RENDERED: APRIL 9, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000888-MR

MARK E. LINEBAUGH
AND MIKE O'HEARN APPELLANTS

v.

APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 08-CI-00048

ROBERT C. CARROLL; JAMES D.
CARROLL; ELEANOR M. CARROLL;
COUNTRYWIDE HOME LOANS, INC;
BANK OF EDMONSON COUNTY;
BRANDON HOGAN; AND
LUTHER N. NORENE APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

COMBS, CHIEF JUDGE: Mark E. Linebaugh and Mike O'Hearn appeal from a judgment of the Edmonson Circuit Court of April 13, 2009, which ruled in favor of

James D. Carroll and Eleanor M. Carroll, his wife, and Robert Carroll in a dispute involving an easement. At issue is the existence and extent of an alleged easement over the Carrolls' property. The trial court held that a reservation clause included in the Carrolls' chain of title was of no legal effect. After our review, we vacate and remand.

By deed of October 31, 1997, Linebaugh acquired property in Edmonson County known as the Old Hall-Thompson place. Linebaugh conveyed 119.35 acres, more or less, to T and L Investments, Inc. A portion of the property was subsequently conveyed to Thomas and Charlene Burnett. In 2005, the Burnetts conveyed the property to the Carrolls. The Old Hall-Thompson house, formerly a bit of marker or reference point, was torn down by the Carrolls after this conveyance.

The deed of June 5, 2000, conveying the property from Linebaugh to T and L Investments contains a lengthy metes-and-bounds description of a 122.35-acre tract. Additionally, the deed contains the following language excepting three acres from the conveyance:

> EXCEPTED AND LYING WITHIN the above described parcel is a three (3) acre tract retained by grantor (Mark E. Linebaugh), said being described as follows: Beginning railroad spike driven in the center of Buzzard Roost Road, said being referenced N 53 deg. 54 min. 19 sec. E 1382.23 feet from the beginning corner of the above described boundary; thence following the existing center of said road N 48 deg. 26 min. 53 sec. E 105.39 feet, N 55 deg. 20 min. 23 sec. E 41.94 feet, N 62 deg. 57 min. 29 sec. E 67.45 feet to a railroad spike; thence leaving said road, S 77 deg. 38 min. 24 sec. E 94.35 feet

> (passing a steel road (sic) at 20 feet) to a 24 inch pike (marked with 2-sets (sic) of 3-hacks(sic)); thence S 12 deg. 58 min. 57 sec. E 452.80 feet to a steel rod (set); thence S 77 deg. 01 min. 03 sec. W 282.23 feet to a ½" steel rod (set); thence N 12 deg. 58 min. 57 sec. W 410.91 feet (passing a steel rod at 390.91 feet) to the point of beginning. LEAVING a balance of 119.35 acres, more or less conveyed, according to a survey by Hardin Land Surveying, Registered Surveyor, Doyle Edward Hardin Ky. LPLS 3406 on May 21, 2000.

The deed also contains the following reservation clause:

> *The Grantee reserves unto himself and his heirs, executors and assigns*, and this conveyance is subject to, the water well and septic system located on the property herein conveyed, near the "old Hall Thompson" house.

(Emphasis added). The Burnetts' deed of conveyance to the Carrolls provided that the conveyance was "subject to all valid restrictions, reservations, limitations, easements, convenants (sic) and conditions as may appear in the record chain of title. . . ." Prior to the commencement of this action, Linebaugh agreed to convey his interest in the three-acre tract to Mike O'Hearn.

In March 2008, the Carrolls filed a verified complaint against Linebaugh, O'Hearn, Luther N. Norene (the attorney who undertook the title examination), and others. The Carrolls alleged that sewage from the residence on Linebaugh's adjoining three-acre tract was being discharged onto their property and that O'Hearn had installed elements of a septic system on their property without their permission. They alleged that the "purported reservation of an interest in the land now owned by [the Carrolls] was ineffective and void due to an

inadequate description. . . ." Complaint at 3. They sought to enjoin O'Hearn's discharge of sewage onto their property and to recover for nuisance and trespass.

Linebaugh and O'Hearn filed an answer and counterclaim. Linebaugh and O'Hearn admitted that elements of a sewage disposal system had been installed at the site, but they alleged that the Carrolls' property was subject to the easement that permitted the use of the water well and septic system situated near the Old Hall-Thompson house for the benefit of the dominant estate (*i.e.,* the three-acre tract reserved). Linebaugh and O'Hearn further alleged that although the Carrolls were fully aware of the existence and extent of the easement, they nonetheless excavated part of the septic system and caused raw sewage to leak onto the Linebaugh property. Linebaugh alleged that the Carrolls had obstructed his rightful access to the septic system and water well; had vandalized the home on his property; and had harassed and intimidated him. Linebaugh and O'Hearn sought an injunction and damages.

The parties conducted no discovery. Linebaugh filed his affidavit, and the Carrolls filed a motion for declaratory judgment. In their motion, the Carrolls contended that the only issue to be decided was the legal effect of the reservation. The Carrolls contended that the nature and extent of the reservation were ambiguous and that the resulting uncertainty had to be resolved in their favor. They contended that the reservation was ambiguous for two reasons: first, the reservation was made in favor of the *grantee* and not Linebaugh, the *grantor*; and second, the reservation did not state the nature of the interest at issue: whether it

was an easement or a fee simple interest. Finally, the Carrolls contended that the purported reservation lacked an adequate description and that it was, therefore, unenforceable.

The judgment of the Edmonson Circuit Court was entered on April 13, 2009. Without preamble, the court concluded that the reservation was void as a matter of law, and title was quieted in the Carrolls. This appeal followed.

On appeal, Linebaugh and O'Hearn argue that the trial court erred in its construction of the deed's reservation clause. They contend that the use of the word *grantee* rather than *grantor* at the beginning of the reservation was an obvious drafting error and that it is clear that Linebaugh intended to create an easement benefitting the tract described in the exception clause. Linebaugh and O'Hearn also argue that the description of the reservation is legally adequate. After our review of the documents and pertinent law, we are compelled to agree with Linebaugh.

The construction of a deed is a matter of law and, absent an ambiguity, the intention of the grantor is to be gathered from the four corners of the instrument. *Phelps v. Sledd*, 479 S.W.2d 894 (Ky. 1972); *Eastham v. Church*, 219 S.W.2d 406 (Ky. 1949). The appellees argue that there is no ambiguity in the deed or the reservation clause so as to allow us to proceed to ascertain the intent of the parties. Again, the reservation clause bears scrutiny:

> The Grantee reserves unto himself and his heirs, executors, and assigns, **and this conveyance is subject to**, the water well and septic system located on the

property herein conveyed, near the "old Hall Thompson" house. (Emphasis added).

The exception clause of the deed in the large paragraph of conveyance immediately precedes this clause. A cursory reading of this clause reveals no patent ambiguity other than the curious, unusual use of *Grantee* (undefined and unnamed, noting that *Grantor* in the previous paragraph identified the grantor as Linebaugh). Although the appellees correctly argue that a grantee can reserve a right, such an occurrence is not the norm. Normally the grantee is on the receiving end of a conveyance by a grantor; *i.e.,* one who had nothing now is acquiring something.

A closer reading of the reservation clause reveals that in context, a latent ambiguity is indeed present: "and this conveyance is subject to …." "This conveyance" refers to the 119.35 acres, the subject matter of the first long and detailed paragraph. The 119.35-acre parcel (the conveyance) is expressly burdened with, made **subject to**, "the water well and septic system **located** on the **property** herein **conveyed** …." Thus, the grantee of the property conveyed bears the burden – but does not enjoy the benefit – of the water/septic system as being located on his property but serving the property of the grantor.

Where there is uncertainty with respect to what interest was conveyed, the court gives primary consideration to the **intent** of the parties. *Eastham, supra*. "In determining the intention of the parties, courts look at the whole deed, along with the circumstances surrounding its execution. . . ." *Arthur v. Martin*, 705

S.W.2d 940, 942 (Ky.App. 1986). In attempting to ascertain intent, courts are admonished to employ common sense – all too often a rare guest in the house of the law:

> Fairness, justice and common understanding must enter into the interpretation of any instrument, and an apparent mistake in the use of words will not be permitted to impair what was the real intention of the parties or to defeat their obvious purpose.

Trivette v. Consolidation Coal Co., 177 S.W.2d 868 (Ky. 1944). (Emphasis added).

An examination of the entirety of the deed and of the circumstances as they existed at the time of its execution reveals the intent of the grantor. By definition and operation of law, a deed's reservation clause retains in the *grantor* an interest in the property conveyed to another. *Black's Law Dictionary* 1472 (1968); *Moore v. Davis*, 117 S.W.2d 1033 (Ky. 1938).

We are persuaded that under these circumstances, the use of the term *grantee* to describe Linebaugh, the *grantor*, in the reservation clause is necessarily a scrivener's error. Linebaugh plainly intended to retain the right to use the water well and septic system that were located near the Old Hall-Thompson house on property that would be conveyed in fee simple to the grantee, T and L Investments. This reservation was clearly intended to burden the property conveyed to T and L Investments and to benefit and to run with the reserved three-acre tract.

Finally, we address the adequacy of the reservation's description. A description is sufficient where the property can be located without resort to

excessive discretion or effort. *See Justice v. Justice*, 39 S.W.2d 250 (Ky. 1931). In this case, the description of the easement is not so vague or indefinite as to prevent its physical identification both with ease and with reasonable certainty.

As to the nature of the interest reserved, the reservation clause construed with the preceding paragraph indicates language attempting to reserve or create an easement on the Carrolls' property to benefit the three-acre tract. The dominant estate (*i.e.,* the three-acre tract reserved) and the servient estate (*i.e.,* the remaining acreage burdened by the reserved parcel) are adequately described on the face of the deed. The subject matter of the reservation is clearly described by the provisions of the reservation clause; proof of its dimensions and boundaries is readily available. On remand, the trial court is at liberty to consider extrinsic evidence and find relevant facts to establish the exact location and parameters of the easement.

In summary, we hold that the Carrolls' chain of title adequately revealed Linebaugh's intention to reserve the three-acre tract for himself and to burden with an easement the Carrolls' property containing the septic system and water well to serve his three-acre tract. Consequently, the Carrolls' property was burdened by the easement at the time it was conveyed to them. Remand is required for a finding of relevant facts to establish the precise boundaries of the easement and to quiet title in Linebaugh. As to appellant O'Hearn, his interest in the land is contingent upon his agreement with Linebaugh and requires no action by this Court or by the trial court.

Accordingly, we vacate the judgment of the Edmonson Circuit Court and remand for further action consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

George R. Carter
Louisville, Kentucky

BRIEF AND ORAL ARGMENT FOR APPELLEES ROBERT C. CARROLL, JAMES D. CARROLL, AND ELEANOR M. CARROLL:

David S. Sprawls
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BRIEF AND ORAL ARGUMENT FOR APPELLEE LUTHER N. NORENE:

Whayne C. Priest, Jr.
Bowling Green, Kentucky