

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001191-MR

ROBERT L. MILBY; RUTH MILBY;
ROBERT STIVERS; and, JOAN STIVERS

APPELLANTS

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS HOPPER, JUDGE
ACTION NO. 96-CI-00677

LEWIS HAMMONS; BEA HAMMONS;
AND, JAMES VAUGHN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, KNOX, AND MCANULTY, JUDGES.

KNOX, JUDGE: This appeal is taken from an order of the Laurel Circuit Court granting summary judgment in favor of appellees, who had filed a declaratory judgment action seeking determination of their rights with regard to a roadway traversing appellants' property. The circuit court found that the roadway in question constituted an easement which appellees had acquired by way of express grant, the location of which remained unchallenged by appellants for nearly sixteen (16) years. We affirm.

Appellants, Robert Milby and Robert Stivers, own a tract of land located at the intersection of Kentucky Highway

1535 and Kentucky Highway 80 in Laurel County. Appellee, Lewis Hammons, owns land to the east of appellants' tract, having acquired it in 1962. At that time, an old county road, located off of Highway 1535, ran diagonally across appellants' property to Hammons' property. While it is unclear from the record to what extent and with what frequency Hammons used the road, he apparently did, on occasion if not most of the time, access his property by way of the road.

In 1980, Milby and Stivers became interested in strip mining their land. They learned, however, they would not be able to obtain a mining permit unless the old county road which accessed Hammons' property was officially closed. As such, they made application to the Laurel County Fiscal Court to have the road closed.

Meanwhile, counsel for Milby and Stivers, James Ridings, contacted Hammons concerning his clients' plans to strip mine their property and their need to have Hammons' access road closed. Apparently, Ridings proposed that if Hammons would not object to the closing of the road, Milby and Stivers would grant him an easement, located elsewhere, across their property. Hammons agreed to the proposal and, shortly thereafter, attorney Ridings presented the following document, entitled "Contract," to Hammons for his signature. On October 16, 1980, Milby, Stivers, Hammons, and Hammons' wife, Laura (now deceased), executed the document, which stated:

This CONTRACT made and entered into on this 16th day of October, 1980, by and between Bertram Robert Stivers and Robert L. Milby, both of Laurel County, Kentucky, first

parties, and Lewis Hammons, and Laura Hammons, his wife, of Route 2, Box 137A, London, Kentucky 40741, second parties.

WITNESSETH: That for and in consideration of the relinquishment by second parties of their privilege and right of objection to the closing of a road across the property of Bertram Robert Stivers and Robert L. Milby located in the East Colony area in an undeveloped subdivision (as described in Deed Book 233, Page 501 in the Laurel County Court Clerk's Office) known as the Upper Colony Subdivision and in consideration of ONE DOLLAR (\$1.00) cash in hand paid by first parties to second parties, the adequacy, sufficiency, and receipt of all of which is hereby acknowledged, the first parties agree to give to second parties, their heirs and assigns forever, without charge or cost to second parties, an easement of not more than thirty (30) feet and not less than twenty-five (25) feet for ingress and egress across the said property of first parties, Bertram Robert Stivers and Robert L. Milby, from Sinking Creek Road (Highway 1535) to the property presently owned by second parties which property is located adjacent to the said property of first parties.

Two (2) weeks later, on October 30, 1980, the fiscal court officially closed the old county road on appellants' property, without objection from the Hammonses.

Appellants' property was strip mined for a two (2) to three (3) year period, in the early to mid 1980s. Hammons began accessing his property by way of a dirt road on the south side of appellants' property which ran from Highway 1535 to his property, parallel with Highway 80. The strip mining operation was later abandoned, and state officials began reclamation of the area in late 1987 or early 1988. Although Hammons' use of the road was interrupted for a brief period during which appellants' property was being reclaimed, once reclamation was complete, Hammons

resumed use of the road to access his property, and has used it for such purpose since that time. When appellee, James Vaughn, acquired a tract of land adjoining Hammons' property, in 1987, Hammons assigned to Vaughn the right to use the access road. Vaughn later graveled, and otherwise, improved the road.

It appears that in the mid 1990s, appellants and neighboring property owners determined to subdivide their land, and approached Hammons with a deed of easement granting Hammons an access road in a different area of their property than where the road is now located. According to Hammons, the proposed easement was approximately three (3) times the length of the existing access road. Hammons refused to execute the document. On August 22, 1996, nearly sixteen (16) years after the parties executed the 1980 "Contract," Milby forwarded letters to Hammons and appellee James Vaughn, both of which stated, in pertinent part:

As I am sure all of you must know, Judge Stivers and I, Mr. and Mrs. James Ridings, and Mr. and Mrs. Mike Reed have offered a permanent easement over our property by means of a Deed of Easement which you apparently have refused to sign. You have been furnished with a sketch showing the easement.

We have previously indicated, and again repeat our willingness to discuss this matter with you, and you have shown no interest in so doing.

Therefore, unless the Deed of Easement is fully executed by each of you, this is to advise that on September 23rd 1996, the passageway which you have surreptitiously placed across our property will be closed and barricaded at each end. Also, the West Laurel Water District will be notified to remove the water line which is on our property without authorization.

On September 24, 1996, Hammons and Vaughn instituted this declaratory judgment action, requesting that their rights concerning the use of the currently existing access road be determined. Specifically, Hammons alleged the agreement he executed in 1980 constituted an easement and that appellants, having acquiesced in the location thereof for sixteen (16) years, could not now deny him the use of the easement. Appellants counterclaimed, alleging trespass. They took the position the agreement executed in 1980 was not the grant of an easement, but merely their promise to grant Hammons an easement at some point in the future. They maintained that Hammons, having refused to accept the easement they offered him in 1996, never acquired the right to access his property by way of theirs and, as such, was trespassing.

The affidavits in the record establish the following. Hammons claims that attorney Ridings represented the document signed by the parties on October 16, 1980, as an easement to which Hammons was entitled immediately thereafter. As such, Hammons claims, in November 1980, just after the parties executed their agreement, he began accessing his property by way of the above-referenced lane on the south side of appellants' property. Hammons claims this roadway was specifically pointed out by attorney Ridings in 1980 as constituting the easement contemplated in the parties' "Contract" of October 16, 1980.

Further, Hammons claims, the location of the road did not change when strip mining operations began on appellants' property. The strip mine operator, and eventually the

reclamation supervisor, replaced the roadway in the same location each time its use was interrupted. In fact, Hammons claims, he spoke with Robert Stivers concerning where the access road should be located once reclamation was complete, and whether the road should be relocated to another area of the property or left where it was. Allegedly, Stivers told him to "put the road back where it is."¹ Finally, Hammons claims he has used the road continuously from 1980 through the present time, with the exception of the brief period during which appellants' land was being reclaimed.

Stivers, by way of affidavit, denies he knew the access road existed and, further, denies he gave any indication whatsoever of where it should be located. He claims he did not discover the existence of the road until sometime between 1989 and 1991, at which time he spoke with appellee Vaughn to let Vaughn know he did not approve of the location of the road.

¹The record includes an affidavit from the reclamation supervisor, Wesley Dean Sizemore, verifying Hammons' claim that, prior to reclamation, a roadway ran from Highway 1535, along the north right-of-way line of Highway 80, to the property owned by Hammons. Further, Sizemore testified that he, appellee James Vaughn, and Hammons spoke with Robert Stivers concerning where the access road should be located following reclamation. He testified:

I advised the gentlemen that unless I heard something of an agreement between the parties as to a different location, that I would replace the road where it was before reclamation commenced. I never heard anything further from the parties, and the road was relocated and gravelled in the same location that it was when I commenced reclamation operations.

Likewise, attorney Ridings claims, by way of affidavit, he never specified to Hammons the exact location of the easement contemplated in the parties' 1980 agreement, and denies he represented the agreement as a grant of an easement. Ridings insists the document was merely a contract to grant an easement at some point in the future.

Hammons moved for summary judgment, arguing he had acquired an easement, located at the currently existing access road, by way of express grant, by implication, by prescription, or alternatively, by estoppel. The circuit court ruled in his favor, finding Hammons acquired an easement by express grant:

1. The Court is of the opinion the contract in question is a duly executed bilateral contract granting an easement within its four corners with consideration given by both sides to enforce the terms which include the granting of a 25-30 foot easement for ingress and egress across the said property of co-owners, Mr. Stivers and Mr. Milby from Sinking Creek Road [Hwy. 1535] to the Hammons' property.

2. Since the Defendants did not select the location of the easement within a reasonable time, Hammons could make the selection. Daniel v. Clarkson, Ky.[,] 338 S.W.2d 691 (1960).

3. The Court is of the opinion the Defendants impliedly acquiesced to this particular location of the easement from November, 1980 to the date of the filing of the Complaint herein on September [24], 1996 for a period of 15 years and 11 months;

- (a) by failure to affirmatively delineate a specific location of an easement as was their obligation under the Contract,

- (b) by having received the benefit of Mr. and Mrs. Hammons' agreement in the bilateral Contract to not object to the closing of the County road which ran

southeast from the Sinking Creek Road to the Hammons' property in order that the property may be strip mined,

(c) and by the evidence herein which indicates the Defendant, Mr. Stivers[,] was aware of the location of the roadway and continued use by the Plaintiffs in March of 1988, or between 1989 and 1991, as asserted by the Plaintiffs, and Defendants, respectively.

On appeal, appellants argue this case was not ripe for summary judgment in that several issues remain in dispute, one of which is whether the "Contract" constituted an easement or merely a contract to grant an easement. As concerns the location of the easement, appellants insist these questions must first be resolved prior to resolution of this matter: (1) whether attorney Ridings, during his discussions with Hammons in 1980, actually pointed out the easement where it now exists; (2) whether, after reclamation of his property, Stivers gave permission to place the road where it had been located prior to the commencement of strip mining operations; and, (3) whether Milby and Stivers acquiesced to the location of the road.

Hammons and Vaughn counter that interpretation of the "Contract" is a matter of law, not a matter of fact, and as such, is an issue appropriate for summary judgment. As for the remaining allegedly disputed issues, they maintain these issues do not involve "material" facts pertinent to resolution of this matter and, thus, are not relevant to this appeal and need not be addressed. We agree.

We are mindful that our review is limited to determining whether there were, in fact, no genuine issues

remaining as to any material fact and whether appellees were entitled to judgment as a matter of law. Scifres v. Kraft, Ky. App., 916 S.W.2d 779 (1996).

There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. "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." Summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . . [.]"

Id. at 781. (Citations omitted).

"The construction as well as the meaning and legal effect of a written easement, however compiled, is a matter of law for the court." Bank One v. Commonwealth, Ky. App., 901 S.W.2d 52, 55 (1995) (citation omitted). As such, we agree with appellees that construction of the "Contract" entered into by the parties in 1980 constitutes a matter of law for the court to decide. Thus, we believe the issue of whether the "Contract" constituted an express grant of an easement was appropriately addressed by the circuit court.

Further, we believe the court correctly determined that appellees were entitled to judgment as a matter of law on the issue of whether the "Contract" constituted an express grant of an easement. While appellants argue the "Contract" does not contain the formalities necessary to create a deed of easement, we disagree. The language in the "Contract" sufficiently identified the land to be burdened, limited the right-of-way by

size and purpose, and expressed the intention of the parties. "In Kentucky, all that is required under the law to pass title to an easement is a description identifying the land which is the subject of the easement and express[ing] the intention of the parties." Saulsberry v. Saulsberry, 121 F.2d 318, 323 (6th Cir. 1941).

Addressing the issue of location, we believe the circuit court correctly located the easement, given the delay on the part of appellants in specifying same. Accepting as true appellants' claims that at no time did they advise Hammons of the exact location of the easement during the sixteen-year period between 1980 and 1996, the court determined that Hammons had the right to locate the easement himself. We agree:

In such a case, there being no definite location of the easement, the servient owner has the right to fix a reasonable route. On his omission to do so within a reasonable time the owner of the dominant estate may make the selection, which will be upheld unless he has abused his right, and in cases where the parties cannot agree the location may be determined by the court.

Daniel v. Clarkson, Ky., 338 S.W.2d 691, 692-93 (1960) (citations omitted) (emphasis added). The circuit court specifically found that sixteen years is an unreasonable amount of time and that, further, appellees had not abused their right in selecting the route. Thus, the court concluded, appellees are entitled to judgment as a matter of law concerning the location of the easement. We believe the court's decision to be sound.

Appellants urge this Court to remand the issue of acquiescence to the circuit court for resolution. However, given

appellants' unreasonable delay in identifying the precise location of the easement, which afforded Hammons the right to select the route himself, we believe it immaterial whether appellants acquiesced in the location of Hammons' access road.

For the foregoing reasons, we affirm the judgment of the Laurel Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Kenneth H. Gilliam
R. Aaron Hostettler
London, Kentucky

BRIEF FOR LEWIS AND BEA
HAMMONS:

Boyd F. Taylor
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BRIEF FOR JAMES VAUGHN:

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