

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002907-MR

ROY GENE MULLINS

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 98-CI-00305

JACK E. WHITAKER

APPELLEE

AND

NO. 2000-CA-001738-MR

ROY GENE MULLINS

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 98-CI-00305

BOONE'S TRACE, LLC

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: We have two appeals out of a Madison Circuit Court case involving the boundary lines of a residential lot and the location of a residence supposedly constructed thereon. The trial court found the residence encroached onto an adjacent lot,

but that the owner of the residence owned part of the adjacent lot by adverse possession. The first appeal is from the trial court's dismissal (made final) of the previous owner of the adjacent lot for fraud in his affidavit concerning title. We agree with the trial court that there is no fraud and affirm that dismissal. The second appeal is from the trial court's dismissal (made final) for slander of title by the record owner of the encroached lot. Again, we agree with the trial court that the assertions were made in good faith and affirm the dismissal. The two appeals were ordered to be heard together by the same panel.

Boone's Trace, Inc. owned a farm in Madison County which it subdivided into Boone's Trace Development. On March 9, 1979, Boone's Trace, Inc. sold Lot 71, Section 3, of Boone's Trace Development, a subdivision in Madison County, Kentucky, to Harry C. Campbell and his wife. The Campbells constructed a house beginning in 1980, and completed it in 1983, on what they thought was Lot 71. On September 25, 1986, the Campbells conveyed the same to Roy Gene Mullins and Gayla S. Mullins, his wife. Gayla subsequently deeded her interest to Roy. In the summer of 1997, it was discovered that the Mullinses' residence was actually constructed on part of Lots 70 and 71.

Legal title to Lot 70 has been in Boone's Trace, LLC since June 24, 1996, when it acquired title from Jack E. Whitaker, Trustee for Whitaker Land Co., who acquired title from F & W Properties, Inc., and Al Florence and Arline Florence, who acquired title from Boone's Trace, Inc. At the time the Mullinses were buying Lot 71, they didn't have the property

surveyed. However, at the lender's request or at someone's request on behalf of the Mullinses, Jack Whitaker signed an Affidavit In Aid Of Title, which was recorded. That affidavit basically states that Whitaker, as trustee, currently owns Lot 70 and he has no claim of ownership to Lot 71, but it includes:

8. That neither the Affiant nor F & W Properties Co., Inc., nor any person or entity claiming through them, has any claims against Harry C. Campbell, Marcella W. Campbell or against the property known as Lot 71, Section No. 3 of the Boone's Trace Development.

The Mullinses closed on Lot 71 and experienced quiet enjoyment until the summer of 1997, when Boone's Trace, LLC had the lots surveyed and discovered half of the Mullinses' residence had been built on Lot 70. Boone's Trace, LLC contacted Roy Mullins about the problem and Mullins filed suit, with a count for slander of title against Boone's Trace, LLC, a count for breach of warranty against his predecessor in title, Harry C. Campbell, and a count for fraud against Jack E. Whitaker, for signing the Affidavit In Aid Of Title which allowed Mullins to acquire title without a survey. On June 12, 1999, the court granted Whitaker summary judgment and made it final and appealable on November 2, 1999. The court granted Boone's Trace, LLC's motion for summary judgment on July 6, 2000, and made the order final. In granting summary judgment, the court made certain findings but made it clear that a jury trial later would decide the remaining issues. For example, the court decided the surveys were conflicting, but it was clear the residence encroached onto Lot 70 and that Mullins owned part of Lot 70 by

adverse possession, although the subsequent trial would decide the true boundary lines of the platted lots and that part of Lot 70 adversely held. The court also determined the Affidavit In Aid Of Title by Whitaker, specifically paragraph 8, waived any claim by Whitaker, and successive owners, to the property adversely held, although the actual boundaries were yet to be determined. Since there is still a question as to what part of Lot 70 Boone's Trace, LLC owned, the trial court held the good faith questions about title, etc. did not slander title.

Roy Mullins appealed both dismissals in separate appeals. In the appeal of the dismissal of Jack E. Whitaker, the appellant alleges error in granting summary judgment because if Boone's Trace, LLC is found to own all of Lot 70, then Whitaker, as a previous owner who signed the affidavit, committed a fraud. This "but if" scenario is rendered moot by the dismissal of the claims against Boone's Trace, LLC, the record owner of Lot 70. The court did not just find that Boone's Trace, LLC made statements questioning title in good faith, but ruled that Roy Mullins, after tacking the time of the Campbells, adversely held that part of Lot 70 that the house sat on and that part that Mullins maintained. The court interpreted the affidavit as a waiver of any claim by the current and former owners of Lot 70 against Mullins's encroachment. That decision was made final and not appealed. The ruling in effect eliminates any fraud argument. In Hicks v. Wallace, 190 Ky. 287, 227 S.W. 293, 295-96 (1921), our Court of Appeals, now our Supreme Court, held that in order to have "actionable fraud" in real estate matters, the

injured party must show a reliance with a subsequent injury. Even if all the other elements of fraud are present, without damages there is no action for fraud. The trial court's finding of adverse possession in the case sub judice provided a remedy without subsequent damages to get a clear title to Mullins's residence and curtilage. Also, the finding of adverse possession shows the affidavit was truthful, and not a misrepresentation. See Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357 (1978); United Parcel Service Co. v. Rickert, Ky., 996 S.W.2d 464 (1999).

In the second appeal, Mullins alleges error in summarily dismissing the slander of title count based on a good-faith dispute. The law on slander of title is very clear. In Hardin Oil Co. v. Spencer, 205 Ky. 842, 266 S.W. 654, 655 (1924), the Court held that an action for slander of title requires malice, the absence of good faith, and that common fairness requires one to give notice to a potential purchaser of his potential claim. There is no such thing as slander of title per se. Bonnie Braes Farms, Inc. v. Robinson, Ky. App., 598 S.W.2d 765, 766 (1980). In Stahl v. St. Elizabeth Medical Center, Ky. App., 948 S.W.2d 419 (1997), this Court held that one alleging slander of title must plead and prove the alleged slander was knowingly and maliciously made, and must show special damages, like a loss of sale or a diminution in its fair market value. In the case sub judice, Mullins only held record title to Lot 71. The questions concerning encroachments concern record title to Lot 70. Adverse possession was found as to part of Lot 70,

leaving a question as to the boundaries of that property adversely held on Lot 70. See also Montgomery v. Milam, Ky., 910 S.W.2d 237 (1995). We would agree with the trial court that one who had record title to Lot 70 had a good faith dispute with an adverse possessor of part of that lot. Therefore, summary judgment under Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991) was proper because it would be impossible for the appellant to produce evidence at trial which would warrant a judgment in his favor.

For the foregoing reasons, the judgments of the Madison Circuit Court are affirmed.

ALL CONCUR.

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