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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001985-MR

JOSEPH KEITH BICKETT,
AND JAMES A. BICKETT[1] APPELLANTS

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 12-CI-00114

DANIEL O. CECIL,
MARY KATHLEEN CECIL,
AND DANIEL O. CECIL, JR.[2] APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

[1] James A. Bickett ("Jamie") is the son of Joseph Keith Bickett ("Bickett"); together they are referred to as "the Bicketts". In the first amended complaint, which the trial court ordered filed, Jamie moved to intervene as a plaintiff to assert the same claim as his father, casting himself as the secondary beneficiary of an oral trust agreement alleged to have been created between his father and Daniel O. ("Danny") and Mary Kathleen Cecil (the "Cecils").

[2] Daniel O. Cecil, Jr. ("Jr.") is the Cecils' son. He was added as a defendant in the first amended complaint because his parents gifted him a portion of the land at the center of this appeal.

NICKELL, JUDGE: The Bicketts appeal from an order entered by the Marion Circuit Court awarding summary judgment to the Cecils, and a judgment overruling the Bicketts' motion to alter, amend or vacate the award of summary judgment to the Cecils. This appeal concerns a 196-acre tract of land known as "the Thompson farm," whether the Cecils have held title to that farm and other property for Bickett since 1988 under an oral trust agreement, and whether the Cecils wrongfully failed to return the property to Bickett upon his request in 2012. Upon thorough review of the record, the briefs and the law, we affirm.

BACKGROUND

In 1988, Bickett had a cocaine habit,[3] was paranoid, could not manage his affairs, and feared losing 265 acres of Marion County farmland. Included in the acreage was the 69-acre Votaw farm and the 196-acre Thompson farm. To protect the land from "his serious drug problem[,]" Bickett arranged with his sister and her husband—the Cecils—to transfer the property into their name. On December 21, 1988, via two separate deeds, Bickett transferred to the Cecils (for consideration) the Thompson farm, with a fair market value of $85,000, and the Votaw farm, with a fair market value of $33,500. Neither deed references an oral trust. The Cecils assumed the mortgages and made the payments.

[3] According to the record, in 1990 Bickett also claimed an alcohol problem substantiated by several alcohol-related arrests. Bickett reported he began snorting cocaine in 1985 or 1986; was clean from 1987 until 1988; and relapsed into cocaine use in 1988 or 1989, when he began "free-basing" cocaine. He also claimed using valium "off and on" for several years.

On February 17, 1989, the federal government filed notice of *lis pendens* stating it had seized the Votaw farm and it was being processed for forfeiture. The Cecils were named in the style of the action and defended the suit. Bickett, fully aware of the action, was not named and asserted no interest in the land. Ultimately, after the Cecils submitted to polygraph examinations and reached an agreement with the federal government, the Votaw farm was released to them.

While Bickett was feeding his cocaine habit in 1988, he was also distributing large quantities of marijuana to the East Coast as part of the so-called "Cornbread Mafia." As a result, he was arrested on federal drug charges in 1989 and released on bond. He was subsequently indicted for conspiracy to distribute and possess marijuana with intent to distribute,[4] aiding and abetting in the possession of marijuana with intent to distribute,[5] possession of cocaine,[6] and, being a felon in possession of a firearm in or affecting commerce.[7] He faced a significant period of incarceration, and a maximum aggregate fine of $6,500,000.

In March of 1990, a jury convicted Bickett on all four counts,[8] prompting the federal government to seize and pursue forfeiture of the Votaw

[4] 21 United States Code (U.S.C.) 846, a Class A felony.

[5] 18 U.S.C. 2 and 21 U.S.C. 841(a)(1), a Class B felony.

[6] 21 U.S.C. 844, a Class E felony.

[7] 18 U.S.C. 922(g)(1), a Class D felony.

[8] Bickett was convicted of the lesser included offense of simple possession of cocaine.

farm. Similar steps were *not* taken regarding the Thompson farm where Bickett lived. The record suggests authorities believed they had seized all of Bickett's land, but were unaware the Votaw and Thompson farms were separate parcels with separate deeds. On May 25, 1990, Bickett was sentenced to serve twenty years, followed by eight years of supervised release. A $17,500 fine was imposed.

In April 2012, Bickett filed a complaint against the Cecils claiming he had deeded the land to them "to be held in trust until [he] requested return of said property[.]" He alleged his oral trust agreement with the Cecils was confidential; covered not only the 265 acres of land, but also an array of farm equipment; and resulted from "legal issues" he was experiencing. The complaint alleged the Cecils: violated the oral trust agreement by failing to return land and equipment to Bickett; failed to provide Bickett an accounting of farm income, sale proceeds and gifts; deliberately mismanaged property; illegally conveyed a ten-acre tract to the Cecils' daughter costing Bickett more than $5,000; and, caused Bickett lost income, mental anguish and duress, making them liable to him for punitive damages. Bickett admits he has no written proof of an oral trust, but filed notice of *lis pendens* with the Marion County Clerk on July 21, 2012, seeking return of the Thompson farm "under an oral trust agreement."

In answering the complaint, the Cecils argued they paid Bickett for the land and hold nothing for him in trust. They asserted: Bickett's claims are barred by statutes of frauds and limitations; estoppel prevents Bickett's current claim of ownership because it is diametrically opposed to the position he took in

federal court in 1990; and, entry of a federal court order of dismissal—releasing the property to the Cecils at the end of the forfeiture action—rendered the matter *res judicata.*

A first amended complaint—adding Jamie as a plaintiff and Jr. as a defendant, and claiming the Cecils had been unjustly enriched by failing to abide by the oral trust—was ordered filed in mid-2013. In July 2014, the Cecils answered the amended complaint, denying anything not previously denied, and arguing the amended complaint failed to state a claim on which relief could be granted. The Cecils moved to file a second amended answer in August 2014, seeking to assert judicial estoppel as an additional defense.

This appeal has little to do with the crimes for which Bickett was convicted and sentenced to serve two decades in federal prison. It turns instead upon the financial picture—specifically the assets and "ability to pay" fines—included in a federal presentence report (PSI) used to assess his fine and, the "property" he listed on and omitted from a financial affidavit submitted to secure *in forma pauperis* status to appeal the federal conviction.

According to the PSI prepared in April 1990, Bickett's unencumbered assets were a 1980 pick-up truck valued at $1,650 and 37 acres in Marion County with a fair cash value of $7,400. The only other equity listed in the report, a "home and 69 acres" with a fair cash value less principal balance owed of $20,409.38 (the Votaw farm), was followed by this caveat:

> This property was deeded to Daniel and Mary O'Daniel[9] in December 1988. [Bickett] received a $500 down payment, and $17,500 additional payments in 1989, toward a total consideration of $80,000 with the agreement the purchasers would pay the principal balance of the mortgage ($58,590.62) and accrued interest ($6,887.00). Approximately $3,409.00 is owned [sic] on the purchase price. However, the United States has filed an Intent to Seize Order, subsequent to conveyance of the deed. Therefore, any equity may be forfeited, which would negate the possibility of receiving additional funds.

Federal authorities seized the Votaw farm believing Bickett had used it "as a meeting place for the sale of more than fifty (50) kilograms of marijuana" on February 12, 1989. Bickett never mentioned the Cecils were merely holding the Votaw farm—or anything else—in trust for him and awaiting his release from prison when they would return the land to him upon request.

The PSI states another property—in which Bickett had an interest at one time—had already been seized.

> The United States has already seized Bicketts Bar of which [Bickett] was one-half owner, valued at $7,400 ($3,700 his half interest); a 1985 Oldsmobile 98 Regency, valued at $6,925; and a 1986 Chevrolet Camaro IROC-Z, valued at $7,975.

Not mentioned anywhere in the PSI is the Thompson farm—an absence not accidental since Bickett voiced several objections to the PSI—but never challenged accuracy of his stated assets.

[9] This is an error. The deed states the farm was transferred to "Daniel O. and Mary K. Cecil."

Also at odds with Bickett's current claim is the financial affidavit he signed under oath on September 25, 1990. The affidavit listed the 1980 pick-up truck and half-interest in Bickett's Bar, acknowledged the Cecils had paid him $17,500 as down payment on a "property sale," but omitted any interest in the Votaw and Thompson farms. Accompanying the affidavit was an unsigned letter from Bickett to the sentencing judge, explaining in part:

> the attached documents will show where all properties are, what value, if any is not siezed [sic] by the Government. I have tried to show that I am in fact without income and without the ability to levy any property to cover any attorney fees.

In November 2012, the Cecils sought summary judgment on Bickett's complaint, arguing the lawsuit was frivolous, Bickett could not recover land he had transferred to the Cecils to defraud his creditors, and, the oral trust he now alleges violates the statute of frauds. After taking the matter under submission, the trial court overruled the motion, deeming it to have been filed prematurely.

As discovery continued, Bickett attempted to have Hon. Thomas E. Clay—the attorney representing the Cecils—disqualified. As grounds, Bickett argued he had sent Clay a confidential letter in November 1991 seeking help with his criminal case and offering information he believed would help the Cecils fight the forfeiture proceeding. In the letter, Bickett admitted knowing Clay represented the Cecils, hoped to help the Cecils without creating "a conflict of interest," and stated multiple times, "I sold the property to the Cecils." The trial court denied the motion to disqualify Clay, noting the Cecils had relied on Clay's legal advice for

many years at considerable expense, and while Bickett had written Clay under the pretense of helping the Cecils, his real motive was convincing Clay to obtain an audio recording Bickett wanted to use in the appeal of his conviction. Bickett's motion to alter, amend or vacate the ruling on disqualification was overruled.

Jury trial was set for August 27, 2014, with a pre-trial conference to occur on July 10, 2014. On June 20, 2014, the Cecils renewed their summary judgment motion, arguing in part: Bickett cannot prevail because he tried to defraud the government by transferring land to the Cecils to avoid legal issues; the Cecils were not unjustly enriched—they bought the land from Bickett, assumed the mortgage and made payments in the wake of the sale; Bickett was served with the forfeiture complaint but did not contest it; and, in the November 1991 letter Bickett sent to Clay, he referenced the "sale" of property to the Cecils and referred to them as "owners." Bickett responded, claiming the Cecils had never answered the amended complaint and he and Jamie should be awarded default judgment.[10]

On July 3, 2014, Bickett filed his own motion for summary judgment, quickly followed by three motions *in limine* and a pre-trial statement demanding the entire Thompson Farm and damages. He claimed he asked the Cecils to hold the land for him because of "his serious drug problem[,]" and went on to suggest his "problem" was drug addiction, not fear of being caught distributing marijuana.

[10] Bickett formally moved for default judgment on August 21, 2014, the same day of the final pre-trial hearing. A hearing was not requested on the motion until September 2, 2014, as part of a motion to vacate the grant of summary judgment to the Cecils.

He further stated the Cecils transferred two and one-half acres to Jamie and his wife in 2005, and in 2011 transferred 39 acres of the Votaw farm to Bickett.[11]

During the pre-trial conference on July 10, 2014, the Cecils argued the five-year statute of limitations on each of Bickett's claims had expired long before suit was filed. They also responded to Bickett's motion for summary judgment—reiterating no oral trust agreement exists—and arguing the claim is foreclosed by the doctrine of issue preclusion due to Bickett's providing inconsistent data in the 1990 PSI—a document the sentencing court used to impose a $17,500 fine,[12] when the maximum potential fine was $4,000,000. The Cecils also argued Bickett could not relitigate an issue previously resolved by the federal court, and Jamie's claim for unjust enrichment was untimely.

Bickett acknowledged the unjust enrichment claim might be time-barred. He then stated his primary theory of the case was a constructive trust. The Cecils sought clarification of the precise claim because the complaint consistently alleged an "oral trust agreement," but twice asked the trial court to declare existence of a "constructive trust," even though it was not argued in the alternative. Bickett stated his motions *in limine* could be heard later. The trial court announced it was unlikely to grant summary judgment, would review the competing trial memoranda, and the pending issues would be taken up during the next hearing.

[11] A 2005 deed from the Cecils to Jamie and Jessica Bickett appears in the record; a deed from the Cecils to Bickett does not. However, when deposed in 2013, Danny Cecil confirmed land had been deeded to Bickett, but gave no details.

[12] Bickett's $5,000 bond, paid by the Cecils, was used as partial payment of the fine.

On July 16, 2014, the Cecils filed their pre-trial compliance asserting as defenses the merger doctrine, issue preclusion, unclean hands, accord and satisfaction, and statutes of both limitations and frauds. The same day, the Cecils filed multiple motions *in limine.* A few days later, they sought leave to file an amended answer to the amended complaint alleging judicial estoppel for the first time.

When court convened on August 21, 2014, the trial court stated motions for summary judgment filed by both parties were pending and announced he was denying all of the Bickett's claims and granting summary judgment to the Cecils on grounds of judicial estoppel, issue preclusion and the merger doctrine. About one month later, a two-page judgment denying the Bickett's summary judgment motion and granting summary judgment to the Cecils was entered stating in full:

> This matter came before the Court on August 21, 2014, for a final pre-trial. The Plaintiffs have filed a motion for summary judgment, and the Defendants have likewise filed motions for summary judgment.
>
> Having reviewed the filings of the parties, the court denies the motion of the Plaintiffs. The Court grants the motion for summary judgment of the Defendants on the following grounds:
>
> 1. The Plaintiff Joseph Keith Bickett made certain statements to the U.S. District Court, Western District of Kentucky, at Louisville, in a criminal prosecution, Docket No. CR 89-00023-02-L, in his application to proceed with his appeal *in forma pauperis* to the United States Court of Appeals, Sixth Circuit. Specifically, the Plaintiff Joseph Keith Bickett certified a financial

affidavit on September 25, 1990, "Answers to Questions Regarding Ability to Pay," in which he failed to disclose any interest in the real estate which is the subject of the instant action. The Court concludes that the Plaintiff Joseph Keith Bickett's purported claim to this property is barred by the doctrine of judicial estoppel based upon the statements he made in the financial affidavit filed in the U.S. District Court action.

2. The Plaintiff Joseph Keith Bickett was a party defendant in an action styled *United States of America v. Joseph Keith Bickett,* United States District Court, Western District of Kentucky, at Louisville, Docket No. CR-89-000.23-02-L [sic]. In that prosecution, U.S. District Judge Charles Simpson determined that the Plaintiff Joseph Keith Bickett did not have any interest in any real estate based upon information provided by Bickett to the U.S. Department of Probation for inclusion in Bickett's Pre-Sentence Investigation Report. As a result of the information contained in the Pre-Sentence Investigation Report, Judge Simpson concluded the Plaintiff Joseph Keith Bickett did not have the ability to pay a fine based upon Bickett's reported financial status.

Based upon the foregoing proceedings in the United States District Court, Western District of Kentucky, at Louisville, the doctrine of issue preclusion prohibits the Plaintiff Joseph Keith Bickett from relitigating his claim to this property in this proceeding.

3. Under the merger doctrine, the Court concludes that all prior statements and agreements, both written and oral between Plaintiff Joseph Keith Bickett and Defendants Danny Cecil and Kathleen Cecil are merged into the deed in which Plaintiff Joseph Keith Bickett transferred the real estate which is the subject of this litigation to Defendants Danny and Kathleen Cecil.

This is a final and appealable order; there is no just cause for delay.

On October 30, 2014, the trial court entered an order overruling the Bicketts' motion to alter, amend or vacate the judgment. This appeal followed.

ANALYSIS

> Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is deemed to be a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove no genuine issue of material fact exists, and he "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*. The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). The non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact[.]" *Id.* On appeal, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Furthermore, because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006).

Keaton v. G.C. Williams Funeral Home, Inc., 436 S.W.3d 538, 542 (Ky. App. 2013). Against this backdrop, we consider the Bicketts' arguments.

First, the Bicketts challenge the trial court's award of summary judgment to the Cecils under the doctrine of judicial estoppel. The trial court concluded Bickett filed an inaccurate financial affidavit in federal court because it omitted land he now claims the Cecils held for him pursuant to an oral trust.

Bickett argues he explained the rest of the story in the cover letter accompanying the affidavit so he did not conceal assets from the federal court. He maintains he did not list the Votaw and Thompson farms because he *believed* both of them to have been seized.

The only language in the letter Bickett could possibly believe supports his position is:

> The attached documents will show where all properties are, what value, if any is not siezed [sic] by the Government. I have tried to show that I am in fact without income and without the ability to levy any property to cover any attorney fees.

Reviewing the cover letter and affidavit, we reject Bickett's contention and agree with the trial court's resolution.

Initially, despite his argument to the contrary, Bickett signed the affidavit under oath as reflected by the warnings on the document itself. Second, the standard form asks,

> Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Without answering "yes" or "no," as required by boxes on the form, Bickett listed:

VALUE	DESCRIPTION
$1,850.00	50% interest in 37 acres (Marion County)
2,500.00	50% interest in Lounge
1,000.00	50% interest in parking lot (Bickett Bar)
500.00	1980 Chevrolet Pickup Truck (junk)

In the two pages following the affidavit, Bickett listed "OTHER INCOME" including $1,800 in rent from Bickett's Bar—which he says has been under seizure since April 1989 and is yielding no income—followed by other items and sale prices, one of them a "property sale" to Daniel and Kathleen Cecil for $17,500, which he describes as a down payment. Under the heading "PROPERTY," he lists only a single debt of $3,409 owed to him by the Cecils "in direct concert with the $17,500.00 mentioned in the INCOME section of this document." On the next page, Bickett states the $3,409 is related to the Cecils having posted $5,000 bond on his behalf which the federal government seized and the Cecils were reluctant to repay.[13] Third, Bickett listed Bickett's Bar which he *knew* had been seized. It is nonsensical that he would list one seized property but not two others. Furthermore, the affidavit did not authorize him to pick and choose the information he revealed. He was to disclose "any" real estate and was warned:

> A FALSE OR DISHONEST ANSWER TO A QUESTION IN THIS AFFIDAVIT MAY BE PUNISHABLE BY FINE OR IMPRISONMENT, OR BOTH[.]

Fourth, Bickett's cover letter, while inartful, says "[t]he attached documents will show where all properties are," giving the impression the only real estate he owned was a 50% share of three items.

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[13] A federal court docket entry dated July 27, 1990, recites: the clerk for the Western District of Kentucky was "directed to pay over forthwith to Treasurer of US sum of $5,000 deposited in Registry of crt by dft in connection w/app bond exed by dft; said sum to be applied as payment in full of $200 SPA [Special Penalty Assessment] debt, w/remaining bal of $4,800 to be applied as partial payment toward $17,500 fine imposed by crt on 5-25-90."

Nowhere in the affidavit, cover letter or attached documents does Bickett list the 69-acre Votaw farm or the 196-acre Thompson farm or any interest therein. Therefore, if the Cecils hold the farms pursuant to an oral trust agreement as Bickett now claims, he concealed those assets from the federal court in 1990.

Judicial estoppel protects the integrity of the judicial process by preventing a party from arguing inconsistent positions. *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 434 (Ky. App. 2008). In federal court, it was advantageous to Bickett to portray himself as having little to no income and/or property. Deeding the farms to the Cecils gave at least the appearance Bickett no longer owned the Votaw and Thompson farms. Bickett asserted no interest in either farm while the federal court was imposing sentence, pursuing forfeiture or considering his application for *in forma pauperis* status.

> Three factors are often associated with judicial estoppel:
>
> (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *See New Hampshire v. Maine*, 532 U.S. 742, 750–51, 121 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001).

Id. at 434-35. All three factors are present in this case. (1) Bickett told the federal court he owned half-interest in Bickett's Bar which had been seized in 1989. He also admitted selling property (while unspecified, probably the Votaw farm) to the Cecils for a down payment of $17,500.00. He revealed nothing in the affidavit that

had not previously been disclosed. The federal government overlooked the Thompson farm. Bickett did not expose that mistake. (2) Relying on information provided by Bickett, the federal court imposed a fine of just $17,500 rather than a greater amount. The federal court also granted Bickett *in forma pauperis* status based on his affidavit. (3) Allowing Bickett to successfully claim the Cecils are holding the property in trust for him would give Bickett an unfair advantage. The Cecils paid him consideration for the property, assumed the mortgages, and made the payments.

This is precisely the situation to which the doctrine of judicial estoppel applies. Bickett has failed to expose any genuine issue of material fact weighing against award of summary judgment to the Cecils.

Bickett next attacks the trial court's reliance on issue preclusion to rule in favor of the Cecils.

> [F]or issue preclusion to operate as a bar to further litigation, certain elements must be met: (1) at least one party to be bound in the second case must have been a party in the first case; (2) "the issue in the second case must be the same as the issue in the first case"; (3) "the issue must have been actually litigated"; (4) "the issue was actually decided in that action"; and (5) "the decision on the issue in the prior action must have been necessary to the court's judgment" and adverse to the party to be bound.

Miller v. Administrative Office of Courts, 361 S.W.3d 867, 872 (Ky. 2011) (internal citations omitted). Applying the five elements to this case yields: (1) Bickett was a defendant in the federal criminal action and is a plaintiff in this civil

action. (2) At issue in both cases is the extent of Bickett's real estate holdings—specifically, did he possess any interest in the 196-acre Thompson farm that was not revealed to the federal court, and is asserted for the first time in state court. (3, 4) The federal court relied on Bickett's statement of assets to impose his fine and grant his application for *in forma pauperis* status; his real estate holdings were both litigated and decided in federal court. (5) Finally, it was necessary for the federal court to determine Bickett's assets to impose sentence. Because the federal court was never apprised of Bickett's alleged interest in the Votaw and Thompson farms, and never considered such, the federal court judgment is adverse to the position Bickett now asserts in state court. Again, Bickett has revealed no genuine issue of material fact foreclosing the trial court's award of summary judgment to the Cecils.

Next, Bickett challenges the trial court's reliance upon the merger doctrine, under which

> upon delivery and acceptance of a deed the deed extinguishes or supersedes the provisions of the underlying contract for the conveyance of the realty. The doctrine applies to covenants pertaining to title, possession, quantity, or emblements of the property, the covenants commonly addressed in deeds. Covenants in the antecedent contract that are not commonly incorporated in the deed, and that the parties do not intend to be incorporated, are often referred to as collateral agreements. The merger doctrine does not apply to collateral agreements.

Drees Co. v. Osburg, 144 S.W.3d 831, 832-33 (Ky. App. 2003) (footnotes omitted).

Bickett admits transferring the Votaw and Thompson farms to the Cecils in separate deeds. He claims the Cecils agreed to have the farms transferred into their name—as evidenced by testimony from Danny Cecil and two recorded deeds. He then goes a step further, however, claiming the Cecils agreed to return the property to him when he requested its return based on a confidential oral trust agreement.[14] The deeds do not reflect existence of an oral trust; Bickett admits he has no written proof of an oral trust, and, Bickett's attempts to secretly record Danny Cecil's admitting the terms of an oral trust agreement never came to fruition. As the trial court found, under the merger doctrine, all prior statements and agreements—both written and oral—merged into the recorded deeds. The trial court did not err.

The Bicketts' fourth argument is the trial court should have granted them default judgment and should have held a hearing on their motion before awarding summary judgment to the Cecils—even though no hearing was sought until *after* summary judgment had already been awarded. On July 3, 2014, the Bicketts filed a written response to the Cecils' renewed summary judgment motion. In the response, the Bicketts mentioned the Cecils had not answered the amended complaint, and while discovery was still ongoing, "if anything, Plaintiffs should be entitled to a Default Judgment." Nothing more was said about default judgment until newly added counsel filed a formal written motion for default

[14] Bickett testified the oral trust agreement was between him and Danny Cecil alone. Kathleen Cecil was not present when the deal was supposedly struck; Bickett testified he told Kathleen the details later.

judgment on August 21, 2014, alleging the Cecils had filed an untimely answer to the amended complaint. The motion for default judgment was filed the same day the trial court convened the hearing at which all Bickett claims were denied and summary judgment was granted to the Cecils.

Default judgments are disfavored in the law. *Smith v. Flynn*, 390 S.W.3d 157, 159 (Ky. App. 2012). The Bicketts cite no support for their argument and the Cecils were active throughout the litigation. Denying default judgment due to a tardy answer is within the trial court's broad discretion. *Cupp v. Cupp*, 302 S.W.2d 371, 372 (Ky. 1957). We discern no abuse of discretion.

The Bicketts' fifth argument is the trial court should have convened an evidentiary hearing on whether Jamie's claims, separate and apart from his father's, were barred by judicial estoppel and issue preclusion. We discern no merit to this claim. Jamie was added as a plaintiff under the theory he was a secondary beneficiary under his father's alleged oral trust with the Cecils. He was not a party to the original agreement, nor is it alleged he overheard or witnessed Bickett and Danny Cecil negotiating the property transfer. At most, he could only parrot what his father had told him. Absent proof Bickett could take under the oral trust agreement, there were no theories under which Jamie, as a secondary beneficiary, could prevail.

The Bicketts' sixth claim is the trial court should have held an evidentiary hearing on his motions to exclude privileged communications and items (letters from Bickett's attorneys and his financial statement and affidavit) he

believes were stolen from his mother's home. Neither written motion requested an evidentiary hearing and neither Bickett's mother nor brother could confirm Kathleen Cecil had removed any item from Mrs. Bickett's home. Bickett raised the issue during the hearing on October 23, 2014, arguing he could have used the stolen items to defeat the summary judgment motion. Counsel for the Cecils argued nothing had been stolen and welcomed Bickett to visit his office, view the entire file, and copies would be made of any item of interest.

The trial court ruled it would not compel return of any documents due to the uncertainty of the sources and how the items were acquired, but would order opposing counsel to follow through on his offer to make his file available for review and to copy any desired item for Bickett. The trial court stated a motion to compel return of the documents would have to be heard separately, but Bickett did not request a hearing. Having failed to ask the trial court to hold an evidentiary hearing on the motion, Bickett cannot now argue error to this Court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010) (party cannot "feed one can of worms to the trial judge and another to the appellate court").

The Bicketts' seventh claim is the trial court should have given the parties notice and reasonable time to conduct discovery on the judicial estoppel and issue preclusion defenses. They specifically intimate no motion for summary judgment on behalf of the Cecils was pending when granted. Such a position is inconsistent with the record and the Bicketts' actions.

The Cecils renewed their summary judgment motion on June 20, 2014, reiterating all facts and authority previously argued, incorporating new grounds and stating recent discovery had strengthened their case. The Bicketts responded to the renewed motion on July 3, 2014, the same day they filed their own motion seeking summary judgment. They must have known the Cecils' renewed motion was pending when they filed their response. When a hearing began a week later, the Cecils announced their renewed summary judgment motion was pending—a statement the Bicketts did not correct—and argument, in which the Bicketts participated, progressed. The Bicketts knew full well the Cecils' renewed motion was pending when it was granted on August 21, 2014.

Furthermore, on July 16, 2014, the Cecils moved *in limine* to exclude statements of Bickett's ownership of the disputed land, specifically arguing issue preclusion, false reporting of assets, failure to mention the Thompson farm, failure to dispute the listing of assets, and the federal court having determined Bickett's ability to pay a fine without knowing he claimed interest in the Votaw and Thompson farms. Seeking to assert the defense of judicial estoppel, on August 13, 2014, the Cecils moved to file an amended answer to the amended complaint and moved to exclude Bickett's claim of ownership as being barred by judicial estoppel due to Bickett taking inconsistent positions. The Bicketts filed a written response to the motion *in limine* on August 21, 2014, coupled with several of their own motions *in limine.* Thus, when the pre-trial hearing commenced on August 21, 2014, the Bicketts knew the Cecils' renewed summary judgment motion was

pending and could be granted at any time. The Bicketts did not request more time to research issues before the trial court announced its decision.

Moreover, the Bicketts raised these claims in their motion to vacate the award of summary judgment to the Cecils. The trial court deemed them to be unpersuasive, thus, more time would not have insured success. Because trial was not going to occur, further consideration of the motions *in limine* was unwarranted. The trial court did not err.

The Bicketts' eighth claim is counsel for the Cecils should have been disqualified due to a conflict of interest. The Bicketts' argument is based on *Lovell v. Winchester*, 941 S.W.2d 466, 468 (Ky. 1997), *overruled by Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015), which required only an "appearance of impropriety" to disqualify an attorney—a very low standard. *Lovell* is no longer controlling law. Now, an "actual conflict, not just a vague and possibly deceiving appearance of impropriety" is required and "should be established with facts, not just vague assertions[.]" *Marcum,* at 718-19. Moreover, before disqualifying counsel, the court must find an actual conflict exists, and state the conflict on the record. *Id.* at 719. The Bicketts did not make the required showing. There was no error.

The Bicketts' ninth and final argument is Hon. Clay should have been disqualified because he was likely to be called as a witness. The Bicketts did not subpoena Hon. Clay as a witness, nor was there any relevant topic on which he could have been questioned. There was no error.

For the foregoing reasons, we affirm the judgment and separate order entered by the Marion Circuit Court.

ALL CONCUR.

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