

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000347-MR
AND
NO. 2002-CA-000502-MR

WALTER CALLIHAN, INDIVIDUALLY
AND WALTER CALLIHAN, INC.

APPELLANTS

v. APPEALS FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 99-CI-00563

CSX TRANSPORTATION, INC.

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: HUDDLESTON, PAISLEY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Walter Callihan and Walter Callihan, Inc.
appeal from two orders of the Greenup Circuit Court, one
granting summary judgment in favor of CSX Transportation, Inc.
(CSXT) for trespass and an injunction barring Callihan from
entering on real property owned by CSXT, and the second
dismissing Callihan's *pro se* complaint against CSXT and various
entities not a party to this action. We affirm.

The parties have a long and litigious history owing to Callihan's insistence, despite numerous adverse decisions by the courts of this Commonwealth, on operating a fruit stand on property owned by CSXT. In 1981, CSXT's predecessor in interest, the Chesapeake and Ohio Railway Company, filed an action for forcible detainer against Callihan in the Greenup District Court. A trial was ultimately held and the trial court entered an order on June 20, 1985, which contained findings that CSXT owned the real property in question and that Callihan had committed an unlawful forcible entry. In addition, the trial court ordered Callihan to vacate the property.

Callihan did quit the property at some point after the entry of the June 1985 order. Subsequently, on November 12, 1993, Callihan filed Articles of Incorporation for a wholly-owned corporation, Walter Callihan, Inc., of which he was the sole shareholder, director, officer, and registered agent. In January 1995, Callihan again entered onto the CSXT property and began operating a fruit stand under the name of Walter Callihan, Inc. On June 5, 1996, CSXT filed a motion for a warrant of restitution and to enforce the District Court's June 1985 order.

A hearing was held, and the trial court entered a new order on February 14, 1997, finding that the June 1985 order was subject to a fifteen year statute of limitations, pursuant to Kentucky Revised Statute 413.090, and that CSXT had acted within

the prescribed statute of limitations in seeking to enforce the June 1985 judgment against Callihan. In addition, the trial court's order found that the parties agreed that the only issue remaining before the court was whether CSXT had waived its right to enforce the June 1985 judgment by way of laches, acquiescence, estoppel, waiver or other means. The court determined that it lacked jurisdiction to entertain equitable defenses which should have been brought before a Circuit Court; however, the District Court went on to state that Callihan could not avail himself of any of these defenses because he admitted to being in contempt of the June 1985 order. Finally, the District Court once again ordered Callihan to vacate the property.

Callihan appealed the February 1997 order to the Greenup Circuit Court which affirmed it and remanded the case to the District Court for further proceedings. The Kentucky Court of Appeals subsequently denied Callihan's request for discretionary review by an order issued on August 19, 1997. Subsequently, the District Court entered an order sustaining CSXT's motion for a warrant of restitution on November 17, 1997. Callihan refused to vacate the property, even after being served with the warrant of restitution, and the District Court determined that it lacked jurisdiction to enforce its order.

In 1996, while CSXT was seeking a warrant of restitution ordering Callihan to vacate the property, Callihan filed a *pro se* action to quiet title in both the Greenup District and Circuit Courts naming CSXT and Walter Callihan, Inc. as defendants. CSXT's motions for dismissal of both actions were granted by the respective trial courts. The Greenup Circuit Court dismissed the 1996 quiet title action with prejudice and the Kentucky Court of Appeals affirmed the trial court's decision.

December 2, 1999, CSXT filed the present action seeking judgment against Callihan and Walter Callihan, Inc. for trespass and an injunction barring them from entering, occupying, operating a business on, or being present in any way on the property without CSXT's permission. CSXT filed a motion for summary judgment accompanied by an affidavit establishing ownership of the property and a memorandum of law supporting its motion. Callihan filed a response and a defective complaint against CSXT and various entities which are not parties to this action. The Circuit Court granted CSXT's motion for summary judgment, entered an injunction against Callihan and Walter Callihan, Inc., and dismissed Callihan's complaint for failure to state a claim upon which relief can be grounded. This appeal followed.

In order to prevail on a motion for summary judgment, the moving party must demonstrate that there are no genuine issues of material fact and that the moving party is entitled to summary judgment as a matter of law. Steelvest v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). CSXT included a sworn affidavit from James Spradlin, a duly authorized officer and employee of the corporation, with its motion for summary judgment. Spradlin's affidavit outlined the history of litigation between CSXT and Callihan, including several adverse decisions by the courts of this Commonwealth determining that CSXT, not Callihan, owned the property in question. In addition, CSXT submitted certified copies of three deeds showing the transfer of the property from Alva May to Chesapeake and Ohio, CSXT's predecessor in interest and copies of the various court orders finding that CSXT owned the property and ordering Callihan to vacate it. Finally, CSXT attached a copy of a letter to Callihan drafted by its counsel on September 10, 1999, requesting that he once again vacate the property.

Once CSXT met the initial burden of showing that there were no genuine issues of material fact, Callihan was obliged to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 482. Furthermore, in meeting this burden, Callihan had "the obligation to present affirmative evidence and not rest on his

'mere allegations.'" Swatzell v. Natural Resources and Environmental Protection Cabinet, Ky., 996 S.W.2d 500 (1999). Callihan represented himself in this action and his response to CSXT's motion for summary judgment asserted that the statute of limitations had expired, that Walter Callihan, Inc. was the proper party defendant in this action, and that Walter Callihan, Inc. has had continuous possession of the property since 1981 when, according to Callihan, the property was deeded to Walter Callihan, Inc.¹ Chesapeake and Ohio filed the successful lawsuit to establish ownership of the property in question in 1981. The Greenup District Court found, in its June 1985 order, that CSXT (which acquired Chesapeake and Ohio's interest due to a merger) owned the property in question. When CSXT sought a warrant of restitution in 1996, the court further found that Walter Callihan, individually, was the proper party defendant and that the June 1985 order was subject to a fifteen year statute of limitations. Furthermore, Callihan filed quiet title actions in both the Greenup District and Circuit Courts in 1996 which were decided in favor of CSXT. Clearly, all of Callihan's defenses in the present action involve claims which have already been resolved adversely to his interests by the courts of this Commonwealth. Consequently, the trial court correctly

¹ Although, Callihan argues that Walter Callihan, Inc. received a general warranty deed to the property in question in 1981, the Greenup District Court made a finding that the entity of Walter Callihan, Inc. was created on November 12, 1993.

determined that Callihan was barred from relitigating his claims by the doctrine of *res judicata*.

We now turn our attention towards Callihan's *pro se* attempt to file a complaint against CSXT, its current counsel and her law firm, the attorney who represented Chesapeake and Ohio in the 1981 action, and the trial judge in both his official and individual capacities. The trial court found that the claim was procedurally improper and failed to state a claim upon which relief may be grounded. Callihan's complaint was filed without leave of the trial court and fails to state any actionable allegations against CSXT. He does make specific claims of wrongdoing against the other named defendants; however, they are not parties to the action at hand and Callihan did not seek to join any of them. Therefore, the trial court acted properly in dismissing Callihan's complaint pursuant to Kentucky Rule of Civil Procedure 12.02(f) for failure to state a claim.

For the forgoing reasons, the judgment of the Greenup Circuit court is affirmed.

ALL CONCUR.

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