

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000866-MR

TRACY MAY;
RAINA MAY

APPELLANTS

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 06-CI-00286

DAVID LEWIS

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

KELLER, JUDGE: Tracy and Raina May (the Mays) appeal from the summary judgment of the Johnson Circuit Court. For the reasons set forth below, we vacate the trial court's summary judgment and remand.

FACTS

At the outset, we note that David Lewis (Lewis) has not filed a brief. The Mays have not sought any sanctions against Lewis for his failure to do so. However, *sua sponte*, we

will accept as accurate the statement of facts and issues as presented by the Mays pursuant to CR 76.12(8)(c).

On July 14, 2006, Lewis filed a complaint in the Johnson Circuit Court, alleging that he owned real property adjacent to or near property owned by the Mays. According to the complaint, the Mays' property contained a county road or public passway that served both the Mays' property and Lewis's property. Lewis complained that the Mays had blocked that county road or public passway, denying Lewis access to his property. In their answer, the Mays stated that Lewis did not own any right-of-way or easement over their property. The Mays also stated that their property has a public passway and private road, but the public passway and private road are at the opposite end of the Mays' property from the Lewis property and are not related to the Lewis property. With their answer, the Mays filed a counterclaim asserting that Lewis had placed a "cloud" on their property. The Mays also filed a third-party complaint joining as parties Phillip and Katrinka Collins, who sold Lewis his property. The Collinses are not parties to this appeal.

On November 8, 2006, Lewis filed a motion for summary judgment. In support of his motion, Lewis argued that the passway or county road was dedicated by way of the plat attached to the complaint. Lewis argued that, because the road had been dedicated, the only way to close it would be to comply with the requirements of KRS 84.405, which requires action by the fiscal

court. Until such closing takes place, members of the public are permitted to use the road. In their response, the Mays stated that the road "long ago washed out and was never rebuilt, it having gone down the stream adjacent thereto." The trial court denied Lewis's motion for summary judgment.

Lewis then moved for a judgment on the pleadings or, in the alternative, renewed his motion for summary judgment, relying solely on what he had filed with his first motion for summary judgment. In their response, the Mays noted that they had filed an affidavit indicating that the passway or road was not contiguous with Lewis's property and that a portion had broken off and washed away. Subsequently, the Mays filed a number of affidavits indicating that the passway had washed away, that the right-of-way had never crossed the Mays' property, or that access to the Lewis property is through the property of two other adjacent landowners. With their response, the Mays filed a motion for summary judgment, citing to the affidavits they had previously filed.

Ultimately, the trial court granted Lewis's motion and ordered the Mays "to remove any obstructions from the road in question" and to "do nothing that will interfere with free ingress and egress of the Plaintiff or the public in general." In so ruling, the trial court found that the road in question had been dedicated as a public road on a subdivision plat. Based on KRS 413.050(2), the court then found that the Mays

"have not filed the required written notice that is called for in" that statute. It is from this judgment that the Mays appeal.

In their appeal, the Mays argue that there are issues of fact regarding the existence and location of the road in question and that the trial court erred in granting summary judgment. As noted above, Lewis has not filed a brief.

STANDARD OF REVIEW

The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.

Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any 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). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.

Id. at 481, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2502, 2514, 91 L.Ed.2d 202 (1986). In *Steelvest* the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

ANALYSIS

We must first determine if the road in question was dedicated, as determined by the trial court. A road can become a public road under KRS 82.400 or by "general and long continued use of a passway by the public." *Whilden v. Compton*, 555 S.W.2d 272, 274 (Ky.App. 1977). As to the latter, the affidavits produced by the Mays indicate that there may have been a ten-foot to twelve-foot passway between the Mays' property and Jenny's Creek; however, "many years ago [that passway] washed away and fell into Jenny's Creek." Therefore, the affidavits raise a question of fact regarding the general and long continued use of the passway by the public. In light of that question of fact, the trial court could not have found, through summary judgment, that the passway was public under the rule set forth in *Whildon*.

KRS 82.400 sets forth the procedure for dedicating a public way or easement. At the outset, we note that the record is unclear as to whether the land in question is

within the city or in the county. However, in his complaint, Lewis states that the land in question is in Johnson County and he refers to the passway as a "county road." Therefore, we will only look to section two of KRS 82.400, which applies to counties. KRS 82.400(2) provides that

where streets or public ways as dedicated on the final subdivision plat have been constructed, inspected, and approved in accordance with the subdivision regulations . . . the dedicated street or public way shall automatically be deemed beneficial to the public interest and shall be, by operation of law, automatically accepted for maintenance by the consolidated local government, city, or county, respectively, forty-five (45) days after inspection and final approval, and shall be a public way for all purposes

It is clear from the evidence that a subdivision plat was filed showing the existence of a public right-of-way running from Jenny's Creek to Kentucky Highway 823. However, there is no evidence in the record that any road was constructed, inspected, or approved. Furthermore, the affidavits filed by the Mays indicate that any portion of the right-of-way near Jenny's Creek no longer exists and ceased to exist some time ago. This clearly raises a factual question regarding the construction, inspection, and/or approval of the road by the county. In light of

these factual questions and deficits in the record, the trial court's summary judgment was inappropriate.

Finally, we are confused by the trial court's citation to KRS 413.050. Section two of that statute states that the limitation period

shall not run in favor of any person in possession of any part of any public road until written notice is given to the county judge/executive of the county in which the road is situated that the possession is adverse to the right of the public to the use of the road.

It appears that the Mays did not argue before the circuit court and are not arguing before us that they have adversely possessed the road. They argued and are arguing that the road does not exist or that, if it exists, it does not exist where Lewis says it does. Therefore, we do not discern that KRS 413.050 currently has any application herein.

CONCLUSION

Because the Mays have raised genuine issues of material fact, the trial court's summary judgment was not appropriate. Therefore, the trial court's summary judgment is vacated and this matter is remanded for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Heather M. Gearheart
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