

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000369-MR

DONALD FERGUSON

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 01-CI-00122

ROBERT FERGUSON AND
RALPH FERGUSON

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Donald Ferguson (hereinafter "Donald") has appealed from the January 23, 2002, order of the Lawrence Circuit Court dismissing his action against his brothers Robert Ferguson and Ralph Ferguson (hereinafter "Robert" and "Ralph"), the executors of their father's estate, on statute of limitations grounds. We affirm.

On June 10, 1993, the will and codicil of James Guar Ferguson were admitted by the Probate Division of Lawrence District County. Robert and Ralph were appointed as the executors of the Estate. Apparently in accordance with instructions in this will, Robert and Ralph sold certain real property, the deeds for which were recorded in 1994. On May 22, 1995, a proposed final settlement was filed, and the executors later moved the district court to approve the settlement on May 21, 2001. On July 12, 2001, Donald's objections to the final settlement were overruled, and the district court entered the final settlement.

On May 8, 2001, Donald, at that time proceeding pro se, filed a complaint in Lawrence Circuit Court naming Robert, Ralph, and Michael D. Osborne (hereinafter "Osborne"), the attorney representing the estate, as defendants. The complaint alleged that Robert and Ralph engaged in self-dealing in regard to the sale of real estate, that they unduly influenced their mentally impaired father into signing the second codicil, that they committed fraud, that they breached their fiduciary duties, and that Osborne committed malpractice by failing to monitor Robert and Ralph's activities. The circuit court dismissed Osborne as a party to the appeal on September 17, 2001, as Osborne never represented Donald and therefore did not owe him any duty of care.

On May 25, 2001, Robert and Ralph first moved the circuit court to dismiss the action as barred by the applicable statutes of limitation. The circuit court granted their renewed motion to dismiss by order entered January 23, 2002, as follows:

On Thursday, January 10, 2002, this action came before the Court upon the renewed motion of Ralph Ferguson and Robert Ferguson to dismiss this action herein on the grounds that same is barred by limitations. And it appearing to the Court that:

[a] this action is barred by the two year statute of limitations for a contest of a will as set forth in KRS 394.240;

[b] that even if the action were not barred by KRS 394.240, the claim of fraud would be barred by the five year statute of limitations set forth in KRS 413.120; and

[c] that a final settlement has been approved by the Lawrence District Court and the Plaintiff failed to file an adversary action within thirty days of the final settlement as required by KRS 395.617.

IT IS THEREFORE ORDERED that this action against Ralph Ferguson and Robert Ferguson be and the same is hereby DISMISSED with prejudice.

This appeal followed.

On appeal, Donald argues that the statute of limitations relating to claims of fraud does not bar this

action. Although KRS 413.120(12) requires that an action for relief or damages for fraud or mistake be commenced within five years of the accrual of the cause of action, KRS 413.130(3) provides that a cause of action does not accrue until discovery of the fraud or mistake. However, the action must be commenced within ten years after the perpetration of the fraud. Here, Donald argues that he did not discover the fraud until 2001¹, so that the cause of action did not accrue until that time. As the will was probated in 1993, he alleges the action for relief was filed within ten years of the perpetration of the fraud. Additionally, Donald argues that the principles of equity demand that he be permitted to go forward with his claim due to the outrageous nature of Robert and Ralph's actions.

On the other hand, Robert and Ralph continue to argue that Donald's claim is time barred. KRS 394.240(1) requires that a will contest be brought within two years of the decision of the district court admitting a will to record or rejecting it. Here, the will was probated in 1993, and the circuit court action was not filed until eight years later. As to the cause of action for fraud, Robert and Ralph argue that Donald knew or should have known about the real estate allegations the day the auctions took place, and in any event, all of the deeds were

¹ Later in the brief, Ronald states that he became aware of Robert and Ralph's conduct in 2001 when the final settlement was filed. However, we note that the proposed final settlement was filed with the district court in 1995.

recorded and were matters of public record in 1994. Likewise, the proposed final settlement was filed in the district court in 1995. Donald did not file his complaint until 2001, well past the five-year limitations period. Finally, Donald's failure to file an adversary action in the district court pursuant to KRS 395.617 bars his ability to go forward.

Because Donald limited his arguments in the brief to the statute of limitations relating to fraud and to equity, we shall only address those issues. First, we do not believe that the facts of this case warrant equitable relief, both in light of the time elapsed and as the argument was not raised below.

As to the ruling that Donald's fraud claim is barred by the applicable statute of limitations, we believe that the circuit court properly decided this issue and therefore did not commit any error. KRS 413.120 provides, in relevant part, that "[t]he following actions shall be commenced within five (5) years after the cause of action accrued: . . . (12) [a]n action for relief or damages on the ground of fraud or mistake." This section must be read in conjunction with the saving clause of KRS 413.130(3), which provides:

In an action for relief or damages for fraud or mistake, referred to in subsection (12) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten

(10) years after the time of making the contract or the perpetration of the fraud.

Ralph and Robert rely upon the case of Cox v. Simmerman, Ky., 243 Ky. 474, 48 S.W.2d 1078 (1932), to support their argument. In Cox, an executor of an estate sold undevised lands at an auction in 1906. For one tract, only the surface rights were to be sold, with the mineral rights reserved. However, by mistake, the deed conveying the property to the buyer transferred the entire title to the land in fee simple. The deed was made to the seller in 1914, but not recorded until 1922, and it was alleged that the error could not have been discovered by the exercise of reasonable diligence until January 1928. Suit was filed later in 1928, alleging that the conveyance was made either by mutual mistake or by fraud on the part of the parties to the deed. The petition was dismissed as barred by the statute of limitations. In affirming, the Court stated "[w]e find the general rule to be that, where the basis for a claimed estoppel is silence or omission to give notice, the party relying thereon must have been without actual knowledge of the true state of facts, and without means of acquiring such knowledge, as by reference to public records." Id. at 1080.

In Skaggs v. Vaughn, Ky.App., 550 S.W.2d 574 (1977), the Court of Appeals considered whether the statute of

limitations barred a suit regarding a deed. In that case, Skaggs attacked the validity of a 1968 deed in a complaint filed in 1974, over five years after the date the deed was recorded. The Court noted that the general rule was that "the recording of a deed obtained by fraud is notice to the grantor, and the grantor must bring an action to set aside the deed within five years after the recording of the deed, or within ten years of the execution of the deed, whichever is earlier." Id. at 579. However, the Court also recognized an exception to the general rule in the case of a confidential relationship between the parties. The exception provides that constructive notice is not sufficient to begin the statute of limitations period when a confidential relationship exists.

In the present appeal, the deeds about which Donald complains were recorded, and thus of public record, on June 24, July 5, and July 27, 1994. Likewise, the proposed settlement of the estate was filed in the Lawrence District Court on May 2, 1995. Thus, Donald should have had at least constructive notice of both the deeds and the proposed settlement over five years before he filed suit. Additionally, Donald failed to allege any type of confidential relationship that would have affected his ability to discover the alleged fraud. However, he belies his claim that he did not discover the alleged fraud until 2001 in his own complaint when he states that he (Donald) was present

during at least one of the auctions when the property in question was sold. Because Donald filed his complaint over five years after he knew, or should have known, of the alleged fraud, the statute of limitations acts to bar his claims.

For the forgoing reasons, the decision of the Lawrence Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leo A. Marcum
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BRIEF FOR APPELLEE:

Eldred E. Adams, Jr.
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