

RENDERED: SEPTEMBER 23, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001432-MR
AND
NO. 2009-CA-001583-MR

WILLIAM H. SHARP, EXECUTOR OF THE
ESTATE OF AGNES SHARP

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 07-CI-00540

MICHAEL SHARP

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: This is an action to set aside a deed of conveyance to
Michael (Mike) Sharp executed by Agnes Sharp. William (Billy) Sharp, Agnes's
son, under authority of a power of attorney, filed a complaint asserting as grounds

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.

for cancellation and restoration that Mike procured the deed by fraud and undue influence.²

On appeal, Billy restricts the issues to the denial of his motion to amend his complaint to assert the imposition of a constructive trust and to establish the boundary line between property he owns and that Agnes conveyed to Mike. We conclude that the trial court did not abuse its discretion and affirm.

Although not biologically related, Agnes referred to Mike as her grandson. He had resided with Agnes since he was two years old and adopted her surname.

Agnes owned two contiguous real estate parcels. One parcel contained a trailer park which sometime prior to the commencement of the present action was conveyed to Billy. Agnes and Mike lived in a home located on an adjoining parcel, which is the subject of the present controversy.

On May 22, 2006, eighty-one-year-old Agnes consulted with a local attorney who prepared a “love and affection” deed conveying the house and lot to Mike, which Agnes signed. Billy, who was Agnes’s power of attorney, did not learn of the conveyance until mid-2007, when he received Agnes’s tax bills.

At trial, Billy testified that when he questioned Agnes regarding the conveyance, she had no recollection of going to the attorney’s office and signing the deed. An affidavit was prepared and signed by Agnes stating that she did not intend to transfer the property to Mike.

² Agnes died during the pendency of this action and Billy, as the administrator of her estate, was substituted as a party.

On July 26, 2007, as Agnes's power of attorney, Billy filed the present action to set aside the conveyance and a bench trial commenced following discovery. To support the claims of fraud and undue influence, Agnes's video deposition was introduced and Billy and Mike testified, as did Joel Day, a registered surveyor. At the conclusion of the plaintiff's proof, the trial court granted Mike's motion for directed verdict finding that there was no fraud or undue influence exerted upon Agnes when she conveyed her property to Mike. The trial court speculated that, although not asserted in the complaint, the only possible remedy was the imposition of a constructive trust. In accordance with the trial court's ruling, on October 31, 2008, a trial verdict and judgment was entered finding the deed valid and enforceable and that the property conveyed was as described in the deed.

On November 3, 2008, Billy filed a motion to vacate the judgment and amend the original complaint to include a new cause of action for a constructive trust. On June 3, 2009, the trial court denied the motion, finding that based on the evidence presented, Agnes intended that Mike legally possess the property when she executed the deed and that the claim for a constructive trust presented in the proposed amended complaint was untimely.

One day prior to the trial court's June order and well in excess of ten days after the entry of the judgment, Billy filed a motion to establish a boundary line surrounding the conveyed property. In that pleading, Billy stated "that it was Agnes Sharp's intention that her son, William H. Sharp, receive the trailer park

free and clear as an ongoing business concern. She also apparently desired that Michael Sharp have a house and lot.” Despite his concession, while that motion remained pending, he appealed the order denying his motion to vacate and amend the complaint. After the trial court denied his motion to establish a boundary line, Billy filed a second notice of appeal from that order. We consider both appeals.

Two issues are presented for our review. First, it is argued that the trial court erred when it denied Billy’s motion to amend the complaint to include the theory of constructive trust and, second, that the boundary line established between that deeded to Mike and that owned by Billy created an encumbrance upon Billy’s adjacent property. There is no challenge to the trial court’s finding that there was no fraud or undue influence committed by Mike when Agnes deeded the property to him.

The basis for the amended complaint is Mike’s testimony at trial that, prior to the conveyance, he told Agnes that if she requested that he reconvey the property to her, he would do so. Although Mike testified in his discovery deposition that he would reconvey the property if Agnes requested, Billy contends that until the trial, he was unaware that Mike made his promise prior to the conveyance. It is necessary to first review the law applicable to the amendment of a complaint.

Leave to amend must be freely granted when justice requires. Kentucky Rules of Civil Procedure (CR) 15.01. However, leave is properly denied where the proposed amendment fails to state a claim upon which relief can be

granted: “Although amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself. CR 15.01; Bertelsman and Philipps, 6 *Ky.Practice*, at 310 (1984).” *First Nat. Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky.App. 1988). Moreover, in *State Contracting and Stone Company, Inc. v. Walker*, 294 S.W.2d 931, 932 (Ky. 1956) (quoting *Boo v. Dixon*, 43 F.Supp. 214, 215 (D.C.Mo. 1942)), the Court expressed its distaste for amendments made after the trial has commenced: “Liberality in permitting amendments to complaints certainly is not to be stretched to the point of allowing an addition of a wholly different cause of action to a complaint after a jury has been impaneled and sworn, the opposing party objecting to the amendment asked.” Finally, we add that our standard of review of a denial of leave to amend a complaint is whether the trial court abused its discretion. *Graves v. Winer*, 351 S.W.2d 193, 197 (Ky. 1961). With the stated principles as our guide, we review whether the trial court abused its discretion when it denied the motion to amend the complaint after a directed verdict had been granted in Mike’s favor.

Our inquiry necessarily requires that the law of constructive trusts be examined. Because the evidence introduced at trial does not support the cause of action asserted, we affirm.

A constructive trust is an equitable remedy imposed when the legal title holder acquired the property under circumstances that the holder may not in good conscience retain the beneficial interest. *Middleton v. Beasley*, 186 Ky. 252,

216 S.W. 591, 592 (1919). More recently, the elements of a constructive trust were explained:

When legal title to property has been acquired or held under such circumstances that the holder of that legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. *Middleton v. Beasley*, 186 Ky. 252, 216 S.W. 591, 592 (1919) (citations omitted). Constructive trusts are created by the courts “in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.” *Hull v. Simon*, 278 Ky. 442, 128 S.W.2d 954, 958 (1939); *see also*, *O'Bryan v. Bickett*, 419 S.W.2d 726, 728 (Ky.1967). “The fraud may occur in *any form of unconscionable conduct*; taking advantage of one's weaknesses or necessities, or in any way violating equity in good conscience.” *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985)(emphasis added), *citing St. Louis and S.F.R. Co. v. Spiller*, 274 U.S. 304, 47 S.Ct. 635, 71 L.Ed. 1060 (1927). In fact, a court exercising its equitable power may impress a constructive trust upon one who obtains legal title, “not only by fraud or by violation of confidence or of fiduciary relationship, but *in any other unconscientious manner*, so that he cannot equitably retain the property which really belongs to another[.]” *Scott v. Scott*, 183 Ky. 604, 210 S.W. 175, 176 (1919)(emphasis added). Similarly we have said that a constructive trust may be imposed where title is taken under “circumstances of circumvention [or] imposition[.]” *Middleton*, 216 S.W. at 592.

Keeney v. Keeney, 223 S.W.3d 843, 849 (Ky.App. 2007). The Court added that the term “confidential relationship” is liberally construed and determined by the facts. *Id.* at 850.

In the present case, the trial court heard the evidence and found that there was no fraud or undue influence in the execution of the deed to Mike. The

court's findings are not challenged. Instead, Billy focuses on Mike's testimony that, prior to the execution of the deed, he promised Agnes that if she requested the property be returned, he would reconvey it to her. He then points out that Agnes told the guardian *ad litem* that she desired the property be reconveyed and in her deposition testified that she wanted the property returned.

Although framed in terms of a misrepresentation, the basis for the constructive trust is an alleged oral agreement between Mike and Agnes that he would reconvey the property if requested by Agnes. Oral agreements to reconvey property can warrant the imposition of a constructive trust. However, the burden upon the party seeking to impose the trust is onerous. “[I]n order to establish a constructive trust growing out of an oral agreement to hold in trust land conveyed by a deed absolute in its terms the evidence must be clear, strong and convincing.” *Langford v. Sigmon*, 292 Ky. 650, 167 S.W.2d 820, 821 (1943). Likewise, if we interpret Billy's newly asserted cause of action for a constructive trust to be imposed because of Mike's alleged misrepresentation that he would reconvey the property to Agnes upon her request, the evidence must be clear and convincing that at the time of the conveyance, Mike misrepresented that he would reconvey the property to Agnes upon her request and, the promise must have been relied upon when Agnes executed the deed. *See Wheat v. Commonwealth, Cabinet for Health and Family Services*, 217 S.W.3d 266 (Ky.App. 2007). For the same reasons that the trial court properly directed a verdict on the fraud claim, it properly found that there was no misrepresentation and the amendment of the complaint futile.

Mike testified that he promised to reconvey the property to Agnes if that was her desire but that her request made after Billy's discovery of the conveyance was prompted by Billy. There is ample evidence in the record that indeed it was Billy, not Agnes, who wanted the property reconveyed.

Agnes's testimony convinced the trial court and convinces this Court that Agnes deeded the property to Mike intentionally and voluntarily, and that it was her desire that the property remain in Mike's name. Her post-conveyance statements to the contrary appear to be made with the hope of resolving the legal battle initiated by her son.

The guardian *ad litem* reported that although Agnes stated she wanted the property reconveyed, she was motivated by the termination of the litigation and it was her intent that Mike have the property after her death. Most telling of the situation was Agnes's deposition. We quote the pertinent portions and her questioning by Mike's counsel:

Q. Okay. Did – have you and Billy discussed the fact that Mikey has the deed for the house?

A. Mikey has the deed for the house, I think.

Q. Yes, he does. Have you discussed that with Billy?

A. (Witness shakes head negatively.)

Q. Not at all?

A. Not at all. Billy hasn't talked to me either.

Q. Okay. Did Billy – did Billy talk to you about bringing this lawsuit against Mikey?

A. About what?

Q. Did Billy talk to you about filing a lawsuit against Mikey?

A. He said something about it, but then he never – just that one time. He never did say any more about it.

Q. Did he ask you if it was – if you wanted to file the lawsuit against Mikey?

A. If he what?

Q. I'm sorry. I don't mean to speak so fast. I'll try to slow down.

Did he ask you if it was okay to file the lawsuit against Mikey?

A. He didn't ask me one way or the other, he just told me he filed it.

Q. Okay. Why did he tell you he filed it?

A. He said that's all he knew to do or something like that. I don't know.

Q. Okay. Do you recall when he told you all that?

A. Huh?

Q. Do you recall when he told you about the lawsuit?

A. I don't know when he filed it.

Q. Okay. Okay. Do you want the lawsuit to continue?

A. I don't know. I don't – I don't have anything to do with it, do I?

Q. Well, you do, actually. See, and that's why I asked you if you understood what's going on here in these

proceedings. What your son has done is filed a lawsuit in your name against Mikey. Do you understand that at all?

A. Yeah.

Q. Okay. And he – in the lawsuit, he is basically saying that Mikey took the house from you without your permission and he has sued to get the house back, okay? Mikey says he did not take the house from you without permission, that you gave him permission and that you signed the deed that I showed you earlier, okay? So they have different opinions about what happened.

A. Well, I don't have any because I don't know what happened. I'm all –

Q. Okay.

A. – confused and –

Q. Okay.

A. – I don't – I don't – I don't know.

Further, Agnes stated her wishes as to the disposition of her property following her death:

Q. That's – okay. I understand that. And as far as the – as far as the house goes, you said you would like that back in your name, the house?

A. Yeah, I'd like to.

Q. Okay. Do you recall what happens to the house when you pass away in your new will? Who gets the house when you pass away?

A. I don't know. I'd have to – I don't know. I'd have to make out a new will when I

Q. Who – who would you like to have the house when you pass away?

A. Huh?

Q. Who would you like to have the house when you pass away?

A. Well, I wanted Mikey to have it because he didn't have any place to live and Billy's got a place to live and the trailer park and all, and I – but that's the only reason that I wanted Mikey to have the trailer park, but I guess that didn't work either, so. . . .

Q. Why didn't that work? Do you know why that didn't work?

A. They don't get along.

Q. Okay. Well, you said that Mikey had the trailer park. Mikey doesn't have the trailer park, Billy has the trailer park, right? Billy – Billy has the trailer park?

A. Yeah, Billy has the trailer park in his name.

Q. And that's why you wanted Mikey to have the house so he would have something?

A. I wanted Mikey to have a place to live but Billy always seemed to want it that way. I don't know what – I don't know what either one of them wants.

We agree with the trial court that the evidence is not clear and convincing that Agnes conveyed the property to Mike in reliance upon the promise that it would be reconveyed to her. To the contrary, there is substantial evidence that she conveyed the property because she desired that Mike own the property before and after her death. Her statements to the contrary were in response to the unrelenting litigation initiated by her son.

Finally, we concur with the trial court's observation that the claim for a constructive trust should have been pursued prior to the entry of the judgment directing a verdict in Mike's favor.

The final issue concerns the establishment of a boundary line. The trial court established the boundary line in accordance with the deed and the drawing presented by Billy's expert, Joel Day. More than ten days after the entry of the judgment, Billy filed a motion "to adjust the boundary line between the parties' real property" alleging that "the line directed by the court creates an unlawful encroachment."

A motion to alter, amend, or vacate a judgment under CR 59.05 must be *served* not later than ten days from the entry of the final judgment. *Huddleston v. Murley*, 757 S.W.2d 216, 217 (Ky.App. 1988). Further, "a trial court loses control of a judgment ten (10) days after the entry of the judgment, except to the extent an authorized, timely motion under CR 59 is made." *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d 713, 718 (Ky.App. 1979). Because the motion was filed more than ten days after the entry of judgment, it cannot be considered timely. The motion was properly denied.

Based on the foregoing, the order of the Scott Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Neil E. Duncliff
Georgetown, Kentucky

BRIEF FOR APPELLEE:

Kevan Morgan
Georgetown, Kentucky