

RENDERED: AUGUST 16, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001957-MR

GLEN D. MILLS

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 15-CI-00033

ALEXIS RAE FARTHING;
GRANDE ENGINEERING, LLC;
NEIL GRANDE; AND
RAYMOND HAMMONS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Glenn Mills appeals from judgments of the of the Knox Circuit Court resolving issues relating to a boundary dispute between him and Alexis Farthing. Mills argues that the trial court erred by finding there was a valid

boundary agreement and by dismissing his related claims against Farthing and other parties. Finding no error, we affirm.

Mills and Farthing own adjacent tracts of land in Knox County, Kentucky. In July 2013, a dispute arose as to the location of the boundary line between the tracts. The disputed area affects 11.2 acres of land between the properties. On July 10, 2013, Raymond Hammonds approached Mills and allegedly represented that he owned a portion of the disputed area based upon a survey by Grande Engineering, LLC. Hammonds actually worked as a property manager for Farthing. The following day, Mills met with Hammonds, and with Neil Grande and Edvard Grande of Grande Engineering. After some discussions, they reached an initial agreement as to the location of the boundary line.

On July 24, 2013, Mills and Hammonds, acting on behalf of Farthing, executed a typewritten agreement setting the boundary (“the Agreement”). Item 4 of the Agreement states:

Agreement exists on the property line from the big rock over to the branch, up to the left hand side of the branch to the main intersection of the drain.

Under the terms of the Agreement, Mills would receive 4.4 acres of the disputed area and Farthing would receive 6.8 acres. The Agreement further provided that Mills would pay \$200 to Neil Grande for a revised survey plat and to

reset the survey monuments. However, a dispute arose over implementation of Item 4 of the Agreement.

On January 30, 2015, Mills filed a complaint against Hammons, Farthing, Grande Engineering, LLC, Edvard Grande and Neil Grande. Mills sought judgments for breach of contract, quiet title, adverse possession, trespass, timber theft, fraud in the inducement, and punitive damages. After a period of discovery, defendants Neil Grande and Hammons filed motion for summary judgment.

On September 30, 2016, the trial court granted partial summary judgment for Grande and Hammons. The court found no genuine issues of material fact pertaining to Mills's claims for quiet title, adverse possession, trespass, timber theft, and fraud. Rather, the court concluded that the only remaining issue concerned Mills claims against the defendants for failure to implement Item 4 of the Agreement.

Thereafter, the parties submitted the remaining issue for a trial before the court. Mills introduced the testimony of Surveyor Richard Frederick. Frederick testified that he conducted a survey of the boundary using the deeds of Mills, Farthing and other adjoining deeds, as well as the Agreement. Frederick created a plat based upon his ground survey, specifically highlighting the agreed boundary between Mills and Farthing.

Mills also testified as to the circumstances surrounding the execution of the Agreement. He maintained that Hammonds misrepresented himself as owner of Farthing's property, and that he did not learn that Farthing was the owner until he saw the deeds at the time the Agreement was executed. Mills further testified that Edvard Grande told him that Hammonds and Farthing prevented implementation of the agreement. Mills also testified that Hammonds told him that Grande Engineering would put the line wherever they were shown. Lastly, Mills testified that the Frederick survey plat showed the correct line agreed by the parties.

Neil Grande testified that he and his father, Edvard Grande, conducted a survey for Farthing. Neil Grande was not a licensed surveyor at the time the survey was conducted but he was acting under his father's direction, who was a licensed surveyor. Neil Grande also testified that he did not specifically locate the line described in Item 4 of the Agreement, and he could not vouch for its accuracy. Neil Grande further testified that he and the other defendants did not attempt to stop the implementation of Item 4 of the Agreement. Edvard Grande was deceased at the time of trial, but portions of his deposition testimony was read into evidence. He also testified that none of the defendants attempted to stop implementation of the Agreement.

At the conclusion of the evidence, the court took the matters under submission. On November 22, 2017, the trial court issued findings of fact, conclusions of law, and a judgment. The court found that Frederick's survey plat was the only credible evidence as to the location of the agreed line. Accordingly, the court established that as the boundary line between Mills and Farthing. The court further found no credible evidence that Neil Grande, Farthing or Hammons did anything to hinder or prevent implementation of Item 4 of the Agreement. Consequently, the trial court dismissed Mills's remaining claim for damages on that matter.

On appeal, Mills first argues that the trial court erred by dismissing his claim for breach of contract against Hammons and Farthing. He further contends that he was entitled to damages which he suffered due to their breach. In an action tried without a jury, findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR¹ 52.01. Findings of fact are not clearly erroneous when supported by substantial evidence, that is, "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409,

¹ Kentucky Rules of Civil Procedure.

414 (Ky. 1998). “[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court.” *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004).

As noted above, the trial court found that neither Hammons nor Farthing did anything to hinder or prevent the implementation of Item 4 of the Agreement. Consequently, the court concluded that they were not in breach of contract. Mills does not point to any evidence to contradict that conclusion, other than his own testimony based on hearsay. Therefore, we find no basis to disturb the trial courts’ findings or judgment in this respect.

Mills primarily argues that summary judgment was not appropriate on his claims for quiet title, adverse possession, fraud, trespass and timber theft. “The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). *See also* CR 56.03. Since a summary judgment involves no fact-finding, this Court’s review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Scrifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

In this case, Mills does not identify any material facts that were in dispute. The evidence was uncontested that Hammons was authorized to execute

the Agreement on Farthing's behalf. Consequently, any misrepresentation on his part would not have been material to the Agreement. Likewise, the alleged misconduct by Neil Grande would not affect the enforceability of the Agreement as a contract.

Furthermore, the parties agreed that the boundary was in genuine dispute and that they intended to settle that dispute by entering into the Agreement. The parties further agree that the boundary shown on Frederick's plat is the agreed line, that the line was marked in accord with the Agreement, and that the parties took actual possession of their respective portions of the disputed area. Since there were no genuine issues regarding the existence of an enforceable contract, the trial court properly entered summary judgment as to the enforceability of the Agreement.

In addition, Mills does not allege any facts that would establish that he adversely possessed any portion of the disputed property beyond the agreed line. As to the trespass and timber-theft claims, Mills did not allege that Hammons and Farthing cut trees on any portion of the disputed property beyond the agreed line. Any potential claim he might have brought based upon the initial trespass was resolved by the Agreement. Therefore, we conclude that the trial court properly granted summary judgment on these issues.

Lastly, Hammons, Farthing and Neil Grande contend that this Court should sanction Mills for filing a frivolous appeal. Under CR 73.02(4), this Court may award a party single or double costs upon a finding the appeal is totally lacking in merit in that it appears to have been taken in bad faith. *See also Leasor v. Redmon*, 734 S.W.2d 462, 463 (Ky. 1987). We find no such circumstances in this appeal. Although we are concerned by the limited briefing of the issues by Mills's counsel on appeal, the issues raised are not so totally lacking in merit that no reasonable attorney could assert such an argument. We also note that counsel for Farthing, Hammons and Neil Grande have only raised this issue in the Appellees' brief and have not filed a separate supporting motion. Under these circumstances, we conclude that sanctions are not appropriate in this case.

Accordingly, we affirm the judgment of the Knox Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John T. Aubrey
Manchester, Kentucky

BRIEF FOR APPELLEE:

Laura A. Phillips
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