

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001088-MR

EDWARD HIGGINS, JR.

APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 02-CI-00246

RODNEY WILLIAMS; VIOLA WILLIAMS;
HOMER WILLIAMS; FREDDIE LEE WILLIAMS;
CAROLYN WILLIAMS; BARBARA ADAMS;
FELICIA ADAMS; DAVID ADAMS;
BRYANT FRAZIER; MARGO BARFIELD;
OMA BARFIELD; CHRISTOPHER BARFIELD;
LISA A. WILLIAMS and CLARENCE WILLIAMS, JR.

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: JONES, MAZE, AND NICKELL, JUDGES.

JONES, JUDGE: The Appellant, Edward Higgins Jr., appeals from the April 10, 2015, and June 15, 2015, orders of the Knott Circuit Court granting summary judgment in favor of Appellees, Rodney Williams *et al.*, and ordering the sale of

certain contested property located in Knott County. For the reasons more fully explained below, we reverse the April 10, 2015, and June 15, 2015, orders of the Knott Circuit Court.

I. BACKGROUND

This is a partition action concerning an approximately fifteen-acre tract of land (“Subject Property”) located in Knott County, Kentucky. The initial partition action was filed by the Appellees, Rodney Williams, Viola Williams, Homer Williams, Freddie Lee Williams, Carolyn Williams, Barbara Adams, Felicia Adams, David Adams, Bryant Frazier, Margo Barfield, Oma Barfield, Christopher Barfield, Lisa A. Williams, and Clarence Williams, Jr. (the “Appellees”). The Appellees are all the heirs of Oma Adams and all have received their interest in the subject property from her. The Appellant, Edward Higgins, Jr., (“Higgins”) received his interest in the Subject Property by way of deed from W.C. Williams, Jr. and Thelma Williams.

This partition action was initially filed by the Appellees on September 20, 2002. Eventually Higgins was joined as a defendant, as it was alleged that he had committed waste on the property by cutting, removing trees, and bulldozing the Subject Property without the consent of the Appellees. In responding to the partition action, Higgins took the position that the property was not divisible and asked the trial court to order the property sold.

The case sat dormant for some time until it was set for trial on June 30, 2005. The trial, however, was delayed by agreed order in January 2005, as the

parties had hoped to negotiate an order of sale of the Subject Property with a coal company. No agreement was ever reached. The record does indicate, however, that in 2006 some of the Appellees entered into a “Coal Lease Agreement” with Enterprise Mining Company.

On July 27, 2008, discovery requests were filed by Higgins. Thereafter, on May 10, 2011, the Appellees filed a motion for “Summary Judgment and Order of Sale.” In response, Higgins filed a motion to compel discovery. Following a period of discovery, the Appellees refiled their motion for summary judgment on May 1, 2014. Prior to the summary judgment motion’s being heard, Higgins’s attorney passed away and Higgins was ordered to obtain new counsel.

On November 20, 2014, the Appellees again filed a motion for summary judgment. However, in their November 20, 2014, motion for summary judgment the Appellees changed their position from their original pleadings and were now advocating for the sale of the Subject Property, rather than its partition. Higgins filed a response on January 29, 2015. In that response, he too had reversed his position and was advocating for the partition rather than the sale of the Subject Property.

On April 10, 2015, the trial court found in favor of the Appellees, granting summary judgment and ordering the sale of the Subject Property. The trial court also concluded that the double wide mobile home belonging to Higgins and his wife was “attached to the property to be sold and will be sold with” the

Subject Property. Subsequently, Higgins filed a motion with the trial court to alter, amend, or vacate the April 10, 2015, judgment and order of sale. The trial court denied that motion by order rendered June 9, 2015.

This appeal followed.

II. STANDARD OF REVIEW

Summary judgment serves to terminate litigation where “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.” Kentucky Rule of Civil Procedure (CR) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment “is proper only where the movant shows that the adverse party cannot prevail under any circumstances.” *Id.* (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky.1985)).

On appeal, we must consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the trial court’s decision. *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378

(Ky. 1992). Our review is *de novo*. *Cumberland Valley Contrs., Inc. v. Bell Cty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

III. ANALYSIS

Before we turn to the arguments of Higgins's appeal we must first note that the Appellees in this case have failed to file a brief. The notice of appeal lists all the Appellees by name and was served on their counsel of record.

However, no brief has been filed on behalf of the Appellees and no explanation has been provided. CR 76.12(8)(c) sets forth the penalties for the failure of an appellee to file a brief:

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

“The decision as to how to proceed in imposing such penalties is a matter committed to our discretion.” *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007) (citation omitted). In this case, applying CR 76.12(8) (c) (i), we choose to accept, for purposes of this appeal, Higgins's statement of facts as correct.

On appeal, Higgins maintains the trial court erred when it entered summary judgment in favor of the Appellees and ordered the sale of the Subject Property. Specifically, he argues that because there is a dispute between the parties of whether partitioning the Subject Property would materially impair its value then an issue of material fact exists and summary judgment was therefore inappropriate.

Higgins also maintains that the trial court erred when it ordered his mobile home to be sold as an attachment with the Subject Property, as the mobile home had never been converted to real estate and remained personal property.

Regarding the divisibility of property, KRS¹ 389A.030(3) provides:

In all such actions indivisibility of the real estate shall be presumed unless an issue in respect thereto is raised by the pleading of any party, and if the court is satisfied from the evidence that the property is divisible, without materially impairing the value of any interest therein, division thereof pursuant to KRS 381.135 shall be ordered.

In *Collins, v. Lewis*, 314 S.W.3d 316 (Ky. App. 2010), we addressed KRS 389A.030(3) and the presumption of indivisibility. Specifically, we held:

Subsection three of KRS 389A.030 “creates a presumption of indivisibility, unless a party to the action raises the issue in a pleading.” *Acton v. Acton*, 283 S.W.3d 744, 750 (Ky. App. 2008). The person claiming divisibility bears the burden of going forward. *Id.* Once some evidence that the property can be partitioned without materially impairing its value is presented, then the party seeking sale bears the burden of proving that division would materially impair the property's value.

Id. at 318.

Here, the trial court granted summary judgment and ordered the Subject Property sold without making any findings of whether the division of the Subject Property would impair its value. This case dates back to 2002 and since its initial proceedings the parties have switched positions regarding the divisibility of the Subject Property. Higgins’s current position is that the Subject Property is

¹ Kentucky Revised Statutes.

divisible and dividing the Subject Property would not impair its value. This was also the position of at least some of the Appellees at one point in this litigation. However, based on the record, it appears that the current position of the Appellees' is that the property is not divisible. However, as stated above, the Appellees have filed no brief and we, pursuant to CR 76.12(8)(c), find Higgins's statement of facts as correct. Accordingly, we must hold that genuine issues of material fact do exist in this matter with respect to whether the property can be divided without affecting its value. At the very least, the trial court should conduct a hearing to determine once and for all what each side maintains about the divisibility. The pleadings as well as the record appear to be conflicting on this issue. In fact, it is impossible for us to even determine whether the trial court considered this issue before rendering summary judgment.

Next we turn to Higgins's second argument: that the trial court erred when it determined that his mobile home was an attachment and should be included as part of any sale of the Subject Property.

KRS 186A.297(1) provides:

When a manufactured home is or is to be permanently affixed to real estate, the owner may execute and file an affidavit of conversion to real estate with the county clerk of the county in which the real estate is located. The affidavit shall attest to the fact that the home has been or will be permanently affixed to the real estate and be accompanied by a surrender of the Kentucky certificate of title. The county clerk shall file the affidavit of conversion to real estate in the miscellaneous record book.

Here, a review of the record reveals no evidence that the mobile home had been converted from personal to real property. There is no evidence in the record to establish that the mobile home has become permanently affixed to the Subject Property. In fact, as pointed out by Higgins in his brief, “there is no evidence in the record to establish the existence of a mobile home on the property, who it belongs to, the existence of liens on the home, or any other information to support the finding made by the trial court regarding this [mobile] home.” Because the record does not support the trial court’s conclusion that the mobile home is affixed to the land, we must vacate the order and remand for additional findings on this issue.

IV. CONCLUSION

For the reasons set forth above, we vacate the April 10, 2015, judgment and order of sale and the June 9, 2015, order of the Knott Circuit Court and remand this matter back to the trial court for additional findings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank C. Medaris, Jr.
Hazard, Kentucky

NO BRIEF FILED FOR
APPELLEES.