

RENDERED: JUNE 3, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000948-MR

CHARLES BROWN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 02-CI-00032

KENNETH N. FURNISH, JR.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

TACKETT, JUDGE: Charles Brown appeals from an order of the Kenton Circuit Court granting summary judgment in favor of his former landlord, Kenneth Furnish, Jr., on Brown's claims for personal injury, breach of contract and constructive eviction.

At issue is whether Brown, by casting some of his claims as contractual, could avoid the one-year statute of limitations on

¹ 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 KRS 21.580.

personal injury claims. We agree with the trial court that he could not and, thus, the trial court's order dismissing Brown's complaint with prejudice is affirmed.

Brown rented an apartment in a building owned by Furnish from March 1995 through August 1999. As early as 1996, Brown noticed that water was leaking into his apartment and saturating the carpet and ceiling when it rained. Shortly thereafter, he noticed mold growing in the apartment. By 1998, Brown was seeking medical treatment for respiratory conditions which his physician attributed to the presence of mold in Brown's apartment. Brown claims that he repeatedly notified Furnish of this unsafe condition and that Furnish took no steps to correct it. Nevertheless, Brown remained in the apartment until he was evicted in August 1999. He filed a complaint, alleging breach of contract, constructive eviction and personal injuries caused by exposure to mold, in July 2002. Furnish asked the trial court to grant summary judgment based on Brown's failure to file his action before the expiration of the one-year statute of limitations governing personal injury claims. The trial court granted the motion, dismissing the action with prejudice, and this appeal followed.

In order to grant a motion for summary judgment, a trial court must establish that there are no genuine issues of material fact upon which a claim for relief could be grounded.

Steelvest, Inc. v. Scansteel Service Ctr., Inc., 807 S.W.2d 476 (Ky. 1991). Kentucky Revised Statute (KRS) 413.140 sets a deadline for filing personal injury claims within one year of the discovery of the injury. There is no dispute that Brown was aware of his claims for mold-related respiratory problems by 1998 or 1999; yet, he chose to wait until 2002 to file this action. Thus, the trial court correctly found that Furnish was entitled to summary judgment on the personal injury claim.

Nevertheless, Brown still claims that genuine issues of material fact exist surrounding his claims for constructive eviction and breach of contract. When previously faced with the question of determining whether constructive eviction had occurred the appellate courts of the Commonwealth held as follows:

In order to have constructive eviction two conditions must exist: (1) an act or omission of the landlord which substantially interferes with the tenant's beneficial enjoyment of the leased premises, and (2) the tenant's abandonment of the premises by reason thereof.

Cox v. Hardy, 371 S.W.2d 945, 946 (Ky. 1963). The evidence in this case indicated that Brown was aware of the mold problem for at least two years before he ceased living in the apartment and that he was actually evicted by Furnish, as opposed to abandoning the premises. Therefore, no genuine issue of

material fact exists surrounding Brown's claim for constructive eviction.

With regard to Brown's claim for breach of contract, the courts of the Commonwealth have previously determined that presenting a personal injury claim under the guise of breach of contract will not allow a plaintiff to avoid the one-year statute of limitations mandated by KRS 413.140. Jones v. Furnell, 406 S.W.2d 154 (Ky. 1966). The trial court cited this case in support of its well-considered ruling in favor of Furnish's request for summary judgment. We agree that Brown's claims, regardless of how they were labeled, were all essentially an effort to recover for personal injuries and, thus barred because they were untimely filed.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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