

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000811-MR

WARD REALTY, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 08-CI-006332

ROY STOESS ESTATE, LLC.;
STOLL KEENON OGDEN, PLLC;
SCOTT W. BRINKMAN; JORDAN
RIVER, INC.; GREATER BUCKNER
INVESTMENT CO., LLC; AND
GRISANTI-HEAD COMMERCIAL
REAL ESTATE, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND CAPERTON, JUDGES.

TAYLOR, CHIEF JUDGE: Ward Realty, LLC, brings this appeal from an August 18, 2008, order dismissing Ward Realty's complaint against Scott W. Brinkman

and Stoll Keenon Ogden, PLLC, (Stoll Keenon) and a January 25, 2011, order of the Jefferson Circuit Court dismissing Ward Realty's complaint against Roy Stoess Estate, LLC (Stoess). We affirm.

This appeal arises from the sale of property owned by Stoess located at 3700 Commerce Parkway in Oldham County, Kentucky (hereinafter referred to as the Commerce Parkway property). In 2004, Stoess entered into a contract for the sale of the property (purchase contract) with Jordon River, Inc. The purchase contract provided that Stoess would pay 3 percent of the purchase price in commission to Ward Realty, as agent for the buyer, Jordon River. Paul Grisanti and Herbert Head (collectively referred to as Grisanti/Head) were real estate agents for Ward Realty and represented Jordon River. Jordon River subsequently assigned its rights under the purchase contract to Greater Buckner Investment Co., Inc. (Buckner) and 393 Investment Properties, LLC (393).

On August 15, 2006, Buckner and 393 purchased the Commerce Parkway property.¹ Scott W. Brinkman, an attorney with Stoll Keenon, represented Buckner and 393 at the real estate closing and prepared the closing documents. At the closing, Brinkman issued two checks as commission for the sale made payable to Grisanti/Head in the total amount of \$192,851.10.

Sometime after the purchase contract for 3700 Commerce Parkway was executed in 2004, but before the actual sale occurred in 2006, Grisanti/Head

¹ The property located at 3700 Commerce Parkway was subdivided into two tracts. One tract was sold to Greater Buckner Investment Co., LLC, and one was sold to 393 Investment Properties, LLC. The two tracts were sold for a total purchase price of approximately 6.4 million dollars.

resigned from Ward Realty. However, Grisanti/Head continued to be involved in several real estate closings on behalf of Ward Realty, including the Commerce Parkway property. Ultimately, a controversy ensued concerning entitlement to the commission from the sale of the Commerce Parkway property between Grisanti/Head and Ward Realty.

On September 12, 2006, Grisanti/Head filed a declaratory judgment action against Ward Realty in the Jefferson Circuit Court (Action No. 06-CI-008012) seeking an adjudication of entitlement to real estate commissions from the sale of various real properties, including the Commerce Parkway property. Ward Realty filed a counterclaim seeking additional commissions from Grisanti/Head. The circuit court ultimately determined that neither Ward Realty nor Grasanti/Head were entitled to additional payments of commissions from the other and dismissed the actions. Both parties pursued direct appeals; both appeals were dismissed without adjudication on the merits. (Appeal Nos. 2008-CA-001437-MR and 2008-CA-001507-MR.)

On June 12, 2008, Ward Realty filed a complaint and amended complaint in the underlying action (Action No. 08-CI-006332) against Stoess, Brinkman, Stoll Keenon, Jordon River, 393 and Buckner. In turn, Stoess filed a third-party complaint against Grisanti/Head.² By interlocutory order entered August 18, 2008, Ward Realty's complaint was dismissed as to Brinkman and Stoll

² In the third-party complaint, Ward Realty, LLC, named Grisanti-Head Real Estate, LLC, Herbert T. Head, and Paul M. Grisanti as third-party defendants. Grisanti-Head Real Estate, LLC, apparently changed its name to Grisanti Group Commercial Real Estate, LLC, which is the party named as appellee to this appeal.

Keenon. Then, by final order entered January 25, 2011, the circuit court granted summary judgment dismissing Ward Realty's complaint against Stoess. Therein, the court stated that "the doctrine of collateral estoppel prohibits Ward Realty's claims against the Stoess Estate." This appeal follows.

From review of the record, it appears that the August 18, 2008, order was rendered pursuant to a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Kentucky Rules of Civil Procedure (CR) 12.02. This order dismissed Ward Realty's complaint against Brinkman and Stoll Keenon. However, as matters outside the pleadings were considered, the motion to dismiss will be treated as a motion for summary judgment. CR 56; *Ferguson v. Oates*, 314 S.W.2d 518 (Ky. 1958). And, the order entered January 25, 2011, granted summary judgment and dismissed Ward Realty's complaint against Stoess. Thus, we will review both the August 18, 2008, order and the January 25, 2011, order as summary judgments.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Resolution of this appeal involves no disputed material factual issues but rather rests upon an issue of law – the application of the doctrine of issue preclusion.

It is well settled that the doctrine of *res judicata* serves as a bar to repetitious lawsuits involving the same cause of action. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998); *Coomer v. CSX Transportation, Inc.*, 319 S.W.3d 366

(Ky. 2010). *Res judicata* is composed of two subparts – claim preclusion and issue preclusion. *Yeoman*, 983 S.W.2d 459; *Coomer*, 319 S.W.3d 366. In this appeal, we are concerned with the doctrine of issue preclusion. Issue preclusion, also known as collateral estoppel, generally operates to bar issues that were litigated in a previous action from being relitigated in a second action. *Yeoman*, 983 S.W.2d 459. The following elements are necessary for issue preclusion to operate as a bar in subsequent litigation:

First, the issue in the second case must be the same as the issue in the first case. [*Restatement \(Second\) of Judgments § 27 \(1982\)*](#). Second, the issue must have been actually litigated[.] *Id.* Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. *Id.* Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment. *Id.*

Yoeman, 983 S.W.2d at 465.

Upon review of the record, it is clear that the paramount issue before the circuit court in the first action (Action No. 06-CI-008012) concerned entitlement to real estate commissions between Ward Realty and Grisanti/Head, including the commission involving the sale of the Commerce Parkway property. Hence, the issue of Ward Realty's entitlement to the \$192,851.10 commission from the sale of the Commerce Parkway property was directly placed before the circuit court in Action No. 06-CI-008012. And, from review of the circuit court's May 14, 2008, Opinion and Order, the court clearly decided that neither Ward

Realty nor Grisanti/Head possessed any lawful claim to a greater portion of the commission than either had previously received.

In the underlying litigation (Action No. 08-CI-006332), Ward Realty claims that appellees improperly paid the \$192,851.10 commission directly to Grisanti/Head instead of directly to Ward Realty. By not paying the commission directly to Ward Realty, Ward Realty claims that it received less than its proper share of the commission. Fundamental to each claim is that Grisanti/Head received a greater portion of the commission and Ward Realty received a lesser portion of the commission than legally mandated.

However, the issue of lawful entitlement to the commission between Ward Realty and Grisanti/Head was previously decided in Action No. 06-CI-008102. And, considering the elements outlined in *Yoeman*, we believe that the doctrine of issue preclusion bars relitigation of this issue in the underlying action. *See Yoeman*, 983 S.W.2d 459. As concluded by the circuit court in Action No. 06-CI-008012, Ward Realty possesses no lawful claim to a greater portion of the commission than previously received. Consequently, in this action, Ward Realty's claims against appellees must fail as it has received its proper commission as adjudicated in Action No. 06-CI-008012 and, thus, has suffered no cognizable damage by appellees failure to directly pay the commission to Ward Realty.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Norbet J. Arrington
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE ROY STOESS
ESTATE, LLC:

Ray H. Stoess, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEES SCOTT
BRINKMAN AND STOLL KEENON
OGDEN, PLLC :

K. Gregory Haynes
Frank F. Chuppe
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLEES SCOTT BRINKMAN
AND STOLL KEENON OGDEN,
PLLC :

Frank F. Chuppe
Louisville, Kentucky