

RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000248-MR

WILLIAM C. OLIVER; MEREDITH
OLIVER; TERRY OLIVER; and
BARBARA BLACK

APPELLANTS

v. APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 01-CI-00018

EQUITABLE PRODUCTION
COMPANY-EASTERN STATES, INC.;
CARSON ASSOCIATES, INC.; GARLAND
OLIVER; and ALEX PATTERSON

APPELLEES

OPINION AFFIRMING

** ** * * *

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

VANMETER, JUDGE: Five heirs of Shady Oliver appeal the Elliott Circuit Court's denial of their CR¹ 60.02 motion for relief from a judgment with respect to the ownership of a tract of land in Elliott County. Finding no error, we affirm.

This case is on its second appearance before this

¹ Kentucky Rules of Civil Procedure.

court.² In 1997, Carson Associates, Inc. and Eastern States Oil and Gas, Inc. filed an action in the Elliott Circuit Court concerning the ownership of undivided oil and gas interests in three tracts of land located in Elliott County (hereinafter referred to as the 1997 action). The defendants included Richard Lewis Oil & Gas, Garry Oliver, Garland Oliver, Alex Patterson, and a number of other heirs of Daniel Oliver and John Rich Branham. One of the tracts was an 80-acre tract of land which was owned in 1920 by Shady Oliver.

In 1998, the trial court conducted a bench trial and, in April 1999, issued extensive findings of fact and conclusions of law. With respect to Shady Oliver's 80-acre tract, the court found that Garland Oliver and his wife Pearl owned all the surface estate and an undivided one-half interest in the oil and gas. Their source of title traced back through a number of instruments recorded in the Elliott County Clerk's office, beginning with a deed dated February 28, 1921 from Shady Oliver to Daniel Olive[r] and recorded in Deed Book 20, page 220. The court found that the other undivided one-half interest in the oil and gas was owned by Alex Patterson. His source of title also traced back through a number of instruments, beginning with an instrument dated June 22, 1920 and recorded in Lease Book 14,

² See *Richard Lewis Oil & Gas, Inc. v. Carson Associates, Inc.*, 2004 WL 178980, 2002-CA-1916 (Ky.App.2004).

page 335. Unfortunately, Lease Book 14 was destroyed by fire in 1956.

After the trial court issued its judgment, one of the losing parties apparently filed a motion for reconsideration. While that motion was under submission, William C. Oliver, Terry Oliver, Martha Shell, Barbara Sue Black, Walter Oliver, William Dell Oliver, Mitchell Dell Oliver, Sam H. Oliver, Marvin Presnell, and Tuliffeny Oliver (collectively the Shady Oliver heirs) in 2001 filed an action (the 2001 action) in Elliott Circuit Court against Equitable Production-Eastern States, Inc. and Carson Associates, Inc. claiming an undivided one-half oil and gas interest in the Shady Oliver 80-acre tract. The basis of the claim was that under his 1921 deed to Daniel Oliver, Shady Oliver reserved to himself an undivided one-half interest in the oil and gas under the 80-acre tract, and that they, as the heirs at law of Shady Oliver, were the rightful owners. By Order entered in January 2002, while the motion for reconsideration of the 1997 action was still pending, the trial court consolidated the 2001 action with the 1997 action.

Later in 2002, the trial court denied the motion for reconsideration. Since the underlying judgment included finality language,³ original defendants Richard Lewis Oil & Gas, Inc., Richard Lewis and Garry Oliver appealed the judgment to

³ CR 54.02.

this court. At the time, they were represented by the same attorney who filed the 2001 action on behalf of the Shady Oliver heirs. This same attorney fully participated in the 1998 bench trial. Further, although the 1997 action and the 2001 action had been "consolidated," the judgment in the 1997 action was not amended to take into consideration the claim of the Shady Oliver heirs. However, by order entered in October 2002, the trial court acknowledged the appeal of the 1997 action, which it described as the 2001 action's "companion case," and it held the claim of the Shady Oliver heirs in abeyance pending the outcome of the appeal.

In January 2004, this court affirmed the judgment of the trial court. Specifically as to the Shady Oliver 80-acre tract, this court stated:

First, appellants contend that the trial court erred in regard to Tract 13 [the Shady Oliver 80-acre tract] by relying on the contents of a lost instrument when finding in favor of Garland Oliver and Alex Patterson. We disagree.

Clear and convincing evidence must be adduced to establish the execution, contents and delivery of a lost deed. *See McWhorter v. Carter, Ky., 267 S.W.2d 736 (1954); Arrington v. Sizemore, 241 Ky. 171, 43 S.W.2d 699 (1931)*. Here, evidence was adduced to show that Garland and Pearl Oliver were the owners of the surface and a 1/2 interest in the underlying oil and gas of Tract 13, which had been Garland Oliver's childhood home. In 1984, Garry Oliver took steps to purchase the surface and an

undivided 1/2 interest in the oil and gas underlying certain property which had become available in settlement of the estate of Daniel Oliver. Unfortunately, the description given for the sold property was, in fact, a description of Tract 13 although that property was not for sale. After the mistake was discovered in 1996, Garry Oliver filed a circuit court action which resulted in the substitution of the nearby Tract 5 for Tract 13, thereby divesting him of any interests in Tract 13.

The evidence in the record regarding the history of Tract 13 shows that in 1920, Shady Oliver transferred to R.A. Chiles a 1/2 interest in the oil and gas underlying Tract 13. Surface rights and the remaining 1/2 oil and gas interest, which Shady Oliver transferred to Daniel Oliver in 1921, eventually passed to Garland and Pearl Oliver. Although a 1956 courthouse fire destroyed the lease book containing the record of the transfer of the Chiles 1/2 interest, other evidence was adduced to show that in 1925, Chiles transferred a 1/64 nonparticipating royalty interest in the oil and gas rights, and that the remaining Chiles interest passed by descent until Alex C. Patterson acquired it in 1977. Finally, the evidence showed that for many years, Ashland Oil has equally divided the Tract 13 royalty payments between Garland Oliver and Alex Patterson.

Appellants assert that the evidence fails to provide clear and convincing proof regarding Garland and Pearl Oliver's, and Alex Patterson's, respective property interests in Tract 13, especially in light of the 1956 destruction of the lease book containing the document transferring the 1/2 oil and gas interest to Chiles and appellants' contention that the document may have constituted a lease rather than a deed. However, even if the evidence was not overwhelming, after reviewing the record we

believe it was sufficient to constitute clear and convincing evidence to support the trial court's findings of fact and its conclusion that appellants possess no interests in Tract 13.

Richard Lewis Oil & Gas, slip op. At 11-13.

Following the appellate decision, a number of the owners of various oil and gas interests in the tracts under consideration, including Garland Oliver and Alex Patterson, filed motions for the disbursement of funds which had been paid into court during the pendency of the action. The Shady Oliver heirs objected to Garland Oliver and Patterson's motion on the basis that paragraph No. 9 of the trial court's original findings of fact was erroneous since, in their words, the court found "that the surface and $\frac{1}{2}$ of the oil and gas passed by Deed dated February 28, 1921, from Shady Oliver to Daniel Oliver of record in Deed Book 20, Page 220." The Shady Oliver heirs further claimed that "[c]areful reading of the aforesaid Deed clearly shows that grantor Shady Oliver reserved the oil and gas interest to himself, that being a $\frac{1}{2}$ interest. This $\frac{1}{2}$ interest would now be vested in [the Shady Oliver heirs]." In response, Garland Oliver and Patterson filed a motion to dismiss.

The Shady Oliver heirs then filed a CR 60.02 motion to relieve them from the effect of the trial court's 1999 judgment, which had been affirmed by this court. In overruling that motion, the trial court stated, in pertinent part:

Movants' contention is as follows: That movants would have entered into evidence a copy of a deed of conveyance of real property between Shady Oliver and Daniel Oliver in which Shady [sic] Oliver retained a one-half interest in the oil and gas associated with the property.

The Court was and is well aware of that contention, the contention made by the movants is essentially the same contention made by William Oliver and others in the initial action of Carson Associates v. Eastern States, et al. That question was well tried and briefed and decided by this Court. That question along with the other title questions involved traveled to the Court of Appeals, and the Court's Judgment was affirmed. It does not appear to the Court that any reference made in the instant motion, would rise to level of 60.02 necessity. It further does not appear that any new evidence or theory of recovery has been put forward by the motion.

The Shady Oliver heirs now appeal the denial of their CR 60.02 motion.

The standard of review of the trial court's denial of a motion filed under CR 60.02 is abuse of discretion. See *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). In exercising its discretion, the trial court should consider (1) whether the movant "had a fair opportunity to present his claim at the trial on the merits and (2) whether the granting of . . . relief would be inequitable to other parties." *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327, 329 (Ky. 1994); *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957).

Due to the unusual procedural history of the case, the Shady Oliver heirs likely were not aware of the 1998 bench trial conducted in the 1997 action, especially since their action was not filed until 2001. However, as noted by the trial court, the same claim advanced by these heirs was known by the trial court, was well tried and briefed, was decided adversely to the position of the heirs, and was affirmed by the Kentucky Court of Appeals. In addition, from this court's earlier decision in this matter, the properties which have been the subject of the litigation have been involved in some sort of dispute since at least 1996, and possibly earlier. Our view is that reopening the litigation to permit these heirs to advance an argument which has already been decided by the trial court would be inequitable to the other parties. It follows that the trial court did not abuse its discretion in denying the Shady Oliver heirs' 60.02 motion.

The order of the Elliott Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEES GARLAND
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