

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000274-MR

JAMES V. GAY; ELLIS C. GAY;
AND EARL GAY

APPELLANTS

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 94-CI-90077

TONY TIPTON; JERRY MILLER;
JOYCE K. DAVIS; AND
TEDDY MARTIN

APPELLEES

OPINION
AFFIRMING IN PART - REVERSING AND REMANDING IN PART
** ** * * * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE; James Gay, Ellis Gay, and Earl Gay (collectively Gay) appeal from an order entered by the Montgomery Circuit Court on April 8, 1996, dismissing Gay's complaint against Tony Tipton (Tipton), orders entered January 28, 1999, February 17, 1999 and February 28, 1999, granting summary judgment in favor of Jerry L. Miller (Miller), Joyce Hardwick Davis (Davis), and Teddy Martin (Martin), and from an order entered January 28, 1999, granting Miller a prescriptive easement

over a tract of land owned by Gay. We affirm in part and reverse and remand in part.

As is the case with many cases involving property disputes, a detailed recitation of the facts is necessary to understand the proceedings below and our resolution of the issues on appeal. Gay owns a 283.55 area tract of land (the Gay property) which lies between a 172 area tract owned by Miller (the Miller property) and a tract of land owned by Martin (the Martin property). Tipton is predecessor in title to the Miller's property. Davis owns a tract of land adjoining the Gay property to the east.

The Miller property is essentially landlocked, with the only access to a public road lying across a passway over the Gay and Martin properties to Kentucky Highway 599 (the highway). According to deeds appearing of record, Tipton purchased the Miller property from the heirs of Adeline Turner in 1993. None of the deeds to Adeline Turner contain an easement across the Gay property. However, the deed from the Turner heirs to Tipton contains the following language:

There is appurtenant to the above-described tract of land an easement of ingress and egress to and from [the highway] across the lands of Teddy Martin, Joyce Hardwick Davis, the Gay heirs, and the Rainbow heirs, which right-of-way has been in the continuous, open, notorious, adverse possession and used continuously by the [Turner heirs] since November 19, 1900.

Whether this language appeared in Tipton's deed to Miller's predecessor in title or in Miller's deed to the property is

unclear as copies of those deeds do not appear of record. It appears that Miller purchased the property in 1994.

On October 18, 1994, Gay filed a petition for declaration of rights with the trial court, alleging that Miller had "constructed passways over Plaintiffs [sic] property without Plaintiffs [sic] consent in order to cut timber on property adjoining Plaintiffs [sic] property." Gay asked the trial court to enter a judgment "declaring the Plaintiffs to be the true and lawful owners of the disputed property," and asked that they be awarded damages to compensate them for damage to the Gay property resulting from Miller's use/construction of the passway.

On March 20, 1995, Miller filed a motion seeking an injunction ordering Gay to remove a barricade blocking the passway and enjoining Gay from further interference with his use of the passway. Attached to Miller's motion was an affidavit executed by Miller, Martin, and Gene Barnes (Barnes) (the Miller affidavit). The Miller affidavit alleged that (a) the Miller property was a dominant tract and the Gay property a serviant tract in that a passway existed across the Gay property to allow access to the highway; (2) Miller and his predecessors in title "acquired the . . . passway or easement . . . by virtue of the unobstructed, open, peaceful and continuous use thereof by defendant, Jerry Miller, and his predecessors in title for more than fifteen (15) years; (3) the passway was the only "possible and practical route" from the Miller property to the highway; and (4) Martin has never questioned the existence of a passway over his property to the highway. Gay responded to Miller's motion by

filing an "answer" alleging that Miller was a trespasser on the Gay property and that the passway was for Gay's use only.

On January 29, 1996, Gay filed an amended complaint adding, among others, Davis, Tipton, and Martin as defendants. As to all of the Appellees, the amended complaint alleged that they had "damaged Plaintiffs' property by causing a roadway or passway to be constructed through Plaintiffs' property without consent or knowledge." Gay asked that he be declared owner of the property in dispute and for a judgment declaring that no one else had a right of way across the Gay property or the right to claim any of the Gay property by adverse possession. As the amended complaint also raised separate causes of action against each appellee, we will discuss each cause of action and the disposition thereof separately.¹

JERRY MILLER

As to Miller, the amended complaint alleged that he:

illegally entered upon Plaintiffs' property without Plaintiffs' consent or knowledge, caused bulldozers to enter thereon and a road or passway constructed through Plaintiffs' property in order to allow logging trucks to cross Plaintiffs' property to reach Highway 599. Said traffic has damaged Plaintiffs' property.

Gay sought an award of \$75,000 in damages against Miller as well as an award of punitive damages.

In his answer to Gay's complaint, Miller included a counterclaim in which he alleged ownership of an appurtenant

¹A Special Commissioner (the commissioner) was eventually appointed by the trial court to hear the various motions made by the parties and make recommendations thereon.

easement across the Gay property by virtue of adverse possession. Miller asked that he be declared owner of the passway and that title to the passway be quieted in his favor.

In March 1998 Miller moved for summary judgment on his counterclaim, relying in part on the Miller affidavit. Despite being given extra time in which to respond to Miller's motion by order of the commissioner, Gay failed to respond.

On May 6, 1998, the Commissioner entered a report recommending partial summary judgment in favor of Miller. The report noted Gay's failure to respond to Miller's motion, and indicated that due to the lack of response, the allegations of the Miller affidavit would be deemed to be uncontradicted. The Commissioner found:

the undersigned has performed a careful review of the entire record in this action to determine if there is a single factual contradiction to the allegations set out in the [Miller] affidavit. None is found. At most, Plaintiffs' Answer simply suggests that Miller has no right to trespass on their land. No statement anywhere in the pleadings . . . disputes the allegations . . . that Miller and his predecessors in title have an unobstructed, open, peaceful and continuous use of the passway for more than 15 years. Therefore, the allegations are taken as true.

The law of prescriptive easements in the Commonwealth is clear. Easements may be created by prescription. Pickel vs. Cornett, 147 S.W.2d 381. A presumption of a grant of easement over a passway arises from 15 years [sic] continued use. Ross vs. Steel, 49 S.W.2d 309. The allegations contained in the [Miller] affidavit clearly place Miller's claim within the law creating a prescriptive easement.

On May 19, 1998, Gay filed exceptions to the Commissioner's report, arguing that it was "premised upon false

and perjured testimony given by" Miller, Martin, and Barnes and that genuine issues of material fact existed. Attached to the exceptions was the affidavit of Earl Gay (the Gay affidavit), in which Earl Gay stated that the Miller affidavit was perjured to the extent that it stated Miller and his predecessors in title had used the passway for more than fifteen years. The Gay affidavit further alleged that while the Turner heirs owned the Miller property, Earl had, at the heirs' request, "administered care for and had power of attorney over the Turner property for a period of twenty-six (26) years." Earl alleged that while his power of attorney over the property existed, none of the appellees used the passway over the Gay property, and that the Appellees did not start using the passway until the property was sold to Tipton in 1992. Based on these allegations, Gay asked the trial court to disregard the Commissioner's findings and deny Miller's motion for summary judgment.

On January 28, 1999, the trial court entered an order granting partial summary judgment and a prescriptive easement over the Gay property in favor of Miller. The trial court's order was made final by entry of an amended partial summary judgment on February 17, 1999.

TONY TIPTON

In addition to the allegations concerning construction of the passway, Gay alleged that Tipton:

sold property allegedly owned by Tipton and which abuts property owned by the Plaintiffs. The property sold by . . .Tipton . . . has no legal ingress or egress to Highway 599. Therefore, he allegedly sold right of way across Plaintiffs' property without knowledge

or consent of the Plaintiffs. . . causing damage to Plaintiffs' property.

Gay sought an award of \$75,000 in damages plus an award of punitive damages from Tipton.

On February 14, 1996, Tipton filed a motion seeking dismissal of Gay's complaint as to him, arguing that the complaint failed to state a claim for which relief could be granted. At a hearing on Tipton's motion, Gay brought forth his evidence concerning Tipton's alleged insertion of the easement language in his deed from the Turner heirs, and argued that by inserting the easement language into the deed, Tipton sold a right a way which he had no right to sell. On April 8, 1996, the trial court entered an order granting Tipton's motion to dismiss.

TEDDY MARTIN AND JOYCE DAVIS

In addition to the allegations concerning the passway, Gay alleged that Martin:

has illegally trespassed upon the Plaintiffs' property for the purpose of illegally cutting timber and hauling it away over the . . . passway which Defendants have constructed . . . Further, Martin has encroached upon Plaintiffs' land, planting and growing crops . . . without Plaintiffs' consent and attempting to illegally annex and join Plaintiffs' property to property owned by [Martin] Martin has also physically attacked . . . Earl Gay by hitting him in the face with his fist because Plaintiff confronted him illegally trespassing on [the Gay property].

As to Davis, Gay alleged that she:

entered upon Plaintiffs' land and illegally cut and removed sixty-eight (68) acres of timber from Plaintiffs' property, thereby damaging the land and depriving Plaintiffs of financial gain.

Nowhere in the amended complaint did Gay allege that title to the land on which Martin and Davis allegedly trespassed was in dispute. Gay sought \$75,000 in damages from Martin, \$138,000 in damages from Davis, and an award of punitive damages against both. In their respective answers, neither Davis nor Martin alleged that title to the land they allegedly trespassed on was in dispute.

Martin filed his motion for summary judgment on May 12, 1998. Attached to his motion was an affidavit from Sara Hodgson (Hodgson), a free-lance paralegal. In the affidavit, Hodgson stated that she had examined the chains of title for the Gay and Martin properties, and that the chains of title could not be traced back to a common source of title or back to a land patent from the Commonwealth. Based on Hodgson's affidavit, Martin alleged that summary judgment was proper because Gay "cannot prove that the title to the land they allege was trespassed on . . . is superior to that of Martin."

Davis filed her motion for summary judgment on June 4, 1998. Attached to her motion was an affidavit from Hodgson stating that she could not trace the chains of title for the Gay and Davis properties back to a common source of title or land patent issued by the Commonwealth. Davis' argument in support of her motion was similar to Martin's.

In response to the motions of Martin and Davis, Gay attached a survey of the Gay property establishing the boundaries thereof. Gay maintained that:

because [Martin and Davis] did not contest the Gay's [sic] ownership of the 283 acres of

land which is the subject of this litigation by way of an affirmative defense in their answer, and further since the record herein clearly proves that the Gay family is, in fact, the owners of the subject land, the Motion[s] for Summary Judgment should be overruled.

On July 15, 1998, the Commissioner entered a report recommending entry of partial summary judgment in favor of Martin and Davis. In so holding, the Commissioner stated:

In a boundary suit/title action where plaintiff alleges title to identified land and defendant denies that title, the plaintiff carries the burden of establishing not only that he has some title to the land, but that he has superior title to the land in dispute. This burden is met by either tracing both titles through an unbroken chain to a common source, Thurman vs. Doss, [Ky., 229 S.W.2d 317 (1950)]. or tracing the plaintiff's title through an unbroken chain to a land patent from the Commonwealth. Alexander vs. Duncan, [Ky., 575 S.W.2d 58 (1933)]. By accomplishing either of these two tasks, the plaintiff not only shows that he has some title to the land, but that he in fact has a superior title to the land.

When a plaintiff fails to carry this burden, the court is required to dismiss the claim. Rose vs. Gatliff Coal Co., [Ky., 99 S.W.2d 214 (1936)].

. . .

In simplest terms, in the face of the Defendants' motions, the Plaintiffs are constrained to come forward with some factual allegation sufficient to create a genuine issue of material fact. The only factual allegation appearing in the Plaintiffs' response is the testimony of a registered land surveyor who has contended that the Gay Heirs' deeds are located on the ground in a particular way. Even assuming that the surveyor's location of the deed boundaries is correct, the Plaintiffs have offered no facts to suggest that the title to that boundary is superior to the title of Davis and Martin, if

the Davis and Martin deeds overlap the Gay survey.

The allegations contained in the affidavit[s] of [Hodgson] must be taken as true, and if true, the only legal conclusion is that the Plaintiffs cannot show a superior title to the land, therefore dismissal is proper.

On January 28, 1999, the trial court entered an order granting partial summary judgment in favor of Davis and Martin over Gay's exceptions to the Commissioner's report. The order was made final by amended partial summary judgments entered by the trial court on February 17, 1999, and February 25, 1999.

Gay contends on appeal that the trial court erred in dismissing the claim against Tipton for failure to state a claim for which relief can be granted. A motion to dismiss for failure to state a claim for which relief can be granted should not be entered "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club, Ky., 551 S.W.2d 801, 803 (1977).

We agree with Tipton that there is no cause of action stated against him for which relief can be granted. Assuming for the sake of argument that Tipton attempted to convey a passway across the Gay property which he did not own to Miller's predecessor in title, we agree with Tipton that the conveyance of the passway was void ab initio. Under KRS 381.150, "a deed . . . purporting to pass or assure a greater right or estate than the person can lawfully pass shall operate to convey . . . so much of the right and estate as that person can lawfully convey." See

also Sirls v. Jordan, Ky. App., 625 S.W.2d 106, 108 (1981).

Thus, if Tipton did not own the passway across the Gay property, he could not convey same to Miller's predecessor in title. While Miller or his predecessors in title may have a cause of action against Tipton, that cause of action does not extend to Gay as they have not been damaged. Thus, the trial court did not err in dismissing Gay's cause of action against Tipton.

Gay next argues that the trial court erred in entering summary judgment in favor of Miller and in granting a prescriptive easement across the Gay property. We disagree on both counts.

Gay's argument in regard to the issuance of summary judgment is without merit. Miller filed his motion for summary judgment with a supporting affidavit showing the absence of any genuine issue of material fact as to the existence of a passway across the Gay property. Once Miller presented evidence of the non-existence of a genuine issue of material fact, the burden shifted to Gay to bring forth evidence showing otherwise. Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992). Gay failed to respond to Miller's motion, even after being given additional time to do so. As Gay set forth no evidence to contradict the allegations contained in the Miller affidavit, the Commissioner had no choice but to recommend entry of summary judgement in favor of Miller, and the trial court did not err in accepting the Commissioner's recommendation.

Contrary to Gay's argument, the allegations contained in the Gay affidavit attached to Gay's exceptions to the

Commissioner's report did not create a genuine issue of material fact. While the Gay affidavit may have created a question of fact in regard to Miller's use of the passway prior to the conveyance of the Miller property to Tipton, the affidavit did not negate the allegations that Adeline Turner and/or her heirs had used the passway across the Gay property since 1900.

In regard to the trial court's creation of the prescriptive easement, case law demonstrates that:

A private passway may be acquired by prescriptive use although a right of way is not strictly a subject of continuous, exclusive, and adverse possession. It is sufficient if the use exercised by the owner of the dominant tenement is unobstructed, open, peaceable, continuous, and as of right for [fifteen years]. [citations omitted] Where the claimant has shown such long continued use, it will be presumed the use was under a claim of right, and the burden is upon the owner of the serviant estate to show that the use was merely permissive.

Pickel v. Cornett, Ky., 147 S.W.2d 381, 382 (1941). The Miller affidavit clearly alleged that use of the passway over the Gay property had been continuous for more than fifteen years by Miller and his predecessors in title. It makes no difference that Miller himself did not use the passway for fifteen years as "the adverse possession of a grantee may be tacked on to that of his grantor to complete the statutory period." Martin v. Kane, Ky., 245 S.W.2d 177, 178 (1952). Thus, the trial court did not err in creating a prescriptive easement across the Gay property in favor of Miller.

Finally, Gay argues that the trial court erred in granting summary judgment in favor of Davis and Martin. We agree.

Under Kentucky law, when a defendant to a trespass action counterclaims and alleges ownership of the land on which he is alleged to have trespassed, the plaintiff must prove his title to be superior to that of the defendant by showing either "title of record from the Commonwealth or from a source shown to be common with that claimed by the defendant." Marinero v. Deskins, Ky., 344 S.W.2d 817, 819 (1961). If the plaintiff is unable to show superior title, then the action must be dismissed. Rose v. Gatliff Coal Co., Ky., 99 S.W.2d 214, 215 (1936).

Our review of the record in this case establishes that Gay's stated cause of action against Davis and Martin sounds in trespass. However, our review of the record also shows that neither Davis nor Martin alleged in response to Gay's allegations that they were the owners of the land on which they allegedly trespassed. In the absence of such an allegation, Gay is not required to prove superiority of title, but need only show that Davis and Martin did, in fact, trespass on property owned by him in order to recover. Thus, it was improper for the trial court to grant summary judgment in favor of Martin and Davis on the ground that Gay failed to show superiority of title.

Having considered the parties' arguments on appeal, the trial court's order of April 18, 1996, dismissing Gay's complaint as to Tipton and the trial court's order of January 28, 1999 granting summary judgment in favor of and creating a prescriptive

easement in favor of Miller are affirmed. The trial court's orders of February 17, 1999 and February 25, 1999 granting summary judgment in favor of Davis and Martin are reversed, and this matter is remanded with instructions to reinstate Gay's claims against Davis and Martin for resolution on the merits.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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