

[Cite as *Dennison RR. Depot Museum, Inc. v. Kallas*, 2010-Ohio-2942.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DENNISON RAILROAD DEPOT
MUSEUM, INC.

Plaintiff-Appellee

-vs-

NICK KALLAS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2009 AP 10 0051

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2008 CV 01 0090

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 25, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, J.

{¶1} Defendant-Appellant Nick Kallas appeals the September 14, 2009, decision of the Tuscarawas County Court of Common Pleas granting declaratory judgment in favor of Plaintiff-Appellee Dennison Railroad Depot Museum, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} This case arose over the ownership of a Berkshire Class Steam Locomotive #2700.

{¶3} In 1991, the Stark County Court of Common Pleas clarified and ruled that the Berkshire Class Steam Locomotive #2700 belonged to the Saint Albans 2700 Preservation and Restoration Society, Inc., a non-profit organization in West Virginia. David Bailey was a member of that organization.

{¶4} On or about April 11, 1996, Appellant Nick Kallas entered into a purchase agreement with David and Rebecca Bailey, personally, for the purchase of their individual interest in the engine.

{¶5} At the time the purchase agreement was entered into, the Berkshire engine was sitting on property owned by Esber Beverage Company, which subsequently sold the property to the Timken Company. The Timken Company, upon purchasing the property upon which the engine sat, wished to have the engine removed from their property.

{¶6} On April 28, 1997, the engine was moved from Canton, Ohio, to Bowerston, Ohio by the Wheeling Lake Erie Railroad, and then was moved from Bowerston to Dennison, Ohio, by the Ohio Central Railroad, where it was then located on a site belonging to Tusco Grocers near Appellee's property.

{¶17} In 2007, Appellant attempted to move the locomotive engine and Appellee subsequently initiated the underlying lawsuit.

{¶18} On January 28, 2008, Plaintiff-Appellee Dennison Railroad Depot Museum, Inc. (hereinafter "Appellee") filed a Complaint for Declaratory Judgment against Defendant-Appellant Nick Kallas (hereinafter "Appellant") seeking title to a Berkshire Class Steam Locomotive #2700 (hereinafter "locomotive"). In its Complaint, Appellee asserted that it obtained clear title to the locomotive after Appellant effectively abandoned the locomotive. In the alternative, the Complaint included allegations that Appellee was entitled to reasonable storage and maintenance fees while the locomotive remained on Appellee's property.

{¶19} On February 17, 2009, Appellee filed a motion for summary judgment asserting that Appellant abandoned the locomotive, and it was entitled to title of the locomotive. Appellant filed a memorandum in opposition and argued that genuine issues of material fact precluded granting summary judgment.

{¶10} The court denied Appellee's Motion for Summary Judgment and this case proceeded to a bench trial on April 30, 2009.

{¶11} During the trial, Appellee presented testimony from Matthew Aloisi, Terry Henry, Jason Johnson, Wendy Zucal as well as from Appellant, himself.

{¶12} Matthew Aloisi is the records custodian for the law firm of Day, Ketterer, Raley, Wright & Rybolt, Ltd. where Atty. Jeffrey Weinstock practiced. He testified that he located two different letters sent to Appellant by Atty. Weinstock, one dated April 18, 1997, and one dated May 1, 1997.

{¶13} In the April 18th letter, Atty. Weinstock, as counsel for the Timken Company, advised Appellant that the Timken Company wanted the engine removed immediately from its property. Atty. Weinstock also stated that representatives of the Timken Company and his office had made several attempts to contact Appellant by written correspondence, phone and facsimile. According to the letter, Atty. Mark Bump of the Timken Company sent a Fax to Appellant in 1996 inquiring into any claims he had in the title or ownership of the locomotive. The letter also stated that repeated telephone calls had been placed to him both at his residence and at the Illinois Railroad museum, none of which were ever answered.

{¶14} Atty. Weinstock went on to inform Appellant that it was his position that Appellant's "acts of discarding and dismantling the locomotive and not responding to any attempts made to contact [Appellant] constitutes abandonment of the locomotive and vests superior title in the Timken Company."

{¶15} The letter further stated that the "locomotive will be removed from its present location within 7-10 days and will be temporarily held beyond the switch until it is ultimately transported to the Dennison Railroad Museum." Lastly, the letter stated that "[b]y not responding you will be deemed to relinquish all claims of ownership you may have in this locomotive. This letter is the only notice you will receive in this matter."

{¶16} This letter was sent to Appellant via certified mail, which was received by him on or about April 30, 1997. The letter was also sent via certified mail to the Illinois Railroad Museum, where Appellant was both a member and the executive director, where it was signed for by Phyllis Schauer.

{¶17} The May 1, 1997, letter was also sent by certified mail, and received by Appellant on May 8, 1997. This letter referenced the April 18, 1997, letter and confirmed that the engine had been removed from the Timken Company property to the Dennison Railroad Museum in Dennison, Ohio. This letter also indicated that the April 18th letter had been faxed to Appellant's attorney Kevin McCabe.

{¶18} The trial court next heard testimony from Terry Henry and Jason Johnson, volunteers with the Dennison Railroad Depot Museum. Henry was instrumental in locating the engine and in putting the Timken Company in contact with the Dennison Railroad Depot Museum. Henry testified that in 1996, his father told him that there was a deserted engine on the Timken Company's property and that the museum should look into acquiring it. (T. at 30). He testified that he went and looked at the engine and that he took some pictures of it sitting there. (T. at 31). He also stated that he spoke with the Timken Company's in-house counsel, Mark Bump, about the engine, and that Atty. Bump asked him to conduct some research into the ownership of the engine. (T. at 30-31). According to Henry, his research turned up a number of people with a possible interest in the engine, one of which was Appellant. (T. at 31-34). He stated that he placed over a half dozen telephone calls to Appellant but none of these calls were ever returned. (T. at 32).

{¶19} Mr. Henry also presented copies of correspondence he sent and received during this time.

{¶20} Mr. Henry testified that he spoke with Gary Antonucci, an employee of the Wheeling and Lake Erie Railroad, who informed him that the railroad would be removing some of their switches near the 2700 steam engine before the spring of 1997 as a cost

saving measure, and that once that occurred, relocating the engine would prove to be very difficult. (T. at 35). Part of this conversation was memorialized in a letter sent by Mr. Henry to Atty. Mark Bump, on Dennison Railroad Depot Museum stationary. (Plaintiff's Exhibit #6).

{¶21} Another letter, this one to Atty. Jeff Weinstock, referred to a conversation Mr. Henry had with Jerry Jacobson on March 25, 1997, wherein he stated that Mr. Jacobson advised him that Ohio Central Railroad would be sending a crew up on March 21, 1997, to look over the engine and determine the feasibility of moving it. (T. at 37-38; Plaintiff's Exhibit #8). In this letter, Mr. Henry also stated that Mr. Jacobson initially expressed to him his fear of reprisal from Appellant, but that Mr. Jacobson subsequently spoke with Appellant and was now more comfortable with the situation. Id.

{¶22} Mr. Henry also presented a letter addressed to him from Atty. Weinstock which stated that Mr. Weinstock's office had been in contact with both the Wheeling and Lake Erie Railroad and Ohio Central Railroad and that they had been advised that the steam locomotive could be moveable as early as April 24, 1997. (T. at 38-39; Plaintiff's Exhibit #9). Atty. Weinstock went on to advise Mr. Henry that the Timken Company was making no representation that it had legal title to the locomotive, and that its main priority was to remove the locomotive from its property. Id. Further, Mr. Weinstock stated that it was his firm's belief that the locomotive had been abandoned by its owners but that a declaratory judgment action would need to be initiated to determine ownership. Id.

{¶23} Mr. Henry further testified once the engine came to be at the Tusco Grocer's site, Jerry Jacobson told him that a tarp needed to be placed over the engine.

(T. at 50-51). He further testified that at no time, during any of his phone conversations or personal meetings with Mr. Jacobson, did Mr. Jacobson ever state that any of these actions concerning this locomotive were done for the benefit of Appellant or that Appellant was the owner of the locomotive. (T. at 51).

{¶24} Jason Johnson, in addition to being a volunteer at the museum, was a salaried employee with the Ohio Central Railroad, which was owned at that time by Jerry Jacobson. He stated that it was always his understanding that no one ever claimed ownership of the engine and that the Timken Company took ownership and gave the engine to the museum. (T. at 74). He stated that he was never told by Mr. Jacobson that the engine belonged to Appellant. (T. at 74, 81). He stated that the first time he heard that Appellant was claiming ownership was when this declaratory action was commenced. (T. at 81-82).

{¶25} With regard to the 2700 steam engine, Mr. Johnson testified that there was always an “unwritten rule” that parts could be taken from the engine and used on other steam engines owned by Mr. Jacobson to keep them running. (T. at 74). He also testified that in 1998 or 1999, he and another man made a trip to a historical museum located in Fort Wayne, Indiana, at the direction of Mr. Jacobson, to retrieve all the extra parts belonging to this steam engine, or “jewelry” as they are sometimes referred to, where they sat in a big pile overgrown with weeds. (T. at 74-75). These parts included main side rods, water pumps, air pumps, etc. (T. at 77). He stated that they loaded the parts onto two semi-tractors and brought them back to Mr. Jacobson’s facilities at Morgan Run, where they remain to this day. (T. at 75, 77).

{¶26} Mr. Johnson went on to testify that he participated in painting the engine when it first arrived in Dennison, which he said took about twenty to thirty gallons of paint and took about twenty to thirty hours of time. (T. at 77-79). He stated that he again helped paint the engine in 2004, requiring about another ten to fifteen gallons, and another twenty to thirty hours. (T. at 79-80).

{¶27} Wendy Zucal, the Director of the Dennison Railroad Depot Museum, testified that at no time was she ever told by Jerry Jacobson that Appellant was the owner of the 2700 steam engine. (T. at 134-136). In fact, she stated that Mr. Jacobson had told her when he brought the engine to the museum that “no one would ever come claim it because if they had to they would have to deal with him on storage and transportation costs and so it would be very unlikely anybody would come to claim it.” (T. at 135). She also testified that when she had spoken with Steve Wait from the Wheeling and Lake Erie Railroad about them pulling the switch from their line near the Timken Company property, that if the museum was not going to take the engine it was headed for the Luntz scrap yard. (T. at 140-141). She further testified that she had been the director of the museum for over twenty years and the first time she ever met Appellant was when this declaratory action commenced. (T. at 141-142). She stated that she is the one who placed the “blue flag” on the line in front of the steam engine pursuant to a federal railroad rule which prohibits a car being pulled in past the flag or a car being taken out past the flag. (T. at 142). She stated that it was Mike Conner, the vice president of the Ohio Central Railroad and member of the museum board, who directed her to place the blue flag on the line after Appellant expressed his desire to

move the engine. (T. at 142). Additionally, she stated that approximately \$300,000.00 was spent on putting in the line where the 2700 steam engine now sits. (T. at 143).

{¶28} The trial court also heard testimony from the Appellant herein as to his position that he did not abandon the 2700 locomotive steam engine.

{¶29} When asked why he did not respond to the correspondence sent to him by Atty. Weinstock, he stated that Jerry Jacobson, of the Ohio Central Railroad, had already advised him that he had moved the engine and would store it for him and therefore, he saw no need to respond to Mr. Weinstock's correspondence. (T. at 187). Appellant further testified that Mr. Jacobson requested his permission to put the locomotive on display at the Dennison Railroad Depot Museum, and that he agreed to allow the locomotive to be displayed, so long as Appellee understood that he owned the locomotive and would not pay for any improvements. (T. at 188, 225). He claims that he indicated to Mr. Jacobson that Appellee could display the locomotive so long as it understood that, at some time in the future, Appellant might take it back. (T. at 188). Appellant stated that he never spoke with Appellee directly because he had already communicated his intentions to Jerry Jacobson. (T. at 121).

{¶30} Jerry Jacobson also testified on behalf of the Appellee. Mr. Jacobson testified that Ms. Zucal proposed moving the 2700 engine from its storage spot next to Tusco Grocers into the museum and that at that time he informed her "that locomotive belongs to Nick Kallas and I can't do anything unless Nick gives me permission for it." (T. at 224). He stated that he called Appellant and obtained his permission to display the engine until such time as he needed it or traded it. (T. at 226). He further testified that he advised Ms. Zucal that Appellant had given the museum permission to

temporarily display the engine and that “it’d be nice if somebody put some paint on the thing, made it look a little nicer.” Id.

{¶31} Timothy Sposato also testified at trial. Mr. Sposato was a previous employee of the Ohio Central Railroad as the Chief Mechanic Officer and was part of the crew that moved the 2700 engine from Bowerston to Dennison. (T. at 256-257). He testified that approximately a month prior to the engine being moved, he made a trip to Canton, at the direction of Jerry Jacobson, to look at the engine. (T. at 263-265).

{¶32} At the conclusion of the trial, the trial court ordered the submission of post-trial briefs.

{¶33} In its Decision filed September 14, 2009, the trial court found Appellant had abandoned his locomotive and Appellee was entitled to clear title to the locomotive. The trial court, in its Conclusions of Law, specifically stated that it found that the witnesses for Appellee were more credible on the issue of abandonment than those for Appellant. (Sept. 14, 2009, Decision at 6).

{¶34} It is from this judgment entry Appellant appeals, raising the following assignment of error:

ASSIGNMENT OF ERROR

{¶35} “I. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING APPELLEE DECLARATORY JUDGMENT, FINDING APPELLANT ABANDONED HIS BERKSHIRE CLASS STEAM ENGINE #2700 AND AWARDING APPELLEE CLEAR TITLE TO THE LOCOMOTIVE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

I.

{¶36} In his sole assignment of error, Appellant argues that the trial court abused its discretion in finding that he abandoned the steam engine. We disagree.

{¶37} The granting of declaratory judgment relief is a matter of judicial discretion. *Stark-Tuscarawas-Wayne Joint Solid Waste Management Dist. v. Republic Services of Ohio II, LLC*, Stark App.No. 2004-CA-00099, citing *Control Data Corp. v. Controlling Bd. of Ohio* (1983), 16 Ohio App.3d 30, 35. A trial court's declaratory judgment cannot be disturbed on appeal absent a showing that the trial court abused its discretion. *Id.* See, also, *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The term abuse of discretion connotes more than an error of law or judgment, it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Id.* In *Bilyeu v. Motorists Mut. Ins. Co.* (1973), 36 Ohio St.2d 35, 37, the Ohio Supreme Court noted: "Thus, a determination as to the granting or denying of declaratory relief is one of degree. Although this court might agree or disagree with that determination, our decision must be whether such a determination is reasonable."

{¶38} Abandoned property has been defined as "property over which the owner has relinquished all right, title, claim, and possession with the intention of not reclaiming it or resuming its ownership, possession or enjoyment." *Doughman v. Long*, 42 Ohio App.3d 17, 21, 536 N.E.2d 394 (1987). "Abandonment requires affirmative proof of the intent to abandon coupled with acts or omissions implementing the intent. Mere non-use is not sufficient to establish the fact of abandonment, absent other evidence tending to prove the intent to abandon." *Kiser v. Board of Commrs.* (1911), 85 Ohio St. 129, 97 N.E. 52; *Long v. Noah's Lost Ark Inc.*, 158 Ohio App.3d 206, 814 N.E.2d 555, 2004-Ohio-4155.

{¶39} In the case sub judice, the trial court heard testimony from a number of witnesses in support of Appellee's position that the steam engine had been abandoned prior to it taking possession of the engine.

{¶40} The trial court also heard testimony from Appellant and Jerry Jacobson that Appellant had never intended to abandon the property.

{¶41} In dealing with conflicting testimony, the Supreme Court of Ohio has held that appellate courts must defer to the trial court as the finder of fact, insofar as the trial court is in the best position to weigh the credibility of the witnesses. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. It follows that a reviewing court should not substitute its judgment for that of the trial court. *Id.* The decision of that trier of fact, be it judge or jury, will not be reversed as being against the manifest weight of the evidence as long as it is supported by some competent, credible evidence going to each of the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶42} In the case sub judice, the trial court found, based on the testimony and evidence as set forth above, that Appellant demonstrated an intent to relinquish his right, title, claim and possession of the locomotive by failing to respond to Atty. Weinstock's correspondence and then further reinforced this intention by failing to reclaim or resume ownership once the engine was relocated to Dennison. (Sept. 14, 2009, Decision at 6).

{¶43} We note that the trial court also explicitly found that Appellee's witnesses were "more credible on the issue of abandonment than the witness for the [Appellant]."

{¶44} Based on the record, we find that the trial court's decision was reasonable and that there was competent, credible evidence supporting the trial court's determination that Appellant had abandoned the property.

{¶45} Appellant's sole assignment of error is overruled.

{¶46} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ SHEILA G. FARMER_____

JUDGES

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