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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000394-MR

ABBOTT, INC. AND THE ESTATE OF JOHNNY BROWN RUSSELL, BY AND THROUGH ITS EXECUTOR, WARREN K. HOPKINS — APPELLANTS

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 08-CI-00177

SAMUEL GUIRGUIS; DARRIN G. TABOR; DIANA P. HERRIN; HOMESTEAD AUCTION & REALTY, INC.; JAMES E. SPEAKS; DWIGHT WEST, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF BRENDA WEST; MICHAEL RUSSELL, INDIVIDUALLY AND AS ATTORNEY-IN-FACT FOR BRENDA RUSSELL; PATSY E. HOLLAND; AND SHARON RUSSELL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON, AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Abbott, Inc., and the Estate of Johnny Brown Russell appeal the entry of a summary judgment by the Hopkins Circuit Court. The Appellants ask this Court to determine whether the trial court properly awarded fee simple ownership of real estate formerly used as a railroad bed to the Appellee, Samuel Guirguis. Having thoroughly reviewed the record, we find the trial court committed no reversible error, and affirm.

I. FACTUAL AND PROCEDURAL HISTORY

This dispute concerns an elevated strip of land approximately 66 feet wide and 1500-2000 feet long, which runs west-to-east and divides 1,066 acres of land owned by Guirguis into northern and southern portions. Abbott, Inc. ("Abbott"), and Guirguis both claimed ownership of this strip of land, which had been used as a railway line from its construction in the late 19th century until 2001.

This action began when Guirguis filed suit against David West, his wife, Brenda West, and James Speaks, the prior owners of his property who sold it to him; Darrin Tabor and Diana Herrin, the individual realtors through whom the transaction was executed; and Homestead Auction and Realty, Inc. ("Homestead"), the seller's realtor. Guirguis asserted claims for damages for fraud, breach of contract, misappropriation, and failure to disclose. He argued that these defendants had misrepresented to him that the land he was purchasing was contiguous and had adequate road access. The Wests and Speaks filed an amended cross-claim adding Abbott as an adverse party at the suggestion of the trial court, who noted during a motion hearing that the ownership status of the railroad bed needed to be resolved.

Resolving this dispute requires an examination of the ownership and usage history of both tracts.

The rail line across the property was constructed in the late 1800's by the Illinois Central Gulf Railroad[1] ("Illinois Central"). The construction of the rail line required elevating the land approximately fifteen feet above the level of the surrounding wetlands. How Illinois Central came into possession of the land which became the railroad bed was never resolved. According to the deposition testimony of Tom Garrett, former general counsel and current president of Paducah & Louisville Railroad, Inc. ("P&L"), business records—a plat map prepared by Illinois Central in 1915—indicated that Illinois Central acquired title by adverse possession sometime prior to the map's creation. Illinois Central only used the land for transportation, and lined its northern and southern boundaries with fences to prevent trespassing by both people and wildlife.

P&L purchased the line from Illinois Central in 1986. Thereafter, P&L transmitted freight on the subject property until 2001. Garrett testified by deposition that P&L shipped commodities—primarily coal—over that line. P&L also conducted inspections of the line twice weekly, performed maintenance on the rails and any related equipment, and performed vegetation control actions annually or semi-annually. Additionally, P&L paid the *ad valorem* taxes on the property and insured it. Garrett further testified that the railroad ceased maintaining the line in 2001, when P&L stopped using it for transmitting freight.

[1] This entity later became known as the Illinois Central Railroad Company.

P&L sought permission from the Surface Transportation Board[2] to abandon the operation of the line in 2003. Garrett testified that, in the railroad context, the term "abandonment" has a specific definition and procedure provided in the United States Code and the Code of Federal Regulations ("C.F.R."). Garrett explained that the definition boils down to ceasing to operate as a common carrier on a specified stretch of federally regulated track. The Surface Transportation Board approved the abandonment, and P&L removed the track. However, Garrett testified that P&L continued to pay the *ad valorem* taxes assessed on the property, and take actions to prevent trespassing. P&L completed the abandonment procedures in November of 2004, according to Garrett's deposition testimony.

In October of 2005, P&L executed a quitclaim deed, conveying its interest in the entire stretch of rail bed, 66 feet wide and four miles in length,[3] to Abbott. William Donan, a part owner of Abbott and a member of P&L's board of directors, testified that Abbott has maintained the property, including the disputed portion, since then. Abbott also erected barriers to prevent foot or ATV traffic on the rail bed, and painted the old concrete boundary posts fluorescent orange (but did not repair or replace the fence).

Abbott also owns real estate to the east of Guirguis, over which the rail bed also crosses. Abbott purchased the portion of the rail bed crossing Guirguis' land, in part, to enable road access and to exclude others from the use of

[2] The federal regulatory body formerly known as the Interstate Commerce Commission.

[3] This litigation only pertains to the span of that property which bisects the property owned by Guirguis.

its property to the east of Guirguis' property. According to Dolan's deposition testimony, Abbott constructed a gate on a portion of that other property owned by Abbott to serve the rail bed property.

Guirguis is the current owner of 12 parcels of real estate, totaling 1,066 acres, which abut the rail bed to the north and south. The deed descriptions of several of these tracts use the edges of the rail bed as boundaries. Guirguis obtained the property in 2007 by purchase from the Wests and Speaks. Earlier in 2007, the Wests and Speaks had purchased the property from brothers Johnny Brown Russell and Harry Russell,[4] who each possessed an undivided half-interest. Dwight West, Speaks, Tabor, and Herrin, all gave deposition testimony indicating their awareness that "someone else" owned the rail bed, and further that the boundary of the rail bed was clearly defined with barricades and "no trespassing" signage. Guirguis testified that he had seen the barricades personally prior to his completing the purchase, but was under the impression nonetheless that the land he intended to purchase was contiguous and uninterrupted, due to the alleged misrepresentations from West, Speaks, and their realtors.

Guirguis filed this action in 2008 against the Wests, Speaks, Tabor, Herrin, and Homestead. The Wests and Speaks filed a cross-claim against Guirguis, the later brought Abbott into the litigation via an amendment to that cross-claim pursuant to Kentucky Rules of Civil Procedure ("CR") 13.08. The

[4] Both Johnny Brown Russell and Harry Russell have since died, and the remaining parties to this appeal are their heirs: Michael Russell, Brenda Russell, Patsy Holland, and Sharon Russell. They will be referred to collectively as the "Russell Appellees."

Russell Appellees were brought in as parties when, in the course of the litigation, the possibility of their having a reverter interest in the subject property arose.

In 2014, after the trial court indicated to the parties that ownership of the property might have reverted to Johnny Brown Russell and Harry Russell following P&L's abandonment of the rail line, Abbott purchased any remaining interest the Russell Appellees may have held. The litigation was bifurcated, leaving only the issue of ownership of the rail bed in the action relating to this appeal.

At some point after the 2014 conveyance to Abbott, the Estate of Johnny Brown Russell moved for dismissal, arguing it had no adverse claims to any party and no party had asserted any claims against it. The trial court denied this motion, reasoning that the champerty defense implicated the Russell Appellees by virtue of their transactions with the Wests, Tabor, and Speaks, as well as Abbott.

The trial court entered an order granting summary judgment, awarding quiet title of the rail bed to Guirguis. In so ruling, the trial court drew the following conclusions: 1) that Illinois Central had never acquired fee simple title to the land which they used as a rail bed, but rather held a prescriptive easement, 2) that P&L's abandonment of the rail line constituted abandonment of any interest in the realty, 3) that P&L's quitclaim deed to Abbott conveyed absolutely no interest in the property, because it lacked any interest to convey, 4) Abbott has no valid claim of adverse possession, 5) the doctrine of champerty cannot apply in this case

because the possessor's interest could not ripen into title, and 6) the 2014 deed from the Russell Appellees to Abbott had no effect, as the Russell Appellees had no interest to convey.

This appeal followed, wherein Abbott asserts several arguments. Abbott first argues that the trial court erred in concluding the rail bed "attached" to Guirguis' deed. Abbott next argues that the trial court improperly precluded the assertion of champerty as a defense. Abbott's third argument challenges the trial court's conclusion that P&L never held a fee simple interest in the disputed property by adverse possession. Fourth, Abbott argues that the trial court's order is overbroad in that it affects property not concerned in the action. Abbott also argues that the trial court erred in denying the Estate of Johnny Brown Russell's motion to dismiss. Finally, Abbott argues that the trial court judge should have recused himself.

II. ANALYSIS

A. STANDARD OF REVIEW

Summary judgment is a procedural mechanism for the expedient disposition of easily resolvable claims. It is appropriate only when the record presents no undisputed issues of material fact. *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Only when it appears impossible from the record that the non-moving party can produce any evidence at trial upon which the fact-finder could possibly find in his favor should a court grant summary judgment. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). The analysis involves only an

examination of the record to determine the legal issue of whether a factual question exists, not to make fact findings. Because summary judgment is a question of law, the appropriate standard of appellate review is *de novo*. *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014).

B. P&L POSSESSED A PRESCRIPTIVE EASEMENT AND NOT A FEE SIMPLE INTEREST

The Court's analysis will begin at the legal bedrock upon which the trial court built its entire ruling, the nature of P&L's possession of the property.

Abbott argues that Illinois Central obtained fee simple title to the rail bed by adverse possession at some unknown point prior to the 1915 creation of the plat map. Because Illinois Central held fee simple title, Abbott's argument continues, P&L obtained the same by its purchase of Illinois Central's entire interest in the line and its operation. Abbott alleges that it then obtained fee simple title to the rail bed via its purchase from P&L. No court records or chain-of-title records indicate Illinois Central ever obtained quiet title by adverse possession.

Alternatively, Abbott contends that even had Illinois Central not obtained fee simple title prior to 1915, its exclusive, actual, hostile, open, and notorious possession of the land until 1986 would have entitled it to claim such an interest by adverse possession. Thereafter, P&L's similar continued use created the same entitlement, and Abbott should be permitted to tack those periods onto its own possession of the land and claim fee simple title.

The trial court, however, held that in the absence of evidence of the nature of Illinois Central's interest in the property dating from the time of the railroad's initial construction, it is presumed as a matter of law to be an easement and not a fee simple title. *Illinois Cent. R.R. Co. v, Roberts*, 928 S.W.2d 822 (Ky. App. 1996). We agree.

In a case with similar facts, this Court held in *Roberts* that where the origin of the authority to construct the rail line is not readily ascertainable from the evidence of record, Kentucky law prefers affording railroads easements rather than ownership interests. *Id.* at 825 (citing *Rose v. Bryant*, 251 S.W.2d 860 (Ky. 1952)). "We view a conclusive presumption in favor of a right-of-way easement as being most tenable where, as here, there are no deeds of original conveyance or any other evidence bearing upon the initial authorization to lay the line." *Id.* The *Roberts* Court even went to so far as to hold that a deed of conveyance, if it contains language "referring in some manner to a 'right of way' operates to convey a mere easement notwithstanding additional language evidencing the conveyance of a fee." *Id.*

Abbott directs our attention to *Winston v. Louisville & Nashville R.R. Co.*, 160 Ky. 185, 169 S.W. 597 (1914), which it claims is the only applicable precedent. In *Winston*, the Court awarded the railroad quiet title by adverse possession in a strip of land adjacent to a pre-existing track where it had constructed a second parallel rail line. However, the business conducted on the disputed property differed in both scope and nature from the business here. The

Winston opinion notes the presence of spurs and side tracks connecting to the second track, and the railroad company's usage of the disputed property for "general railroad business" including loading and unloading, meeting of trains, placing of cars for shipment, and discharging freight to consignees. *Id.* at 597. In other words, Louisville & Nashville Railroad Company operated the premises as a rail yard, necessitating more than a simple right-of-way.

On the other hand, the rail bed here did not have any side tracks or spurs. It was a single rail line which crossed otherwise undeveloped land. Garrett testified that P&L used it for purposes related to the transmission of freight, which included maintaining and inspection of the track and equipment, as well as vegetation control. The disputed property was never used as a rail yard.

The applicable precedent here is *Roberts*, and the most tenable result is that P&L's interest, which it inherited from Illinois Central, was a prescriptive easement; that is, an easement obtained through adverse possession, and not a fee simple title. The trial court correctly found that P&L never had a fee simple interest to convey.

C. THE TRIAL COURT PROPERLY RESOLVED ISSUES OF MATERIAL FACT RELATED TO ADVERSE POSSESSION OR CHAMPERTY

A railroad easement, like any other easement, is merely a right to cross the servient estate, which does not affect ownership of the servient estate. *Roberts* at 826. Also, like other easements, a railroad easement may be lost by

abandonment. *City of Harrodsburg v. Cunningham*, 299 Ky. 193, 184 S.W.2d 357, 359 (1944). Where railroad easements differ lies in the federal regulation. Under 49 C.F.R. § 1152.50, a common carrier desiring to abandon a line which has been inactive for two years must petition the Surface Transportation Board for authority to do so. Upon receiving such authority, the carrier must notify the Surface Transportation Board of a consummated abandonment (discontinuing operations, salvaging the track, canceling tariffs, and notifying the Surface Transportation Board to remove the track from the interstate rail network) within one year. 49 C.F.R. § 1152.29(e)(2). The Surface Transportation Board loses jurisdiction over a properly abandoned railroad easement. *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 532 (6th Cir. 2002). While federal authorities define abandonment of a railroad easement, they do not address the underlying property issues, leaving the issue of abandonment of property rights to be resolved according to state law. In Kentucky, easements are not abandoned simply by non-use. "The authorities take pains to mark the distinction between mere non-user, with nothing more, and non-user attended by circumstances showing clearly the intention of abandonment of the easement." *City of Harrodsburg* at 359.

Here, P&L undisputedly abandoned its right to operate the railway, and in so doing, manifested an intent to relinquish its easement. P&L's subsequent action, salvaging the rails, is an additional act consistent with that obvious intent.

The trial court thus properly concluded that P&L abandoned any easement interest at that time.

Because P&L abandoned its easement, the right to possess and use the land reverted to the owners of the tracts representing the servient estate. *Roberts* at 827. The conveyance from P&L to Abbott occurred in October 2005, nearly a year after the abandonment occurred. Dolan, as a member of P&L's board of directors, cannot dispute his awareness of that fact, either actual or imputed. This reversion had the effect of interrupting the continuity of P&L's possession.

To prevail on an adverse possession claim, the claimant must offer clear and convincing evidence to satisfy each of the common law elements, and that those elements remained satisfied for a period defined by statute. Those common law elements are: "1) possession must be hostile and under a claim of right, 2) it must be actual, 3) it must be exclusive, 4) it must be continuous, and 5) it must be open and notorious." *Moore v. Stills*, 307 S.W.3d 71, 77 (Ky. 2010) (quoting *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878 (Ky. 1992)). By statute, adverse possession must be held for fifteen years to ripen into a claim to a valid title. Kentucky Revised Statute ("KRS") 413.010; *Moore* at 78. The defense of champerty requires proof of the same common law elements, but not the statutory duration element. *Cherry Bros. v. Tenn. Cent. Ry. Co.*, 222 Ky. 79, 299 S.W. 1099 (1927).

Even if Abbott's possession satisfied each of the other common law elements of adverse possession, the reversion severed the continuity of possession

of P&L from Abbott's. Abbott can neither claim adverse possession nor assert champerty as a defense. The statutory period has not yet lapsed for a permissible claim of adverse possession. The trial court correctly held that Abbott cannot assert champerty because his possession could never ripen into a fee simple title, and as such any allegations related to champerty asserted against the Russell Appellees are moot.

D. ABBOTT'S ARGUMENT AS TO THE MOTION TO RECUSE IS MOOT

Abbott moved the trial judge to recuse himself due to a personal dispute between Dolan and the trial judge. The trial judge denied the motion, insisting he could be fair and impartial. Abbott asserts this denial as an error for our review. Kentucky trial court judges have a duty to sit in cases where no valid reason exists to merit recusal. *Commonwealth of Kentucky, Revenue Cabinet v. Smith*, 875 S.W.2d 873, 879 (Ky. 1994). The bases for which a judge may recuse are found in KRS 26A.015 and Kentucky Supreme Court Rule ("SCR") 4.300, Canon 3E. Both of those provisions allow judges to recuse when the judge's "impartiality might reasonably be questioned." *Jacobs v. Commonwealth*, 947 S.W.2d 416, 417 (Ky. App. 1997) (quoting SCR 4.300). The question of whether a judge's impartiality might reasonably be questioned falls squarely within that judge's discretion, and appellate courts will not easily disrupt the exercise of that discretion. *Dunlap v. Commonwealth*, 435 S.W.3d 537 (Ky. 2013).

However, having affirmed the rulings of trial court, with no remand required, the issue of recusal is moot, and this Court need not address it further.

III. CONCLUSION

After our review, we conclude that the trial court properly granted judgment as a matter of law to quiet title of the former rail bed to Guirguis. Accordingly, we affirm the entry of summary judgment. Further, because we affirm the trial court's judgment on the merits, there is no matter to remand, and the issue of recusal is moot.

ALL CONCUR.

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