

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

J. TERRY EVANS, in his capacity as
LICKING COUNTY TREASURER, et al.

Plaintiffs-Appellees

-vs-

THE THOMAS J. EVANS
FOUNDATION

Defendant-Appellee

-vs-

JAMES S. CORMICAN, et al.

Defendants-Appellants

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CA 76

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 08 CV 1574

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 5, 2010

APPEARANCES:

For Plaintiffs-Appellees

For Defendant-Appellee

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Wise, J.

{¶1} Appellant James Cormican and several other Licking County property owners appeal the decision of the Court of Common Pleas, Licking County, which granted summary judgment in favor of Appellee Thomas J. Evans Foundation (“Foundation”) in an action to determine title to certain real property. The relevant facts leading to this appeal are as follows.

{¶2} The real property at issue in this matter is a portion of a former railroad line in Licking Township, Licking County. The property was once owned by the Ohio Midland Railroad Company. A deed instrument was filed on November 5, 1915, purporting to transfer the property from the Ohio Midland Railroad Company to the Baltimore and Ohio Railroad Company.

{¶3} On June 19, 1984, Appellee Foundation purchased from the Baltimore and Ohio Railroad Company, for the sum of \$100,000.00, the real estate, track material, bridges, ballasts, ancillary buildings, facilities, and the like, that were a portion of a railroad formerly known as The Baltimore and Ohio Railroad Company, Midland Branch, consisting of 38.21 acres, more or less. The Foundation obtained a deed for the property at issue, which was accepted and filed with the Licking County Recorder on July 6, 1984.

{¶4} The Foundation leased the property to the Buckeye Scenic Railroad for a number of years until the lease was terminated in 2007. Shortly after the lease was terminated, the Foundation indicated it planned to develop said former railroad property into a public bicycle and pedestrian path, which will adjoin properties owned by appellants.

{¶15} On August 7, 2008, the Licking County Prosecutor filed a complaint in the Licking County Court of Common Pleas seeking a declaration as to the ownership of the former railroad property. The complaint was filed on behalf of the Licking County Auditor, Licking County Treasurer, Licking County Engineer and the Licking County Board of Commissioners (hereinafter the “Licking County Plaintiffs”), and named the Foundation and the following adjoining property owners as defendants: James S. Cormican, Carol J. Cormican, Herbert J. Dales, Sr., Betty L. Dales, Joachim M. Simon, Diane L. Simon, Bradley H. Smith, Carol L. Smith, Gregory E. Schell, Mary Jane Schell, David T. Schell, Jane T. Schell, Mark T. Schell, and Jene F. Davis (hereinafter “Appellants”).

{¶16} The Foundation filed its answer to the complaint on September 5, 2008, asserting that it held full legal and record marketable title to the railroad property. The Foundation also filed a cross-claim against appellants, seeking a declaratory judgment that it is the sole owner of the property and that any claims asserted appellants should be quieted in its favor. Appellants filed an answer, counterclaim and cross-claim on September 5, 2008, claiming ownership interests in the former railroad property, based in part on their claim that the property reverted to them once it ceased to be used as a railroad. In addition, appellants’ counterclaim alleged that the Licking County Plaintiffs were liable for inverse appropriation, abuse of process, civil conspiracy and trespass. These counterclaims were subsequently dismissed by appellants, without prejudice, and are not at issue in this appeal.

{¶17} On February 13, 2009, the Foundation filed a motion for summary judgment, supported by the affidavit of Stephen D. Parks, a real estate title examiner.

Appellants filed a memorandum contra on March 6, 2009. The Foundation filed a reply memorandum in support of its motion for summary judgment on March 20, 2009. Appellants filed a supplemental memorandum contra March 26, 2009, to which the Foundation filed a sur-reply on March 27, 2009.

{¶8} On April 29, 2009, the trial court issued a judgment entry granting summary judgment in favor of the Foundation. The court held, inter alia, that any interests arising prior to November 5, 1915 were extinguished by the operation of Ohio's Marketable Title Act (R.C. 5301.47 to R.C. 5301.56).

{¶9} On May 20, 2009, an agreed judgment entry was filed which dismissed, without prejudice, all remaining claims that were not disposed of by the April 29, 2009 judgment entry.

{¶10} Appellants filed their notice of appeal on May 27, 2009. They herein raise the following two Assignments of Error:

{¶11} I. THE TRIAL COURT ERRED IN CONCLUDING THAT THERE WAS NO MATERIAL DISPUTE OF FACTS PURSUANT TO CIVIL RULE 56(C).

{¶12} II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE THOMAS J. EVANS FOUNDATION WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW PURSUANT TO CIVIL RULE 56(C)."

I., II.

{¶13} In their First and Second Assignments of Error, appellants contend the trial court erred in granting summary judgment in favor of Appellee Foundation. We disagree.

Summary Judgment Standard of Review

{¶14} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward*, Richland App.No. 07 CA 33, 2007-Ohio-5301, ¶ 34, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

{¶15} Civ.R. 56(C) provides, in pertinent part:

{¶16} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * ”

Ohio's Marketable Title Act

{¶17} At the center of this dispute is Ohio's Marketable Title Act, R.C. 5301.47 to 5301.56, which became law nearly fifty years ago as a means of simplifying land title transactions by allowing persons to rely on a record chain of title as set forth in the pertinent statutes and by eliminating “ancient interests” which operate to cloud otherwise clear titles. See *Semachko v. Hopko* (1973), 35 Ohio App. 2d 205, 209; *Carlson v. Koch* (January 19, 1978), Cuyahoga App.Nos. 36497, 36498, 1978 WL

217670. The Act functions as “a 40-year statute of limitations for bringing claims against a title of record.” *Collins v. Moran*, Mahoning App.No. 02 CA 218, 2004-Ohio-1381, ¶ 20. R.C. 5301.55 states that the Act “shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions ***.”

{¶18} R.C. 5301.48 states as follows:

{¶19} “Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest as defined in section 5301.47 of the Revised Code, subject to the matters stated in section 5301.49 of the Revised Code.

{¶20} “A person has such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in:

{¶21} “(A) The person claiming such interest; or

{¶22} “(B) Some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.”

{¶23} R.C. 5301.47 (D) through (F) defines some of the terms pertinent to this appeal, including the following:

{¶24} “(D) ‘Person dealing with land’ includes a purchaser of any estate or interest therein, a mortgagee, levying or attaching creditor, a land contract vendee, or

any other person seeking to acquire an estate or interest therein, or impose a lien thereon.

{¶25} “(E) ‘Root of title’ means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the ‘root of title’ is the date on which it is recorded.

{¶26} “(F) ‘Title transaction’ means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee’s, assignee’s, guardian’s, executor’s, administrator’s, or sheriff’s deed, or decree of any court, as well as warranty deed, quit claim deed or mortgage.”

{¶27} In addition, R.C. 5301.47(A) provides that “[m]arketable record title *** operates to extinguish such interests and claims, existing prior to the effective date of the root of title ***.” Similarly, R.C. 5301.50 provides that “ *** record marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claim, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title. All such interests, claims, or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.”

Analysis

{¶28} In the case sub judice, the trial court found that the Foundation's 1984 deed from the Baltimore and Ohio Railroad Company was a "title transaction" within the meaning of R.C. 5301.47(F), *supra*. See Summary Judgment Entry, April 29, 2009, at 4. The trial court also found that the Foundation's "root of title" was the previous deed in the chain of title of the Foundation, dated October 1, 1915, and filed for record on November 5, 1915, and recorded in the Office of the Recorder of Licking County, Ohio. *Id.* at 4. The trial court recognized this as the first deed to be found in the Foundation's chain of title which was recorded more than forty years prior to the time marketability was determined. Accordingly, the trial concluded that the Foundation has "marketable record title" to the former railroad strip, and found in the Foundation's favor pursuant to the Marketable Title Act.

{¶29} In the present appeal, appellants, rather than providing a broad challenge to the trial court's application of the Act to the facts of the case, instead chiefly present a battery of contentions with limited statutorily-based arguments. In fact, appellants' brief does not specifically reference the Act until the next-to-last page of the argument section, and then only in reference to the exceptions set forth in R.C. 5301.49, as discussed *infra*.

{¶30} Appellants, for example, direct us to a deed reference to a lawsuit in Licking County in 1874 and three prior recorded conveyances in their various title chains— in 1852, 1870, and 1871 – all of which were recorded on June 4, 1900 at the Licking County Recorder's Office. However, as the holder of marketable record title, the Foundation was not bound by interests existing prior to the root of title. The Foundation

thus was not required to check the title for any transaction occurring prior to November 5, 1915.¹ Appellants also claim that they paid real estate taxes at certain times for their entire parcels, including the former railroad right-of-way. Nonetheless, the payment or non-payment of real estate taxes has no bearing on the question of ownership under the circumstances of this case. There is no provision in the Act that indicates that the determination of “marketable record title” is materially affected by the payment or non-payment of real estate taxes. Appellants also argue that various railroad valuation maps would demonstrate that there are material facts in dispute. Upon review, we find that none of the “map” arguments raised by appellants overcome the application of the Act or create a genuine issue of material fact.

{¶31} Appellants additionally raise arguments concerning the adequacy of the Foundation’s title. Their first challenge in this regard concerns the legal description in the Foundation’s 1984 deed from Baltimore and Ohio Railroad Company. Appellants also complain that the 1984 deed to the Foundation does not contain any prior deed reference. Appellants further maintain that the right of way language in the instruments of conveyance diminishes the rights conveyed to the Foundation. Appellants also attack the description in the 1915 deed, on the basis that it allegedly fails to describe the property being conveyed with certainty. Nonetheless, this Court has held that under the Marketable Title Act, even a “stray” or “wild” recorded deed may be the basis for marketable record title. *Minnich v. Guernsey S. & L. Co.* (1987), 36 Ohio App. 3d 54, at

¹ The Foundation further responds that the nineteen-century conveyances upon which appellants base their claims would not affect the Foundation’s title because they were recorded years after the date of the conveyances when the earlier grantors no longer owned the land. See R.C. 5301.25. However, it is not necessary that we reach this issue under the circumstances of this case.

paragraph one of the syllabus. Moreover, we conclude the Act overcomes appellants' claims and find that appellants have failed to articulate how the alleged defects in conveyance between the Foundation and its predecessors in title would supersede application of the Act and result in prejudicial error on appeal. See App.R. 12(B).

{¶32} Appellants' remaining argument is that the Act does not extinguish their interests in the property as a result of the exceptions set forth in R.C. 5301.49, which provides such marketable record title shall be subject to:

{¶33} "(A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest; and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in 5301.51 of the Revised Code."

{¶34} As applicable to the case sub judice, the statute thus provides that a marketable record title is subject to [1] interests and defects and [2] possibilities of reverter. Appellants propose that the Foundation was put on notice by "clear and precise references to the Railroad Valuation Section Maps" which appellants assert were not fully provided upon recording. See Appellants' Brief at 16. Appellants do not describe with specificity the rights of way contained in said maps or identify who owns

them, nor do they articulate how such rights of way defeat fee ownership of the property by the Foundation or establish fee ownership of the property in appellants.

{¶35} As to the possibility of reverter (based on the theory that the property is no longer being used for a railroad), we agree with the Foundation that such an assertion can only be maintained under the facts of this case if a preservation notice under R.C. 5301.51 is filed. The record in this case indicates there were no preservation notices filed in either the chains of title of appellants or the Foundation, at any time, much less during the critical forty years following November 5, 1915, the Foundation's root of title. See Stephen Parks Affidavit at ¶20. Under the statutory scheme, other persons (here, appellants) have the opportunity to utilize recordation in the chain of title to preserve their rights, and if they fail to do so, undesired outcomes for some landowners may result, as is evident in the case sub judice. The Ohio Supreme Court has recognized: "The Marketable Record Title Act is also a recording act in that it provides for a simple and easy method by which the owner of an existing old interest may preserve it. If he fails to take the step of filing the notice as provided, he has only himself to blame if his interest is extinguished." *Heifner v. Bradford* (1983), 4 Ohio St. 3d 49, f.n. 4, quoting *Miami v. St. Joe Paper Co.* (Fla. 1978), 364 So.2d 439, 442.

{¶36} Thus, we hold reasonable minds could only conclude that appellants failed to preserve their alleged rights in the property, and the trial court properly found that "any interests arising prior to November 5, 1915, are null and void under the Act." Judgment Entry, April 29, 2009, at 4.

Conclusion

{¶37} Upon review, we find the record demonstrates that the Foundation holds marketable record title and was entitled to rely upon the provisions of the Marketable Title Act when it purchased the railroad property in 1984. We hold summary judgment in favor the Foundation was not in error.

{¶38} Appellants' First and Second Assignments of Error are therefore overruled.

{¶39} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 1203

J. TERRY EVANS, in his capacity as
LICKING COUNTY TREASURER, et al.

-VS-

JUDGMENT ENTRY

-VS-

Case No. 09 CA 76

Defendants-Appellants

Costs assessed to appellants.

/S/ JOHN W. WISE

/S/ WILLIAM B. HOFFMAN

/S/ PATRICIA A. DELANEY_____

JUDGES