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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001403-MR

JUAN PENA, ADMINISTRATOR OF THE ESTATES OF LOREN PENA, JUAN MANUEL PENA, AND GABRIEL PENA; JUAN PENA, INDIVIDUALLY; AND LORENA PENA, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 06-CI-009421

GREEN TREE SERVICING, LLC — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellants, Juan Pena, Administrator for the Estates of Loren, Juan Manuel, and Gabriel Pena, as well as Juan Pena and Lorena Pena, individually, appeal from an order of the Jefferson Circuit Court granting summary

[1] Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

judgment in favor of Appellee, Green Tree Servicing Center, LLC, in this wrongful death/personal injury action. After reviewing the record herein, we conclude that summary judgment was erroneous and therefore, reverse and remand to the trial court for further proceedings.

This case arises out of a tragic manufactured home fire that occurred in Louisville on October 25, 2005, and resulted in the deaths of four minor children. On the day in question, Maribel Recillas Garcia was babysitting Loren, Juan and Gabriel Pena, as well as her own child, Lisbeth Recillas Garcia. Ms. Garcia was watching the children in a 1984 Buccaneer manufactured home[2] that her husband had purchased from Green Tree less than two months earlier on September 1, 2005. Green Tree had previously repossessed the home from another individual living in the same mobile home community. As a result, the home was not physically relocated prior to the Garcia's purchase.

The trial court herein found that the evidence established that Ms. Garcia had been in the restroom for approximately ten minutes and when she opened the door she was met with heavy smoke. Although the parties disagree as

[2] The parties and trial court herein interchange the terms "manufactured home" and "mobile home." However, KRS 227.550 defines those terms, in relevant part as:

> (7) "Manufactured home" means a single-family residential dwelling constructed in accordance with the federal act, manufactured after June 15, 1976, and designed to be used as a single-family residential dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. . . .
>
> (10) "Mobile home" means a factory-built structure manufactured prior to June 15, 1976, which was not required to be constructed in accordance with the federal act.

Clearly, the 1984 Buccaneer falls within the definition of a manufactured home.

to whether a smoke detector was actually installed in the home, there is no dispute that if one was installed, it was non-operational at the time of the fire. Further, no one challenged Ms. Garcia's claim that she did not hear a detector. Although Ms. Garcia was able to escape, neither she nor the neighbors were able to save any of the children.

Appellants are the parents and the administrators of the estates of three of the children. They filed a complaint in the Jefferson Circuit Court on October 23, 2006,[3] claiming that Green Tree had sold the manufactured home without ensuring that it met the minimum standards regarding the habitation of premises as required by local, state and federal law. As such, Appellants alleged that Green Tree was negligent *per se* for failing to comply with the safety regulations.

On December 10, 2008, Green Tree moved for summary judgment on the grounds that (1) it was not a manufactured home retailer and thus was not subject to the statutory duties set forth in KRS 227.550, *et seq.*; (2) even if it was a retailer, the home was excluded from inspection requirements because it was installed prior to 2004; and (3) there was no evidence that Green Tree's failure to inspect was causally related to the smoke detector not alerting on the morning of the fire.

[3] Initially, the Penas and the Garcias filed separate complaints. However, by order entered February 7, 2008, the two actions were consolidated.

On May 20, 2009, the trial court entered an opinion and order granting summary judgment in favor of Green Tree. The court initially rejected Green Tree's argument that it was not a retailer, noting:

> Green Tree may refer to itself as a home loan servicer, but documentation in the record reveals that it is also a manufactured/mobile home dealer. Given the term "dealer" its common definition . . . it is clear that Green Tree's attempt to distinguish a "dealer" from a "retailer" is . . . semantic and unpersuasive . . . . Green Tree's efforts to pigeonhole itself into the dealer category, and thus escape its duties as a retailer, is troubling; it basically gets the benefit of selling repossessed, or perhaps new, manufactured homes without having to ensure their safety because of its "status" as a "lending institution." It is obvious that Green Tree at some point spent time and effort to become certified by the Commonwealth of Kentucky to deal in manufactured homes, and the Court cannot overlook the fact that Green Tree, while it may be lending money to individuals to buy homes, it is also certified to sell those homes as a dealer. . . . This being a motion for Summary Judgment, the Court is bound to resolve all doubts in favor of Mr. Pena, the non-moving party. The Court therefore finds that Green Tree, as a certified "dealer" of manufactured/mobile homes, is bound to the duties enumerated in KRS 227.550, et seq., a result which should not be too surprising to Green Tree, who should have understood from its own Certificate issued by the Commonwealth of Kentucky that, as a dealer, it had statutory obligations to fulfill.

Nevertheless, the trial court determined that Green Tree was "excused" from its statutory duties in this case by virtue of an exemption set forth in KRS 227.605(2). Further, the trial court concluded that Appellants failed to show that Green Tree's failure to inspect the home, and in particular the smoke detector, prior to selling it to the Garcias was causally related to the subsequent fire and

deaths of the victims. Following entry of the order granting summary judgment, Appellants appealed to this Court.

The proper standard of review in an appeal from a summary judgment is concisely set forth in *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), as follows:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." (Citations omitted).

See also Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

KRS Chapter 227.550 *et seq*. addresses fire prevention and protection for manufactured/mobile homes and recreational vehicles. Pursuant to KRS

227.555 every manufactured/mobile home shall have "at least one (1) working smoke detector located inside the home near the bedroom areas" and "at least two (2) operable means of egress, if the home was originally equipped with at least (2) means." Further, KRS 227.600 provides, in pertinent part:

> Any retailer who has acquired a previously owned manufactured home, mobile home, or recreational vehicle without a seal[4] shall apply to the department for the appropriate seal by submitting an affidavit that the unit has been brought up to or meets reasonable standards established by the board for previously owned manufactured homes, mobile homes, or recreational vehicles. Those manufactured homes or mobile homes taken in trade must be reinspected and certified. A numbered Class B1 Seal shall be affixed by the retailer to the unit prior to sale. A seal will not be required if such retailer submits an affidavit that the unit will not be resold for use as such by the public. A retailer shall not transport or install a manufactured or mobile home which is to be used for residential purposes which does not have a Class B1 Seal.

Similarly, 815 KAR 25:050 requires:

> Section 7. Retailer Inspection of Used Manufactured Homes in Manufacturer's or Retailer's Possession.
>
> (1) A repossessed home or a home taken in trade or purchased by the retailer, shall be re-inspected and certified to the office on Form HBCMH 40 regarding compliance with Section 9(1)(a) through (h) of this administrative regulation.
>
> (a) An existing B seal shall be removed upon trading or purchase. The unit shall be reinspected and a new seal shall be affixed to the unit if it meets applicable requirements.

[4] A "B1 seal" means the unit "[h]as been inspected and found to be in compliance with applicable standards for human habitation." A "B2 seal" means the unit: "1. Has been inspected and found not to be in compliance with applicable codes; 2. Is a salvage unit unfit for human habitation; and 3. Shall be sold only for the purpose of use as a storage or utility building." 815 KAR 25:050 §1(5).

(b) A manufactured unit shall not be resold as a dwelling unless it qualifies for and has affixed to it a B1 seal.

(c) The retailer shall affix the appropriate seal to the unit prior to possession or transportation of the unit.

A B2 seal unit shall not be resold unless the purchaser knowingly and willingly signs Form HBCMH 28.

Section 9. Process for Application of B1 Seals.

(1) Every used manufactured or mobile home shall be inspected by a certified inspector or a certified retailer and a B seal indicating its compliance or noncompliance with the applicable federal standards under which the home was constructed shall be affixed to the home. The inspection shall consist of the following:

(a) Inspection of the plumbing and waste systems to determine if the systems are operable and free of leaks;

(b) Inspection of the cooling system, and heating or fuel-burning system to determine that they are operational;

(c) Inspection of the electrical system, including the main circuit box, each outlet, and each switch in order to detect:

1. A damaged covering;

2. A missing screw; or

3. Improper installation;

(d) Inspection for the existence of adequate and operable smoke detection equipment;

(e) Inspection of the doors, windows, and general structural integrity of the unit;

(f) Inspection for the existence of two (2) exits;

> (g) Inspection for storm windows in a manufactured home, but not in a mobile home; and
>
> (h) The sealing of all exterior holes to prevent the entrance of rodents.

In ruling that Green Tree was exempt from the above inspection requirements in the instant case, the trial court relied on the language of KRS 227.605, which states:

> (2) Except for manufactured or mobile homes installed within the Commonwealth of Kentucky before July 13, 2004, no person shall sell, lease, rent, or furnish for use as a dwelling in the Commonwealth of Kentucky any previously owned manufactured or mobile home that does not bear a B1 Seal and which is not installed in compliance with the manufacturer's instructions, if available, or ANSI 225.1, Manufactured Home Installations.

The trial court specifically noted:

> The Buccaneer in question was a 1984 model, and there is no evidence disputing Green Tree's contention that it never moved the home after it repossessed it from Mr. Clark in September 2005. Further, Mr. Pena has provided no affirmative evidence indicating the home was installed after July 13, 2004. While the word "person" is not defined in KRS Chapter 227, KRS Chapter 446 relates to the construction of statutes and KRS 446.010(26) states that "As used in the statute laws of this state, unless the context requires otherwise . . ." the term "person" "may extend and be applied to . . . limited liability companies." The Court is satisfied that in the absence of a definition excluding limited liability companies as "persons" within KRS Chapter 227, it is entirely within reason to consider Green Tree a "person" for the purpose of selling a manufactured home. Thus, Green Tree, as a "person" selling a manufactured home installed *before* July 13, 2004, was exempted from the requirement to have a B1 seal affixed to the home. (Emphasis in original).

After reviewing the applicable statutes, we are of the opinion that the trial court erred in finding that Green Tree was exempt from its statutory duties by virtue of KRS 227.605. Certainly, the trial court is correct that in some instances a limited liability company may fall within the statutory definition of a "person." However, KRS 227.550 defines a retailer as "any person, firm, or corporation who sells or offers for sale two or more manufactured homes . . . in a consecutive 12 month period." Green Tree, when it voluntarily filed a licensed retailer application, certified that it would comply with the manufactured/mobile home regulations as a "retailer," not as a "person."

Had the legislature intended to excuse retailers from the inspection obligations for units installed before 2004, it would have explicitly done so either by language in KRS 227.600 or inclusion of the term "retailer" in KRS 227.605. Moreover, we believe the public policy behind imposing stricter duties on retailers is obvious. Retailers are in the business of selling multiple homes in commerce; ordinary persons are not. Retailers, by virtue of agreeing to be bound by the applicable statutes and regulations, have the heightened obligation to ensure that what they are selling is habitable and safe for the citizens of this Commonwealth.

"The seminal duty of a court in construing a statute is to effectuate the intent of the legislature." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002) (*citing Commonwealth v. Harrelson*, 14 S.W.3d 541 (Ky. 2000)). If a statute is clear and unambiguously expresses the legislature's intent, it must be applied as written. *Hall v. Hospitality Resources, Inc*., 276 S.W.3d 775, 784 (Ky. 2008); *see*

also Griffin v. City of Bowling Green, 458 S.W.2d 456, 457 (Ky. 1970). Furthermore, when a word used in a statute is ascribed a particular meaning, courts must accept such even if the statutory definition differs from the ordinary meaning of the word. *Schroader v. Atkins*, 657 S.W.2d 945, 947 (Ky. 1983). Finally, "[w]hen there appears to be a conflict between two statutes, . . . a general rule of statutory construction mandates that the specific provision take precedence over the general." *Commonwealth v. Crum*, 250 S.W.3d 347, 351 (Ky. App. 2008) (*quoting Commonwealth v. Phon*, 17 S.W.3d 106, 107-8 (Ky. 2000)).

We are of the opinion that KRS 227.600 is the more specific statute and imposes greater duties upon a retailer than an ordinary person. Therefore, because the legislature did not include the term "retailer" within the exemption set forth in KRS 227.605, we conclude that the legislature did not intend for the exemption to apply. Such a determination, we believe, is consistent with the overall statutory scheme set forth in KRS Chapter 227.

We also take issue with the trial court's finding that Appellants "can present no affirmative evidence that Green Tree had anything to do with the smoke detector not being operational, much less that its failure to inspect the smoke detector to insure it was operational was the causal link between its actions and the grievous injuries Mr. Pena and his family have sustained." Specifically, the trial court found:

> There are a number of possible reasons the smoke detector did not function properly: it could have been installed improperly, or it could have been installed properly, and the batteries were dead. It could have been

> disconnected by one of the Garcia family members before the fire, or it may have been damaged somehow between the date they moved in and the fire.
>
> . . . .
> [I]t is *possible* the smoke detector did not work on that date because Green Tree had sold the Garcias a home with a defective smoke detector. It is just as possible that the smoke detector was in proper working order on the day of the sale but that its batteries died the day after, and the Garcias never checked or replaced them. It is further possible that the smoke detector functioned properly until the hour before the fire, when its batteries finally died. If this was the case, then a proper B1 Seal inspection would *not* have necessarily prevented the children's deaths. The Court simply cannot find that Mr. Pena has presented the type of evidence demonstrating Green Tree's actions probably caused his injuries. (Emphasis in original).

We are of the opinion that the trial court made impermissible assumptions and ignored crucial evidence presented by Appellants. First, Appellants strongly disputed the existence of a smoke detector. Although the trial court states that one was found in the rubble, in fact, the fire investigator found only a small piece of metal that appeared to be part of a detector. No other parts or batteries were found. The Garcias testified by affidavit that they did not recall ever seeing a detector on the premises. In addition, the Garcias produced evidence that (1) they had only purchased the mobile home 45 days earlier; (2) according to the B1 seal process, a proper smoke detector would have either been hard wired or would have had a ten-year battery; and (3) the Garcias had been using stove burners to heat the home due to the lack of a functioning heating system. Finally, Fire Investigator Sergeant Todd Leonard testified by affidavit that "the failure of a properly installed and

operational smoke/fire detector would have been a factor in the death of the children."

Certainly, Appellants bear the burden of proving causation, but they may do so by the use of circumstantial evidence. *See Huffman v. SS. Mary & Elizabeth Hosp.,* 475 S.W.2d 631, 633 (Ky. 1972). We believe that the trial court herein usurped the function of the jury. When viewing the evidence in the light most favorable to Appellants, there appears to be a genuine issue of material fact as to whether a smoke detector was even installed in the Garcias' home and whether Green Tree's failure to fulfill its statutory and regulatory duties was causally connected to the fire and the deaths of four children. While they may have an uphill burden, we simply cannot conclude that it is "impossible that [Appellants] will be able to produce evidence at trial warranting a judgment in [their] favor. *Lewis*, 56 S.W.3d at 436. Clearly, summary judgment was premature.

For the reasons set forth herein, we reverse the order of the Jefferson Circuit Court granting summary judgment in favor of Green Tree Servicing, LLC. This matter is remanded to the trial court for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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