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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000834-MR

JAMES FRANCIS AND
KERNAL FRANCIS APPELLANTS

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 04-CI-00205

ALEX FRANCIS AND
IDA FRANCIS APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND JONES, JUDGES.

JONES, JUDGE: This appeal involves an interfamilial property dispute. The Knott Circuit Court found that the disputed property belonged to Appellees, Alex Francis and Ida Francis, and entered summary judgment in their favor. Appellants, James Francis and Kernal Francis, appeal from the circuit court's summary

judgment and subsequent order denying their motion to set the summary judgment aside.[1] For the reasons more fully explained below, we reverse and remand.

I. Background

The parties each purport to own certain property in Knott County, Kentucky. In 2004, Appellees filed this action. In their complaint, Appellees asserted that Appellants were clouding their title, trespassing, and wrongfully removing timber from the subject property. They requested the court to quiet title to the property in their favor, establish boundaries in accordance with their assertion of ownership, and award them various amounts of damages. The Appellants responded to the complaint by denying that Appellees owned the disputed land. The parties engaged in discovery for some time. Eventually, Appellees moved for summary judgment.

The circuit court conducted a hearing on the summary judgment motion on November 17, 2011. At the hearing, Appellees presented testimony from Kenneth W. Johnson, a licensed surveyor. Mr. Johnson testified that he had surveyed the property and testified to the appropriate boundary line. Mr. Johnson admitted, however, that he did not conduct any type of title examination and was not qualified to give a legal opinion regarding rightful title.

Acting without the assistance of counsel, Kernal Francis cross-examined Mr. Johnson. Appellants did not produce any additional evidence. Instead, the Appellants argued to the circuit court that they, not Appellees, were

[1] Kernal Francis and James Francis filed their appeal without the assistance of counsel. They also defended the circuit court action without the assistance of counsel.

the rightful owners of the property. Among other reasons, they asserted ownership as the result of a settlement agreement from another case, *Kentucky River Coal Corporation v. Kernal Francis, Nancy Francis, Stanley Francis, and Mima Francis,* Civil Action No. 92-CI-275.[2] Appellants also argued that the circuit court should not grant judgment in favor of Appellees because Appellees had not produced evidence that they had clear legal title to all of the property contained in the survey.

The circuit court granted summary judgment in favor of Appellees. The circuit court ordered that a copy of Mr. Johnson's survey map was to be appended to the order and that ownership of the property was to be established according to the map.

II. Standard of Review

The standard of review on appeal when a trial court grants a motion for summary judgment 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Steelvest, Inc.*

[2] The Appellees were not parties to the prior action or to the settlement.

v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480–82 (Ky. 1991)). The word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436 (citing *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky.1992)). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Id.* at 436.

III. Analysis

The record in this case is anything but clear. Upon review, however, we are satisfied that Appellees initiated this action primarily as one to quiet title. Their complaint repeatedly indicates that Appellants' actions clouded their title to the disputed property. Moreover, as relief, they affirmatively requested the court to quiet title in their favor.

The authority for maintaining a quiet title action is codified at Kentucky Revised Statute (KRS) 411.120, entitled, "Action to quiet title; court order if title proved." It provides:

> Any person having both the legal title and possession of land may prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. If the plaintiff establishes his title to the land the court shall order the defendant to release his claim to it and to pay the plaintiff his costs, unless the defendant by his answer disclaims all title to the land and offers to give such release to the plaintiff, in which case the plaintiff shall pay the defendant's costs, unless for special reasons the court decrees otherwise respecting the costs.

By its very terms, the statute places the initial burden of establishing title to the disputed land on the plaintiff. The defendant is not required to produce any proof until the plaintiff has come forward with some legally sufficient proof that establishes both the plaintiff's possession and title to the disputed land. Plaintiff prosecuting a quiet title action "must recover on the strength of his title and not upon the weakness of his adversary's title, or the fact that his opponent has no title." *Gabbard v. Lunsford*, 215 S.W.2d 985, 986 (Ky. 1948).

In a quiet title action, title to land must generally be established through one of three ways: (1) title deducible from the Commonwealth; (2) adverse possession for the statutory period; or (3) title to a common source. *Noland v. Wise*, 259 S.W.2d 46, 48 (Ky. 1953). An exception to this rule exists where the controversy is limited to only the location of a boundary line between properties. *See Jones v. Wheeldon*, 217 S.W. 2d 221 (Ky. 1949). In such a case, if the defendant does not contest the plaintiff's claim to the property in general, but only disputes the appropriate boundary line, the plaintiff need not show proof of title back to the Commonwealth or a common grantor. *See id.*

Turning to the case at hand, we must first determine whether the boundary line exception is applicable. Having reviewed the entire record, we do not believe that this dispute can be appropriately described as one of mere disagreement regarding the location of a boundary line. Again, the record is difficult to decipher. However, it appears that Appellants contest far more than the

mere location of a boundary line between two parcels of land. Appellants make reference to fraud in certain deeds and conveyances and generally dispute Appellees' ownership of the property in question. By the same token, Appellees appear to assert that Appellants at one time were divested of their interest to a portion of the disputed property via a subsequent conveyance.

Since the boundary exception is not applicable, it was incumbent on Appellees to adduce some proof of their title to the property by one of the three acceptable means. Appellees did not claim title by adverse possession or show proof of title going back to the Commonwealth. This leaves proof of title from a common source. "If plaintiff alleges title through a common source, and this is not denied, or defendant pleads title from a common source, all that plaintiff has to do is to prove his own title to the common source. However, if common source is not pleaded, or admitted, plaintiff has to go further and prove not only his own title, but the title of the defendant to a common source." *Alexander v. Duncan*, 57 S.W.2d 58, 60 (Ky. App. 1933).

We have combed through the record, but are unable to find proof of title going back to a common source. While Appellees filed an unverified complaint, which quoted various deeds and conveyances, it does not appear that the deeds or the documents of conveyance were ever filed of record. Furthermore, the only actual evidence Appellees presented at the hearing was Mr. Johnson's testimony regarding his survey performed without the benefit of a title search.

Appellees' motion for summary judgment relied on the survey

and the legal deficiencies in Appellants' claim to title. In granting summary judgment to Appellees, the circuit court found:

> The Plaintiffs have submitted a deed and a surveyor's expert opinion to describe the property line in question. The Defendants have submitted no proof other than their allegation that they own this property because of a previous court order in [a] previous case that did not involve the Plaintiff's [sic]. The Defendant's [sic] have misinterpreted the court order and they do not own the property claimed herein by Plaintiffs.

The circuit court noted only that Appellees produced a deed. It did not make any findings regarding whether Appellees proved title to a common grantor or back to the Commonwealth. In failing to make such findings before quieting title in Appellees' favor, the circuit court erroneously shifted the burden onto Appellants. Before examining the substantive merits of Appellants' claim to title, the circuit court should have considered whether Appellees adduced sufficient proof to establish title *i.e.,* proof of title going back to the Commonwealth or proof of title from a common grantor. *Rose v. Griffith*, 337 S.W.2d 15, 17 -18 (Ky. 1960).

While this Court is sympathetic to the complexity, confusion, and seemingly endless continuation of this case, we must conclude that the circuit court improperly granted summary judgment. In the absence of proof sufficient to establish Appellees' title to the property, the circuit court should not have entered judgment in favor of Appellees.

Of course, this is not to say that Appellants have superior title to the property. On remand, the circuit court may well reach the same end result. However, before quieting title in Appellees' favor, the court must make findings, based on substantial evidence of record, that Appellees proved title to the disputed property sufficient to quiet title. A survey is not substantial evidence sufficient to prove legal title.

IV. Conclusion

Wherefore, for the foregoing reasons, we hereby reverse and remand this matter to the Knott Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR

BRIEF FOR APPELLANTS:

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