

RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-000960-MR

MANUAL LANE AND
THELMA LANE

APPELLANTS

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 98-CI-00212

GENE DILLMAN; LAVERA
AUSMUS LASLEY (D/B/A BELL
LUMBER); ROBERT LASLEY
(D/B/A BELL LUMBER)

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

HENRY, JUDGE: Manuel Lane and Thelma Lane appeal from an order of the Bell Circuit Court adjudging that they are not the owners of a 78.40-acre tract of property located in Bell County which they claim by adverse possession. Based upon a trial by deposition, the circuit court concluded that appellee D. Gene Dillman is the lawful owner of the disputed tract. For the reasons stated below, we affirm.

The 78.40-acre tract in dispute lies along Yellow Creek in Bell County about halfway between Pineville and Middlesboro. The Lanes assert ownership of the tract by adverse possession. The Lanes contend that they and, before them, Manuel Lane's forebears, have exclusively, openly, and notoriously possessed the property continually since 1913. They assert that they and their family predecessors continually occupied the residence from 1913 to 1965 as a residential farm, built various structures upon the tract, farmed and logged the tract, fenced the tract with barbed wire, and identified their claim to the tract by painting perimeter trees along the boundary line. The Lanes concede that the last Lane to actually live on the property, Manuel's mother Jennie Lane, left in 1965, but contend that since that time they have continued to exercise control over the tract by visiting the property, paying property taxes on the property, and by continuing to paint the boundary-line trees.

Record title to the property is held by appellee D. Gene Dillman. The tract in dispute is part of a larger 1,320-acre tract¹ which was purchased in 1965 from Cumberland College by Dillman's predecessor in title, Dark Ridge Development Company, Inc., a company formed and owned by Dillman. The tract had been acquired by Cumberland College's predecessor,

¹ The tract is also described in the record as being a 1,700-acre tract.

Williamsburg Institute, from the A. Gatliff family by way of donation in April 1909. It appears that the A. Gatliff family had acquired the property in the 1800s.

It appears that at the time of the Gatliff family donation of the larger tract, Kitty Lane, a forebear of Manuel's, occupied the 70.40-acre tract. Coincident with the Gatliff donation, Kitty Lane quit-claimed any interest she had in the 70.40 acre tract to Gatlin, reserving, however, a life estate. It appears that following the lapse of this life estate, the Lane family continued to occupy the property. While the Lanes contend that their possession was adverse to Williamsburg Institute/Cumberland College's record title, Dillman alleges that the occupation was by lease and/or permissive use so as to preclude the occupation from ripening into a fee by adverse possession.

Contrary to the Lane's version of the facts, Dillman alleges that following Jennie Lane's "abandonment" of the property and Dillman/Dark Ridge's purchase of the property from Cumberland College, both of which occurred in 1965,² Dillman and/or Dark Ridge have mined, timbered, drilled, leased, dug, traversed, grazed and otherwise occupied the property.

² While both events occurred in 1965, Dillman's purchase of the property and Jennie's leaving the property are unrelated. Jennie left the property because of health problems and/or because a flood washed out the bridge which provided primary access to the property.

According to the Lanes, in 1994, upon an occasion of a visit to the property, they discovered the appellee Lasleys (d/b/a Bell Lumber)³ cutting timber on the tract. The Lasleys indicated that they were cutting timber pursuant to a lease from Dillman. According to the Lanes, this was the first knowledge they had that there was any other claim to the property. On May 8, 1998, the Lanes filed a complaint in Bell circuit court seeking to quiet title to the property in their favor under a claim of adverse possession.

Following discovery and deposition testimony of the witnesses, the case was decided upon the record by the Bell Circuit Court. By Findings of Fact, Conclusions of Law, and Judgment entered April 14, 2004, the circuit court held in favor of Dillman's record title, and determined that the Lanes had not succeeded in proving their assertion of a fee in the property by adverse possession. The circuit court further determined that subsequent to 1965, in addition to his record title, Dillman had also met the criteria to establish title under the principles of adverse possession. This appeal followed.

This case was tried by deposition. In such cases, even though the trial court did not have the opportunity to observe the witnesses to judge their credibility, nevertheless, we defer

³ The Lasleys, who conduct a timbering business under the name of "Bell Lumber," are parties to the litigation only as concerns to whom the royalties for the lumber they timbered from the tract should be paid.

to the trial court's findings of fact and will disturb same only if clearly erroneous. CR 52.01; Vanover-May v. Marsh, 793 S.W.2d 852, 854 (Ky.App. 1990). A finding of fact is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998). "Substantial evidence" means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men. Id. On the other hand, we review the trial court's conclusions of law de novo. Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky.App. 1998).

One may obtain a perfect title to real property by adverse possession for the statutory period of time of fifteen years even when there is no intention by the adverse possessor to claim land not belonging to him. Kentucky Revised Statutes 413.010; Tartar v. Tucker, 280 S.W.2d 150, 152 (Ky. 1955). There are, however, five elements, all of which must be satisfied, before adverse possession will bar record title: 1) possession must be hostile and under a claim of right, 2) it must be actual, 3) it must be exclusive, 4) it must be continuous, and 5) it must be open and notorious. Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc., 824 S.W.2d 878, 879-880 (Ky. 1992). The party claiming title through adverse possession bears the burden of proving each element by

clear and convincing evidence. Phillips v. Akers, 103 S.W.3d 705, 709 (Ky.App. 2002).

In its April 14, 2004, order, the circuit court made the following findings of fact and conclusions of law relevant to our discussion:

FINDINGS OF FACT

The Court finds as follows:

1. The Plaintiffs allege ownership of this property by adverse possession for themselves as heirs of the late Joe Lane. However, the Court finds to the contrary.

2. The Defendant, D. Gene Dillman, purchased a tract of land in 1965 from Cumberland College that included the property in question and Dillman has presented a documented chain of title dating back more than ninety (90) years, relying on the records of the Bell County Court Clerk of which the Court takes notice.

3. Since 1965, the Defendants, D. Gene Dillman/Dark Ridge Development Company, have been in actual physical possession under color of title and have exercised open, notorious and exclusive control of the subject matter of this litigation.

. . . .

5. Defendants have timbered, mined, leased and openly controlled the tract of land sued upon. Plaintiff's claim of possession is not supported by the record. The Lane family abandoned the property in 1965 and have since made no use of the property or exercised any dominion and control over the property with the exception of painting boundary trees and paying taxes.

CONCLUSIONS OF LAW

. . . .

2. In order for the Plaintiffs herein to acquire title by adverse possession, they would have to show entry under color of title, open and notorious possession of the property, hostile to the claims of all others and exclusive in nature for the prescribed time. As a matter of law, the Plaintiffs have not met their burden of proof.

3. Defendant, D. Gene Dillman, has shown not only *de jure* title for over ninety (90) years, unbroken in nature, but has also, as a matter of law, shown to have established title, also adversely to the whole world, including the heirs of Joe Lane, granting him defacto possession of the property sued upon.

4. As a matter of law, Plaintiffs have failed to establish any claim to the property in question. D. Gene Dillman has established his Title and is thereby entitled to payment for any timber removed by the other Defendants herein, namely, Lasley, Ausmus and Bell Lumber.

To simplify matters, we note that even if we accept the appellants' contention that they had, prior to 1965, acquired title by adverse possession as against the record title now held by Dillman,⁴ nevertheless, the record supports the circuit court's conclusion that Dillman met the criteria to acquire title to the property under the principles of adverse

⁴ There is a dispute as to whether the Lanes occupied the land prior to 1965 hostilely or permissively.

possession in the 15 years following the Lanes' "abandonment"⁵ of the property in 1965.

In his affidavit of November 23, 1999, and his deposition testimony, Dillman testified that following his acquisition of the property in 1965 he had exercised exclusive control over the property by, among other things, leasing timber rights to the property; leasing gas and oil exploration rights; leasing the coal rights to the property; granting fishing, hunting, and trapping rights to the property; paying state and county real estate taxes on the property; and by listing, and paying, unmined mineral taxes and undeveloped gas taxes on the property. According to Dillman's affidavit and testimony, since 1965 he and or his predecessor in title, Dark Ridge Development Company, have been in actual physical possession of the property under color of title and have exercised open, notorious and exclusive control of the subject matter of this litigation.

In light of the foregoing, even if the Lanes claim ripened into ownership by adverse possession prior to Dillman's acquisition of record title, there is substantial evidence in the record to support the circuit court's finding that Dillman satisfied the criteria for acquiring ownership of the property under the principles of adverse possession in the years subsequent to 1965.

⁵ We note that a fee-simple title to realty cannot be abandoned. Turk v. Wilson's Heirs, 266 Ky. 78, 98 S.W.2d 4 (1936)

The Lanes contend that they preserved their ownership by adverse possession after 1965 by visiting the property, by paying property taxes on the property, and by painting the perimeter trees to the tract. However, there was conflicting testimony regarding this, and we must defer to the circuit court in its resolution of the conflicting evidence. Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 852 (Ky.App. 1999). Accordingly, we will not disturb the decision of the circuit court.

For the foregoing reasons the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Otis Doan, Jr.
Harlan, Kentucky

BRIEF FOR APPELLEE:

Bill Hayes
Middlesboro, Kentucky