

RENDERED: OCTOBER 5, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001030-MR

JOHN ROSQUIST,
JUDY ROSQUIST AND
EAST KENTUCKY PAVING

APPELLANTS

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 11-CI-00888

CYNTHIA CLARK AND
EUGENE PHILLIPS

APPELLEES

OPINION VACATING AND REMANDING

** ** * * * **

BEFORE: COMBS, JOHNSON AND J. LAMBERT, JUDGES.

COMBS, JUDGE: John and Judy Rosquist appeal from the partial summary judgment entered on June 23, 2014, by the Scott Circuit Court; the findings of fact, conclusions of law, and order of the circuit court entered on January 24, 2017; and the order and final judgment of that court entered in favor of the Rosquists'

neighbors, Cynthia Clark and Eugene Phillips, on May 22, 2017. Having carefully studied the record and the applicable law, we vacate and remand.

This case involves a dispute over lakefront property in a gated community, Victoria Estates, in Scott County. The following material facts are undisputed. Lot 89 and Lot 92 share the boundaries of a narrow cove adjacent to a private fishing lake. Lot 92 is owned by the Rosquists, who purchased the property in November 1999.

Before the Rosquists purchased Lot 92, the lakefront portion of Lot 89 had been excavated by a contractor, Burton Runyon. Later, but still before the Rosquists purchased Lot 92, a portion of Lot 92 was also excavated by Runyon. Runyon's second excavation was undertaken in an effort to widen the cove. After the cove was widened (but not before), Lot 92 enjoyed lake access. The Rosquists bought Lot 92 (again, November 1999) and floated a dock at the cove's edge.

Clark purchased Lot 89 in November 2006. In September 2011, she and Phillips, her husband, filed an action against the Rosquists. In their complaint, Clark and Phillips alleged that the Rosquists encroached upon Lot 89 when they caused the cove to be widened. They alleged a continuing trespass unabated specifically with respect to the dock floating in the cove and the location of a fire pit and rock wall. They sought restoration of Lot 89 to its original condition and damages to include the period before Clark purchased Lot 89. Separately, Clark

and Phillips alleged a violation of the covenants governing the community. The Rosquists denied the substantive allegations against them and asserted the statute of limitations as an affirmative defense.

After a period of discovery, the Rosquists filed a motion for summary judgment. In an order entered on June 23, 2014, the trial court observed that excavations of the cove had occurred prior to the purchase of either Lot 89 or Lot 92. It determined that the right to recover for trespass does not pass with the conveyance of real property and that Clark “bought the property subject to the altercations [sic] which occurred prior to their [sic] purchase.” The court concluded that the Rosquists were entitled to summary judgment with respect to the issue of damages to the property caused by the excavation of the lake prior to Clark’s purchase of Lot 89. The court denied summary judgment with respect to the allegation concerning a violation of the development’s covenants and the allegation that the dock and other structures encroached upon Lot 89.

Over the objection of the Rosquists the trial court resolved to conduct a bench trial to resolve the remaining issues. The trial was conducted on February 29, 2016. In an order entered on January 24, 2017, the trial court noted that Runyon testified that the developer or a real estate agent had asked him to excavate at Lot 92. The court found that John Rosquist, too, had been “actively involved in the expansion of this cove and subsequently placed a boat dock on that portion of

the cove that is over [Lot 89].” The court determined that the expansion of the cove constituted a continuing trespass and that Clark and Phillips were entitled to have Lot 89 restored to its original configuration. It also concluded that the Rosquists had violated provisions of the community’s restrictive covenants by failing to secure the approval of a committee of the homeowners’ association for the expansion of the cove, the alteration of the landscaping, or the design and placement of their dock. The trial court entered a mandatory injunction, and in a final order entered on May 22, 2017, the court selected the bid of McCauley Excavating, LLC, to undertake the restoration project at Lot 89 at a cost of more than \$65,000. This appeal followed.

On appeal, the Rosquists argue that the trial court erred by concluding: (1) that any trespass was actionable; (2) that Clark and Phillips were entitled to an equitable remedy as a result of the Rosquists’ violation of the community’s restrictive covenants; and (3) that Clark and Phillips were entitled to injunctive relief to remove a cloud upon the title to their property. We agree with each of these contentions.

A civil action for trespass is governed by a five-year statute of limitations. KRS¹ 413.120. Distinctions between a temporary or continuing trespass and a complete or permanent trespass are important not only in

¹ Kentucky Revised Statutes.

determining the correct measure of damages but also the date upon which the cause of action accrued.

A structure is permanent “if it cannot be readily remedied, removed or altered at reasonable expense, or is durable and meant to last indefinitely” while “if the structure can be changed or repaired or remedied at reasonable expense, it is temporary.” *Wimmer v. City of Ft. Thomas*, 733 S.W.2d 759, 761 (Ky. App. 1987), citing *Ferguson v. Utilities Elkhorn Coal Co.*, 313 S.W.2d 395 (Ky. 1958).

The date the cause of action accrues for a permanent trespass is the “date the structure was completed and its operations commenced, or the date of the first injury, or the date it became apparent that injury would occur.” *Id.* If

the trespass or invasion of the landowners’ property is a continuing one, damages are recoverable for the five-year period immediately preceding the initiation of the action. *Id.*, citing *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755 (Ky. 1965).

Damages cannot be recovered for any part of the injury that occurred more than five years before commencement of the action.

In this case, the circuit court determined in its initial order granting partial summary judgment that the excavations of the cove had occurred prior to the purchase of either Lot 89 or Lot 92. It observed that the right to recover for trespass does not pass with the conveyance of real property and that Clark purchased the property subject to the durable changes in the land that were

wrought before she bought Lot 89. It concluded that the Rosquists were not liable for any damage to the property caused by the excavation of the cove prior to Clark's purchase of Lot 89 in 2006. Based upon the undisputed facts, these conclusions are sound and appear to be based upon the court's determination that the trespass was a permanent one.

The circuit court's later determination that the trespass was a continuing one is incongruent. However, even if the trespass is deemed to have been continuous in nature, the statute of limitations would still operate to bar all claims for damages occurring more than five years prior to the date upon which the complaint was filed. All excavation at the cove was completed before the Rosquists purchased Lot 92 in 1999. Clark purchased Lot 89 in November 2006. She and Phillips filed their complaint in September 2011. In order to establish a cause of action for damages under these circumstances, Clark and Phillips would have to show a reduction in the fair market value of Lot 89 within the five-year limitations period immediately preceding September 2011. Clark purchased Lot 89 during this five-year period. Neither she nor Phillips showed that the second excavation undertaken at the cove before Clark purchased Lot 89 adversely impacted the market value of Lot 89 after she purchased it. Clark and Phillips have not demonstrated that they have suffered an injury as a result of the alleged

trespass. Consequently, because they cannot establish a *prima facie* case they are not entitled to relief on this basis.

The Rosquists next contend that the trial court erred by concluding that Clark and Phillips are entitled to equitable relief based upon the Rosquists' violation of the community's restrictive covenants. We agree that it erred on this issue as well.

Restrictive covenants were imposed upon the building lots in Victoria Estates through a declaration of covenants, conditions, and restrictions recorded against each parcel. The declaration governing each lot provides that:

no construction [including staking, clearing, excavation, grading and other site work] and no plantings or removal of plants, trees or shrubs or buildings . . . shall take place except in strict compliance with this article . . . until the approval of the appropriate committee has been obtained.

It also provides that the "plans and designs of all docks shall be submitted to the [modifications committee] for approval as applicable."

In its judgment, the trial court noted as follows: "[i]t is undisputed that there was no approval sought by any committee of the Home Owners Association for the expansion of the cove, the alteration of the landscaping of these two lots, the placement of a dock or the design of a dock by any party including the Rosquists." It concluded that Clark and Phillips were entitled to enforce the

covenants against the Rosquists and that the remedy for the violations was restoration of Lot 89 to its original contours.

Restrictive covenants are generally enforceable by any grantee against any other. *Black v. Birner*, 179 S.W.3d 873 (Ky. App. 2005). In this case, however, Clark and Phillips seek to enforce the covenants against the Rosquists who were not grantees of Lot 92 **at the time** that the excavation of the cove was undertaken. A proceeding in equity does not provide a mechanism for the enforcement of restrictive covenants against parties who were not owners of the real property burdened by those covenants. Moreover, the failure to secure approval for the design and placement of the dock is a mere technical violation -- slight and inconsequential -- as there is no allegation that the dock fails to meet the structural and aesthetic requirements established by the covenants. There is no allegation that the design or placement of the dock affects the ongoing interests of the community in any way.

It has been noted that the maxim that “equity aids the vigilant, not those who sleep on their rights” has particular force when the injunctive power of the Court is invoked. *Greene v. Eversole*, 177 S.W.2d 559, 560 (Ky. 1944). Clark purchased the property after the cove was excavated and the Rosquists’ dock was already afloat. Nevertheless, she and Phillips waited nearly five years before seeking an injunction against the Rosquists. There is no substantial benefit to any

property owner to require the removal of the dock, and we are persuaded that it would be inequitable under these circumstances to require the Rosquists to restore the contours of Lot 89.

Finally, the Rosquists argue that the trial court erred by concluding that Clark and Phillips were entitled to a mandatory injunction requiring the restoration of the original contours of Lot 89 in an effort to remove a cloud upon their title. Again, we agree that the trial court erred in so concluding.

Clark and Phillips have exclusive possession of Lot 89 to the point that the lake meanders, and they cannot show legal title to anything beyond the water's edge. The Rosquists have not asserted an adverse claim to any portion of Lot 89, and their decision to float a dock at the edge of the cove does not constitute an act sufficient to create a cloud upon the title to Lot 89. Consequently, Clark and Phillips have not shown that they are entitled to an equitable remedy against the Rosquists. Under the circumstances of this case, the equitable powers of the court cannot be used to enjoin a trespass. *Barker v. Warren*, 6 Ky. L. Rptr. 86 (Ky. 1884), citing *Trustees v. Berry*, 2 J.J. Marsh. 483 (Ky. 1829).

By separate order, we deny the motion of Phillips and Clark to strike portions of the Rosquists' brief on appeal. Part of that motion is rendered moot because we have not considered those disputed portions of the brief in preparation of this opinion. The remainder of the motion is denied as not well taken since the

Rosquists properly preserved for our review their contentions as to the errors of the trial court.

The order of the Scott Circuit Court is vacated and remanded for entry of appropriate orders consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

D. Duane Cook
Georgetown, Kentucky

BRIEF FOR APPELLEE:

Neil E. Duncliffe
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