

RENDERED: JANUARY 6, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000981-MR

JAMES SULLIVAN; DARIUS SULLIVAN;
AND SULLIVAN BROTHERS COAL COMPANY APPELLANT

APPEAL FROM PIKE CIRCUIT COURT
v. HONORABLE THOMAS M. SMITH, SPECIAL JUDGE
ACTION NO. 12-CI-00526

BETTY MCCOWN; MISTY POTTER; MIKE ROWE;
JUDY KEEN; AND RUSTY ROWE APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: James Sullivan, Darius Sullivan, and Sullivan Brothers Coal Company (collectively, “the Sullivans”) appeal from a summary judgment of the Pike Circuit Court dismissing their claims against the heirs of the Estate of Nickitie Flanary (collectively, “the Flanary heirs”). The Sullivans argue that the trial court

erred in finding that the Flanary heirs are not bound by the terms of a settlement with a third party concerning title to property allegedly covered by a coal lease.

We agree with the trial court that the Flanary heirs are not bound by that settlement, nor have the Sullivans sufficiently alleged any liability to them arising out of that settlement. Hence, we affirm.

This matter has a complex procedural and factual history. Sometime prior to 1991, Sullivan Brothers Coal Company, a partnership operated by James and Darius Sullivan, entered into a lease of coal rights on property owned by a Trust established under the Will of Nickitie Flanary (“the Flanary Trust”). Under the terms of the lease, the Flanary Trust was to receive \$2.00 per ton of coal removed. The Sullivans entered into a sub-lease with Wellmore Coal Corporation “Wellmore” to mine the coal. In 1991, the Sullivans filed an action alleging that Wellmore breached its obligation to extract all of the mineable and merchantable coal and by rendering unmined coal inaccessible. The action resulted in a jury verdict in favor of the Sullivans.

Following an appeal to this Court, the Sullivans entered into a settlement agreement with Wellmore for an amount in excess of the jury verdict. In 1995, the Flanary Trust filed an action against the Sullivans and Wellmore to recover any settlement proceeds which should have been paid as royalties under the coal lease. The Sullivans filed a counterclaim against the Flanary Trust alleging, among other things, that the Trust had received royalties for coal that did not belong to it. Specifically, the counterclaim alleged that the coal lease included

a tract owned by the heirs of Jackson Rowe (“the Jackson Rowe heirs”). Based on this dispute, the court ordered that the Sullivans deposit \$265,446 of the settlement proceeds into an interest-bearing account for distribution to any claimants.

Thereafter, in 1996, the Jackson Rowe heirs filed an action against Wellmore and the Sullivans alleging that the Sullivans had accepted royalties and wheelage for coal mined from and transported over a parcel of land belonging to them. The complaint referred to coal mined and royalties paid to the Flanary Trust, but neither the Trust nor the Flanary heirs were named as parties to that action. The Sullivans filed a motion to consolidate the actions. The court denied the motion to consolidate, but granted their motion to join the Flanary heirs as necessary parties to the Jackson Rowe case.

In February 1997, the Flanary Trust and the Sullivans entered into a settlement agreement of all issues raised in the 1995 action. The Sullivans paid the Flanary Trust the sum of \$229,052.78, plus accrued interest, for distribution to the Flanary heirs. The settlement agreement further provided that:

There is pending in the Pike Circuit Court an action “Thompson v. Wellmore” by which the heirs of Jackson Rowe make certain claims against the Defendants in the within action for the mining of coal claimed by the Jackson Rowe heirs. The Defendants in the within action, the Sullivan Brothers, by the execution of this Settlement Agreement, expressly retain the right to recover from the Plaintiffs herein, the Estate of Nickitie Flanary, any sums which might be adjudged against the Flanary Heirs on account of any payment by the Sullivan Brothers to the Flanary Heirs for coal which may be adjudged to belong to the Jackson Rowe Heirs. By entering into the within agreement neither the Plaintiffs

nor the Defendants admit or deny any obligation to the other arising out of the matters asserted in Thompson v. Wellmore, but the Sullivan Brothers expressly reserve any claim they may have against the Flanary Heirs relative to any coal or mineral properties adjudged to the Jackson Rowe Heirs in Thompson v. Wellmore.

For reasons not apparent from the record, the Jackson Rowe case was not resolved until 2011. The Sullivans attempted to file a separate action against the Flanary Trust in 2006. However, the Flanary Trust had lapsed during the interim, and the individual trustees were all deceased. The circuit court dismissed that action in 2012. In 2011, the Sullivans settled the action by an agreed order stipulating that the Jackson Rowe heirs are the owners of the disputed tract and all remaining coal and minerals upon that property.

Following entry of that settlement and the dismissal of the 2006 action, the Sullivans filed this action against the Flanary heirs, known and unknown, seeking to recover any royalties paid for coal mined from the disputed tract in the Jackson Rowe case. The Flanary heirs responded with a motion to dismiss pursuant to CR¹ 12.02, arguing that the Sullivans' claim was an improper attempt to dispute the title of their lessor. Several of the Flanary heirs separately moved to dismiss, arguing that they could not be bound by the terms of the settlement with the Trust or the separate settlement with the Jackson Rowe heirs.

The parties conducted additional discovery on the matter, and the trial court treated the matter as a motion for summary judgment pursuant to CR 56. In an opinion and order entered on May 28, 2015, the trial court granted summary

¹ Kentucky Rules of Civil Procedure.

judgment for the Flanary heirs, concluding as a matter of law that the Sullivans were not authorized to dispute the title of their landlord under the coal lease, and that the Flanary heirs could not be bound by a settlement or judgment to which they were not parties. The Sullivans now appeal from this order.

As an initial matter, we note that the parties submitted affidavits and records from the prior litigation in support of the motion to dismiss. When parties present matters outside of the pleadings in support of a motion to dismiss, the trial court may treat it as a motion for summary judgment pursuant to CR 56. CR 12.02. “The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. *Steelvest*, 807 S.W.2d at 480. The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. *Id.* Since a summary judgment involves no fact-finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Scrifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

The Flanary heirs argue that the Sullivans' claim against them is barred for two reasons. They first cite the long-standing rule that a tenant in possession cannot dispute the title of his or her landlord. *Demunbrum v. Kentucky Nat. Parks Comm'n*, 128 S.W.2d 963, 965 (Ky. 1939). See also *Pierson v. Coffey*, 706 S.W.2d 409, 414 (Ky. App. 1985), citing *Campbell v. Hensley*, 450 S.W.2d 501 (Ky. 1970). Based on this rule, the Flanary heirs argue that the Sullivans cannot deny the Trust's title to the property subject to the coal lease.

The Sullivans respond that the subject of this action does not involve a challenge to the title of the Flanary Trust or the Flanary heirs. Rather, the Sullivans contend that the Flanary Trust and the Flanary heirs received royalties for coal mined on a tract which has been found to belong to the Jackson Rowe heirs. The Sullivans note that their 1997 settlement with the Trust expressly reserved the right to assert this claim against the Flanary heirs once the issue of title to the disputed tract was resolved.

In a related argument, the Flanary heirs argue that they cannot be bound by the 2011 order finding that the coal was mined from property belonging to the Jackson Rowe heirs. In the Jackson Rowe case, the circuit court granted the Sullivans' motion to add the Flanary Trust as a party to the action. However, the Flanary heirs note that the Sullivans never filed a pleading to join them or the Trust or to assert any claim against them. The Sullivans contend that the Flanary heirs cannot complain that they were never joined as parties to the Jackson Rowe case

because their predecessor, the Flanary Trust, expressly agreed to be bound by the outcome of that matter.

We agree with the trial court that summary judgment was appropriate in this case. By its own terms, the 1997 settlement does not apply to the claims which the Sullivans are asserting in this action. The settlement specifically reserved the Sullivans' right to assert a claim against the Flanary Estate for any sums which might be adjudged to belong to the Jackson Rowe heirs. The 2011 Agreed Order simply states that the Jackson Rowe heirs are the owners of the disputed tract and any remaining coal oil or gas on that property. The Sullivans have never alleged that they were obligated to pay any amount to the Jackson Rowe heirs.

Thus, the only issue presented in this action concerns the collateral effect of the 2011 Agreed Order. To the extent that the disputed tract was part of the property covered by the coal lease, the Flanary Trust or the Flanary heirs were indispensable parties to determine the title of the disputed tract. But while the circuit court granted the Sullivans' motion to join the Flanary Trust or the Flanary heirs as parties to the Jackson Rowe case, the Sullivans never filed an amended complaint naming them as parties or asserting any claims against them.

The 1997 settlement reserved the Sullivans' right to bring such a claim. However, the Flanary heirs did not specifically agree to waive formal joinder or to be bound by the outcome of the Jackson Rowe case. And as the trial court noted, the Sullivans had no authority to dispute the title of the Flanary heirs

as against any third parties. Consequently, the Flanary heirs were not bound by any determination of title in the Jackson Rowe case, nor have the Sullivans alleged that the Flanary heirs could be liable to them under the terms of the coal lease. Therefore, we conclude that the trial court properly dismissed the Sullivans' complaint against them.

Accordingly, the summary judgment by the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

William H.B. Rich
Paris, Kentucky

BRIEF FOR APPELLEE:
BETTY MCCOWN

Lawrence R. Webster
Pikeville, Kentucky

BRIEF FOR APPELLEES:
MISTY POTTER, MIKE ROWE,
JUDY KEEN AND RUSTY ROWE

Billy R. Shelton
Lexington, Kentucky