in its favor against the defendants in the amount of \$27,569.85, the amount of rent that Mullins Logistics had collected from the property after June 28, 2002. The court ordered the consolidation of Eagle Way's case with the foreclosure action by PNL against HA and PRW and with a third action, one filed by Mullins Logistics against various defendants based on a claim of tortious interference.⁵

⁴ See 02-CI-01226.

⁵ See 02-CI-01467.

In a Memorandum Opinion and Judgment entered on June 3, 2003, the court addressed all three actions. As to the foreclosure action that had been previously appealed, the court held that the leases were terminated by operation of law when the order confirming the sale was entered. The court stated that the issue of leases was not reserved by the parties and that the appeal from the order confirming the sale had been dismissed. As to Eagle Way's action, the court awarded summary judgment in Eagle Way's favor in the amount of \$27,569.85. The court rejected arguments by the lessee and sublessees that they were holdover tenants or possessors of a valid lease. The court reasoned that the defendants "could have raised all defenses available to a tenant in the course of the initial litigation and did not. They are barred from asserting those defenses now." The court then made that portion of the judgment final and appealable. Finally, the court made no disposition of Mullins Logistics' tortious interference claim, and we assume that the claim is still subject to litigation in the circuit court. These appeals followed.

PRW argues that the circuit court erred when it terminated its rights under the lease from HA. We begin by noting that PRW has already filed a direct appeal to the original foreclosure action. The court entered the order

confirming the sale on June 21, 2002. Two days later, PRW filed a notice of appeal with this court. That appeal was later dismissed because PRW failed to join an indispensable party (Eagle Way) to the appeal.

A review of the order confirming the sale indicates both that it left open issues concerning rent and attorney's fees and that it lacked finality language. Under these circumstances, PRW's first appeal may well have been dismissed by this court for the additional reason that it was an appeal from an interlocutory order. For this reason, we will assume, without deciding, that the effect of the Memorandum Opinion and Judgment entered by the court on June 3, 2003, gave finality to the court's ruling on the issue of PRW's rights under its lease with HA. Assuming that is the case, PRW then timely appealed from that judgment.

PRW raises two issues in its brief. First, it argues that the circuit court erred in holding that its lease with HA terminated by operation of law when the order confirming the sale was entered.

As we have noted, the initial lease of the property from HA to PRW ended on February 28, 2002. The foreclosure complaint was filed by PNL on December 14, 2001. Although HA and PRW attempted to extend the lease from March 1, 2002, through March 31, 2003, such attempt was not a valid extension

of the lease because the Security Agreement and the Assignment of Rents and Leases signed on behalf of HA provided that, once a foreclosure action was filed, HA could only lease the property with the written approval of the mortgage holder (PNL). Since PNL did not give written approval of the attempted lease extension, it was not valid as to PNL. Therefore, the court correctly concluded that PRW did not have a valid lease after February 28, 2002, and that PRW's lease terminated by operation of law no later than the date the order confirming the sale was entered.

PRW's second argument is that the court erred in ruling that PRW was not a holdover tenant. The applicable statute provides:

If, by contract, a term or tenancy for a year or more is to expire on a certain day, the tenant shall abandon the premises on that day, unless by express contract he secures the right to remain longer. If without such contract the tenant shall hold over, he shall not thereby acquire any right to hold or remain on the premises for ninety (90) days after said day, and possession may be recovered without demand or notice if proceedings are instituted within that time. But, if proceedings are not instituted within ninety (90) days after the day of expiration, then none shall be allowed until the expiration of one (1) year from the day the term or tenancy expired. At the end of that year the tenant shall abandon the premises without demand or notice, or stand in the same relation to his landlord that he did at the expiration of the term or tenancy aforesaid; and so from year to year, until

he abandons the premises, is turned out of possession, or makes a new contract.

KRS⁶ 383.160(1). PRW argues that if its lease with HA is determined to have expired on February 28, 2002, then it became a holdover tenant 90 days thereafter since no party to the action filed a forcible detainer action to remove it from the property. In making this argument, PRW misstates the full holding in Terry v. Henry, 274 Ky. 778, 120 S.W.2d 404 (1938). Further, this argument overlooks the facts surrounding the foreclosure action.

PRW argues Terry stands for the premise that, in order to remove a holdover tenant, a party must rely solely on a detainer action filed in district court within 90 days of the end of the lease. A review of Terry shows the court merely stated a detainer action could be used. 120 S.W.2d at 407. Further, the court specifically stated, "We express no opinion about what could have been accomplished . . . if they had sought other remedies." Id. Kentucky law has long recognized the writ of possession as one of the other remedies available to the buyer at a judicial sale. See Henderson v. Meadows, 290 Ky. 188, 160 S.W.2d 588 (1942). Thus, we find no error in the fact that Eagle Way sought possession through a writ of possession.

⁶ Kentucky Revised Statutes.

Nor can we accept PRW's argument that no action was taken to contest its continued possession. Early in the foreclosure action, PNL put all parties on notice that it would not approve continued occupancy of the property. First, on March 6, 2002, PNL filed a motion that all rents be turned over to it. Within its motion, PNL made it clear that it had not approved of any attempt to extend or modify the lease between HA and PRW. Then on April 23, 2002, PNL filed a motion to terminate all leases and subleases or, in the alternative, to extend them based on the original terms through the confirmation of sale. Finally, once the sale was confirmed by court order on June 21, 2002, it became final as to the rights of all named parties in the property. See Smith v. Decker, 374 S.W.2d 487, 490 (Ky. 1964); KRS 426.574. In short, Eagle Way took any rights PRW had in the property once the sale was confirmed.⁷

We also note that PRW's argument as to being a holdover tenant is foreclosed by its judicial admissions. PRW filed numerous documents in the case that indicated a concession that it was not a holdover tenant.

The appeal of the Mullins companies is likewise without merit. In the court's Memorandum Opinion and Judgment,

⁷ PRW did file a motion asking that any sale of the property be subject to its lease. However, that motion was not granted. Further, PRW's reliance on Kendall v. Thirwell, 453 S.W.2d 604 (Ky. 1970), is misplaced. In that case, the sale was made expressly subject to lease rights.

the court determined that Eagle Way had the sole right to possess the property and that the Mullins companies had no right, title, or interest therein. In contesting this conclusion, the Mullins companies rely both on the argument that they obtained valid rights through PRW and on the argument that they also qualify as holdover tenants.

A holdover tenant can claim rights under KRS 383.160. The Mullins companies claim no action was taken against them until more than 90 days after their leases/assignments expired on February 28, 2002. Thus, they claim they are entitled to holdover for an additional year.

The Mullins companies' argument on this point fails for several reasons. First, a holdover tenant relationship arises between parties to the lease/assignment that has expired. See Case v. Home Tobacco Warehouse Co., 311 Ky. 95, 223 S.W.2d 569, 571 (1949). ("[I]t is presumed that the terms of the original lease are carried over into the extension provided by the statute.") Under the facts in this case, the Mullins companies could claim holdover status, but only as to PRW. The Mullins companies cannot claim holdover status directly against Eagle Way or its predecessors in title as their contract extended only to PRW. Further, the fact that the Mullins companies can claim continued possession through the continued occupancy of their subtenants serves merely as a basis for PRW

to claim continued occupancy. See Ventura Hotel Co. v. Pabst Brewing Co., 33 Ky. L.Rptr. 149, 109 S.W. 354, 356 (1908) (A tenant is said to retain possession through its subtenants for purposes of determining its status as a holdover tenant under the statute.)⁸ As we have already rejected PRW's claim as a holdover tenant, this is of no help to the Mullins companies.

Any further argument by the Mullins companies relies on the claim that PRW had an interest, through a valid lease or as a holdover tenant, which in turn was passed to them. As we have noted herein, PRW had no interest in the property following the order confirming the sale. Thus, it had no interest to pass to the Mullins companies. Therefore, we conclude that the circuit court correctly held that Eagle Way had sole right to possess the property beginning June 28, 2002, and that the Mullins companies had no right, title, or interest therein.

The judgment and orders of the Christian Circuit Court are affirmed.

⁸ While the Ventura case is designated as "[n]ot to be officially reported," we adopt its reasoning as persuasive on this matter.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT, PEMBROKE ROAD
WAREHOUSES, LLC:

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BRIEF AND ORAL ARGUMENT FOR
APPELLANTS, MULLINS LOGISTICS,
INC., MULLINS WAREHOUSES,
LLC., AND PENNYRILE
DISTRIBUTION, INC., f/k/a
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