

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000016-MR

JOBSTON THREET AND JOANNE THREET

APPELLANTS

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 01-CI-00049

JERRY SMOOT; PATSY SMOOT;
CITIZENS COMMERCE NATIONAL BANK;
UNITED STATES ATTORNEY;
FARMER'S HOME ADMINISTRATION;
LEXINGTON LOOSELEAF TOBACCO WAREHOUSE CO.;
MONOGRAM CREDIT CARD;
SOUTHERN STATES OWENTON COOPERATIVE;
CENTRAL DISTRICT, INC.; and, COUNTY OF OWEN

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, JOHNSON, AND HENRY, JUDGES.

BARBER, JUDGE: Appellees, Jerry Smoot and Patsy Smoot (the Smoots), were the owners of certain real property in Owen County, Kentucky, which was the subject of a foreclosure action. The property was ordered sold by the circuit court to satisfy

the Smoots' debts and Appellants, Jobston and Joanne Threet (the Threets) were the purchasers. Subsequent to the sale conducted by the Master Commissioner the Threets discovered that the deed conveying the property to them contained an error. There also arose a dispute over the ownership and removal of a greenhouse and gates located on the real estate.¹ Although this case has many named appellees, the only parties between whom controversy exists are the Threets and the Smoots. We affirm the judgment of the circuit court.

Preliminarily we note that none of the named appellees has filed a responsive brief. In such circumstances we are authorized by CR 76.12(8)(c) to impose certain consequences such as accepting the appellant's statement of facts as true. However, where the statement of facts conflicts with those of the trial court we may only accept the appellant's version if it can be said that the trial court's findings were clearly erroneous. Whicker v. Whicker, 711 S.W.2d 857, 858 (Ky.App. 1986). In addition, imposition of any consequences under CR 76.12(8)(c) is discretionary with the appellate court.

In this appeal the Threets claim that the trial court erred by not awarding them their attorney's fees and by not awarding more money for the greenhouse and gates that were

¹ Various other issues arose between the Smoots and the Threets such as the entitlement to the proceeds from growing crops and the ownership of a mobile home. However, the Threets have not prosecuted an appeal for any issues other than those mentioned in the main body of the opinion.

removed from the property. After reviewing the record it is clear that the trial court's judgment considered all of the evidence presented and correctly applied the law.

With respect to the award of attorney's fees, the Threets argue that the circuit court should have allowed their claim because they brought the mistake in the deed to the attention of the court and other parties and conferred a benefit to the other parties in the litigation. The mistake involved the description of the property and included some property that actually belonged to third parties, not parties to the litigation, and did not include certain property that should have been included.

The trial court considered the situation and ordered the Master Commissioner to correct the deed by excising that portion that belonged to the third parties and reissuing a deed to the Threets and by issuing a new deed that reconveyed the excised property to the third parties. It also determined that the Threets were not entitled to their attorney's fees in the litigation because it did not believe that the law supported such an award, nor did it feel that attorney's fees were appropriate in this case.

Ordinarily attorney's fees will not be awarded absent a contract or statute expressly allowing for their imposition. However, the Threets correctly point out that the court, in

equity, may allow a party its attorney's fees in the court's discretion. Kentucky State Bank v. Ag Servs., Inc., 663 S.W.2d 754, 755 (Ky.App. 1984). It appears that the court in this case exercised that discretion and determined that an award of fees was not appropriate. We can discern no abuse of this discretion and thus will not disturb the court's decision.

With respect to the greenhouse and the gates removed by the Smoots, the Threets maintain that the circuit court should have awarded more damages. The Threets point out that they introduced evidence at a hearing before the court that showed the replacement cost of the greenhouse and the gates to be much more significant than the \$1,500.00 awarded by the court. The exhibits that are part of the record do show that the Threets expended more money than the court awarded.

However, the Threets' claim is essentially one of conversion of property. The measure of damages in such cases is the fair market value of the property converted - not the replacement cost. Batson v. Clark, 980 S.W.2d 566, 575 (Ky.App. 1998). The circuit court noted that the proof showed that the greenhouse that was removed by the Smoots was of considerably less value than the one the Threets constructed to replace it. The court's determination that the greenhouse that was removed was worth \$1,000.00 is not clearly erroneous and it is based on a correct application of the law, thus, it will not be reversed.

The value awarded for the gates, \$500.00, is negligibly less than that claimed by the Threets, and we cannot say the amount awarded by the circuit court was clearly erroneous.

For the reasons stated above the judgment of the Owen Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Gerald T. Kemper
Owenton, Kentucky

BRIEF FOR APPELLEES:

No Briefs Filed.