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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001261-MR

JOSEPH POLSGROVE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
CIVIL ACTION NO. 89-CI-01757

GERALD LUNDERGAN,
CHARLOTTE LUNDERGAN
and LUNDY'S CATERING COMPANY,
A Kentucky Partnership

APPELLEE

OPINION

AFFIRMING IN PART

AND

REVERSING IN PART

** ** * * *

BEFORE: EMBERTON, Chief Judge; BAKER and HUDDLESTON, Judges.

HUDDLESTON, Judge: Joseph Polsgrove appeals from a Fayette Circuit Court order adjudging that he is precluded from "asserting different property lines to the easement¹ used by the Lundergans" under the doctrines of res judicata and judicial admissions and, further, that the Lundergans acquired the right to use the easement by adverse possession, rendering irrelevant the question of "whether the Lundergans' use of the easement (with respect to location and boundaries) was in conformance with the deed description." Consistent with the foregoing, the circuit court also dismissed Polsgrove's trespass claim and ordered him to "remove the fence and any other impediment to ingress and egress over the easement which he has placed within the confines of the easement," and refrain from blocking the easement in the future.

In November 1989, Polsgrove initiated this action against Gerald and Charlotte Lundergan and Lundy's Catering Company, a Kentucky partnership, seeking declaratory, injunctive and monetary relief for the alleged trespass and resulting

¹ As described in the deed by virtue of which the Lundergans acquired the easement, the property at issue is:

An easement for a passageway extending from the Northwest corner of said Tract 2 property to the Paris (Maysville) Pike over the west sixteen feet of property adjoining on the North side of said property as evidenced by a deed of conveyance dated 8-15-47 of record in the aforesaid Clerk's Office in Deed Book 424 page 469.

damage to his property caused by the Lundergans' use of the easement in question. Polsgrove sought a preliminary injunction declaring that the easement had been "abandoned and extinguished" as to the Lundergans, or, in the alternative, that the Lundergans had exceeded the permissible scope of their easement or "intentionally trespassed upon [his] real property." Polsgrove also asked the court to preliminarily enjoin the Lundergans from further use of the easement "for any purpose whatsoever, or in the alternative, from further exceeding the permissible scope of use of the easement" and to impose restrictions upon the use of the easement by the Lundergans.²

In an agreed order of settlement and dismissal entered on November 24, 1992, the court dismissed the matter, observing that "the existence of the easement in question is acknowledged by [Polsgrove] for the purposes of the declaratory judgment

² Polsgrove subsequently filed a "verified amended and substituted complaint for declaratory judgment injunctive relief and damages" seeking a judgment declaring that the easement appurtenant to the properties of the parties was (1) "established only for the access to properties which, otherwise, had no means of ingress and egress," and, accordingly, the Lundergans were "conveyed no lawful title to or rights to use same," (2) "has been, and is now, as a matter of law, extinguished as to the [Lundergans] or, in the alternative," (3) the Lundergans "have been, and are now, exceeding the permissible scope of use of the easement" and enjoining the Lundergans from "further injuring [his] rights in the use and enjoyment of said easement," "trespassing upon [his] real property" and "awarding [him] compensatory and punitive damages"

action," subject to specified limitations as ordered by the court.³ However, the aforementioned settlement was set aside in a second agreed order on January 25, 1995. Subsequently, the Lundergans moved for summary judgment, and the case was returned to the court's active docket in April 1995. Following a hearing, the court granted summary judgment in favor of the Lundergans on April 17, 1995, finding that no genuine issue of material fact existed as to whether the subject easement was conveyed to the Lundergans by former Chief Justice Robert F. Stephens in 1987⁴ and used by the Lundergans since that time.

³ For instance, the easement was to be used "only for reasonable residential and agricultur[all] uses" as opposed to commercial uses, no vehicle "greater in size than a three-quarter ton vehicle with a two-horse trailer" was permitted on the easement and if a vehicle in excess of that size was to be used, the Lundergans were required to provide two days' notice to Polsgrove. Further, the Lundergans assumed responsibility for "any and all damage caused by use of the easement" and agreed to use the easement only in "weather that is conducive to firm and stable ground." In return, Polsgrove was ordered not to "interfere with the permissible use of the easement." Polsgrove also received \$1,000.00 for "past damages."

⁴ According to the judgment, the deed is "recorded at Deed Book 1402, Page 402 in the Fayette County Clerk's Office, dated October 2, 1987, with the easement being specifically described as Tract III therein," and this easement was also "created and referred to in Deed Book 424, Page 469, dated August 15, 1947, and is also set forth in a plat of record attached to the aforesaid deed and located at Deed Book 424, Page 472 in the Fayette County Clerk's Office." Further, the deed "reflects that the easement is granted without limitation or restriction on use."

Relying on the testimony of Chief Justice Stephens,⁵ Gerald Lundergan's affidavit and the deed of conveyance, the court determined as a matter of law that the Lundergans "have a good and valid easement as set forth in the deed conveying same to them as referenced above and that there has been no abandonment of the easement." Accordingly, the Lundergans were to be "responsible for maintaining the easement which they use on a frequent basis and may be held liable for damage which they cause to the adjoining property."

On June 20, 1995, the court granted a motion by Polsgrove to set aside the summary judgment. However, the court reinstated its judgment in an order entered on November 28, 1995, rejecting Polsgrove's argument that he was entitled to an evidentiary hearing on whether the easement had been abandoned. Because the easement was "an express easement of which the parties had full knowledge at the time of their respective purchases," the court concluded that the easement could not be terminated. Polsgrove appealed to this Court from the April 1995 judgment, but his appeal was dismissed as untimely.

⁵ Chief Justice Stephens testified that he walked the easement at least annually, never intended to abandon the easement and conveyed same to the Lundergans. Likewise, his son, Andrew Stephens, testified that he and his brothers occasionally used the easement during his family's period of ownership from 1964 through 1987.

On August 30, 2000, the Lundergans filed a "motion to enforce judgment and hold in contempt," arguing that Polsgrove had violated the court's order by erecting a fence across a segment of the easement and periodically locking the gate, thereby making the easement inaccessible. Polsgrove filed a motion to dismiss. In support of his motion, he relied on the fact that he had "hired a surveyor to survey the disputed boundary" who would testify that he had not committed a violation. He also argued that the Lundergans had trespassed on his property. According to Polsgrove, the Lundergans had requested that the parties enlist the services of another surveyor but had neglected to contact one as agreed.

Because the circuit court had "already ruled on the issues of the existence of the easement and the abandonment or frequent use of the easement" by the Lundergans and the "boundaries of the easement are included within the scope" of those issues, it held that Polsgrove was precluded from relitigating that issue under the doctrine of res judicata, "or more specifically 'issue preclusion.'" Citing the same rationale, the court also dismissed Polsgrove's trespass claim. However, the court went on to rule that the Lundergans had acquired the right to use the easement "as used by them by their (or their predecessor in interest's) adverse possession of such passageway" since their use had been actual, open, notorious,

forcible, exclusive, hostile and continuous for at least fifteen years. It is the court's order to this effect, entered on April 16, 2002, which prompted this appeal.

On appeal, Polsgrove contends that "a party cannot move to change a summary judgment seven (7) years after its entry," the court lost jurisdiction to change its judgment ten days after its entry rendering the subsequent order void, and since the Lundergans pled neither prescription nor adverse possession, the judgment as altered is also void on that basis. Beyond that, Polsgrove argues that the Lundergans failed to present evidence to establish adverse possession and, since he "no longer knows the size or extent of the easement," the judgment is "erroneous for uncertainty." The Lundergans, on the other hand, are in complete agreement with the circuit court.

It is now beyond dispute that the Lundergans acquired a "good and valid easement" from Chief Justice Stephens by virtue of the deed of conveyance referenced in the April 1995 judgment. Likewise, the parameters of the easement were defined by the description contained in the deed, also referenced by the court. By operation of Kentucky Rules of Civil Procedure (CR) 59.05, the judgment became final ten days after its entry absent a motion for post-judgment relief, thereby conclusively establishing both the existence and parameters of the easement at issue.

Contrary to Polsgrove's characterization of the relief sought by the Lundergans, they merely sought to enforce the court's valid and binding judgment to that effect. The court acted well within its authority in granting this relief, i.e., enforcing its prior judgment, albeit for the wrong reasons. In contrast, Polsgrove belatedly attempted to introduce new evidence in support of his position that the boundaries of the easement were incorrect. Any argument in that vein was necessarily germane to the action litigating the existence and abandonment issues and, therefore, had to be addressed at that time under the doctrine of *res judicata*,⁶ which, while inapplicable here, would bar relitigation of the boundary issue. Assuming Polsgrove can substantiate his assertion that the Lundergans have used portions of his property not encompassed in their easement, he may have a meritorious trespass claim. We do not reach that question as such a claim must be resolved in a separate action.

In light of this determination, the remaining inquiry is whether the circuit court exceeded its authority in

⁶ The doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. Yeoman v. Commonwealth of Kentucky, Health Policy Bd., Ky., 983 S.W.2d 459, 464 (1998).

concluding that the Lundergans' use of the easement satisfies the elements necessary to establish a claim of adverse possession despite the fact that the Lundergans did not seek relief on this basis. The Lundergans cite Bryant v. Bullock⁷ for the proposition that a "claim of adverse possession does not have to be specifically pleaded to be upheld." They have taken this statement out of context. In Bryant, the Court found that a "party may prove title by adverse possession under a general allegation of ownership, although adverse possession has not been specifically pleaded."⁸ The present case is distinguishable in this crucial respect. Unlike the appellee in Bryant, the Lundergans did not allege in their answer that they are "the owner and in possession of the land in controversy."⁹ More to the point, however, any discussion of pleadings is irrelevant in the context of a motion to enforce a judgment. If the Lundergans wish to litigate this issue, they must do so in a separate action. In unilaterally raising this factual issue in the context of a motion to enforce a summary judgment and addressing the merits of the issue in the absence of proof, the circuit court committed reversible error.

⁷ 309 Ky. 590, 218 S.W.2d 381 (1949).

⁸ Id. at 382 (emphasis supplied).

⁹ Id.

Consistent with the foregoing, the order is affirmed to the extent that it enforces the summary judgment establishing the existence of the subject easement, directs Polsgrove to remove any impediments from the easement and refrain from interfering with the Lundergans' use of the easement in the future, and dismisses his trespass claim. However, that portion of the order holding that the Lundergans acquired any easement across Polsgrove's property by adverse possession is reversed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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