

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001017-MR

DON PATRICK; BARBARA PATRICK;
J.W. ALLEN, JR.; JEAN ALLEN;
STEWART GIBBS; BERTHA GIBBS;
MARSHALL STREET; PRISCILLA SUE
STREET; S.C. ALLEN, JR.; LISA
ALLEN; TED C. PATRICK; CAROL
PATRICK; MARVIN PATRICK; and
JOANN PATRICK

APPELLANTS

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 95-CI-00272

KENTUCKY MAY COAL COMPANY;
DOVIE MILLER; GARY MILLER;
J.B. MILLER; NOLA MILLER;
GENEVA CUNNINGHAM; DOUGLAS
CUNNINGHAM; DELMAR MILLER;
MARGIE MILLER; RUBY JEAN MILLER;
ARTHUR MILLER; RUBY BERGEN; OMA
JEAN TAYLOR; GROVER TAYLOR;
JOSEPHINE MILLER; LARRY MILLER;
LOSS MILLER; DOROTHY MILLER;
and MARVIN MILLER

APPELLEES

OPINION
VACATING AND REMANDING
** ** * * * * *

BEFORE: COMBS, McANULTY, and SCHRODER, Judges.

COMBS, JUDGE: Don Patrick and "the Allen heirs" appeal a
judgment of the Magoffin County Circuit Court, which declared

that Dovie Miller, et. al (the Millers), had acquired ownership by adverse possession of the surface tract and underlying minerals of a certain parcel of property in Magoffin County, KY.

The Allen heirs claim ownership of the entire surface and mineral estate of lot three (the "Susie Allen tract") on Long Creek, based on a May 4, 1964, deed by the Allens to the Millers. That deed conveyed lot one, the "dower" tract, and lot two, but omitted it lot three. The Millers claim ownership of both the mineral and surface estate of lot three, which adjoins lot two, by adverse possession.

On December 19, 1995, Kentucky May Coal Company (Kentucky May) filed an action in interpleader seeking a declaration of the respective ownership interests in the property; the owner of lot three was entitled to mining royalties from Kentucky May. By order of March 13, 2001, the court entered its judgment in favor of the Millers. This appeal followed.

The Allens allege two errors on appeal: (1) that the entry of summary judgment without notice to the parties by the Magoffin Circuit Court was erroneous and (2) that summary judgment in favor of the Millers was incorrect. In resolving these issues, we also must determine whether adverse possession of a surface tract carries over to ownership of the underlying mineral tract where the two interests have not been severed.

Our standard of review is that we may not set aside findings of the trial court unless they are clearly erroneous. CR 52.01. Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980).

On or about May 11, 1964, Joe Miller (deceased), husband of appellee Dovie Miller, purchased real property from Rhena Swinney, et. al, who purported to sell to Joe all of Swinney's interest in the property at issue; that property is located on Long Branch in Magoffin County, Kentucky. Even though the deed did not convey lot three, the Miller heirs have been in continuous possession of this parcel of land. After Joe Miller died, Dovie Miller, his widow, became one of the group identified as the Miller heirs.

In 1980, the same dispute over royalties was litigated in Sam Allen, Jr., et. al v. Dovie Miller, et. al (80-CI-126). By deposition in that earlier lawsuit, the Miller heirs testified that prior to and since 1964, Joe Miller and his family had openly, continuously, exclusively, adversely, and notoriously possessed and used lot three to tend cattle. This 1980 case was dismissed for failure of the plaintiffs to prosecute.

On April 23, 1992, Kentucky May obtained leases from Dovie Miller and the other Miller heirs for the purposes of mining and producing coal on property conveyed to the Millers by Swinney. (TR, p. 12). On June 20, 1994, S.C. Allen, Jr., and the Allen heirs granted Kentucky May the mining rights to lot three on Long Creek.

After reviewing the evidence presented earlier in Sam Allen, Jr., et. al v. Dovie Miller, et. al, (the 1980 lawsuit), in conjunction with the evidence in the present action, a special commissioner found that the minerals have not been severed from lot three. Furthermore, the commissioner determined that the

Miller heirs have adversely possessed the surface of lot three with its underlying minerals since 1964, thereby acquiring ownership. On March 13, 2001, the court directed the Master Commissioner to execute a deed for lot three to the Miller heirs. On March 19, 2001, the Allen heirs filed a motion to alter, vacate or amend; that motion was overruled on April 28, 2001. On May 10, 2001, the Allen heirs filed this appeal.

The Allen heirs first cite as error the clerk's failure to serve notice of the filing of the recommended judgment as a grounds for a dismissal. We agree. The clerk filed the recommendation of the Special Commissioner, which was sent to the Circuit Judge and was then signed without any notice having been given to the parties as required by CR¹ 53.06, which provides:

The commissioner shall prepare a report of his recommendations to the court upon the matter and, if required to make findings of fact and conclusions of law, he shall set them forth in the report.

Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report...shall be by motion. The court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

An appellant must have an opportunity to make timely objections to a Commissioner's report and to ask for a hearing on those objections. Kelley v. Fedde, Ky., 64 S.W.3d 812, 814 (2002), construing CR 53.06(2). "While a full-blown evidentiary hearing is not contemplated by [CR 53.06], the parties must be

¹Kentucky Rules of Civil Procedure.

afforded an opportunity for oral argument." Id. (Citing Haley v. Haley, Ky. App., 573 S.W.2d 354 (1978)).

Pursuant to CR 53.06(1), the clerk was required to serve the recommended findings of February 23, 2001, upon all parties in the action. Because of this omission, the Allen heirs and the Miller heirs were not afforded the right to "serve written objections" to the findings before the judgment was entered in March. Thus, not only were the Allen heirs unable to exercise their right to file objections; but they also lost the opportunity to present their objections in a hearing before the court. At a minimum, the Allen heirs were entitled to an oral argument before the court. Kelley, supra at 814.

We will refrain from discussing the outstanding issues and disputes as to material facts that additionally appear to render the summary judgment premature in this case. We vacate this judgment and remand in light of CR 53.06 for further action of the Magoffin Circuit Court consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

J. Scott Preston
Paintsville, Kentucky

BRIEF FOR APPELLEES:

Larry D. Brown
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