

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001552-MR

JOE B. HALL AND
KATHERINE HALL

APPELLANTS

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 99-CI-00278

SERENITY SHORES, INC.

APPELLEE

AND: NO. 2000-CA-001604-MR

SERENITY SHORES, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 99-CI-00278

JOE B. HALL and his wife,
KATHERINE HALL; and
PATRICK BARBIERE and his wife,
MAUREEN BARBIERE

CROSS-APPELLEES

OPINION
AFFIRMING ON APPEAL AND CROSS-APPEAL

** ** * * * **

BEFORE: COMBS, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Joe B. Hall and Katherine Hall (the Halls) bring this appeal from a March 14, 2000, summary judgment of the Marshall Circuit Court. Serenity Shores, Inc. (Serenity Shores) cross-appeals from the same judgment. We affirm on appeal and cross-appeal.

Serenity Shores is a homeowners association for a 103-acre plus subdivision, which came into existence in 1974. At the time of its creation, the subdivision had no access to a public road. To resolve same, Serenity Shores purchased by "Agreement" dated November 30, 1976, a sixty-foot "right of way" from one, Ray Holland, and one, Fray Holland. The Agreement stated, in relevant part, as follows:

Beginning at a point on the southwest right-of-way of the Old Birmingham Road, where center of the road from Serenity Shores Subdivision intersects with the Old Birmingham Road; thence, in a Southwesterly direction along the centerline of said road to a point where the road intersects the property presently owned by Serenity Shores, Inc. The right-of-way herein conveyed being all of the property lying on thirty (30) feet of either side of said centerline, the right-of-way being sixty (60) feet wide.

. . . .

(4) The Buyers agree to maintain the road at their expense and to allow the general public the use of the said road, it being the intention of the Buyers to turn the road over to the County.

(5) The Sellers agree to take the necessary steps to have this agreement examined and approved in open Court by the Marshall County Circuit Court due to Hester

Wilson having been adjudged an incompetent by the Marshall Circuit Court.

Thereafter, Serenity Shores petitioned the Marshall Fiscal Court to accept the road into the county road system. The Marshall Fiscal Court did same on October 4, 1997. It appears that the county only accepted into its road system forty-eight feet of the sixty-foot wide right of way. This left a six-foot strip on each side of the road that was not accepted by the Marshall Fiscal Court into the road system.

In 1999, Serenity Shores constructed an entrance sign on a portion of the six-foot strip on the Halls' side of the road. The sign identified the entrance to Serenity Shores off Kentucky Highway 962. Additionally, Serenity Shores planted trees on that six-foot strip. The Halls filed an action for declaratory judgment in the Marshall Circuit Court, and Serenity Shores filed a counter-claim. Each party claimed ownership of the portion of the six-foot strip not accepted by the county into its road system. The circuit court entered summary judgment on March 14, 2000, in favor of Serenity Shores. Upon motion to alter, amend, or vacate judgment, the circuit court entered an order on May 30, 2000, which contained additional findings of fact and conclusions of law. This appeal and cross-appeal follow.

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Summary judgment is proper when there exists no material issue of fact and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. (CR) 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

On direct appeal, the Halls contend that the November 1976 Agreement merely granted Serenity Shores a sixty-foot wide right of way easement, and that the six-foot strip at issue has been "abandoned" by Serenity Shores. The circuit court found that there was no evidence establishing that Serenity Shores had abandoned the remainder of the right of way.

Abandonment has been defined as the known relinquishment of a right or property without the intention of reclaiming it or re-assuming its ownership or enjoyment. See Illinois Central Railroad v. Roberts, Ky. App., 928 S.W.2d 822 (1996). The Halls argue that Serenity Shores abandoned the six-foot strip by non-use of same. It is well established that non-use of an easement is not conclusive of abandonment. See Mammoth Cave National Park Association v. State Highway Commission, 261 Ky. 769, 88 S.W.2d 931 (1935). Upon the circumstances of this case, we do not view Serenity Shores' mere non-use of the six-foot strip of the right of way as evidencing abandonment. Simply stated, we think the Halls failed to produce evidence showing that Serenity Shores intentionally relinquished ownership to the six-foot right of way. See Illinois Central Railroad, 928 S.W.2d 822.

The Halls additionally argue that the 1976 Agreement expressed an intention by both parties that Serenity Shores was to retain nothing, but only was to be a conduit for transferring the "right of way" to the county. Thus, the Halls argue that "when the county accepted something less than the sixty feet (60), the unaccepted portion must revert back to grantor Wilson

because it was never intended for Serenity Shores to have anything that wasn't conveyed to the county." We disagree.

In 1976, Serenity Shores paid \$5,000.00 as consideration for the right of way. We interpret the 1976 Agreement as transferring to Serenity Shores a sixty-foot wide right of way easement. The 1976 Agreement specifically stated that it was only the intention of the buyers to turn the road over to the county. We do not think that such recitation of the buyers' intention negates the unambiguous language of the 1976 Agreement -- that Serenity Shores purchased a sixty-foot wide right of way easement. We reject the Halls' argument that Serenity Shores only purchased the right to transfer the sixty-foot wide right of way easement to the county. Such interpretation of the 1976 Agreement defies its plain language and common sense.

In sum, we are of the opinion that the circuit court did not commit error by entering summary judgment.

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As Serenity Shores failed to raise any affirmative allegations in its cross-appeal, we summarily affirm.

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

COMBS, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT.

BRIEFS FOR APPELLANTS/CROSS-
APPELLEES:

Flem Gordon
Madisonville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Charles W. Brien
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