

RENDERED: August 14, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-1470-MR

CLAUDIA HOLLIN and EDWARD HOLLIN

APPELLANTS

V. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 95-CI-0069

OPAL COWDEN

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, KNOFF, and KNOX, Judges.

COMBS, JUDGE: This appeal involves a property dispute concerning the ownership of a specific tract of land located in Laurel County, Kentucky. The Laurel Circuit Court adjudged that Opal Cowden (Cowden) was the owner of the real property at issue. Subsequently, Claudia and Edward Hollin (the Hollins) filed a CR 60.02 motion alleging mistake, inadvertence, or excusable neglect. The CR 60.02 motion was denied by the Laurel Circuit Court. We affirm.

Cowden, on behalf of herself and her other co-tenants, filed a complaint against the Hollins on February 3, 1995, claiming an undivided interest in the property in controversy. The complaint accused the Hollins of destroying markers, monuments, and improvements on the property, cutting and removing timber, blocking and obstructing access to the property, and threatening Cowden in order to keep her off the property.

On February 6, 1995, the Laurel Circuit Court issued an order restraining and enjoining the Hollins from coming upon the property in dispute. This order also restrained the Hollins from interfering with Cowden's right to come and go and from harming, threatening, or harassing Cowden.

Next, the Hollins filed a motion to dismiss. They alleged that Cowden had failed to join parties who were indispensable to the action.

On April 3, 1995, the Laurel Circuit Court entered an agreed order consolidating this case with another (filed previously by various other co-tenants) for the purpose of bringing before the court at once all persons owning or having an interest in the land for a final adjudication of the boundary line to be binding on all of the parties. At this time, the court converted the restraining order to a temporary injunction with the caveat that all parties be able to enter the land for investigatory and survey purposes -- free of interference from one another -- in order to complete discovery and to prepare for trial.

On August 28, 1995, the Hollins filed their answer.¹ In it, they asserted that Claudia Hollin was the actual owner of the property -- having acquired it through adverse possession. On December 8, 1995, the trial court set forth a discovery schedule ordering Cowden to complete her proof within four months, granting the Hollins two months from the date of the closing of Cowden's evidence to complete their proof, and allowing Cowden thirty days thereafter for rebuttal. On April 29, 1997, Cowden made a motion for leave to submit this action to the court for a decision on the merits. Cowden provided the court with the testimony of six witnesses while the Hollins offered no testimony at all. They essentially failed to conduct any discovery.

Opal Cowden testified that she had grown up on the land and that she had lived there from her birth until 1971. Since 1971, Cowden explained, she visited the property two to three times per year. Cowden produced many photographs of herself, her family, and friends on the property to corroborate her testimony. She also testified that she never saw the Hollins having cattle on the property, farming, logging, or engaging in any other activity there. She emphasized that had she been aware of any activity on her property, she would have ended it.

¹We note that the answer was not filed in timely fashion. However, no objection was made and any defect as to procedure thus was waived.

Ralph Peters, a registered land surveyor, also testified. After reviewing the parties' deeds, he determined that Opal Cowden owned the property in question and that the Hollins were attempting to claim over thirty acres of her land.

The Laurel Circuit Court entered its findings of fact, conclusions of law, and judgment on May 19, 1997. The court found that Cowden's grandparents had acquired the disputed tract of land by deed dated April 22, 1885, and concluded that Opal Cowden is the owner of all the real property in dispute. The Hollins filed a CR 60.02 motion alleging mistake, inadvertence, or neglect. The Laurel Circuit Court denied this motion, and the Hollins' appeal followed.

The Hollins argue that they are the true owners of the land in question by right of title as well as by adverse possession. They argue that Cowden cannot trace her title back to the Commonwealth of Kentucky. Pursuant to their CR 60.02 motion, the Hollins request that the May 19, 1997, judgment of the court be set aside and that they be allowed to introduce new evidence -- including several affidavits. They seek to be awarded "all proper and equitable relief" to which they may be entitled.

The purpose of a CR 60.02 motion is:

[t]o bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the

party was prevented from so presenting by duress, fear, or other sufficient cause.

McQueen, Jr. v. Commonwealth, Ky., 948 S.W.2d 416 (1997), citing Black's Law Dictionary, Fifth Edition, 487, 144. None of these circumstances is present in this case. Additionally,

[a] CR 60.02 movant must demonstrate why he is entitled to this special, extraordinary relief. ...[h]e must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

supra. In this case, the Hollins have utterly failed to demonstrate why they are entitled to special or extraordinary relief; they have offered no justification or explanation for having failed to submit to the trial court the evidence upon which they now rely.

Addressing the Hollins' 60.02 motion, the Laurel Circuit Court explained as follows:

The Court has reviewed the provisions of CR 60.02 and finds that they do not apply in this case. In short, there has been no mistake or excusable neglect. There is no claim of newly discovered evidence which was not readily available during the proof time. There is no claim of false evidence or fraud. Nor have any other valid grounds been raised.

Court Order, June 17, 1997. We agree. Our standard of review is the stringent one of abuse of discretion. According to Fortney v. Mahan, Ky., 302 S.W.2d 842 (1959):

Any action under CR 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse.

After a thorough review of the facts of this case, the arguments of counsel, and the applicable law, we find no abuse of discretion. The Hollins filed a CR 60.02 motion in an attempt to introduce "new" evidence, evidence which in fact was available and could have -- and therefore should have -- been introduced at trial. They have not provided any compelling reason why this evidence was not introduced at the trial level. Therefore, their CR 60.02 motion is unfounded.

We therefore affirm the judgment of the Laurel Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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