

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001993-MR

CLARENCE W. EMBRY AND
PATRICIA EMBRY

APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 01-CI-02846

JOSEPH W. KISER AND
NORMA T. KISER

APPELLEES

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

DYCHE, JUDGE: This case involves an unfortunate dispute between neighbors concerning the existence of an easement over the Embrys' property for the Kisers to gain access to their property. The trial court found, by summary judgment, that the easement existed, had not been extinguished, and that without the easement the Kisers' property was landlocked. Our review of the record leads us to the conclusion that the Embrys have produced enough evidence to merit a trial on the latter two

issues. We therefore vacate the trial court's judgment, and remand for further proceedings.

The Embrys' property fronts on Todds Road in Fayette County. Although the Kisers' property has a mailing address of Todds Road, the Embrys' property lies between it and Todds Road. The deeds in the chains of title to both tracts refer to a 12-foot easement running along the east boundary of the Embrys' property from Todds Road to the Kisers' property. It is undisputed that the easement existed at one time.

The bone of contention is whether the easement has been extinguished, and if so, whether the Kisers are thereby landlocked. Both parties and the trial court have cited Curran v. City of Louisville, 83 Ky. 628, 7 Ky. L. Rptr. 734 (1886) for the proposition that mere non-use will not extinguish a valid easement; some additional affirmative action by the owner of the servient estate, for the period necessary to acquire the property by adverse possession, must be taken.

[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.

Steelvest, Inc. v. Scansteel Service Ctr., 807 S.W.2d 476, 482 (Ky. 1991).

Our review of the record indicates that Mr. Embry testified that his family had placed a fence blocking the easement. This evidence, if believed, is sufficient to present a fact question concerning the extinguishment of the easement. In addition, Mr. Embry testified that there was access to the Kiser property by means of Calvary Lane. Again, if believed, this is sufficient to create a fact question as to whether the Kisers would be landlocked absent the easement in question.

We find that the Embrys have produced sufficient evidence to defeat the Kisers' summary judgment motion. Whether they have enough proof to prevail is yet to be seen. The judgment of the Fayette Circuit Court is vacated, and this matter is remanded for proceedings consistent with this opinion.

BUCKINGHAM, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

BRIEF FOR APPELLANTS:

Richard V. Murphy
Lexington, Kentucky

BRIEF FOR APPELLEES:

Bennett E. Bayer
Landrum & Shouse LLP
Lexington, Kentucky