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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000769-MR

ROBERT PAUL ATKINSON

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 09-CI-00139

DARRELL BILLINGS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

ACREE, JUDGE: The issue before this Court is whether the Powell Circuit Court properly entered summary judgment in favor of appellee Darrell Billings on appellant Paul Atkinson's claim that Billings wrongfully converted Atkinson's property. Because Billings is entitled to judgment as a matter of law, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment to the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and Kentucky Revised Statutes (KRS) 21.580.

On September 15, 2007, the Powell County Master Commissioner held a public auction to sell a 285-acre farm held in fee simple as tenants in common by Gerald Hodges, James Hall, and Strother D. Hall.² As directed by the court, the Commissioner divided the property into three parcels: the “Turkey Knob” tract, the “Homestead” tract, and the “Cemetery” tract. The Commissioner advertised the public sale in the local newspaper for three consecutive weeks before the auction. The terms of the sale included the following provision: 10% down day of sale; balance with deed on or before 30 days; subject to Court approval; unpaid purchase price shall bear interest at a rate of twelve (12%) percent per annum from date of sale until paid.

Prior to the sale, Atkinson, with oral permission from James Hall, cut the hay on the Homestead tract and rolled the hay into 110 large circular bales. Atkinson failed, however, to remove the circular bales from the property before the public auction on September 15, 2007. Consequently, the Commissioner announced at the sale that rolled bales of hay existed on the Homestead tract and the owner of the hay (Atkinson) had thirty (30) days from the date of the sale to remove the hay from the property. Both Atkinson and Billings were present at the auction.

During the sale, Billings purchased the Homestead tract for \$570,000 dollars and received a sale bond. The sale bond did not include any reference to the hay bales. After the auction, but before the deed passed to Billings, Atkinson informed

² The public sale was a result of a court order issued in partition action *Hodges, et al. v. Hall, et al.*, Powell Circuit Court, File No. 06-CI-00319.

Billings that he would remove the hay bales from the land in a couple of weeks.

The deed to the Homestead tract subsequently passed to Billings on October 17, 2007, but Atkinson had yet to remove the circular hay bales from the property. It is undisputed that no contract or agreement existed between Atkinson and Billings regarding the hay.

Billings desired to improve the Homestead tract and the hay bales prevented him from doing so. Consequently, on December 25, 2007, approximately ninety (90) days after the auction, Billings sold the hay to a third party for \$38.00 per bale, for a total of \$4,180.00.

On May 20, 2009, Atkinson filed a conversion action in Powell Circuit Court claiming Billings wrongfully converted and sold the hay bales, and requesting the proceeds Billings received from the hay bales' sale. On January 8, 2010, Billings filed a motion for summary judgment arguing that, because Atkinson did not remove the hay bales from the property within the 30-day period, Atkinson relinquished his right to the hay and thus the hay became Billings' property as the bona fide purchaser of the Homestead tract. In response, Atkinson asserted that a genuine issue of material fact existed as to whether he abandoned the hay and, as a result, summary judgment was not proper.

The circuit court agreed with Billings and entered summary judgment in his favor. In so doing, the circuit court determined that, at the time Billings sold the hay, each bale had an estimated value of \$38.00 and the total proceeds received by Billings in the amount of \$4,180.00 represented the fair market value of the hay.

Additionally, the circuit court reasoned that, to avoid an unjust enrichment to Billings, Atkinson should be compensated for his labor in cutting the hay.

Ultimately, the circuit court awarded Billings \$2,786.66, representing two-thirds of the hay's value, and Atkinson \$1,393.34 representing one-third of the hay's value.

On February 10, 2010, Billings filed a Motion to Alter, Amend, or Vacate the judgment on the grounds that Atkinson's abandonment of the hay rendered him ineligible to recover any proceeds from the sale of the hay. Following a hearing on March 17, 2010, the circuit court reduced Atkinson's award from \$1,393.34 to \$500.00. This appeal followed.

On appeal, Atkinson asserts summary judgment was improper because a genuine issue of material fact existed. More specifically, Atkinson contends that it was disputed whether he abandoned the hay bales on the Homestead tract and, as a result, summary judgment was not proper. Additionally, Atkinson claims the circuit court's summary judgment is contrary to the precedent set forth in *Potter v. Baynes*, 186 Ky. 289, 217 S.W. 359 (1920), concerning whether the hay bales became Billings' property as a result of the sale. Finally, Atkinson asserts that, because Billings wrongfully converted the hay bales, he is entitled to recover the full fair market value of the hay.

In reviewing a grant of summary judgment, this Court must determine "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). When the defendant

is the moving party, he or she may establish a right to summary judgment by asserting facts that negate one or more of the elements of the plaintiff's prima facie case. *See Hoskins' Adm'r v. Kentucky Ridge Coal Co.* 277 S.W.2d 57, 58-59 (Ky. 1955). Once this burden has been met, the non-moving party, *i.e.*, the plaintiff, must establish a genuine dispute as to at least one of the material facts theretofore shown by the moving defendant to be undisputed. *See* 3 John A. Day & Kelly J. Smits, *Litigating Tort Cases* § 31:22 (West 2010) ("When a party not moving for summary judgment has failed to make a showing sufficient to establish the existence of an element essential to that party's case, there can be no genuine issue as to any material fact, because a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."). Summary judgment is proper only when it appears impossible for the non-moving party to produce evidence at trial warranting judgment in his favor. *Scifres*, 916 S.W.2d at 787-88. When reviewing a summary judgment order, only legal questions and the existence, or non-existence, of material facts are considered. *Id.* Therefore, a grant of summary judgment is reviewed *de novo*. *Id.*

Conversion is an intentional tort involving the "wrongful exercise of dominion and control over property of another." *State Auto. Mut. Ins. Co. v. Chrysler Credit Corp.*, 792 S.W.2d 626, 627 (Ky. App. 1990). "[T]here is no such thing as a conversion by accident." *Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 632 (Ky. 2005). To prevail on a conversion claim, the claimant must prove:

(1) the plaintiff had legal title to the converted property; (2) the plaintiff had possession of the property or *the right to possess it at the time of conversion*; (3) the defendant exercised dominion over the property in a manner which denied the plaintiff's rights to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment; (4) the defendant intended to interfere with the plaintiff's possession; (5) the plaintiff made some demand for the property's return which the defendant refused; (6) the defendant's act was the legal cause of the plaintiff's loss of the property; and (7) the plaintiff suffered damages by the loss of the property.

Meade v. Richardson Fuel, Inc., 166 S.W.3d 55, 58 (Ky. App. 2005) (citing *McClendon*, 157 S.W.3d at 632 n.12) (emphasis added).

In light of these elements, we find Atkinson cannot sustain his conversion claim against Billings because Atkinson failed to prove, at a minimum, he had a right to possess the hay at the time of the alleged conversion. It is undisputed that, at the public auction on September 15, 2007, prior to the sale of the Homestead tract, the Commissioner announced that Atkinson had 30 days from the date of the sale to remove the hay bales from the property. It is also undisputed that Billings and Atkinson did not have a separate oral or written agreement concerning the ownership or removal of the hay bales. As a result, the 30-day grace period controlled. As of October 15, 2007, 30 days from the date of the auction, Atkinson had not removed the hay bales from the Homestead tract. Consequently, Atkinson's right to possess the hay ceased as of October 15, 2007. Accordingly, when Billings sold the hay bales to a third party on December 25, 2007, the moment of the alleged conversion, Atkinson no longer retained the right to possess

the hay. Therefore, Atkinson is unable to prove at least one element of a prima facie case of conversion. Summary judgment was appropriate as a matter of law.

Atkinson argues he had a right to possess the hay bales because the hay did not run with the title to the land, but was specifically reserved to him at the public auction by the Commissioner's statement prior to the sale of the Homestead tract. Consequently, Atkinson contends that his failure to remove the hay bales from the property within the 30-day window did not negate his right to possess the hay. In support of his position, Atkinson relies on *Potter v. Baynes*, 186 Ky. 289, 217 S.W. 359 (1920).

In *Potter*, the original landowner, Baynes, sold his farm to Potter. At the time of the sale, the farm in question contained several acres of corn. After title to the farm passed to Potter, Baynes proceeded to gather and store the corn located on the farm. When Baynes refused to return the corn to Potter, Potter filed suit seeking to recover the corn. Potter claimed title to the corn on the grounds that the deed conveying the farm made no reservation of the corn to Baynes. At the conclusion of trial, a jury returned a verdict declaring Baynes the owner, and entitled to possession, of the corn. On appeal, the Court of Appeals, then Kentucky's highest court, affirmed the jury's verdict reasoning that, though the deed did not specifically reserve the corn to Baynes, the evidence established that Potter understood the crops on the farm were reserved by Baynes and not included in the sale of the farm. *Potter*, 217 S.W. at 360. *Potter* is distinguishable from the case *sub judice*.

At the outset, we note that *Potter* did not involve a conversion claim. *Potter* was not seeking to recover from Baynes the fair market value of the corn, but was in fact seeking the return of the corn itself. *See State Auto.*, 792 S.W.2d at 627 (noting the proper “measure of damages in conversion is the value of the property at the time of conversion”); 13 David J. Leibson, *Kentucky Practice: Tort Law* § 8.1 (2008) (explaining that conversion involves an intentional interference so severe as to force the defendant to pay the fair market value of the property converted).

More importantly, the court in *Potter* found that, though the deed did not specifically reserve the corn to Baynes, the evidence established that Baynes retained an exclusive, unfettered right to possess the corn. Similarly, in the case before us, neither the sale bond nor the deed reserved the hay bales to Atkinson. However, the evidence shows not that Atkinson had an exclusive, unfettered right to the hay. He could have been compelled to remove the hay immediately; instead, he was granted, gratuitously, the right to store, and the concomitant right to possess and remove the hay for a period of 30 days. This was not an exclusive, unfettered right, but a limited right only. After 30 days passed, Atkinson’s right to possess and remove the hay came to an end. Accordingly, *Potter* is not persuasive authority under these facts.

Atkinson also contends that summary judgment was improper because a genuine issue of material fact existed as to whether Atkinson abandoned the hay. Abandonment may be a complete defense to a claim of conversion. *See Mastin v.*

Hisle, 343 S.W.2d 592 (Ky. 1961) (indicating that abandonment is a valid defense to a conversion claim); *Greer v. Arroz*, 330 S.W.3d 763, 765-66 (Ky. App. 2011) (finding the plaintiff abandoned the personal property at issue foreclosing the plaintiff's claim of conversion); *see also Johnson v. Northpointe Apartments*, 744 So. 2d 899, 905 (Ala. 1999) (“[A]bandonment is a defense to an action for conversion.”); *Weicht v. Suburban Newspapers of Greater St. Louis, Inc.*, 32 S.W.3d 592, 597 (Mo. App. E.D. 2000) (“[A]bandonment [is a] complete defense to a conversion claim); 18 Am. Jur. 2d Conversion § 102. In an intentional tort action, however, the plaintiff bears the initial burden of proving his or her prima facie case before the burden shifts to the defendant to establish any viable defense. *See* 1 Dan B. Dobbs, *The Law of Torts* §19 (West Group 2001). As explained above, Atkinson is unable to establish a required element of his conversion claim, *i.e.*, that he had the right to possess the hay at the time of the conversion. Because Atkinson cannot establish a prima facie case of conversion, the burden does not shift to Billings to adequately prove an abandonment defense. Therefore, whether a genuine issue of material fact exists concerning Atkinson's abandonment of the hay does not preclude summary judgment. Atkinson's argument is without merit.

Finally, Atkinson argues he was entitled to the fair market value of the hay bales, as evidenced by the proceeds Billings received from the hay's sale, as a result of Billings' wrongful conversion of the property. Because there was no conversion, there was no damage. However, the circuit court determined, *sua sponte*, to compensate Atkinson, ultimately in the amount of \$500, for his labor in

cutting and rolling the hay. Because the record contains ample support for the trial court's award to Atkinson pursuant to the doctrine of unjust enrichment, and because Billings has not cross-appealed, we will not disturb that award.

The Powell Circuit Court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Edward Davis
Stanton, Kentucky

BRIEF FOR APPELLEE:

Stephen R. Johnson
Campton, Kentucky