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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001799-MR

DEMART BOWLING — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE DANIEL SPARKS, JUDGE
ACTION NO. 00-CI-00119

JOYCE VANHOOSE AND
DAVID VANHOOSE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON,[1] SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: This is a property dispute. Demart Bowling alleges that by quit claim deed dated August 5, 1997, and recorded on August 8, 1997, he is the sole owner of certain property located in Johnson County. The circuit court found that Bowling jointly owned the lot with the appellees and James Tevis. At a judicial sale, the Vanhooses purchased the property and the sale was ultimately confirmed. Bowling maintains that

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the court erred when it found that the parties are tenants in common and that it should have appointed commissioners pursuant to KRS 381.135(4) to make a recommendation as to the divisibility of the property. We find no error.

The disputed property is a 60 X 140 foot lot purchased in 1947 by Ray and Ethel Tevis. Ray died intestate in 1967. The deed, however, was not recorded until October 31, 1997, and the affidavit of descent not until 2002. Ray's wife, Ethel, and their four children, Ronald Tevis, Davis Tevis, Joyce Tevis, now Joyce Vanhoose, and James Tevis are listed as heirs in the affidavit. As Ray's wife, Ethel received a one-half interest in Ray's undivided one-half interest in the property giving her a three-fourths interest. The remaining one-fourth interest descended a one-sixteenth to each of the four children.

Ethel later married Lawrence Vanhoose, and in 1994, she died testate. In accordance with her will, one-half of her three-fourths undivided interest was left to Lawrence and the remaining one-half interest was devised in equal parts to David and Ronald. Thus, Lawrence owned a six-sixteenths undivided interest; David and Ronald each owned a four-sixteenths interest; and Joyce and James Tevis continued to own a one-sixteenth interest each.

In August 1997, Lawrence Vanhoose, by quit claim deed, purported to transfer the entire interest in the property to

Bowling who, in August 1997, recorded the deed. Subsequently, David and his wife and Ronald and his wife conveyed their combined eight-sixteenths interest to Joyce Vanhoose. That deed was recorded on December 21, 1999.

On March 8, 2000, the Vanhooses filed a complaint seeking judicial sale of the jointly owned property. Bowling opposed the petition alleging that by reason of the recorded deed to him from Lawrence, he was the exclusive owner of the property. The property was sold and the sale confirmed.

Bowling does not dispute the facts nor does he challenge the finding of the trial court that Ethel and her four children were tenants in common after Ray's death. His claim of sole ownership is based on the fact that neither Ray nor the appellees recorded a deed to the property prior to his filing of the deed from Lawrence to him; and, therefore, under KRS 382.270,[2] his deed takes precedence over any earlier non-recorded deed. The statute in effect at the time this case was decided provided:

> No deed . . . conveying a legal or equitable title to real property shall be valid against a purchaser for a valuable consideration, without notice thereof . . . until such deed . . . is acknowledged or proved according to law and lodged for record.

[2] Kentucky Revised Statutes.

The purpose of the recording statute is to protect good faith purchasers against claims to the property of which they are not and could not have been reasonably aware. It would be a complete misconstruction of the statute and of well established property rules, however, to hold that merely recording a deed can divest tenants in common of their interest in the property. It is a fundamental rule that the grantor can grant only his interest in the property and no more. KRS 381.150 states:

> A deed and warranty of land purporting to pass or assure a greater right or estate than the person can lawfully pass or assure, shall operate to convey on warrant so much of the right and estate as such person can lawfully convey.

And in Vanhoose v. Fairchild,[3] the court stated that:

> Where no title, legal or equitable, passed by a conveyance to the purchaser, for the reason that the title was in another person than the vendor, the fact that the purchaser paid value and had no notice is immaterial.

Although dealing with facts not identical to those presented in this case, the reasoning of the court in Sirls v. Jordan[4] has direct application to our analysis. In Sirls, an affidavit of descent omitted three heirs at law of the decedent. After the property was sold to a purchaser with no knowledge of

[3] 145 Ky. 700, 141 S.W. 75, 76 (Ky. 1911) (citations omitted).

[4] 625 S.W.2d 106 (Ky.App. 1981).

the undisclosed heirs, one undisclosed heir brought an action for partition or sale of the property. The purchasers in that case relied on two recording statutes, KRS 382.080[5] and KRS 382.120,[6] neither of which the court held could defeat the interest of the undisclosed heirs. Particularly relevant to the present case is the court's discussion of basic property law.

> Finally, we are confronted by the principle that the decedent's estate in intestacy vests in the heirs at law immediately upon his death. It is undisputed that the appellee is an heir at law of the decedent and that title vested in her and the other heirs at Eukley McNeely's death. We add to this the fundamental rule that what passes under a deed is that title that the grantor had.
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> * * * *
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> The inescapable conclusion is that the four heirs could warrant and convey only the interests which they inherited from the decedent.[7]

Applying the recited law to this case, Lawrence could not have conveyed to Demart the entire property because the heirs of Ray Tevis owned their undivided interest under the law of intestate descent and distribution.[8] Their title vested immediately upon Ray's death. KRS 382.270 is simply intended to protect innocent

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[5] KRS 382.080, like KRS 382.270, is a recording statute and extends to leases of oil, gas, coal, or mineral right and privilege for longer than five (5) years.

[6] KRS 382.120 provides the requirements for an affidavit of descent to enable the heir to file a deed and convey his interest.

[7] Id. at 108 (citations omitted).

[8] KRS 391.010.

purchasers against claims to property that was conveyed to them. It does not alter the long standing, undisputable rule, that the deed can not pass greater title than was possessed by the grantor.

Finally, Demart contends that the circuit court was required to appoint three commissioners to determine divisibility. Demart never requested division of the property and, to the contrary, stated in an affidavit that the property was not subject to division. Moreover, where the court can ordinarily presume and take judicial notice that the property can not be divided without materially impairing the value of the several interests, there is no requirement that proof be offered on indivisibility.[9] The 60 X 140 lot in question is owned in three fractional interests. There was no request to partition the property, and the court properly found that it was not divisible; there was, therefore, no need to appoint commissioners.[10]

The orders and judgment of sale of the Johnson Circuit Court are affirmed.

ALL CONCUR.

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[9] Foreman v. Taylor, 239 S.W.2d 260 (Ky. 1951).

[10] KRS 381.135(4).

BRIEF FOR APPELLANT:

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Paintsville, Kentucky

BRIEF FOR APPELLEE:

George K. Wells
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