RENDERED: DECEMBER 14, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000497-MR

MARIANNA ASHEY — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 06-CI-00194

CITY OF LAGRANGE; CITY OF LAGRANGE FOUNDATION, INC.; THE LAGRANGE PARK BOARD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD,[1] NICKELL AND TAYLOR, JUDGES.

HOWARD, JUDGE: Marianna Ashey (hereinafter Ashey) appeals a February 7, 2007, order of the Oldham Circuit Court, granting summary judgment in favor of the City of LaGrange (hereinafter LaGrange), adjudging Ashey to have no ownership interest in a

[1] Judge James I. Howard completed this opinion prior to the expiration of his appointed term of office on December 6, 2007. Release of the opinion was delayed by administrative handling.

disputed strip of land adjoining her property on one side, and designating it as a public pass-way. Finding no error, we affirm.

In 1908, LaGrange annexed a parcel of land known at that time as the W. Z. Russell Addition. The annexation was authorized by two separate ordinances. A plat was recorded by Mr. Russell, showing the now-named Monroe and Maple streets. The presently disputed strip of property, adjoining that now owned by Ashey, is a portion of what was designated as "Monroe Street" on the Russell plat. However, the land was not developed, nor the streets improved at that time.

In the 1950's, a city sewer easement was run along the disputed portion of "Monroe Street." The Utility Commission's plat showed the now disputed strip as a public easement. In 1958, the city annexed some additional property, including the tract now owned by Ashey. The ordinance and judgment annexing Ashey's property also defined the disputed strip as a portion of Monroe Street.

In 1988, Tri-County Properties, Inc., purchased a large parcel of land, including what is now Ashey's property. This is when Ashey's parcel, consisting of 0.277 acres, was first surveyed off from the larger tract and was sold to William Morgan and his wife. The Morgan deed contained a metes and bounds description and incorporated a survey plat, which stated that it was "subject to all legal rights of way, pass-ways, easements and restrictions apparent or of record." Once again, this survey described the now disputed strip of property as a portion of Monroe Street which was "never opened." Perhaps most importantly, the Morgan deed expressly does not include the disputed strip,

but rather describes the property conveyed as lying on the "northwest side of Monroe Street."

The remainder of the larger property remained intact and was sold to LaGrange Single Family Homes in 1998, for the purpose of constructing a subdivision. A subdivision plat was filed, defining the streets and lots, and again designating the disputed strip of property as a street. The subdivision was never approved and, in 2003, the property, now known as The Glen, was sold to the City of LaGrange Foundation, Inc., who now intends to develop it as a conservation park. At some unknown time, the owners of what is now Ashey's property and the owners of "Lot 10," on the other side of the disputed strip, began using it as a parking area, between their two homes.[2]

In January, 2004, Ashey acquired her property. Her deed contains an identical description to that found in the Morgan deed and, like the Morgan deed, specifically excludes the disputed strip of property. Ashey's deed also references the 1988 survey, which refers to this strip as an unfinished portion of Monroe Street. Nonetheless, in 2005, when LaGrange announced its intention of improving the disputed strip as a pass-way to the conservation property, Ashey prepared a "Deed of Restriction," signed by her, and recorded it with the Oldham County Clerk on March 14, 2005. LaGrange then filed this action in circuit court seeking an adjudication that the disputed parcel is a public right-of-way. Ashey responded, claiming that the property had never

[2] Lot 10 was owned by Robert and Joan Beckworth at the time the original action was filed in circuit court and they were named as co-defendants. However, they are not parties to this appeal.

been properly accepted by the city; that the city's failure to develop it constituted abandonment; and that the parcel had been acquired by her predecessors-in-title by means of adverse possession, and passed to her as such.

In an opinion and order entered February 7, 2007, the circuit court granted LaGrange's motion for summary judgment and held that the disputed parcel is a public right of way. The court further held that Ashey had no "right, title, interest or claim" to it except as a member of the general public, entitled to use it as a public pass-way. This appeal followed.

When reviewing a trial court's grant of summary judgment, we must determine "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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in her favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v.*

Johnson, 841 S.W.2d 169, 171 (Ky. 1992). *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004).

The only argument Ashey makes on this appeal is that the circuit court's opinion and order violated the Kentucky Constitution by failing to recognize the separation of powers outlined in Section 156a. It appears as though this argument pertains only to that portion of Ashey's original argument claiming that the property had never been properly accepted by the city. She has apparently conceded her abandonment and adverse possession arguments, asserted in the circuit court.

Section 156a of the Kentucky Constitution provides as follows:

> The General Assembly may provide for the creation, alteration of boundaries, consolidation, merger, dissolution, government, functions, and officers of cities. The General Assembly shall create such classifications of cities as it deems necessary based on population, tax base, form of government, geography, or any other reasonable basis and enact legislation relating to the classifications. All legislation relating to cities of a certain classification shall apply equally to all cities within the same classification. The classification of all cities and the law pertaining to the classifications in effect at the time of adoption of this section shall remain in effect until otherwise provided by law.

Regrettably, Ashey's brief does not make clear exactly what she believes to be the law governing this matter. She complains that the 1908 annexation and/or dedication of the streets did not comply with the statutory mandates, but does not cite to any such statutes, in effect then or now, which she asserts were violated. In fact, she argued in the trial court against LaGrange's reliance on KRS 82.400, which is the specific

statute which sets out the procedures for dedicating a public way or easement. She maintains that the legislature has made "many such rules" pertaining to the requirements for dedicating and maintaining streets, which the circuit court ignored, but she has failed to point either the circuit court or us to any such specific rule or statute.

In its judgment, the circuit court found that the disputed tract of property was properly dedicated and accepted by the city of LaGrange, pursuant to *Louisville & Nashville R. Co. v. City of Owensboro*, 238 S.W.2d 148, 152, 153 (Ky.App. 1951):

> [W]here the owner of land lays the same out into building lots, streets, and alleys, and exhibits a map of it, which defines the lots, streets, and alleys, though the streets and alleys are not yet actually opened, and sells the lots as bounded by such streets or alleys, this is an immediate dedication of such street or alley to the use of the purchaser and to the public. . . .
>
> [A] street dedicated to the purchasers and the public in a subdivision outside of the city limits automatically became a city street when the subdivision was taken into the city.

The trial court also found that formal dedication is not required pursuant to *City of Louisville v. Louisville Scrap Material Company, Inc.*, 932 S.W.2d 352 (Ky. 1996). The court supported its decision with the case of *City of Henderson v. Yeaman*, 184 S.W. 878 (Ky.App. 1916), which holds that a city may accept a street dedication when it is ready and that adjoining property owners are estopped from declaring that the property is not a street.

In reviewing the record, this court concludes that the trial court correctly interpreted the applicable law and correctly found that no genuine issue exists as to any

material fact. Over 50 years of documentary evidence unfailingly supports such a decision. In addition to the 1908 documents, the 1958 ordinance and judgment defines the disputed strip as a portion of Monroe Street; the 1988 Morgan Deed and survey do the same, as does the 1998 subdivision plat. Ashey's own 2004 deed, with the same metes and bounds description as the Morgan deed, not only refers to this adjoining strip as "Monroe Street," but specifically describes her property as bordering it, not including it. Ashey offered absolutely no evidence in the trial court to refute any of this history, or to support a judgment in her favor. Because it appears that the disputed strip of property was properly dedicated as a street and accepted by the City of LaGrange in 1908, according to the law at that time; and because Ashey failed to "present . . . at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial," pursuant to *Hubble v. Johnson*, *supra.,* the City of LaGrange was entitled to judgment as a matter of law and summary judgment was appropriately granted.

The summary judgment granted by the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Alan N. Linker
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