RENDERED: July 2, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002440-MR

DENNIS J. FRANCIS AND
GEORGIA FRANCIS — APPELLANTS

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
ACTION NO. 78-CI-000294

CITY OF HENDERSON; THORP
CREDIT INC. OF INDIANA; AND,
FIRST NATIONAL BANK OF HENDERSON — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: DYCHE, EMBERTON, and JOHNSON, JUDGES.

JOHNSON, JUDGE: Dennis Francis, and his wife, Georgia Francis (the Francises), have appealed from the judgment of the Henderson Circuit Court entered on May 20, 1981, which quieted title to property located at 701 Merritt Drive, in the appellee, City of Henderson, Kentucky (the City). We reverse and remand.

Many of the facts necessary for a resolution of the issues presented in this appeal were previously recited by this Court in an opinion rendered on November 19, 1993, in the appeal brought by the Francises from the order of the Henderson Circuit

Court resolving identical issues in a companion case concerning title to several tracts of realty surrounding the property at issue in this case.[1] While the facts and procedural history of the two cases are well known to the parties, we will, nevertheless, set forth those facts essential for an understanding of this appeal.

In 1963, the Francises obtained a deed to the property on Merritt Avenue, which they caused to be recorded. This property is designated as Tract 3 on the City's plat. The Francises subsequently acquired deeds to other lots adjacent to Tract 3, title to which was at issue in a separate case filed several years after this action. In 1974, the Francises obtained a loan from Safeway Finance Corporation of Evansville, Indiana, the predecessor of the appellee, Thorp Credit Inc. of Indiana (Thorp Credit), and pledged the real estate as security for the loan. A supplemental mortgage was executed in 1977. The instant action was commenced by Thorp Credit, in 1978, to foreclose on the property secured by its mortgages. In addition to the Francises, Thorp Credit named as defendants the First National Bank of Henderson (First National), which also had a mortgage on the property, and the City. In its answer, the City alleged that it was the owner of the real estate described in the complaint and specifically asked that "it be adjudicated as the holder of the fee simple title to the real property described in the complaint." The City also filed a cross-claim against the

[1] See Francis v. City of Henderson, case no. 91-CA-1256-MR, opinion designated "not to be published." The opinion became final on December 13, 1993.

Francises in which it claimed to own the property in fee simple. It asked that the Francises "be adjudged to have no right to use or occupy the said real property and that they be ordered to vacate all of the said real property and deliver possession thereof to the City of Henderson."

First National asserted that the "real property comprise[d] no part of any street, alley or public easement," and that the Francises "and their predecessors in title, have openly, notoriously and adversely used, possessed and claimed ownership of, [the property at issue] for a period of more than fifteen (15) years." It further asserted several affirmative defenses to the City's cross-claim, including "waiver, estoppel, unclean hands, latches [sic], abandonment, and judicial admission." In their answer to the City's cross-claim, the Francises alleged that they were the "fee simple owner[s]" of the property by adverse possession" and further pled that the City's cross-claim was barred by the "Statute of Limitations, estoppel, unclean hands and waiver."

On May 8, 1981, the City moved for summary judgment on all claims. In opposition to the motion, the Francises argued that the City was estopped from asserting title as it had given them permits to build on the property. They also argued that "the city had known that various people have claimed and used the real estate now in ligitation [sic] sence [sic] the year 1790 . . . up to present date 1981."

On May 20, 1981, the trial court entered its judgment which contained its findings of fact and conclusions of law. It found

that "[t]he City of Henderson, Kentucky, is situated entirely within a tract of land granted to Richard Henderson & Company by an act of The General Assembly of the Commonwealth of Virginia in the year 1778." It concluded that the land on which the Francises' house was situated was "the property of the City of Henderson for the use and benefit of the general public." The trial court held that the Francises could not claim title by adverse possession as they had not given the notice required by Kentucky Revised Statutes (KRS) 413.050(1) in order for the limitations period to have run. This statute reads as follows:

> The limitations mentioned in KRS 413.010 to 413.040 shall not begin to run in respect to actions by a city for the recovery of any part of any street, alley or other public easement or the use thereof in the city, until the legislative body of the city has been notified in writing by the party in possession or about to take possession that his possession will be adverse to the right or title of the city. Until such notice is given, all possession of any part of any street, alley or public easement in any city shall be deemed amicable, and the person in possession the tenant at will of the city.

On June 1, 1981, a timely joint motion to amend the judgment was filed by First National and Thorp Credit pursuant to Kentucky Rules of Civil Procedure (CR) 59. Before an order was entered disposing of the CR 59 motion, the Francises, who had proceeded pro se since early in the litigation, filed a notice of appeal. On September 29, 1981, this Court ordered that the appeal be dismissed since there had not been a ruling on the CR 59 motion. The order provided that the full time to appeal from the final judgment would "begin to run immediately following the entry of an order ruling on the CR 59 motion." After the matter

was remanded to the Henderson Circuit Court in 1981, there was no attempt by First National, or Thorp Credit, to obtain a ruling on their motion.

In 1989, the Francises moved for a default judgment, or for an involuntary dismissal of the claims of the City and the lending institutions on the basis that those parties had taken no action in furtherance of their claims since 1981. Neither the City, First National, or Thorp Credit filed a response to the motion. On August 7, 1989, the trial court denied the motion, however, it still did not address the pending CR 59 motion. Also, in that year, the Francises filed a cross-claim against the City seeking $2,000,000 in damages for the City's alleged bad faith in its dealings with the Francises. The record does not contain any response by the City to these allegations.

In 1992, nearly nine years after this Court dismissed the appeal as having been taken from a non-final judgment, the City moved for an order of ejectment. The trial court ordered that the motion be held in abeyance until this Court resolved the appeal in the companion case. The companion case was commenced in 1989 by the Commonwealth of Kentucky to collect unpaid ad valorem taxes. As in the 1978 action, the City was joined as a party and it filed a cross-claim against the Francises in which it sought to quiet title to several lots surrounding the tract at issue in this litigation.[2] On April 1, 1991, the trial court

[2]The 1978 action concerned only Tract 3 on the City's plat. The 1989 action concerned title to Tracts 4, 5, 11, 12, and 13 of the City's plat. The Francises' residence is located on Tracts 3 and 4.

entered its judgment in the companion case and held that the Francises' deeds to the various tracts could not convey legal title to the Francises as the City had had legal title to the property from the time it was developed. It further rejected the Francises' claim to the tracts by adverse possession, for the same reason it had in this case, that is, that they had not given notice to commence the running of the limitations period as provided in KRS 413.050(1). Finally, the trial court held that the issue of ownership in the various tracts was governed by the doctrine of res judicata and that the parties were bound by its 1981 decision in this action.

In this Court's opinion in the appeal from the 1991 judgment, it was held that because the tracts to which the Francises claimed were not used as a "street, alley or other public easement," the trial court erred as a matter of law in its application of KRS 413.050(1). It was also held that the trial court erred in applying the doctrine of res judicata because the 1981 judgment quieting title to Tract 3 in the City was not final. The summary judgment in favor of the City was remanded for further proceedings, including a trial on the merits of the Francises' claim of adverse possession. The City did not seek discretionary review of that opinion.

In April 1996, nearly fifteen years after this Court dismissed the Francises' appeal in the instant action as having been filed prematurely, the City moved the trial court to rule on the CR 59 motion to amend its summary judgment. In their response to the motion, the Francises argued that this Court's

1993 opinion held that the basis for the trial court's 1981 judgment was erroneous as a matter of law. Inexplicably, First National and Thorp Credit moved to withdraw their pending CR 59 motion to amend the 1981 judgment. Although three years had passed since this Court rendered its opinion vacating the trial court's judgment containing identical issues in the companion case, the trial court did not alter its judgment to conform to the law established therein. On August 21, 1996, the trial court granted the motion to withdraw, thereby finally commencing the running of the time for filing a notice of appeal from the 1981 judgment in favor of the City. The Francises filed a timely notice of appeal on August 29, 1996.

Before we address the merits of the appeal, it is necessary to dispose of the motion of the City to dismiss the appeal, or alternatively, to strike the Francises' brief. The City argues that the brief filed by the Francises does not conform to the Civil Rules pertaining to appeals. Specifically, the City contends that the Francises "attempted to improperly add material to the record on appeal," that they have "attached exhibits [newspaper articles and pictures of the property] to their brief which were not a part of the record of the proceedings in the trial court," that the brief contains allegations against the City for which no basis exists in the record, and that the brief "does not contain a correct Statement of Points and Authorities . . . nor does it contain a Statement of the Case. . . [but] consists of 23 pages of mainly unintelligible and accusatory writing."

While the City has accurately listed several deficiencies in the Francises' brief, we do not believe that the grounds given in its motion are sufficient to warrant the dismissal of the appeal. See Crossley v. Anheuser-Busch, Inc., Ky., 747 S.W.2d 601 (1988). Further, while the Francises, who continue to proceed without benefit of legal counsel, have failed to comply with various provisions of CR 76.12(4), it is our opinion that no purpose would be served in striking their brief. Further, the facts, legal issues, and the trial court's findings and conclusions contained in the 1981 judgment are identical to those in the prior appeal between these parties from the 1991 judgment. We are familiar with the dispute between these parties and the issues implicated by the appeal, and for this reason, the brief filed by the Francises has not hindered our review. Also, it is apparent that the City is well aware of the legal issues presented by the appeal and was able to file a brief addressing those issue despite the "unintelligible" arguments of the Francises. This panel has certainly not considered the extraneous material in the appendix of the brief which is not contained in the record on appeal. Further, the allegations against the City and the Francises' request for monetary damages and/or sanctions against the City will not be addressed as those issues are not ripe for our review. Otherwise, the motion of the City is denied.

As stated earlier, in the 1981 judgment from which this appeal has been taken the trial court granted summary judgment on the City's cross-claim and quieted title in the City after

concluding that the Francises could not possibly establish their claim of adverse possession because of their failure to provide the notice required by KRS 413.050(1). Although their arguments are not articulated with great clarity, the Francises contend that this Court's opinion rendered on November 19, 1993, in the companion case, conclusively determined that KRS 413.050(1) has no application to the title dispute between themselves and the City. We agree and have set forth, in detail, the procedural facts regarding both actions to demonstrate that this is a situation calling for the application of the doctrine of res judicata, the doctrine founded on the principle "that parties ought not to be permitted to litigate the same issue more than once." Moore v. Gas & Electric Shop, 216 Ky. 530, 287 S.W. 979 (1926).

Although both the 1978 case (the instant case) and the 1989 case, were commenced by other parties, the City filed cross-claims in both cases asserting fee simple ownership to the real property which the Francises also claimed to own. In both cases, the trial court determined that the City had been the legal owner of the property since its inception. The only difference in the two cases is that title to different, but adjoining pieces of property, was at issue. Clearly, an opinion of this Court, involving the same parties, precludes the relitigation of the issues determined in the prior appeal even though the appeal is from a different cause of action. See Penco, Inc. v. Detrex Chemical Industries, Inc., Ky.App., 672 S.W.2d 948 (1984).

The City attempts to avoid the application of collateral estoppel by arguing that "the pleadings in the two cases were different which has caused inconsistencies in the application of the law." Specifically, the City contends that it "mischaracteriz[ed]" the nature of its interest in the property in the companion case as being in fee simple. The City states that "no such mischaracterization . . . has occurred in this case." However, as set forth on page 3 infra, the City did assert a fee simple interest in the tract at issue in the instant litigation. And, as pointed out in the 1993 opinion, regardless of how the City attempts to characterize its interest, the evidence presented by the City in establishing its claim was the same in both cases and shows that ownership was vested in the City when it was originally laid out.

Accordingly, we hold that the trial court erred as a matter of law in applying KRS 413.050(1) to defeat the Francises' claim of title to the property by adverse possession and this matter is reversed and remanded to allow the Francises to proceed to trial on that claim. For the sake of judicial economy, and the efficient use of the parties' time and resources, we urge the parties on remand to seek consolidation of the two pending cases in the Henderson Circuit Court for a final resolution of the issue of title to the property.

EMBERTON, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

BRIEF FOR APPELLANTS:

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Georgia Francis
Pro Se
Henderson, KY

BRIEF FOR APPELLEE, CITY OF HENDERSON:

Hon. Joseph E. Ternes, Jr.
Henderson, Ky

BRIEF FOR APPELLEES, THORP CREDIT AND FIRST NATIONAL:

Hon. Charles Edward Clem
Henderson, KY