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NO. COA03-1405

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

SUE KING, on behalf of the
ALICE HEARD Heirs and BERTHINA
G. PALMER, on behalf of the L.
GRAY Heirs,

Plaintiffs,

v.

Onslow County
No. 01 CVS 3960

POPKINS AND ASSOCIATES,
POPKINS BROTHERS
ENTERPRISES, INC., and THE
STATE OF NORTH CAROLINA,
Defendants.

Appeal by plaintiffs from judgment filed 17 March 2003 by Judge Thomas D. Haigwood in Onslow County Superior Court. Heard in the Court of Appeals 26 May 2004.

Janine W. Dunn for plaintiffs-appellants.

Ellis, Hooper, Warlick, & Morgan, L.L.P., by Victor H.E. Morgan, Jr., for defendant-appellees Popkins and Associates and Popkins Brothers Enterprises, Inc.

Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley, Jr., for the State.

BRYANT, Judge.

Sue King on behalf of Alice Heard heirs and Berthina Palmer on behalf of L. Gray heirs (collectively plaintiffs) filed an action to quiet title and to obtain recovery for cut timber against Popkins and Associates, Popkins Brothers Enterprises, Inc. and the State of North Carolina, successors in interest (defendants).

Pursuant to its motion, the trial court granted summary judgment in favor of defendants. Plaintiffs appeal.

This case involves a dispute regarding the location of a common boundary between property owned by plaintiffs and property owned by defendants¹. The common boundary, which lies between plaintiffs' property to the west and defendant's property to the east is a stream known as the Big Branch.

The Alice Heard heirs are the owners of the property² described as follows:

BOUNDED ON THE (sic) Westerly side by the Old Burns Road, bounded on the Northerly (or Northwesterly) side by a lot or strip of land conveyed by Thomas B. Koonce to Carrie Gray, bounded on the easterly side by Big Branch, being Tract No. 1 of Thomas B. Koonce land at Bell's Fork as shown by a map made by R.E. Koonce, C.E., dated May 30, 1941, and recorded in Book of Maps No. 1 at Page 159, Onslow County Registry, and being more particularly bounded by a line beginning at point on the Easterly side of Old Burns Road at the most Southerly corner of Tract No. 2, as shown by the map above referred; runs thence, along the Southerly side of Tract No. 2 (now owned by Carrie Gray), North 58 Degrees 30 Minutes East 740 Feet more or less to a point on Big Branch; runs thence with the line of Big Branch, 760 Feet, be that distance more or less, the most Southerly corner of Lot No. 1 as shown by said map; running thence North 65 Degrees West 430 Feet to the Old Burns Road,

¹Popkins and Associates and Popkins Brothers Enterprises, Inc., conveyed this property to the N.C. Department of Transportation on 27 August 2001. This conveyance is reflected in Deed Book 1759, Pages 190 and 194, of the Onslow County Register of Deeds.

²This Deed reflects the conveyance of Mable Phifer's one-half undivided interest in the property described to Carol Heard Devane, recorded in Book 921, Page 180, of the Onslow County Register of Deeds.

North 31 Degrees 30 Minutes West 134 Feet to the point of BEGINNING (sic); containing 5 acres more or less.

The L. Gray heirs are the owners of the property³ described as follows:

Bounded on the westerly side or end by the Old Burns Road and on the easterly side or end by the Big Branch, being the southerly half (approximated as to acreage rather than by width of road frontage) of Tract No. 2 of Thomas B. Koonce lands at Bell's Fork as is more particularly pictured and shown by a map made by R.E. Koonce, Engineer, dated May 30, 1941, and appearing of record in book of Maps 1, at Page 159, Onslow County Registry, and more particularly bounded by a line BEGINNING (sic) at a point on the easterly side of the Old Burns Road at the most southerly corner of Tract No. 2 and the most westerly corner of Tract No. 1 as shown by the map above referred to; running thence with the Old Burns Road North 31 degrees 30 minutes West 127 feet to the most southerly corner of the tract of land conveyed by Thomas B. Koonce and wife to Lillie Rayner; running thence with the line of said Lillie Rayner North 58 degrees 30 minutes East 645 feet, be that distance more or less, to a point at or in Big Branch; running thence with Big Branch, as the same meanders, in a southerly direction 165 feet, be that distance more or less, to the most northerly corner (in said Branch) of Tract No. 1 as shown by the map above referred to; running thence with the northerly line of said Tract No. 1 south 58 degrees 30 minutes West 740 feet to the point of beginning; containing 2-1/2 acres, more or less, and being a small part of that tract of land which was conveyed by L.D. Sewell to Thomas B. Koonce by a deed which is recorded in Book 132, at Page 600, in the office of the Register of Deeds of Onslow County, North

³This Deed is a Quitclaim Deed that reflects the conveyance of John B. Washington and wife, Lula H. Washington's undivided interest in the property described to Berthina Gray Palmer, recorded in Book 1110, Page 906 of the Onslow County Register of Deeds.

Carolina, and was conveyed by Thomas B. Koonce and wife to the said Carrie Gray by a deed dated March 22, 1944. The beginning point above referred to is 1487 feet in the direction of South 31 degrees 30 minutes east from the present intersection of the Old Burns Road with the old Jacksonville-New Bern Road.

Surveyor Henry Corbett was first contacted to conduct a survey of these two parcels of land in 1993 by Berthina Gray Palmer. On 10 April 1994 Corbett prepared a survey map of the above-described L. Gray heir property for Berthina Gray Palmer. In preparing a sketch based upon review of the existing plats and deeds of the adjoining land, Corbett determined that the natural monument called Big Branch served as the natural boundary between Palmer property and Popkins property.

In preparing the actual physical survey of the Palmer property, Corbett found a ditch in the area and considered it to be the bed of Big Branch. A survey of the Popkin property prepared by surveyor Barden Lanier on 28 November 1995 also showed Big Branch as a boundary line between the properties.

On 22 June 1995 Corbett prepared a survey map of the Alice Heard heirs' property for Mable Phifer (Phifer). On 12 September 1998 he prepared a second survey map for Alice M. Heard. Because the metes and bounds description in the original deeds dated 31 May 1941 did not coincide with the location of Big Branch, the Corbett surveys in effect reduced the Heard heirs' acreage from 2.5 to 1.59 acres and the Gray heirs' acreage from 5.0 to 3.6 acres.

Corbett prepared revised survey maps for Palmer, Heard and Phifer on 15 September and 1 November 1998. Those maps contained

calls for metes and bounds descriptions as well as the call for Big Branch. Corbett noted on the revised survey maps that there were "areas" or "lines" of contention, areas where Big Branch did not coincide with the metes and bounds descriptions.

On 29 November 2001 plaintiffs filed action to quiet title and set aside deeds on the grounds that plaintiffs are the actual owners of the disputed property.

Plaintiffs' sole assignment of error is that the trial court erred in granting summary judgment for defendants.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Lowe v. Bradford*, 305 N.C. 366, 368-69, 289 S.E.2d 363, 365-66 (1982). In reviewing a trial court's grant of summary judgment, the evidence must be construed in a light most favorable to the non-moving party. *Craven County Bd. of Educ. v. Boyles*, 343 N.C. 87, 90, 468 S.E.2d 50, 52 (1996). The burden is on the party moving for summary judgment to show the absence of any genuine issue of fact and his entitlement to judgment as a matter of law. *Id.*

The issue in this case is the location of the plaintiffs' property lines in relation to the natural monument, Big Branch. The 1994 and 1995 surveys prepared by Corbett showed that metes and

bounds descriptions in plaintiffs' deeds extended beyond the line of Big Branch and that the acreage of the plaintiffs' property was less than that called for in plaintiffs' deeds.

It has been the law in this State since 1795 that a natural boundary called for in a deed is controlling. See *Sandifer v. Foster*, 2 N.C. 237, 1 Hayw. 237 (1795). In *Lance v. Codgill*, 236 N.C. 134, 71 S.E.2d 918 (1952), the North Carolina Supreme Court held:

Whenever natural objects, such as rivers, creeks, rocks and the like, are distinctly called for and satisfactorily proved, they become landmarks, to which preference must be given because the certainty which they afford excludes the possibility of mistake. It follows that in case of a conflict, a call for courses and distances must yield to one for a natural object. The course and distance controls only in the event the natural object cannot be located.

Id. at 136, 71 S.E.2d at 919 (citing *Cherry v. Slade*, 7 N.C. 82, 1819 N.C. LEXIS 16 (1819); *Brown v. Hodges*, 233 N.C. 617, 65 S.E. 2d 144 (1951)).

At the summary judgment hearing, defendants offered the affidavit of the State's expert land surveyor, Glenn King. In King's opinion, there is no physical evidence that Big Branch was ever located further to the east than shown on the survey maps for Phifer, Heard and Palmer. Further, based on King's personal observations of the land, he concluded that because water logically flows downhill to the lowest level of the land, the topography indicates that the location of Big Branch has not changed over time. King concluded that the distances shown on the R.E. Koonce

map from 1941 may have been calculated by interpolation rather than actual survey of the distances of the property lines.

The metes and bounds called for in plaintiffs' deeds extends some distance to the east of the Big Branch. The discrepancy between the deeds and Corbett's physical survey of the plaintiffs' property resulted in more acreage for plaintiffs. Plaintiffs acknowledge Big Branch as a natural monument whose location controls, nevertheless plaintiffs contend there is a material issue of fact as to whether the location of Big Branch has changed. Plaintiffs state in a fairly conclusory fashion, based on speculative testimony, that the location has changed. Berthina Palmer testified "the Branch is back there somewhere." Another of plaintiffs' witnesses said he "didn't know where Big Branch was." Moreover, plaintiffs' surveyor, Mr. Corbett did not indicate any thing other than the ditch that could have been Big Branch. Further, Mable Phifer testified the "ditch and Branch had to be the same." Plaintiffs can point to no specific facts to show the location of Big Branch has changed.

To overcome a motion for summary judgment, plaintiffs must set forth "specific facts" to show a genuine issue. See N.C.R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but . . . by affidavits [which] must set forth specific facts showing that there is a genuine issue for trial [or] summary judgment . . . shall be entered against him"); See also *Orient Point v. Plemmons*, 68 N.C.

App. 472, 473, 315 S.E.2d 366, 367 (1984); *See also* *Lowe v. Bradford*, 305 N.C. 366, 368-69, 289 S.E.2d 363, 365-66 (1982) (citing Rule 56(e) which "precludes . . . summary judgment . . . [based] on conclusory allegations unsupported by facts").

Plaintiffs failed to show any other specific location of Big Branch in their forecast of the evidence. Summary judgment for the defendants was properly granted.

Affirmed.

Judges TYSON and STEELMAN concur.

Report per Rule 30(e)