

RENDERED: OCTOBER 23, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001808-MR

BETTY MCCLEES;
AND BOBBY COMBS

APPELLANTS

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 97-CI-00277

GARY COMBS;
DELENA COMBS;
AND JAMES COMBS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; LAMBERT,¹
SENIOR JUDGE.

VANMETER, JUDGE: Betty McClees and Bobby Combs (collectively referred to
as McClees) appeal from a summary judgment, entered by the Knott Circuit Court

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

in favor of appellees (collectively referred to as Combs), regarding ownership of certain real property (Property) by record title or adverse possession. For the reasons stated hereafter, we affirm.

An extensive recitation of the facts and procedural history of this matter is unnecessary. Briefly, the action originated in 1997 when appellees' predecessor, Stella Combs, sought a declaration of rights relating to the alleged trespass and unauthorized mining of the Property, which consisted of some 38.42 acres including a 6.11-acre tract described in a 1995 quitclaim deed from the Kentucky River Coal Company (KRCC) to McClees. Both parties claimed ownership of the entire surface. Combs also claimed ownership of all mineral rights to the entire Property, while McClees claimed ownership of the mineral rights except as to the 6.11-acre tract.

Certain mineral royalties were placed in escrow pending the dispute's resolution. In June 2003, the trial court entered a partial summary judgment finding that Combs possessed record title to the Property outside the 6.11-acre tract. The court reserved the determination of which party held superior record title to the 6.11-acre portion. McClees's appeal from the partial summary judgment was dismissed as interlocutory, and the trial court released the escrowed funds to Combs after McClees failed to post a bond.

In September 2008, the trial court entered a final summary judgment for Combs. Reaffirming and expanding its prior partial summary judgment, the

court found that Combs possessed the entire Property, including the 6.11-acre tract, by both record title and adverse possession. The Master Commissioner was directed to execute a deed quieting title in Combs's favor against any claim by McClees. This appeal followed.

Summary judgment shall be granted only if “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR² 56.03. The trial court must view the record “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 Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482. On review, the appellate court 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).

Here, both parties adduced substantial evidence regarding the Property's record chain of title. Nevertheless, the record demonstrates, as found by the trial court, that the property described in Combs's record chain of title,

² Kentucky Rules of Civil Procedure.

including the 6.11-acre tract, simply was not the same property described in McClees's record chain of title. As stated in *French v. Childers*, 280 Ky. 339, 133 S.W.2d 63, 63 (1939), a party challenging the title to land "must recover on the strength of his own title" rather than on the weakness of the opponent's title. Here, absent proof of ownership by record title or adverse possession, McClees's claim to the Property must fail, and the trial court did not err by finding that no genuine issue of material fact existed as to the superiority of Combs's record title to the Property's surface and mineral rights.

We further agree with the trial court that no genuine issue of material fact existed as to whether Combs also established title to the surface of the Property, including the 6.11-acre tract, by adversely possessing the Property for the requisite period of time. Proof of adverse possession requires a claimant to show

possession of disputed property under a claim of right that is hostile to the title owners interest. Further, the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of fifteen years. *Tarter v. Tucker*, Ky., 280 S.W.2d 150, 152 (1955); *Creech v. Miniard*, Ky., 408 S.W.2d 432, 436 (1965); KRS 413.010. "The 'open and notorious' element requires that the possessor openly evince a purpose to hold dominion over the property with such hostility that will give the non-possessory owner notice of the adverse claim." *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co.*, Ky., 824 S.W.2d 878, 880 (1992) (citing *Sweeten v. Sartin*, Ky., 256 S.W.2d 524, 526 (1953)).

Phillips v. Akers, 103 S.W.3d 705, 708 (Ky.App. 2002).

Here, for purposes of addressing the adverse possession claim, the trial court specifically traced the Property's possession from 1941 until the court's judgment. According to the record, the Property's surface and mineral estates were separated in 1941, when John L. Combs sold the surface by recorded deed to the Combs predecessors, retaining the mineral estate. Clayton Pelfrey then purchased the surface estate by deed in 1947. It was undisputed that Pelfrey deeded easements across the Property for a county road and power lines, that he and his family built and lived in several houses on the Property between 1947 and 1961, and that he buried a child on the 6.11-acre tract. Between 1947 and 1961, Pelfrey also raised livestock, gardened, and took action to clear and farm most of the unmined portions of the Property, including parts of the 6.11-acre tract. He temporarily mortgaged the Property in 1958, and he took steps to halt the unauthorized cutting of trees on the Property. In 1961 Pelfrey sold the Property by recorded deed to Stella Combs, who ultimately filed this action. Stella Combs drilled a gas well on the Property in 1963, and either she or her tenants resided on the Property until 1966.

Meanwhile, John L. Combs or his various lessees continuously conducted underground mining operations on the Property between 1947 and 1961. Chutes were constructed, ponies and mules were used in removing the coal, and Pelfrey was employed as a night watchman in the mines. A recorded deed shows that in 1967, the mineral estate was sold to James Combs and Jimmie Combs, who auger mined the entire Property through 1968. At one point they paid KRCC a

mineral royalty after unintentionally mining beyond the Property's northern boundary, but the record contains no indication they ever paid royalties for mining coal on any portion of the Property, including the 6.11-acre tract. Finally, the Combs witnesses stated that the ownership and use of the Property, including the 6.11-acre tract, was never challenged prior to McClees's claims. McClees confirmed the existence and location of the houses and roadway across the Property, that the houses were occupied until the mid-1960s, and that the Property was mined.

As noted above, proof of adverse possession requires a showing that the claimant possessed the disputed property "under a claim of right that is hostile to the title owner's interest[,]" and that the possession was "actual, open and notorious, exclusive, and continuous for a period of fifteen years." *Phillips*, 103 S.W.3d at 708. Here, the undisputed evidence showed that during the nineteen years between 1947 and 1966, Combs and the Combs predecessors actually, openly, notoriously, exclusively and continuously possessed the entire surface of the Property, including the 6.11-acre tract, under a claim of right which was hostile to the interests of any other party claiming title ownership. Further, as the adverse possession occurred under color of title, the possession extended to the entire tract as described in the deed and as established by the survey commissioned by Combs. *See Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co.*, 824 S.W.2d 878, 8880 (Ky. 1992). Thus, no genuine issue of material fact existed as to whether Combs's adverse possession of any portion of the Property's surface,

including the surface of the 6.11-acre tract, ripened into title by 1966. The trial court did not err by granting summary judgment for Combs as to the issue of adverse possession.

McClees next contends that the trial court erred by ordering the distribution of the accrued mineral royalties. However, given our conclusion that Combs possesses superior record title to the Property's surface and mineral rights, McClees's contention on appeal regarding the trial court's distribution of accrued mineral royalties is rendered moot.

Next, we are not persuaded that the trial court abused its discretion by failing to afford greater weight to the deposition testimony of one of McClees's witnesses. Clearly the judge, as the trier of fact, had the right to believe or not believe the witness in whole or in part. *Bissell v. Baumgardner*, 236 S.W.3d 24 (Ky.App. 2007). Further, in the absence of any showing of exceptional circumstances pursuant to CR 26.02(4)(b), the trial court properly denied McClees's notice to take the deposition of an expert witness whom Combs had retained but decided not to call at trial.

Finally, we are not persuaded by McClees's claim that error occurred because the special circuit court judge failed to grant McClees's motion to transfer the proceeding to a regular circuit court judge. The special judge, who was not the chief judge of the administrative region, possessed no authority to reassign the case. *See* SCR³ 1.040(1).

³ Kentucky Rules of the Supreme Court.

The summary judgment entered by the Knott Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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