RENDERED: SEPTEMBER 25, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000740-MR

MARK ANTHONY CRAWFORD;
AND HIS WIFE, AMY CRAWFORD APPELLANTS

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 10-CI-00128

PAULA STARR CRAWFORD MILLS
AND RICKY CRAWFORD APPELLEES

<u>OPINION & ORDER</u>
<u>AFFIRMING IN PART, REVERSING IN PART,</u>
<u>AND REMANDING;</u>
<u>DENYING MOTION FOR RELIEF</u>
<u>UNDER CR 76.12(8);</u>
<u>AND DISMISSING RICKY CRAWFORD</u>
<u>AS PARTY TO APPEAL</u>

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Mark Crawford, and his wife Amy Crawford (collectively, "Mark"), appeal from a judgment by the Knox Circuit Court which reformed two

deeds conveying two tracts of real property, one to him and one to his sister, Paula Starr Crawford Mills (Paula). Mark argues that the trial court erred by reforming the deeds, in rejecting his claim of adverse possession to both tracts, and in finding that the oral contract to convey both tracts was unenforceable under the Statute of Frauds. We find no error in the trial court's judgment in these matters. However, we conclude that the trial court erred by reforming the deed to grant a remainder interest to Ricky Crawford, who was not a party to the action. Furthermore, we conclude that Mark was entitled to assert a *quantum meruit* claim for the value of his improvements to the tract conveyed to Paula. Therefore, we remand this matter for additional findings and entry of a judgment for Mark on these issues. In addition, we conclude that Ricky Crawford is not a proper party to this appeal, and accordingly, we dismiss him as a party.

As an initial matter, we note that Paula failed to file a brief in this case, as required by CR[1] 76.12(1). Under CR 76.12(8), we may accept Mark's statement of the facts and issues as correct, reverse the judgment if we believe his brief supports such a result, or treat the failure to file a brief as a confession of error and reverse the judgment without reaching the merits of the case. However, the rule does not mandate a particular penalty; it merely provides penalty options which an appellate court, in its discretion, may impose for failure to file a brief. *Kupper v. Kentucky Bd. of Pharmacy*, 666 S.W.2d 729, 730 (Ky. 1983). Furthermore, the underlying facts of this matter are not in dispute. Since we must

[1] Kentucky Rules of Civil Procedure.

review the trial court's conclusions of law *de novo*, we decline to view Paula's failure to file a brief as a confession of error in all of the matters. Therefore, we deny Mark's motion for relief under CR 76.12(8)

In 1993, Fred and Nettie Perkins purchased real property at 461 Dancy Branch Road in Knox County, Kentucky. The Perkinses acquired the property in two separate transactions: first, 0.35 acres from John Dixon by deed on August 13, 1993, and recorded on July 29, 2002; and second, 0.65 acres from Tony and Brenda Jackson by deed dated May 12, 1992, and recorded on June 23, 1993.

Nettie Perkins is the mother of Mark and Paula, and Fred Perkins was their stepfather. After acquiring the properties in 1993, Fred and Mark built a garage on the 0.65 acre tract, where they operated an automobile repair business together. Around the same time, the Perkinses secured a mortgage on the 0.35 acre tract. Mark testified that the proceeds of the mortgage were used to build a house on the property. Mark also testified that Fred promised to give the house and garage to him so long as Mark paid the mortgage. Mark made the monthly mortgage payments and eventually paid off the mortgage. During the period both before and after Fred's death in 2000, Mark lived in the house and paid all the utility bills and property taxes for both the house and the garage.

After Fred's death, all of his interest in both tracts passed to Nettie by virtue of the survivorship clause in the deeds. In 2002, Nettie hired an attorney, Barbara Yetter, to prepare two deeds. Nettie testified that she intended to give the garage property to Paula to be held in trust for Mark and his brother Ricky

Crawford, until her death, and to give the house property directly to Mark. However, the deed given to Paula described the house property and the deed given to Mark described the garage property. In addition, the deed to Paula did not include any restriction on the conveyance. Mark was not present when the deeds were prepared, but he was given one of the deeds in a separate meeting with his brother, Kenneth Crawford. Mark testified that he believed his deed was for both the house and garage.

In 2007, Mark learned of the mistake in the deed descriptions and persuaded Nettie to execute a deed transferring the house property to him. In 2010, Paula filed this action against Mark and his wife, Amy, seeking to set aside the 2007 deed and to reform the 2002 deed to reflect Nettie's intentions. The matter proceeded to a bench trial on August 8, 2013.

Thereafter, on February 17, 2014, the trial court entered findings of fact, conclusions of law and a judgment. The trial court concluded that any interest which Fred had in the properties passed to Nettie upon his death by virtue of the survivorship clause. The court further found that any verbal agreement between Fred and Mark to transfer the tracts was unenforceable under the Statute of Frauds. The court also found that Nettie clearly intended to transfer the garage property to Paula in trust for Mark and Ricky, and the house property to Mark. The court concluded that the deeds should be reformed to reflect Nettie's intention. The trial court also found that Mark had failed to establish that he is entitled to the garage property by adverse possession. Consequently, the trial court concluded that

Nettie's transfer of the house property to Paula did not violate Kentucky's Champerty Statute, KRS[2] 372.070(1).[3] Mark filed a motion to alter, amend or vacate the judgment pursuant to CR 59.05, which the trial court denied on March 26, 2014.

In his notice of appeal, Mark named both Paula and Ricky as Appellees. But while the trial court granted Ricky a remainder interest in the garage property, he was never named as a party before the trial court. Except in limited circumstances, an appeal will not lie against a person who was not a party to the proceedings in which the judgment was rendered. *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 543 (Ky. App. 2007). While we must separately address Ricky's absence as a party below with respect to the merits of the appeal, he is not a proper party to the appeal. Therefore, we will dismiss him as a party to this appeal.

Mark first argues that he was entitled to title of the garage property by adverse possession, and as a result, the 2002 deed to Paula was void as champertous. To prove the elements of adverse possession, Mark's possession of the garage must have been hostile, under a claim of right, actual, exclusive, continuous, open, and notorious for a period of at least fifteen years. *See Appalachian Reg. Healthcare v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878,

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[2] Kentucky Revised Statutes.

[3] KRS 372.070(1) provides as follows:

> Any sale or conveyance, including those made under execution, of any land, or the pretended right or title thereto, of which any other person has adverse possession at the time of the sale or conveyance, is void; but this section does not render void any devise of land in adverse possession.

879–80 (Ky. 1992). *See also Moore v. Stills*, 307 S.W.3d 71, 77 (Ky. 2010). These elements must be demonstrated by clear and convincing evidence. *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002). We agree with the trial court that Mark failed to prove these necessary elements.

While Mark claims that he has been in possession of both tracts since 1993, his possession of the properties was not exclusive while Fred was alive, nor was it openly adverse to Fred and Nettie's ownership. At most, Mark exclusively and adversely possessed the garage and house properties after Fred's death in 2000. Thus, Nettie's 2002 deed to Paula was not champertous. Furthermore, the filing of this action in 2010 tolled any additional period of adverse possession with respect to either the house or the garage property. *Thompson v. Ratcliff*, 245 S.W.2d 592, 593–94 (Ky. 1952). Therefore, the trial court correctly rejected Mark's claim of adverse possession.

Second, Mark argues that Paula failed to carry her burden of proof to warrant reformation of the deeds. We disagree with respect to the reformation of the property descriptions. As discussed above, Nettie executed two deeds in 2002, conveying one property to Mark and the other to Paula. Nettie testified that she intended to convey the house property to Mark and the garage property to Paula. The testimony regarding her intent is corroborated by the fact that Mark built and occupied the house and paid the mortgage secured by the house property. However, the attorney inadvertently reversed the property descriptions. We agree with the trial court that Paula established the mistake in the deeds by clear and

convincing evidence. *Sutton v. Noe*, 289 Ky. 657, 159 S.W.2d 997, 998 (1942). Therefore, the trial court properly reformed the deeds to reflect Nettie's intent.

We question whether the trial court properly reformed the deed to convey the property to Paula during Nettie's life, and then equally to Mark and Ricky as joint tenants. Nettie's 2002 deed conveyed the house property to Paula without restriction. However, any error in this regard accrues to Mark's benefit, as he is now entitled to a remainder interest which he did not previously have under the 2002 deed. Furthermore, there was no evidence that Nettie intended to convey both properties to Mark, as he now claims.

On the other hand, we must conclude that the trial court erred by reforming the deed to grant a remainder interest to Ricky. As noted above, Ricky was never a party to the action before the trial court. Ricky was not an indispensible party to the action to reform the deed descriptions, since the judgment only affected Mark and Paula's current interests in the disputed tracts. *See Hamblin v. Johnson*, 254 S.W.2d 76, 77 (Ky. 1952).

But as a general rule, all parties claiming an interest in the land or any part thereof purportedly conveyed by the instrument sought to be reformed, and whose interests will be affected by the reformation of the instrument, are necessary parties to the action. *See Right to reformation of contract or instrument as affected by intervening rights of third persons,* 79 A.L.R.2d 1180 § 23[a] (1961 & Cumulative Supp.). Ricky was not named as a grantee or devisee in either of the 2002 deeds executed by Nettie. Furthermore, it appears that Paula brought her

petition to reform the deeds as an *in personam* action, rather than an *in rem* or *quasi in rem* action. *See Commonwealth v. Maynard*, 294 S.W.3d 43, 48-49 (Ky. App. 2009), *citing Gayle v. Gayle*, 301 Ky. 613, 192 S.W.2d 821, 821 (1946). Consequently, Ricky was a necessary party to a reformation action seeking to grant him a remainder interest in the garage property. Since he was not a party to the action below, the trial court was without jurisdiction to adjudicate his potential interest in the garage property. Therefore the trial court's judgment reforming the deed to grant Ricky that interest must be set aside.

Third, Mark argues that the trial court erred in finding that any agreement between him and Fred to transfer both the house and garage properties was barred by the Statute of Frauds. As set out in KRS 371.010, Kentucky's Statute of Frauds prohibits enforcement of any contract for the sale of real estate or a contract that is not to be performed within one year, "unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent." As the trial court found, any oral agreement between Mark and Frank to convey the properties was clearly barred by this requirement.

However, Mark notes there are a number of exceptions to this rule. The Statute of Frauds does not prohibit enforcement of an oral agreement which is subsequently memorialized in writing. Mark argues that the 2002 deed of the

garage property and the 2007 deed of the house property were sufficient writing to memorialize the agreement. We disagree.

A memorandum signed by the party to be charged is sufficient if it relieves the court of the necessity of relying upon parol evidence to establish the existence of the contract. *Koplin v. Faulkner*, 293 S.W.2d 467, 470 (Ky. 1956). In the current case, Nettie was not a party to any oral agreement between Fred and Mark. Rather, Fred's interest in the properties passed to Nettie upon his death. Moreover, the 2002 deed contains no indication that Nettie intended to reaffirm Fred's oral agreement. Rather, the deed clearly shows that she was exercising her discretion to dispose of the property as she saw fit. Consequently, the deeds were not sufficient to constitute a written memorialization or reaffirmation of Fred's oral agreement.

Mark also contends that the Statute of Frauds does not apply because he fully performed his obligations under the oral agreement. But since the trial court reformed the deeds to grant the house property to Mark, his performance under the oral agreement is moot with respect to that property. Furthermore, while Mark paid the mortgage on the house property, he did not complete those payments until after Nettie executed the 2002 deeds. Generally, part performance will not take an alleged contract out of the Statute of Frauds. *Head v. Schwartz's Exec'r*, 304 Ky. 798, 202 S.W.2d 623, 625 (1947). Even assuming that the oral agreement applied both to the house and to the garage properties, Mark's performance was insufficient to constitute an exception to the Statute of Frauds.

Finally, Mark argues that the trial court erred by failing to grant him a *quantum meruit* recovery for the benefits he conferred on the garage property. *Quantum meruit* is an equitable remedy invoked to compensate for an unjust act, whether it is harm done to a person after services are rendered, or a benefit is conferred without proper reimbursement. The remedy entitles the one who was harmed to be reimbursed the reasonable market value of the services or benefit conferred. *Lofton v. Fairmont Specialty Ins. Managers, Inc.*, 367 S.W.3d 593, 597 (Ky. 2012). Furthermore, a party may recover the reasonable value of the services provided even if the underlying contract is unenforceable by reason of the Statute of Frauds. *Head v. Schwartz's Exec'r*, 202 S.W.2d at 625. Mark points to the uncontested evidence that he exclusively contributed to the maintenance and improvement of the garage property after Fred's death, and substantially contributed to the maintenance and improvement of the garage property prior to Fred's death. Consequently, he contends that he was entitled to a judgment reflecting those contributions.

Mark did not specifically request this relief in his answer or prior to trial. However, he did request the relief in his closing argument and in his post-trial motion. In the absence of an Appellee's brief, we will deem this to be sufficient to preserve the matter for appeal. The more difficult question concerns the sufficiency of the evidence warranting a *quantum meruit* judgment. Most of Mark's evidence concerned his contributions to the improvement and maintenance

of the house property. Since Mark received that property as part of the trial court's judgment, he is not entitled to be separately compensated for those contributions.

Nevertheless, we agree with Mark that there was substantial evidence showing his contributions to the garage property both before and after Fred's death. Mark paid the property taxes and utilities for the garage property and has maintained that property as his own since Fred's death. The only remaining question concerns the reasonable value of his contributions and improvements to the garage property. Since this is a question of fact, this matter must be remanded to the trial court for additional findings.

Accordingly, the judgment of the Knox Circuit Court is affirmed, except with respect to the reformation of the deed granting Ricky Crawford a remainder interest in the garage property, and the trial court's denial of a *quantum meruit* recovery to Mark for the value of his improvements conferred on the garage property. Therefore, we reverse this aspect of the trial court's judgment. We remand for entry of a new judgment adjudicating the rights of the named parties to the subject properties, for findings of fact on the *quantum meruit* issue, and for a judgment in accord with those findings.

The motion by Mark Crawford for relief under CR 76.12(8) is denied to the extent that he seeks to treat Paula's failure to file a brief as a confession of error.

On the Court's own motion, it is further ordered that Ricky Crawford is dismissed as a party to this appeal.

ALL CONCUR.

ENTERED: September 25, 2015 /s/ Irv Maze
Judge, Court of Appeals

BRIEF FOR APPELLANTS: No Brief for Appellee

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