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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000077-MR

DEARBORN SAVINGS BANK — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 13-CI-00862

STEPHANIE HALL — APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, JONES AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This case involves a lengthy dispute over a recorded easement. In the latest of a series of litigation concerning the easement, Dearborn Savings Bank filed counterclaims against Stephanie Hall. Pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), the Kenton Circuit Court dismissed the following claims: (1) malicious prosecution, abuse of process and bad faith; (2)

tortious interference with a contract; (3) trespass; (4) attorney fees pursuant to a 2005 settlement agreement and (5) for a declaratory judgment that Hall abandoned or forfeited the easement or is barred by laches in asserting her rights in the easement. After the circuit court made its order final and appealable, Dearborn appealed. To understand Dearborn's involvement and the issues, historical background is required.

Hall's property adjoins property known as 1035 Montague Road in the City of Park Hills (Montague property) and, for many years, Hall used an unpaved recorded easement across that property to access the rear of her property. In 1998, the Montague property was owned by Richard and Carol Forbrich who constructed a home on the property. Near the end of construction of the home, the Forbrichs and Hall entered into an agreement to pave the unpaved easement and have one branch serve as the driveway to the Forbrich property and the other serve Hall's property.

In 1999, shortly after construction of the driveway, a landslide occurred taking down most of the driveway, earth and many trees. Subsequent smaller landslides occurred and all the trees and most of the earth which formed the Forbrich hillside moved down the hill.

Hall and Forbrich filed suit against each other for the restoration of the driveway. Each also filed claims against the City of Park Hills and its zoning

administrator to enforce hillside controls. After the cases were consolidated, an agreed order was entered to have the master commissioner sell the Forbrich property at public auction. One of the terms of sale was that the buyer was required to post a bond and submit plans within a specified time for the restoration of the hillside, including the joint driveway. No bids were received on the property and the order of sale was vacated.

The lawsuit proceeded. In September 2005, the Forbrichs, Hall, the City of Park Hills and various other parties[1] entered into a settlement agreement. Among the terms of that agreement, the City of Park Hills paid Hall and the Forbrichs more than $100,000. Most of the Forbrichs' settlement proceeds and title to the property went to their mortgagee, the Bank of Kentucky.

In 2007, the Montague property was purchased by Cozzart Investments. The property was later conveyed to Tammy Kemper who conveyed the property to TK Properties & Investment, LLC, a limited liability company, owned by Tammy but controlled by her husband (collectively referred to as the Kempers). The Kempers obtained a loan for the property through Dearborn.

In 2007, the Kempers hired a geotechnical engineering firm to rebuild the hillside. After receiving the engineer's plans, including building several large retaining walls, the Kempers' attorney sent Hall a letter stating that the Kempers

[1] Other parties included some Forbrich creditors.

had cleared the path of the easement used by Hall to access the rear of her property for a cost of $8,400 and that after it was cleared, Hall used the easement for ingress and egress. The letter demanded that pursuant to Kentucky Revised Statutes (KRS) 381.640 and KRS 381.650 requiring parties sharing a passway to property bear jointly the cost of repair, construction, and maintenance, Hall pay one-half the cost of the work performed. The letter further advised that the Kenton County Planning and Zoning Administration inspected the property and that the driveway in its current location required concrete supporting walls and the estimated cost would be $90,000, one-half of which would be Hall's responsibility. The letter also proposed an alternative to construct a new driveway for a cost of $75,000. Under this plan, Hall was to assign her rights to the recorded easement to the Kempers in exchange for an easement across the alternate driveway. Again, the letter demanded Hall pay one-half the cost. The letter was sent on July 10, 2007 and required a response by July 13, 2007; otherwise the Kempers would file a legal action.

Believing the easement of record would be restored by the new owners of the neighboring property, Hall consulted an attorney. In the meantime, the Kempers began construction of the new driveway to serve both properties and blocked and eventually destroyed the bottom part of the recorded easement by

constructing retaining walls. In September 2007, the Kempers applied to Dearborn for a refinancing loan to finish the project.

In October 2007, the Kempers filed an action against Hall to force her to pay one-half of the construction cost of the retaining walls and new driveway. Hall counterclaimed for the unlawful bulldozing of the easement access and requested that her recorded easement be restored. During the pendency of the action, the Kempers threatened to close the new driveway. Hall filed a motion in limine requesting that the court order the Kempers be required to permit Hall ingress and egress through the new driveway until the easement of record is restored and that any subsequent owner be placed on notice of this requirement. The circuit court granted the motion on November 19, 2008. Before the action concluded, the Kempers filed bankruptcy and no one appeared on behalf of the Kempers at trial. On December 4, 2008, the circuit court ordered the easement of record be restored to its previous condition and further granted all relief requested by Hall in her counterclaims.

The Kempers defaulted on the loan with Dearborn. Tammy Kemper executed a document, which she and Dearborn believed to be a deed in lieu of foreclosure. However, the deed was deficient because its lacked any conveyance language. Not realizing the deed's deficiency, Dearborn proceeded to offer the property for sale through a realtor.

During an attempted sale of the property in 2011, Dearborn learned of the defect in the deed when the title company rejected the deed in lieu. Dearborn commenced a foreclosure action under its mortgage and Dearborn named Hall as a party because of her claimed easement.

Hall counterclaimed alleging negligence on the basis that Dearborn should have supervised the Kempers' restoration of the property so that the retaining walls would not block the recorded easement and violations of the Consumer Protection Act. However, the circuit court found Dearborn did not own the property and the counterclaims were dismissed. Hall filed a motion to alter, amend, or vacate as to ownership of the Montague property. The case was referred to the master commissioner who concluded that the deed in lieu of foreclosure was not a deed and Hall's motion was denied.

The matter proceeded to a foreclosure sale. At the foreclosure sale held on April 2, 2013, Dearborn purchased the property, taking credit for its judgment. It subsequently assigned its bid to A & L Corporation, LLC, its Indiana limited liability company subsidiary.

On April 22, 2013, Hall filed this action against Dearborn alleging trespass and nuisance. Dearborn filed a motion to dismiss alleging Hall's claim to the recorded easement was released by the 2005 settlement agreement, it had no

duty as the owner of the servient estate to maintain the easement, and Hall waived her rights to the recorded easement by failing to promptly assert those rights.

The circuit court denied the motion to dismiss on September 25, 2013. It concluded that the 2005 settlement agreement did not purport to extinguish the recorded easement and the damage Hall asserts is separate and distinct from the claims and damages asserted in the 2005 agreement. It further concluded Dearborn had a duty to permit Hall to use the driveway. Finally, the circuit court ruled that the July 2007 letter from the Kempers' attorney indicating that Hall used the recorded easement after it was cleared by the Kempers is evidence that Hall did not abandon the easement.

On November 4, 2013, Dearborn filed its answer and counterclaim alleging malicious prosecution, abuse of process, and bad faith,[2] tortious interference with contract, trespass, a claim for attorney fees under the 2005 settlement agreement and a statutory claim under KRS 381.460 and KRS 381.640. It also alleged Hall acted with malice towards Dearborn with flagrant indifference to its rights and requested punitive damages. Finally, Dearborn requested that the circuit court declare that Hall abandoned or forfeited her right to the recorded easement or she is barred by equitable principles from asserting any right in the

[2] The "bad faith" alleged is in relation to the malicious prosecution and abuse of process claims and, therefore, subsumed in those claims.

alleged easement or declare that Hall may, at her own expense, construct a passway in the area of the alleged easement.

Hall filed a motion to dismiss the counterclaims on December 18, 2013. Before her motion was ruled upon, on April 4, 2014, Hall was permitted to amend her complaint to include various causes of action including fraud and misrepresentation, unjust enrichment, negligence, violations of the terms of the 2005 settlement agreement and a claim for punitive damages.

On December 24, 2014, the circuit court dismissed Dearborn's counterclaims for malicious prosecution, abuse of process, tortious interference with contract, trespass, and its claim for attorney fees pursuant to the 2005 settlement and release. It also dismissed Dearborn's request for declaratory judgment. The court's judgment included the finality language required by CR 54.02 that "[t]his is a final and appealable order and there is no just cause for delay."

The standard for determining whether to grant or deny a motion to dismiss under CR 12.02 is well embedded in our law and summarized in *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (internal quotations and footnotes omitted):

> A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved[.] Accordingly, the pleadings should be liberally

> construed in the light most favorable to the plaintiff, all allegations being taken as true. This exacting standard of review eliminates any need by the trial court to make findings of fact; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Dearborn's counterclaims for malicious prosecution and abuse of process are premised on the factual allegation that the issues raised by Hall in this action were previously litigated by her and resolved adversely to her in the 2011 foreclosure action and, that in the 2005 settlement agreement, Hall released all claims against the Forbrichs, their successors and assigns.

There are six elements to a malicious prosecution claim:

> 1) the defendant initiated, continued, or procured a criminal or civil judicial proceeding, or an administrative disciplinary proceeding against the plaintiff;
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> 2) the defendant acted without probable cause;
>
> 3) the defendant acted with malice, which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice; and in the civil context, means seeking to achieve a purpose other than the proper adjudication of the claim upon which the underlying proceeding was based;
>
> 4) the proceeding, except in ex parte civil actions, terminated in favor of the person against whom it was brought; and

> 5) the plaintiff suffered damages as a result of the proceeding.

Martin v. O'Daniel, 507 S.W.3d 1, 11–12 (Ky. 2016).[3] As noted in *Prewitt v. Sexton*, 777 S.W.2d 891, 893 (Ky. 1989), as applied to civil cases, the tort is properly referred to as wrongful use of civil proceedings. It is one that has not been favored in the law. As the Court explained:

> Public policy requires that all persons be able to freely resort to the courts for redress of a wrong, and the law should and does protect them when they commence a civil or criminal action in good faith and upon reasonable grounds. It is for this reason that one must strictly comply with the prerequisites of maintaining an action for malicious prosecution.

Id. at 895 (quoting *Raine*, 621 S.W.2d at 899).

Even if, as Dearborn characterizes them, Hall's claims are substantially related to those raised in her counterclaim in the 2011 foreclosure action, those claims were not resolved favorably to Dearborn as required to sustain an action for malicious prosecution. The claims were never resolved on the merits nor could they be resolved because when asserted in 2011, Dearborn did not own the Montague property and was not the proper party against whom such claims could be asserted.

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[3] In *Martin*, the Court revised the articulation of the elements of the tort set forth in *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981). Under either articulation, the result in this case would be the same.

Dearborn also argues that the 2005 settlement agreement released all claims against the Forbrichs, their successors and assigns. It contends this settlement agreement and the judgment of dismissal accompanying it was a ruling in favor of Dearborn as the Forbrichs' successor.

Hall's claims against Dearborn arise from damages to the easement in 2007, after the settlement agreement was signed and the construction of the new driveway. Her claims are not for the same damages caused by the landslide and were not resolved by the 2005 agreement. Her claim is for damages caused by blocking the recorded easement after it was cleared in 2007. Dearborn's reliance on a settlement agreement signed long before its association with the property, to which it was not a party and before the damage to the easement claimed in the complaint is untenable as a favorable prior resolution in its favor.

The essential elements of an action for abuse of process are "(1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." *Bonnie Braes Farms Inc. v. Robinson,* 598 S.W.2d 765, 766 (Ky.App. 1980). Concisely stated:

> [T]he gist of [abuse of process] is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance.... The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the

> proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.

Flynn v. Songer, 399 S.W.2d 491, 494 (Ky.App. 1966) (quoting *Prosser on Torts* (3d ed.) § 115, pp. 876-77). Merely because a lawsuit is groundless is not sufficient to state a claim for abuse of process. "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion even though with bad intentions." *Simpson v. Laytart*, 962 S.W.2d 392, 394-95 (Ky. 1998).

Under the facts as alleged by Dearborn, it has not stated a claim for abuse of process. There are no facts alleged that Hall threatened Dearborn with use of the judicial process to gain any collateral advantage. She is using the judicial system for its intended purpose to obtain her legal rights to a recorded easement.

Dearborn also counterclaimed for tortious interference with contract. The underlying factual allegations of its claim is that Hall interfered with Dearborn trying to sell the Montague property in 2007-2011 by threatening prospective buyers with legal action over the easement. As we did with the claims for

malicious prosecution and abuse of process, we must view the facts most favorably to Dearborn and apply the law to those facts.

Tortious interference with contractual relations has six elements: 1) the existence of a contract; 2) the defendant's knowledge of the contract; 3) the defendant's intent to cause a breach of that contract; 4) that the defendant's actions in fact caused a breach of the contract; 5) that the plaintiff suffered damages as a result of the breach; and 6) that the defendant enjoyed no privilege or justification for its conduct. *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 5-6 (Ky.App. 2012). Generally, to prevail, a plaintiff "must show malice or some significantly wrongful conduct." *Id.* at 6 (quoting *Nat'l Collegiate Athletic Ass'n By and Through Bellarmine Coll. v. Hornung*, 754 S.W.2d 855, 859 (Ky. 1988)). While tortious interference with a prospective contract is a distinct claim from interference with an existing contract, the elements are similar in that "some element of ill will is seldom absent from intentional interference; and if the defendant has a legitimate interest to protect, the addition of a spite motive usually is not regarded as sufficient to result in liability." *Nat'l Collegiate Athletic Ass'n By & Through Bellarmine Coll.*, 754 S.W.2d at 859 (quoting *Prosser and Keeton on Torts* § 130 (W.P. Keeton 5th ed. 1984)).

The obvious problem with the counterclaim asserted by Dearborn under either theory is that it did not own the Montague property when Hall

allegedly interfered with an existing contract. There was not an enforceable contract of sale with any prospective buyer nor even alleged that a contract existed. Although Dearborn argues it would have been able to correct the title problem prior to closing by having Tammy Kemper execute a quitclaim deed in its favor or the buyer at closing, it remains that during the time in question Dearborn did not have legal title to the property and could not convey it to a purchaser.

Moreover, we agree with the circuit court that Dearborn's factual allegations, even if true, are not the type of improper interference required to sustain the tort. Hall allegedly informed prospective buyers of the fact of her intent to pursue legal remedies against any new owner of the property to assert her right to the easement. The allegations made by Dearborn against Hall do not amount to malicious or wrongful conduct as required to state a claim for intentional interference with an existing contract or a prospective contract.

The fourth counterclaim dismissed by the circuit court is for trespass. Dearborn alleges Hall has used the driveway constructed by the Kempers to access their property from Montague Road since 2007 and has no easement to do so since the new driveway is not located within the recorded easement. The circuit court concluded that a trespass claim against Hall is precluded by the prior orders and judgments of the court granting Hall use of the driveway until the recorded easement was restored.

The existence of an easement is a complete defense to a trespass action. *Townsend v. Gulf Interstate Gas Co.*, 308 S.W.2d 793, 794 (Ky. 1957). Here, Hall has a recorded easement but access to that easement is blocked. However, by court order, since 2008 she has had the right to use the driveway as a means of ingress and egress. In the 2008 order entered in the action filed by the Kempers, Hall was granted the right of ingress/egress through the driveway until the recorded easement is restored and all future owners of the Montague property were put on notice of her right. Dearborn, while not a party to that action, was the mortgage holder and, as were all potential owners, put on notice of Hall's right to use the driveway. Contrary to Dearborn's assertion, the circuit court did not relocate the recorded easement to the area of the driveway. It ruled that based on prior court orders, Hall had a right to use the driveway to access her property until the recorded easement was restored. On that basis alone, the circuit court properly dismissed Dearborn's counterclaim for trespass.

Although we agree with the reasoning of the circuit court, we point out an additional flaw in Dearborn's trespass claim under the facts as alleged. Dearborn states that Hall has used the driveway as a trespasser since 2007. The 2008 judgment undeniably and expressly bound the Kempers and granted Hall the right to use the driveway until the recorded easement was restored. Dearborn did not have legal title to the property until 2013 making Dearborn's factual

allegations impossible to prove. Dearborn's counterclaim for trespass was properly dismissed.

Dearborn's counterclaim for attorney fees is based on the following language contained in the 2005 settlement agreement: "The prevailing party in any future litigation concerning any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be entitled to recover his or its reasonable costs, attorney's fees and expert witness fees." Dearborn argues that the damage claimed by Hall is the same damage arising from the landslide in 1999 and released under the 2005 settlement agreement and, if it can establish that fact, it would be the prevailing party entitled to attorney fees in this action.

As stated earlier, the damage claimed by Hall allegedly arose after the 2005 settlement and after the Kempers cleared the covered easement of record to gain access to their property and then blocked access to it when constructing the new driveway. It was Hall's use of the easement after 2007 that led to the litigation between the Kempers and Hall. The 2005 settlement agreement to which the Kempers were not a party had no impact on any future interference with the use of the easement and, therefore, Dearborn, as their successor, has no claim to attorney fees under the provisions of that agreement.

Finally, Dearborn contends that the circuit court should not have dismissed its claim that Hall abandoned the easement. The rule applicable to a claim that a recorded easement has been abandoned is as follows:

> Forfeiture of easements is not favored in the law and its mere nonuse without adverse possession is not sufficient to establish abandonment. When the easement is created by deed, it occurs "*only where in connection with nonuser there is a denial of title, or act by an adverse party, or attendant facts and circumstances showing an intention on the part of the owner of the easement to abandon it.*

Dukes v. Link, 315 S.W.3d 712, 718 (Ky.App. 2010) (quoting *City of Harrodsburg v. Cunningham*, 299 Ky. 193, 198, 184 S.W.2d 357, 359 (1945)).

Dearborn argues that as the dominant estate owner, Hall had a duty to maintain the easement in a safe traveling condition. The law is stated in *Spalding v. Louisville & N.R. Co*., 281 Ky. 357, 136 S.W.2d 1, 2 (1940):

> Even conceding that plaintiffs were rightfully using the passway at the time, such passways, when otherwise not qualified by contract or obligatory terms in their creation, impose no duty upon the servient estate to maintain them in a safe traveling condition. On the contrary, such duty is imposed upon the dominant estate[.]

The factual basis for Dearborn's claim is that since the 1999 landslide and the easement became impassable, Hall has done nothing to restore the easement and took no action to prevent the Kempers from building the retaining walls and blocking the recorded easement.

While the lengthy history of this case and Hall's involvement in the prior litigations suggest that Dearborn's counterclaim may be difficult to prove and may not survive a future dispositive motion made by Hall, nevertheless, its allegations "meet at least the bare elements" for a claim that Hall abandoned or forfeited her right to the easement by not taking any action to restore the recorded easement after the initial landslide or take legal action to prevent the Kempers from blocking the recorded easement. *Mitchell v. Coldstream Labs., Inc*., 337 S.W.3d 642, 646 (Ky.App. 2010).

We also agree with Dearborn that its allegations are sufficient to survive a motion to dismiss its declaratory judgment action because it has stated facts sufficient to create an issue regarding laches.

> The basis of the doctrine of laches is that a court of equity will withhold relief if it would be inequitable to grant the demand. In its legal significance laches is not merely delay, but delay that results in injury or a disadvantage to the adverse party. What is unreasonable delay always depends on the facts in the particular case.

Card Creek Coal Co. v. Cline, 305 Ky. 473, 475, 204 S.W.2d 571, 573 (1947). We cannot say that it is impossible for Dearborn to prove that Hall's delay in objecting to the construction of the retaining walls was unreasonable and that it suffered damage.

The circuit court is undeniably familiar with the facts garnered through prior litigations which, at this point, do not favor Dearborn's claim for

declaratory judgment. Nevertheless, under the CR 12.02(f) standard, it has alleged sufficient facts to permit those claims to proceed.

Based on the foregoing, the Kenton Circuit Court's order of partial dismissal is affirmed except as to Dearborn's claims that Hall abandoned or forfeited her right to the easement and its request for declaratory judgment based on laches. The case is remanded for further proceedings.

ALL CONCUR.

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