

RENDERED: JULY 27, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001046-MR

WILLIAM E. WATSON AND BONITA WATSON

APPELLANTS

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 04-CI-00076

ANNA K. SMITH AND HIRIAM P. SMITH

APPELLEES

OPINION REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,¹ SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: William E. Watson and Bonita Watson appeal from an order and judgment of the Livingston Circuit Court, entered on April 18, 2006. It is undisputed that the Watsons' neighbors, Anna K. Smith and Hiriam P. Smith, built a sidewalk that encroaches on the Watsons' property. At issue is the court's choice of remedy. Following a bench trial, the court concluded that Smith had acted in good faith in constructing the sidewalk and that the hardship on Smith of removing the sidewalk

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.

outweighed the hardship on the Watsons in allowing it to remain. The court accordingly ordered the Smiths to pay monetary damages to the Watsons. On appeal, the Watsons argue that the court erred in failing to grant them injunctive relief by ordering the Smiths to remove the sidewalk. We agree, and therefore reverse.

The Watsons and the Smiths own adjoining tracts of property in Livingston County, Kentucky. The Watsons, who live in Florida, purchased their property in 1986. Mr. Watson's mother resides in a house on the property. The Smiths purchased the adjacent property in 1995. In 1997, they tore down the house that stood on the property. In 2001, the Smiths constructed a duplex, one part of which was to be used as an office building, on the property. They did not have the property surveyed at that time, nor did they offer any evidence that they attempted to ascertain their boundaries prior to construction by consulting either the description in their deed or the survey referenced in the deed.

During the course of the construction, Watson's mother informed Watson that the flags marking the new construction appeared to be closer than the line of the former building. When Watson was next passing through Kentucky, he measured his lot and discovered that the construction flag was about one inch beyond the Smiths' property on his property. Watson informed Smith that the flag was about one inch over the line but that he "was not going to argue over an inch." Thereafter, on several occasions, the Smiths mowed or had someone mow the grass past their boundary and on the Watsons'

property. On more than one occasion, Watson's mother confronted Smith about trespassing on the Watson property.

The Smiths eventually constructed a concrete sidewalk leading from the new duplex building to the street. Ultimately, they had a survey performed which confirmed that the property line was located where Mr. Watson had indicated. It is undisputed that the sidewalk encroaches upon the Watsons' property for a length of 21.5 feet, in a width ranging from 1.4 feet at one end to 1.9 feet at the other.

The Watsons filed a complaint against the Smiths claiming unlawful and tortious trespass and requesting injunctive relief, consisting of the removal of the sidewalk from their property and restoration of the property to the condition in which had existed prior to the encroachment, and monetary damages for the loss of use of their property. The Smiths asserted the affirmative defense of estoppel, and stated a counterclaim of adverse possession.

At trial, Smith testified that he was mistaken as to the location of the boundary because various structures which had existed on the property when he purchased it, including the house which he had demolished, a water spigot, a power pole, and a sidewalk, had also encroached onto the Watson property. As a result, he contended, the Smiths and Watsons were mutually mistaken about the location of the boundary line.

The trial court directed a verdict for the Watsons on the Smiths' counterclaim of adverse possession. The court further found, however, that there had

been a genuine dispute about the location of the boundary line, and that the Smiths had constructed the encroaching sidewalk in good faith. The court ordered that the property encroached upon should be transferred by quitclaim deed to the Smiths and that the Watsons should receive monetary damages of \$632.25. The trial court appears to have been motivated in its choice of remedy by the fact that if the sidewalk was removed, the Smiths' duplex would no longer comply with regulations governing accessibility for the disabled to commercial buildings.

On appeal, the Watsons argue that the court erred in its choice of remedy. They contend that, absent a legal basis for estoppel, an owner is entitled to an injunction for the removal of trespassing structures, and that the finding of good faith was an insufficient basis for allowing the encroaching sidewalk to remain.

It is a well-established principle of law that an owner is entitled to an injunction for the removal of trespassing structures. It was enunciated in Kentucky in an unpublished case dating from the late nineteenth century, which stated, “[t]here is no such law or equity that would compel the owner of land to surrender his title because another had made improvements upon it by mistake.” *Crain v. Hargis*, 1873 WL 11139, 6 Ky.Op. 410 (Ky.1873).

There are three doctrines which may operate to the advantage of the encroaching party in the case of a disputed boundary: (1) the “agreed boundary” doctrine which applies when there is clear proof of a parol agreement between the parties setting forth an agreed boundary; (2) when there is some evidence of an oral agreement and the

parties take possession to this agreed line for the statutory period required for adverse possession; and (3) equitable estoppel, which occurs when a landowner knows the true line but nonetheless silently permits an adjoining owner to make substantial improvements unknowingly past the line. *See Embry v. Turner*, 185 S.W.3d 209 (Ky.App. 2006) *citing Faulkner v. Lloyd*, 253 S.W.2d 972 (Ky. 1952).

In order to establish an equitable estoppel against one asserting title to real property, the party attempting to raise it must show an actual fraudulent representation, concealment or such negligence as will amount to a fraud in law, and that the party setting up such estoppel was actually misled thereby to his injury. In all instances a clear strong case of estoppel must be made out in order to pass title by reason thereof.

Id. at 215-16, *citing Jones v. Travis*, 302 Ky. 367, 369, 194 S.W.2d 841, 842 (Ky. 1946).

None of these doctrines was shown to apply in this case. There was no finding of a parol agreement between the parties as to the location of the boundary. As to the second doctrine, the trial court directed a verdict for the Watsons on the counterclaim of adverse possession. Finally, the third doctrine of equitable estoppel was not shown since Watson did not silently acquiesce in the construction of the sidewalk, nor did he in any manner induce or mislead Smith to build the encroaching sidewalk without checking the survey or measuring his boundaries.

For the foregoing reasons, the judgment of the Livingston Circuit Court is hereby reversed and remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mark C. Blankenship
Murray, Kentucky

BRIEF FOR APPELLEE:

William F. McGee, Jr.
Smithland, Kentucky