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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000010-MR

JIMMY CRUM AND
KAREN CRUM — APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 04-CI-00504

CLYDE PERRY AND
BETTY PERRY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND WINE, JUDGES; HARRIS,[1] SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Jimmy and Karen Crum appeal from a Floyd Circuit Court order, entered on December 5, 2008, which denied their motion to alter, amend, or vacate an order which terminated their easement across the Perrys'

[1] Senior Judge William R. Harris 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.

property for use and maintenance of a septic tank and sewage distribution lines. After carefully reviewing the record and applicable law, we affirm.

The Crums and the Perrys are neighbors in a subdivision. The Perrys' property deed grants the owners an express easement to use an existing septic tank and drainage lines which are located on the Crums' property. At some point, the septic system malfunctioned, which caused sewage to seep from the septic system, resulting in contamination, a noxious odor, and unsightly view.

The septic system failure triggered a barrage of litigation between the neighbors. On May 20, 2004, the Crums filed a lawsuit against the Perrys claiming easement interference, alleging that the Perrys prevented the Crums from properly maintaining the septic system. On June 2, 2004, the Perrys filed an answer to the suit and a counterclaim based upon the Crums' failure to properly maintain the septic system. On July 7, 2004, the Crums moved for a temporary restraining order and requested permission to repair the easement sewage problem in question. The trial court issued the restraining order, but the Crums did not repair the problem.

Four months later, on November 10, 2004, the Perrys moved for temporary injunction. The trial court denied the motion, giving the Crums additional time to make the repairs. Over two years later, the repairs were still incomplete. On December 11, 2006, the trial court ordered the Crums to comply

with the requirements of the Floyd County Health Department and to complete the repairs in a timely manner. On July 27, 2007, the Perrys filed a motion to terminate the easement based upon the Crums' failure to comply with court orders. This motion was renewed and renoticed for hearing four times.

On May 8, 2008, the Perrys filed an amended motion to terminate the easement. On June 23, 2008, the trial court entered an order allowing the Crums to have 30 days from June 13 to complete the repairs. On July 25, 2008, the Perrys filed a renewed motion to terminate the easement. On September 19, 2008, the trial court ordered the Crums to fully comply with the court's previous orders within one week and ordered that the Crums pay attorney's fees in the amount of $450.00. On the same day, the Crums noticed the court that the process of compliance had begun. On October 24, 2008, after a hearing on a motion filed by the Perrys, the trial court gave the Crums until noon of that day to comply with prior court orders, which they failed to do. On November 3, 2008, the trial court entered its order terminating the easement.

On November 11, 2008, the Crums filed a motion to alter, amend, or vacate the November 3, 2008 order, stating that they had changed plumbers and made efforts to make the repairs. Following a hearing, the motion was denied, and the order under review was entered. This appeal follows.

An easement is not an estate in land, but rather an interest or property right in land. *Illiniois Cent. R. Co. v. Roberts*, 928 S.W.2d 822 (Ky. App. 1996).

Just as easements may be lawfully created in several ways, easements can also be terminated by different methods: express grant, prescription or abandonment.

Clearly neither grant nor prescription is at issue in this case. However, our review of the record calls for a closer examination of whether the Crums abandoned the property. The Crums claim that the trial court lacked the authority to terminate the easement because they made several reasonable attempts to cure the septic system problem, which included filing suit against the Perrys in May 2004 to gain access to the land, hiring an inspector to evaluate the system, meeting with a representative of the Floyd County Health Department, and hiring plumbers.

Relying on *Chitwood v. Whitlow*, 313 Ky. 182, 230 S.W.2d 641 (1950), the Crums argue that non-use or disrepair alone is insufficient to prove abandonment. *Chitwood* involved a roadway easement, created by prescription, which fell into disrepair and could not be used. In *Chitwood*, the Court provided, "[i]t is the general rule that mere non-user for a relatively short period of time will not constitute abandonment. There must be other acts or circumstances which indicate that the owner of the dominant estate intended to give up the rights in the land he had acquired." *Id.* at 641.

Similarly, courts have used the same standard when analyzing the abandonment of easements which were created by an express grant. *City of Harrodsburg v. Cunningham*, 299 Ky. 193, 184 S.W.2d 357 (1945). In

Cunningham, the former Court of Appeals quoted from "17 Am.Jur. page 1026, Sec. 142":

> An easement may be abandoned in whole or in part and either by unequivocal acts showing clear intention to abandon and terminate the right or by acts in pais without deed or other writing. The intention to abandon is the material question and may be provided by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case.

Id. at 359 (quotation marks omitted.)

After reviewing the circumstances of this case, we find that the trial court was within its discretion to terminate the easement. This litigation began in 2004. On December 11, 2006, the Crums were ordered to comply with the health department guidelines and repair the septic system. Almost four years after the commencement of this litigation, the Crums had not completed the repairs despite numerous warnings from the court. During this time, the septic system created a nuisance to the neighborhood and potential health risks to all exposed. Although the Crums blame the condition on a dispute with their plumber, the amount of time that the septic system was in disrepair was unreasonable.

In light of the numerous warnings and opportunities given by the trial court and the potential risk involved, we conclude that the Crums' failure to properly repair the septic tank within four years constitutes clear intent to abandon the easement.[2] Therefore, we find no error in the court's termination of the easement.

[2] CR 52.04 precludes any inquiry into whether the trial court should have made specific findings, since the Crums failed to make such request.

Accordingly, we affirm the order of the Floyd Circuit Court entered on December 5, 2008.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James D. Adams, II
Prestonsburg, Kentucky

BRIEF FOR APPELLEES:

Michael S. Endicott
Paintsville, Kentucky