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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001983-MR
AND
NO. 2008-CA-002045-MR

TIM HAAG — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 03-CI-00194

KIMBERLY D. WILSON;
BENJAMIN H. WILSON;
AND WILLIAM H. TINGLE, JR. — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: This is an appeal and cross-appeal from a judgment of the Henry Circuit Court which resolved a boundary dispute between Timothy Haag, Kimberly and Benjamin Wilson ("the Wilsons"), and William Tingle. The trial

court found that the boundary description in Haag's senior deed should control over the descriptions in the Wilsons' and Tingle's junior deeds. The trial court also found that the doctrines of adverse possession and agreed boundary were not applicable in this case. However, the trial court further found that the description in Haag's deed should be reformed based on a mutual mistake between the original grantor and grantee. The court also found that Haag should be equitably estopped to claim his boundary against the Wilsons because he did not object when they built improvements in the disputed area.

We find that there was substantial evidence to support the trial court's conclusions concerning the sufficiency of the description in the senior deed. We also agree with the trial court that the doctrines of adverse possession and agreed boundary are not applicable in this case. But we further find that the doctrines of mutual mistake and equitable estoppel are not applicable under the circumstances presented in this case. Hence, we affirm in part, reverse in part, and remand for entry of a new judgment and additional proceedings to determine the appropriate remedy.

Haag, the Wilsons, and Tingle each own adjoining tracts of land located on Boyer Lane in Henry County, Kentucky, near Campbellsburg. All of the property at issue was originally an undivided tract owned by Irvin and Wilma Slocum. In November of 1975, the Slocums sold a portion of that tract to Kenneth Williams. In 1990, Williams conveyed the property to Haag, and the same description appears in his deed. In 1989, Wilma Slocum (now widowed) conveyed

a lot to her niece, Kimberly Wilson, and her husband, Benjamin.[1] The remaining portion of the Slocum property was conveyed to Willie Tingle in 1990 under a contract for deed. On completion of the contract, the deed to this tract was conveyed to Tingle on September 24, 1994.

Of the three "out-conveyances" from the Slocum tract, two of them -- the 1975 deed to Williams and the 1989 deed to Wilson -- contain property descriptions expressed in lay language. The property description in the Williams deed consists of distances and acreage. The property description in the Wilson deed refers to distances, but also mentions stakes and several iron pins. Mark Patterson conducted a survey in 1994 to prepare the property description for Tingle's deed. Patterson's description uses metes and bounds calls and refers to stakes or pins used in the survey.

The boundary dispute in this case arose in 2002 when Haag voiced a concern that Tingle was encroaching on his property. In 2003, Haag hired Marty Bright to conduct a boundary survey. Bright's survey showed that both the Wilsons and Tingle were encroaching on Haag's property. The survey showed that the Wilsons had built improvements which encroached onto Haag's property. The survey also showed that Tingle was encroaching onto Haag's property, although he had not built any improvements on the disputed area.

[1] The parties agree that the Slocums gave the property to the Wilsons in 1986, but Wilma Slocum did not deliver the deed to the Wilsons until 1989.

Based on Bright's survey, Haag brought this action in 2003 against the Wilsons and Tingle. He argued that the Wilsons and Tingle were encroaching on his property. He also asked the trial court to determine the property line between the parties. In their answers, the Wilsons and Tingle asserted that the boundary description in Haag's deed was the result of a mutual mistake between the Slocums and Williams. Consequently, they asked that Haag's deed be reformed to reflect the property line as understood by the parties to that deed. In addition, they argued that the description in the Williams deed was ambiguous and should be reformed by parol evidence. They also asserted that they had acquired title to the disputed areas by agreed boundary or by adverse possession. Finally, the Wilsons argued that Haag should be equitably estopped from enforcing his boundary line because he failed to object to their construction of improvements in the disputed area.

In 2004, the trial court appointed a master commissioner to hear evidence regarding the disputed property line. Haag relied on Bright's survey and testimony in support of his claim. The Wilsons and Tingle presented the expert testimony of Todd Brown and Mark Patterson.[2] Brown and Patterson disagreed with Bright about the boundaries, stating that Bright moved some of the lines in order to fit the distances in the senior deed. However, they agreed that Bright had

[2] Although Brown and Patterson are referred to as surveyors in some of the pleadings, neither are currently licensed land surveyors. Brown has worked as a supervisor for surveying field crews and had completed the educational requirements, but had not obtained a surveyor's license at the time of trial. Patterson held a land-surveying license at the time of the 1994 survey, but his license had lapsed by the time of trial.

applied generally accepted surveying practices. In addition, Kenneth Williams testified that he walked the property in 1975 with Irvin Slocum who pointed out the boundaries claimed by the Wilsons and Tingle. Similarly, the Wilsons testified that they walked the property in 1986 with Wilma Slocum who pointed out the boundary with the Williams/Haag tract.

In his report, the commissioner found that the Wilsons and Tingle had not proven any agreed boundary or that they had adversely possessed the disputed area for the requisite period. The commissioner also found that the property description in the Williams/Haag deeds was not ambiguous and could be located with reasonable certainty based on the Bright survey. Finally, the commissioner concluded that Haag was not estopped to claim the boundary set out in his deed.

The Wilsons and Tingle filed objections to the commissioner's report and requested additional findings and a new trial. The trial court upheld the commissioner's findings concerning the boundaries set out in the senior deed, as well as the commissioner's legal conclusions concerning adverse possession and agreed boundary. However, the court scheduled an additional hearing on the issues of mutual mistake and equitable estoppel.

In an order entered on July 10, 2008, the trial court again affirmed the commissioner's findings concerning the sufficiency of the description in the senior deed and the boundaries of the property as set out by Bright's survey. The trial court also agreed with the commissioner that there was insufficient evidence to establish any agreed boundary between the parties, or that the Wilsons or Tingle

had acquired title to the disputed areas by adverse possession. However, the trial court found that Tingle had proven a mutual mistake in the boundary description between Tingle and Haag's tract. Based on Williams's testimony, the trial court directed that the property line be reformed to reflect the understanding between the Slocums and Williams. With respect to the Wilsons, the trial court found that Haag was equitably estopped to claim to boundary set out in his deed because he remained silent when the Wilsons were building improvements on the disputed area. The trial court subsequently denied Haag's motion to alter, amend or vacate. This appeal and cross-appeal followed.

In their cross-appeal, the Wilsons and Tingle first argue that the trial court erred by finding that the property description in Haag's deed is unambiguous. They point to Bright's admissions that he had to modify the direction calls in order to fit the distance calls and acreage set out in the deed. They also note that Bright's boundary does not follow the edge of Boyer Lane as set out in the deed, but at some points it actually crosses the road. Based on these inconsistencies, the Wilsons and Tingle maintain that the deed description is ambiguous and thus subject to modification by parol evidence.

As this matter was tried before the circuit court without jury, our review of factual determinations is under the clearly erroneous rule. Kentucky Rules of Civil Procedure ("CR") 52.01. This rule applies with equal force on an appeal from a judgment in an action involving a boundary dispute. *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980). Furthermore, "[a] fact finder may choose

between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors." *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky. App. 2002) (quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184-85 (Ky. App. 1987)).

In this case, the parties agree that the boundary description in Haag's deed overlaps portions of the descriptions in the Wilsons' and Tingle's deed. As a result, the trial court correctly found that the boundary description in the senior title is controlling. *See Karr v. Ray*, 232 Ky. 767, 24 S.W.2d 609, 611 (1930); and *Johnson v. Thornsberry*, 200 Ky. 665, 255 S.W. 284 (1923). Moreover, only Bright conducted a survey based on the description in the senior title. As a result, the trial court concluded that Bright's survey and testimony was most relevant to determine the sufficiency of that description.

The trial court accepted Bright's testimony that the location of the boundaries could be determined with reasonable certainty based on the description in Haag's deed. Although a strict reading of the distance calls would extend one line across Boyer Lane rather than to the right of way, the trial court noted that this deviation would not affect the boundaries between any of the parties to this case. And while the other experts disagreed with Bright's priorities in determining the boundaries, they agreed that Bright had applied generally accepted surveying practices. In addition, no other expert testified that Haag's deed description was ambiguous. Therefore, the trial court did not clearly err by accepting the Bright survey. Furthermore, since extrinsic evidence cannot be admitted to vary the terms

of a written instrument in the absence of an ambiguous deed, *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000) and *Sword v. Sword*, 252 S.W.2d 869 (Ky. 1952), the trial court did not err by declining to consider parol evidence to explain the boundary in the senior deed.

The Wilsons and Tingle next argue that the trial court erred by rejecting their theories of agreed boundary and adverse possession. Where the parties to an agreement fixing the boundary line each take possession to the agreed line and exercise possession for the statutory period, the agreed line becomes fixed although the agreement may be in violation of the statute. *Combs v. Combs*, 240 S.W.2d 558, 559 (Ky. 1951). Similarly, the Wilsons and Tingle maintain that they and their predecessor adversely possessed up to their claimed boundaries for the requisite period.

We agree with the trial court that neither of these doctrines is applicable. In order for an agreed or conditional boundary line to be sustained in law, it must be shown that: (1) there was a *bona fide* controversy between the owners at the time respecting the true location; (2) the line claimed to have been agreed upon was marked; (3) actual possession was taken in accordance with such agreement; or (4) there was continuing acquiescence or mutual recognition by coterminous landowners for a considerable length of time. *Bringardner Lumber Co. v. Bingham*, 251 S.W.2d 273, 274-75 (Ky. 1952) (citing *Cline v. Blackburn*, 292 Ky. 713, 168 S.W.2d 15 (1943); *Steele v. University of Kentucky*, 295 Ky. 187, 174 S.W.2d 129 (1943); *Wagers v. Wagers*, 238 S.W.2d 125 (1951); and *Redman*

v. Redman, 240 S.W.2d 553 (Ky. 1951)). As the trial court noted, there was no evidence of any dispute involving the location of the boundary line before 2002. And while Kenneth Williams testified that Irvin Slocum walked off the boundaries in 1975, the trial court correctly noted that there was no evidence that Slocum and Williams intended this to be an oral agreement setting the boundary line.

Likewise, title by adverse possession requires proof that the possession was hostile, under a claim of right, actual, exclusive, continuous, open, and notorious for a period of at least fifteen years. These elements must be demonstrated by clear and convincing evidence. *See Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878, 879-80 (Ky. 1992). Here, neither the Wilsons nor Tingle held title to their respective tracts for more than fifteen years before Haag raised a question about the boundaries. Furthermore, the trial court correctly found that the present-day parties cannot tack the years of possession between the original grantor and grantee. As a general rule, a grantor's continued possession after conveying to a grantee is presumed to be permissive. The character of such possession will not change unless the grantor makes an express disclaimer of such relation and a notorious assertion of title in himself. *Williams v. Thomas*, 285 Ky. 776, 149 S.W.2d 525, 527-28 (1941). In the absence of any such disclaimer by the Slocums, their continued possession of the disputed property cannot be considered as adverse to Williams.

Consequently, we now reach the issues raised in Haag's direct appeal. Haag first argues that the trial court erred by reforming the boundary between him

and Tingle based on the mutual mistake between the Slocums and Williams. As noted above, the parol evidence rule prohibits introduction of extrinsic evidence to explain an unambiguous deed. However, the parol evidence rule does not preclude an equitable claim for reformation based on mutual mistake. *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343, 345 (Ky. 1970).

In *Abney v. Nationwide Mutual Insurance Co.*, 215 S.W.3d 699 (Ky. 2007), the Kentucky Supreme Court set out the elements necessary to vary the terms of a writing based on mistake:

> To vary the terms of a writing on the ground of mistake, the proof must establish three elements. First, it must show that the mistake was mutual, not unilateral. Second, "[t]he mutual mistake must be proven beyond a reasonable controversy by clear and convincing evidence." Third, "it must be shown that the parties had actually agreed upon terms different from those expressed in the written instrument."
>
> The mistake must be one as to a material fact affecting the agreement and not one of law, which is "an erroneous conclusion respecting the legal effect of known facts." A material fact is one that goes to the root of the matter or the whole substance of the agreement.

Id. at 704 (internal citations omitted).

We agree with the trial court that there was evidence to establish that the Slocums and Williams made a mutual mistake in the boundary description. However, Kentucky courts have recognized that it would be inequitable to reform a deed on the ground of mutual mistake between an original grantor and grantee if a subsequent purchaser from the grantee was without notice of the mistake. *Althaus*

v. Bassett, 245 S.W.2d 943, 944-45 (Ky. 1952). *See also Swiss Oil Corporation v. Hupp*, 232 Ky. 274, 22 S.W.2d 1029, 1031 (1928) ("Conceding, though not determining, that the evidence was sufficient to authorize the reformation contended for as between the parties to the involved transactions, the law seems to be well settled that no reformation may be had to the detriment of intervening rights of third parties . . . .") In this case, there is no evidence that Haag would have had reason to know of the mistake.

Williams never made any statements to Haag which contradicted the deed's description of the boundary line with Tingle's tract. There is no evidence of any improvements in the disputed area, or that the boundary was even marked. Consequently, we must conclude that the trial court erred by reforming the boundary between Haag and Tingle based upon mutual mistake.

Finally, the trial court found that Haag was equitably estopped to claim the boundary against the Wilsons because he remained silent while they built an extension on their mobile home in 2000. In addition, the Wilsons built another building, referred to as a barn or a shed, on the disputed area in 2002. Although Haag did not learn the true line until the Bright survey was completed in May 2003, he admitted that he had suspected that his line was actually much farther over for several years. Furthermore, he felt confident enough about his line in June 2002 to tell Tingle he was mowing on his property, but he said nothing to the Wilsons when they built their shed/barn. Based on this silence, the trial court

found that Haag is estopped as to the Wilsons to claim the property line past the line claimed by the Wilsons.

Haag argues that his silence was not sufficient to warrant application of the doctrine of equitable estoppel. We agree. In extraordinary circumstances, title to real property may pass by an equitable estoppel where justice requires such action. *Embry v. Turner*, 185 S.W.3d 209, 215 -216 (Ky. App. 2006). A landowner who knows the true line and silently permits an adjoining owner to make substantial improvements unknowingly past the line is estopped to claim to the true boundary. *Faulkner v. Lloyd*, 253 S.W.2d 972, 974 (Ky. 1953). In order to establish an equitable estoppel against one asserting title to real property, the party attempting to raise it must show an actual fraudulent representation, concealment or such negligence as will amount to a fraud in law, and that the party setting up such estoppel was actually misled thereby to his injury. *Embry v. Turner*, *supra* at 215-16.

Haag's silence with respect to the Wilsons does not rise to the level of actual fraudulent misrepresentation or negligence which would amount to a fraud at law. There is no evidence that Haag made any representations to the Wilsons about the location of the boundary line. Haag may have had suspicions about the location of the true boundary as early as 2000, but he did not know the true boundary until Bright completed his survey in 2003. And there is no evidence that Haag's delay in obtaining the survey was unreasonable. Furthermore, Haag's "mere acquiescence" to the construction is not sufficient to create an estoppel

given the uncertainty about the boundary at that time. Therefore, we respectfully conclude that the trial court clearly erred by finding that Haag is estopped to claim the property line past the line claimed by the Wilsons.

We note, however, that this does not leave the Wilsons without a remedy. Although the Wilsons encroached onto Haag's property, they did so under color of the property description in their deed and without knowledge of Haag's claim. Indeed, Haag was equally ignorant of the true property line. In such cases, the trial court may fashion an equitable remedy to balance the rights of the parties. "We think under the circumstances the court should have ascertained by proof the reasonable value of the strip of land taken and required its conveyance to appellees upon their payment of the sum fixed. After the value is ascertained, the appellees should be given the choice of paying the reasonable value and requiring a conveyance or of removing the improvements." *Faulkner v. Lloyd*, *supra* at 974.[3] But since this involves a question of fact, we must remand this matter for additional proceedings to determine the appropriate remedy with respect to the Wilsons' property.

Accordingly, the judgment of the Henry Circuit Court is affirmed in part, reversed in part and remanded for additional proceedings. On remand, the trial court is directed to enter a judgment recognizing the boundary between Haag's and Tingle's tracts as set out in the Bright survey. The trial court is further

[3] We note that the Wilsons may also have a remedy under an applicable title-insurance policy.

directed to determine the appropriate remedy for the Wilsons' innocent encroachment onto Haag's tract.

ALL CONCUR.

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