

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000131-MR

ROY A. GREENE;
AND JANICE GREENE

APPELLANTS

v. APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE STEPHEN L. BATES, SPECIAL JUDGE
ACTION NO. 97-CI-00178

KEVIN BROWNING;
AND PATRICIA BROWNING

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Pendleton Circuit Court after a jury found that appellees had acquired title to certain property by adverse possession. Appellants contend that the court erred in its instructions to the jury. For the reasons stated hereafter, we affirm.

The parties are adjacent landowners. In 1965, appellants purchased a 56.20-acre tract of land, as well as the adjacent .077-acre tract which is in controversy. In 1987, appellees purchased a 2.04-acre tract which they believed

included the adjacent .077-acre tract. Appellees adduced evidence to show that the disputed area had been treated as part of their tract throughout the ownership of that tract by them and by their predecessors in title, who owned the tract between 1930 and 1987. More specifically, appellees adduced evidence to show that the existing fences between appellants' larger tract and the disputed area had been in place for more than fifteen years, and to show that both they and their predecessors had treated the disputed property as their own by keeping it mowed and physically indistinguishable from the remainder of their yard for more than fifteen years. Appellees further adduced evidence that they had used the disputed tract for the storage of wood and for their children's play area, as well as evidence that both the existing and the previous septic systems were installed so as to extend into the disputed tract.

Appellants, by contrast, adduced evidence to show that during the previous fifteen years they had periodically used the disputed area for parking their own and their employees' vehicles, as well as for accessing their larger tract by climbing over the fence. Appellees denied having seen appellants use the disputed tract in this manner, and there was no evidence that the parties ever discussed ownership of the disputed tract until appellees sought and were awarded damages after appellants' cattle escaped into appellees' yard.

Appellants thereafter advised appellees to remove their property from the disputed tract, and they started taking steps to install a roadway across the disputed tract into their larger tract. Appellees then filed this action to establish title by adverse possession, and the court awarded the tract to them after a jury found in their favor. This appeal followed.

Appellants' sole contention on appeal is that the trial court erred by failing to require the jury to find whether appellees' adverse possession of the property was exclusive and continuous "for every day" of the fifteen-year statutory period. We disagree.

The various adverse possession instructions set out in Palmore, Kentucky Instructions to Juries (Civil), Chap. 47 (4th ed. 1989), specifically require a jury in an adverse possession case to find that property was adversely held "continuously and without interruption for 15 years or more at any time" prior to a given date. Consistent with those model instructions, the trial court defined "continuous possession" as involving "uninterrupted possession against all others for more than fifteen years." Further, the court instructed the jury that the various elements of adverse possession, including exclusive and continuous possession, must be established by evidence that appellees possessed the land "for a period of at least fifteen (15) years."

Appellants nevertheless assert that the court erred by failing to instruct the jury that the elements of adverse possession existed "every day" for the requisite fifteen-year period. They largely rely on Lyle v. Holman, Ky., 238 S.W.2d 157, 160 (1951), which was a prescriptive easement case in which Kentucky's highest court stated that for purposes of adverse possession, the hostile possession of disputed property must be "exclusive and continuous for every day of the statutory period." See also Ballard v. Moss, Ky., 268 S.W.2d 35 (1954); Stephens v. Kidd, 298 Ky. 38, 181 S.W.2d 688 (1944). However, Kentucky courts have subsequently confirmed the long-established rule that there need not be actual, continuous occupancy where other forms of physical use demonstrate the ongoing assertion of dominance over the property. Thompson v. Ratcliff, Ky., 245 S.W.2d 592 (1952). Thus, a vacancy which is for a reasonable duration, incident to a change of possession or ownership, does not interrupt a term of adverse possession. Eversole v. Roberts, 239 Ky. 352, 39 S.W.2d 986 (1931). Moreover, evidence of adverse possession may exist in the form of things such as the erection and maintenance of a fence or other physical improvements on the property, and even evidence of sporadic use may be sufficient to establish possession. See, e.g., Meece v. Hale, Ky. App., 678 S.W.2d 796 (1984); Kentucky Women's Christian Temperance Union v. Thomas, Ky., 412 S.W.2d 869

(1967); Greenway v. Watson, 268 Ky. 745, 105 S.W.2d 848 (1937).

As stated long ago in Louisville & N.R. Co. v. Rayl, 32 Ky. 870, 107 S.W. 298, 300 (1908),

[w]e see no good reason why an additional instruction should be given embodying the idea that the possession must have been such as to furnish the defendant a cause of action for the recovery of the land every day during the period of 15 years, when, as a matter of fact, the question of adverse, open, notorious, continuous, and uninterrupted possession is submitted to the jury; and, if the possession be of that character, the defendant would necessarily have a cause of action for the recovery of the land every day during the limitation period.

(Emphasis added.)

Simply put, the case law does not support appellants' assertion that the court was required to instruct the jury to find whether appellees' adverse possession of the property was exclusive and continuous "for every day" of the fifteen-year statutory period. Hence, the court did not err by failing to so instruct the jury.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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