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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-001208-MR

TOMMY JAKE MAY — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 05-CI-01475

JAMES MICHAEL MAY;
AND CONNIE MAY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT AND VANMETER, JUDGES.

VANMETER, JUDGE: Tommy Jake May appeals from the order of the Pike Circuit Court granting summary judgment in favor of James Michael May and Connie May. For the following reasons, we affirm.

In 2005, James and his wife Connie filed a complaint against Tommy, asserting ownership to a certain parcel of property referred to by the parties as the "homeplace." They claimed ownership by way of a deed dated March 16, 1990,

executed and delivered by James's and Tommy's parents, Ralph and Fern May. In that deed, Ralph and Fern reserved a life estate interest in the property and resided on the property until their deaths in 2002 and 1995, respectively. The deed was recorded on September 11, 1990 in the Pike County Clerk's office.

In 2002, the last will and testament of Ralph May was probated and filed of record. In his will, Ralph left James "the home I live in." In 2003, Tommy recorded a deed dated April 6, 1994, in which Ralph and Fern conveyed to him a parcel of property bearing approximately the same description as the deed to James, but no life estate was reserved. Thereafter, a dispute arose as to ownership of the "homeplace."

Before the trial court, Tommy disputed the validity of the 1990 deed to James, arguing that the signatures of Ralph and Fern were forged and that the date of the deed had been altered. Tommy also for the first time contested the validity of Ralph's will, claiming that it did not bear genuine signatures executed in the presence of witnesses. The trial court held a hearing on the matter and subsequently granted summary judgment in favor of James and Connie, finding them to be the true owners of the "homeplace" by way of the 1990 deed and Ralph's bequest in his 2002 will. The court further found the 1994 deed to be invalid. This appeal followed.

Summary judgment shall be granted only if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law." CR[1] 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted).

On appeal from a granting of summary judgment, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Lewis B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (citations omitted). Because no factual issues are involved and only legal issues are before the trial court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

Kentucky law is clear that the possession of a deed and its recording by the grantee creates a presumption of delivery and acceptance. *Wells v. Butcher*, 299 Ky. 332, 335, 185 S.W.2d 406, 407 (1945); *Fisk v. Peoples Liberty Bank & Trust Co.*, 570 S.W.2d 657, 660 (Ky.App. 1978). Furthermore, reservation by a grantor of a "life estate" interest in the property conveyed by the deed is evidence that the grantor contemplated the deed would pass title immediately. *Rodgers v.*

[1] Kentucky Rules of Civil Procedure.

*Hendrickson*, 293 S.W.2d 456, 458 (Ky. 1956). With regards to an alleged forgery of a deed, clear and convincing proof must be presented to void a deed which purports to be signed and acknowledged by the grantor. *Gose v. Perry*, 302 S.W.2d 618, 619 (Ky. 1957) (citations omitted).

On appeal, Tommy contends that the trial court erred by finding no genuine issue of material fact existed concerning the validity of the 1990 deed and Ralph's will. In particular, Tommy claims that affidavits addressing the signatures on the 1990 deed and Ralph's will were sufficient to defeat James's and Connie's motion for summary judgment. We disagree.

The trial court found that the 1990 deed from Ralph and Fern to James bore the signatures of Ralph and Fern, was notarized, duly recorded by the Pike County Clerk, and met all of the requirements for recordation in the Commonwealth of Kentucky. In addition, the court found that when Tommy recorded his deed in 2003, the 1990 deed was on record. *See* KRS[2] 382.270 (requires recording of all instruments affecting real property); KRS 382.280 (deeds take effect in the order in which they are legally acknowledged and recorded). The court emphasized that the 1990 deed was recorded while both Ralph and Fern were alive; thereby strengthening the presumption that James received delivery of the deed. The deed to James also contained "life estate" language, which is strong evidence that Ralph and Fern contemplated the deed would pass title immediately. The court further found that the 1994 deed to Tommy did not contain "life estate" language and that Tommy did not record his 1994 deed until 2003, after both of his parents had died.

[2] Kentucky Revised Statutes.

With respect to the validity of Ralph's and Fern's signatures on the 1990 deed, the court referred to Tommy's deposition testimony, in which he admitted that Ralph's signature on the 1990 deed appeared to be valid and that the signature of the notary (now deceased) on the 1990 deed was genuine. The court also found that while the typed date "1989" on the 1990 deed was replaced with the handwritten date "1990", nonetheless, the deed was notarized in 1990. Thus, the court held that the handwritten alteration did not invalidate the deed.

Concerning Tommy's challenge to the validity of Ralph's will, the trial court found that his claim was barred by the statute of limitations pursuant to KRS 394.240(1), which provides, in part:

> Any person aggrieved by the action of the District Court in admitting a will to record or rejecting it may bring an original action in the Circuit Court of the same county to contest the action of the District Court. Such action shall be brought within two (2) years after the decision of the District Court.

Since no litigation had been filed contesting the validity of the will, which was probated and recorded in 2002, the court found that Tommy's present challenge was untimely. We agree. Thus, even if Tommy could successfully challenge the validity of the 1990 deed, we note that the "homeplace" still passed to James by virtue of Ralph's will, which was probated prior to Tommy's recording in 2003 of the 1994 deed, and not contested until now.

Finally, Tommy asserts that the affidavits of record sufficiently create a genuine issue of material fact so as to defeat James's and Connie's motion for summary judgment; however, the deeds of record, Tommy's deposition testimony,

and Ralph's will overwhelmingly support the trial court's finding that no genuine issue of material fact existed and that James and Connie were entitled to judgment as a matter of law.

The order of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tommy R. May
Pikeville, Kentucky

BRIEF FOR APPELLEES:

Donald H. Combs
Pikeville, Kentucky