RENDERED: AUGUST 19, 2011; 10:00 A.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001570-MR

JOSEPH R. NALLY APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 05-CI-00736

MICHAEL L. CISSELL,
ELIZABETH MARIE CISSELL,
AND DONALD G. PLOETNER APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: In this quiet title action, Joseph R. Nally has appealed from the Nelson Circuit Court's entry, following a bench trial, of its findings of fact, conclusions of law and judgment in favor of Michael L. Cissell and Elizabeth Marie Cissell (collectively "Cissell"). After a careful review, we affirm.

Cissell purchased a parcel of property containing approximately 167 acres in Nelson County in 1975. He off-conveyed numerous smaller parcels from this parent tract before losing the remainder in a foreclosure action in 1984 and subsequently repurchasing the remainder of the parent tract on February 8, 1985.

Through a series of transactions between 1976 and 1984, several of the smaller tracts Cissell had off-conveyed were divided and recombined into an approximately 14.72-acre tract which was conveyed to Donald G. Ploetner and his wife, Lillian M. Ploetner, on June 23, 1984. On July 11, 1989, Lillian quitclaimed her interest in the tract to Donald. Simultaneously, Donald deeded the tract to Joseph Nally and his wife, Peggy Nally. On June 23, 1995, Peggy quitclaimed her interest in the property to Joseph.

As part of the parent tract he repurchased, Cissell now owns the lands adjoining the south and east property lines of Nally's property. Shortly before Ploetner sold to Nally, Cissell approached him regarding erecting a fence along their adjoining property line. Ploetner informed Cissell he was selling and would not assist in constructing the fence, but he did not contest the proposed location of the fence. Cissell proceeded with the construction which took several months to complete. After Nally purchased his land, he assisted Cissell by straightening and tamping down some of the posts, and by providing some new posts. Nally did not contest the placement of the fence.

Cissell made improvements to the land within the newly fenced area. In 1994-1995, he constructed a road and installed a culvert and a catch basin to

alleviate water runoff issues on other portions of his property. He later, in 1995 and into 1996, installed a foundation for a manufactured home he intended to move onto the property for his daughter to use, and ran water lines to the site. Cissell planted trees in the area and installed a septic system adjacent to the newly constructed foundation. He later contracted to have electrical service run to that portion of his property.

In 2005, Nally approached Cissell to discuss the location of the fence. Nally informed Cissell he had measured and believed the fence was encroaching on his land. Nally later had a survey conducted which confirmed his measurements. The fence enclosed approximately 1.387 acres of Nally's property within Cissell's fence. Nally sent a letter to Cissell requesting that he remove the fence, but Cissell refused. When no agreement could be reached, Nally filed the instant suit seeking to quiet title in himself to the disputed land. Cissell filed a counterclaim alleging he had acquired title to the disputed land through adverse possession, acquiescence, express or implied agreement, and/or estoppel. Because Cissell contended he and Ploetner had agreed to the location of the fence and for Cissell to obtain title to the disputed land, Nally subsequently amended his complaint to name Ploetner as a defendant.

At a bench trial convened on June 11, 2008, it was stipulated that the property description in Nally's deed from Ploetner included the disputed area. It was undisputed that Cissell was a previous grantor in Nally's chain of title to the land in question. The main areas of contention were the dates of the fence

construction and other improvements and the contents of an alleged verbal agreement between Cissell and Ploetner.

Cissell testified that the fence was constructed in mid-1989. He stated he and Ploetner agreed to the location of the fence and, further, that since Ploetner was divorcing his wife and did not wish to "be out any money," Cissell provided all of the materials and labor for the fence in exchange for title to the disputed area. The alleged agreement was not in writing. Ploetner testified that although a discussion was had regarding placement of the fence, no agreement was actually reached between himself and Cissell. Cissell produced testimony from several witnesses who placed the date of construction of the fence in 1989. Cissell testified that the electrical service, road, culvert and catch basin were installed in 1994 or 1995, and that the water line and mobile home foundation were constructed in 1996. He stated he had planted trees in the disputed area and kept the area mowed since it was fenced.

Nally testified that the fence was not in existence when he purchased the property in July of 1989, and was not constructed until sometime in early 1992. He stated the utility poles used for extending electrical service to the disputed area were stamped with "98" and that he had many years of experience in working at a contracting company which set utility poles. In his experience, the "98" stamp indicated the poles were made in 1998, thus making Cissell's testimony that the service was installed in 1994 or 1995 clearly and patently incorrect. Nally

presented testimony from his son and daughter-in-law that the fence did not exist when they lived on Nally's property between 1989 and 1991.

Following the trial, the court ordered the parties to submit posttrial memoranda setting forth their respective positions and personally viewed the subject property. Nally argued that Cissell, as a previous grantor, could not assert a claim of adverse possession against him as a subsequent grantee, citing *Watlington v. Kasey*, 293 Ky. 382, 168 S.W.2d 988 (1943). Further, Nally contended Cissell had failed to prove any alleged adverse possession had continued for the requisite time period of fifteen years. He pointed to testimony regarding a horse he had owned which regularly wandered onto Cissell's property prior to erection of the boundary fence. The testimony indicated the wandering ceased in 1992. Further, Nally stated he had testified that when he was maintaining his land in 1991 no fence was present and that in 1992 one of his farmhands informed him the fence was being constructed. Thus, Cissell could not have adversely possessed the disputed area for in excess of fifteen years as required. Nally also argued Cissell had failed to prove the existence of an agreement with Ploetner regarding relocation of the boundary line.

Cissell contended he maintained open, notorious, continuous and hostile possession of the disputed land for sixteen years prior to the filing of the instant suit, thus he had acquired title by adverse possession. Alternatively, he contended the agreement as to the property line location and construction of the fence was sufficient to establish the new boundary even in the absence of a writing,

citing *Wolf v. Harper*, 313 Ky. 688, 233 S.W.2d 409 (1950). He argues Nally should be estopped from asserting a claim to the land based on the actions of his predecessors in title, specifically Ploetner.

On June 25, 2010, the trial court entered its findings of fact, conclusions of law and judgment. It found there was no enforceable agreement between Cissell and Ploetner regarding the location of the boundary line, and even if such an agreement existed it would be unenforceable against Nally. The trial court went on to find that the doctrine of estoppel was inapplicable under the facts adduced at trial. It ruled that Cissell had met the necessary requirements to establish he was entitled to have title to the property quieted in his favor by virtue of his adverse possession for sixteen years, stating Cissell "could not have been more open, hostile and notorious in his use of it." Nally's motion to alter, vacate or amend the judgment was denied and this appeal followed.

Nally contends the trial court erred in failing to hold Cissell could not claim title to the disputed area under a theory of adverse possession because he was a previous grantor in Nally's chain of title. Further, citing *Ferrell v. Childress*, 172 Ky. 760, 189 S.W. 1149 (1916), Nally claims former grantors are unable to assert that their possession is adverse to a subsequent grantee because such possession is not hostile. Finally, Nally argues Cissell failed to meet the fifteen-year requirement to obtain title by adverse possession. We disagree with Nally's assertions and affirm.

First, Nally argues the holding in *Watlington* precludes Cissell from asserting a claim to the land by adverse possession. In *Watlington*, the heirs of a previous grantor attempted to take possession of a parcel of property by adverse possession from a subsequent grantee. The Court held

> the heirs of Nat H. Watlington cannot obtain title by adverse possession to land which their ancestors conveyed to defendants' predecessor in title, Akers, since the law will not allow a grantor to assert a claim adverse to his grantee, and any land conveyed to which the grantor retains possession is presumed to be held by him as agent of his grantee in the absence of an explicit disclaimer and a notorious assertion of right in the grantor.

168 S.W.2d at 990. This rule was later reaffirmed in *Louisville Gas & Electric Co. v. Brown*, 391 S.W.2d 713 (Ky. 1965), where the Court held "[u]nder the special rule applicable as between grantor and grantee the grantor and his heirs could not obtain title by adverse possession as against the grantee and his successors in title without giving notice by way of an express disclaimer and making a notorious assertion of title." *Id*. at 714 (citing *Williams v. Thomas*, 285 Ky. 776, 149 S.W.2d 525 (1941); *Hoagland v. Fish*, 238 S.W.2d 133, 135 (Ky. 1951)).

Contrary to Nally's assertion, Cissell did make a "notorious assertion of title" by virtue of erecting the fence and improving the disputed land. Cissell exercised dominion and control over the area to the open exclusion of all others and treated it solely as his own property. There was no effective or binding agreement as to the boundary line location; Cissell merely fenced the area and began using it as though it were his. As the trial court noted, "he could not have

been more open, hostile and notorious in his use of it." Thus, the prohibition in *Watlington* is inapplicable to the matter at bar and the trial court did not err in failing to rule otherwise.

Next, Nally argues the trial court erred in finding Cissell had possessed the disputed area in a hostile manner. He contends that since Cissell was a previous grantor, his possession could not properly be deemed hostile under the holding announced in *Ferrell*. We disagree. The single sentence in *Ferrell* upon which Nally relies is nothing more than a simplified statement of the same rule of law we have just discussed from *Watlington*. Thus, as we have already passed on the issue of Cissell's hostile holding of the land, no further discussion is warranted.

Finally, Nally argues the evidence adduced at trial contradicts a finding that Cissell met the fifteen-year possession requirement to maintain an action for adverse possession. In support of his argument, Nally points to the fact that Cissell testified he had electrical service run to the property in 1994 or 1995, yet the poles carrying the service lines were not made until 1998. He contends that since Cissell's recollection was obviously wrong as to the electrical service, he must also be wrong in his recollection of when the fence was constructed. Nally asserts that the three-year "gap" in Cissell's memory regarding the electrical service installation date can be extrapolated to show the fence was not constructed until 1991 or 1992. Thus, he alleges only fourteen years, at most, elapsed prior to the filing of the instant suit, and the trial court erred in not so finding. We decline to follow Nally's strained logic.

Conflicting testimony was given surrounding the dates of construction of the fence around the disputed area. The trial court personally observed all of the testimony and was in the best position to weigh and judge the credibility of the witnesses. CR[1] 52.01. We will not substitute our judgment for that of the trial court unless it is clearly erroneous. *Id*. Contrary to Nally's assertion, Cissell's allegedly flawed memory was not the sole evidence upon which the trial court could have based its decision. Cissell presented testimony from several witnesses who unequivocally stated the fence was constructed in 1989 and gave plausible explanations for their certainty. Further, even if Cissell was incorrect in his memory regarding the electrical service, nothing in the record indicates he was incorrect as to his other memories. Certainly, the record is devoid of any indication Cissell missed the date of the fence building by the three years Nally asserts. In light of the substantial evidence presented, we are unable to conclude the trial court clearly erred in determining Cissell had adversely possessed the property for a period in excess of fifteen years.

For the foregoing reasons, the judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

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[1] Kentucky Rules of Civil Procedure.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES,
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