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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000110-MR

HELEN RINGUS — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 13-CI-00199

MASONIC TEMPLE CO., INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Helen Ringus appeals from an Order of the Woodford Circuit Court granting partial summary judgment in favor of Masonic Temple Co., Inc. and dismissing her counterclaim alleging that Masonic Temple negligently stored keys to a building rented by Ringus which resulted in a series of burglaries. She contends that the court erred in dismissing her counterclaim, arguing that it was not

impossible for her to prevail on the counterclaim had the matter proceeded to trial. For the reasons stated below, we find no error and AFFIRM the Order on appeal.

Appellant leased a property storage unit from Appellee in Midway, Kentucky. She used the property to store materials and inventory for a retail jewelry business at a separate location. On April 1, 2013, Appellee initiated the instant action in Woodford District Court seeking unpaid rental fees from Appellant in the amount of $2,100. Appellant answered and counterclaimed on June 10, 2013, alleging that Appellee acted negligently which proximately resulted in money damages to Appellant. Specifically, Appellant alleged that Bill McDaniel ("McDaniel"), who was employed as Appellee's maintenance supervisor, failed to safeguard a key or keys to the facility which allowed McDaniel's son, Aaron, and Aaron's girlfriend, Kayla Kennedy, to steal from Appellant precious metals and jewelry. The storage facility allegedly had been broken into previously on more than one occasion, and by unknown persons, who purportedly used a key to enter the facility. Appellant did not report these break-ins to the police. In an attempt to catch the perpetrator, Appellant then intentionally left a window unlocked at the storage facility in hopes of luring the perpetrator, and she waited inside. Appellant caught Aaron and Kayla entering through the unlocked window. She maintained that McDaniel's negligence in safeguarding the door key should be imputed to Appellee. The filing of the counterclaim resulted in the matter being transferred to Woodford Circuit Court.

After discovery was conducted, Appellee filed a Motion for Partial Summary Judgment on October 24, 2014. It sought to have Appellant's counterclaim dismissed upon arguing that Appellant could produce no evidence that Aaron committed the alleged prior thefts, nor that he had ever used Appellee's door key to enter the facility. Additionally, Appellee maintained that Appellant could not demonstrate that McDaniel was negligent in safeguarding the key.

On December 17, 2014, the Woodford Circuit Court sustained Appellee's motion and rendered an Order Granting Partial Summary Judgment. In so doing, it dismissed all claims set out in Appellant's counterclaim. It then transferred back to Woodford District Court Appellee's claim for past rent due. This appeal followed.

Appellant now argues that the Woodford Circuit Court committed reversible error in sustaining Appellee's Motion for Partial Summary Judgment as to Appellant's negligence claim.[1] She contends that Aaron unlawfully gained entry into her place of business using keys that he received from his father, or with the help of his father. She goes on to argue that she might prevail on her claim if the matter proceeded to a jury trial, and maintains that it was foreseeable that if Appellee was negligent in securing the keys to the property, and if those keys fell into the hands of a third party who used them for criminal conduct, then Appellee

[1] Appellant also raises for the first time on appeal a claim of breach of contract and covenant of quiet enjoyment. This claim was not asserted in Appellant's June 10, 2013 Answer and Counterclaim, nor was it raised in any subsequent amended complaint. Further, this claim was not practiced during the pendency of the proceedings nor addressed in the Order on appeal. As such, it is not ripe for appellate review and will not be addressed herein. Kentucky Rule of Civil Procedure (CR) 76.12.

could be liable for the damages resulting from its negligence. In sum, Appellant argues that issues of fact remain for adjudication which precluded the entry of summary judgment in favor of Appellee.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 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 Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). 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. *Id*. "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." *Id.* And finally, "[t]he standard of review on appeal of a 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." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Appellant and resolving all doubts in her favor, we cannot conclude that Appellant could prevail at trial on her claim that Appellee, through its agent McDaniel, acted in a negligent

manner which proximately resulted in damages to Appellant. It is uncontroverted that Appellant can present no evidence that Aaron ever possessed or otherwise obtained a key or keys to Appellant's rented space. Appellant cannot demonstrate that Aaron committed the alleged prior bad acts, nor that he used Appellee's key to commit those purported acts. When Appellee caught Aaron unlawfully entering her rented space, he entered through an unlocked window and was not in possession of Appellee's key. The entirety of Appellant's claim rests on her assumption that Aaron *might* have unlawfully entered her rented space using Appellee's key, and that Appellee *might* have been negligent in safeguarding said key.

Kentucky law is clear that conclusory allegations based upon conjecture and speculation are not sufficient to create an issue of fact sufficient to defeat summary judgment. *Henninger v. Brewster*, 357 S.W.3d 920, 929 (Ky. App. 2012). Additionally,

> [t]he curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief . . . that something will "turn up" cannot be made [a] basis for showing that a genuine issue as to a material fact exists.

Neal v. Welker, 426 S.W.2d 476, 479-80 (Ky. 1968) (citation omitted).

Appellant candidly hopes that she would be able to demonstrate the veracity of her claims if the matter proceeded to trial. However, the matter cannot move forward on mere supposition and hope. Rather, the burden rests with Appellant to

demonstrate the existence of a genuine issue of material fact in support of her negligence claim. As Appellant has not presented even a scintilla of proof that Aaron ever possessed or wrongfully used a key to the rented space, that he used said key to unlawfully enter the space to commit a theft, nor that McDaniel in any way failed to safeguard the keys under his control, it would be impossible for her to prevail if the matter proceeded to trial.[2] Accordingly, we find no error.

For the foregoing reasons, we AFFIRM the Order Granting Partial Summary Judgment of the Woodford Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward E. Dove
Lexington, Kentucky

BRIEF FOR APPELLEE:

Shaye Page Johnson
Anthony M. Pernice
Lexington, Kentucky

[2] The word "impossible" in this context is "used in a practical sense, not in an absolute sense." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Perkins v. Hausladen,* 828 S.W.2d 652, 654 (Ky. 1992)).