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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000007-MR

ULABON T. ACREE; RICK JOHNSON;
VIRGIL ISAAC; AND PATSY GEARHEART — APPELLANTS

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 98-CI-00168

KENTUCKY MAY COAL COMPANY, INC.;
PROGRESS LAND CORPORATION;
MARSH COAL COMPANY, LLC;
KING BROTHERS MINING COMPANY;
FAITH COAL SALES, INC.; RESERVE HOLDINGS, LLC;
EQT PRODUCTION COMPANY; LARRY HONEYCUTT;
PAULINE HONEYCUTT; JOYCE COLLIER;
LARRY JOHNSON; AND RANDEL
JOHNSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: Ulabon T. Acree, et al.[1] (hereinafter collectively referred to as "Appellants") appeal from the Knott Circuit Court's order granting summary judgment in favor of Kentucky May Coal Company, Inc., et al.[2] (hereinafter collectively referred to as "Appellees"). For the following reasons, we affirm.

Appellants, as well as others, filed the underlying complaint against Appellees seeking to quiet title to, and be declared the owners of, a 125-acre tract of real property located in Knott County, Kentucky. A patent for the property was issued on July 16, 1902 to Alamander Martin. Appellants are descendants of an Alamander Martin (hereinafter referred to as "Alamander 1"), who died in 1895. Appellants claim Alamander 1 was issued the patent after his death, and as his heirs, they have inherited the property. Appellees trace their claim of title to the property through another man named Alamander Martin ("Alamander 2"), who deeded the property to William J. Hall on August 16, 1902. In short, the parties claim interests in the subject property through two different Alamander Martins.

Appellees moved for summary judgment on the basis that Appellants did not allege possession of the property, and therefore failed to establish a prima facie case to quiet title. Appellants did not respond to the motion for summary judgment and the trial court ruled in favor of Appellees, holding that Appellants did not allege possession of property in order to effectively quiet the title, and any claims

[1] Rick Johnson, Virgil Isaac, Patsy Gearheart, Stella Rowe, Chris Rowe, James Rose, Ethelene Collins, Brenda Gordon, Lawrence Rose, Connie Chapman, and Cidy (Andy) Rose.

[2] Progress Land Corporation; Marsh Coal Company, LLC; King Brothers Mining Company; Faith Coal Sales, Inc.; Reserve Holdings, LLC; EQT Production Company; Larry Honeycutt; Pauline Honeycutt; Joyce Collier; Larry Johnson and Randel Johnson.

to recover the property were barred by the limitations period and doctrine of laches. This appeal followed.

Summary judgment shall be granted only if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[3] 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482.

On appeal from a granting of summary judgment, our standard of review 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 judgment as a matter of law." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (quoting *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996)). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

[3] Kentucky Rules of Civil Procedure.

Appellants first argue the trial court erred by granting summary judgment on their action to quiet title on the basis that they lacked possession of the property. We disagree.

As an initial matter, Appellees correctly assert that Appellants failed to preserve the claims of error brought on appeal. Appellants did not respond to Appellees' motion for summary judgment, and failed to raise the issues it now raises on appeal at any other point in the underlying proceeding. While true that an appellate court is "without authority to review issues not raised in or decided by the trial court[,]" *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009), in this case, the trial court addressed the possession requirement in an action to quiet title, and further held any other claims by the Appellants were barred by the doctrine of laches and any applicable statutes of limitations. Since the issues raised in this appeal were addressed by the trial court, we maintain jurisdiction over Appellants' claims of error.

KRS[4] 411.120 provides, in part, that "[a]ny person having both the legal title and possession of land may prosecute suit" to quiet the title. Thus, to maintain an action to quiet title, "the plaintiff must allege and prove both title and possession." *Noland v. Wise*, 259 S.W.2d 46, 48 (Ky. 1953) (citations omitted). However, an exception exists to allow an action to quiet title "by one who is the owner of land but not in possession when an effort is made on the part of the defendant to seize and fraudulently appropriate the particular title under which the plaintiff claims."

[4] Kentucky Revised Statutes.

Williams v. Thomas, 285 Ky. 776, 782, 149 S.W.2d 525, 528 (1941) (citations omitted).

The exception to the possession requirement was discussed in depth in *Cumberland Co. v. Kelly*, 156 Ky. 397, 399, 160 S.W. 1077 (1913). In deciding when the exception will not apply, the court explained:

> Defendant did not obtain its deed from Howard by fraud. It is not seeking to appropriate or convert plaintiff's title. It is claiming title by deed from a third party whose patent covers the land. Manifestly the only question in the case is: Has the plaintiff or the defendant the paramount title?
>
> No ground for canceling defendant's deed is shown. If, under these circumstances, plaintiff could maintain the action in question without possession, it is difficult to imagine a case where such an action could not be maintained. In every instance of conflicting patents the plaintiff could allege that some one of the deeds under which defendant held covered the land sought to be recovered and maintain an action in equity, though not in possession. Such is not the rule in this jurisdiction.

Id. at 1078.

In the case at bar, the circumstances are analogous to those reviewed by the court in *Cumberland Co.* Similarly, no evidence in the record supports a finding that Appellees obtained title to the property from Appellants by fraud. Appellees claim title to the property from a third party, tracing back to Alamander II. As in *Cumberland Co.*, the essential component to Appellants' complaint seeks to establish whose chain of title is superior. Thus, without proof of possession of the

property, Appellants cannot seek to quiet title to the property, and the trial court's granting of summary judgment was appropriate.

Next, Appellants argue the trial court erred by determining each of their remaining claims was barred by the doctrine of laches. We disagree.

The doctrine of laches "serves to bar claims in circumstances where a party engages in unreasonable delay to the prejudice of others rendering it inequitable to allow that party to reverse a previous course of action." *Plaza Condominium Ass'n , Inc. v. Wellington Corp.*, 920 S.W.2d 51, 54 (Ky. 1996) (citation omitted). While the trial court determined that any claim would be barred by the doctrine of laches, the trial court also held that Appellants' claims seeking to recover the property were barred by the applicable statutes of limitations. Indeed, KRS 413.010 reads, in part, "an action for the recovery of real property may be brought only within fifteen (15) years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims." Since the record supports the trial court's finding that any claim to recover the property at issue is barred by the 15-year statute of limitations, the application of the doctrine of laches is inconsequential to the granting of summary judgment. We find no error in this regard.

The Knott Circuit Court order granting summary judgment is affirmed.

ALL CONCUR.

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