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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000671-MR

ELMER J. STEWART, JR.
AND DENISE ANN STEWART, HIS WIFE — APPELLANTS

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 02-CI-00121

DWIGHT ROY AND LOIS ROY,
HIS WIFE; ROBERT HAGY; AND
RICHARD COLLINS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Elmer J. Stewart, Jr. and his wife, Denise Ann Stewart, have appealed from a judgment of the Adair Circuit Court entered on March 2, 2004, in an action arising out of a boundary line dispute. Having concluded that the findings of the trial court quieting title by adverse possession in the

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

appellees are not clearly erroneous and that it did not abuse its discretion, we affirm.

The Stewarts and the appellees, Dwight Roy and Robert Hagy,[2] own adjoining land on the south bank of the Green River in Eunice, Adair County, Kentucky. On May 28, 2002, the Stewarts filed a complaint against Roy to quiet title to a 1.45-acre tract of land and against Hagy to quiet title to a 4.83-acre tract of land, both of which overlapped the Stewarts's property.[3] The Stewarts claimed ownership of the 6.28 acres through record title. In their counterclaims, Roy and Hagy also claimed ownership of the disputed property by record title, and alternatively, by adverse possession.

At a bench trial held on December 3 and 4, 2003, the Stewarts, Roy, and Hagy presented evidence in support of their respective positions. The evidence consisted of copies of deeds, plats, and surveys of the property, and expert and lay witness testimony.

Timothy Phipps, a professional land surveyor, and his wife, Judy Phipps, testified on behalf of the Stewarts. The

[2] Lois Roy, Dwight Roy's former wife, conveyed her interest in the disputed property to Dwight Roy on June 5, 1996, as recorded in Deed Book 215, Page 183, in the Adair County Clerk's Office. Richard Collins was appointed a Warning Order Attorney, who reported that Collins had sold his property prior to the filing of the lawsuit. Although Lois and Richard did not participate in the circuit court action, they have not been dismissed as parties on appeal.

[3] While the Roy property and the Hagy property overlap the Stewart property, the Roy property and Hagy property are separate and distinct and do not overlap each other.

Phipps's testimony established that the property description contained in the Stewarts's deed, coupled with the survey of the property, indicated that the disputed property was included in the Stewarts's deed and the deeds in their chain of title. The plat prepared by Phipps showed both the disputed property lines of Roy and Hagy, the paling fence[4] that crossed part of the Stewarts's property and divided the disputed Roy and Hagy property, and the boundary lines of the Stewarts's entire tract of land. He also indicated that other historical monuments confirmed his results.

Lay testimony presented on behalf of the Stewarts indicated that the disputed property was located at the extreme rear of the Stewart tract and that a creek ran through the southeast disputed corner of the land. The property can be reached by a haul road, but most of the Stewarts's land is wooded. Elmer Stewart testified that prior to purchasing the land in 1999, he had walked the boundary lines with R.V. Collins, who was present when the first survey of the property was completed in 1995 by Phipps. Stewart testified that one of his grantors, Eldridge Pike, described boundary lines to him that were consistent with Phipps's 1995 plat.

Gary Girgler, another licensed land surveyor, testified on behalf of Hagy. Girgler stated that he had not

[4] The paling fence was described as vertical wooden pickets connected by wire.

visited the property in question. Girgler testified that he had been hired to perform a survey of the property, and he had reviewed the deeds and the plat prepared by Phipps. However, because he had not been given two good monument points at which to begin his survey, he had not done a survey, nor prepared a plat of the property. He testified that he questioned whether Phipps's plat was completely correct because (1) the plat referred to a Chestnut Oak tree listed in a deed from 1833, and he had doubt whether it is still standing;[5] and (2) a property line held by the United States Government, was unusable because the government deed was in "pitiful condition" as it did not contain a proper metes and bounds description.

Lay testimony on behalf of Roy and Hagy indicated that Marion Jones had possessed the disputed property for approximately 100 years. Floyd Roy, who is Dwight's father, testified that a fenced field existed in the 1950's that was used as pasture land. Other testimony revealed that Hagy and his predecessors had farmed the land since the 1960's, and had kept hay in a vacant house on the property.[6]

[5] However, Timothy Phipps opined that a Chestnut Oak tree he observed was perhaps 200 years old and most likely the same tree referred to in the deeds.

[6] Marty Daniels testified that the house was no longer standing, but the old well was still in existence.

On March 2, 2004, the trial court entered judgment in favor of Roy and Hagy concluding that they had acquired title to the property through adverse possession. This appeal followed.

In an action tried without a jury, CR[7] 52 provides that "[f]indings of fact shall not be set aside unless clearly erroneous . . . ." "A factual finding is not clearly erroneous if it is supported by substantial evidence."[8] Substantial evidence is evidence that, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.[9] With respect to property title issues, the appropriate standard of review is whether the trial court's findings of fact are clearly erroneous or whether it abused its discretion.[10] An appellate court may not substitute its opinion for that of the trial court absent clear error.[11]

The Stewarts contend that the trial court erred by concluding that Roy and Hagy had demonstrated sufficient activity on the disputed property to establish adverse

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[7] Kentucky Rules of Civil Procedure.

[8] Cole v. Gilvin, 59 S.W.3d 468, 472-73 (Ky.App. 2001) (citing Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998)).

[9] Sherfey v. Sherfey, 74 S.W.3d 777 (Ky.App. 2002).

[10] Phillips v. Akers, 103 S.W.3d 705, 709 (Ky.App. 2003) (citing Church & Mullins Corp. v. Bethlehem Minerals Corp., 887 S.W.2d 321, 323 (Ky. 1992)).

[11] See Cole, 59 S.W.3d at 473.

possession. We disagree. After reviewing the evidence, we must conclude that the trial court's findings of fact are supported by substantial evidence and its conclusion that Roy and Hagy had acquired the entirety of the disputed property through adverse possession is not an abuse of discretion.

In order to prove the elements of adverse possession, a claimant must show possession of disputed property under a claim of right that is hostile to the title owner's interest. Further, the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of 15 years.[12] According to our Supreme Court, "[t]he 'open and notorious' element requires that the possessor openly evince a purpose to hold dominion over the property with such hostility that will give the nonpossessory owner notice of the adverse claim."[13] Mere intentions or verbal expressions of a property claim are not sufficient absent physical acts appearing on the land evidencing a purpose to hold the property hostile to the rights of and giving notice to the title holder.[14] Absent proof that the possessor made physical improvements to the property, such

[12] Tarter v. Tucker, 280 S.W.2d 150, 152 (Ky. 1955); KRS 413.010.

[13] Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878, 880 (Ky. 1992) (citing Sweeten v. Sartin, 256 S.W.2d 524, 526 (Ky. 1953)).

[14] See Gatliff Coal Co. v. Lawson, 247 S.W.2d 375, 377 (Ky. 1952); and D.B. Frampton & Co. v. Saulsberry, 268 S.W.2d 25, 27 (Ky. 1954).

as fences or buildings, there must be evidence of substantial, not sporadic, activity by the possessor.[15]

The Stewarts's evidence tended to show that they held superior title to the property and exercised some control over the disputed area by hunting. However, the trial court's findings that Roy and Hagy had established by clear and convincing evidence that they adversely possessed the disputed property are supported by the evidence. For example, the Stewarts's own surveyor testified that he observed during both his 1995 survey and his 1999 survey that the property in question has been mowed "over a period of time." This conclusion was based on the vegetation that was present. Hagy testified that he had raised a garden on certain parts of the disputed property. Floyd Roy testified that in 1950, a certain field had been fenced and used as pasture. Daniels testified the disputed area had been farmed in the 1970's and 1980's and that a vacant house on the land had been used as a hay barn. Elmer Stewart never attempted to dispute any of these claims and never attempted to show that he had been the one to mow the fields or to use the land for any purpose other than hunting. All the appellees' witnesses testified that their impression was that Roy and Hagy had possessed the land in question for 30

[15] Kentucky Women's Christian Temperance Union v. Thomas, 412 S.W.2d 869, 870 (Ky. 1967).

years or more. Furthermore, the trial judge personally viewed the disputed property and noted that "the area is all woodlands, until one reaches the Roy tract. There is open land on the Roy and Hagy tracts." The trial court also stated:

> There are numerous places where one can see part of a paling fence . . . [which] extends to a chestnut oak tree on the side of a knob as indicated on the exhibits. The lands . . . are mostly cleared without any undergrowth or timber. It is obvious that the area has been open land for many years. The paling fence establishes a well defined boundary line.

As noted above, such evidence is crucial to establishing a claim of adverse possession. It is clear that the trial court's findings were consistent with the standard set forth in Tarter, and we conclude the trial court's findings that Roy and Hagy had adverse possession of the disputed land were not clearly erroneous or an abuse of discretion.

Accordingly, the judgment of the Adair Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES, DWIGHT ROY AND LOIS ROY:

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BRIEF FOR APPELLEE, ROBERT HAGY:

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