

RENDERED: MARCH 27, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000924-MR

MONT JACK HAMMOND;
DARRELL FRALEY; AND
JACQUIE FRALEY, HIS WIFE

APPELLANTS

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 12-CI-00066

CLYDE JASON HAMMOND
AND ASHLEY HAMMOND,
HIS WIFE; AND CLYDE
HAMMOND AND TAMMY
HAMMOND, HIS WIFE

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, J. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Mont “Jack” Hammond appeals from the Martin Circuit Court’s judgment in favor of the Appellees, Clyde Hammond, Ashley Hammond,

Clyde Hammond, Jr., and Tammy Hammond. The court's judgment declined to impose a constructive trust or other equitable relief in favor of Jack regarding a tract of land. After careful review, we reverse the trial court's judgment.

This case arises from a conveyance of two tracts of land located in Martin County, Kentucky. The tracts were conveyed on March 25, 1971, from Homer and Glendine Pack to Mont Hammond for the sum of \$8,000.00. A day later, on March 26, 1971, Mont Hammond and his wife, Mable, executed a mortgage with Inez Deposit Bank in the amount of \$5,300.00.

Jack alleges that in 1971, he purchased this land with his father while he was living and working in Ohio. During that time, he suffered a stroke, and his parents wanted him to come home so that his family could assist in his care. Jack alleges it was during this time that his father found the tract of land that is the subject of this action, and they decided to purchase it together.

At the hearing in this matter, Jack testified that he tendered \$3,000.00 of the purchase price on the date of the closing, and his parents borrowed the remainder from Inez Deposit Bank. A copy of this mortgage was tendered at trial, and it designated that the Hammonds borrowed \$5,300.00. Jack alleges that due to the mortgage being given on the property by Mont and his wife, the 22-acre tract was titled in Mont's name only. However, Jack contends that it was understood that he owned one-half of the property, and pursuant to testimony of Jack's brother, Billy Ray Hammond, Mont showed him the property lines as to how Jack and Mont divided the property.

When the property was purchased, Jack and his father verbally agreed to divide the property, and it contained a dilapidated “shack” that the family called a “shanty.” Jack built a new home around the older structure soon after it was acquired and took up residency there. He lived on the property for over forty years, tending to his half of the same. Jack is a man of limited education, and he alleges he did not understand the legal effects of not having a deed for his one-half interest in the property. He contends that he trusted his father and his family, and that he made improvements to what he understood was his half of the land and never once thought that there would be an issue as to its ownership. Clyde Hammond, Sr., acknowledged his awareness of Jack’s claim to the property when he testified in his deposition that his parents did not want Jack to “actually own” any of the property because they thought “if he’d get out drinking that he’d sell it.”

Jack alleges that in 1984, Mont and Mable executed a straw-man deed to the then Martin County Attorney, who immediately transferred the property back to Mont and Mable as joint tenants with right of survivorship. Mont died in 1990, and Mable kept the property in her name until 1999, when she deeded the property to her son, Clyde Hammond, Sr. In 2007, Clyde and his wife transferred the 22-acre tract to their son, Clyde Hammond, Jr.

At this point, problems arose between the parties. Jack’s daughter, Jackie Fraley, and her husband, Darrell Fraley, also Appellants in the instant action, resided with Jack and their children to assist Jack with his care.

Disagreements between Clyde Jr.’s daughters and Jackie resulted in a physical

assault. The disagreement arose over a water pump Jack had installed on the property decades before. When matters reached a boiling point, Clyde Jr., tendered a rental agreement to Jackie to sign for her to be able to stay on the property with her father. Thinking they were being ushered from the property, Jack, Jackie, and Darrell filed the instant suit.

Jack sought relief from the trial court, alleging that a constructive trust had been established in 1971 and that the Appellees and their predecessors in title held Jack's portion of the property in trust for him. Pleading in the alternative, Jack argued he was entitled to his half of the property through adverse possession, as well as through the equitable principles of promissory estoppel, laches, and detrimental reliance. Jack's position was that although he did not obtain a deed for his share of the 22-acre tract of land he purchased with his father in 1971, equity demanded that he should receive a deed from the Appellees as a result of his possessing the property for over forty years.

The answer filed by the Appellees failed to assert any affirmative defenses, as required by Kentucky Rules of Civil Procedure (CR) 8.03. The answer did contain a counterclaim that simply asked that the Appellants be ousted from the property. Just prior to trial, the Appellees filed a motion to amend their answer to include the omitted affirmative defenses to include the statute of frauds and the statute of limitations. That motion was denied, and after a hearing, judgment was entered by the Martin Circuit Court on April 2, 2013, denying Jacks' claim that a constructive trust be established awarding him one-half of the

property. Jack then filed a motion to alter, amend, or vacate, which was denied on April 24, 2013. This appeal now follows.

Jack makes two arguments on appeal. The first is that it was clearly erroneous for the trial court not to impose a constructive trust and award him half of the property that is the subject of this action. The second argument is that the Appellees waived their right to assert any affirmative defenses and the trial court erroneously relied on such defense in its final judgment. We agree with both arguments.

Pursuant to CR 52.01, the findings of fact by a circuit court are not to be disturbed unless the findings are clearly erroneous. Unless there is no substantial evidence in the record that supports the findings made by a trial court, we will affirm the trial court's judgment. *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116 (Ky. App. 1998). Appellate review of legal determinations and conclusions from a bench trial, such as this one, is *de novo*. *Goshorn v. Wilson*, 372 S.W.3d 436 (Ky. App. 2012).

Jack argues that he is a man of limited education, and that after he suffered a stroke, his parents wanted him to be closer to them so that his family could take care of him. He acknowledges that there was no written agreement between him and his father evidencing their financial arrangement to purchase the property, or how the 22-acre tract was to be divided. However, Jack argues that the evidence of the mortgage in favor of Inez Deposit Bank giving the bank a lien

on the property evidences a debt of \$5,300.00, which supports his argument that he paid approximately \$3,000.00 (\$2,700.00) of the purchase price.

Jack argues that a constructive trust should have been imposed as an equitable remedy, citing *Middleton v. Beasley*, 186 Ky. 252, 216 S.W. 591 (Ky. 1919). In support of this argument, Jack argues that Billy Ray Hammond, his brother and the uncle of Clyde Jr., testified not only that he was very familiar with the property that Jack and their father had purchased together in 1971, but that their father acknowledged to him that Jack had paid a portion of the purchase price for the property as well. Billy Ray went on to testify that he and his father walked the property together several times in the early 1980s and that his father showed him the boundary lines between his property and the portion Jack owned. Bill testified that he knew the history of the property and that Jack had helped pay the purchase price when it was acquired in 1971.

Jack argues that Billy Ray did not testify to anything on direct or cross-examination that would contradict his argument that he and Mont bought the property together and that he paid a portion of the purchase price. Jack argues that the trial court did not give due regard to Billy Ray's testimony, pointing to the trial court's conclusions of law. Those are as follows:

In the case at bar, we have the testimony of the Plaintiff that he put \$3,000.00 into the purchase of the residence. There are no records which support that testimony. There is no written agreement between [Mont] and the Plaintiff Mont Jack Hammond. There is no evidence that supports his contention he made four or five payments on the mortgage. There is no evidence of the funds that he

used to construct the house. In sum, the Plaintiff's evidence is woefully lacking in establishing the factual elements of a constructive trust.

Jack argues that what was unavailable by way of documentary evidence was more than offset by the testimony of witnesses, including the credible testimony of Billy Ray Hammond, who was an uninterested party in this case. Jack argues that testimony alone should have given the lower court sufficient authority to implement a constructive trust in favor of him.

We agree with Jack that a constructive trust was appropriate and supported by the evidence in this case. In *Kaplon v. Chase*, 690 S.W.2d 761 (Ky. App. 1985), this Court stated:

In brief, the lower court noted that a constructive trust is an equitable remedy which provides relief from a fraud or breach of confidence. *O'Bryan v. Bickett*, Ky., 419 S.W.2d 726 (1967). The fraud may occur in any form of unconscionable conduct; taking advantage of one's weaknesses or necessities, or in any way violating equity in good conscience. *St. Louis and S.F.R. Co. v. Spiller*, 274 U.S. 304, 47 S.Ct. 635, 71 L.Ed. 1060 (1927). For example, a constructive trust arises when a person entitled to property is under the equitable duty to convey it to another because he would be unjustly enriched if he were permitted to retain it. *Becker v. Neurath*, 149 Ky. 421, 149 S.W. 857 (1912). The injured party is not required to show actual fraud to support a constructive trust. As our highest court observed in *Hull v. Simon*, 278 Ky. 442, 128 S.W.2d 954, 958 (1939):

Constructive trusts are such as are raised by equity in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.

In the instant case, although there is no fraud established by the record, it is against equity that Clyde Jr. and his relatives should retain the property, when the testimony of witnesses and other evidence indicates that Mont and Jack bought the property together and intended for Jack to live there with his family. In our view, a careful examination of the record indicates that there *was* evidence that showed that Jack paid a portion of the purchase price for the 22-acre tract. Indeed, the purchase price of the property was \$8,000.00; however a mortgage was only taken out in the amount of \$5,300.00. Given the fact that there is no other evidence as to how this portion of the purchase price was paid, and given the fact that Jack's brother's testimony also indicates that his father and brother shared the property, we find the evidence of the mortgage in the amount of \$5,300.00 to support the existence of a constructive trust. Furthermore, Jack made improvements to the property and lived continuously on the property for forty years. We also conclude that this evidence supports the fact that Mont and Jack purchased the property jointly with the intention that Jack would live there with Mont and Mable.

In conclusion, we agree with Jack that equity demands that a constructive trust be imposed in the instant case. We also agree that given the trial court's denial of the Appellees' motion to amend their answer to plead affirmative defenses, it defies logic that the trial court then based its decision in part on the statute of limitations. The trial court stated in its final judgment,

The court also concludes that the Plaintiff's claim must fail because of the statute of limitations. KRS 413.040

states that any action to recover real estate must be brought within fifteen years after the right to recover it first accrues to the Plaintiff. In this case, the Plaintiff claims that there was an agreement with his father that his father would transfer title to an interest in the property to him. The deed in question was dated March 25, 1971. An argument could be made that the statute of limitations began on that date, when the deed was placed in the name of Mont Hammond only. Giving the Plaintiff the benefit of the doubt, one could assume that the Plaintiff might believe his father would convey an interest to the property to him within a reasonable period of time. Under either analysis, the time for institution of a lawsuit for recovery of an interest in the property has long since expired.

We agree that once the trial court denied the Appellees' motion and denied them the opportunity to amend their answer to include affirmative defenses such as the statute of limitations from consideration, it was inconsistent for the lower court to disregard its prior ruling and identify that defense in its final judgment.

A review of the record and the testimony at the bench trial indicates that Mont and Jack Hammond purchased the tract of land together. Jack has lived there for forty years and made improvements to the property. While his stroke has rendered him incapable of fully caring for himself, this arrangement has allowed him to be cared for by family and loved ones. Further, the evidence indicates that Jack paid a portion of the purchase price of the property, and his siblings testified that they were aware of the arrangement between him and his father. We find this to be sufficient evidence to support a constructive trust, and the trial court's findings to the contrary were clearly erroneous.

For the foregoing reasons, we reverse the Martin Circuit Court's findings of fact, conclusions of law, judgment, and remand the matter for further proceedings consistent with this proceeding.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Larry D. Brown
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BRIEF FOR APPELLEES:

Adam S. O'Bryan
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