

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001539-MR

JEROME (AKA JERRY) KALLOP AND
MARTHANNA KALLOP

APPELLANTS

APPEAL FROM CLARK CIRCUIT COURT
v. HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 01-CI-00652

MARY S. BLOOMFIELD AND
C.V. BLOOMFIELD, HER HUSBAND,
DOROTHY S. BOTTO, A WIDOW,
WALTER T. SWETNAM AND
ANGELA Y. SWETNAM, HIS WIFE, AND
COMMUNITY TRUST BANK, N.A.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR
JUDGE.¹

McANULTY, JUDGE: In this action to quiet title to a small tract
of land used as a parking lot in downtown Winchester, Kentucky,
Jerome (aka Jerry) Kallop and Marthanna Kallop (the Kallops)
appeal from the trial court's grant of summary judgment in favor
of Mary S. Bloomfield, C.V. Bloomfield, Dorothy S. Botto, Walter

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

T. Swetnam and Angela Y. Swetnam (the Swetnams). The Kallops admit that the Swetnams were the record owners of the property but believe that the trial court should have found that they were the owners by adverse possession. Because we conclude that the Kallops did not establish that they were the holders of adverse title as a matter of law, we affirm.

The Swetnams filed the underlying action in Clark Circuit Court to quiet title in their names to property located on North Maple Street in the city of Winchester, Clark County, Kentucky (the property). The property is approximately 21 feet by 211 feet and is utilized as a parking lot. It fronts North Maple and ends in an alley.

The property is particularly described as follows:

That certain lot or parcel of land on the east side of North Maple Street (formerly known as Water Street) in Winchester, Clark County, Kentucky, described as follows, to-wit: Beginning at a stake in the east margin of said street, the southwest corner of Lot No. 27 in the plat of the City of Winchester, said point being the northwest corner of Lot No. 26 on said plat; thence with the line of said lot No. 27, S 72 degrees E 211 feet; thence N 18 degrees E 21 feet to division line; thence with the same N 72 degrees W 211 feet to a point in the east margin of said street; thence with the margin of said street S 18 degrees W 21 feet to the beginning. The said lot being a lot 21 feet wide cut off of the southernmost portion of Lot No. 27.

W.D. Swetnam acquired the property from N.B. Ratliff by deed dated October 18, 1949. Earlier in the year 1949, W.D. Swetnam acquired an adjoining lot from a different grantor that was 65 feet by approximately 211 feet, which made his property fronting North Maple Street total 86 feet by approximately 211 feet. About four years after he acquired the property and the adjoining lot, W.D. Swetnam leased back to the Ratliff family a lot totaling 90 feet, "more or less," by 211 feet. The property was part of this lot.

W.D. Swetnam died testate on December 17, 1979. Under his will, the Swetnams became the owners of the property.

On April 13, 1983, the Ratliff family conveyed property to Jerry Kallop. In addition to a property conveyance, the Ratliff-to-Kallop deed included an assignment of the leasehold rights from W.D. Swetnam for the lot that was 90 feet by 211 feet. But the property conveyance from the Ratliffs included the property at issue in this case, which property the Ratliffs no longer owned as they had conveyed it to W.D. Swetnam in 1949.

Over seventeen years after Jerry Kallop acquired the property from the Ratliff family, he conveyed it to his wife, Marthanna W. Kallop, along with several other parcels of real estate in Clark County.

The Swetnams contemplated selling their property in 2001. In preparation for the sale, they asked a local engineer to perform a survey based on the recorded deeds. The engineer informed the Swetnams that the property was included in Jerry Kallop's deed from the Ratliff family. Upon learning of the possible cloud on their title, the Swetnams filed the underlying action to quiet title.

In response to the Swetnam's complaint, the Kallops asserted that they had adversely possessed the property for the statutory period.

In discovery, the Swetnams deposed the Kallops. And the Kallops deposed Clarence V. (Vic) Bloomfield and Mary S. Bloomfield, W.D. Swetnam's son-in-law and daughter.

The Kallops asserted that they thought they owned the property. They introduced photographs to show that they maintained the property, which was utilized as a parking lot, differently than the property that they leased from the Swetnams, which was also utilized as a parking lot. There is a concrete divider between the two parking lots. As to how the Kallops maintained the property that they believed they owned, they stated that they picked up trash, had the lot sealed and re-stripped and repaired the sidewalks. But they did not do anything to maintain the leased property other than keep the lot free of debris.

Vic Bloomfield testified that he and the Kallops spoke a number of times over the years about the Kallops purchasing the property that they were currently leasing from the Swetnams. Vic Bloomfield did not recall having a discussion with the Kallops about the property line. Moreover, Vic Bloomfield did not notice that the Kallops were treating the lots on either side of the concrete barrier differently in that they were taking better care of the property at issue than the property that they were leasing.

A couple of months after the depositions of the parties, the Kallops took the deposition of Karen R. Bushart (Bushart), the Clark County Property Valuation Administrator. Bushart testified that the Kallops had received a tax assessment on the property since 1983.

A couple of months after Bushart's deposition, the Swetnams filed a motion for summary judgment. They argued that the case turned on the deeds and instruments of record in the Clark County Clerk's office. According to the records, the Swetnams owned the property. The Swetnams contended that the Kallops did not establish the five elements of adverse possession: (1) actual physical possession; (2) which is open and notorious; (3) exclusive; (4) hostile and under a claim of right; and (5) continuous for the statutory period of time of fifteen years. In particular, they asserted that Kallop's deed

might have included the property; however, it simultaneously provided an assignment of the lease, which also encompassed the property. Thus, the Swetnams concluded that Kallop's possession was permissive under the lease assignment; therefore, Kallop could not establish the hostile element of adverse possession as a matter of law.

In response, the Kallops made a motion for summary judgment in their favor. They asserted that the Swetnam's recitation of facts in support of their summary judgment motion was essentially accurate. The Kallops argued that those facts demonstrated the requisite elements of adverse possession. And they pointed to two facts that they believed were the most important. First, they maintained the property in a manner that would clearly show the Swetnams that the Kallops were claiming it as their own. Second, the Kallops had been paying the taxes on the property since 1983. The Kallops contended that there was no genuine issue of material fact in the case and that they were entitled to judgment as a matter of law.

Community Trust Bank, N.A., did not participate in the summary judgment proceedings, nor has it participated in these proceedings.

After a number of months passed and the trial court had not ruled on the motions for summary judgment, both parties renewed their motions for summary judgment. Less than three

months later, the trial court issued an order granting the Swetnams' motion for summary judgment. In its order, it decided that the absolute fee simple title to the property is in the Swetnams. In granting summary judgment in favor of the Swetnams, the trial court concluded that the Kallops failed to establish that their possession was hostile. The trial court found that their possession was amicable because they possessed the property as assignees of their grantors under a lease for and on behalf of the Swetnams who had legal title to the leased land.

The standard of review of a trial court's granting of 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." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial warranting a judgment in its favor. See James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co., 814 S.W.2d 273, 276 (Ky. 1991).

In considering a motion for summary judgment, the court must view all the facts and inferences drawn therefrom in the light most favorable to the party opposing the motion. See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476,

480 (Ky. 1991). "The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." Id. It is not the purpose of the summary judgment rule to cut litigants off from their right of trial if they have issues to try. See id.

In this appeal, the Kallops argue that they presented sufficient evidence to establish their title to the property by adverse possession. They contend that their holding was adverse even though they acted under a mistake as to the true boundary between their land and the Swetnams' land. Moreover, the Kallops argue that their occupancy and improvements to the property represented actual adverse possession and such possession was continuous for over 15 years. In the alternative, the Kallops contend that genuine issues of material fact remain that warrant submission to a jury.

We begin with the Kallops' argument that there were genuine issues of material fact that precluded summary judgment. In the underlying proceedings, the Kallops took the stance in their various summary judgment motions that there was no genuine issue of material fact. Having taken this stance, they should not now be permitted to assume an inconsistent posture to defeat the decision of the trial court by claiming that there were genuine issues of material fact. See BTC Leasing, Inc. v. Martin, 685 S.W.2d 191, 193 (Ky. App. 1984). Nonetheless, we

believe the trial court was correct in concluding as a matter of law that the Kallops did not hold the property by adverse possession.

We are inclined to believe that the Kallops thought that they owned the property. There is simply no circumventing, however, the facts that they held the property under a lease agreement and all of the actions that the Kallops undertook to maintain the property were consistent with the terms of the lease. Granted, the Kallops did not maintain in the same manner the other property that they acknowledge they were leasing, but their maintenance is not the type of distinct and unequivocal act that would put the Swetnams on notice of the Kallop's hostile claim. See Fordson Coal Co. v. Mills, 234 Ky. 64, 27 S.W.2d 382, 384 (Ky. 1930). It is not as if the Kallops fenced in the property or put up signs stating that they owned the property. In this case, such acts would be necessary because "[i]t is the legal owner's knowledge, either actual or imputable, of another's possession of lands that affects the ownership." Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878, 880 (Ky. 1992). As far as the Swetnams were concerned, the Kallops' improvements were permissive, and there can be no other conclusion under the facts of this case.

The Kallops argue that they recorded a deed of the conveyance of the property and they paid taxes on the property; thus knowledge of their adverse possession was imputable to the Swetnams. All five elements, however, must be satisfied before adverse possession will bar record title. See Appalachian Regional Healthcare, 824 S.W.2d 878 at 880. The hostile element is not satisfied in this case because the Kallops' claim was not unequivocal. While there was a recorded deed, there was also a recorded lease. The lease was valid, but the deed was void. And all the actions that the Kallops undertook to maintain the property were permitted under the lease and consistent with the lot's use, which was a parking lot.

With regard to the evidence that the Kallops received a tax assessment on the property, "[p]ayment of taxes may strengthen the payor's claim that he believed he owned certain property but is not itself sufficient to show possession or an intent to hold the property adversely." See Phillips v. Akers, 103 S.W.3d 705, 709 (Ky. App. 2002). As discussed above, as a matter of law, the Kallops' claim to the property was not hostile because it was not unequivocal.

We affirm the summary judgment of the Clark Circuit Court in favor of the Swetnams.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANTS:

Fred E. Peters
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEES:

Michael A. Rowady
Blair & Rowady
Winchester, Kentucky