

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001610-MR

LARRY ROSE COAL COMPANY
(LARRY ROSE COAL COMPANY, INC.)

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 89-CI-00280

JOHN C. MAIN AND
EVELYN J. MAIN (HIS WIFE)

APPELLEES

AND: 1999-CA-001617-MR

LOWELL JENKINS AND
CEE JAY, INC.

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 89-CI-00280

JOHN C. MAIN AND
EVELYN J. MAIN (HIS WIFE)

APPELLEES

OPINION
REVERSING APPEAL NO. 1999-CA-001610-MR
AND APPEAL NO. 1999-CA-001617-MR

*** **

BEFORE: HUDDLESTON, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Larry Rose Coal Company (Rose), Cee Jay, Inc. (Cee Jay), and Lowell Jenkins (Jenkins) bring these consolidated appeals from a judgment of the Knox Circuit Court entered without benefit of jury on June 8, 1999. We reverse in both Appeal No. 1999-CA-001610-MR and in Appeal No. 1999-CA-001617-MR.

On June 23, 1989, appellees, John C. Main and Evelyn J. Main (the Mains), filed a trespass action in the Knox Circuit Court alleging that Rose, Cee Jay, and Jenkins¹ had willfully mined, removed, and/or caused to be removed coal belonging to the Mains. Rose, Cee Jay, and Jenkins duly answered denying the trespass.

For many years this action lay in the circuit court. During this time, a number of depositions were filed of record. Also, the record was supplemented with the Opinion and Judgment of the Knox Circuit Court entered December 10, 1974 in John C. Main, Jr. v. John Hendrickson, et al, Civil Action No. 5133 (herein referred to as the Hendrickson heirs litigation).

On June 21, 1998, an order was entered referring the matter to a Special Commissioner of the Knox Circuit Court for findings and recommendations. It appears the Commissioner made no report.

On June 8, 1999, the court rendered its own Findings of Fact, Conclusions of Law, and Judgment. The court awarded damages for trespass, thus precipitating these appeals. We shall address the appeals separately.

¹There were other defendants to this action who have not appealed.

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Upon examination of the record, we conclude that there is no factual basis to support the judgment against Rose. Other than the listing of Rose as a defendant to this action and a rather tenuous suggestion that Larry Finley, owner of Rose, may have received some royalty payments from property he owned in the area, there is nothing to support a claim against Rose. Nor, do the findings and conclusions of the circuit court implicate Rose in the alleged trespass to Mains' coal.

The judgment against Rose is perforce clearly erroneous. Ky. R. Civ. P. 52.01. Same is hereby reversed.

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The resolution of this appeal requires an analysis of the facts and law.

At all times herein relevant, appellees, Jenkins and Cee Jay, mined under a lease from the Hendrickson heirs obtained in July, 1983. The mining was conducted under Permit No. 861-5162 issued by the Kentucky Department for Natural Resources to L, J, and C Coal Company, an entity, according to the permit application, owned by Jenkins. It appears the Mains first complained of the alleged trespass in 1989, after mining in the area had probably ceased.

The Mains claim fee ownership of a 3.31-acre tract of land adjoining the Hendrickson heirs lease. In the underground

mining of the Hendrickson heirs lease, the Mains contend that Jenkins and Cee Jay willfully breached their boundary and removed coal from beneath their acreage. The circuit court agreed with the Mains and entered judgment for willful trespass and resulting damages.

In this appeal, Jenkins and Cee Jay contend the Mains' action should have failed. They argue that the Mains did not establish title to the coal under the 3.31-acre parcel. In support thereof, they point to the 1974 Hendrickson heirs litigation wherein the Mains sued the heirs to establish title. In that litigation, the Mains claimed ownership of the 3.31-acre parcel of land in fee. They were unsuccessful. The court determined that the Hendrickson heirs were the owners of the "Dean seam of coal" underlying the 137-acre tract, but specifically stated it was unable to determine ownership of the 3.31-acre parcel. The court stated as follows:

(5) The evidence is insufficient for the Court to adjudge ownership of the 3.31 Acre parcel of land described in the complaint, and this case is retained on the docket in order that the parties may present additional evidence on that issue for subsequent determination by the Court;

Notwithstanding the foregoing statement by the court, it appears that no further action was taken to determine ownership of the 3.31 acres. The instant trespass litigation filed in 1989 put title to underlying coal in issue.

It is a fundamental principle of law in a trespass action for wrongful removal of coal, the plaintiff must prove title. See Rose v. Gatliff Coal Co., 266 Ky. 416, 99 S.W.2d 214

(1936). In proving title, one must do so affirmatively and may not rely upon the weakness of defendant's title. See Knott Coal Corporation v. Kelly, Ky., 417 S.W.2d 253 (1967). To prove title, one must establish title from a common source or from the Commonwealth. Sandlin v. Baker, 242 Ky. 645, 47 S.W.2d 55 (1932).

The Mains claim fee title to the 3.31 acres through a deed dated August 22, 1942, from Mrs. Meredith G. Carpenter, Special Deputy Director, Division of Banking, Commonwealth of Kentucky, liquidating the First State Bank of Barbourville to John C. Main, Jr.² (the 1942 deed). The property was described by deed reference only. It purported to convey all property acquired by First State Bank of Barbourville (First State Bank) in a Commissioner's Deed of December 9, 1929, which had not theretofore been sold. Specifically the deed stated:

CONVEYANCE ONE:

All the right, title and interest of first party of every kind, character and description in and to the property conveyed to the First State Bank, Barbourville, Kentucky, by Commissioner's Deed of date the 9th day of December 1929, which deed is of record in the Knox County Court Clerk's office in Deed Book 67 at pages 310-317, to which reference is hereby made. There is excluded from this conveyance any and all tracts of land, mineral rights, and/or oil and gas rights heretofore sold. (Emphasis added.)

²In 1943, John C. Main, Jr. conveyed the property to John C. Main, Sr. At John C. Main, Sr.'s death, the property passed to his widow, Rosa G. Main. In 1974, Rosa G. Main, widow, conveyed the property back to John C. Main, Jr.

Jenkins and Cee Jay contend the Mains may not establish title without proving the coal underlying the 3.31 acres has not sometime in the past been off-conveyed. They direct us to the cases of Stephens v. Terry, 178 Ky. 129, 198 S.W. 768 (1917), and Miller v. Breathitt Coal, Iron & Lumber Co., 152 Ky. 390, 153 S.W. 468 (1913), supporting the principle that one claiming title under a grant containing an exclusion must show that his title does not fall within the exclusion. The Mains reply that Jenkins and Cee Jay are estopped to impugn their title because the respective titles are derived from a "common source" -- First State Bank. The circuit court agreed with the Mains and found as follows:

5. The Court does hereby make a finding of fact that the abstracts of title for the Plaintiff's property and the Hendrickson heir's property reflect common ownership from August 14, 1896, through January 13, 1931. The First State Bank of Barbourville owned the larger tract of which the Plaintiff's property and the Hendrickson heirs property were both a portion. (Emphasis added.)

We are compelled to disagree with the circuit court. We do not believe the Hendrickson heirs and the Mains share a common source of title. It is true that both the Mains and the Hendrickson heirs received their respective properties from First State Bank. The Hendrickson heirs were conveyed the 137-acre tract by deed dated January 13, 1931. The Mains' property emanated from a deed dated August 22, 1942 -- the 1942 deed. While both deeds derive from a "common grantor," First State Bank, we are of the opinion the conveyances do not share a common source of title.

In Bolin v. Buckhorn Coal & Lumber Co., 211 Ky. 847, 278 S.W. 154 (1925), the Court clarified the critical distinction between a **common grantor** and **common source** of title in a trespass to try title action:

It is therefore insisted that plaintiff proved title to a common source and it was not necessary to prove title from the commonwealth. On the other hand, it is argued that plaintiff merely proved that he and the Daniels derived title through a common grantor and not through a common source. It is true that the terms "common grantor" and "common source of title" do not always mean the same thing. For instance, proof that both plaintiff and defendant acquired title through a common grantor is not sufficient to dispense with proof of title from the commonwealth, where the tracts are separate and distinct and the common grantor's title was derived from separate sources. (Citation omitted.)

In the case at hand, the record reflects the Hendrickson heirs' 137-acre parcel was a "separate and distinct" tract. The 137-acre tract was identified as the "Second Tract" in the November 7, 1929, Commissioner's Deed from Turkey Creek Coal Company to First State Bank.³ It thus had a separate and distinct identity. We find no evidence in the record to indicate that the 137-acre tract and the 3.31-acre tract were ever united as a single tract of land either as to surface or mineral under the ownership of First State Bank. Therefore, we cannot say that First State Bank is the common source of these properties. In sum, we hold that First State Bank was indeed a common grantor, but not a common source. Such is insufficient to prove title in

³In the November, 1929, Commissioner's Deed, we observe that a "Third Tract" was described containing a surface estate of 3.31 acres.

a trespass action for wrongful removal of coal. It was thus incumbent upon the Mains to establish title to the Commonwealth.

The Mains did support their claim with a chain of conveyances dating back to the Commonwealth. They claim fee title to the 3.31 acres through the aforementioned 1942 deed. That deed contained no property description. Rather, the 1942 deed purported to convey all property interests acquired by First State Bank from Turkey Creek Coal Company through the 1929 Commissioner's Deed. The conveyance, however, **excluded any property that may have theretofore been sold, including coal.**

As such, we think it incumbent upon the Mains to prove that they actually received title to the coal underlying the 3.31 acres from the 1942 deed. In short, the Mains failed to demonstrate that the coal had not been off-conveyed. Hence, we deem the chain to be insufficient to establish title to the coal in question.

The Mains place great reliance upon a survey conducted by Kentucky Utilities Company in 1978 wherein the utility purported to locate the boundary between the Mains' and the Hendrickson heirs' properties. This was done pursuant to condemnation proceedings for a utility right-of-way upon the surface estate. We do not view such as supporting the Mains' claim to establish ownership of the coal underlying the property.

Upon the whole of the record, we are compelled to also reverse Appeal No. 1999-CA-001617-MR.

In view of our determination, we consider the question of damages moot.

For the foregoing reasons, the judgment of the Knox Circuit Court is reversed both in Appeal No. 1999-CA-001610-MR and in Appeal No. 1999-CA-001617-MR.

ALL CONCUR.

BRIEFS FOR APPELLANT, LARRY
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