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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000935-MR

RANDY LEE MILLER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 17-CI-003003

EMILY SKILES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, SPALDING,[1] AND L. THOMPSON, JUDGES.

SPALDING, JUDGE: Randy Miller appeals from the summary disposition of a dispute involving an easement to a garage. The Jefferson Circuit Court concluded that the easement had been extinguished by joinder of the dominant and servient

[1] Judge Jonathan R. Spalding authored this opinion prior to the expiration of his term of office. Release of this opinion was delayed by administrative handling.

estates prior to Mr. Miller's acquisition of his property; that the extinguished easement was not revived by its mention in subsequent conveyances; that even had an easement existed, it was abandoned by Mr. Miller's failure to maintain the garage as required in the easement; and that the finding of abandonment of the easement was fatal to Mr. Miller's claim of a prescriptive easement. We affirm.

The easement in question was created in 1984 when Raymond and Elizabeth Montgomery, who owned what are now the Miller and Skiles properties, sold the Miller portion of the property to Constance Webb. The deed for that conveyance included a "perpetual appurtenant easement consisting of the right to use the concrete block garage adjacent to the rear of the house situated on the lot described as Tract 2 [now the Skiles property]" and required that "[m]aintenance, repairs, and any replacement of the garage" be at Ms. Webb's sole expense. Notably, in 1985, the Montgomerys also sold what is now the Skiles property to Ms. Webb. At that point, Ms. Webb became owner of both the dominant and servient estates.

In July 1988, Ms. Webb sold the Miller property to Lucy Sakry by deed which included the conveyance of "an appurtenant easement for garage and access thereto as set out in Deed Book 5458, Page 400," citing the easement language in the deed by which the Montgomerys had transferred the Miller property to Ms. Webb. Ms. Sakry owned that property until 2004 when she

conveyed the property to Mr. Miller as part of divorce proceedings between them. That deed provided that the conveyance was subject to "any and all easements, restrictions, stipulations and mortgages of record affecting said property." It did not include any specific language in regard to the easement in question.

In September 1988, Ms. Webb sold the Skiles property to Richard and Ruth Cain by deed indicating that the conveyance was "made subject to easement for use of concrete block garage and other rights and responsibilities in favor of others set out in Deed Book 5458, Page 400." The Cains subsequently sold their property to appellee Skiles by deed covenanting that the property was free of encumbrances "except restrictions and easements of record." Like the Miller deed, it did not include any specific language in regard to the easement in question.

A dispute arose in 2017 when Ms. Skiles was cited by Louisville Metro Government on the basis that the garage was in a state of disrepair and was thus in violation of property maintenance regulations. The garage was in such disrepair that the roof had failed. After attempts to resolve the dispute proved fruitless, Ms. Skiles initiated this action in the Jefferson Circuit Court seeking to quiet title to the garage attached to her home which caused her to be cited by the Metro government. Ms. Skiles alleged in her complaint that the easement created in the 1984 deed of the Miller property to Constance Webb was extinguished in 1985 when Ms. Webb became owner of both the dominant and servient estates;

that the reference to the prior easement in subsequent deeds did not create a new easement; that Mr. Miller had abandoned the easement; that Mr. Miller was in breach of his duty to maintain the garage; and that Mr. Miller was trespassing on her property.

In response, Mr. Miller maintained that he enjoyed a perpetual appurtenant easement for the use of the garage and that he was using the garage to store property consistent with that easement. In addition, Mr. Miller argued that Ms. Skiles was not entitled to a judgment quieting title because an "issued but unapproved" plat placed the garage on his property, thus creating a genuine issue as to the true owner of the garage. Finally, Mr. Miller insisted that even if the easement had been extinguished through the doctrine of merger, it was revived when reference to the easement was contained in subsequent deeds to the properties and that, in any event, he was entitled to a finding of a prescriptive easement for use of the garage. Both parties moved for summary judgment.

After considering written memoranda submitted by the parties, the circuit court concluded that there were no genuine issues of material fact and that Ms. Skiles was entitled to judgment as a matter of law. The court was persuaded that the easement was extinguished when Ms. Webb obtained common ownership of what is now the Skiles and Miller properties under the doctrine of merger. Citing *Sievers v. Flynn*, 305 Ky. 325, 204 S.W.2d 364 (1947), the court noted the

rationale underpinning the merger doctrine: "the reason one may not have an easement in his own land is that an easement merges with the title, and while both are under the same ownership the easement does not constitute a separate estate." *Id*., 204 S.W.2d at 366. Of particular pertinence to this appeal, the circuit court also determined that references to the extinguished easement in subsequent conveyances did not revive the extinguished easement.

Further, the circuit court held that Mr. Miller's failure to maintain and repair the garage, despite his obligation to do so if the easement was valid, evinced an intention to abandon the easement. Stating that Mr. Miller had offered no evidence to controvert Ms. Skiles' showing regarding his evident intention to abandon the easement, the circuit court concluded that the finding of abandonment also precluded the establishment of a prescriptive easement through open and notorious use. This appeal followed.

As an initial matter, we reiterate the familiar and well-established standard by which appellate courts review the entry of summary judgment:

> The 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. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992). "The record must be viewed 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, Inc. v. Scansteel Service Center, Inc*., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . ." *Huddleston v. Hughes*, Ky. App., 843 S.W.2d 901, 903 (1992), citing *Steelvest, supra* (citations omitted).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). Applying these criteria to the issues advanced in this appeal, we discern no error in the opinion of the circuit court.

We are convinced that the dispositive issue in this appeal centers upon the extinguishment of the easement by operation of the doctrine of merger. With respect to that issue, the various deeds to the properties in question speak for themselves; thus, there is no dispute of material fact. Resolution of the issue is purely a question of law.

Although Mr. Miller does not appear to seriously dispute the finding that the easement was extinguished through the merger of the dominant and servient estates, he cites numerous cases from foreign jurisdictions to support his contention that the easement was revived by reference to it in subsequent conveyances. We are not persuaded.

Because Mr. Miller correctly states that there is little, if any, Kentucky caselaw directly addressing the issue of revivor of an extinguished easement, we agree that the decisions of our sister jurisdictions on this issue prove instructive. Unfortunately for Mr. Miller, however, the cases upon which he relies support rather than undermine the decision of the circuit court. Consider, for example, the holding of the Washington Court of Appeals in *Radovich v. Nuzhat*, 104 Wash. App. 800, 16 P.3d 687 (2001). Citing comment h to the Restatement (First) of Property § 497 (1944), the *Radovich* court offered the following rationale for its decision that an easement previously extinguished by merger had been recreated:

> It is not necessary to reach the issue of whether the parking easement was previously extinguished by merger. We hold that, even if merger occurred, the easement was recreated by subsequent conveyances.
>
> > When an easement has been extinguished by unity, the easement does not come into existence again merely by severance of the united estates . . . . Upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise. If it does arise, however, it does so because it was newly created at the time of the severance. *Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made* or from the implications of the circumstances of the severance. (Emphasis added). [RESTATEMENT (FIRST) OF PROPERTY § 497, comment h.]

Id., 16 P.3d at 690-91 (emphasis in original).

Similarly, the Arkansas Court of Appeals also cited the Restatement of Property and utilized virtually identical reasoning in holding that a *new* easement had been created after severance of the previously united estates:

> Once an easement has been extinguished through merger, the easement does not come into existence again merely by severance of the estates. Restatement (First) of Property § 497, cmt. h. However, upon severance, "a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise," but if it does arise, "it does so because it was newly created at the time of the conveyance." *Id*. "Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance." *Id*. The Restatement (Third) of Property, Servitudes, § 7.5 also states **that the standards for recreating an easement that has been extinguished are the same standards that are required to create an easement in the first instance**.

Doug's Elec. Serv., Inc. v. Miller, 79 Ark. App. 28, 83 S.W.3d 425, 429 (2002) (emphasis added). The Arkansas court further emphasized that the descriptions of the easement found in deeds subsequent to its extinguishment needed to be more than "mechanistic recitals" of the description in the original deed creating the easement. Rather, the descriptions must be sufficient on their face to demonstrate the requisite intent to recreate the easement in the subsequent conveyance. *Id.*, 83 S.W.3d at 430. Nothing in the deeds in the instant case is sufficient to support a conclusion that an easement was "newly created at the time of the severance." Rather, we find at best "mechanistic" references to the extinguished easement.

We find further support for our conclusion in this Court's opinion in *Black v. Birner*, 179 S.W.3d 873 (Ky. App. 2005), a case involving restrictive covenants:

> Although we agree that the language in the Blacks' deed and other indications may have been sufficient to put them on notice of the restrictions, this is irrelevant if the covenants themselves are invalid. Recording and notice do not of themselves render the restrictions valid and enforceable. As the Kentucky Supreme Court has said:
>
> > "[T]he grantee is charged with notice of an encumbrance upon property created by an instrument which is of record, notwithstanding the fact that it may exist only collaterally in the chain of title." However, **such an encumbrance must be enforceable in order to bind the grantee**.

Id. at 881-82 (emphasis in original) (citing *Oliver v. Schultz*, 885 S.W.2d 699, 700 (Ky. 1994)). In our view, the principles at work in *Birner* regarding restrictive covenants apply with equal force to easements, as both are encumbrances upon the use of property. Thus, we are convinced that the circuit court correctly concluded that the extinguished easement in this case had not been recreated so as to burden Ms. Skiles' estate.

Our decision on the extinguishment issue renders moot any discussion of abandonment. There was no valid easement capable of being abandoned.

Finally, we agree with Ms. Skiles that Mr. Miller waived any claim of error regarding adverse possession or prescriptive easement by his failure to comply with Kentucky Rule of Civil Procedure (CR) 76.03(8) providing that a "party shall be limited on appeal to issues in the prehearing statement . . . ." In his prehearing statement, Mr. Miller listed the issues on appeal as: 1) whether the easement of record was extinguished under the doctrine of merger; 2) whether a common owner's conveyance of formerly dominant and servient estates to separate owners operates to revive an easement; and 3) whether the circuit court correctly concluded that the easement of record was extinguished by abandonment. Mr. Miller did not raise the issue of the circuit court's judgment granting summary judgment as to his affirmative claims of adverse possession or prescriptive easement as required by CR 76.03(8). He did not timely move this Court for leave to submit additional issues for good cause shown.

As this Court explained in *Sallee v. Sallee*, 142 S.W.3d 697 (Ky. App. 2004):

> CR 76.03(4)(h) provides that within twenty days of filing a notice of appeal, an appellant must file a prehearing statement setting out a "brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges[.]" CR 76.03(8) specifically provides that a "party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion."

Id. at 698. *Sallee* holds that where an appellant's brief raises an issue which had not been listed in the prehearing statement or in a motion requesting permission to argue the issue, the issue is not properly before this Court for review. *Id.* "[T]he significance of this rule is that the Court of Appeals will not consider arguments to reverse a judgment that have not been raised in the prehearing statement[.]" *American General Home Equity, Inc. v. Kestel,* 253 S.W.3d 543, 549 (Ky. 2008). Thus, Mr. Miller's failure to list the issue of reversing the circuit court's judgment regarding adverse possession or prescriptive easement in his prehearing statement precludes our review of those issues.

In sum, the Jefferson Circuit Court properly concluded that the easement for use of the garage was extinguished through merger of the dominant and servient estates and that the extinguished easement was not recreated in subsequent conveyances. Any other issues as to the judgment are not properly before us to decide. The grant of summary judgment in Ms. Skiles' favor is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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