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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000761-MR

RICKY STEVENS — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 13-CI-00127

GARY PEYTON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO, AND VANMETER,[1] JUDGES.

VANMETER, JUDGE: In an action to quiet title to real estate, the plaintiff's right to relief depends on his proving his title, not on the weakness of the defendant's title. In this case, the primary issue we must resolve is whether the Hopkins Circuit Court erred in denying Ricky Stevens' petition to quiet title to a claimed

[1] Judge Laurence B. VanMeter authored this opinion prior to being elected to the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

parcel of property. We hold, under the facts of this case, that Stevens failed to satisfy his burden of proof. We therefore affirm the trial court's judgment.

I. Facts and Procedural Background.

The trial court entered extensive Findings of Fact, Conclusions of Law and Judgment following its bench trial in this matter:

FACTS

> [Stevens] resides in the Stoney Point area of Hopkins County. His residence is located on a 16 (sixteen) acre parcel which borders Stoney Point Road. Stevens became aware of a parcel that adjoined his property which was identified in the Hopkins County Property Valuator's Office as Parcel #26. He inquired as the size and ownership of Parcel #26 and was told it was 5 (five) acres owned by Island Creek Coal Company. He contacted Island Creek who told him they had no knowledge of the property and did not have any legal evidence of ownership. Nonetheless, Stevens offered to purchase the property from Island Creek and a quit claim deed was executed on March 26, 2004. The following description and source of title was contained in the deed:
>
> > "Being a parcel of approximately 20 acres adjoining lands of the Second party (i.e. Stevens) to the South, East and West and Gary Peyton to the North. Said Property being located approximately 2000 feet west if [sic] the intersection of Stoney Point Road and Dalton Road and shown as Parcel 26 on the attached Property Tax Map "Exhibit A".
> >
> > Being property assessed to Island Creek Coal Company for tax year 2003 as Bill No. 11567 and Account No. 109640001."
>
> Exhibit A to the deed is nothing more than a Property Valuation Administrator ("PVA") aerial photo and provides scant, if any, description. In addition to the description being woefully inadequate, it is noteworthy

that the size of Parcel 26 referred to in the PVA office was 5 (five) acres, however, the deed increased the size to 20 (twenty) acres.

Stevens began clearing, fencing and cutting timber on the property. In 2010 he hired the services of Keith Whitledge to perform a survey. Mr. Whitledge, a licensed land surveyor in Kentucky for approximately 15 (fifteen) years, testified that he performed a "possession survey". This, according to Mr. Whitledge, is a process whereby the surveyor simply plots the location of existing landmarks. He simply plotted the fence which had been erected by Stevens. It bore no semblance to any historical description and although Mr. Whitledge indicated he looked at some old deeds, there is no indication they were relied upon in making the description. Based on this survey, the parcel now contained 34.2 (thirty-four and two-tenths) acres.

When Stevens originally became aware of the property it was described in the PVA office as containing 5 (five) acres. In 2004 when the deed was prepared it increased from 5 (five) acres to 20 (twenty) acres. In 2010 when the 'possession survey" was performed it increased to 34.2 (thirty-four and two tenths) acres.

It is disputed how [Peyton] became aware of Stevens' claim. Gary Peyton, although certainly not lacking in competence, is physically impaired from a stroke and unable to speak clearly. His son and property manager, David Peyton, testified on his behalf at the hearing and trial. It is clear that Peyton and others visited Stevens on occasion in Stevens' workshop. It is also clear that several witnesses, including David Peyton and Gary Peyton (who was not called as a witness) could observe activity in the vicinity of Steven's southern border which is the direction of the disputed property. David Peyton testified that Ricky Stevens' brother, David Stevens, made a statement to Peyton to the effect, "How long you going to let my brother cut your Dad's timber?" David Stevens denied the statement but regardless, Peyton became aware of Stevens' activities on the

disputed property [in] approximately 2012 and this action followed.

[Peyton] states that he acquired title to the property by quit claim deed from Chevron- U.S.A., Inc. in 1990 recorded at Deed Book 499 Page 281 in the office of the Hopkins County Clerk. Exhibit A to that deed is a metes and bounds description of several parcels, some containing only mineral interests, others containing minerals and surface. Peyton claims that "Parcel 31" of that deed contains the disputed property.

In March, 2012, Peyton hired James Dean Cansler, licensed land surveyor, to conduct a survey and determine if the disputed property is described in the Peyton[] deed. Cansler consulted several sources including previous deeds in Peyton's chain of title, PVA maps, archives of Donan Engineering (a well[-]known engineering firm), coal mine maps dating as far back as 1945, maps from Associated Engineers (Cansler's Employer), farm maps, maps from Ricky LeGrand (a surveyor employed by Peyton), and other sources. Cansler and two assistants walked the property three times. He testified that the disputed property is contained in Parcel 31 of Peyton's deed. He pointed out that the description of Parcel 31, as contained in Peyton's deed "did not close" when platted. However, he researched the property records and found that the typewritten description was copied incorrectly from a prior deed dated 1895. When the description in the 1895 deed was used the plat nearly closed.

Cansler was questioned regarding the fact that the configuration of the property in dispute did not match the configuration of Parcel 31. Likewise, the disputed property contains only 34 [(]thirty-four) acres and Parcel 31 calls for 50 (fifty) acres. His explanation was that encroachments and off conveyances have reduced Parcel 31 in size and configuration. But, it is likewise possible that the configuration of the 34 (thirty-four) acres at issue is not described by <u>any</u> recorded deeds, maps or documents and is just as likely a portion of a larger tract previously platted by deed. The configuration of the 34

(thirty-four) acres appears to be only where Stevens put up a fence, timbered or cleared. Mr. Cansler testified that he was not familiar with the term "possessions survey."

Other witnesses testified, including the Hopkins County Property Valuation Administrator, Margaret Brown, surveyor Ricky LeGrand, David Stevens, Mark Walker, Danny Ray, James Basham, David Allen Daugherty, Kevin Sisk, Carrol Sisk and Dr. Tristen Lineberry. These witnesses testified regarding the value of the improvements made to the property and that Stevens' efforts improving the property were open and obvious to a casual observer.

CONCLUSIONS OF LAW

KRS[2] 411.120 provides that one seeking to quiet title in his name must have both legal title and possession of the property. Stevens has not established legal title to any portion of the property in dispute. Although the PVA records indicated that Island Creek owned 5 (five) acres in 2004, there was no legal source of title to the 5 (five) acres. That is, there is no evidence that Island Creek obtained title by deed or otherwise.

That purported 5 (five) acres quadrupled to 20 (twenty) acres when the deed was prepared from Island Creek to Stevens. Again, there is no legal title by deed or otherwise to the 20 (twenty) acres. The size of the property increased to 34 (thirty-four) acres by the time Mr. Whitledge conducted his "possession survey" in 2010 and again there is no illegal title vesting in Stevens or any predecessor in title.

Nor did Stevens prove that he possessed the property. He did make improvements by clearing, timbering and fencing, but only small portions of the 34 (thirty-four) acres were encroachments upon by structures or permanent improvements (such as a pond dam).

[2] Kentucky Revised Statutes.

> The Court concludes that Respondent, Gary Peyton, proved his legal title to the property in issue by virtue of his deed from Chevron U.S.A., Inc.
>
> Stevens seeks alternative relief under the theory of estoppel. Basically, this theory of recovery holds that a property owner who watched another perform improvements on property that the improver believes he owns is estopped from asserting title. But this theory fails for two reasons. First, the improvements consisted primarily of fencing, timbering and clearing. The Court can hardly adjudge one who trespasses on another by erecting fences and taking timber entitled to equitable relief. There is a small portion of a building encroaching on the property and a small portion of a pond dam, but nothing to justify equitable title. Secondly, in order to prevail, Stevens must show that he, in good faith, believes he owns the property. In fact, he has no claim to ownership whatsoever, and no basis to argue that he had a good faith belief that he owned the property.
>
> JUDGMENT
>
> Based on the foregoing, it is the Judgment of this Court that Ricky Stevens' petition to Quiet Title is DENIED. Title to the property is adjudged vested in the Respondent, Gary Peyton.

The trial court entered subsequent orders regarding Peyton's damages claim with respect to Stevens' cutting timber on the property and Peyton's attorney's fees. This appeal followed.

II. Standard of Review.

Because this appeal is from a bench trial without a jury, the trial court's findings of fact are "not [to] be set aside unless clearly erroneous with due regard being given to the opportunity of the trial judge to consider the credibility of

the witnesses." *Lawson v. Loid,* 896 S.W.2d 1, 3 (Ky. 1995) (citing CR[3] 52.01). Factual findings are not considered clearly erroneous if they are "supported by substantial evidence." *Gosney v. Glenn,* 163 S.W.3d 894, 898 (Ky. App. 2005) (citations omitted). Appellate review of legal determinations and conclusions from a bench trial is *de novo*. *Id.* (citations omitted). These standards apply to our review of property title disputes. *Church & Mullins Corp. v. Bethlehem Minerals Co*., 887 S.W.2d 321, 323 (Ky. 1992); *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002). Furthermore, "[a] fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors." *Howard v. Kingmont Oil Co*., 729 S.W.2d 183, 184–85 (Ky. App. 1987) (citing *Gatliff v. White*, 424 S.W.2d 843, 844 (Ky. 1968)).

III. Issues on Appeal.

On appeal, Stevens raises three issues. First, that the trial court erroneously quieted title in favor of Peyton, and additionally erred in failing to grant Stevens a jury trial on whether Peyton was estopped to deny Stevens' title. And second, the trial court erred in granting summary judgment to Peyton on the measure of damages to the timber. We discuss these issues in turn.

A. ***Quiet title claims.***

A quiet title action is governed by the terms of KRS 411.120. The statute provides in relevant part,

[3] Kentucky Rules of Civil Procedure.

> Any person having both the legal title and possession of land may prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. If the plaintiff establishes his title to the land the court shall order the defendant to release his claim to it.

Initially, we note the statute is clear, since it requires a "petition in equity," that the adjudication is made by the trial court without a jury. *Tarter v. Medley*, 356 S.W.2d 255, 256 (Ky. 1962).

By the terms of the statute, "and according to the decisions of this court, the plaintiff in a quiet-title action has the burden to establish his title; he may not succeed on the weakness of the title of his adversary." *Kephart v. Rucker*, 379 S.W.2d 244, 246 (Ky. 1964); *Aluminum Co. of Am. v. Frazer*, 328 S.W.2d 142, 144 (Ky. 1958) (stating "the right of a party to relief, if he has any, depends on the strength of his own title, not on the weakness of the title of the hostile claimant. A party must allege and prove legal title in himself if the answer denies his title. The burden rests upon the defendant who claims title in a counter-claim to establish the title which he has set up to defeat the plaintiff's claim of ownership[]").

In large part, Stevens' title claim is based on Hopkins County PVA records, his quitclaim deed from Island Creek Coal, and the alleged deficiencies in Peyton's title and the testimony of the surveyors.

First of all, and insofar as Stevens relies on the property valuation administrator's records, those records do not establish title. Its records are for the purpose of assessing property within the county for taxation. *See* KRS 132.410,

132.420.[4] The laws of this Commonwealth designate the county clerk's office as the repository of deeds, mortgages, wills, and other instruments affecting title to real estate. *See* KRS 382.110 (deeds, mortgages and other instruments are to be recorded in the county clerk's office) and 394.300 (recording of probated wills in the county clerk's office); *Wulftange v. McCollom*, 83 Ky. 361, 365–66 (1885) (stating "one of the principal objects of the creation of the office of county court clerk by the Constitution was to facilitate [real estate] transfers, and to perpetuate evidence of title to real property[]").

Secondly, a quitclaim deed only transfers the interest of the grantor, if any. A quitclaim deed places the "grantee upon notice that his grantor has doubts concerning the sufficiency of his title, and the deed itself is notice to him that he is getting a doubtful title." *Arnett v. Stephens*, 199 Ky. 730, 739, 251 S.W. 947, 951 (1923). As noted by the trial court, Island Creek initially advised Stevens that it had no record that it owned this property and its quitclaim deed recited no source of title. Case law supports the proposition that a quitclaim deed is sufficient to convey title, *see*, *e.g., Smith v. Graf*, 259 Ky. 456, 470, 82 S.W.2d 461, 468 (1935) (stating "a grantor's title to real property may be as effectually conveyed by a quitclaim deed as by any other form of conveyance[]"), and the Office of Attorney General has opined that a quitclaim deed is not necessarily required to recite a source of title, as required by KRS 382.110. OAG 77-278. That said, and as noted

[4]Margaret Brown, the Hopkins County PVA, testified that PVA maps and records were only made for reference of her staff and her, and that her office did not represent that her maps were accurate.

by Peyton, Island Creek admitted to having no knowledge or record of ownership of the initially claimed five-acre tract, and no deeds of record, no surveys, no maps, and no historical accounts of any kind documented ownership of the property.

In *Chandler v. Sullivan*, 265 S.W.2d 78 (Ky. 1954), Chandler purchased a piece of property, knowing that a question existed as to his vendor's title. In the ensuing action between Chandler and Sullivan, a competing land owner, the court affirmed the trial court's decision in favor of Sullivan, stating:

> The only certain thing about this record (three volumes) is the uncertainty itself. Thus, two surveyors reached different conclusions. The chancellor is an able judge, experienced in deciding controversies of this character. Doubtless he had the benefit of a personal knowledge of the lay of the land and the various locations of the former and present roads. Under such conditions we are not persuaded that the judgment is erroneous.

Id. at 79–80.

Here, the trial court was confronted with a doubtful claim, as set up by Stevens. Stevens contacted Island Creek to acquire a five-acre tract. Island Creek told Stevens it had no record of ownership. Stevens persisted and received a quitclaim deed for a "tract" which then quadrupled in size to twenty acres. Stevens fenced the property and then in 2010 hired Whitledge to survey it. Whitledge, a licensed land surveyor, testified that he performed a "possession survey," meaning simply plotting the location of existing landmarks, in this instance the fence which had been erected by Stevens. The resulting survey, now 34.2 acres (!) bore no

semblance to any historical description. We also note the complete absence of any reference by the trial court or by Stevens of any attempt to prove Island Creek's title. Stevens makes a half-hearted attempt to fit his claim to one of adverse possession based on his and Island Creek's paying taxes on the property. Mere payment of taxes, however, is insufficient to establish a claim of adverse possession. *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002).[5] The trial court, in addition, heard testimony as to Peyton's title, and from surveyors who testified as to the location of Peyton's property. Having carefully reviewed the record, we affirm the trial court's judgment quieting title in favor of Peyton.

With respect to Stevens' claim that he was entitled to a jury determination as to whether Peyton was equitably estopped to deny Stevens' title, we note, again, that a quiet title action, by statute, is designated to be tried in equity. KRS 411.120. Case law establishes that the trial court, in its discretion, may permit factual questions in such a dispute to be submitted to a jury. *Gibson v. Cent. Ky. Nat. Gas Co*., 321 S.W.2d 256, 257 (Ky. 1958). Any jury determinations in such a case are, however, advisory only and may be disregarded by the trial judge. *Poff v. Richardson*, 312 Ky. 237, 240, 227 S.W.2d 175, 176 (1950). The trial court did not err in denying Stevens' motion for a jury trial on the equitable estoppel claim.

[5] Stevens' adverse possession claim fails for many reasons, not the least of which are the failure to adversely possess a defined boundary for the requisite time period. *Moore v. Stills*, 307 S.W.3d 71, 82 (Ky. 2010).

As to Stevens' claim that the trial court erred in failing to find Peyton was equitably estopped to deny Stevens' title, again, we disagree. In *Embry v. Turner*, 185 S.W.3d 209 (Ky. App. 2006), this court discussed at length equitable estoppel and its proof in connection with a real property dispute:

> *Faulkner* [*v. Lloyd*, 253 S.W.2d 972 (Ky. 1952)] finally observes that the doctrine of estoppel can often come into play in disputed boundary cases. Specifically, the opinion notes:
>
> > In the absence of a valid boundary agreement or adverse possession, a line may nevertheless become fixed by the operation of an estoppel. A landowner who knows the true line and silently permits an adjoining owner to make substantial improvements unknowingly past the line is estopped to claim to the true boundary. The same is true if a landowner by conduct or assertions as to the boundary line is instrumental in having the improvements made past the true line.
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> *Faulkner*, 253 S.W.2d at 974, citing *Martin v. Hampton Grocery Company*, 256 Ky. 401, 76 S.W.2d 32 (1934). As stated by this court in *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005):
>
> > The essential elements of equitable estoppel are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action

> based thereon of such a character as to change his position prejudicially.
>
> *Id*. at 899 (Citation omitted). Also of particular note here, our predecessor court held in *Jones v. Travis*, 302 Ky. 367, 194 S.W.2d 841 (1946), as follows:
>
> > In extraordinary circumstances title to real property may pass by an equitable estoppel where justice requires such action. In order to establish an equitable estoppel against one asserting title to real property, the party attempting to raise it must show an actual fraudulent representation, concealment or such negligence as will amount to a fraud in law, and that the party setting up such estoppel was actually misled thereby to his injury. In all instances a clear strong case of estoppel must be made out in order to pass title by reason thereof.
>
> *Jones*, 302 Ky. at 369, 194 S.W.2d at 842.
>
> The Embrys suggest that the Turners' purported "acquiescence" in their fence for four to five years without filing any sort of legal action is sufficient to establish estoppel. However, "[m]ere acquiescence ... is not sufficient to create an estoppel. The party asserting it must have been induced to act to his detriment or misled to his injury." *Thomas v. Holmes*, 306 Ky. 632, 637, 208 S.W.2d 969, 972 (Ky.1948), citing M*ercer v. Federal Land Bank of Louisville*, 300 Ky. 311, 188 S.W.2d 489 (1945)[.]

185 S.W.3d 209, 215–16.

We have quoted at length from *Embry* because it places in context Stevens' claim that Peyton is equitably estopped from asserting his title to the land. Based on the findings by the trial court, any action or inaction by Peyton was at most "mere acquiescence." As held in *Embry*, mere acquiescence is insufficient to

create an estoppel. 185 S.W.3d at 216. The trial court did not err with respect to this issue.

B. ***Damages to Timber.***

Stevens additionally appeals the trial court's decision that he was liable to Peyton for treble damages and attorney fees by virtue of KRS 364.130(1). This statute provides:

> (1) Except as provided in subsection (2) of this section,[6] any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times the cost of any damages to the property as well as any legal costs incurred by the owner of the timber.

Stevens argues that he was not liable under the statute for treble damages because he had "color of title" and that, at a minimum, he should have been entitled to submit this claim to a jury. In *Meece v. Feldman Lumber Co*., 290 S.W.3d 631 (Ky. 2009), the court discussed the meaning of "color of title" as used in KRS 364.130(1). The court held that "color of title" requires a deed that "describe[s] the boundaries with a degree of certainty that readily allows the property to be located." *Id.* at 635. In *Meece*, even though the trespasser had a deed and possessed a long chain of title, the court held that it nevertheless did not have "color of title" since the tract could not be located without a lot of guesswork, it

[6] KRS 364.130(2) is inapplicable to this case because it requires written notice prior to cutting the timber.

was uncleared, unenclosed, without well-marked boundaries, had no natural monuments, no defined point of beginning, nor any signs of adverse possession. *Id*. at 636. The court rejected a standard that a subjective belief of ownership creates "color of title," and instead held that "under the current version of KRS 364.130, color of title is an objective standard from which a subjective belief may be formed (to be deemed an innocent trespasser in a civil suit)." *Id.*

In this case, we agree with the trial court that Stevens did not have a deed that provided "color of title." The deed did not refer to a source of title, and the description of the property in the deed did not permit accurate location or identification of the property.

IV. Conclusion.

Based on the foregoing, the Hopkins Circuit Court's Judgment quieting title in favor of Gary Peyton, and awarding him damages and attorney's fees is affirmed in all respects.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Clint Prow
Providence, Kentucky

BRIEF FOR APPELLEE:

William R. Thomas
Madisonville, Kentucky