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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001645-MR

WARWICK FOUNDATION, INC. APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 14-CI-00357

CARL E. HEBROCK; AND
SALLY L. HEBROCK APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: The Warwick Foundation, Inc. (Warwick) appeals from an order of the Mercer Circuit Court granting summary judgment to the appellees, Carl and Sally Hebrock (collectively "the Hebrocks"). The trial court found that the Hebrocks are the owners of an easement by express grant through Lot #1 of

Warwick's property, as well as an easement by express grant bisecting several other tracts owned by Warwick. Warwick argues that the Hebrocks are not the rightful owners of any easement, by express grant or otherwise. Therefore, Warwick contends that it was entitled to summary judgment in its favor.

We find no issue of material fact as to the Hebrocks' ownership of an express easement through Lot #1 of Warwick's property. However, we find no evidence to support the existence of an express easement crossing other tracts owned by Warwick. At most, any easement across those tracts are by implication or prescription. Because those issues were not ripe for summary judgment, we affirm in part, reverse in part, and remand for further proceedings.

Background

The dispute in this case originates from the division of seven (7) lots of the James McMurry lands (hereafter, McMurry lands) in Mercer County, Kentucky. In September 1902, James McMurry devised these lands to his heirs. In particular, he conveyed Lot #5 of the McMurry lands to Helen Hurst. Her deed contained language granting the property free access to the family graveyard for burying purposes, a right of way along the N 77 ½ E property border to the Kentucky River, and a right to a passway through Lot #1 of the McMurry lands to the public road. While the language of the 1902 deed expressly granted an

easement along the N 77 ½ E line to the river, it failed to specify the location of the passway through Lot #1.

The heirs of Helen Hurst, referred to collectively as "T.E. McMurry, et al." in the record, conveyed Lot #5 to Finley and Mary Belle Britton by deed on April 19, 1948. That deed also contained language granting Lot #5 the right to a passway through Lot #1 of the McMurry lands out to the road. In January of 1950, Finley and Mary Belle Britton conveyed this property to Gilbert Britton. This deed contained the same language in its description. Subsequently, following the passing of Gilbert Britton, Myrtle Britton received the deed to Lot #5 by way of Gilbert Britton's will recorded in the Anderson County Clerk's Office.

In 1978, Clay Lancaster purchased Lot #1 of the McMurry lands, which would be the formative property of the Warwick Foundation. Lancaster's deed to Lot #1 contained no reference to an easement granted to Lot #5. Upon the death of Clay Lancaster in 2000, his will established the Warwick Foundation to preserve his legacy. Warwick has maintained ownership of Lot #1 since his passing.

The Hebrocks purchased Lots #5 and #6 of the McMurry lands from Myrtle Britton on October 30, 2002. The deed conveying these lands to the Hebrocks contained the same language as that of every other deed in the chain of title for Lot #5 regarding the right to a passway through Lot #1. Additionally, in

2002, Warwick purchased Lots #2, #3, #4, and #7 of the McMurry lands from Marion T. Mershon and Jennie Mae Mershon. The Mershon-Warwick deed contains language indicating that Lot #5 of the McMurry lands has a right of way over Lot #1. That deed also provides for a right of way over Lot #4 to the Kentucky River so long as Lot #5 is owned by McMurry heirs. However, this is the only deed in Warwick's chain of title appearing to limit the express easement in this way. The McMurry-Mershon deed only limits the easement's existence to ownership by McMurry heirs inasmuch as it pertains to a right of way across Lot #4 to the river.

The parties agree that there is a narrow gravel road from the Kentucky River along the N 77 ½ E line and diverting onto Lot #7 of the McMurry lands. This road, which has existed at least since the Hebrocks first took up residence on Lot #5, leads from Lot #5 along the N 77 ½ E line along the property lines between Lots #3, #4 and #7. The road then diverts through Lot #7 and Lot #1 out to the public road. In 2012, Carl Hebrock engaged the services of Dan Phillips, sole owner and operator of DPS Land Surveyors, after some concern regarding his access to the gravel road. Phillips testified that, because he maintained a personal relationship with the Hebrocks, he had elected to perform a retracement survey of the McMurry lands on their behalf free of charge. Phillips testified that Carl

Hebrock's involvement in the survey was of no real consequence, save for the fact that he commissioned its performance.

Phillips' deposition testimony specified that the retracement survey, referenced extensively in both briefs and throughout the record, would not effectively grant the Hebrocks any sort of easement. Rather, his retracement would be a mapping based upon deed descriptions and his physical survey of the land. Notwithstanding that testimony, Phillips' completed retracement survey contains a clear indication that Lot #5 of the McMurry lands is the dominant estate to an express easement running through Lot #1. Phillips' deposition testimony is indicative of this opinion. The evidence received from Phillips would suggest that an easement does exist through Lot #1. However, he did not express a clear opinion as to Lot #5's right to an express easement through Lots #2, #3, #4, or #7. At the most, any such easement is only implied from the location of the aforementioned gravel road found in his retracement survey.

The Hebrocks brought this suit in December of 2014 seeking declaratory relief regarding the existence of their passway through Lot #1 and the other intervening lots of the McMurry lands. The Hebrocks further sought injunctive relief from Warwick's obstruction of the passway and damages associated with their loss of use and enjoyment of property. Warwick filed its answer in January of 2015. In its answer and counterclaim, Warwick sought

declaratory relief that no such easements existed, along with injunctive relief precluding the Hebrocks from using the road.

Following cross-motions for summary judgment, the trial court entered an order ruling in favor of the Hebrocks, finding them to be the owners of an express easement granting Lot #5 the right to a passway through Lot #1 of the McMurry lands. However, the trial court found that an issue of fact exists as to the location of that passway. Consequently, the court reserved that issue for later adjudication. The court also found that the Hebrocks are the owners of an express easement which tracks along the N 77 ½ E line, bisecting several other tracts of land owned by Warwick and diverting onto Lot #7. This appeal follows.

Standard of Review

On appeal, Warwick contends that the trial court erred by granting summary judgment in favor of the Hebrocks. The standard of review of a summary judgment on appeal 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." CR[1] 56.03. To make this determination, the court must view the record in the light most favorable to the nonmoving party. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991)). Accordingly, we will

[1] Kentucky Rules of Civil Procedure.

affirm an order granting summary judgment only where it appears that it would be impossible for the nonmoving party to present evidence at trial which might produce a judgment in their favor. *Id.*

Issues

As an initial matter, we note that the trial court's summary judgment order of September 13, 2017 included finality language required by CR 54.02. But even when the recitation is present, an appellate court must determine whether the trial court rendered final adjudication upon one or more claims in litigation. *Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722, 726 (Ky. 2008) (citing *Hale v. Deaton*, 528 S.W.2d 719, 722 (Ky. 1975)). In the current case, the trial court conclusively determined the existence of an express easement through Lot #1 and the intervening lots, reserving only the issue of the location of that easement. Under the circumstances, we find that the trial court properly designated its summary judgment order as final and appealable.

Having made this determination, it is apparent that there are two issues to be resolved in this case. The first is whether the trial court correctly found no genuine issue of material fact as to the existence of an express easement granting Lot #5 of the McMurry lands a passway through Lot #1; the second is whether the trial court correctly found no genuine issue of material fact as to the existence of an express easement which begins along the N 77 ½ E line,

intersecting multiple properties belonging to both Warwick and the Hebrocks, and diverts onto Lot # 7. Express easements may only be created by "[a] written grant consistent with the formalities of a deed[.]" *Loid v. Kell*, 844 S.W.2d 428, 429-30 (Ky. App. 1992). In accordance with that rule, we will first resolve the issue of a passway through Lot #1 of the McMurry lands, and then whether an express easement exists which would grant Lot #5 rights of ingress and egress over Lots #2, #3, #4, and #7 of the McMurry lands.

I. Express Easement Through Lot #1

While the creation of an express easement requires a written grant consistent with the formalities of a deed, it is not always necessary for that written description to be present in the chain of title for both the dominant and servient estates. *Dukes v. Link,* 315 S.W.3d 712, 715-717 (Ky. App. 2010). Where a dominant and servient estate share a common grantor, the conveyance of an express easement need not appear in the chain of title of the servient estate. *Id.* at 716. Where a title search back to the common grantor would reveal the easement, it is not necessary for language conveying an express easement to appear in the servient estate's chain of title. *Id.* at 717. Under such circumstances, the owner of a servient estate has adequate notice of the express easement so as to validate the burden it imposes. Furthermore, land purchasers will not be considered purchasers without notice for failure to exercise due diligence in discovering encumbrances on

the land. *Louisville Chair & Furniture Co. v. Otter*, 219 Ky. 757, 294 S.W. 483, 486 (1927).

Here, Warwick essentially argues that there is no evidence to suggest that the Hebrocks or their predecessors in title are or ever were the owners of any express easement interest in a passway through Lot #1 of the McMurry lands. However, every deed throughout the Hebrocks' chain of title, dating back to 1902, contains language which consistently grants Lot #5 right to a passway through Lot #1. Therefore, the easement has been created by virtue of formalities consistent with that of a deed. Furthermore, the lands in question here are derivative of a common grantor, James McMurry, in 1902. A title search back to the common grantor here should reflect the granting of a passway through Lot #1 to Lot #5. Warwick produced no evidence that such a title search was conducted to no avail.

To the contrary, the Hebrocks presented evidence to suggest that Lot #5's right to a passway through Lot #1 is actually indicated in Warwick's chain of title. In fact, the Mershon's 2002 deed to Warwick explicitly refers to this easement in Warwick's deed to Lot #2. While that deed description does appear to limit the easement's scope with respect to Lot #5,[2] the deed contains no limitation

[2] The Mershon-Warwick deed contains the following language with respect to the easement:

> There is also conveyed the right of way now used therefor over Lot #1 of the James McMurry lands; subject to the reservation of the McMurry graveyard located on said lands together with the McMurry heirs' right of ingress and egress to same; further subject

on the express easement through Lot #1. Under the circumstances, we agree with the trial court that there was ample evidence of an express easement across Lot #1 in Warwick's chain of title, although it does not precisely match the language in Hebrock's chain of title.

Warwick further posits in some detail that the Hebrocks are perfectly capable of reaching the public road without making use of any passway. Indeed, this would preclude the Hebrocks from establishing an easement by necessity. However, it is clear that the Hebrocks do in fact own an express easement interest in a passway through Lot #1 of the McMurry lands. An express easement generally lasts forever unless terminated or extinguished by an act of the parties such as abandonment, conveyance, or merger. *Scott v. Long Valley Farm Kentucky, Inc.*, 804 S.W.2d 15, 16 (Ky. App. 1991). Consequently, the existence of an alternate means of reaching a right of way's destination cannot extinguish an express easement. *Id.*

Therefore, we find that the trial court correctly found no genuine issue of material fact as to the Hebrocks' right to a passway through Lot #1 by way of express grant. But since the location of that easement is still an issue of material

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to the right of ingress and egress for the owners of Lot #5 and to and from the Kentucky River over Lot #4 so long as Lot #5 is owned by any of the McMurry heirs.

fact, the trial court correctly reserved said issue to be addressed on remand. On this matter, we note only that, when determining the location of an easement, a reasonably convenient and suitable location is always presumed to be intended. *Texas Eastern Transmission Corp. v. Carman*, 314 S.W.2d 684, 687 (Ky. 1958).

II. Express Easement Along the N 77 ½ E Line

The second issue presented is whether the trial court properly found that the Hebrocks are the owners of an express easement from Lot #1 across Lots #2, #3, #4, and #7 along the N 77 ½ E line to Lot # 5. When interpreting an express easement, it is of vast importance to determine the intent of the conveying party. Generally, where the language of a conveying instrument is not ambiguous, intent of the parties at the time of conveyance should be read from the page and determined based on the context of the agreement. *Id*. The intent of the original parties will inform the easement's location, its purpose, and its scope. This implies that where the language of a conveying instrument is ambiguous, then the intent of the original parties must be determined based upon evidence extraneous of the document itself.

Although the McMurray Lands were subdivided at the same time in 1902, the deed to Lot #5 only refers to an express easement across Lot #1. However, Lot #5 does not share a common boundary with Lot #1, thus requiring access across the intervening lots. As previously noted, the Mershon-Warwick

deed refers to a right of ingress and egress across Lot #4 to the Kentucky River so long as Lot #5 is owned by McMurry heirs. Furthermore, the 1902 source deeds of Lot #2 and #4 each specify that those lots have free access to the family graveyard "a passway through Lot No. 1 to the public road." The 1902 source deed of Lot #3 includes similar language regarding access to the graveyard but reserves a passway through Lot #6 to the public road.

When these descriptions are read together, the reserved passway could encompass the gravel road that lies along the N 77 ½ E line and diverts onto Lot #7. This reading would be consistent with the apparent intent of the McMurray heirs to preserve their common access to the graveyard and to the public road. Indeed, if Lot #5 does not have a right of access across the intervening lots, then the easement which was undoubtedly intended through Lot #1 effectively leads to nowhere, thus defeating the clear intention of the original grantor. However, the parties have not referred this Court to any source deeds reserving a similar passway from Lot #7 to the public road.

Contrary to the conclusion reached by the trial court, such a right can only exist by implication of the deeds rather than by an express grant. Based upon these facts, we conclude that a latent ambiguity exists concerning the scope of the easement granted to Lot # 5. A latent ambiguity is one which is not apparent based upon the words of an instrument alone but presents itself when connected with

collateral facts. *Vorherr v. Coldiron*, 525 S.W.3d 532, 542-43 (Ky. App. 2017). Latent ambiguities in the interpretation of parties' intentions when creating an easement generate questions of material fact. *Id.* When faced with such an ambiguity, the court must consider all parol evidence so as to determine the intent associated with a written instrument's construction. *Id.* But since parol evidence is necessary to explain a latent ambiguity, summary judgment on that issue is generally not appropriate. *Id.* at 544. Hence, we find that the trial court erred in granting summary judgment as to the existence of an express easement along the N 77 ½ E line.

In addition to their claim of an express easement, the Hebrocks also claimed that they were entitled to an easement by implication or by prescription. An easement by implication may exist under two legal theories: (1) quasi-easement and (2) easement or way by necessity. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001). A quasi-easement arises from a prior existing use of land; whereas, an easement by necessity is based on public policy and an implied intent of the parties favoring the use and development of land as opposed to rendering it useless. *Id.* But in either case, an implied easement is not favored, and the party claiming the right to an easement bears the burden of establishing all the requirements for recognizing the easement. *Id.* at 489-90. Although the facts

of the current case suggest an implied easement, we conclude that genuine issues of material fact remain on that issue as well.

Similarly, it is possible that the Hebrocks are the owners of a prescriptive easement along the N 77 ½ E line. Where a dominant tenement maintains possession of an easement that is "unobstructed, open, peaceable, continuous, and as of right" for the prescribed statutory period of 15 years or more, that tenement will have acquired a prescriptive easement. *Cole v. Gilvin*, 59 S.W.3d 468, 475 (Ky. App. 2001). In this case, any determination that a prescriptive easement exists requires further consideration of extrinsic evidence. Pivotal to this distinction will be how long an open pathway has existed along the N 77 ½ E line. Although the trial court made an arguably reasonable inference, it is not an inference which warranted the granting of summary judgment on this issue.

Conclusion

Accordingly, this Court affirms the summary judgment by the Mercer Circuit Court as to Lot #5's right to an express easement through Lot #1 of the McMurry lands. However, we reverse the trial court's grant of summary judgment with regard to the existence of an express easement through Lots #2, #3, #4, and #7. On remand, the trial court should conduct further proceedings to determine the location of the passway through Lot #1. Additionally, on remand, the trial court

should consider any right the Hebrocks might have to an easement by implication or a prescriptive easement along the N 77 ½ E line.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
William W. Allen Lexington, Kentucky	Winfield Frankel Danville, Kentucky