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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001968-MR

JAMES BRASHEAR, JR. — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 87-CI-00374

DONALD C. GRAVES; AND
GAYLORD STACY T/A
COMMERCIAL FUEL SALES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

VANMETER, JUDGE: James Brashear, Jr. appeals from the Perry Circuit Court's orders granting partial summary judgment in favor of appellees Donald C. Graves

[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 Statutes (KRS) 21.580.

and Gaylord Stacy T/A Commercial Fuel Sales, and voluntarily dismissing appellees' remaining claims. For the following reasons, we affirm.

Facts

Appellees filed suit in September 1987 regarding a dispute over a parcel of land, seeking to quiet title and to obtain damages for trespass and interference with a contractual relationship, a declaration of their rights, and punitive damages. The dispute arose after Brashear purchased a tract known as the Algoma Spur tract at a January 1987 master commissioner's sale.[2] After recording his deed in February 1987, Brashear notified a Sears store in Hazard that a portion of its parking lot was located on the Algoma Spur tract, and that if Sears desired to continue using that portion of the lot, it should sign a lease with Brashear for $650 per month. After Brashear's demand and subsequent demands went unanswered, he directed Sears to cease using his property. Thereafter, appellees filed suit asserting that they or their predecessors in title had entered into a lease with Sears in August 1976 authorizing Sears to use the easement over the disputed property.

Appellees claimed title to the easement pursuant to a deed recorded in June 1967 from the Grant Combs heirs to Perry Bowl, Inc. This deed conveyed a tract of land, not in dispute here, as well as a permanent and exclusive easement in the form of a covenant running with the land. More particularly, the easement was for the purposes "of ingress and egress to its adjoining property, and for the purpose of parking motor vehicles, provided, however, that [Perry Bowl's] use of

[2] The master commissioner's sale was held as a result of a partition action the Grant Combs heirs instituted in Perry Circuit Court in 1965.

said property shall not interfere with the use of the main railroad and spur tracks, running through said property." The deed of conveyance further provided that

> in the event such of the above described property is no longer used as a railroad right-of-way, and when the [Comb heirs] are willing to sell the said above described property, [Perry Bowl], its heirs and assigns shall purchase the same for an amount equal to the market value of said property at that time.

Perry Bowl's rights were eventually conveyed to appellee Commercial Fuel Sales through a series of other deeds.

During the proceedings below, the parties submitted cross motions for partial summary judgment. For his part, Brashear argued that Perry Bowl did not acquire any easement rights by virtue of the June 1967 deed, as the Combs heirs had no conveyable interest in that property due to a 1912 agreement made by Grant and Susan Combs. In that agreement, Grant and Susan Combs combined certain assets with Slemp Coal Company to form a combination company "for the purpose of making a lease for mining coal under the combined holdings[.]" Specifically, Grant and Susan Combs provided "mineral and mineral rights" from some 100 acres of their land which are not at issue here. Additionally, as is relevant here, the parties agreed:

> Whereas it may be necessary for the operation of the coal upon said property that the lessee of the combined properties have additional place **to build houses for miners and a right of way to the railroad for a coal railroad**, it is agreed that said **Combs will rent to said Coal Company ten acres of land,** or as much of said ten acres as shall be desired by the lessee, on upper end of his farm below the County road, and next to the railroad

> . . . including with this the said railroad right of way for the coal railroad from the L.&E. Railroad to a point where the tipple shall be built in the field below the Pine tree hollow, and for this ten acres or as much of said ten acres as shall hereafter be desired by the lessee and including the right of way, the said Slemp Coal Company or the lessee of the Combination company shall pay to the said Combs a rental of Twenty five ($25.00) dollars per acre, payable annually in advance and continue during all the time such land is used.

(Emphasis added.) A portion of this land has since become known as the Algoma Spur tract.[3]

Based upon these and other documents in the record, the circuit court granted partial summary judgment in appellees' favor in a 1990 order. Although Brashear moved the court to vacate its partial summary judgment, the court eventually denied Brashear's request and further dismissed appellees' remaining claims. This appeal followed.

[3] In July 1974, Slemp Coal Company's successor in title, Grant Coal Company, surrendered this ten-acre tract to the Combs heirs, excepting 1.93 acres which was granted for Grant Coal Company, its successors and assigns' "exclusive benefit . . . as a railroad right of way and also as a tipple or coal loading site and when the same is no longer used for said purposes, the said property shall revert to the [Combs heirs], their heirs and assigns." Pursuant to the terms of the agreement, the remainder of the 1912 agreement continued "in full force and effect."

Procedure

Brashear argued that the circuit court should vacate its 1990 order since one judge initially presided over the matter and heard the parties' arguments while a special judge signed the order granting partial summary judgment. The record reflects that the latter judge was designated as a special judge by order by the Chief Regional Circuit Judge to preside "in all matters pending in the Perry Circuit Court from September 17, 1990, up to and including September 21, 1990."

Here, Brashear argues that the special judge lacked the authority to enter the September 19, 1990, order resolving the parties' summary judgment motions. We disagree.

KRS 26A.020(1) provides the Chief Justice of the Kentucky Supreme Court with the authority to designate a regular or retired justice or judge of the Court of Justice as a special judge when "a judge of any Circuit or District Court fails to attend, or being in attendance cannot properly preside in an action pending in the court[.]"[4] "The purpose of the use of special judges, acting *pro tempore*, is to expedite the handling of litigation, whenever and wherever needed." *Regency Pheasant Run Ltd. v. Karem*, 860 S.W.2d 755, 757 (Ky. 1993) (superseded in part

[4] At one point, the power to appoint retired judges to serve as special judges was vested in the Chief Regional Circuit Judges. *Huntzinger v. McCrae*, 818 S.W.2d 613, 615 (Ky.App. 1990). The Chief Regional Circuit Judge appointed the special judge in the matter *sub judice*, and Brashear does not take issue with that aspect of the appointment. However, *see Jacobs v. Commonwealth*, 947 S.W.2d 416, 418 (Ky.App. 1997) (by order dated October 8, 1992, Chief Justice revoked Chief Regional Circuit Judges' authority to appoint retired judges to serve as special judges).

by rule as stated in *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740, 742 n.1 (Ky. 1999)).

The *Regency Pheasant Run Ltd.* court held that the use of retired judges as special judges

> is clearly authorized by the Kentucky Constitution, the Kentucky Revised Statutes and is in the best interest of the operation of the Kentucky Court of Justice.
>
> "The authority to exercise administrative control of the judicial branch of government is vested in the Supreme Court of Kentucky." *Kentucky Utilities v. South East Coal Company*, Ky., 836 S.W.2d 407, 408 (1992). See also *Ex Parte Auditor of Public Accounts*, Ky., 609 S.W.2d 682 (1980). From a reading of the Kentucky Constitution, statutory law and case law it is beyond cavil that such appointments are proper.

860 S.W.2d at 757-58. The special judge's appointment in the matter *sub judice* was therefore proper, and the order giving him the authority to preside "in all matters pending in the Perry Circuit Court from September 17, 1990, up to and including September 21, 1990" certainly encompassed the authority to enter the September 19, 1990, order.

Still, Brashear argues that the 1990 order was improperly entered because he was not given notice that the special judge had been appointed to his case. We disagree.

Brashear relies upon two Kentucky Supreme Court cases in support of his argument. In *Regency Pheasant Run Ltd.*, 860 S.W.2d at 757, the court held that the Chief Justice of the Kentucky Supreme Court had the authority to appoint

as a special judge a retired judge who was practicing law. In *Kentucky Utilities Co. v. South East Coal Co.*, 836 S.W.2d 407, 409 (Ky. 1992), the supreme court held that South East Coal's motion for the recusal of a special justice was untimely when the motion was not filed until after oral argument and the issuance of an opinion some ten months later. The court also held constitutional its procedure authorizing the Chief Justice to appoint a special justice to serve on the Kentucky Supreme Court when one justice was disqualified from participating in the consideration of a case.[5] Simply put, neither of these cases requires that a party be notified of the assignment of a special judge, and we have found no other authority requiring such notification. Accordingly, Brashear is not entitled to relief in this regard.

Next, Brashear argues that the 1990 partial summary judgment order was improperly entered when the special judge signed it without presiding over the arguments held on the issues. However, pursuant to KRS 26A.030:

> Upon the death of a judge, or when from any cause the office is vacant, or when the judge is absent, his replacement or successor, no matter how chosen, may sign any orders of court left unsigned by his predecessor, the same as his predecessor might have done.

As such, the special judge had the authority to sign the order resolving the parties' cross motions for partial summary judgment, just as the original judge might have done.

[5] In *Hodge v. Commonwealth*, 17 S.W.3d 824, 824 (Ky. 1999), the supreme court explained that it had since rescinded the policy it found constitutional in *Kentucky Utilities Co. v. South East Coal Co.*

Brashear also argues that the 1990 order was improperly entered because the special judge simply signed the opinion and order tendered by the appellees. We disagree.

Brashear cites several cases in which Kentucky's appellate courts have condemned the practice of trial courts adopting findings of fact prepared by counsel. For example, in *Callahan v. Callahan*, 579 S.W.2d 385, 387 (Ky.App. 1979), this court reversed the trial court's judgment, explaining that the adoption of prepared findings and conclusions both calls into question whether the decision-making process is totally under the trial judge's control, and presents problems for appellate review. However, the Kentucky Supreme Court subsequently held that tendered findings and conclusions adopted by a trial court should not be easily rejected "in the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility[.]" *Bingham v. Bingham*, 628 S.W.2d 628, 630 (Ky. 1982). In that case, no reversible error occurred since the record showed that the trial judge "prudently examined the proposed findings and conclusions and made several additions and corrections to reflect his decision in the case." *Id.* at 629. More recently, in a case where both parties submitted proposed findings of fact, as occurred below, the Kentucky Supreme Court cited *Bingham* and held simply that it was "not error for the trial court to adopt findings of fact which were merely drafted by someone else." *Prater v. Cabinet for Human Resources, Commonwealth of Kentucky*, 954 S.W.2d 954, 956 (Ky. 1997).

In any event, the cases Brashear cites are inapplicable in the matter *sub judice* as each turns on adequate compliance with CR[6] 52.01,[7] which requires a trial court to find facts, state conclusions of law, and render a judgment in "all actions tried upon the facts without a jury or with an advisory jury[.]" Here, since no trial took place, CR 52.01 does not apply. Rather, the court was required to rule upon motions for summary judgment. Trial courts are not required to attach findings or conclusions when they render summary judgment. *Wilson v. Southward Inv. Co.*, 675 S.W.2d 10, 13 (Ky.App. 1984) (citing CR 52.01, CR 56.01). Indeed, summary judgment should be granted only when no genuine issues as to any material facts exist. CR 56.03. Further, because summary judgment involves only legal questions, "an appellate court need not defer to the trial court's decision and will review the issue de novo." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001).

Merits

Brashear argues that no easement was granted to Perry Bowl because not all of the Combs heirs signed the deed which was recorded in 1967. We disagree.

The copy of the deed between the Combs heirs and Perry Bowl that was recorded in 1967 contained only 9 of the 23 grantors' signatures. However,

[6] Kentucky Rules of Civil Procedure.

[7] Brashear does cite one case which involved a summary judgment motion; however, in that case, the court did not reach the issue regarding whether the trial court's findings of fact and conclusions of law were proper. *Stafford v. Board of Education of Casey County*, 642 S.W.2d 596, 598 (Ky.App. 1982).

the record reflects that additional grantors signed the deed in 1967. Further, before the deed was recorded in 1967, still other grantors conveyed their interests in the property to grantors who did ultimately sign the deed. Brashear does not argue that fewer than all of the grantors eventually signed the deed. Rather, he argues that the subsequent recording of the deed with the additional signatures, after appellees initiated their lawsuit, was too late.

The court in *Turner v. McIntosh*, 379 S.W.2d 470, 472 (Ky. 1964), explained that an

> unrecorded deed is valid and must prevail over a subsequent deed if the subsequent grantee knew or had notice of its existence prior to his purchase, or had information sufficient to put him on inquiry that would have led to its discovery upon a search; such information is deemed equivalent to notice.

Here, the recorded deed with 9 of 23 grantors' signatures clearly was sufficient to put Brashear on inquiry that would have led to the discovery of a deed with the remaining grantors' signatures. As such, Brashear is not entitled to relief in this regard.

Next, Brashear argues that the Combs heirs had no interest to convey in the 1967 deed because the 1912 agreement, between Grant and Susan Combs and Slemp Coal Company, granted "exclusive" surface rights in the property to their combination company. We disagree.

Under the 1912 agreement, Grant and Susan Combs conveyed to the combination company the "mineral and mineral rights" from some 100 acres of

their land which are not at issue here. Additionally, they agreed to lease some ten acres or less, including the acreage now in issue, for the construction of houses for miners and for a railroad right-of-way. The provision Brashear cites, giving the holding company "exclusive surface rights for building and mining use[,]" applies to the larger rather than the smaller tract. There is no exclusivity provision with regard to the smaller tract.

As no exclusivity provision related to the lease of the ten-acre tract, nor did the combination company ever assert that one existed, Grant and Susan Combs and their heirs had the right to use the land in any manner that did not interfere with the lease. 52 C.J.S. *Landlord & Tenant* § 543 (West, Westlaw 2008) ("When a landowner grants a right for the specific, nonexclusive use of property to another through a lease, the landowner retains the right to continue any other use of the property that does not interfere with the right granted, and the owner can transfer the retained right of use to a third party"). Accordingly, in 1967 the Combs heirs acted within their rights when they conveyed to Perry Bowl a permanent and exclusive easement, in the form of a covenant running with the land for the purposes "of ingress and egress to its adjoining property, and for the purpose of parking motor vehicles[,]" the use of which expressly could not "interfere with the use of the main railroad and spur tracks, running through said property[,]" as provided by the 1912 agreement. Thus, Brashear purchased the property at the Master Commissioner's sale subject to a valid grant of an easement running with the land.

Because we hold that the circuit court did not err in its determination that appellees had an express easement, we need not address whether they acquired an easement by prescription.

The Perry Circuit Court's orders are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Stephan Charles
Manchester, Kentucky

BRIEF FOR APPELLEE:

Paul R. Collins
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