RENDERED: JULY 31, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001664-MR

SANDRA LATTANZIO AND JAMES LATTANZIO — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN REYNOLDS, JUDGE
ACTION NO. 18-CI-00672

SCOTT KELLER; SCOTT KELLER, LLC; AMY COLEMAN; STEVE ELLIOTT; BARBARA ARCHAMBAULT; BENJAMIN BEALMEAR; LAURA BEALMEAR; AND CODY SMITH — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND MAZE, JUDGES.

CLAYTON, CHIEF JUDGE: James and Sandra Lattanzio appeal *pro se* from a Fayette Circuit Court order of October 23, 2018, dismissing their case against

multiple defendants for lack of standing. Having reviewed the record and applicable law, we affirm.

The Lattanzios are married and operate Thoroughbred Sport Horses, LLC ("TBSH"), a thoroughbred horse rehoming business. Sandra is the sole and organizing member of the LLC. The Lattanzios' adult daughter, Geena Kelly, was involved in the business, which included training, showing, and promoting Fuerst Valhalla, a thoroughbred show horse.

In January 2017, the Lattanzios rented a farm on Hume Bedford Pike in Lexington. The property was owned by Arcana, LLC, whose sole member was Jaclyn Slate. The property was managed by Karen Schaffer, who resided onsite.

In February 2017, James Lattanzio contacted the Lexington police to report that numerous items had been stolen from the farm, including farm equipment, tractors, trailers, machines, a horse trailer, hand tools, a 2004 Dodge truck, and several horses, including the show horse. Following a police investigation, Geena Kelly was arrested and indicted by a Fayette County grand jury for the thefts. Geena claimed she sold the farm equipment to purchase feed for the horses. A summons was issued for Geena's boyfriend, Cody Smith, and his father, James Smith, for trespass and menacing against James Lattanzio.

On February 23, 2018, the Lattanzios filed a *pro se* lawsuit against Geena Kelly and twelve other defendants, alleging conversion, conspiracy,

negligence, and business interference. They claimed Geena had stolen the equipment, vehicle, and horses from the farm and alleged the other defendants had assisted her in the thefts and had taken, used, received, and disposed of the property. The defendants included the following individuals: Dr. Amy Coleman, a veterinarian who contracted with Geena Kelly to lease the show horse; Scott Keller, who boarded the show horse at his farm for Dr. Coleman; Dr. Ben Bealmear, a veterinarian who cared for some of the horses; Laura Bealmear, Dr. Bealmear's wife; Barbara Archambault, a family friend of the Lattanzios who testified on behalf of Geena Kelly before the Fayette County grand jury; Steve Elliott, a purchaser of some of the farm equipment; Cody Smith; and James Smith.

The litigation continued for some time thereafter, with several of the defendants either not responding to the complaint or moving to dismiss the suit. The trial court permitted the Lattanzios to amend their complaint twice to address the issues raised by these motions.

On June 22, 2018, the Lattanzios filed their third amended complaint, now naming a total of eighteen defendants and raising new claims of trespass to chattels. The complaint contained the following counts: (1) Trespass to Chattels – Property & Land; (2) Concert of Actions (aiding and abetting); (3) Conversion and Conversion after Trespass; (4) Unjust Enrichment; (5) Business, Livelihood, Income Interference – Nuisance; (6) Abuses of Legal Processes; (7) Concert of

Acts in Abuse of Legal Process; (8) Trespass to Chattel in Land Property and Chattel; (9) Intentional Infliction of Emotional Distress & Outrageous Conducts; (10) Negligence; and (11) Gross Negligence (in assault/menacing). It asked for a replevin warrant for recovery of any obtainable property; $500,000 in damages; $1.5 million in treble damages; $3 million in punitive damages; and all costs and fees.

Defendants Scott Keller, Scott Keller, LLC, Dr. Amy Coleman, Steve Elliott, Barbara Archambault, Ben Bealmear, Laura Bealmear, and Cody Smith all filed motions to dismiss. Following a lengthy evidentiary hearing, the trial court entered an order granting the motions and dismissing the case on the grounds that the Lattanzios lacked standing because they could not show an ownership interest in the property at issue in the lawsuit. The trial court recognized that although TBSH may have owned some of the property, the LLC was never made a party to the lawsuit. Furthermore, as to their claims based merely on possession, such as trespass to chattel, the trial court held that the Lattanzios were unable to show their right to reside upon the property where the alleged thefts took place. This appeal by the Lattanzios followed.

Because the trial court considered matters outside the pleadings in dismissing this case, the dismissal is treated as a summary judgment. "[R]eliance on matters outside the pleadings by the court effectively converts a motion to

dismiss into a motion for summary judgment." *Chen v. Lowe*, 521 S.W.3d 587, 591 (Ky. App. 2017) (citations omitted).

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). The trial court must view the record "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) (citations omitted). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted).

On appeal, "[a]n appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004) (citations omitted).

"[T]he principle 'that some substantial claim to a personal right must be alleged' by a party is part of the basic law of standing." *Bell v. Commonwealth, Cabinet for Health and Family Services, Dep't for Community Based Services*, 423

S.W.3d 742, 750 (Ky. 2014) (quoting *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978)).

The appellants argue that the trial court abused its discretion in conducting a hearing on the issue of standing rather than requiring the defendants to file answers to the third amended complaint. They contend the trial court failed to read the third amended complaint which raised new tort theories of trespass and unfairly acted as an advocate for the defendants by ordering the "needless" hearing on standing at the request of one of the defendants' attorneys. They further argue that the hearing was unnecessary because the issue of standing had already been waived.

As support for their contention that the issue of standing was waived, the appellants rely upon *Harrison v. Leach,* 323 S.W.3d 702 (Ky. 2010). But their reliance on that opinion is misplaced. In *Harrison*, the issue of standing was never raised before the trial court and was raised for the first time *sua sponte* in the Court of Appeals. *Id.* at 706. It is axiomatic that "[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989) (citations omitted). By contrast, the issue of the Lattanzios' standing was timely raised and fully litigated before the trial court and is therefore properly before us in this appeal.

The record shows that the trial court gave the Lattanzios more than adequate time and opportunity to prepare and to present their arguments regarding standing. The Lattanzios do not explain how more time would have helped them to strengthen their case or how requiring the defendants to file answers to the third amended complaint would have clarified the fundamental issue of standing. "[T]he hope that something will come to light in additional discovery is not enough to create a genuine issue of material fact." *Benningfield v. Pettit Environmental, Inc*., 183 S.W.3d 567, 573 (Ky. App. 2005).

Furthermore, the record shows the trial court did consider their claims of trespass to chattels, as evidenced by its statements during the course of the evidentiary hearing and its express statement in the order of dismissal that they had failed to prove their right to reside on the property upon which the alleged trespass occurred.

In order to state a claim for the tort of conversion, a plaintiff must show that he or she "had legal title to the converted property . . . [and] had possession of the property or the right to possess it at the time of the conversion[.]" *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 853 (Ky. App. 2014) (citations omitted). By contrast, a trespass to chattel is committed "by *intentionally* (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another. (Emphasis added)." *Ingram Trucking, Inc. v. Allen*, 372

S.W.3d 870, 872 (Ky. App. 2012) (quoting RESTATEMENT (SECOND) OF TORTS § 217 (1965)).

But the Lattanzios did not clarify the distinction between themselves as individuals and the LLC, TBSH, and simply failed to provide evidence that they personally and individually either held legal title or possessed the property at issue. "A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment." *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) (citation omitted).

For the foregoing reasons, the order of the Fayette Circuit Court granting the defendants' motions to dismiss and dismissing the entire case is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

James Lattanzio, *pro se*
Sandra Lattanzio, *pro se*
Lexington, Kentucky

BRIEF FOR APPELLEES BARBARA ARCHAMBAULT, BEN BEALMEAR, LAURA BEALMEAR, AND CODY SMITH:

Joseph D. Buckles
Lexington, Kentucky

BRIEF FOR APPELLEE DR. AMY COLEMAN:

Gregory E.J. Coulson
Lexington, Kentucky