

RENDERED: MARCH 24, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-000712-MR

WALLER AVENUE, LLC

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 04-CI-01097

CATHERINE DALY JEFFERSON;  
UNKNOWN SPOUSE OF CATHERINE  
DALY JEFFERSON; WADE H.  
JEFFERSON, III; LINDA K.  
JEFFERSON; BYRON RIVERS  
JEFFERSON; UNKNOWN SPOUSE OF  
BYRON RIVERS JEFFERSON; SUSAN  
MARIE JEFFERSON A/K/A SUSAN  
MARIE JEFFERSON FULKS; UNKNOWN  
SPOUSE OF SUSAN MARIE JEFFERSON  
A/K/A SUSAN MARIE JEFFERSON FULKS;  
UNKNOWN HEIRS OF SUSAN MARIE  
JEFFERSON A/K/A SUSAN MARIE  
JEFFERSON FULKS; CITIZENS BANK &  
TRUST CO. OF JACKSON; PNC BANK F/K/A  
CITIZENS FIDELITY BANK AND TRUST  
COMPANY OF LEXINGTON; TED W. HAHN;  
HAROLD H. MULLIS; AND J. PAT WILLIAMS

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: BARBER AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

---

<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

MILLER, SENIOR JUDGE: Appellant, Waller Avenue, LLC, brings this appeal from an order of the Fayette Circuit Court. For the reasons stated below, we affirm.

Appellant is a limited liability corporation owned by William L. Berkley and Leslie H. Berkley. Appellant is the owner of an undivided two-sixths interest in the real property located at 366 Waller Avenue, Lexington, Kentucky.

The Waller Avenue property is subject to a lease dated February 1, 1966. The lease provides for a rental of \$200.00 per month. At the time the lease was entered into, the property was vacant. Subsequently, under the leasehold, an office building was erected thereon.

The owners of Waller Avenue, LLC, William L. Berkley and Leslie H. Berkley, are also the current lessees under the lease, having acquired their interest through a series of assignments commencing in 1970. Through available options, the lease has been extended through 2062.

Wade H. Jefferson, III, also owns a two-sixths interest in the property, and Byron Rivers Jefferson and Susan Marie Jefferson each own a one-sixth interest. Each of these individuals obtained title to his or her interest pursuant to the will of Wade H. Jefferson, Sr., except that Wade H. Jefferson, III, obtained his second, unencumbered, interest from his sibling Elizabeth Kelly Jefferson.

Appellees, Ted W. Hahn, Harold H. Mullis, and J. Pat Williams, jointly; PNC Bank f/k/a Citizens Fidelity Bank and Trust Company of Lexington; and Citizens Bank & Trust Co. of Jackson (Citizens Bank), are the holders of judgment liens, see KRS 426.720, against one of the one-sixth interests owned by Wade H. Jefferson, III. The Citizens Bank lien, which is subordinate to the other two liens, secures a judgment in the amount of \$2,860,249.46; the remaining liens secure judgments totaling approximately \$450,000.00

On March 10, 2004, appellant filed a complaint in Fayette Circuit Court seeking to partition the subject property pursuant to Kentucky Revised Statutes (KRS) 389A.030. In addition to the co-owners of the property and, where applicable, their spouses and heirs, the appellant named the lienholders as parties to the action with the objective of having their liens on the encumbered one-sixth interest extinguished in connection with the partition. The appellant did not, however, seek to have the leasehold interest extinguished.

Citizens Bank responded to the complaint and objected to the extinguishment of its lien in connection with the partition action. Citizens Bank did not object to the partitioning and sale of the property, but rather sought to have its lien on the encumbered one-sixth interest survive the partition and retain a lien on the interest post-partition.

On June 22, 2004, the appellant filed a "Motion for Judgment and Order of Sale" wherein it sought the sale of the property as a whole, free and clear of all liens, claims, or interests of the parties, including the Citizens Bank lien and other liens. On March 3, 2005, the circuit court entered an order denying the appellant's Motion for Judgment and Order of Sale on the basis that KRS 389A.030 does not provide for the naming of lienholders as parties to a partitio action, and, accordingly, the statute does not authorize the extinguishment of a lienholder's interest in connection with a partitioning. This appeal followed.

The appellant contends that the trial court erred in its determination that KRS 389A.030 does not provide for the joinder of lienholders to a partition action as necessary parties and for the corresponding extinguishment of their lien interest. KRS 389A.030 provides, in relevant part, as follows:

(1) When two (2) or more persons . . . share title to real estate in such manner that a conveyance by them jointly would pass a fee simple title, any one (1) or more of them may bring an action for the sale or division thereof in the Circuit Court of the county in which the land, or the greater part thereof, lies, making parties defendant those owners who have not joined as plaintiffs. . . . Defendant owners shall be brought before the court in the manner provided by the civil rules whether or not a fiduciary possesses a power of sale of the defendant's interest, but any fiduciary possessing such a power shall also be made a

defendant. The case shall be tried without a jury. (Emphasis added).

. . . .

(3) In all such actions indivisibility of the real estate shall be presumed unless an issue in respect thereto is raised by the pleading of any party, and if the court is satisfied from the evidence that the property is divisible, without materially impairing the value of any interest therein, division thereof pursuant to KRS 381.135 shall be ordered.

(4) If a sale of all or any part of the real estate shall be ordered, the court shall refer the matter to the master commissioner or appoint a commissioner to conduct a public sale and convey the property upon terms of sale and disposition of the net proceeds as may have been determined by the court.

The statute provides for the joinder of owners of the property to the partition action, and does not provide for the joinder of lienholders as necessary parties. "Where the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written." Griffin v. City of Bowling Green, 458 S.W.2d 456, 457 (Ky. 1970). "Lienholders" are manifestly not "owners." Because lienholders are not required to be joined in an action under KRS 389A.030, the legislature could not have intended that a lien, against the choosing of a lienholder, be extinguished in connection with a partitioning. By omitting lienholders as necessary parties, it

follows that KRS 389A.030 does not contemplate forced extinguishment of a lien in a partition action.

The appellants, however, make note that KRS 389A.030(3) provides that a division of property shall be in accordance with KRS 381.135,<sup>2</sup> and that KRS 381.135 (1)(b) refers to "all persons interested in the property" as necessary parties rather than "owners." KRS 381.135(1)(b) provides, in relevant part, as follows:

(1)(b) A person desiring a division of land held jointly with others, a person desiring an allotment of dower or curtesy, or a person with an ownership interest of twenty percent (20%) or more in a closely held farm corporation or partnership may file in the Circuit Court of the county in which the land or the greater part thereof lies a petition containing a description of the land, a statement of the names of those having an interest in it, and the amount of such interest, with a prayer for the division or allotment; and, thereupon, all persons interested in the property who have not united in the petition shall be summoned to answer not more than twenty (20) days after service of the summons. The written evidences of the title to the land, or copies thereof, if there be any, must be filed with the petition. (Emphasis added).

KRS 381.135 is the successor statute to Civil Code of Practice Section 499. Subsection 1 of Section 499 stated as follows:

---

<sup>2</sup> KRS 381.135 addresses the procedures in the event the subject property is divisible. It is uncontested that in the present action the subject property is indivisible. Hence, KRS 381.135 is not applicable to the present case.

A person desiring a division of land held jointly with others, or an allotment of dower, may file in the circuit court or county court of the county in which the land or the greater part thereof lies, a petition containing a description of the land, a statement of the names of those having an interest in it, and the amount of such interest, with a prayer for the division or allotment; and, thereupon, all persons interested in the property who have not united in the petition shall be summoned to answer on the first day of the next term of the court. The written evidences of the title to the land, or copies thereof, if there be any, must be filed with the petition.

See Barry v. Baker, 29 Ky. 573, 93 S.W. 1061, 1062 (1906).

As can be observed by comparison, Subsection 1 of Section 499 of the Civil Code of Practice closely corresponds to Section (1)(b) of KRS 381.135. In Barry, supra, the Court interpreted Subsection 1 of Section 499 as follows:

The words "those having an interest in it," and "all persons interested in the property who have not united in the petition shall be summoned to answer," etc., refer to persons owning an interest in the land under the same title, and are the only persons necessary to be made parties to such an action. See case of McIntire v. McIntire's Ex'r, 82 Ky. 502. . . . It was not intended by the framers of the Code that a mere lienholder should be a necessary party to an action for a division of land. When a person takes a lien upon an undivided interest in land, he must receive it with the knowledge and understanding that his lien will follow and remain upon the particular interest, wherever placed in the division; otherwise, it would operate as a detriment and disadvantage to those who did

not mortgage their interests. They could not have their interests allotted free from liens without the consent of the mortgagees.

Id. at 1062.

Under the foregoing construction of 381.135(1)(b), by which we are bound (Kentucky Rules of the Supreme Court (8)(a)), lienholders are not necessary parties to the action. Again, it follows that the intent of the statute could not be that lienholders be compelled as parties to an action and subject to having their liens extinguished in conjunction with the partitioning. To the contrary, the Barry court pointed out that a lienholder should be able to record his lien "with the knowledge and understanding that his lien will follow and remain upon the particular interest, wherever placed in the division [.]"

We further observe that the principle that lienholders are not necessary parties to a partition is undoubtedly the majority rule. "The holder of a mortgage or other lien upon the undivided interest of a cotenant is not, in the absence of a statute stating otherwise, a necessary party to a suit for partition, since the lien is transferred to the interests in severalty allocated to the cotenants." 59A Am. Jur. *Partition* § 95 (2005). See also *Annotation, Holder of Mortgage or other Lien upon an Undivided Interest in Real Property as a Necessary or Proper Party to a Suit for Partition*, 126 A.L.R. 414. As

there is no statute or other authority in Kentucky providing that a lienholder is a necessary party to a partition action, we are unpersuaded by the appellant's argument to the contrary.

Finally, the appellant cites us to 3 Kentucky Practice, *Joint Tenancies and Partitions*, § 14.45, p. 354-355, wherein it is stated "It is the considered judgment of the author that the defendants should include . . . (3) The holder of any lien against the interest of any person therein or any portion thereof no matter how created." We agree with this guideline. Mortgagees and lienholders should be named as parties or, in the absence of that, should intervene in the proceedings for the purpose of ensuring that those interests are protected, and so that the partitioning court may have full information and facts concerning nonownership interests. That is different, however, from the holders of such interests being necessary parties for the purpose of extinguishing their interests as a part of the partition.

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

John S. Talbott  
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR  
APPELLEE:

John P. Brice  
James T. Hodge  
Lexington, Kentucky