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Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-000922-MR

TOMMY COLLINS;
SANDRA COLLINS

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 02-CI-00766

BRENDA CRISP STEPHENS;
STANLEY STEPHENS

APPELLEES

OPINION

AFFIRMING

** ** * * * * * ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Tommy Collins and Sandra Collins appeal from a judgment of the Floyd Circuit Court in a case tried by deposition pursuant to Ky. R. Civ. P. (CR) 43.04 which determined that the appellees had acquired title to a disputed area of property by virtue of adverse possession. On appeal,

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

the appellants contend that the appellees failed to meet the criteria to have obtained ownership of the property by adverse possession. For the reasons stated below, we affirm.

In November 1977 Brenda Crisp and George Crisp purchased a tract of land in Floyd County situated a short distance from Drift Hill Road. The residence faces northwest and the northwest property line of the tract is set back from Drift Hill Road approximately 70 feet. A gravel driveway runs from Drift Hill Road toward the residence. A gravel parking area is distinguishable directly in front of the residence.

Brenda and George separated from January 1987 until October 1987, during which period the residence was vacant. George Crisp died in 1999, Brenda moved, and the residence was empty for a brief period; however, either her brother or her son has occupied the residence more or less continuously since that time. Brenda is currently married to appellee Stanley Stephens.

Brenda testified that since the Crisps moved onto the property in November 1977 the family has used the driveway to access the residence and have parked their vehicles in the parking area directly in front of the structure. Brenda stated that she was told that the disputed area was part of the property she had originally purchased, and that she has occupied and treated the area as her own property since November 1977.

Brenda also testified that the driveway from Drift Hill Road is the only way to access her property

Tommy Collins and Sandra Collins own a tract of property adjacent to the Crisp property. Their property fronts Drift Hill Road. Their deed and the only survey introduced into the record indicate that they possess legal title to the disputed property. The disputed property forms roughly a right triangle with one leg running southeast the approximately 70 foot length of the Collins' property from Drift Hill Road to the corner of where it adjoins the Crisp property. This leg forms the boundary between the disputed property and the Collins property. Brenda testified, and the appellants do not dispute, that at one time a fence ran the length of this line, as though to define a boundary placing the disputed property on the Crisp side of the boundary line. The other leg runs southwest the approximately 70 foot distance of the northwest perimeter of the Crisp property. The triangle is completed by the approximately 110 foot line running from Drift Hill Road to the southwest corner of the Crisp property line. Based upon these dimensions, the triangle encompasses an area of approximately 2,450 square feet.

The appellants, for the most part, acknowledge that Brenda has used the property as she claims. However, they contend that the use was permissive up until 1999, when George

died and her brother moved into the residence. The appellants also argue that the only acts done by the appellees over any period of time was to park their vehicles on the property and this does not give rise to a claim of adverse possession. The appellants also allege that because the property was left unoccupied during the Crisp's brief separation and for a short period following George's death, Brenda's use of the property cannot ripen into ownership by adverse possession because the appellees' occupation was not continuous. The appellants contend that Brenda can access her property through the back way, and that their predecessor in title did so.

This case was tried by deposition. In such cases, even though the trial court did not have the opportunity to observe the witnesses to judge their credibility, nevertheless, we defer to the trial court's findings of fact and will disturb same only if clearly erroneous. CR 52.01; Vanover-May v. Marsh, 793 S.W.2d 852, 854 (Ky.App. 1990). On the other hand, we review the trial court's conclusions of law de novo. Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky.App. 1998).

The findings of fact and conclusions of law made by the trial court in this case were minimal. Relevant to our discussion are the following portions of the trial court's April 20, 2004, judgment:

Findings of Fact

. . . .

6. The defendants and those acting through them have exclusively occupied, used and claimed the area in dispute since December 1977.

7. Neither the plaintiffs or their predecessor have occupied or made viable claim to the disputed area prior to their lawsuit in 2002.

CONCLUSIONS OF LAW

The defendants have successfully defended this action on the basis of adverse possession.

JUDGMENT

Based on the foregoing, the plaintiffs' complaint is DISMISSED. Title to the disputed area as shown on the survey map filed in the record hereof be and hereby is vested in the defendant, Brenda Crisp Stephens, by reason of adverse possession thereof for the statutory period.

One may obtain a perfect title to real property by adverse possession for the statutory period of time of fifteen years even when there is no intention by the adverse possessor to claim land not belonging to him. Kentucky Revised Statutes 413.010; Tartar v. Tucker, 280 S.W.2d 150, 152 (Ky. 1955).

There are, however, five elements, all of which must be satisfied, before adverse possession will bar record title: 1) possession must be hostile and under a claim of right, 2) it

must be actual, 3) it must be exclusive, 4) it must be continuous, and 5) it must be open and notorious. Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878, 879-880 (Ky. 1992). The party claiming title through adverse possession bears the burden of proving each element by clear and convincing evidence. Phillips v. Akers, 103 S.W.3d 705, 709 (Ky.App. 2002).

The appellants contend that the appellees' occupancy of the disputed area did not arise to a level of adverse possession on the basis that the only activity done over any period of time has been to park their vehicles there.

This claim is contrary to the trial court's finding that the appellees "and those acting through them have exclusively occupied, used and claimed the area in dispute since December 1977." We believe that the trial court's finding is not clearly erroneous in that it is supported by substantial evidence under the clear and convincing standard.

Brenda testified that she and George were told when they bought the property that the disputed property went with their tract. Indeed, at the time of the purchase a fence line clearly defined a division between the properties with the disputed area within the Crisp boundary. She testified that they used the driveway to access their property and parked their vehicles in the area in front of the residence. Tommy, in his

deposition testimony, essentially agreed with this, but alleged that the use was permissive, an assertion which Brenda denied. However, as opposed to the allegation that the disputed property was used merely for a driveway and for parking, Brenda testified that the family used the property as essentially their front yard, and treated and maintained it as such. As the fact-finder, it was the trial court's prerogative to believe this testimony, which we construe it to have done.

The trial court's finding that the appellees exclusively occupied, used and claimed the area in dispute since December 1977 is supported by substantial evidence and is not clearly erroneous under the clear and convincing standard.

The appellants also contend that the appellees' claim of adverse possession must fail because the appellees "did not hold the property continuously and uninterruptedly for the fifteen year statutory period." Citing Lyle v. Holman, 238 S.W.2d 157 (Ky. 1951) and Stephens v. Kidd, 181 S.W.2d 688 (Ky. 1944), the appellants claim that the standard to comply with the "continuously" element requires that the disseisor occupy the property for every hour of every day, or at least every day. The appellants argue that Brenda and George's nine-month separation from January 1987 until October 1987, during which time the premises were unoccupied, interrupted the continuity of their occupation of the property. Similarly, the appellants

argue that Brenda's vacating of the premises for a short time following George's death breached the continuous prerequisite.

The requirement of continuous occupancy is a sound one. However, it does not mean that the disseisor in person need be present on the premises at all times. The nature and required continuity of adverse possession is explained in Combs v. Ezell, 232 Ky. 602, 24 S.W.2d 301. It was there held continuous occupancy did not require that any person need live on the land. The important consideration is whether or not the physical use of the property by the owner or his representative, the erection of structures, or the keeping of chattels thereon demonstrates that he is asserting dominion over the property. It was pointed out that after one has gone into adverse possession, its continuity may be broken by: (1) an act of the real owner; (2) intrusion of a stranger; or (3) abandonment by the occupant. See also 1 Am.Jur., Adverse Possession, Section 168.

Thompson v. Ratcliff, 245 S.W.2d 592, 593 (Ky. 1952).

Brenda testified that during her 1987 separation and during the brief vacancy of the residence following George's death that the utilities remained on the residence and indicated that, except for the vacancy of the residence, there was no change to her occupancy and claim to the disputed property.

We do not believe the rigid rule contained in Lyle and Kidd is applicable in this situation. The mere vacating of the residence did not interrupt the occupation of the disputed area under the facts of this case. Under the appellants' theory, the mere vacating of the home for, for example, a two-week vacation

would interrupt the continuity of the occupation. We do not construe Lyle and Kidd as so holding.

For the foregoing reasons the judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John David Preston
Perry, Preston & Miller
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Martin L. Osborne
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