

RENDERED: September 3, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000582-MR

KEITH JONES AND
MILLIE JONES

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 95-CI-0245

WILLARD MCKENZIE AND
BRENDA MCKENZIE

APPELLEES

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: JOHNSON, KNOX AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Keith Jones and Millie Jones (the Joneses) appeal from the summary judgment of the Floyd Circuit Court entered on February 9, 1998, that declared Willard McKenzie and Brenda McKenzie (the McKenzies) the owners of a parcel of real property. We reverse and remand for further proceedings.

On January 23, 1976, the McKenzies purchased a tract of residential property in a subdivision in Floyd County. The Joneses obtained possession of an adjoining tract of property from James and Fannie Goble by land contract in 1992 and by deed

in 1994. The McKenzies and the Joneses maintained their personal residences on their respective properties. At some point, the exact time of which is in dispute, the McKenzies built a fence along the line that they allege is the correct property boundary. On September 10, 1993, a lawyer for the Joneses wrote a letter to the McKenzies claiming that this fence was approximately eight to ten feet over the boundary line between the two properties and was located on the Joneses' property. The parties are in agreement that this letter served to interrupt any period of adverse possession by the McKenzies.

On March 31, 1995, the Joneses filed a complaint in Floyd Circuit Court claiming that the encroachment on their property by the McKenzies "constitute[d] a trespass upon the property of the [Joneses] by the [McKenzies], and such encroachment interferes with the enjoyment and use by the [Joneses] of their property." In the complaint, the Joneses asked the trial court to establish the correct boundary line between the properties. On September 7, 1995, the McKenzies answered the complaint by claiming they owned the disputed property by adverse possession. The Joneses moved the trial court for a bench trial. The McKenzies filed an amended answer on July 1, 1996, claiming that the Joneses had trespassed on their property by damaging a chain link fence, storage building and garden owned by them, and also claiming, in the alternative to having ownership of the property by adverse possession, that they held an easement by prescription.

On August 28, 1996, the Joneses filed a motion for summary judgment which was supported by a survey purporting to show an encroachment by the McKenzies. The McKenzies responded on September 3, 1996, with their own motion for summary judgment claiming adverse possession of the property pursuant to an affidavit stating that the fence was built in 1977. On January 7, 1997, the McKenzies filed another motion for summary judgment claiming that the fence was evidence of their "claim of ownership to the property and continued use of same" since taking title to it in 1976. On January 16, 1998, the Joneses filed a response to the motion for summary judgment and a counter-motion for summary judgment. The Joneses claimed that the fence was not built until at least 1980, and accordingly, that the requisite 15-year period for adverse possession could not have run from 1980 to 1993. In support of their position, the Joneses filed affidavits from four people. On January 29, 1998, the Joneses filed a supplement to their motion for summary judgment in which they challenged the deposition testimony of Quentin Castle who constructed the fence.

On February 9, 1998, the trial court entered summary judgment pursuant to Kentucky Rules of Civil Procedure (CR) 56 in favor of the McKenzies, stating, in pertinent part, as follows:

That since January 23, 1976, under a claim of right and under color of title, the Defendants, Willard McKenzie and Brenda McKenzie, his wife, have been in actual, exclusive, continuous, open and notorious possession of their real property, which extends to the location of a chain link fence erected by Quentin Castle of Castle Fencing Company.

This appeal followed.

The Joneses make the following three arguments: (1) "entry of a summary judgment was not appropriate given the conflicting evidence presented in the motions and responses"; (2) "the court's findings regarding the beginning date of the [McKenzies'] possession and the description of the boundary are clearly erroneous and the judgment is not supported by substantial evidence"; and (3) "the clear weight of the evidence compels that judgment in favor of [the Joneses] be entered." While it is obvious that the Joneses' arguments are inconsistent, they are permitted to argue in the alternative.

It has been noted by our Supreme Court in Commonwealth v. Thomas Heavy Hauling, Inc., Ky., 889 S.W.2d 807, 808-09 (1994), that "[t]he filings of cross-motions for summary judgment do not always mean that the parties have consented to a resolution of the case on the existing record; nor is the trial court necessarily at liberty to treat the case as if it were submitted for a final resolution on a stipulated record." While the Supreme Court in Thomas Heavy Hauling, concluded "that the parties herein consented to a resolution on the existing record," in the case sub judice, we cannot so conclude. Furthermore, while the trial court in the case sub judice also "made specific findings of fact and set forth its conclusions of law," the trial court clearly stated that its judgment was being entered "pursuant to Civil Rule 56 of the Kentucky Rules of Civil

Procedure". Thus, we will review this judgment as a summary judgment, with our standard of review being,

whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (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, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476, 480 (1991). Summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, 807 S.W.2d at 480, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). 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 ..." Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992), citing Steelvest, supra, (citations omitted).

Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

The case sub judice is similar to Watts v. Carrs Fork Coal Co., Ky., 275 S.W.2d 431, 432 (1955). The McKenzies "not only failed to sustain the burden of establishing that there was no genuine issue as to any material facts, but [their] denial of [the Joneses'] statements . . . created a material factual issue." Id. Furthermore, even "[u]ndisputed facts will not support a summary judgment if contrary inferences may be drawn therefrom." Roberts v. Davis, Ky., 422 S.W.2d 890, 894 (1967) (citation omitted).

We will now review the essential factual findings to determine whether there is a genuine issue as to any material fact. The trial court, in its findings of fact, stated as follows: "That since January 23, 1976, under a claim of right and under color of title, [the McKenzies], have been in actual, exclusive, and continuous, open and notorious possession of their real property, which extends to the location of a chain link fence erected by Quentin Castle of the Castle Fencing Company." We have found no facts in the record to support this finding, and the McKenzies in their brief have not directed us to where any such facts can be found in the record. We believe the above-quoted "finding" in actuality is a conclusion of law, or at a minimum a mixed finding of fact and conclusion of law. Had there been unrefuted evidence of actual, exclusive, and continuous, open and notorious possession of the property since January 23, 1976, then summary judgment would have been proper. However, we find nothing in the record to support this "finding", and instead find many material facts that are in dispute.

If the period of adverse possession ended on September 10, 1993, which was the date of the letter from the Joneses' attorney to the McKenzies, then to encompass the required 15 years the possession had to begin prior to September 10, 1978. Thus, the critical time period that we must review is between January 23, 1976, (the date the McKenzies took possession of the property) and September 10, 1978, (the date of the letter from the Joneses' attorney to the McKenzies).

The McKenzies presented the following evidence concerning their possession of the property:

(1) An affidavit from Paris Goble (Goble), the prior owner of the Joneses' property, wherein Goble stated that the location of the fence was determined by "mere guess", and that the parties agreed that if it was ever found to be an encroachment on one party by the other, the fence would be moved. Goble also stated that the reason the fence was constructed was because his great-granddaughter Jennifer Lilly (Lilly) had been injured on a lawn mower at the McKenzies' house and the fence was built to separate the properties. Goble stated that he had not given any of his property to any member of his family, nor had he conveyed the disputed property by deed to the McKenzies. Rather, he stated that he merely had allowed family members who lived around him to use his property for gardens, raising cattle and "ever day [sic] use".¹

(2) An affidavit and deposition from Quentin Castle (Castle) wherein he stated that he had built the fence in 1977. A deposition of Castle wherein he testified that he remembered building the fence in question in 1977 because he had gone through a "bitter divorce" in 1976, and that he had met Brenda McKenzie through a "lady friend" that he met after his divorce.

On the other hand, the Joneses' presented evidence to support their claim of possession as follows:

(1) A survey report that purportedly showed that the McKenzies were encroaching on the Joneses' property by ten feet.

(2) Affidavits from four people who claimed that the fence in question was not constructed until at least 1980 or 1981.

¹ The Goble affidavit was somewhat confusing and inconsistent. In fact, the Joneses also relied in part upon this same affidavit.

(3) A copy of Castle's divorce decree entered on August 4, 1978, to support their argument that if Castle had built the fence the year after his divorce, then it would have been built in 1979, not 1977, as Castle had claimed.

(4) While the McKenzies had admitted that the precipitating event for the erection of the fence was the injury to Lilly by a lawnmower, they argued that the injury occurred in 1977. The Joneses, on the other hand, introduced a medical record from Highlands Regional Medical Center showing treatment of Lilly for a then "ten day" old "lawn mower accident" on June 23, 1979.

In their pleadings, the McKenzies' have consistently claimed to possess the property in question since taking title in 1976. In a pro se answer that Brenda McKenzie filed with the trial court in April 1995, she stated that the fence was erected on "the line established when we built our house through [Farmer's Home Administration]." In a memorandum, the McKenzies argued that they and their grantors identified the boundary line when the conveyance was made to them in 1976, and that the fence was erected one year later. Castle, in his deposition, stated that he erected the fence "running along where that there was small survey stakes a running." However, Castle failed to identify when and by whom the stakes were put in place. These references by the McKenzies to the boundary line being established on the date they originally took possession of the property in 1976 are not supported by any testimony and are refuted by the Joneses, and thus, at issue.

The date of the construction of the fence is material if the fence is determined to be the initial manifestation of

adverse possession; and as set out above, there is a genuine issue of material fact as to when the fence was constructed. Accordingly, since there are genuine issues of material fact, we reverse the judgment of the Floyd Circuit Court and remand this matter for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Hon. C. Thomas Anderson
Prestonburg, KY

BRIEF FOR APPELLEES:

Hon. Larry Brown
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