

RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000981-MR

R. P. SMITH AND
IMOGENE SMITH

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 00-CI-00428

NORA J. HEMPHILL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: R. P. Smith and Imogene Smith appeal the Knox Circuit Court's order denying their motion to alter, amend, or vacate the court's judgment after the court found against the Hills and in favor of Nora J. Hemphill in this boundary dispute case. After a careful review of the record, we affirm because the

circuit court did not err in entering its judgment without first entering an order of submission.

I. FACTUAL AND PROCEDURAL BACKGROUND

Hemphill filed her complaint in the circuit court alleging that the Smiths had trespassed upon her land and had made an unlawful and wrongful claim on her land that had cast a cloud on her title to the property. She sought to quiet the title to the property in her favor, but there was a dispute between the parties as to the location of the boundary line between their properties.

Both Hemphill and the Smiths hired separate surveyors to survey the disputed property and determine where the boundary line was located. The surveyors disagreed on the placement of the boundary line. Both surveyors were deposed, and Hemphill was also deposed.

The circuit court entered an order stating that the case would be tried by deposition. The court ordered the parties to submit their proof by deposition by specified dates. The circuit court then directed Hemphill to submit her trial brief by December 17, 2007, and the Smiths were ordered to submit their trial brief by January 2, 2008. The Smiths were also directed to tender an Order of Submission simultaneously with the filing of their trial brief.

After the depositions were submitted to the circuit court, Hemphill filed her trial brief. The Smiths never filed their trial brief, nor did they tender the Order of Submission that the court had ordered them to provide. On February 15, 2008, *i.e.*, approximately two months after Hemphill submitted her trial brief, and

approximately one and a half months after the Smiths were supposed to file their trial brief, the circuit court entered its findings of fact, conclusions of law, and judgment in favor of Hemphill. In doing so, the court analyzed the depositional testimony of the two surveyors and ultimately found that the boundary line's location was where Hemphill's surveyor had testified it was.

Ten days later, on February 25, 2008, the Smiths moved to alter, amend or vacate the judgment or, alternatively, to grant a new trial. They provided no reasons or affidavits in support of this motion until they filed their memorandum in support of the motion on April 3, 2008. In this memorandum in support, the Smiths argued that they never tendered their trial brief or an Order of Submission because they did not receive Hemphill's trial brief, so they were unaware that Hemphill had filed her trial brief with the court. The Smiths also contended that the circuit court never entered an Order of Submission to notify the parties that the case had been submitted for final judgment. Thus, they asserted that the circuit court's judgment deprived them of the procedural and substantive due process rights under the United States Constitution and the Kentucky Constitution because they were denied the opportunity to respond to Hemphill's trial brief by filing their own trial brief.

Hemphill opposed the Smiths' motion, arguing that her trial brief and her proposed judgment were served on the Smiths and noting that those documents were not returned to her, as should have occurred if they were unable to be served. Hemphill also noted that her "counsel was never contacted by [the Smiths']

counsel to inquire as to the status of said documents or to ask if they had been mailed.”

On April 16, 2008, the circuit court entered its order denying the Smiths’ motion to alter, amend or vacate the judgment, reasoning as follows:

Counsel for the [Smiths] concedes that [their] Trial Brief was not filed in accordance with the scheduling order, but counsel argues that same should be excused for failure of counsel to receive [Hemphill’s] Trial Brief and proposed Findings of Fact, Conclusions of Law and Judgment. Counsel for the [Smiths] does not argue that she did not receive or was not aware of the terms and conditions of the Court’s scheduling order of August 13, 2007.

The circuit court continued, noting:

The Court will state that its Judgment of February 15, 2008, was not a Judgment of default entered against the [Smiths] as a sanction for failure to comply with the scheduling order. Rather, the Court fully considered all of the evidence in the record, including the depositions filed of record, and the Court’s decision was based on the evidence as the Court saw it, albeit without the benefit of the [Smiths’] Trial Brief.

The Smiths now appeal the circuit court’s order denying their motion to alter, amend, or vacate the judgment or, alternatively, to grant a new trial.

Specifically, they argue: (a) the case was not properly submitted to the circuit court and the court erred both in entering its judgment without first entering an order of submission and in denying the Smiths’ motion to alter, amend, or vacate the judgment or, in the alternative, to grant a new trial; (b) there was insufficient evidence in the record to support the circuit court’s decision in favor of Hemphill;

and (c) the trial court committed substantial error in determining the location of the boundary line.

II. ANALYSIS

We first note that, as discussed previously, the Smiths filed their motion to alter, amend, or vacate the judgment or, in the alternative, to grant a new trial on February 25, 2008, ten days after the circuit court entered its judgment, but the Smiths did not support this motion with any reasons or affidavits until April 3, 2008. Because the Smiths did not submit the grounds and affidavits in support of their motion in a timely fashion, as required pursuant to CR¹ 59.01 and CR 59.02, the denial of their motion for a new trial under CR 59 was not preserved for our review. *See Ligon Specialized Hauler, Inc. v. Smith*, 691 S.W.2d 902, 904 (Ky. App. 1985). Therefore, we will only review the denial of the Smiths' motion to alter, amend, or vacate the judgment.

A. CLAIM REGARDING ORDER OF SUBMISSION

The Smiths first contend that the circuit court erred in denying their motion to alter, amend, or vacate the judgment because the case was not properly submitted to the circuit court and the court erred in entering its judgment without first entering an order of submission.

As previously noted, the circuit court entered a scheduling order, following a pretrial conference, in which the court set forth the dates by which the parties' proof by deposition, trial briefs, and order of submission were to be

¹ Kentucky Rule of Civil Procedure.

tendered. Kentucky Rule of Civil Procedure 16 permits courts to direct attorneys to appear for pretrial conferences to discuss “matters as may aid in the disposition of the action.” CR 16(1)(f). That Rule further provides that, after such a conference is held, the court shall issue an order reciting the action taken at the conference, and

such order when entered controls the subsequent course of the action, unless modified at or before the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

CR 16(2).

“The law is well settled that the parties are bound by a pre-trial order.”

Marcum v. Smith, 375 S.W.2d 386, 387 (Ky. 1964). Thus, pursuant to CR 16, the parties in this case were bound by the circuit court’s scheduling order, but the Smiths failed to comply with the order when they failed to file their trial brief and tender an order of submission by the date specified in the order.

To the extent the Smiths contend that, pursuant to their local rules of court, the circuit court should not have entered its judgment before entering an order of submission, the Smiths’ argument is misplaced. Rule 15 of the Local Rules of the Twenty-Seventh Judicial Circuit of Laurel and Knox Counties provides, in pertinent part, as follows:

A. Upon submission of any action to the Court for final Judgment, the parties shall prepare and present to the

Court an Order of submission setting forth in particular the issue or issues on which the action is submitted.

B. An action shall be submitted only upon the entry of an order of submission. The order of submission, along with the record, shall be placed in the appropriate order/judgments basket in the Clerk's Office.

* * *

D. The Court may, but need not, pass upon any such action *before* such order of submission.

(Emphasis added).

Thus, pursuant to Local Rule 15(D), the circuit court was permitted to enter its judgment before the order of submission was entered, and the Smiths' argument to the contrary lacks merit. Therefore, the circuit court did not err in denying the Smiths' motion to alter, amend, or vacate the judgment on this basis.

B. CLAIM REGARDING SUFFICIENCY OF THE EVIDENCE

The Smiths next contend that there was insufficient evidence in the record to support the circuit court's decision in favor of Hemphill. The Smiths specified in their notice of appeal that they were appealing from the court's order denying their motion to alter, amend, or vacate the circuit court's judgment.

However, they did not raise this argument concerning the sufficiency of the evidence in that motion, and they also did not raise any argument in that motion concerning the substantive findings the court entered in its judgment. Therefore, we will not review this claim for the first time on appeal. *See Kennedy v.*

Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976).

C. CLAIM REGARDING COURT'S BOUNDARY LINE FINDING

Finally, the Smiths assert that the trial court committed substantial error in determining the location of the boundary line. However, the Smiths also did not raise this claim in their motion to alter, amend, or vacate the circuit court's judgment, so we will not consider it for the first time on appeal. *See Kennedy*, 544 S.W.2d at 222.

Accordingly, the order of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barbara Elliott Yeager
Barbourville, Kentucky

BRIEF FOR APPELLEE:

Ross E. Murray
London, Kentucky