RENDERED: AUGUST 10, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000407-MR

RAYMOND G. DICKERSON AND MARY LUCILLE DICKERSON — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 02-CI-01632

HENRY L. STEPHENS, JR., KATHRYN K. STEPHENS, J. DAVID MARTIN, NICHOLAS W. FERRIGNO, RHONDA FERRIGNO, VALERIE S. EASON, P. ERIC REDFIELD, AMY REDFIELD, AND BARBARA HEIL, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF PERSONS OWNING LOTS IN FORT MITCHELL HEIGHTS; THE FORT MITCHELL COMPANY; AND UNKNOWN SUCCESSORS AND ASSIGNS OF THE FORT MITCHELL CO. — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,[1] SENIOR JUDGE.

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

WINE, JUDGE: The underlying facts of this action are not in dispute. All of the parties own lots in the Fort Mitchell Heights subdivision in Fort Mitchell, Kenton County, Kentucky. Raymond G. Dickerson and Mary Lucille Dickerson ("the Dickersons") claim ownership to portions of lot numbers 47 and 50 by virtue of a quitclaim deed they acquired from the City of Fort Mitchell. The Appellees allege that those lots were reserved for park use by the common grantor. In response, the Dickersons assert that the grantor's reservation was insufficient to create a valid dedication of the lots for public use. In the alternative, the Dickersons contend that any dedication has been abandoned through non-use, and that they have acquired full rights to the lots through adverse possession. We agree with the trial court that summary judgment for the Appellees was appropriate on these issues. However, we conclude that there is a genuine issue of material fact concerning whether the fence erected by the Dickersons constitutes an ouster of the rights of the Appellees. Hence, we affirm in part, reverse in part, and remand for additional factual findings.

In 1910, The Fort Mitchell Company purchased property from Ida Hudson White/Ida Presley Prettyman. In 1911, The Fort Mitchell Company developed the property into the Fort Mitchell Heights Subdivision, which was comprised of seventy-three lots. The subdivision plat, dated March 9, 1911, and recorded March 11, 1911, identified lots 47 and 50 as "Park." The following language is also attached to the plat:

> All streets and parks are hereby dedicated to and for the exclusive use of the property owners in this subdivision and for the use of the Fort Mitchell Company, its successors or

> assigns in the development or use of any adjoining property it owns or may acquire.
>
> The right is reserved to lay and maintain the streets, lanes and parks all the necessary water and gas mains, sewers, telephone and electric conduits, poles and wires and appurtenances, and to connect thereto; also the right to establish grades of streets, walks and lanes and to establish building lines on lots.
>
> In Witness Whereof, the President and Secretary have hereunto affixed their hands and seals this 9th day of March, 1911.
>
> The Fort Mitchell Company
> Per O.J. Carpenter, President
> Per Thos J. Creaghead Secretary and Treasurer

The Fort Mitchell Company placed restrictions in the deeds for sixty-two of the lots sold in the subdivision, stating that the Park "shall be subject to control by a majority of them in interest." In addition, all of the deeds in the subdivision, except one quitclaim deed that was part of the dissolution of the company, contained statements that there was a general plan in the development of the subdivision.

In 1930, there was a "land swap" involving portions of lots 47 and 48 of the subdivision. The land swap was between Mary A. Thorpe and the remainder of the residents in the subdivision. The deed recording the land swap recites the restrictions placed upon the Park lots. Further, all of the other owners in the subdivision, including The Fort Mitchell Company, acknowledged and released these restrictions and signed the deed to convey the portion of the Park property. In exchange, Thorpe conveyed a portion of lot 48 to the owners of the lots in the Fort Mitchell Heights subdivision and The Fort

Mitchell Company "with General Warranty in dedication for the exclusive use of the property owners of the said Fort Mitchell Heights Subdivision, and for the use of the said Fort Mitchell Company, its successors or assigns, in the development or use of any adjoining property it owns or may acquire."

Except for this land swap, The Fort Mitchell Company never conveyed lots 47 and 50. There is no similar language in the chain of title for these lots. The only restrictions in the chain of title for lots 47 and 50 are found on the recorded plat.

On June 11, 1976, the City of Fort Mitchell advertised publicly for the sale of real estate that included "all of Lot 50 and a portion of Lots 47 and 48 of the Fort Mitchell Heights Subdivision . . . ." The City did not have record title of these lots and the City does not appear in the chain of title. Raymond Dickerson and Lanny Holbrook submitted a bid of $2,500.00 for the property. The City accepted the bid and conveyed the lots by quitclaim deed.

In February 2002, the Dickersons applied for and received a building permit from the City to allow construction of a fence around a portion of lot 47. After the fence was constructed, the Appellees brought this action for declaratory and injunctive relief, alleging that the fence constitutes a violation of the plat restrictions. In response, the Dickersons asserted that the restrictions were unenforceable or had been abandoned through non-use. The Dickersons also filed a third-party complaint against The Fort Mitchell Company, or its successors or assigns, asserting unrestricted ownership of the lots by adverse possession.

In separate orders entered August 18, 2004, and July 15, 2005, the trial court granted summary judgment for the Appellees. In its first order, the trial court found the Park restrictions on the plat constitute a restrictive covenant for the benefit of all of the lot owners in the Fort Mitchell Heights subdivision. In its second order, the court concluded that those restrictions run with the land and cannot be extinguished except by consent of all the lot owners in the subdivision. The court further determined that the restrictions placed on lots 47 and 50 are valid and enforceable. Finally, the court found that the fence erected by the Dickersons violates the Park restrictions and the rights of the owners, and the court directed the Dickersons to remove the fence. In an amended final judgment entered on January 20, 2006, the trial court found that the Dickersons' adverse possession claim against The Fort Mitchell Company would not preclude summary judgment for the Appellees.

On appeal, the Dickersons contend that summary judgment was inappropriate because there were issues of fact concerning the enforceability of the Park restrictions, on their defenses of non-use and abandonment, on their adverse possession claim, and whether the fence constitutes an ouster of the other lot owners. The standard of review governing an appeal of a summary judgment is well settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03.

In *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Because factual findings are not at issue, there is no requirement that the appellate court defer to the trial court. *Goldsmith v. Allied Building Components*, 833 S.W.2d 378, 381 (Ky. 1992). "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*, 807 S.W.2d at 480. Despite this high standard, we agree with the trial court that the Appellees were entitled to summary judgment on most of the issues presented in this appeal.

The Dickersons first argue that the language used by The Fort Mitchell Company on the 1911 plat was insufficient to create a valid dedication of the Park lots for public use. In particular, the Dickersons contend that The Fort Mitchell Company's restrictions of the Park lots to "the exclusive use of the property owners in this subdivision and for the use of the Fort Mitchell Company" is inconsistent with a general

dedication for public use. At the least, the Dickersons assert that there were genuine issues of material fact on this question which would preclude summary judgment.

We agree with the Dickersons that dedication must be proven by evidence of the intent of the dedicator. *Hofgesang v. Woodbine Ave. Realty Co.*, 414 S.W.2d 580, 584-85 (Ky. 1967). But it is equally well-established that such intent need not appear explicitly on the face of the deed or plat, but may be proven by other circumstances and conditions demonstrating such intention. *See id.* at 585, holding that intent to dedicate need not be express but,

> often rests on mere conduct of the owner of land relied on by others to their injury so as to constitute an estoppel against the owner, and effectuate a dedication notwithstanding that there was never in the mind of the owner any actual intent to dedicate, the theory being that the owner must be held to intend the reasonable and necessary consequences of his acts.

See also Cassell v. Reeves, 265 S.W.2d 801 (Ky. 1954); *City of Hazard v. Eversole*, 313 Ky. 254, 230 S.W.2d 921 (1950); and *Central Land Co. v. Central City,* 222 Ky. 103, 300 S.W. 362, 364 (1927), holding that where the dedicator's intent was not clearly stated on the plat, the intent may be inferred from the context of the plat and evidence of actual public use for the intended purpose. In this case, the intent to dedicate the lots for Park use appears on the face of the plat, so no additional evidence is necessary to prove the dedication. *Shurtleff v. City of Pikeville*, 309 Ky. 420, 217 S.W.2d 976, 977 (1949).

We need not reach this question, however, because the trial court did not find that the 1911 plat constituted a dedication of the lots for public use. Rather, the trial court found that the plat and the language in the deeds of the other subdivision lots

constitute a restrictive covenant. We agree. Where the owner of a tract of land adopts a general scheme for its improvement, dividing it into lots and conveying these with uniform restrictions as to the purposes for which the land may be used, such restrictions create equitable easements in favor of the owners of the several lots. Such restrictions are not for the benefit of the grantor alone, but for the benefit of all purchasers. Such restrictions are referred to as a reciprocal negative easement. The easement runs with the land sold by virtue of the express burden placed upon it and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. *Rieger v. Wessel*, 319 S.W.2d 855, 857-58 (Ky. 1958).

The proof necessary to prove a reciprocal negative easement, like the proof necessary to show a dedication, depends upon the intention of the grantor. *Brueggen v. Boehn*, 344 S.W.2d 404, 405 (Ky. 1961). The essential elements for proof of a reciprocal negative easement are a common grantor, a general plan or scheme of restriction, and restrictive covenants running with the land, in accordance with such plan or scheme and within the plan or scheme area in deeds granted by the common grantor. That is, in order for a reciprocal negative easement to arise, there must have been a common owner of the related parcels of land, and in his various grants of the lots, he must have included some restrictions, either affirmative or negative, for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be similarly treated, so that once the plan is effectively put into operation, the burden he has placed upon the land conveyed is by operation of law reciprocally placed upon the land retained.

First Security National Bank & Trust Co. of Lexington v. Peter, 456 S.W.2d 46, 50 (Ky. 1970), *citing* 20 *Am. Jur. 2d 733, Covenants, Conditions, etc.*, § 173.

The Dickersons first argue that there was no common grantor among lots 47 and 50 and the lots owned by the other Fort Mitchell Heights subdivision owners. However, the Dickersons acquired lots 47 and 50 by quitclaim deed outside of the regular chain of title. Consequently, the Dickersons could not acquire any more rights in the lots than their grantor had to convey. 23 *Am. Jur. 2d Deeds* § 276, pp. 255-56 (2002 & 2007 Supp.). The quitclaim deed from The City of Fort Mitchell could not extinguish the rights of the other lot owners.

We further agree with the trial court that restrictions can be placed upon property by a recorded plat. When lots are sold in reference to the recorded plat, the restrictions become one with the deeds and with the chain of titles and constitute constructive public notice. *Parrish v, Newbury*, 279 S.W.2d 229, 232 (Ky. 1955). As the trial court noted, the restrictions on lots 47 and 50 appear clearly on the recorded plat and in the chain of titles of the collateral conveyances. The deeds involved in the 1930 land swap further demonstrate the intent of The Fort Mitchell Company. Therefore, any interest which the Dickersons acquired through their quitclaim deed was subject to the recorded Park restrictions.

The Dickersons next contend that The Fort Mitchell Company's reservation of a general power to dispense with the restrictions negates the purpose of uniform development from which the mutuality of right among lot owners in a platted subdivision

is deemed to arise. *Brueggen*, 344 S.W.2d at 405. However, the existence of such a reservation does not automatically destroy mutuality. Rather, the reservation of the right to amend restrictions is only one factor to be considered in determining whether the grantor intended to establish a uniform plan of development, and all of the language in the restrictions should be considered in arriving at the grantor's intention. Factors to be considered in this determination include: whether the reservation is consistent with the general surroundings in the subdivision development; whether it is in harmony with other buildings and structures therein; and whether it is in compliance with the specific restrictions set out in the plan of development for the subdivision. *La Vielle v. Seay*, 412 S.W.2d 587, 593 (Ky. 1966). *See also* Annotation, "Validity and construction of restrictive covenant requiring consent to construction on lot," 40 A.L.R.3d 864, § 4, pp. 879-81 (1971).

In this case, The Fort Mitchell Company reserved a right to use the streets and the Park lots only for the benefit of the adjoining lots. Such a reservation is entirely consistent with the general plan for the development of the subdivision, as evidenced by the recorded plat. A party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Steelvest*, 807 S.W.2d at 482. In the absence of any contrary evidence negating the showing that The Fort Mitchell Company established the Park lots for the benefit of all of the Fort Mitchell Heights subdivision owners, the trial court properly granted summary judgment on this issue.

We also agree with the trial court that the Dickersons failed to show any genuine issue of fact on their defenses that the Park restrictions have become unenforceable through non-use. The right to enforce a restrictive covenant may be lost by waiver, abandonment, or by a general change in the character of the neighborhood to which the covenant applied. *Bagby v. Stewart's Executor*, 265 S.W.2d 75, 77 (Ky. 1954). Likewise, the restrictions may become unenforceable when the conditions have been disregarded over a period of years by the owners of most or all of the lots in the group so that the enforcement of the restrictions against those who have not violated the covenants would be oppressive and inequitable. *Goodwin Bros. v. Combs Lumber Co.*, 275 Ky. 114, 120 S.W.2d 1024 (1938).

But in this case, there is no showing that there has been a change in conditions justifying a release of the restrictions. Similarly, the Dickersons make no showing that the conditions have been disregarded by the other owners in the Fort Mitchell Heights subdivision. To the contrary, the character of the neighborhood has remained unchanged since 1911. Furthermore, lots 47 and 50 remained unchanged since the land swap in 1930 until the Dickersons built the fence in 2003. In short, there was no evidence showing that the Park restrictions have been abandoned or waived.

For the same reason, we find that the Dickersons' claim of adverse possession did not foreclose summary judgment. It is well-established that a claimant seeking to prove adverse possession must demonstrate that the possession had been hostile and under claim of right, actual, exclusive, continuous, open, and notorious for a

period of at least fifteen years. *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Company, Inc.*, 824 S.W.2d 878, 880 (Ky. 1992). In this case, the Dickersons make no showing of any open or continuous activity on lots 47 and 50 which would be adverse to the rights of the other lot owners. Indeed, the Dickersons' construction of the fence in 2003 was the first activity on the lots which could be considered adverse. Therefore, the Appellees were entitled to summary judgment dismissing this claim.

The Dickersons next complain that the trial court failed to rule on its third-party complaint naming The Fort Mitchell Company, or its successors and assigns. But once the trial court found the Park restrictions to be valid and enforceable, those claims became moot. The reciprocal negative easement may be enforced by the other Fort Mitchell Heights subdivision lot owners, regardless of the right or standing of The Fort Mitchell Company. *Black v. Birner*, 179 S.W.3d 873, 878 (Ky.App. 2005). Therefore, the pending claims against The Fort Mitchell Company were properly dismissed.

Finally, the Dickersons assert that the trial court erred in finding that their construction of a fence constitutes an ouster as a matter of law. They maintain that the Fort Mitchell Heights subdivision lot owners continue to have access to the Park lots. In particular, they point to a passway across lot 52 to lot 47. They also point out that lot 50 fronts on Park Road and is not fenced. Therefore, the Dickersons argue that summary judgment was not appropriate on this issue.

As a general rule, the question of whether an ouster has occurred is an issue of fact. *MCI Mining Corp. v. Stacy*, 785 S.W.2d 491, 495 (Ky.App. 1989). The trial

court determined that the Dickersons' actions in erecting the fence were clearly intended to impede access "to the use and enjoyment of those lots as a park by any lot owner in the subdivision [and] violates the very purpose and essence of a park . . . ." In reaching this conclusion, the trial court focused on the Dickersons' claims that the Park restrictions are no longer enforceable. The court also noted that the Dickersons have posted "No Trespassing" signs at the remaining access points to the lots. Thus, the court concluded that the Dickersons' actions were intended to exclude the other lot owners from the Park lots. *See Cary-Glendon Coal Co., Inc. v. Warren*, 303 Ky. 846, 198 S.W.2d 499 (1947).

We agree to the extent that the trial court correctly found the Park restrictions to be a valid and enforceable easement running to the benefit of the lot owners in the Fort Mitchell Heights subdivision. And we also agree that the posting of "No Trespassing" signs is clearly in derogation of the rights of the other lot owners. But as owners of the servient estate, the Dickersons are entitled to alter access to the Park lots so long as the change does not result in a material inconvenience to the rights of the owners of the dominant estate. *Stewart v. Compton*, 549 S.W.2d 832, 833 (Ky.App. 1977).

The Dickersons presented evidence that the Appellees continue to have access to the Park lots by other routes. Likewise, the Appellees presented evidence showing that the fence erected by the Dickersons does in fact result in a material inconvenience to their access to the Park. We conclude that this constitutes a genuine issue of material fact precluding summary judgment as to this one issue. Therefore, we

must remand this matter for additional factual findings to determine whether the fence erected by the Dickersons causes a material inconvenience to the Appellees' access to, and use and enjoyment of the Park lots. In addition, the trial court should consider whether there are acceptable remedies short of requiring the Dickersons to remove the entire fence.

Accordingly, the judgment of the Kenton Circuit Court is affirmed in part, reversed in part, and remanded for additional findings as set forth in this opinion.

KNOPF, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: With respect to my esteemed colleagues, I must dissent as to their interpretation of whether ouster has occurred as a matter of fact. My colleagues believe that there is a jury question on the issue of ouster. I believe the trial court was correct as a matter of law. The facts in this action must conclude that no ouster has occurred. It has been well established that fifteen years is required for co-tenants to lose title to property by virtue of ouster. *May v. Chesapeake & O. Ry. Co.,* 212 S.W. 131 (Ky. 1919). Ouster, in effect, is a claim of adverse possession against a joint tenant. In order for a claimant to demonstrate an ouster has occurred, the claimant most prove the same elements necessary for adverse possession. *Wood v. Wingfield,* 816 S.W.2d 899, 903 (Ky. 1991). *White Log Jellico Coal Company, Inc., v. Paula Zipp, Alan Zipp and Gatliff Coal Company,* 32 S.W.3d 92 (Ky. 2000).

The parties have agreed that in February 2002, the Dickersons applied for and received a building permit from the City to allow construction of a fence around a portion of lot 47.

This fence, in no manner, was constructed within fifteen years of the date of the claim for ouster. For those reasons, I would affirm the trial court's judgment.

BRIEFS FOR APPELLANTS:

Michael T. McKinney
Burlington, Kentucky

BRIEF FOR APPELLEES:

Gerald F. Dusing
Covington, Kentucky