

RENDERED: NOVEMBER 14, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000399-MR

BONNIE SMITH

APPELLANT

APPEAL FROM MARTIN CIRCUIT COURT
v. HONORABLE DANIEL SPARKS, JUDGE
ACTION NO. 05-CI-00334

BILLIE RAMBO; GENEVA SUE LITTLER
AND JAMES EDWARD HORN

APPELLEES

OPINION
AFFIRMING

*** * * * *

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

ACREE, JUDGE: Bonnie Smith appeals from the summary judgment and dismissal of her claim to an ownership interest in certain real property in Martin County, Kentucky, from which timber was harvested. We affirm.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

The parties are members of one family. The family's patriarch was James E. Horn. James E. had four children – James Henry Horn, Billie Rambo, Bonnie Smith, and Geneva Sue Littler.

The patriarch, James E., died testate on April 10, 2002. His will devised his home and lot, described as the "Tomahawk, Kentucky" property, to his son James Henry for his life, then to Billie for her life, then to Bonnie for her life, then to Geneva Sue in fee simple absolute. Other than specific bequests not relevant to this action, the remainder of James E.'s real and personal property was to be divided equally among his four children. His estate was probated and a final settlement approved on October 29, 2004.

In addition, and apart from his power to devise, James E. Horn held a life estate in other real property in the Turkey Creek area of Martin County, Kentucky. His son, James Henry, was the remainderman. The Turkey Creek property passed to James Henry outside the administration of the estate.

James Henry died in 2003 and the Tomahawk property passed to Billie Rambo in accordance with the will of James E. The Turkey Creek property passed to Billie Rambo in accordance with James Henry's will.

Bonnie filed this action against her siblings, Billie Rambo and Geneva Sue Littler, and her nephew, James Edward. She alleged "an interest in real and personal property by virtue of inheritance from the Last Will and Testament of

James E. Horn[.]” She first claimed that “Billie Rambo and Geneva Sue Littler, took the personal property described hereinabove and either kept or disposed of it, without giving the plaintiff her fair share, or without paying her for same[.]” Second, she claimed Billie and Geneva Sue “caused the property at Turkey Creek to be timbered, without permission of the plaintiff, and without the plaintiff being paid any monies for her interest[.]”

Bonnie’s first claim, concerning her interest in the real and personal property passing through the estate, was dismissed on March 3, 2006.² Bonnie does not seek our review of that order here.

The only remaining claim was that the Appellees deprived Bonnie of income from the timbering of the Turkey Creek property. On December 27, 2006, upon motion of Billie and Geneva Sue, the trial court entered summary judgment against Bonnie, finding that the subject real property was “property in which [Bonnie] did not, and has not ever, based on the record, have an ownership interest.” Bonnie appeals that judgment here.

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to

² The March 3, 2006, order included finality language authorized by Kentucky Rules of Civil Procedure (CR) 54.02. Bonnie filed a timely Notice of Appeal of that order. However, no prehearing statement was filed with this Court and the appeal was dismissed on September 13, 2006. Because Bonnie does not challenge the March 3, 2006, order in the appeal now before us, we need not address whether Bonnie’s complaint presented “multiple claims” susceptible to separate finality under CR 54.02. *See, Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722, 727 (Ky. 2008), *citing Jackson v. Metcalf*, 404 S.W.2d 793, 794-95 (Ky. 1966).

judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Appellate review takes note of the requirement that the trial court view the evidence in the light most favorable to the non-moving party, and summary judgment should be granted only if it appears impossible that the non-moving party will be able to produce evidence at trial warranting a judgment in his favor.

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480-82 (Ky. 1991). The party seeking summary disposition bears the initial burden of establishing that no genuine issue of material fact exists and the burden then shifts to the party opposing the motion to present “at least some affirmative evidence showing that there is a genuine issue of fact for trial.” *Id.* at 482.

Bonnie argues on appeal that two genuine issues of material fact made the grant of summary judgment improper. The first is whether James E. held an interest in real property other than the Tomahawk property and the Turkey Creek property. The second is whether the timbering occurred on property other than the Turkey Creek property. Our review convinces us that no such issues exist.

The record identifies only two parcels of real property that, in any manner, were owned by James E. – the Tomahawk property and the Turkey Creek property. Billie and Geneva Sue presented to the trial court the will of James E. making it clear that Bonnie would have no right to the Tomahawk property until Billie died. They also presented the deed to the Turkey Creek property showing that the grantors conveyed a life estate in that property to James E. with the

remainder to James Henry. If there is some documentation or evidence of any kind that James E. owned other real property, it is not a part of this record.

Furthermore, the record includes Billie's affidavit that the timbering occurred on the Turkey Creek property. Bonnie did not present any countervailing affidavit or other evidence to the contrary.

The record shows that there were no genuine issues of material fact and that the Appellees were entitled to judgment as a matter of law. The judgment of the Martin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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