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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001997-MR

CAROL WALDMAN APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 07-CI-09166

RANDALL WALDMAN;
LUKE SYKES; AND LAUREN SYKES APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND WINE, JUDGES.

NICKELL, JUDGE: Carol Waldman appeals from an order dismissing her claims for trespass and waste. She argues the trial court erred by: (1) concluding "innocent" trespassers are not liable for damages; (2) utilizing the wrong measure of damages and dismissing her claim for aiding the trespass; and (3) dismissing her

claims for waste and damage to the property. After reviewing the record, the law, and the briefs, we affirm in part, reverse in part, and remand.

Carol Waldman is the widow of Alan Waldman. Alan and Carol married in 1995. In 2004, the couple purchased a home to be used as rental property in Louisville, Kentucky. The couple owned the home in joint tenancy with right of survivorship. They initiated divorce proceedings in December 2005, and Carol returned to her home state of Arizona. Alan passed away before the decree of dissolution became final and the dissolution action was dismissed. Prior to his death, Alan executed a will disinheriting Carol.

Alan's only child, Randall Waldman, acted as executor of Alan's estate, but was removed from that position by the district court. Randall asserted that Alan had conveyed the home's title to him by way of a quitclaim deed just days before his death. In reliance on the quitclaim deed and in accordance with Alan's will, but unbeknownst to Carol, Randall allowed his daughter, Lauren Sykes, and her husband, Luke Sykes, to move into the house. Carol attempted to retake possession of the home and sell it, but the Sykeses would not vacate the premises and lived in the house for approximately one year.

Carol brought a forcible detainer action in district court, which was dismissed because ownership of the property was contested and no landlord-tenant relationship was established. She then filed a declaratory judgment action in Jefferson Circuit Court seeking: (1) a declaration that she was the sole owner of the property; (2) ejection of the Sykeses from the property; and (3) monetary

damages for unpaid rent and property damage. The trial court granted a partial summary judgment declaring Carol to be the sole owner of the property and ordering the Sykeses to be ejected from the property. Randall filed a notice of appeal to this Court, but then filed a motion in the trial court to dismiss his notice of appeal "because the parties have reached an agreement."[1] This Court entered an order on June 13, 2008, dismissing the appeal upon Randall's motion.[2] Carol then filed an amended complaint alleging the Sykeses had committed waste and removed tangible property from the home. Following a bench trial on Carol's remaining claims, the trial court entered findings of fact, conclusions of law, and an order dismissing the remaining claims arising under Carol's complaint. This appeal followed.

First, Carol argues the trial court erred by concluding an "innocent" trespasser is not liable for damages to a property owner. She further argues the trespass by the Sykeses and Randall was neither innocent nor harmless. In ruling against Carol, the trial court relied upon a line of cases involving trespass to land for the purpose of obtaining surface minerals. *See Church and Mullins Corp. v. Bethlehem Minerals Co.,* 887 S.W.2d 321 (Ky. 1992).

We conclude the trial court misapplied *Church and Mullins Corp.,* when it found that "innocent" trespassers are not liable for damages. In *Church*

[1] The record does not reflect the terms of the agreement.

[2] No appeal was taken from the partial summary judgment adjudging Carol to be the sole owner of the property and that determination is now final. Further, no cross-appeal was taken from the judgment below and any issues regarding the ownership of the property are not before us.

and Mullins Corp., the trial court found that Bethlehem Minerals willfully trespassed upon the property of Church and Mullins Corp. to procure minerals. The Court of Appeals reversed concluding the trespass was innocent. Relying solely on *Swiss Oil Corp. v. Hupp*, 253 Ky. 552, 69 S.W.2d 1037 (1934), the Supreme Court of Kentucky reversed the Court of Appeals concluding that the trial court's finding of willful trespass was not clearly erroneous. The Supreme Court did not discuss the consequences of innocent trespass in *Church and Mullins Corp.*; rather, its analysis focused on the factors to be considered in determining whether a trespass was willful. However, in *Swiss Oil Corp.,* 69 S.W.2d at 1039, the former Court of Appeals explained that the distinction between a willful and an innocent trespass is one of consequence in regard to the amount of damages resulting therefrom, stating:

> the abstract distinction between a willful and an innocent trespasser met with in the opinions dealing with this character of cases, namely, the one knows he is wrong and the other believes he is right. *The degree of culpability as between the two determines the extent of liability*. The former class of wrongdoers find the way of the transgressor hard under the law. They are held to a strict accountability for their malappropriation of another's property. Complete restitution without credit for expenses incurred or deduction of costs of production is required. But those who invade the property of another inadvertently or under a bona fide belief or claim of right and extract minerals are allowed credit for proper expenditures in obtaining or producing them. While not allowed any profit, they are not to be penalized.

(Emphasis added). As stated above, any distinction between innocent and willful trespassers relates to the extent of liability rather than the existence of liability.

Therefore, the trial court erred by holding that innocent trespassers are not liable for damages.

Next, Carol argues the trial court utilized the wrong measure of damages for trespass, and the trial court's finding that she failed to adequately prove the reasonable rental value of the property was clearly erroneous. We agree.

Church and Mullins Corp. and *Swiss Oil Corp.* both dealt with trespass in connection with oil and mineral extraction, which require damages specific to that context. In *Walden v. Baker*, 343 S.W.2d 797, 799 (Ky. 1961), under circumstances similar to the present case, the former Court of Appeals held the measure of damages for trespass is ". . . the reasonable rental value of the property for the period of time it was wrongfully withheld."

William Stout, a certified real estate broker and property manager, testified on Carol's behalf. He stated the reasonable rental value of the property was $1,475.00 per month. Stout's testimony and valuation was uncontroverted. The trial court found that Stout's testimony was speculative because he also testified that similar property rented for a lower amount and, therefore, could not state with certainty the amount that the Sykeses or any other tenant would have paid under a standard lease agreement. However, the amount a tenant "would have" paid under a standard lease agreement is not the correct measure of damages. Under *Walden*, the proper measure is the reasonable rental value during the period the property was withheld from the owner. Therefore, as Stout testified to the reasonable rental value of the property, and his testimony was

uncontroverted, the trial court's finding otherwise was clearly erroneous and must be reversed. *See Callahan v. Callahan*, 579 S.W.2d 385, 387 (Ky. App. 1979) (trial court's findings that household furnishings were valued at $500.00 and automobile was valued at $100.00 were clearly erroneous when the only valuations in evidence showed the furnishings to be worth $2,000.00 and the automobile to be worth $650.00).

Additionally, Carol argues the trial court erred by dismissing her complaint against Randall for aiding the trespass. Kentucky law imposes liability on those who aid or abet a trespass. *Jackson v. Metcalf*, 415 S.W.2d 363 (Ky. 1967); *Bird v. Lynn*, 49 Ky. 422 (1850) ("To render a party liable for trespass who was not present, such party must knowingly and intentionally have encouraged its commission in a way calculated to cause it to be done."). The trial court dismissed the claim against Randall based upon its erroneous application of *Church and Mullins Corp.* Here, the uncontroverted evidence demonstrated the Sykeses entered and wrongfully occupied the property through the actions and purported authority of Randall. Therefore, Carol's claim against Randall for aiding and abetting trespass was improperly dismissed and must be reversed.

Finally, Carol argues the trial court erred by dismissing her claims for waste and damage to the property as a result of the alleged trespass. Carol also argues the trial court erred in finding these damages offset a loan Randall alleged he made to her.

KRS[3] 381.350 states:

> [i]f any tenant for life or years commits waste during his estate or term, of anything belonging to the tenement so held, without special written permission to do so, he shall be subject to an action of waste, shall lose the things wasted, and pay treble the amount at which the waste is assessed.

The Sykeses were neither life tenants nor tenants for years because the property was not conveyed to them. They occupied the property by virtue of Randall's permission. Likewise, Randall was neither a life tenant nor a tenant for years because Alan granted his entire interest in the property, being that of joint tenancy with right of survivorship, to Randall through the quitclaim deed. Moreover, in her brief before this Court, Carol concedes she never alleged the Sykeses or Randall were life tenants. According to KRS 381.350, an action for waste applies only to life tenants and tenants for years.

It appears that Carol confuses the concepts of waste and trespass. *Black's Law Dictionary* at page 1760 (Revised 4th ed., West 1968), defines "waste" in pertinent part, as follows:

> An abuse or destructive use of property by one in rightful possession. . . A destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title or the full estate. . . The primary distinction between "waste" and "trespass" is that in waste the injury is done by one rightfully in possession.

[3] Kentucky Revised Statutes.

(Internal citations omitted). Carol argues the trial court erred by holding trespassers are not liable for waste. Under the authority cited above, however, because neither the Sykeses nor Randall held a life tenancy or a tenancy for years, the trial court properly dismissed Carol's action for damages arising from her claim for waste.

Moreover, the trial court properly found Carol's other claims for damages resulting from injury to her property as a result of the trespass to be unsupported by credible evidence. CR[4] 52.01 provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." A judgment is not "clearly erroneous" if it is "supported by substantial evidence." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id.*

In comparing the proffered "before" and "after" photographs, the trial court found no credible evidence of the alleged damage. Carol has not shown this finding to be clearly erroneous. Rather, she asks this Court to substitute its judgment of the evidence for that of the trial court, which we are not authorized to do. *Bickel v. Bickel*, 95 S.W.3d 925, 928 (Ky. App. 2002). Similarly, in regard to Carol's claim for stolen property, the trial court found the evidence was not credible because she could not produce photographs of or receipts for the claimed

[4] Kentucky Rules of Civil Procedure.

items. Further, items she claimed had been stolen appeared in the "after" photographs. Thus, we have no reason to disturb the trial court's findings on this issue under *Bickel*.

Carol also argues that the trial court's finding that a loan allegedly made by Randall to Carol offset any damage to the property was not supported by substantial evidence. However, because the trial court properly dismissed Carol's claims for damage to the property for lack of evidence, any error in its finding regarding the alleged loan is *dicta* and therefore, harmless.

In conclusion, we reverse the portion of the judgment dismissing Carol's claim for damages arising under her allegations of trespass against Randall and the Sykeses. We further direct that judgment be entered in favor of Carol for the reasonable rental value of the property as testified to by Stout. No new trial is warranted because the "well settled rule in this jurisdiction is that upon reversal of a judgment in an 'equity' (nonjury) case the case will not be remanded for a retrial or for taking of further proof unless there are special exigencies or circumstances indicating that the 'ends of justice' require such a remand." *City of St. Matthews v. Oliva,* 392 S.W.2d 39, 40 (Ky. 1965) (citations omitted). The portions of the judgment dismissing the claims for waste and damage to the property are affirmed.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Homer Parrent, III
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BRIEF FOR APPELLEE:

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