

RENDERED: JUNE 3, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002742-MR

ULYSSES G. BOLTON

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 02-CI-01050

BOYD BARGER AND SHEILA BARGER;
AND MARCUS MORGAN AND BETTY SUE MORGAN

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

McANULTY, JUDGE: Appellant Ulysses G. Bolton (Bolton) brings this appeal from an order of the Laurel Circuit Court entered November 10, 2003, granting summary judgment to appellees, husband and wife Marcus and Betty Sue Morgan (Morgans) and husband and wife Boyd and Sheila Barger (Bargers) in a dispute over title to real property. Before us, Bolton argues that the trial court's grant of summary judgment to the Morgans and the Bargers was improper in the face of conflicting affidavits

creating a genuine issue of material fact. Having reviewed the record, we agree with the trial court and affirm.

The facts as gathered from the record are as follows. In 1966, James Schoonover deeded the following property in Laurel County to Irvin and Alice Young:

Beginning at a black oak stump by the road; thence with the Rigg's line to a mountain birch on a rock; thence a straight line to a white oak in the branch; thence a straight line to a black oak at the road on top of the hill; thence with John May's line to the beginning (sic).

There is excepted from the above boundary, that part of land sold to Ulyssa Campbell by deed dated March 31st 1910, which is duly recorded in Deed Book No. 36, at page 397, containing (20) acres more or less.¹

In 1967, Irvin and Alice Young deeded a portion of the above property to Norman Frye (which would ultimately belong to appellant Bolton), and retained the remainder of the property deeded to them by Schoonover (which would ultimately belong to appellees Morgans and Bargers). The description of the property deeded to Frye was as follows:

Beginning at a black oak tree at the road; thence with the road 27 rods and 4 feet to a black oak; thence a westerly direction 82 rods to a rock cliff; thence a southeastern direction 20 rods to a white oak and black oak; thence an eastern direction 82 rods to

¹ For our purposes, we will refer to this description (including the Campbell exception) as the "source deed description."

the point of beginning, containing 10 acres more or less.²

Frye deeded the property to others in 1969, and the same property went through a succession of owners until 2000 when it was deeded to appellant Bolton and his wife.

In 1969, after the death of Irvin Young, his heirs deeded back to their mother and mother-in-law, Alice Young, the property in Laurel County that they had received from Irvin Young by intestate succession. This restored Alice Young to ownership of the same property as before her husband died. The description of this property was the same as in the "source deed" to the Youngs from Schoonover, with the following addition:

There is further excepted that portion of the above described property heretofore sold to Norman Frye by deed of date May 10, 1967, recorded in Deed Book _____, Page _____, containing 10 acres more or less.³

In 1970, Alice Young filed a quiet title action against Dan E. Watts (Laurel Circuit Court Civil Action No. 8). At issue was a boundary dispute.⁴ By judgment entered April 1, 1972, the Laurel Circuit Court quieted title to the property in

² For our purposes, we will refer to this as the "Frye (Bolton) tract."

³ For our purposes, we will refer to this as the "Frye (Bolton) exception."

⁴ It is difficult to tell from the record before us exactly what the dispute entailed, but it appears from specific language in the judgment that the dispute was over a boundary north of the Rockingham School Road, which had on it a barn. Also, insofar as the chain of title in the properties before us, Dan E. Watts' name does not appear on any of the deeds.

favor of Alice Young, describing said property as the "source deed description" plus the "Frye (Bolton) exception." The court also found that a survey prepared by Ace Hensley in 1968 (after the Young's sale to Frye) was an accurate description of the boundary of Alice Young's property, and included that description in the judgment as well:

For greater certainty, as to the description of the boundary of the property belonging to the plaintiff, Alice Young, the plat prepared by Ace Hensley, of date August 27, 1968, and filed in the record herein, as a plaintiff's exhibit #1, is referred to, and the Court finds that the survey description contained thereon accurately describes the boundary of property owned by the plaintiff, as follows:

Beginning at a stake in the U.S. Forestry Service property line; thence South 87 degrees 00 minutes West 1,056 feet to a white oak; thence North 59 degrees 00 minutes East 1,287 feet to an iron pin; thence North 81 degrees 00 minutes East 25 feet to a pin; thence North 12 degrees 00 minutes West 163 feet to a stake; thence North 46 degrees 30 minutes West 400 feet to a stake; thence North 42 degrees 00 minutes West 300 feet to a stake; thence North 36 degrees 45 minutes West 200 feet to a stake; thence North 33 degrees 15 minutes West 200 feet to a stake; thence North 59 degrees 00 minutes West 256.6 feet to a stake; thence North 47 degrees 45 minutes West 221.5 feet to a stump; thence continuing with the U.S. Forest Service land South 16 degrees 30 minutes West 1,029.60 feet to a stake; thence South 43 degrees 30 minutes West 990 feet to

the beginning corner, containing 43.75 acres, more or less.⁵

In 1973, Alice Young deeded her property to Wendy and Jerry Wagers. This deed described this property as in the "source deed description," and included the "Frye (Bolton) exception." This deed, however, also included for the first time the "legal survey description," and indicated that "title to [Alice Young] was confirmed by Order and Judgment of the Laurel Circuit Court, of date April 1, 1972, as entered in the action of Alice Young, a widow, versus Dan E. Watts, being Civil Action Number 8."

In 1979, the same property ("source deed description," "Frye (Bolton) exception," and "legal survey description") was deeded from Wendy Wagers to Jerry Wagers as part of their divorce. In 1986, Jerry Wagers and wife Connie Wagers deeded the same property to Lincoln Federal Savings and Loan Association. In this deed, however, the "source deed description" and "Frye (Bolton) exception" were dropped. The property was solely described as in the "legal survey description." In 1986, Lincoln Federal deeded the property, again solely described as in the "legal survey description," to Elila Adams. The "legal survey description" continued through successive deeds up to 1993 when the property was deeded to the

⁵ For our purposes, we will refer to this as the "legal survey description."

Morgans, appellees herein. In 1994, the Morgans deeded a portion of this same property to the Bargers, also appellees.

Thus, to sum up, the issue before us involves two properties, both originating with property owned by the Youngs. The Bolton tract was initially sold by the Youngs to Frye, and the description of the Frye (Bolton) tract has remained the same through all deeds down to Bolton's deed. After the sale of the Frye (Bolton) tract, the description of the remainder of the Young property (which would ultimately become the Morgan-Barger tract) specifically excluded the Frye (Bolton) tract down through the quiet title action, where the alternative survey description was added. Successive deeds dropped the language excluding the Frye (Bolton) tract, but kept the alternative survey description up through the Morgans' deed.

On November 5, 2002, Bolton filed an action in Laurel Circuit Court asserting that the Morgans and the Bargers were claiming as theirs a portion of Bolton's property that was rightfully his by actual title. Bolton asked the court to quiet title to the property in his favor and to establish the boundary between the Bolton and Morgan-Barger properties.

The Morgans and Bargers moved for summary judgment, alleging that Bolton could not create a genuine issue of material fact because the Morgans and Bargers legally held the property by adverse possession, thus conveyance of the property

to Bolton was champertous pursuant to Kentucky Revised Statutes (KRS) 372.070.⁶ Alternatively, the Morgans and Bargers claimed to have met the fifteen-year statutory period for adverse possession pursuant to KRS 413.010,⁷ having actual title since 1972 pursuant to the quiet title judgment.

The motion for summary judgment contained an affidavit from surveyor Hensley affirming that in 1968 he surveyed what would become the Morgan property; that his survey excluded all conveyances from the original source deed; and that the circuit court's quiet title judgment ruled that his plat accurately described what would become the Morgan property. Also included were affidavits from Marcus Morgan and Boyd Barger affirming that since 1993 they had held the property pursuant to the 1972 quiet title judgment boundary.

Bolton opposed the Morgan-Barger adverse possession claim with an affidavit from Morgan-Barger predecessor in title, Jerry Wagers, in which he stated that while living on the

⁶(1) Any sale or conveyance, including those made under execution, of any land, or the pretended right or title thereto, of which any other person has adverse possession at the time of the sale or conveyance, is void; but this section does not render void any devise of land in adverse possession.

(2) A judgment creditor, after a return on the execution of no property found, may file a petition in equity to subject any real estate to which the defendant has legal or equitable title even if the property is in the adverse possession of another. The person in possession shall be made a defendant in any such action.

⁷ Subject to Kentucky Revised Statutes 411.190(8), an action for the recovery of real property may be brought only within fifteen (15) years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims.

Morgan-Barger property he did not assert any claim on the Bolton property.

Upon consideration of the record and arguments of counsel, the circuit court granted summary judgment to the Morgans and Bargers finding that they were owners in fee simple of the property described in the "legal survey description" in the 1972 quiet title judgment and that Bolton had no interest in the Morgan-Barger property by virtue of his deed (to the "Frye tract").

Before us Bolton argues that the circuit court erred in granting the motion of Morgan and Barger for summary judgment, specifically contending that the affidavits in support are conflicting and create two genuine issues of material fact: 1) the location of the boundary line; and 2) whether the Morgans and Bargers and their predecessors have been in possession of the property for at least fifteen years prior to the filing of this action. Bolton also argues that the doctrine of after-acquired property or estoppel by deed operates as a matter of law to vest title in Frye and his successors such as Bolton.

The standard of review on appeal of a summary judgment under Kentucky law is well-settled:

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a

matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, 807 S.W.2d at 480, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . ." Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992), citing Steelvest, supra (citations omitted).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

At the point of summary judgment, the record consisted of the 1972 quiet title judgment and affidavits from Marcus Morgan, Boyd Barger, surveyor Ace Hensley, and Jerry Wagers. The 1972 judgment clearly indicates that Alice Young's property excluded the Frye (Bolton) property. Furthermore, the 1972 judgment provided an additional, *alternative*, description of the property, surveyor Hensley's "legal survey description," the same description contained in the Morgan property deed. There is, therefore, no question that the property owned by the Morgans and the Bargers does not include the Frye (Bolton) property. As such, even viewing the record in the light most favorable to Bolton, and resolving all doubts in his favor, the

1972 judgment clearly indicates that the two properties are not the same, thus the trial court correctly found no genuine issues of material fact and properly granted summary judgment to the Morgans and the Bargers.

We need not reach Bolton's argument that the affidavits of Morgan, Barger and Wagers are conflicting and thus reach a genuine issue of material fact with regard to the issue of adverse possession. The trial court's decision rests on undisputed evidence that the two properties are not the same following from the 1972 judgment and surveyor Hensley's affidavit.

For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth A. Smith, Jr.
London, Kentucky

BRIEF FOR APPELLEE:

Tommie L. Weatherly
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