RENDERED: MAY 22, 2015; 10:00 A.M.
NOT TO BE PUBLSIHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000379-MR

CHRISTOPHER SANDERS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 09-CI-011276

FLIK INDEPENDENT SCHOOLS; GALLAGHER BASSET SERVICES, INC.; TRINITY HIGH SCHOOL FOUNDATION, INC.; JAMES HEADDEN SEPTIC TANK SERVICES, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE, D. LAMBERT AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: The Appellant, Christopher Sanders, appeals the January 23, 2013 opinion and order of the Jefferson Circuit Court, granting summary judgment to Appellee Trinity High School Foundation, Inc. (an entity

separate from Trinity High School, Inc.), based upon its finding that the Foundation was entitled to "up the ladder immunity" from Sanders's workers' compensation claim. Sanders was employed by Co-Appellee Flik Independent Schools ("Flik"), which the court found to be a subcontractor of the Foundation. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

FACTS AND PROCEDURE

Sanders was employed by Flik, a company which provided food services to Trinity High School students and staff. Sanders was injured when he stepped on a misaligned manhole cover that opened, allowing him to fall into a grease vat located on property to which the Foundation held legal title.

The Foundation leased the property to the School for the purpose of instructing students in accordance with a "Sponsorship Agreement" to which the Foundation, the School, as well as the Roman Catholic Bishop of Louisville, were parties.

The Sponsorship Agreement references the lease agreement between the Foundation and the School. Rob Saxton, Director of Finance and Administration at the School, testified that the relationship between Trinity Foundation and the School was, primarily, that of landlord and tenant. Although he was unaware of any written "maintenance agreement" between the Foundation and the School, his testimony was clear that responsibility for "day-to-day" operational matters had been delegated to and were the responsibility of the

School. When it came to the specific maintenance of the grease vat, the manhole to access it, and the manhole cover, he was also clear that the School had engaged a "subcontractor" – Headden Septic Tank Services, Inc.

Because Sanders's injuries occurred in the workplace, he filed a workers' compensation claim with his employer, Flik. Flik maintained workers' compensation insurance and accepted and paid Sanders's workers' compensation claim through medical benefits and settlement as contemplated by KRS[1] 342.690.

In November of 2009, Sanders filed third-party negligence claims against Headden and the School based upon the allegation that the cover of the grease vat had not been properly installed, and that the parties had been negligent in maintaining the school grounds and storage facilities, and the grease vat in particular.[2]

In August of 2010, Flik and Flik's workers' compensation carrier intervened in this action to protect their subrogation interest in any recovery from a third-party for the workers' compensation benefits paid. On September 22, 2010, the School filed a motion for summary judgment arguing that Sanders's claim against it was barred pursuant to "up-the-ladder" immunity of KRS 342.690 and KRS 342.610.

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[1] Kentucky Revised Statutes.

[2] Sanders eventually settled with Headden and an agreed order of partial dismissal on behalf of Headden was entered on October 19, 2012.

Sanders responded to the School's motion in April 2011 by filing a pleading that combined a motion to amend his complaint to add the Foundation as a defendant with a direct response to the School's motion for summary judgment.

On August 29, 2011,[3] the circuit court granted the School's motion for summary judgment. In so doing, the court found the School was entitled to up-the-ladder immunity pursuant to the workers' compensation act's exclusive remedy provision, KRS 342.690. In part, the court's opinion stated that:

> Trinity [High School] was the "employer" or "contractor." Sanders worked for Flik, a subcontractor that obtained and paid workers' compensation benefits for its employees. It paid workers' compensation benefits for its employees. It paid workers' compensation benefits as contemplated in KRS 342.690. Furthermore, Trinity was an "employer" within the meaning of KRS 342.610 in that Trinity utilized Sanders' direct employer as a subcontractor for food services . . . that the provision of food services to students and staff was a regular and recurrent part of Trinity's work.

Accordingly, the School was dismissed from the action. No appeal was taken from that order.

Sanders's pending motion to amend the complaint to add the Foundation as a party was subsequently granted.[4] Sanders alleged the Foundation,

[3] The parties cite this date rather than the date the order was entered by the clerk, August 30, 2011. Kentucky Rule of Civil Procedure (CR) 58.

[4] Both Sanders and the Foundation reference and attribute significance to an odd, and in our opinion irrelevant, sequence of procedural events that occurred before the Foundation was made a party. On September 8, 2011, before the Court ruled on Sanders's motion to amend the complaint to add the Foundation as a defendant, Sanders moved the circuit court to amend its August 29, 2011 order to "distinguish between Trinity High School, Inc. and Trinity Foundation, Inc. and [to] deny Trinity Foundation, Inc. any relief sought by Defendant's Motion of September 21, 2010." As of the filing of that motion, the circuit court had not yet exercised personal jurisdiction of the Foundation and, therefore, could neither grant nor deny relief to it. Nevertheless, on September 13, 2011, one day before allowing the amended complaint to be

as the owner of the property, failed to discover, correct, or warn of the dangerous condition – a premises liability claim.

The Foundation asserted various defenses, including that "the Kentucky Workers' Compensation Act provides the exclusive remedy for Plaintiff's injuries and damages." In April 2012, the Foundation moved the circuit court for summary judgment on two grounds: (1) like the School, it was entitled to up-the-ladder immunity pursuant to KRS 342.690; and (2) as a landlord out of possession of the subject property, the Foundation owed no legal duty to Sanders.

On January 23, 2013, the court entered an opinion and order granting the Foundation's summary judgment motion. In essence, it stated that because the court previously found that the provision of food services to students and staff "was a regular and recurrent part of Trinity High School's work [and] that the [F]oundation leased the premises to Trinity High School, the . . . Foundation is also entitled . . . to 'up-the-ladder' immunity." Having so ruled, the circuit court found it unnecessary to address the Foundation's second argument – that the Foundation owed no duty to Sanders for the allegedly defective condition on the property.

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filed, the circuit court entered an order granting the motion to amend and clarifying that "Defendant's Motion for Summary Judgment is Denied as Trinity Foundation has been the owner of the real property upon which Plaintiff fell at all relevant times and there[fore] Trinity Foundation is not a statutory contractor within the definition of KRS 342.690(1)." Because this order purports to address the rights of an entity not before the court as a party, it is improper. *Mason v. Commonwealth*, 331 S.W.3d 610, 629 (Ky. 2011)("[I]t is beyond dispute that a court generally should not issue an opinion or judgment against an entity that is not a party to the action or is not otherwise properly before the court."). Even if this order had been proper, it is certainly an interlocutory order that the circuit court could, and did, revise at any time prior to its entry of a final judgment. CR 54.02(1). For the additional reason that we are affirming the circuit court on the alternate ground argued in the Foundation's summary judgment motion, the order does not affect our review.

STANDARD OF REVIEW

Review of a summary judgment asks "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 CR 56.03). "The record must be viewed 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 Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Furthermore, "it is . . . the rule in this jurisdiction that the judgment of a lower court can be affirmed for any reason in the record." *Fischer v. Fischer*, 348 S.W.3d 582, 591 (Ky. 2011). "If an appellate court is aware of a reason to affirm the lower court's decision, it must do so, even if on different grounds." *Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 496 (Ky. 2014) (citing *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006) ("If the summary judgment is sustainable on any basis, it must be affirmed.")).

ANALYSIS

Citing numerous differences between the School and the Foundation, Sanders states that they are separate and distinct entities. In particular, Sanders notes that the Foundation functions as the landlord of real estate to its tenant, the

School, which uses the property to carry out the School's educational mission. Accordingly, Sanders argues that the exclusive remedy provisions of the Workers' Compensation Act do not apply to the Foundation because it is not a "contractor" within the meaning of KRS 342.610. He argues, therefore, that the trial court erred in granting summary judgment to the Foundation on that basis.

We need not address the merit of Sanders's argument for reversal on the circuit court's "up-the-ladder" determination. As noted above, we must affirm even if on different grounds, as long as the record supports those grounds. After more than three years of litigation and discovery, there is an adequate record. The distinctions between the Foundation and the School that Sanders acknowledges, and others in that record, make it clear the Foundation was "a non-operative, non-negligent entity who was a landlord out of possession." *Kenton County Public Parks Corporation v. Modlin*, 901 S.W.2d 876, 880 (Ky. App. 1995) (citation omitted). The Foundation owed no duty, as a matter of law, to Sanders. *Id.*

Starns v. Lancaster stated the rule in Kentucky as follows:

> At common law, a tenant in full and complete control of premises which he occupies owes the same duty to persons coming there upon his invitation, express or implied, to keep such premises in a reasonably safe condition as he would if he were the owner, and is *prima facie* liable for damages proximately caused by defects in or dangers on the premises that reasonably could have been avoided by appropriate care taken by him, irrespective of whose duty it was, as between landlord and tenant, to make such repairs. Such invitees, when seeking redress for injuries sustained by them by reason of defects in the premises, must seek such redress from the tenant and not from the landlord, at least in the

absence of any statutory provision making the landlord liable.

553 S.W.2d 696, 697 (Ky. App. 1977) (quoting 49 Am.Jur.2d Landlord and Tenant § 982, at 954-55 (1970)). No statute makes the Foundation liable here.

There is no genuine issue of material fact regarding which entity had day-to-day operational control of the premises; at all relevant times, such responsibility was the sole responsibility of the School. The fact that the Foundation paid for capital improvements, such as repairing the roof, does not make the rule inapplicable; it applies ‘irrespective of whose duty it was, as between landlord and tenant, to make such repairs.” *Id.* Absent a genuine issue regarding the pertinent facts of premises control, it is a legal question as to whether the Foundation owed a duty to Sanders. Applying *Starns*, we conclude no duty was owed and the Foundation was entitled to summary judgment.

CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court’s January 23, 2013 Opinion and Order granting summary judgment in favor of Trinity High School Foundation, Inc.

ALL CONCUR.

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