

RENDERED: SEPTEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002556-MR

C. J. ELLIS

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 98-CI-00138

CARL T. AKINS AND
BARBARA AKINS

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: CAPERTON, KELLER AND NICKELL, JUDGES.

NICKELL, JUDGE: C.J. Ellis (C.J.) appeals from the Whitley Circuit Court's judgment entered on September 28, 2006, awarding Barbara and Carl T. Akins (collectively Akins) superior title and damages for trespass to their property near the Dog Slaughter Creek headwaters in Whitley County, Kentucky. Although we are inclined to affirm the circuit court on the merits, after careful review of the

record, we must dismiss C.J.'s appeal because a party necessary to the disposition of the action is not before us.

This case arises from a disputed boundary between two adjacent tracts of land. The Akins acquired their tract from Jim and Sandy Davenport by deed recorded on June 17, 1997. The legal description to the Akins tract has not changed since 1909 when their tract was severed from a larger parcel. Their tract generally shares its northwestern boundary with a parcel owned by C.J.

C.J. acquired the majority of his claimed tract from his father, Henry Ellis (Henry), by deed recorded June 1, 1993. Subsequently, Henry executed a deed of correction to C.J., adding calls to the prior deed's legal description and substantially increasing the size of C.J.'s property. Recorded on October 8, 1993, the deed of correction included several acres not previously described in C.J.'s chain of title.

On March 4, 1998, C.J. filed suit alleging Carl Akins had destroyed a fence on his property, and requested a declaratory judgment as to the location of Akins' boundary and an injunction preventing Akins from interfering with any fence not located on Akins' property. In their answer, Akins denied C.J. owned the property on which the fence was located, asserted possession of and legal title to the property, and filed a counterclaim for trespass. Akins requested the court quiet title to their property and enter judgment against C.J. for all damages sustained.

Prior to filing suit, C.J. had hired a licensed surveyor to survey and plat the property described in the deed of correction, but the surveyor was unable to do so. After seven years of litigation and notice of the circuit court's intent to finally adjudicate the claims, C.J. remained unable to submit anything but a general plat of the area. In contrast, Akins submitted a plat of the land described in their deed.

C.J. attempted to repudiate Akins' plat and chain of title with unsubstantiated evidence, but the circuit court concluded Akins' title was superior. Thus, because C.J. had erected the fence on Akins' property, the court also concluded C.J. had trespassed on Akins' property and Akins was entitled to recover damages for the trespass. The circuit court entered judgment accordingly on September 28, 2006.

On December 6, 2006, Akins conveyed his property to Jonathan David Hamblin by general warranty deed. However, the deed was not recorded until January 12, 2007, and as a result of the delay, C.J. had no formal notice of the transfer of interest until 2007. In the interim, on December 11, 2006, C.J. filed a notice of appeal indicating his intention to appeal the circuit court's judgment to this Court.

Before the submission of briefs, Akins moved this Court to dismiss the appeal because the property in question had been conveyed to Hamblin, and Akins was no longer a real party in interest. This motion was passed to the merits panel of this Court. After reviewing the parties' briefs, we now hold that by

transferring the property to Hamblin, Akins was divested of his interest in the property and was no longer a real party in interest for the purpose of this appeal. Therefore, we grant the motion and dismiss.

Consequently, Hamblin became a real party in interest and a party required for the disposition of this action. A party whose interest in property may be impaired by the outcome of an action is a required party—necessary and indispensable—to the disposition of the action. CR¹ 19.01(b); *Hazard Coal Corp. v. Getaz*, 234 Ky. 817, 29 S.W.2d 573, 578 (1930); *Lunsford v. Witt*, 309 S.W.2d 348, 349 (Ky. 1958); *see also E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 779-880 (9th. Cir. 2005), cert. denied, 546 U.S. 1150, 126 S.Ct. 1164, 163 L.Ed.2d 1128 (2006) (using “necessary” and “indispensable” interchangeably with respect to parties required to be joined under Rule 19). Clearly, a ruling in C.J.’s favor on appeal would impair Hamblin’s interest in the property.

However, because C.J. had no notice of the transfer until Akins recorded the deed to Hamblin – which occurred after the notice of appeal had been filed – CR 76.24 provides the only vehicle for bringing Hamblin before this Court. Having lost jurisdiction, the circuit court could not join Hamblin under CR 19 or substitute him as a party under CR 25. Although C.J., Akins, or Hamblin could have moved this Court for leave to substitute Hamblin at any time after the recording of the deed to Hamblin, absent a motion, this Court may not *sua sponte* substitute Hamblin as a party on appeal.

¹ Kentucky Rules of Civil Procedure.

Although we cannot substitute parties *sua sponte*, we may consider whether all required persons are before us, and if they are not, dismiss the action on our own accord. *Republic of Philippines v. Pimentel*, --- U.S. ---, 128 S.Ct. 2180, 2188, 171 L.Ed.2d 131 (2008) (authorizing *sua sponte* consideration of parties required under Rule 19 and dismissal by appellate courts upon absence); *Treadway v. Russell*, 299 S.W.2d 245 (Ky. 1957) (declaring appellate relief may be denied because an indispensable party is absent). Unquestionably, failure to ensure all required persons are before the Court is detrimental to C.J. and all other appellants. Although in some cases we may remand for joinder or substitution of parties, even if the proper parties were before us, Ellis has been unable to secure adequate evidentiary proof supportive of his claim. The failure to add Hamblin as a party was fatal to this appeal. Therefore, for the foregoing reasons, we dismiss C.J.'s appeal.

It is hereby ORDERED that this appeal be, and it is, DISMISSED.

ALL CONCUR.

ENTERED: September 18, 2009

/s/ C. Shea Nickell
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

Larry E. Conley
Corbin, Kentucky

Timothy Crawford
Corbin, Kentucky