

RENDERED: OCTOBER 13, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000054-MR

JOHN SHORT AND LISA SHORT

APPELLANTS

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE A. BAILEY TAYLOR, JUDGE
ACTION NO. 10-CI-00569

WINIFRED C. PERKINS; FERN PERKINS;
WILLIAM STACEY; SCOTT SIMPSON; AND
HICKS & MANN, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

JONES, JUDGE: John and Lisa Short appeal from an order of the Grant Circuit Court denying their motion to alter, amend, or vacate, the court's previous order dismissing their action without prejudice. After careful review, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Estate of Catherine Osborne, through the heirs to the estate (the “Osborne Heirs”), held an auction on April 25, 2009, conducted by Timberlake Auction Service, LLC. The auction advertised “2 Farms: 138 +/- acres, 3 tracts, Plus 140 Farmall Tractor.” Farm 1 was advertised as Tract 1, 40 +/- acres with a house, and Tract 2, 40 +/- acres of bottom ground along Eagle Creek (“Tract 2”). Photos were produced indicating the location of each parcel on a topographical map.

Appellees, Winifred C. Perkins and Fern Perkins (the “Perkinses”), purchased Tract 2 from the Osborne Heirs for \$54,000 at the auction, as evidenced by a general warranty deed, recorded on June 4, 2009 (“Deed 1”). On page 2 of Deed 1, it states as follows:

. . . containing 141 acres, 3 roods and 22 poles.

EXCEPTION: There is excepted from the above tract of land about 100 acres which was sold to Fred Webster by Felix Osborne by deed dated February 16, 1948, recorded in Deed Book 72, Page 286 in the Grant County Clerk’s Office, Williamstown, Kentucky.

There is meant to be conveyed herein about 41 acres, more or less, which boundaries are set out and well established that lies along the banks of Eagle Creek.

Next, the Perkinses listed Tract 2 for sale through Melton Real Estate, LLC. The listing described the land as:

40 acres! Hunting property, mostly wooded except front lot for corn, soy beans, etc. Borders Eagle Creek.

Three weeks later, on June 25, 2009, John Short purchased Tract 2 from the Perkinses for \$60,000. The parties entered into a Vacant Land Contract. The contract contained specific terms as it related to inspections and indemnity.

Paragraph 11 provided, in pertinent part:

[T]his Contract is contingent upon an inspection of the Real Estate as provided hereafter: Inspection Period. Buyer shall have the right for the period of ___ calendar days after the date of Contract acceptance (the “Inspection Period”) to obtain inspections of the Real Estate in order to determine whether or not the real estate is adequate for buyer’s intended use It shall be the Buyer’s sole responsibility, through Buyer’s own investigation and inspections to determine that the Real Estate is fit and adequate for Buyer’s intended use FAILURE TO NOTIFY SELLER, BY WRITTEN NOTICE, OF ANY UNACCEPTABLE DEFECTS BEFORE EXPIRATION OF THE INSPECTION PERIOD SHALL CONSTITUTE AN ACCEPTANCE OF SUCH DEFECTS, AND BUYER SHALL TAKE THE REAL ESTATE “AS IS” WITH RESPECT TO SUCH DEFECTS.

. . . .

Waiver of Inspection Contingency: [JWS] (Initials) if initialed, Buyer acknowledges he/she has been provided the opportunity to conduct inspections of the Real Estate Buyer waives the right to conduct inspections and agrees to take the Real Estate “AS IS”, except as otherwise represented by Seller.

Paragraph 14 further provided, in pertinent part:

Buyer, at Buyer’s expense, may have the Real Estate surveyed and certified by a Kentucky licensed surveyor.

The closing occurred on July 24, 2009. The parties entered into a general warranty deed (“Deed 2”). Deed 1 and Deed 2 have the same description

of Tract 2, except for Deed 2 stating “N 62 W 22 6/10 pikes” instead of “poles.”

After the sale, on July 27, 2009, the Shorts hired Hicks & Mann, Inc., to perform a survey of the land. The survey results provided that the property purchased was only 25.84 acres, as opposed to the 40 acres Tract 2 was advertised to contain.¹

Eventually, as a result of the discrepancy revealed by the survey, the Shorts filed suit against various defendants. The initial Complaint was filed on September 16, 2010, against Charles Melton d/b/a Melton Real Estate, LLC, and Winifred and Fern Perkins. Therein, the Shorts alleged that Melton and the Perkinses knew or should have known that the property in question was not 41 acres, as it was advertised to be. Based on these facts, the Shorts asserted claims of misrepresentation and fraud against Melton and the Perkinses.

Thereafter, the parties filed various motions and responses. On January 27, 2011, Melton Real Estate, LLC, filed a third-party complaint against the Osborne Heirs, who had sold Tract 2 to the Perkinses. Melton provided that the Perkinses conveyed and described Tract 2 to the Shorts exactly as they had received it from the Osborne Heirs only 60 days earlier. The Perkinses filed a cross-claim against the Osborne Heirs.

The trial court reviewed the various motions, cross-motions, and relevant memoranda submitted by the parties. Following a hearing and the trial court’s review, on January 12, 2012, the trial court entered an order that provided, in pertinent part:

¹ Appellees allege that the plat created by the survey conflicts with the photos depicting Tract 2. (Exhibit 11; Exhibit 3).

The above matter came before the Court on Motions for Summary Judgment filed by the Plaintiffs and by the Defendant/Third Party Plaintiff, Melton Real Estate, LLC, on December 21, 2011. A Motion to dismiss for failure to join an indispensable party was also filed on behalf of Timberlake Auction Service, LLC. All parties had filed memoranda and/or objections to the pending Motions.

The Court, having heard the parties and it appearing that the real issue in this case involves a boundary dispute between Plaintiffs and the adjoining property owner and all parties agreeing to work together to attempt a resolution of said boundary dispute which will require the assistance of non-parties (i.e., the adjoining land owner and two surveyors), the parties agreed to work together for the next 45 days to see if the boundary can be redrawn between the Plaintiffs' property and the adjoining property owner with the assistance of the two surveyors in order to avoid unnecessary litigation expenses in proceeding further. Accordingly,

IT IS NOW THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

1. That all pending motions should be and the same hereby are taken under advisement pending a further hearing by the Court.
2. Within 45 days from and after the date of this Order, the parties shall file written Status Reports regarding their progress in working toward a voluntary resolution of the boundary dispute. If the parties are not moving forward to resolve the boundary dispute, any party may move the Court for a hearing on the pending motions.

...

As referenced in the trial court's order, it became clear that the real issue in this case was a boundary dispute.

On March 9, 2012, a Joint Status Report was submitted to the trial court providing that the Osborne Heirs believed it was necessary to re-survey Tract 2. Following the re-survey of Tract 2, on September 19, 2012, counsel for the Osborne Heirs provided a letter to all parties explaining what they believed to have caused the boundary dispute causing an issue in this case:

The Osborne heirs verified through an independent survey that the survey prepared for John and Lisa Short was in error as it failed to include all of the lands that were encompassed by the deed which originated from the Osborne heirs. The survey prepared for William Stacey included 12.4480 acres that was within the legal description of the deed to the Shorts. To resolve the matter, Tom Leach met with Attorney Rita Ferguson and explained the error of the Hicks & Mann survey. As we previously discussed because of the Eagle Creek Bed, there was a misunderstanding as to which 'branch' the legal description followed. Once that branch was determined, then the full acreage could be accounted for and there was no discrepancy about the amount of acreage that the Shorts were to receive. You have previously received a copy of the correct plat and the legal description for that acreage.

To correct the Hicks & Mann survey, it was necessary for the 12.4480 acres that was [sic] erroneously included in the deed to the Stacey family be 'quitclaimed' to the Shorts. Accordingly, on August 15, 2012, I prepared the deed and sent it to Attorney Ferguson. I then called her office several times to request the status of the Stacey's [sic] signing the document since she understood the error. Finally, I received the deed returned, unsigned, with the following note: "Please be advised that Attorney Rita Ferguson on behalf of her client, Reb Stacey is returning the enclosed deed UNSIGNED. Any further questions or clarification should be addressed to Rita, signed by Marsha Bowen, Administration Assistant."

The Osborne heirs have spent in excess of \$4,000.00 for new survey field work, preparation of a new legal description, etc., to correct what all along has been a survey error. We have attempted to correct this error, even though it is not the Osborne heirs' legal problem, because as we asserted from the beginning ALL acreage was included in the deed they issued to the Shorts' predecessors-in-title. At this point, we have resolved the matter from our standpoint and do not intend to spend additional attorneys [sic] fees in trying to rectify the 'issue' created [by] a surveyor that is incorrect. Accordingly, I suggest you all discuss the matter and take the necessary steps to get this matter resolved by either bringing professional liability claims against the parties responsible for creating the incorrect survey and/or including the Stacey family in the proceedings since they do not intend to cooperate to resolve the matter without additional litigation.

In the near future, I will be filing a Motion to Dismiss my clients from the litigation as we have established to the satisfaction of ALL surveyors involved that of the 25.84 acres included in the Stacey transfer, 12.4480 acres from the Osborne farm was erroneously conveyed to the Staceys. I believe my clients have gone above and beyond what was required of them to resolve the matter when the survey created an issue with the amount of acreage when, in fact, there was no issue – all acreage was accounted for.

As explained in the letter, it was determined that the neighboring landowner, Mr. Stacey, had included about 12 acres in his survey that were not contained in his property's description. At one point, the parties appeared to agree that a global resolution would be to have Mr. Stacey convey the 12 acres by deed to the Shorts. In pursuit of a potential global resolution, counsel for the Osborne Heirs prepared a deed of correction to the Shorts, transferring the 12 acres. This

deed of correction was provided to counsel for Mr. Stacey; however, counsel indicated that Mr. Stacey did not intend to sign the deed of correction.

The Shorts filed their first amended complaint on December 6, 2012, which added Mr. Stacey, Deborah Stacey Worthington, Scott Simpson, and Hicks & Mann, Inc., as defendants. All defendants filed timely answers. Therein, the Shorts alleged that Scott Simpson, while acting within the course and scope of his employment with Hicks & Mann, Inc., performed a survey of Tract 2, which was erroneous and failed to properly include 12.4480 acres. Further, the Shorts added Mr. Stacey and Deborah Stacey Worthington, whom they believed owned the neighboring property that the Shorts alleged included 12.4480 acres that was within the legal description of the deed to the Shorts. The Shorts asserted that as a result of “clearly erroneous and wanton and willful acts, they were entitled to punitive damages.”

On July 25, 2013, the Shorts filed another motion for summary judgment with supporting memorandum. On July 30, 2013, Deborah Stacey Worthington filed a motion to dismiss and for attorney’s fees, as she had no interest in the property at issue and has not been married to William Stacey for over 25 years.

On August 14, 2013, Mr. Stacey filed his response to the Shorts’ motion for summary judgment. Therein, Mr. Stacey denied that any of his property belonged to the Shorts. He alleged that it was a material issue of fact as to which surveyor is correct in the description of the property. He claimed that the

issue was not ripe for summary judgment because there were several factual issues to be determined, including the correctness of any surveys and who has an interest in the property, whether by deed or adverse possession. Further, all of the necessary parties were not yet before the trial court for an adjudication of the issues.

On September 3, 2013, the Perkinses submitted a memorandum in response to the Shorts' motion for summary judgment. Therein, the Perkinses reiterated that they conveyed Tract 2 to the Shorts through a description in the exact way that they received it from the Osborne Heirs by way of warranty deed approximately 60 days earlier.

On December 23, 2013, the trial court entered a partial order of dismissal. Therein, the court dismissed all claims against Deborah Stacey Worthington, Timberlake Auction Service, Charles Melton, individually, and Charles Melton d/b/a Melton Real Estate, LLC. Additionally, the trial court granted the Shorts' oral motion to join all necessary or indispensable parties, and all other pending matters of record were taken under submission pending further orders by the court.

Following the trial court's December 2013 order, the case sat dormant for almost a year. During this time, the Shorts did not obtain a title search or seek to add any parties.

On November 3, 2014, the Shorts filed a Motion for Leave to File a Second Amended Complaint, asking to add necessary parties. Mr. Stacey and

Hicks & Mann, Inc., objected to the Shorts' motion and filed a joint motion to dismiss on November 10, 2014. Therein, they detailed their reasoning for dismissal as to both parties and argued that the action should be dismissed for failure to prosecute. The motion to dismiss alleged that the Shorts had known about these parties for over a year, and asserted that they would have known about the correct parties sooner had they performed proper title searches of the property. The Shorts filed their memorandum in opposition to the motion to dismiss on November 21, 2014.²

The matter came before the trial court for a hearing on November 19, 2014. At the hearing, the court determined that the case had lingered and mutated such that the appropriate action would be to dismiss the case without prejudice so as to provide a "clean slate" to file the action. The Shorts sent local counsel with limited knowledge about the case to the hearing. On November 24, 2014, the trial court issued an order dismissing the case without prejudice. This order provided:

This matter having come before the Court on Plaintiff's Motion for Leave to File Second Amended Complaint on November 19, 2014, to which Defendants, Hicks and Mann, Inc. and William Stacey, filed a Memorandum in Opposition and further moved to dismiss the underlying action, to which counsel for Winifred C. and Fern Perkins verbally joined, and counsel for Plaintiff responded, the Court, being sufficiently advised, **HEREBY ORDERS THAT THIS CASE IS DISMISSED** without prejudice.

² Although the motion was signed on November 18, 2014, it was not filed with the court until November 21, 2014, after the date of the hearing.

The Shorts filed a motion to alter, amend and/or vacate judgment on December 11, 2014, claiming that the order of dismissal was unsupported by the evidence and contrary to law. Following a hearing on the matter, where the Shorts again sent local counsel with limited knowledge of the case, the motion was denied by the trial court on December 17, 2014.

This appeal followed.

II. ANALYSIS

The overarching issue we must decide here is whether the trial court abused its discretion in dismissing the Shorts' complaint without prejudice. We review a trial court's decision to dismiss a cause of action with or without prejudice for abuse of discretion, which is a deferential standard. *Sublett v. Hall*, 589 S.W.2d 888, 893 (Ky. 1979). A trial court has abused its discretion if it acted in a way which was "arbitrary, unreasonable, unfair or, unsupported by sound legal principles." *Wildcat Prop. Mgmt., LLC v. Reuss*, 302 S.W.3d 89, 93 (Ky. App. 2009) (quoting *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004)).

At the conclusion of the hearing on the motion to dismiss, the trial court opined that the case had lingered on and "mutated" such that it was appropriate to dismiss the case without prejudice so that it could be refiled on a "clean slate" with the appropriate parties. Therefore, we must determine whether the trial court abused its discretion in dismissing the matter without prejudice to grant a "clean slate" for the case to be refiled. We find that the trial court did not abuse its discretion.

This case meandered from various parties, to various theories, and after nearly four years on the docket, came before the trial court on a motion to dismiss. Local counsel with limited information about the case appeared on behalf of the Shorts. While various motions were filed throughout the four-year time span, no real progress was made. No depositions were taken. The Shorts did not conduct a title search or seek to provide an accurate description of the property, or even seek out an independent surveyor to conduct a survey on behalf of the court. It was within these parameters that the court found it best to dismiss the action *without prejudice* so as to give the Shorts the opportunity to re-file the case on a clean slate, with appropriate parties and claims.

The Shorts repeatedly emphasize that length of time alone is not the test of diligence. *See Gill v. Gill*, 455 S.W.2d 545, 546 (Ky. 1970); *Stapleton v. Shower*, 251 S.W.3d 341, 343 (Ky. App. 2008). We agree with this principle and acknowledge its precedential support. However, here, the facts go beyond a mere passage of time. Rather, it is the failure of the Shorts to efficiently pursue the action by failing to identify the property at issue and the parties necessary to the action, and the failure of the Shorts to draft a cause of action consistent with the facts of the case.

The ongoing litigation has had a great impact on the parties involved. The Perkinses have now been involved in the litigation for nearly five years for real estate that they owned for less than six weeks. The Perkinses have maintained from the outset that they sold to the Shorts exactly what was conveyed to them.

Now, several years and thousands of dollars in attorney's fees later, they are still involved in convoluted litigation that really appears to boil down to a boundary dispute.

The parties involved in this matter have been entangled in litigation at the hands of the Shorts. It goes without saying that prejudice visits any defendant who must linger in litigation of indeterminate duration while the plaintiff decides when and whether to pursue his claim. *See Jaroszewski v. Flege*, 297 S.W.3d 24, 32 (Ky. 2009) (one of the “basic purposes” behind CR³ 41.02 is “to protect the defendant from the prejudice of being a defendant in a lawsuit for a protracted period”).

In considering the totality of the circumstances, we hold that the trial court properly overruled the Shorts' motion to file a second amended complaint and properly granted the joint motion to dismiss filed by Mr. Stacey and Hicks & Mann, Inc. The only real prejudice that would occur is if this case were allowed to continue on as asserted, to the detriment of all parties involved.

A compounding issue here is the failure of the trial court to provide a detailed order explaining its dismissal of the action. Indeed, trial courts must make explicit findings on the record so that the parties and appellate courts will be properly apprised of the basis for the trial court's rulings and the appellate courts can assess whether the trial court properly considered the totality of the circumstances in dismissing the case. *Jaroszewski*, 297 S.W.3d at 36. However, in

³ Kentucky Rules of Civil Procedure.

Jaroszewski, the Court held that enumerated factors and more stringent analysis apply to dismissals with prejudice under CR 41.02, not to a dismissal without prejudice under CR 77.02. *Id.* at 31.

The trial court's written order does not specify a rule under which it dismissed the action. While Mr. Stacey and Hicks & Mann, Inc., asserted dismissal for failure to prosecute under CR 41.02, among other claims in their memorandum in support of their motion to dismiss, the record reveals that the trial court ultimately granted their motion to dismiss, without prejudice, so as to create a "clean slate" for the Shorts to refile the case with appropriate parties and causes of action.

While we agree that the trial court did not provide its reasoning for dismissal in its written order, we find that the Shorts had the opportunity to request factual findings and failed to do so. The Shorts failed to preserve the alleged error by calling the absence of essential findings of fact to the trial court's attention as required by CR 52.02 and CR 52.04. Accordingly, the Shorts waived review of any alleged error. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Notably, the court dismissed the action without prejudice, a far less drastic measure than a dismissal with prejudice. The Shorts failed to timely respond to the motion to dismiss and only sent local counsel with limited knowledge of the case to the hearing on the motion. Further, case law supports that the stringent standards under CR 41.02 are required because usually actions under CR 41.02 are dismissed with prejudice, terminating the lawsuit. Here, the

trial court made clear that its motivation was not to terminate the lawsuit, but rather to provide the plaintiffs with a clean slate to properly file their claim with the necessary parties, and allow the parties unnecessary to the action to remove themselves from the prejudice of ongoing litigation. Given these facts, we find that it was well within the trial court's discretion to dismiss the case without prejudice.

In sum, we find that the trial court did not abuse its discretion in dismissing the Shorts' complaint. Further, we view any remaining contentions of error to be without merit.

IV. CONCLUSION

For the foregoing reasons, the Order of the Grant Circuit Court is affirmed. The Shorts' recourse, given that their case was dismissed without prejudice, is to refile their suit and issue new process.

COMBS, JUDGE, CONCURS.

KRAMER, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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BRIEF FOR APPELLEES
WINIFRED C. PERKINS AND
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