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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000699-MR
AND
CROSS-APPEAL NO. 2002-CA-000755-MR

NORMAN G. PEPPER — APPELLANT/CROSS-APPELLEE

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE DONALD E. ARMSTRONG, JR., SPECIAL JUDGE
ACTION NOS. 98-CI-003265 & 98-CI-006093

HARVEY C. TINCHER
and WANDA A. TINCHER, HIS WIFE — APPELLEES/CROSS-APPELLANTS

AND

BETTY TINCHER — APPELLEE/CROSS-APPELLEE

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: Harvey C. Tincher, Wanda Tincher, and Norman G. Pepper appeal from a judgment of the Jefferson Circuit Court that ordered specific performance of a land sale contract and

awarded damages to Betty Tincher. Harvey, Wanda and Pepper collectively assert that the trial court was mistaken in determining the size of the lot to be conveyed, as well as in awarding Betty damages for the loss of the use of her property. Pepper separately contends that the trial court erred by requiring him to convey an easement to Betty, and he also contends that the dismissal of his counterclaim against Betty and his cross-claim against Harvey and Wanda was improper. Additionally, Harvey and Wanda argue that, although Betty has a right to specific performance of the contract, the trial court erred in requiring them to pay the costs of incidentals necessary for approval of a subdivision plot. Because we agree that the trial court's findings of fact and conclusions of law are clearly erroneous and otherwise insufficient, we affirm the trial court's judgment in part, reverse in part, and remand this matter for additional findings.

In February of 1995, Betty and her husband, Robert Tincher, purchased a tract of real property located at 14045 Dixie Highway in Jefferson County, Kentucky. The tract consisted of approximately twenty-nine acres, and included a residence, a detached garage, and commercial property that Robert and Betty operated as a fishing pay-lake. Sometime after purchasing the property, Robert became ill with cancer and could no longer make the mortgage payments. Robert suggested selling

the property to his brother, Harvey Tincher, with the stipulation that Robert and Betty would retain possession of the portion of the property containing the house, garage and lot.[1] Harvey and his wife, Wanda, agreed to purchase the property, assume the outstanding mortgage, and convey back the agreed portion of property.

On or about June 17, 1997, Wanda prepared a handwritten agreement describing the transaction. The terms of the agreement are as follows:

> I, Betty Tincher, have agreed to the sale of the property at 14045 Dixie Hwy., to Harvey and Wanda Tincher for the balance of the loan on such property. They will receive a deed to the portion containing the lake and the bait house. In return, I will receive a clear deed to the portion containing the house, garage and lot which has been surveyed off the original survey.

Contrary to the wording of the written agreement, a survey of the lot was never produced. Although Robert and Harvey had previously discussed the general dimensions of the lot, nothing had been reduced to writing.

On July 10, 1997, Betty, acting for herself and as power-of-attorney for Robert, executed a deed conveying the

[1] For the reader's convenience, the house, garage, and lot will hereafter be referred to simply as "the house."

entire property to Wanda.[2] During the closing, Betty advised the closing attorney of Harvey and Wanda's agreement to convey the house back to her. The closing attorney advised Betty that a sell-off deed and plat could not be prepared and executed until Betty provided a survey setting out the exact property she was to receive.

Robert died on August 30, 1997. Betty continued to live in the house, and, on several occasions, demanded that Wanda convey the "clear deed" to the house as provided in the agreement. Wanda and Harvey took the position that they had no duty to convey the property until Betty produced a legally sufficient survey.

In response, Betty retained a surveyor, Richard Matheny, who agreed to prepare a survey. Matheny produced three preliminary survey drawings based on his discussions with Betty about the boundaries of the lot. The drawings designate proposed lots of 0.78 acres, 0.83 acres, and one acre. However, Matheny had difficulty obtaining approval for his proposals, and he was never able to produce a completed survey plat. Furthermore, Harvey and Wanda did not agree to any of the lots proposed by Matheny.

[2] This deed is recorded in the Office of the County Clerk of Jefferson County, Deed Book 6910, Page 112.

On July 30, 1998, Harvey and Wanda conveyed the entire property to Pepper.[3] Although his deed does not reflect Betty's reserved interest, Pepper concedes that Betty is entitled to the portion of the property containing the house. Like Harvey and Wanda, Pepper took the position that he had no obligation to convey the house to Betty until a legally sufficient survey was produced.

During the course of the litigation, Pepper retained a surveyor, William Kelley, to prepare a survey of the property. Harvey, along with Joe Bryant, the bank's appraiser during the 1997 sale, gave Kelley a description of the boundaries for the lot that Robert and Harvey had discussed. Based on this description, Kelley produced a survey plat designating a lot of 0.679 acres.

On June 11, 1998, Pepper filed a complaint against Harvey and Wanda, seeking to enforce the land-sale contract and to remove any cloud from his title. On October 29, 1998, Betty filed a separate complaint, seeking to enforce her agreement with Harvey and Wanda to convey title to the house back to her. In addition to specific performance, Betty also sought damages against Harvey, Wanda, and Pepper for breach of contract and loss of the use of her property. She further asserted a claim

[3] This deed is recorded in the Office of the County Clerk of Jefferson County, Deed Book 7081, Page 968.

for reimbursement of utility expenses paid on behalf of Pepper's portion of the property. Pepper filed a counterclaim against Betty and a cross-claim against Harvey and Wanda, asserting that his only obligation was to execute a deed to Betty once a proper survey was presented. In addition to specific performance, Pepper sought to recover the *pro rata* share of real estate taxes and insurance he paid on behalf of Betty's portion of the property. Pepper also sought indemnification for any damages he might incur due to Harvey and Wanda's breach of their agreement with Betty. On November 15, 1999, the trial court entered an order consolidating Pepper's action with the action brought by Betty.

A bench trial was held on October 27, 2000. The trial court entered its Findings of Fact, Conclusions of Law and Judgment on November 20, 2001. The trial court concluded that, although Matheny's drawing had not been approved as a completed survey plat, the 0.83 acre tract depicted in his drawing was the most probable lot envisioned by Harvey and Robert. Accordingly, the trial court directed Pepper to convey the property to Betty. The court also directed Pepper to grant Betty an easement of ingress and egress for access to the garage.

The court also entered a judgment jointly and severally against Harvey, Wanda, and Pepper that awarded Betty $4,000.00 for the loss of the use of her property. In addition,

the court entered a judgment against Harvey and Wanda for $600.00, and against Pepper for $1,080.00 for utilities Betty paid on behalf of their portion of the property. The trial court dismissed Pepper's counterclaim against Betty, but it did not address his cross-claims against Harvey and Wanda.

In response to a motion to alter, amend or vacate,[4] the trial court entered an order amending its prior findings and judgment. The court found that the easement of ingress and egress was necessary for access to the garage, and that the value of Betty's property would be substantially diminished without such access. The court also found that awarding damages jointly and severally against Harvey, Wanda, and Pepper was appropriate because "[w]hen Defendant Pepper bought this property with full knowledge of the retained interest of Plaintiff Betty Tincher, he bought whatever problems came along with said property."[5] However, the court did reduce the judgment against Pepper for the utilities to $650.00. This appeal by Pepper and cross-appeal by Harvey and Wanda followed.

Harvey, Wanda, and Pepper collectively make two arguments. First, they challenge the trial court's findings concerning the boundaries and size of the property to be

[4] Ky. R. Civ. P. (CR) 59.05.

[5] Order Amending Findings of Fact, Conclusions of Law & Judgment, March 7, 2002, p. 3.

conveyed to Betty. They assert that there was no evidence to support the trial court's finding that Richard and Harvey had envisioned the 0.83 acre tract depicted by Matheny's drawing. We agree.

A trial court's factual findings shall not be set aside unless clearly erroneous.[6] This rule applies equally to boundary disputes.[7] Most boundary dispute cases involve unclear, ambiguous, or erroneous descriptions of the property to be conveyed. In this case, however, there was no written agreement concerning the boundaries of the lot to be conveyed. Rather, the exact boundaries of the lot were the subject of an oral agreement between Harvey and Richard. Thus, it is unavailing to resort to the rules governing boundary disputes.

The surveyors, Matheny and Kelley, based their plats on the information provided to them by Harvey and Betty. Their plats, therefore, are accurate only to the extent that they reflect this information. Since Betty was not directly involved in the discussions between Harvey and Richard, Harvey's testimony was the only direct evidence of the oral agreement concerning the boundaries of the lot.

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[6] CR 52.01.

[7] Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980). *Citing* Rowe v. Blackburn, Ky., 253 S.W.2d 25, 27 (1952). *See also* Story v. Brumley, Ky., 253 S.W.2d 24 (1952).

As noted by the trial court, the parties generally agree upon the location of the southern and western boundary lines of the proposed lot. The major issues in dispute concern the length of those boundaries and the locations of the northern and eastern boundaries. The trial court found that Matheny's 0.83 acre drawing represents the most probable lot envisioned by Robert and Harvey. However, Matheny testified that when Betty showed him the boundaries of the lot, he recommended that the northern line be moved farther north because the existing line came too close to the house and garage. His 0.78 acre drawing is based on his understanding of the boundaries that were originally agreed upon, while the 0.83 acre drawing shows the modified line which he suggested.[8] When the evidence is viewed in its entirety, we find that there was insufficient evidence to support the trial court's designation of the 0.83 acre lot.

The evidence also does not compel a finding in favor of Kelley's 0.679 acre plat, as asserted by Harvey and Pepper. According to Harvey, he and Richard "walked off" the boundaries of the lot sometime in July or August of 1997. Using specific trees and rocks as references, they came to an agreement concerning the boundaries of the proposed lot. Although Betty was not involved in these discussions, she notes that Robert was

[8] The one-acre drawing, on the other hand, merely represented Matheny's opinion as to the most-marketable lot.

bed-ridden during this time and, therefore, it is unlikely that he would have been able to walk off the property as Harvey claimed.

Joe Bryant, an appraiser from Bullitt County Bank, met with Harvey and Robert prior to the sale of the property in August of 1997. Bryant testified that he discussed the boundaries of the proposed lot with Harvey and Robert, and that he and Harvey had walked off the boundaries. He could not recall if Robert had accompanied them as they walked the property. Bryant stated that he, Harvey, and Robert discussed the boundaries, and everyone appeared to be in agreement with the boundaries as set out by Harvey. Bryant also stated that Kelley's 0.679 acre plat appeared to represent the boundaries which he and Harvey walked.

However, Bryant gave additional testimony that seems to conflict with this testimony. As he was walking the boundaries with Harvey, Bryant made a rough sketch showing the dimensions of the lot. Although Bryant states that Kelley's plat accurately reflects the boundaries Harvey pointed out to him in 1997, the measurements and the acreage shown on his sketch are closer to the 0.78 acre drawing prepared by Matheny.[9]

[9] In his deposition testimony, Bryant calculated the area of the lot to be 0.679 acres. Harvey and Pepper note that this acreage is almost identical to that calculated on Kelley's survey plat. However, Bryant calculated the area based upon a 117' x 253'

In particular, Bryant's sketch shows a western boundary of approximately 117 feet in length, while Kelley's plat shows it as 108 feet, and Matheny's shows it as 120 feet. Similarly, Bryant's sketch shows the northern boundary as 253 feet, while Kelley's plat shows it as 226.05 feet, and Matheny's shows it as 256.67 feet. Bryant's sketch of the other boundaries is also more consistent with Matheny's 0.78 acre drawing than with Kelley's 0.679 acre plat. Additionally, it appears from Bryant's sketch that Matheny's location of landmarks is more consistent with the parties' agreement than is Kelley's survey.

Although Bryant's sketch was clearly not intended as a survey, it was made around the time of the agreement and represents the only independent and contemporaneous evidence regarding Richard and Harvey's oral agreement. When taken as a whole, the evidence would support a finding that Matheny's 0.78 acre drawing is the most probable lot envisioned by Robert and Harvey. On the other hand, the evidence could also reasonably support Kelley's 0.679 acre plat. Because factual findings are outside of the purview of this Court, we must remand this matter

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lot. (117 x 253 = 29,601/43,560 = 0.679 acres). The actual lot which he measured, however, has an additional 3,648 square feet due to its irregular eastern border. ((48' x 60' =)2,880 + (48' x 57' = 2,736/2 =) 1,368 = 4,248 square feet) This means that the total area depicted on Bryant's sketch is actually (29,601 + 4,248 =) 33,849 square feet, or (33,849/43,560 =) 0.777 acres.

to the circuit court for additional findings of fact on this issue.

Harvey, Wanda and Pepper's second contention is that the trial court erred in awarding Betty $4,000.00 in damages for the loss of the use of her property. We agree. The trial court essentially found that Betty was deprived of the use of her property because Harvey, Wanda, and Pepper failed to convey the property to her as set out in the agreement. Betty was entitled to bring this action for specific performance of the contract and to seek damages for the delay in performance.[10] However, as noted above, it is not clear from the evidence which party had a duty to obtain the survey needed to convey the property. If Betty had the duty to obtain the survey, then the other parties cannot be liable for damages Betty incurred because of the delay.

There was no evidence that Harvey, Wanda, or Pepper ever prevented Betty from using the property. By her own admission, she lived in the house until March of 1998. Her daughter lived in the house thereafter. Simply put, the record lacks evidence to support the trial court's award of damages to Betty for the loss of the use of her property.

[10] Billy Williams Builders & Developers, Inc. v. Hillerich, Ky., 446 S.W.2d 280, 282 (1969).

Pepper also brings two arguments separately on appeal. Pepper first asserts that the trial court erred by requiring him to convey a 20-foot easement along the northern boundary of the lot for access to the garage. The lot on which Betty's house and garage sits is bounded on the north by a gravel road, which provides access to the rest of Pepper's property.[11] The house is accessible from Richie Road, a short, paved street along the western boundary of the lot; however, the only practical access to the garage for parking is from the gravel road. The trial court stated that Betty's property would be useless and valueless without access to the garage from the gravel road. Pepper contends that this finding was clearly erroneous, as there was no evidence that the property as a whole would lack access without the easement. We agree.

An easement by necessity is founded on an implied grant or reservation. It is based on the principle that wherever one party conveys property, he also conveys whatever is necessary to the beneficial use of that property, and retains whatever is necessary to the beneficial use of land he still possesses. However, such an easement will only be implied if it

[11] As noted above, the exact location of the northern boundary is in some dispute. It is not clear from the record whether the boundary line is at the edge of the gravel road or is located at some point short of the gravel road.

is of strict necessity; mere convenience is inadequate.[12] In this case, there was insufficient evidence to support the trial court's conclusion that the property would be worthless without access to the garage from the gravel road.

Betty argues that the evidence supports a finding that she should retain the right to use the road as a quasi-easement or easement by implication. Recently, in Cole v. Gilvin,[13] this Court explained that the theory of quasi-easement, or easement by implication,

> is based on a legal inference that the original owner intended to create an easement in favor of one section of his realty. A quasi-easement is based on the rule that "where the owner of an entire tract of land or of two or more adjoining parcels employs one part so that another derives from it a benefit of continuous, permanent and apparent nature, and reasonably necessary to the enjoyment of the quasi-dominant portion, then upon a severance of the ownership a grant or reservation of the right to continue such use arises by implication of law."[14] Generally, in order to prove an easement by implication of law, a party must show: (1) that there was a separation of title from common ownership; (2) that before the separation occurred the use which gave rise to the easement was so long continued,

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[12] Marrs v. Ratliff, 278 Ky. 164, 128 S.W.2d 604, 609 (1939).

[13] Ky. App., 59 S.W.3d 468 (2001).

[14] Kreamer v. Harmon, Ky., 336 S.W.2d 561, 563 (1960). *See also* Swinney v. Haynes, 314 Ky. 600, 236 S.W.2d 705 (1951). [Footnote in original]

obvious, and manifest that it must have been intended to be permanent; and, (3) that the use of the claimed easement was highly convenient and beneficial to the land conveyed.[15] Because a quasi-easement involves the intentions of the parties, the date the unity of ownership ceases and there is a severance of common ownership is the point of reference in ascertaining whether an easement has been imposed upon adjoining land.[16]

Factors relevant to establishing a quasi-easement include: "(1) whether the claimant is the grantor or the grantee of the dominant tract; (2) the extent of necessity of the easement to the claimant; (3) whether reciprocal benefits accrue to both the grantor and grantee; (4) the manner in which the land was used prior to conveyance; and (5) whether the prior use was or might have been known to the parties to the present litigation."[17] The courts have implied an easement more readily in favor of a grantee than a grantor because a grantor has the ability to control the language in the deed to express the intentions of the parties.[18] Whether the

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[15] Evanik v. Janus, 120 Ill.App.3d 475, 485, 76 Ill.Dec. 308, 458 N.E.2d 962, 969 (1983); Bob's Ready to Wear, Inc. v. Weaver, Ky.App., 569 S.W.2d 715, 718 (1978). [Footnote in original]

[16] Evanik, 120 Ill.App.3d at 486, 76 Ill.Dec. 308, 458 N.E.2d at 969; Thompson v. Schuh, 286 Or. 201, 593 P.2d 1138, 1145-46 (1979); Boyd v. McDonald, 81 Nev. 642, 650 n. 6, 408 P.2d 717, 721 n. 6 (1965)(noting that evidence of later conveyances by original owner was only relevant to show intentions with respect to initial severance); Holden v. Weidenfeller, 929 S.W.2d 124 (Tex.App.1996). [Footnote in original]

[17] Bob's Ready To Wear, Inc. 569 S.W.2d at 719 (*citing* Knight v. Shell, 313 Ky. 852, 233 S.W.2d 973 (1950), and Restatement of the Law of Property § 476 (1944)). *See also* Sievers v. Flynn, 305 Ky. 325, 204 S.W.2d 364 (1947). [Footnote in original]

[18] Knight, 233 S.W.2d at 975; Restatement of the Law of Property § 476 cmt. c. [Footnote in original]

> prior use was known involves not absolute direct knowledge, but "susceptibility of ascertainment on careful inspection by persons ordinarily conversant with the subject." [19] Also, the use must be "reasonably necessary" meaning more than merely convenient to the dominant owner, but less than a total inability to enjoy the property absent the use.[20] While all of the factors are considered, the factor involving necessity is considered the most important.[21]

Betty argues that there was sufficient evidence to justify a finding that an easement by implication existed. She notes that the lot containing the house and garage was part of the larger tract at the time the property was conveyed to Robert and Wanda; she also states that the gravel road was used for access to the house and garage well before that time. She further argues this use would have been clear to Pepper at the time he purchased the property.

We do not believe that the evidence supports a finding of an easement by implication. None of the survey plats or drawings show access to the garage from the gravel road. Moreover, the trial court did not consider the evidence in light

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[19] Sievers, 305 Ky. at 328, 204 S.W.2d at 366. [Footnote in original]

[20] Id. This factor is different from and less stringent than the analysis applicable to creating an implied easement by necessity. [Footnote in original]

[21] Cole v. Gilvin, 59 S.W.3d at 476-77. [footnote omitted]

of the appropriate standard for finding an easement by implication. Consequently, we must remand this matter for further findings of fact and conclusions of law.

Pepper also argues that the trial court erred by dismissing his counterclaim against Betty for real estate taxes and insurance that he paid for Betty's portion of the property. He also complains that the trial court failed to address his cross-claim against Harvey and Wanda for expenses which he incurred due to their failure to convey the lot to Betty. After the trial court entered its initial Findings of Fact, Conclusions of Law, and Judgment, Pepper filed a CR 59.05 motion in which, among other things, he asked the court to address the issues related to his counterclaim and cross-claim. We believe Pepper properly brought the failure to make findings on these issues to the trial court's attention.[22] Consequently, on remand, he is entitled to further findings on the merits of these claims.

Finally, Harvey and Wanda argue that the trial court's order for specific performance was erroneous. They contend that, under the terms of the agreement, they had no duty to convey a lot to Betty until she obtained a survey and produced a legally sufficient deed. Because Betty has thus far failed to

[22] CR 52.04.

perform these duties, Harvey and Wanda argue that she is not yet entitled to specific performance of the agreement.

It is well settled that, when a contract is silent as to certain obligations to be assumed, the law will imply an agreement to do those things required to properly execute the contract.[23] Clearly the parties understood that a survey was necessary before Harvey and Wanda could convey the lot to Betty. Likewise, none of the parties challenge the enforceability of the agreement between Harvey, Wanda, and Betty.[24] Consequently, the trial court was within its authority to order completion of the survey and approval of the subdivision plat as a prerequisite to specific performance of the contract.

The more fundamental question, however, concerns which party had a duty to obtain a survey and subdivision-plat approval, and, moreover, which party should be required to bear those expenses. The written agreement was silent as to this matter. While the closing attorney advised Betty that she had the responsibility for obtaining the survey, her opinion on the subject is not definitive. However, the fact that the attorney voiced that opinion and no one objected may be evidence of the

[23] Warfield Natural Gas Co. v. Allen, 248 Ky. 646, 59 S.W.2d 534, 536 (1933).

[24] Most notably, the appellants do not challenge the trial court's ruling that the statute of frauds was not specifically raised as an affirmative defense.

parties' understanding. Furthermore, while the trial court strongly suggested that Betty erred in failing to have a survey completed, the court did not make a finding whether the agreement required her to do so. Under the circumstances, we must remand this matter back to the trial court for additional findings of fact on this question.[25]

We agree, however, that Pepper, who was not a party to the agreement between Harvey, Wanda, and Betty, has no obligation to assume these costs. At most, Pepper agreed to execute a deed to Betty when such a deed was ready. As a result, the trial court erred by requiring Pepper to pay half of those costs.

Accordingly, the judgment of the Jefferson Circuit is affirmed in part, reversed in part, and remanded for additional

[25] We note that, in the absence of an agreement to the contrary, the burden is on the seller to pay for surveys and other incidentals in the sale of real estate. Edwards v. Inman, Ky. App., 566 S.W.2d 809, 811 (1978). The thorny factual question in this case concerns who is the seller. Originally, Betty sold the property to Harvey and Wanda. If the agreement to convey back the house and garage is construed as part of that initial agreement, then Betty is the seller and has the obligation to assume those expenses. On the other hand, the parties did not deem the agreement to convey back the house and garage as a necessary part of the agreement for Betty to convey the entire property to Harvey and Wanda. If that agreement is viewed independently of the initial transfer, then Harvey and Wanda are the sellers and they have the obligation to pay for the survey and other expenses.

findings of fact, conclusions of law and a judgment consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE
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