RENDERED: AUGUST 3, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001812-MR
&
NO. 2006-CA-001841-MR

FELDMAN LUMBER CO. — APPELLANT/ CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID TAPP, JUDGE
ACTION NO. 04-CI-00704

NELLIE MEECE AND JUANITA WHITIS — APPELLEES/ CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM[1], SENIOR JUDGE.

DIXON, JUDGE: This action arises from a boundary dispute between adjoining property owners, Appellant Feldman Lumber Company, and Appellees, Nellie Meece and Juanita Whitis. Appellant had filed a quiet title action in the Pulaski Circuit Court claiming

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised statutes (KRS) 21.580.

ownership of 18.10 acres of land located on the headwaters of Buck Creek in eastern Pulaski County. The Pulaski Circuit Court found the boundary to exist as claimed by Appellees. Finding that the trial court acted within its discretion and that it based its decision on substantial evidence, we affirm.

In the mid-1950's, the owner of Feldman Lumber Company acquired a tract of land known as the "Dykes Tract," consisting of approximately 230 acres and which borders property owned by Appellees. On January 14, 2000, James R. Williams conveyed an adjacent parcel of land described as Tract II to Appellant. The relevant description of the property conveyed provides:

> TRACT II: Containing forty acres, more or less, and bounded as follows to wit, on the waters of Buck Creek:
>
> BEGINNING on a buckeye, elm and white oak, standing on the East bank of Buck Creek; thence N 84 degrees E 25 poles to a white oak; thence S 41E 84 poles to a chestnut and dogwood; thence N 32 degrees E 125 poles to a white oak and hickory; thence S 80 degrees E 66 poles to two poplars; thence Silas Dyke's line to the creek, down the creek to the beginning.

The chain-of-title to Tract II in Appellant's deed can be traced in a continuous line to a Commissioner's Deed dated November 20, 1908.

Appellees acquired their interest in the disputed property by deeds dated April 26, 1961, and October 12, 1970. Appellees traced their unbroken chain of title to the Thomas Hail Patent dated October 4, 1848, which describes the boundaries as follows:

> Beginning as a sugartree and small Spanish Oak and hickory sapling standing on the east side of said Buck Creek in the hillside of a free ston cliff; thence N 74 E 28 poles to a spotted oak and chestnut oak; thence due South 50 poles to three back oaks on top of ridge; thence S 56 W120 poles to a black oak and hickory; thence S 8 E 110 poles to a white oak and gum; thence S 75E 48 poles to a hickory and poplar; thence S 53 E 26 poles to two sugartrees; thence due South 26 poles to two small Spanish oak; wild cherry and poplar near a sink hole in a field; thence S 44 W 28 poles to a black oak; thence due west 40 poles to a black oak and hickory; thence N 48 W 98 poles to a stake; thence N 15 E 185 poles to a stake; thence N 56 E poles to the beginning.

Following a bench trial in September 2005, the trial court entered findings of fact and conclusions of law adjudging Appellees to be the owners of the disputed property. Specifically, the trial court found that Appellant's surveyor, Ralph Peters, made no attempt to locate the monuments, corners or lines described in Appellant's deed; rather his conclusion that the disputed acreage belonged to Appellant was based upon a plot of land omitted from various United States Forest Service (USFS) Tracts and the boundary of the Silas Dykes' property.

On the other hand, the trial court noted that Appellees' surveyor, David Altizer, located all relevant USFS Tract lines and monuments, and even discovered a directional error and erroneous call on the face of Appellee Whitis' deed. Altizer concluded that the Thomas Hail patent was the appropriate description from which to conduct his survey. Using that description, Altizer began his survey from a "sugartree and small Spanish oak and hickory sapling standing to the East side of Buck Creek on the hillside at a free stone cliff." The trial court noted that it was particularly significant that

the cliff Altizer located, and that was documented in photographs introduced by Appellees, was the only one of its type in the area. Moreover, the trial court relied upon the fact that an overlay representing USFS Tract No 1573 and the J.W. Whitis Heirs Patent[2] corresponded appropriately with the Thomas Hail Patent boundaries of the disputed property.

In addition to concluding that Appellees had demonstrated superior title to the disputed property, the trial court also concluded that Appellees demonstrated by clear and convincing evidence each element necessary to sustain a claim to the disputed property by adverse possession:

> Defendants' family had exercised actual possession of the disputed property since the 1800's. Meece, now 86 years old, was born on the property and resided there for nearly her entire lifetime. Meece's mother cut timber on the disputed property in the late 1930's or early 1940's without objection from any neighbor. Notably, when Feldman purchased the property from Williams in 2000, all of the timber upon the property purchased had been previously cut *except* for the parcel in question. For nearly 30 years, Defendants have marked the outside boundary with "No Hunting" signs thereby giving open and notorious notice of their claim[.]

On appeal, Appellant first argues that Appellees did not locate their property line in accordance with accepted legal principles. Essentially, Appellant takes issue with the fact that Altizer surveyed the Thomas Hail Patent rather than the description contained in Appellees' deed. The result, Appellant contends, is that Altizer failed to locate and utilize the Silas Dyke line to establish the correct boundary between the parties' properties.

[2] Another parcel of land owned by Appellant Meece.

Since the case was tried without a jury and the trial court made specific findings of fact and conclusions of law, we must briefly address the standard by which we review this matter. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. A factual finding 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 is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Janakakis-Kostun v. Janakakis*, 6 S .W.3d 843, 852 (Ky. App. 1999) (citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)). "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." *Uninsured Employers Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991). In boundary dispute cases, this Court has uniformly adhered to the clearly erroneous standard:

> It is the rule that, where this Court cannot say on an appeal from the decree in a action involving a boundary dispute that the Chancellor's adjudication is against the weight of the evidence, the decree will not be disturbed.

Croley v. Alsip, 602 S.W.2d 418, 419 (Ky. 1980).

Generally, in describing boundaries, natural and permanent monuments are the most satisfactory evidence and control all other means of description; and artificial markers, courses, distances and area follow in order named as evidence of boundaries, area being the weakest of all means of description. *Wagers v. Wagers*, 238 S.W.2d 125

(Ky. 1951). Further, a deed description is sufficient if a surveyor using the deed and extrinsic evidence can locate the land and establish its boundaries. *Ken-Tex Exploration Co. v. Conner*, 251 S.W.2d 280 (Ky. 1952).

The trial court determined that Altizer appropriately utilized the Thomas Hail Patent as the proper description upon which to conduct his survey, and that he located four of the monuments described therein. Further, Altizer introduced a complete chain of title for Appellees' property back to the Hail patent. Based upon all of the evidence introduced, we simply cannot conclude that the trial court's conclusion that Altizer's survey established that the disputed property belonged to Appellees was clearly erroneous.

Appellant next contends that the trial court's finding that Appellees established title to the disputed acreage by adverse possession is not supported by substantial evidence. And while Appellant concedes that it failed to raise this issue in the trial court, it claims that the trial court committed palpable error that if not addressed by this Court will result in manifest injustice. We find Appellant's argument both unpreserved and unpersuasive.

The basic elements of adverse possession are well-established. In order to establish title through adverse possession, a claimant must show possession of disputed property under a claim of right that is hostile to the title owner's interest. Further, the possession must be shown to be actual, open and notorious, exclusive and continuous for a period of fifteen years. *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955); *Creech v.*

Miniard, 408 S.W.2d 432, 436 (Ky. 1965); KRS 413.010. The law is clear that one may obtain a perfect title by adverse possession. *Stephenson Lumber Co. v. Hurst*, 259 Ky. 747, 83 S.W.2d 48 (Ky. 1934); *see also Gatliff Coal Co. v. Lawson*, 247 S.W.2d 375 (Ky. 1952). Therefore, if Appellees, under the facts in this case, have established ownership of the disputed property by adverse possession, the strength of their title renders moot any claim of title by Appellant.

The trial court found that Appellees satisfied all elements to establish ownership by adverse possession by clear and convincing evidence. While Appellant contends that such is palpable error, it fails to provide any explanation or any evidence to contradict the findings below. Because we conclude that the trial court's decision is, in fact, supported by substantial evidence in the record, we hold that that the trial court did not err in finding that Appellees established adverse possession.

CROSS-APPEAL

In their cross-appeal, Meece and Whitis argue that the trial court erred in failing to award them treble damages and legal costs they incurred for Feldman's cutting of timber on the disputed property. Meece and Whitis had counterclaimed for damages under KRS 364.130, which provides in relevant part,

> (1) Except as provided in subsection (2) of this section, any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times

> the cost of any damages to the property as well as any legal costs incurred by the owner of the timber.

The trial court, relying on *Hurst v. Commonwealth*, 276 Ky. 824, 125 S.W.2d 772 (1939), ruled that because a bona fide dispute existed between the parties as to the actual boundary between the two properties, Feldman had reason to believe the timber was his and thus possessed *color of title.* As such, the trial court concluded that Meece and Whitis were not entitled to treble damages, but rather only the fair market value of the timber removed from the property. We agree that because of the dispute as to the correct boundary lines, Feldman was an innocent trespasser and not subject to the provisions of KRS 364.130. *See Gum v. Coyle*, 665 S.W.2d 929 (Ky. App. 1984); *Lebow v. Cameron*, 394 S.W.2d 773 (Ky. 1965); and *Swiss Oil Corp. v. Hupp*, 253 Ky. 552, 69 S.W.2d 1037 (Ky. 1934).

Furthermore, with respect to the claim for legal costs, the trial court ruled,

> Meece also seeks to recoup her "legal costs" including attorney fees. While KRS § 364.130 authorizes an award of attorney's fees, as well as other costs incurred during the litigation, the Court cannot - in good faith - conclude that a violation of the statute occurred. Therefore recoupment of attorney fees and surveyor's expenses is precluded. In accordance, however, with CR 54.04, Meece is awarded court costs in the amount of $653.72.

While we understand Meece and Whitis' argument that they were essentially forced to incur legal fees to defend the quiet title action, we agree with the trial court that because there was no violation of KRS 364.130, Meece and Whitis are not entitled to recover such legal fees.

For the foregoing reasons, the decision of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John T. Aubrey
Manchester, Kentucky

BRIEF FOR APPELLEE:

John T. Mandt
Somerset, Kentucky