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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001728-MR

CHARLES DWIGHT HUBER AND
KARLENE R. HUBER — APPELLANTS

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 07-CI-00313

CHARLES HERMAN HUBER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

DIXON, JUDGE: Dwight and Karlene Huber appeal a Marion Circuit Court order of partial summary judgment and a judgment declaring the parties' rights. Finding no error, we affirm.

Dwight and Karlene, who are Herman's son and daughter-in-law, purchased a tract of land from Herman and his wife, Jestine, in March 2004. The

deed granted a life estate to Herman and Jestine and provided that they "retain exclusive use and control" of the property. A dispute arose between Dwight and Herman in 2006 regarding the property; thereafter, Dwight and Karlene filed a declaratory judgment action against Herman in September 2007.

The parties convened for a bench trial on July 2, 2008. Counsel engaged in a two-hour conference with the trial judge, setting forth the issues of law and fact. The parties argued their respective positions, and the court summarily ruled on the legal issues. The court then heard testimony from the parties on the remaining issues. On August 14, 2008, the court rendered a partial summary judgment and a trial judgment declaring the rights of the parties. This appeal by Dwight and Karlene followed.

Dwight and Karlene contend the court improperly granted partial summary judgment on the morning of trial. They also contend the court erred by determining they must install a septic system on the property, that they are not entitled to use the property without permission from both life tenants, and that they are liable for the mortgage on the property.

Summary judgment is proper only when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (*quoting* Kentucky Rules of Civil Procedure (CR) 56.03). Dwight and Karlene contends the court committed reversible error by ruling on Herman's oral motion for summary judgment on the morning of trial. They cite CR 56.03, which

provides that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." While this is a correct statement of the rule, it is also true "that the ten-day requirement of CR 56.03 may be waived absent a showing of prejudice." *Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc.*, 649 S.W.2d 415, 416 (Ky. App. 1983). A review of the lengthy bench conference shows the parties discussed the undisputed facts and agreed that the court should decide certain issues of law. Consequently, it is disingenuous for Dwight and Karlene to contend that they were "ambushed," when they clearly participated in the summary judgment proceedings. Under the circumstances of this case, we find no error in the court's decision to entertain the oral partial-summary judgment motion.

We now address the errors of law alleged by Dwight and Karlene. First, they dispute the court's finding that they are responsible for installing a septic system on the property. A house on the property, built in the 1950s, has a straight-line sewer pipe that empties sewage over a hillside.[1] In March 2008, Dwight and Karlene contacted the health department to inspect the house. The inspector issued Dwight a citation for non-compliance with sewage disposal regulations pursuant to Kentucky Revised Statutes (KRS) 212.210. As a result, a proper septic system must be installed.

[1] Apparently, no one lives in this house full-time. It appears that Herman visits the property occasionally and stays overnight.

"As a general rule a tenant for life must make all ordinary, reasonable, and necessary repairs required to preserve the property and prevent its going to decay or waste . . . [.]" *Prescott v. Grimes*, 143 Ky. 191, 136 S.W. 206, 207 (Ky. App. 1911). Dwight and Karlene contend installing a septic system constitutes an act to preserve the property. In contrast, Herman asserts that, since no septic system has ever existed for him to repair or maintain, installing a new septic system is a permanent improvement and the responsibility of Dwight and Karlene as the remaindermen. We agree.

It is the duty of the life tenant to preserve the property "for the remaindermen in substantially the condition in which it was received by the life tenant[.]" *Lindenberger v. Cornell*, 190 Ky. 844, 229 S.W. 54, 57 (Ky. App. 1921). Furthermore, the life tenant "is under no legal obligation to undertake any improvements . . . [.]" *Bigstaff's Trustee v. Bigstaff*, 165 Ky. 251, 176 S.W. 1003, 1005 (Ky. App. 1915). In light of the circumstances presented here, we conclude the court did not err by finding that Dwight and Karlene are obligated to install the septic system as a matter of law.

Next, Dwight and Karlene contend the trial court erred by concluding they cannot use the property without the consent of both life tenants. This issue arose because Dwight entered the land, demolished a storage building, and cleared trees with Jestine's permission, but without Herman's permission. The court relied on *Taylor v. Bradford*, 244 S.W.2d 482, 483-84 (Ky. 1951), which states that a co-tenant enjoys the full use of the estate subject to the rights of other co-tenants.

Because Jestine must respect the rights of her co-tenant, the court concluded that permission from both co-tenants is required.

Dwight and Karlene contend that Jestine has authority to unilaterally permit them to use the property because she enjoys exclusive use of the land as a co-life tenant. We disagree.

The undisputed facts show that Dwight entered the land, with Jestine's permission, and demolished a structure used by Herman for storage. In so doing, Dwight destroyed or removed personal property belonging to Herman. Dwight also removed numerous trees from the property and boarded his horses there. As this Court has previously noted, "the law will not permit one co-tenant, [w]here all must act in unison, to obtain a secret profit to the disadvantage of his co-tenants." *Howell v. Bach*, 580 S.W.2d 711, 713 (Ky. App. 1979) (citation omitted). We believe this principle is applicable here. While Jestine did not "profit" by giving Dwight permission to use the land, her co-tenant, Herman, suffered a disadvantage from her unilateral act. Accordingly, the court correctly concluded that Dwight's use of the property requires the consent of both life tenants.

Finally, Dwight and Karlene contend the court erred in finding that they are liable for the mortgage on the property because the issue was not raised in the pleadings. A review of the bench conference shows that Dwight and Karlene executed a mortgage to purchase the property from Herman. While Herman signed the mortgage as a life tenant, only Dwight and Karlene executed the promissory

note to secure payment of the purchase price. Furthermore, the video record reveals that counsel for Dwight and Karlene specifically asked the court to make a ruling on liability for the mortgage payments. For Dwight and Karlene to assert on appeal that this issue was not raised below is also disingenuous. We find no error in the court's determination that Dwight and Karlene are responsible for the mortgage.

For the reasons stated herein, we affirm the judgment of the Marion Circuit Court.

ALL CONCUR.

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