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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000759-MR

KATHERINE HUBER AND
JAMES HUBER — APPELLANTS

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE SAMUEL TODD SPAULDING, JUDGE
ACTION NO. 16-CI-00093

GREEN COUNTY FISCAL COURT
AND COUNTY OF GREEN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

DIXON, JUDGE: Appellants, Katherine and James Huber, appeal from an order of the Green Circuit Court granting Appellees', the Green County Fiscal Court and Green County (collectively "the County"), motion for summary judgment and dismissing the Hubers' action as being barred by the statute of limitations. For the

reasons set forth herein, we reverse the order of the Green Circuit Court and remand this matter for further proceedings consistent with this opinion.

The Hubers own approximately 75 to 80 acres of land located on Dewey Kidd Road in Green County, Kentucky. According to the Hubers, when they purchased their property in 1986, Dewey Kidd Road extended southward from Willie Rice Road and stopped just inside their northern property line. Over the next several years, the Hubers claim that they constructed a nine-foot wide private roadway from where Dewey Kidd Road ended southward through the middle of their property to their southern boundary. The Hubers contend that they were responsible for all maintenance of said roadway.

In August 2009, the County chipped and sealed not only Dewey Kidd Road but also the roadway extending across the Hubers' property. Joseph Huber, the Hubers' son who lives on the property, stated in his deposition that upon discovering that the County had chipped and sealed the roadway on their property, he contacted the Green County Attorney, Russell Goff, to voice his parents' objection to the intrusion upon their private property. According to Joseph, Goff told him that the county road crew that was doing the work on Dewey Kidd Road had contacted him (Goff) to let him know that the road work was finished and that they had additional material leftover. Goff allegedly stated to Joseph that he had directed the crew to chip and seal the roadway that was on the Hubers' property so

that the extra material did not go to waste. According to Joseph, Goff acknowledged that the County should not have encroached on the Hubers' property without their permission but that he thought he was doing them a favor by improving their roadway. Joseph testified that Goff apologized, and that he thought the matter was closed.

Subsequently, sometime in 2012 or 2013, Joseph stated that he returned home to find that the roadway on the Hubers' property had been treated with lime. He contacted then-Green County Judge Executive, Mary Ann Blaydes Baron, who told him that she was not aware of any county maintenance performed on that roadway. Joseph claimed that Baron nevertheless sent a road crew out to remove the lime from the roadway. The Hubers maintain that with the exception of two incidents where the County plowed snow from Dewey Kidd Road all the way through their property for the benefit of an adjacent tenant, the County performed no other maintenance on their roadway for the next several years.

In July 2016, the County dumped a pile of rocks on the Hubers' property. A crew foreman allegedly told Joseph that the roadway running through the Hubers' property was a county road and the County intended to make repairs to such. Shortly thereafter, the County allegedly removed the Hubers' gates and fencing and began preparations to widen the roadway. Apparently, over the next few months the situation between the Hubers and the County escalated, and the

Hubers claim that they realized the County was attempting to take their private property.

On September 2, 2016, the Hubers filed a complaint against Green County and the Green County Fiscal Court. On February 17, 2017, the County filed a motion for summary judgment arguing that the Hubers admitted that the disputed roadway was chipped and sealed on August 28, 2009, and that pursuant to *Cary v. Pulaski County Fiscal Court*, 420 S.W.3d 500 (Ky. App. 2013), they had five years from that date to file any action against the County. As the Hubers did not file their complaint until September 2016, the County asserted that their action should be dismissed as being time-barred.

The trial court held a hearing on the County's motion for summary judgment on March 1, 2017. The following day, the Hubers retained new counsel, who immediately filed a motion to stay the proceedings until he had a chance to review the file. The motion was denied and, on March 3, 2017, the trial court granted the County's motion for summary judgment. The Hubers thereafter filed a motion to set aside or vacate the trial court's order and requested an evidentiary hearing to determine: (1) whether a governmental agency of Green County committed a taking of the Hubers' private property and, if so (2) when did they know, or should have known, such taking occurred. Attached to the motion was an

affidavit from Joseph Huber. The trial court denied the motion and this appeal ensued.

On appeal, the Hubers argue that the roadway that runs through their property is not, in fact, Dewey Kidd Road but instead is private property that they have developed and maintained. They contend that the trial court erred in finding that the County's single act of chipping and sealing the disputed roadway on August 28, 2009, was a "taking" of their property and, as such, they had five years from that date to file any type of reverse condemnation action. The Hubers assert that a "taking" is not consummated by the happening of a single event, or the occurrence of any specific act, taken by a government entity. Rather, the actions by the state, both prior to and subsequent to an event or act, must unequivocally demonstrate to the landowner the government's intention to take possession and control of the landowner's private property. Furthermore, the Hubers point out that once the state has taken possession and control of the property, it must take substantive steps to open the property for public use, which the County has not done. The County, on the other hand, argues that the roadway crossing the Hubers' property is simply an extension of Dewey Kidd Road and is part of the County road system. Notwithstanding, the County argues that the Hubers were on notice as of August 28, 2009, that the County intended to take that portion of the roadway and that they had five years to contest such action.

Our standard of review on appeal of 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 shall be granted "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 as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[1] 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

"Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). "So we operate under a de novo standard of review with no need to defer to the trial court's decision." *Id.* Under that review, summary judgment should only be granted "when, as a matter of law, it appears that it would

[1] Kentucky Rules of Civil Procedure.

be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

Reverse or inverse condemnation is "the term applied to a suit against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are used." *Commonwealth, Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984); *see also Commonwealth, Dept. of Highways v. Gilles*, 516 S.W.2d 338, 339 (Ky. 1974).

> [W]here an entity possessing the power of eminent domain prematurely enters upon the [premises] of the condemnee, the exclusive remedy of the landowners is based on Kentucky Constitution, Section 242, which provides that "just compensation for property taken" shall be made. This remedy is frequently referred to as

> "reverse condemnation." The measure of damages is the same as in condemnation cases.

Witbeck v. Big Rivers Rural Electric Cooperative Corp., 412 S.W.2d 265, 269 (Ky. 1967), *overruled on other grounds in Commonwealth, Dept. of Highways v. Stephens Estate*, 502 S.W.2d 71, 73 (Ky. 1973) (citations omitted). A plaintiff in a reverse condemnation action may, instead of opting to receive damages, ask for equitable or injunctive relief, including the recovery of the property at issue. *See Stearns*, 678 S.W.2d at 381 (citing *Keck v. Hafley*, 237 S.W.2d 527 (Ky. 1951)).

Nevertheless, there are limits on a landowner's right to bring a reverse condemnation action against the governmental agency that has committed a taking. "Recovery [is] permitted . . . on the theory that when the acts of the state constitute[] a taking of property, the law [implies] an agreement to pay for it." *Curlin v. Ashby*, 264 S.W.2d 671, 672 (Ky. 1954). Because the obligation is viewed as an implied promise to pay, the action must be brought within five years from the date of the accrual of the action (i.e., the date of the "taking") pursuant to KRS 413.120(1). *See Cary v. Pulaski County Fiscal Court*, 420 S.W.3d at 518.

The trial court relied on the decision in *Cary*, noting that the factual scenario herein is "virtually identical" to that presented in *Cary*. The facts therein were that sometime between 2001 and 2003, a Pulaski County road crew graveled and widened a roadway that traversed the appellants' property. Thereafter, the county occasionally mowed the area around the road. Sometime in 2005, another

Pulaski road crew then chipped and sealed the disputed roadway. One of the appellants testified in her deposition that shortly after the county chipped and sealed the roadway in 2005, she visited the county courthouse and located documents indicating that the county considered the roadway to be part of its system of county roads. As a result, she visited the county judge executive and expressed her disagreement. According to the appellant's testimony, the county judge executive advised her "to get a lawyer." Nevertheless, the appellants waited three years to file their complaint.

The trial court in *Cary* granted the defendant fiscal court's motion for summary judgment finding that the plaintiffs were barred by the five-year statute of limitations in which to bring a reverse condemnation action. The trial court therein concluded,

> The uncontroverted evidence establishes that Grace observed, made no objection to, and acquiesced in the improvement and construction of Taylor Cemetery Road by county road officials at all relevant times. As noted by the circuit court,
>
> > Ms. Cary's testimony on this particular point is unassailable. She learned of the county's maintenance of the roadway long before initiating this litigation:
> >
> > > Q. Now at the time the County road crew was out working on the roadway did you, did you know that they were there at that time?

A. I did not know it was County.

Q. Okay, did you make someone lunch at that time when they were working on the roadway?

A. Yes.

Q. Who did you believe was working on the roadway?

A. Probably County.

. . .

Q. Okay. When, when the County initially came in and worked on it the day you gave them the sandwiches what did they do to the roadway at that time? What improvements did they make?

A. Uh, they graded it, ditched it, put in at least two tiles. One went across and one went for a gate.

Q. Did they gravel it at that time?

A. Yes, they graveled.

Q. Okay. When did, um, when did you first learn that the county was maintaining the roadway?

A. When they chipped and sealed it.

Q. Now how long would that have been after they were there and you served them lunch?

A. I think a couple of years.

Q. Did you hire a lawyer at that time?

A. Not at that time.

> Thus, Ms. Cary was aware that the public funds were being expended to improve and maintain Taylor Cemetery Road. Therefore, regardless of any possible error made by the Fiscal Court in adopting the Taylor Cemetery Road into the county system, the Carys lost their right to oppose the improvement to the road when they allowed it to be mowed, graded, ditched, graveled, chipped and sealed and allowed "at least two tiles" to be put in.

Id. at 518. The trial court herein similarly concluded that the County's act of chipping and sealing the Hubers' roadway on August 28, 2009 constituted a "taking," and, thus, they had five years from that date to bring a reverse condemnation action against the County. We must disagree.

We are of the opinion that the facts herein, viewed in the light most favorable to the Hubers, are vastly different from those presented in *Cary*. Joseph Huber testified in his deposition that when he discovered that the County had chipped and sealed the disputed portion of the roadway, he contacted the county attorney, who apologized and stated that it would not occur again. In fact, according to Joseph, the county attorney explained that they had been working on an intersecting roadway and simply used the extra material on the Hubers' property. Further, Joseph vaguely referenced in his deposition, but more specifically detailed in his affidavit, the incident in 2012 or 2013 when the County applied lime to the roadway. Joseph contacted the then-county judge/executive

who apologized and had the lime removed. Finally, Joseph stated that in August 2016, the County dropped a pile of rocks on the property and attempted to remove the gates and fencing that had been erected by the Hubers to restrict access to their property. One month later, they filed their complaint.

Unlike the appellants in *Cary*, who, when the county chipped and sealed their property, finally raised an objection and were specifically told to "get a lawyer," the Hubers were allegedly given assurances in 2009, and again in 2012 or 2103, that the County would not again enter their property. Clearly, if the Hubers' testimony is to be believed, one could reasonably conclude that the Hubers were not placed on notice that the County was attempting to take possession and control of their roadway until 2016, when it began removing their fencing and gates.

Unfortunately, we necessarily must comment on the representation the Hubers received during the majority of the proceedings below. It is apparent from the pleadings and videos of the hearings that the Hubers' counsel was unable to provide them adequate representation. The only depositions taken were those by the County. No relevant law was cited in the pleadings. The only questions asked during the hearings were those prompted by Katherine Huber. Although the trial court went out of its way to afford the Hubers the opportunity to be heard, it is obvious that counsel failed to properly present a case or defend against the County's motion for summary judgment.

The County has argued in this Court that we should not consider Joseph Huber's affidavit because it was attached to the Hubers' motion to alter or vacate and was thus tendered subsequent to the summary judgment order. In fact, however, the Hubers' counsel on appeal correctly points out that the information contained in that affidavit is actually found in the record, albeit not as concisely presented as it was in the affidavit. Prior counsel simply never raised the necessary issues or pointed out the relevant evidence in the trial court. It was not until the hearing on the Hubers' motion to alter or vacate the summary judgment order that substitute counsel adequately argued that issues of material fact existed as to what constituted a taking and when the Hubers knew or should have known that the County was asserting possession and control of their private property. While the County argues that facts in the record cast great doubt on the "gratuitous comments" in Joseph's affidavit, we would note that "[w]here questions exist regarding the credibility of witnesses and the weight of evidence, such matters must await trial and not be determined on motion for summary judgment." *Amos v. Clubb*, 268 S.W.3d 378, 382 (Ky. App. 2008) (citing *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273 (Ky. 1991)).

Unquestionably, the Hubers and the County greatly dispute the nature of the roadway on the Hubers' private property. The County contends that the evidence it produced clearly establishes that the disputed roadway is merely an

extension of Dewey Kidd Road and that it has continuously maintained it through the years. The Hubers, on the other hand, argue that they developed and maintained the roadway on their property, and when the County did take action, such as what occurred in 2009, they protested and were given assurances that such would not again occur. Although there is no dispute that that the County chipped and sealed the roadway on August 28, 2009, we believe there is a material issue of fact as to whether that act constituted a taking so as to place the Hubers on notice that the County was asserting control and possession of their property.

It is well-settled that even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render summary judgment if there is any issue of material fact. *Puckett v. Elsner*, 303 S.W.2d 250, 251 (Ky. 1957). The trial court must examine the evidence, not to decide any issue of fact, but only to determine if a real issue exists. "It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try." *Steelevest*, 807 S.W.2d at 480.

Viewing the evidence in the light most favorable to the Hubers and resolving all doubts in their favor, we cannot conclude, as a matter of law, "that it would be impossible for [the Hubers] to produce evidence at the trial warranting a judgment in [their] favor . . . ." *Id.* at 483 (quoting *Paintsville Hosp. Co.* 683 S.W.2d at 256). Accordingly, the trial court erred in granting the County's

summary judgment motion and finding that the Hubers' action was barred by the statute of limitations.

For the reasons set forth herein, the order of the Green Circuit Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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