RENDERED: DECEMBER 19, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001934-MR

COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION
CABINET — APPELLANT

v.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 06-CI-00275

STEPHEN BARR AND ALL UNKNOWN
DEFENDANTS CLAIMING ANY RIGHT,
TITLE OR INTEREST IN THE SUBJECT
PROPERTY OF THIS LITIGATION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, the Commonwealth of Kentucky Finance and Administration Cabinet (Cabinet), appeals from an order of the Breckenridge Circuit Court granting partial summary judgment in favor of Appellee, Stephen

Barr, and dismissing its action for trespass and treble damages. Finding no error, we affirm.

In June 1975, Hill Street Realty Company conveyed to the Cabinet for the benefit of the Department of Fish and Wildlife Resources ("Department") two tracts of land in Breckenridge County amounting to approximately 4053.814 acres. The Department thereafter took possession of the surveyed and platted property by painting yellow lines and posting "Wildlife Management Area Boundary" signs along the surveyed boundaries.

In November 2003, the estate of Martha Frymire conveyed a 91-acre tract to Stephen Barr. The deed was accompanied by references to the adjoining landowners by a property valuation map and parcel numbers. It also contained a statement that it was sold by boundary and not by acreage. The property had well-marked boundary lines consisting of tall, white PVC piping. Barr thereafter notified the adjoining landowners of his intention to cut timber on the property. None of the other landowners disputed the marked boundaries or challenged Barr's right to cut timber.

Shortly after Barr began logging, the Department learned of the activity and informed him that he was trespassing and illegally logging on the Department's property. Specifically, the property that is the subject of this dispute is either a 26.447-acre tract (according to Barr's survey) or a 31.167-acre tract (according to the Department's survey) that is not contiguous to the remainder of the Wildlife Management Area. As the trial court noted, the disputed property is

"rough, wooded land located amid surrounding rough, wooded land." Ultimately, Barr ignored the Department's demand to cease and removed timber valued at $37,561.00 from the disputed property.

On November 28, 2006, the Cabinet filed a complaint in the Breckenridge Circuit Court that asserted that Barr, without license or permission, had intentionally trespassed and logged timber on its property. It further demanded treble damages, consisting of three times the stumpage value of the timber and three times any damage to the property pursuant to KRS 364.130. Barr filed an answer wherein he disputed the Cabinet's claims and asserted ownership of the disputed property. In addition, Barr filed a counter-claim and third-party complaint to quiet title.

In August 2011, Barr moved for summary judgment on all issues relative to the complaint and counterclaim, which was denied by the trial court. Barr then filed a motion to alter, amend or vacate the trial court's order or, in the alternative, to reconsider the limited issue concerning the sufficiency of the deed under which the Cabinet claimed title to the disputed property. Barr argued that the Cabinet could not prove ownership because the property was neither included within the metes and bounds description in the Cabinet's deed nor on the surveyor's plat appended to said deed.

On October 22, 2013, the trial court entered an order granting summary judgment in favor of Barr, finding that the Cabinet failed to establish

ownership of the disputed property. The Cabinet thereafter appealed to this Court as a matter of right.

Our standard of review on appeal of a 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). Summary judgment shall be granted "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 judgment as a matter of law." CR 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 v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

The Cabinet argues herein that, contrary to the trial court's conclusions, it presented overwhelming evidence proving ownership of the disputed property. Specifically, the Cabinet contends that the record established that (1) its deed contains the disputed property by reference to its source of title; (2) its deed was properly recorded in the Breckenridge County Clerk's office; (3) the disputed property in its source of title can be traced back to 1918; (4) Barr's deed's source

of title can be traced back only to 1928; and (5) Barr's deed's chain of title does not contain the disputed property until 2003.

It is well-settled that before one can recover in an action for trespass, he must prove his own title to the property claimed to have been trespassed upon. *Marinaro v. Deskins*, 344 S.W.2d 817, 819 (Ky. 1961). Further, when a defendant to a trespass action counterclaims and alleges ownership of the land on which he is alleged to have trespassed, the plaintiff must prove his title to be superior to that of the defendant by showing either "title of record from the Commonwealth or from a source shown to be common with that claimed by the defendant . . . ." *Id.* If the plaintiff is unable to show superior title, then the action must be dismissed. *See Rose v. Gatliff Coal Co.*, 266 Ky. 416, 99 S.W.2d 214, 215 (1936).

The record herein clearly establishes that the disputed property was neither included within the metes and bounds description contained in the Cabinet's deed nor on the surveyor's plat appended to the deed. Further, it was uncontroverted that the disputed property was listed on the Breckenridge County tax rolls for at least thirty-seven years prior to the instant litigation as belonging to George Frymire and his heirs, and that they paid taxes on said property. Affidavits of the adjoining landowners demonstrate that even they believed the disputed property was owned by the Frymires before it was sold to Barr. Finally, as previously noted, the property is not contiguous to the remainder of the land conveyed to the Cabinet, and the Department did not mark it as it did with the other acreage. In

fact, there seems to be no dispute that neither the Cabinet nor the Department asserted any ownership of the property until Barr began logging in 2006.

Despite being unable to establish ownership based upon the deed's legal description or plat, the Cabinet nevertheless asserts ownership through the source of title language contained in the deed. Specifically, the source of title in the Cabinet's deed referenced fourteen other deeds comprising 62 tracts with seven exceptions. The following statement is given after the source of title:

> Reference be made to the foregoing deeds for the descriptions of several tracts and parcels of land from which Tracts No. 1 and No. 2, hereinabove described were assembled and it is the Grantor's specific intention herein to convey to the Grantee all of the lands described in said deeds, excepting therefrom only the 0.736 acre parcel and the 0.914 acre parcel described above with reference to Tract No. 1 hereof.

The Cabinet contends that the disputed property is described in one of the referenced deeds contained in the source of title.

As noted by the trial court, it is a general rule that where a deed contains both a particular and a general description of the property conveyed, the particular will prevail over the general. *Handy v. Standard Oil Co.*, 468 S.W.2d 302, 303 (Ky. 1971). *See also Letcher County Coal and Improvement Co. v. Marlowe*, 398 S.W.2d 870, 873 (Ky. 1965); *Bland v. Kentucky Coal Corporation*, 306 Ky. 1, 206 S.W.2d 62, 63 (Ky. 1947). It is also true that reference to property in a prior deed can act to convey the land described in the prior deed, but only if the property in the current deed is not adequately described. In other words, the general rule that

courts apply is stated as: Reference in a current deed to property in a prior deed through words such as "being the same as ..." or other like language, will not act to enlarge or restrict the description of the property in the current deed if the property is particularly described. *Stutts v. Humphries*, 408 So.2d 940, 944 (La. App. 2d Cir. 1981); *Powell v. Peel*, 309 Ky. 380, 217 S.W.2d 959, 960 (1949); *Finlay v. Stevens*, 36 A.2d 767, 771 (N.H. 1944). Finally, when a deed describes property by reference to a plat or map, the grantor is considered to have adopted such as part of the deed, and the grantee takes title in accordance with the boundaries so identified. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 10 S.Ct. 518, 33 L.Ed 872 (1890).

We are of the opinion that the general rule that "[a] particular description in a deed that is certain and definite will prevail over the identifying reference in a prior deed" is applicable to this case. 23 Am.Jur.2d *Deeds* § 51. The property conveyed to the Cabinet in the 1975 deed is specifically described by metes and bounds, as well as the attached plat. It is uncontroverted that neither includes the disputed property. Significantly, even the Cabinet's own surveyor admitted that but for the source of title in the Cabinet's deed, it had no claim to ownership of the disputed property. As the trial court observed, the terms of a written instrument are to be construed against the drafter, *Pulliam v. Wiggins*, 580 S.W.2d 228, 231 (Ky. App. 1978), which is the Commonwealth herein.

We agree with the trial court that based upon the evidence of record, the Cabinet failed to establish ownership of the disputed property. In fact, we are

astounded that the Cabinet has chosen to waste taxpayer monies in prosecuting this case for nearly eight years in light of the clear evidence that George Frymire and his heirs owned and paid taxes on the disputed property for almost four decades prior to its sale to Barr. The Cabinet does not, and cannot, dispute that this parcel of property is not attached to the wildlife management area and has never been marked or otherwise claimed by the Department. As such, the trial court properly determined that the Cabinet could not maintain its trespass action and summary judgment in favor of Barr was proper.

The order of the Breckenridge Circuit Court granting summary judgment in favor of Stephen Barr is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

James G. Womack
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE STEPHEN BARR:

Kenton R. Smith
Brandenburg, Kentucky