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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000742-MR

DR. JOHN BRUNER; AND
BETH BRUNER — APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 09-CI-01301

DON COOPER; AND
PATTY COOPER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Dr. John and Beth Bruner appeal from the Pulaski Circuit Court's order denying their motion for time to conduct additional discovery and granting summary judgment sustaining the claim that "Edward Meece Road" is neither an easement nor a public road. The Bruners allege that summary judgment was

granted prematurely and that genuine issues of material fact remain pursuant to CR[1] 56.03. However, a review of the record indicates that the Bruners had ample time and notice to conduct discovery and provided no evidence establishing a genuine issue of material fact. Hence, we affirm.

Background

This case concerns a road in Pulaski County, Kentucky generally known as "Edward Meece Road." The road passes through and is bound on both sides by property owned by Don and Cathy Cooper. Edward Meece Road begins at Coleman Road and solely provides access to the Coopers' property and Bruners' property before concluding.

On September 8, 2009, Don and Cathy Cooper filed an action in Pulaski Circuit Court asking that the road be declared their own private passway. As defendants, the Coopers named Pulaski County Fiscal Court to the extent that Pulaski County claimed the road as part of its system, and John and Beth Bruner to the extent that they use the road for ingress and egress to their private property.

All parties participated in initial written discovery and Pulaski Fiscal Court produced documents as well as an affidavit. The Bruners did not produce any documents or offer any affidavits and none of the parties to this lawsuit conducted depositions.

On February 15, 2011, the Coopers moved for a partial summary judgment, arguing that there were no genuine issues of material fact and that, as a

[1] Kentucky Rule of Civil Procedure.

matter of law, the Pulaski Fiscal Court failed to establish Edward Meece Road as a county road per strict statutory requirements under KRS[2] 178.050.[3] Both the Pulaski Fiscal Court and the Bruners responded with their own motions for summary judgment. The Pulaski Fiscal Court contended that Kentucky law establishes a "presumption of regularity" for public officers that the Coopers failed to overcome. *See Wallace v. City of Louisa*, 273 S.W. 720 (Ky. 1925). Alternately, the Bruners' motion argued that Edward Meece Road satisfies the requirements for a "public road," or at a minimum, the requirements for an easement.

On October 28, 2011, trial court granted both the Bruners' and Pulaski Fiscal Court's motions for summary judgment. The court agreed with the Bruners that the Coopers failed to meet their burden of proof and therefore dismissed the Coopers' claims. The Coopers timely appealed from this order.

On June 7, 2013, a panel of this Court reversed the circuit court's judgment on the issue of whether Edward Meece Road is a county road and remanded for an entry of a partial summary judgment in favor of the Coopers on this matter. This Court found that the Fiscal Court had failed to produce any formal order showing that Edward Meece Road had been accepted into the county system of maintenance. In the absence of such evidence, this Court concluded that

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[2] Kentucky Revised Statutes.

[3] KRS 178.050 provides, in relevant part, "Notices and advertisements for the establishment, alteration or discontinuance of any county road, bridge or landing… shall be published pursuant to KRS Chapter 424 by the county road engineer."

Edward Meece Road could not be considered a county road. Consequently, we directed that the Pulaski Fiscal Court be dismissed as a party to the proceedings. *See Cary v. Pulaski County Fiscal Court*, 420 S.W.3d 500, 508 (Ky. App. 2013).

On the issue of whether Edward Meece Road is a public road or easement, we reversed and remanded for additional discovery and findings. We noted that the Bruners had not provided any affirmative evidence supporting either conclusion. Additionally, we held that the Coopers were not required to offer any evidence rebutting the claim of public road or easement until the Bruners met their initial burden by providing evidence supporting their claim. *Id.* at 508-09.

On remand, the Coopers filed a motion for summary judgment. In support of their motion, the Coopers pointed out that the Bruners had not engaged in any discovery efforts since the rendering of the June, 7, 2013 opinion, despite this Court's directions. When the Coopers' motion was called for a hearing on February 6, 2015, the Bruners had not responded to the motion for summary judgment. The Bruners requested additional time, stating that the motion had been mailed to the wrong address. Over the Coopers' objections, the Pulaski Circuit Court allowed the Bruners an additional 10 days to respond.

On February 24, 2015, the Bruners filed a motion for time to conduct additional discovery. The motion for time submitted by the Bruners admitted that they had not engaged in any discovery efforts, but did not provide any reason for this inactivity. On April 6, 2015, the trial court denied the motion for time to

conduct additional discovery and granted summary judgment for the Coopers. It is on this order and judgment that the Bruners appeal.

Standard of Review

The two issues central to this appeal are whether the trial court acted within its discretion in denying the Bruners additional time to conduct discovery and whether the trial court properly granted the Coopers' motion for summary judgment.

An order denying additional time to conduct discovery is an evidentiary ruling reviewed for abuse of discretion. "It is a well-established principle that a trial court has broad discretion over disputes involving the discovery process." *Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. App. 2001). A trial court's decision does not amount to an abuse of discretion unless the decision is "arbitrary, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

The standard on an appeal from 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 is appropriate "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 of material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The record must be viewed in a light most favorable to the non-moving party and the trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). This Court's review is *de novo* such that we owe no deference to the conclusions of the trial court. *Scifres*, 916 S.W.2d at 781.

Furthermore, "[t]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest*, 807 S.W.2d at 480. The trial court should take up a summary judgment motion only after the opposing party has been given a reasonable opportunity to complete discovery. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010), citing *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988).

Analysis

We will first examine whether the Pulaski Circuit Court acted within its discretion in denying the Bruners' motion for additional time. The trial court determined that sufficient time had been given for both parties to conduct discovery, noting that the Bruners had done nothing to advance their claims since we remanded the case for additional discovery and findings in our Court of Appeals opinion on June 7, 2013. The court then added that it gave the Bruners an

additional 10 days to respond to the Coopers' December 18, 2014 motion for summary judgment, but they failed to provide even affidavits to support their claims. In sum, the trial court reasoned that the Bruners had over one year since our 2013 opinion to conduct discovery. We would add that this case has been pending, in general, since 2009. During this time, the Bruners did not produce any documents, conduct any depositions, or offer any affidavits to support their claim. Nor have they offered any explanation for their inactivity.

In consideration of these circumstances, we cannot hold that the trial court's decision was arbitrary, unfair, or unsupported by sound legal principles. *See*, *English*, 993 S.W.2d at 945. Therefore, the trial court did not abuse its discretion by denying the Bruners' motion for additional time.

Next, we must determine whether the trial court properly granted a summary judgment holding that Edward Meece Road is not a "public road" or easement. The Bruners argue that summary judgment was premature. "Whether a summary judgment was prematurely granted must be determined within the context of the individual case." *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky. App. 2007). While there is no exact limitation on the time parties have to complete discovery absent a pretrial order, for the sake of judicial efficiency this time is not indefinite. *Id*. at 844. Summary judgment is proper when all parties have had a reasonable opportunity to conduct discovery. In light of our holding that the Bruners had sufficient time to conduct discovery, we accordingly hold that summary judgment was not premature. *Blankenship*, 302 S.W.3d at 668.

The Bruners further argue that genuine issues of fact remain. In their brief, the only specific issue that the Bruners allege is in dispute regards the original placement of a deeded county road through the Coopers' property. However, this contention is not relevant to the Bruners' claims. The Bruners argue that the current route of Edward Meece Road, regardless of whether there was once a deeded road in a different location, is the route that now qualifies as a public road or easement. Therefore, whether or not there was once a deeded road in a different location is not material.

The Bruners also allege that factual disputes arise from the complaint. However, pleadings are not evidence. *Educational Training Systems, Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003). It is well-established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings, but must, by counter-affidavit or otherwise, show that evidence is available justifying trial of the issue involved. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co*., 281 S.W.2d 914, 916 (Ky. 1955).

A review of the record indicates that there is no evidence creating a genuine dispute of material fact. The Bruners contend only that their easement has arisen by prescription, or in the alternative, that Edward Meece Road has become a public road. Easements can be created by express written grant, implication, prescription, or estoppel. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001). Prescriptive easements require open, hostile, actual, notorious, and

continuous use of property for the statutory period of 15 years. *Allen v. Thomas*, 209 S.W.3d 475, 478 (Ky. App. 2006). *See* KRS 413.010. A "public road" can be established under similar circumstances as a prescriptive easement, with the statutory 15-year requirement of adverse use by the public. *Whilden v. Compton*, 555 S.W.2d 272, 274 (Ky. App. 1977).

The Bruners bear the burden of providing affirmative evidence satisfying the requirements of a public road or easement. "Easements are not favored and the party claiming the right to an easement bears the burden of establishing all the requirements for recognizing the easement." *Carroll*, 59 S.W.3d at 490. In our prior opinion, we noted that, "the Bruners have never cited anything of record, aside from their own pleadings, indicating that Edward Meece Road is or qualifies as a public road." *Cary*, 420 S.W.3d at 509. Since our opinion was rendered in 2013, the Bruners have not offered any additional evidence and therefore we conclude that Edward Meece Road is neither a public road nor easement.

Conclusion

The record indicates that the Bruners have had a fair and full opportunity to litigate this action. This case has been pending since 2009. In 2013, the Bruners were given an additional chance to discover and introduce evidence when we reversed and remanded the trial court's order on summary judgment for further findings. Furthermore, our 2013 opinion specifically stated that the Bruners bore the burden of proof on their claim of a public road and easement.

Throughout this process, the Bruners failed to meet their burden of providing affirmative evidence to support their allegations that Edward Meece Road is a public road or easement. In light of these circumstances, we conclude that the trial court properly denied the motion for additional time to conduct discovery and properly granted summary judgment for the Coopers.

Accordingly, the judgment of Pulaski Circuit Court is affirmed.

ALL CONCUR

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEES:
Scott T. Foster Somerset, Kentucky	Matthew J. Baker Bowling Green, Kentucky