RENDERED: JANUARY 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002005-MR

SIZEMORE MINING CORPORATION — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 11-CI-00079

MARY ELIZABETH ANDERSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

ACREE CHIEF JUDGE: Sizemore Mining Corporation appeals from the Floyd Circuit Court's November 9, 2012 order denying its motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Having reviewed the record and the applicable law, we affirm.

On January 25, 2011, Mary Elizabeth Anderson, by and through her attorney in fact, Sarah King, filed a Petition for Declaration of Rights in Floyd Circuit Court. The petition sought to cancel a coal lease that Mary Elizabeth's parents, Mary Jane and M.C. Anderson, entered into with Sizemore in 1942. Sizemore mined coal on the Andersons' property until 1968. The petition alleged that Sizemore thereafter failed to produce coal or pay royalties in violation of implied covenants under the lease. Mary Elizabeth later filed a motion for summary judgment arguing that, under Kentucky law, there is an implied obligation to commence development of mineral interests by lessees, and asking the circuit court to declare the lease forfeited.

Sizemore responded that summary judgment was inappropriate because material issues of fact existed regarding whether Mary Elizabeth owned the coal that was the subject of the lease, claiming that her deed description of the property did not match the description in Sizemore's lease. Sizemore also argued that it had complied with the terms of the lease by mailing the minimum annual rental payments until the lessors started returning the royalties, and that the lessors had failed to give adequate notice of their demand to develop the property.

The circuit court granted the motion for summary judgment in an order entered on August 24, 2012. The order declared Mary Elizabeth to be the current owner, individually and/or as trustee, of the mineral properties covered under the 1942 lease. The order also stated that, since 1968, Sizemore had paid only minimum royalties in the amount of $222.30 per year, and had not taken any action

to produce coal. The court further found that, although proper notice and demand had been given to Sizemore, it had failed to commence development of the mineral interests and hence breached the implied covenant under the lease. The court deemed the 1942 mineral lease forfeited, and the obligations of the parties, and their heirs and assigns, terminated.

Sizemore did not pursue a direct appeal of this order. Instead, on October 1, 2012, Sizemore filed a motion to set aside the judgment pursuant to CR 60.02, claiming newly discovered evidence regarding the ownership of the property subject to the lease. The motion alleged that Sizemore had discovered that Mary Elizabeth was not the owner of the property because she had conveyed her interest in the property to Sara King, and that the conveyance was recorded in the Floyd County Clerk's Office.

The circuit court denied the motion, stating that Sizemore had not met its burden of proving that it possessed newly discovered evidence which could not have been discovered by due diligence, as the deed in question from Mary Elizabeth to King was a public record. The court further found that the issue of ownership between Mary Elizabeth and King did not materially affect Sizemore's interests under the lease in question. The action was pursued by King on behalf of Mary Elizabeth as trustee and, therefore, the issues were properly before the circuit court. This appeal by Sizemore followed.

CR 60.02 states, in pertinent part, that:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02[.]

We review the circuit court's denial of a CR 60.02 motion for an abuse of discretion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). To amount to an abuse of discretion, the circuit court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a "flagrant miscarriage of justice," we will affirm the circuit court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Sizemore argues it had no reason to conduct a due diligence title examination because the Petition for Declaration of Rights never claimed that there was a difference between the acreage in the lease and the deed, or disclosed that the property actually belonged to King. In a factually similar case, *Leeds v. City of Muldraugh*, 329 S.W.3d 341 (Ky. App. 2010), a group of business owners sued the City of Muldraugh, alleging arbitrary enforcement of ordinances relating to parking, zoning, and utility collection. The City was granted summary judgment. The owners then moved for relief pursuant to CR 60.02, alleging newly discovered evidence, specifically, deeds showing that the City did not own the property at issue. The trial court denied the motion, and this Court affirmed the decision in part on the grounds that the documents relied upon by appellants were of public

record and could have been located by an exercise of reasonable diligence. *Leeds*, 329 S.W.3d at 346.

The deeds in the case at bar were similarly in the public record and easily accessible. Furthermore, in addressing a dispute over a sixty-year-old mineral lease on real property, it was not unreasonable for the circuit court to assume that Sizemore could, and would, have uncovered the existence of the pertinent deeds and reviewed them. The circuit court did not, therefore, abuse its discretion in denying the CR 60.02 motion.

Although Sizemore claims that sections (a) ("mistake, inadvertence, surprise or excusable neglect"), (c) ("perjury or falsified evidence") and (d) ("fraud affecting the proceedings") of CR 60.02 are also grounds for relief, these arguments were never raised in the motion before the circuit court. "[A]n appellant preserves for appellate review only those issues fairly brought to the attention of the trial court. . . . A new theory of error cannot be raised for the first time on appeal." *Elery v. Commonwealth*, 368 S.W.3d 78, 97-98 (Ky. 2012) (internal citations and quotation marks omitted). We reiterate also that a CR 60.02 motion cannot be used as "a substitute for, nor a separate avenue of, appeal." *Mauldin v. Bearden*, 293 S.W.3d 392, 397 (Ky. 2009).

The Floyd Circuit Court's November 9, 2012 order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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