RENDERED: OCTOBER 17, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000979-MR

LENNIE ADAMS AND LONNIE GRAY — APPELLANTS

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 09-CI-00379

GLENN MARCUM; GREG SEMINOFF;
CORNELIA M. HUMPHRIES;
EFFIGENA INGHRAM; LOUISE B. HART;
BETTY ANN MCLEAN; GENE M. ROSS;
JAY H. ROSS; AND MITCHELL E. ROSS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

NICKELL, JUDGE: Lennie Adams and Lonnie Gray (collectively "Adams") have appealed from the Estill Circuit Court's grant of summary judgment in favor of Glenn Marcum, Greg Seminoff, Cornelia M. Humphries, Effigena Inghram, Louise

B. Hart, Betty Ann McLean, Gene M. Ross, Jay H. Ross and Mitchell E. Ross (collectively "Marcum"). Following a careful review, we affirm.

In this quiet title action concerning mineral interests, primarily oil and gas reserves, the trial court was tasked with interpreting a deed executed in 1916 to determine whether that conveyance reserved a portion of the mineral rights in the grantor—as urged by Adams—or transferred all of the mineral rights to the grantees—as urged by Marcum. Both sides moved the trial court for summary judgment. It was undisputed no genuine issue of material fact existed and the trial court's decision would be purely an issue of law. On submission of the memoranda and arguments of the parties, the trial court rendered its judgment on October 27, 2011.

The trial court's well-written order granting summary judgment set forth the appropriate legal standard to be employed, the basic factual background and arguments of the parties, and its conclusions of law. Because we do not believe it necessary to improve on the trial court's judgment, we set forth the pertinent portions thereof and adopt them as our own.

> The Court has been asked to rule on the Motions for Summary Judgment and feels it necessary to give a brief recitation of the rules it must be guided by in determining whether or not a summary judgment is appropriate. The trial Court must determine whether there are any genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. (*Palmer v. International Association of Machinists*, 882 S.W.2d 117, 120 [Ky. 1994]; *Stewart v. University of Louisville*, 65 S.W.3d 536, 570 [Ky. App. 2001]; Civil Rule 56.03.) The movant bears the initial burden of convincing the

Court by evidence in the record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing the summary judgment to present "at least some affirmative evidence that there is a genuine issue of material fact for trial." (*Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 [Ky. 1991].) "The Court must view the record in the light most favorable to the non-movant and resolve all doubt in his (or her) favor." (*Commonwealth v. Whitworth*, 74 S.W.3d 695, 698 [Ky. 2002].) "The inquiry should be whether from the evidence of record facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." (*Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 [Ky. 1999].)

Defendants' Motion for Summary Judgment is premised on the argument that his family owns the mineral rights and they have a valid lease to the minerals in this case. At issue is a deed dated August 24, 1916, from W.L. Marcum to James F. West and James Harris recorded in D.B. 43, P. 117, in the Estill County Court Clerk's Office which the Defendants refers (sic) to as (the "Marcum" deed). The Defendants argue that the deed did not sever their predecessor's title because only "1/8th interest in the minerals was conveyed." Since Defendant Lonnie Gray is a successor in interest to [W.L.] Marcum, the Defendants argue that W.L. Marcum retained ownership of the property and did not convey all of it.

Plaintiffs state that there are some minor factual disputes and that no stipulations of fact have been made. Plaintiffs agree that the ultimate issue is one of law, which is the Court's interpretation of the August 24, 1916, deed. The Plaintiffs' position is that the deed in question conveyed all the mineral interests in the property to the grantees West and Harris; who are the Plaintiffs' predecessors in title. This is the major issue.

The deed itself purports to convey certain property and then "all minerals," and then later in the deed, the "all minerals" appears to be described by saying they are "*a*

1/8th part or share of all the oil and gas in, on and underlying the aforesaid premises, and that the gas rights is One hundred dollars . . .". Plaintiffs make several arguments:

1. The first provision in the description was words of conveyance, and the second was words of clarification;

2. In interpreting descriptions, a court must follow the rule that general descriptions must yield to specific, but that this second description is not a description but a clarification;

3. If provisions in a deed are in conflict, it must be resolved against the grantor;

4. *Crabtree v. Petroleum Exploration, Inc.*, 282 Ky. 32 (1940).

Based on the above, the Plaintiffs seek a summary judgment to the extent that the Defendants' predecessor in title, W.L. Marcum[,] conveyed all his mineral interests in the subject property to Plaintiffs' predecessors in title, West and Harris. Therefore, the Court must decide whether the deed is ambiguous as an initial matter and then, if it is ambiguous, what rules apply on the issues of interpretation of the deed.

In the Court's mind, there is no doubt that it is a deed and it is ambiguous. Although partly a conveyance of realty and minerals, had this been solely a mineral deed, the rules would have changed very little, if any. "The interpretation of a deed is a matter of law, and thus our review of this case is de novo. This rule applies equally to a deed involving mineral rights. In interpreting a deed, we look to the intentions of the parties, 'gathered from the four corners of the instrument' [citations omitted] using its words, common meaning and understanding. We will not substitute what was intended 'for what was said.' [citations omitted]. Further, a deed shall be construed based upon its provisions as a whole." *Florman v. Mebco Limited Partnership*, 207 S.W.[3d] 593, 600 (Ky. 2006). In this case, additional guidance is

given on how to interpret a deed. For example, if a deed is determined *not to be ambiguous*, then it is not to be construed against the drafter, whether it was prepared by the grantor or grantee. *Florman*, supra at page 600. "The rule is also well settled that the deed will be construed most strongly against the grantor and in favor of the grantee if it admits of two constructions." *Florman*, supra. There are also rules as to whether or not the deed is capable of two constructions, and if the deed is prepared by the grantee, the rule reverses and is held against the grantee most strongly, although the Court is finding it difficult to determine exactly who the preparer was, and there is no testimony at this point as to who that was. Additionally, no stipulations appear from the record as to whether it was the grantor or the grantee.

In 1916, the grantor [W.L.] Marcum made the conveyance which stated at first that the conveyance was "A certain tract or parcel of land together with all the mineral rights including all the oil and gas and oil and gas rights which the first party owns in, on and underlying the premises . . ." Thereafter, it became muddied up, for lack of better words, with the following phrase: "the oil and gas which the first party hereby conveys is a one eighth 1/8th part and share of all the oil and gas in, on and underlying the aforesaid premises . . ." The Court, being asked by the parties to determine the issue as a matter of law, finds that the deed is subject to two distinct interpretations and it is ambiguous because of the grantor's use of the language that he is conveying "all my mineral rights including oil and gas rights" and then restricting it with language that he is conveying a ("1/8th oil and gas interests") to the same grantees. As for the use of extrinsic evidence upon the finding of an ambiguity, the Court does not see the particular relevance of the 1915 lease because the acreage is 100 and 150 acres in the respective documents, and the Court notes that the 1915 lease allows the lessee the option to "surrender for cancellation" the lease upon payment of a dollar "at any time." This is assuming that some type of forfeiture or abandonment had not occurred in the months between the lease and the deed at issue. (There is a 14-month gap in signing the documents in question.)

The Court simply does not have proof before it that any of this occurred or did not occur. In other words, the 1915 lease could have been over in May 1915 or any month thereafter until the August 1916 deed simply by the lessee paying the $1.00 to [W.L.] Marcum. On the other hand, it could have lasted through both World Wars. Therefore, this extrinsic evidence the Court is allowed to use because of the ambiguity is of little value. Furthermore, the lease does not sever the mineral interest pursuant to *Weatherly v. American Agr. Chemical Co.*, 16 Tenn.App 613, 65 S.W.2d 592 (1933).

As the Court sees it, the problem for the Defendants is that in 1916, this ambiguous document gave "all the minerals," as opposed to "1/8th" of the minerals to the same grantees. The rules on how to resolve that issue have been pointed out by the parties and the case below:

> **It is also worth noting the general rule that an *ambiguous deed* should be interpreted, where possible, as *granting a fee simple* interest rather than a life estate.**
>
> **To say the least, a doubt would remain as to the character of the estate that was intended to be conveyed, *and it is an established rule* that, where the terms of a deed *are susceptible of two constructions*, one *favoring a fee and the other a lesser estate*, it is the duty of the court to adopt the construction *favoring a fee*.** *Campbell v. Prestonsburg Coal Co.*, 79 SW2d (sic) 373, 376[,] 258 Ky. 77 (Ky. 1934).

Accordingly, the Court feels that there are no genuine issues of material fact and that the Plaintiffs are entitled to a summary judgment as a matter of law. The Court feels that it has properly determined the granting clause and the deed as being ambiguous and thereafter relied on extrinsic evidence (of little probative value) to determine the grantor's intent. The Motion for Summary Judgment

> filed by the Defendants is therefore DENIED. The Motion for Summary Judgment filed by the Plaintiffs is GRANTED in that a fee simple title passed to James Harris and James West by the August 1916 deed and the 1915 lease did not sever the mineral interest.

(Emphasis and omitted citations in original).

Adams subsequently moved the trial court to alter, amend or vacate the summary judgment, arguing the trial court had misinterpreted the deed and incorrectly determined the deed contained an ambiguity. According to Adams, the deed was very clear in what it was—and was not—conveying, contending that the language regarding a "1/8th part or share" of the oil and gas rights was an exception or reservation of rights rather than a conveyance. On May 4, 2012, the trial court entered an eight-page order denying the motion, rejecting the arguments presented, and reiterating its earlier finding that the deed was ambiguous and would, therefore, be construed in favor of granting a fee simple interest in the subject property. The trial court further noted the deed specifically stated "it was *conveying* 'all the minerals' and that it was *conveying* 'a one-eighth part or share,' not 'reserving' one-eighth, which is the basis for the Court's finding of an ambiguity." This appeal followed.

On appeal, 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." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996). Furthermore, because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community*

Services, Inc., 210 S.W.3d 188, 189 (Ky. App. 2006). With these standards in mind, we turn to the allegations of error presented.

Adams contends the trial court's decision is infirm because it improperly ignored the language of reservation or exception contained in the deed and further ignored the "clear statement of intent" of the parties as to the amount of mineral rights to be conveyed. Adams also relies on a piece of extrinsic evidence to contend a subsequent deed executed by James Harris reveals his understanding that he had been conveyed only a partial (1/8th) interest in the oil and gas by W.L. Marcum. We have reviewed the record and disagree with Adams's allegations of error.

As previously stated, no genuine issues of material fact existed, and thus, the trial court's decision was purely one of law. Therefore, the sole tasks presented on appeal are a determination of whether the trial court correctly interpreted the deed in question and whether Marcum was thereafter entitled to entry of a judgment in his favor as a matter of law. The answer to both inquiries is in the affirmative.

As the trial court correctly noted, the 1916 deed contained two distinctly different and mutually exclusive descriptions of the mineral rights being conveyed and no prior severance of the mineral rights was demonstrated. There can be no reconciliation of this contrary language from the four corners of the instrument. Contrary to Adams's contention, the plain language of the deed does

not lend itself to a finding of a conveyance and subsequent reservation. Thus, the deed is clearly ambiguous and required interpretation.

We agree with the trial court that the extrinsic evidence presented by the parties was of little probative value in determining the intention of the parties, thereby requiring resort to accepted rules of construction to make such a determination. The trial court's reliance on *Campbell* as guidance for its decision was proper. We likewise conclude courts are required to construe the ambiguous deed as granting a fee simple interest. The trial court did so in granting summary judgment to Marcum. We cannot say the decision was in error.

Therefore, for the foregoing reasons, the judgment of the Estill Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David M. Ward
Winchester, Kentucky

BRIEF FOR APPELLEE:

S. Scott Marcum
Paducah, Kentucky