IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
SEPTEMBER 27, 2002 Session

TERRY GREEN, ET AL. v. GLEN TURNER, ET AL.

Appeal from the Chancery Court for Claiborne County
No. 12,549 Billy Joe White, Chancellor

FILED NOVEMBER 26, 2002

No. E2001-02326-COA-R3-CV

This is a suit by the Plaintiffs Green against the Defendants Turner, asking the Court to determine the common boundary line between the parties' properties. The Trial Court found the evidence preponderated in favor of the Turners' position, resulting in this appeal by the Greens. We affirm.

Tenn.R.App.P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Cause Remanded

HOUSTON M. GODDARD, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

Floyd W. Rhea, Sneedville, Tennessee, for the Appellants, Terry Green and Linnie Green

Benjamin S. Pressnell, Tazewell, Tennessee, for the Appellees, Glen Turner and Michelle Turner

OPINION

The origin of this appeal was a suit filed by Terry Green and his wife, Linnie Green, against Glen Turner and his wife, Michelle Turner. The original suit asked the Trial Court to determine the location of the parties' common boundary line.

The Turners filed an answer and a counter-complaint seeking payment of one-half of the costs for the chain link fence they contend Mr. Green agreed to pay as a part of an agreement the Greens say was entered into relative to location of the boundary line.

The Greens filed an answer to the counter-claim, denying any such agreement was ever made.

After an adverse ruling as to the Greens, they appealed raising the following three issues:

STATEMENT OF THE ISSUES

1. DID THE CHANCELLOR ERR IN FINDING THAT A MISTAKE OCCURRED IN DRAFTING THE PARTIES' RESPECTIVE DEEDS SUFFICIENT TO JUSTIFY REFORMATION?

2. DID THE CHANCELLOR ERR IN FINDING THAT APPELLANTS ENTERED INTO A BINDING PAROL AGREEMENT TO CHANGE THE PARTIES' BOUNDARY LINE?

3. DID THE CHANCELLOR ERR BY FAILING TO APPLY TENNESSEE CODE ANNOTATED SECTION 28-2-110(a) TO APPELLEES' COUNTER-COMPLAINT?

As this is a non-jury case, our review is *de novo* upon the record of the proceedings below; however, that record comes to us with a presumption that the trial court's factual findings are correct. Tenn.R.App.P. 13(d). We must honor that presumption unless we find that the evidence preponderates against the trial court's factual findings. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are not accorded the same deference. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996).

Preliminarily, we note that an agreed order was entered on the 17th day of August 1999, representing that the parties "have compromised and settled all issues before the Court." On August 24, 1999, the Greens filed *pro se* an unstyled paper writing representing that they did not agree to this order. We do not find in the file any order addressing the Greens' contentions, but we do find as Exhibit Number 10, a copy of a proposed order setting aside the agreed order. This order is signed by counsel for the parties, but not by the Chancellor. We will presume that a signed order was inadvertently not included in the appellate record, or was inadvertently never filed. We reach this conclusion because the Chancellor proceeded to have a plenary trial on the issues raised in the pleadings.

The evidence in the appellate record is embodied in a statement of the evidence which is, as often is the case, woefully inadequate. (See Appendix for entire statement of the evidence.) For example, numerous exhibits were introduced but not referenced in the statement of the evidence. We are, however, able to identify the Fultz survey relied upon by the Greens and the Parson survey relied upon by the Turners and found by the Chancellor to properly locate the line.

We also note that the recorded deeds of the parties have no calls, merely referring to directions as "northerly," "easterly," "southerly," and "westerly." Also, we note that, although both deeds recite the descriptions contain "one acre more or less," in fact, the tracts, which are 300 feet by 200 feet, contain over one and one-third acre.

In resolving the dispute, the Chancellor made the following findings of fact:

1. That the original deed contains a mistake in measurement concerning the correct distance of the parcels in dispute from the then-existent Shenandoah Road.

2. That the survey of Dennis Fultz was correct insofar as it corresponded to the language of the original deed conveying said property by the parties' common grantor, Myrtle Green.

3. The Court further finds that the Plaintiffs[1] did, on more than one occasion, agree to the common boundary line between the parties reflected by the Defendants' survey by Parsons Engineering and Associates dated February 25, 1997.

4. That the Court therefore finds that the Parsons survey more accurately reflects the disputed property, when considering the mistaken measurements from the original deed, said measurements having been taken by laypersons, to-wit: the plaintiff, Terry Green and the defendant, Glen Turner.

Given the primitive method of measuring the property described in the statement of the evidence,[2] we do not find that the evidence preponderates against the Chancellor's finding of fact as to the location of the line.

The second issue contends that the Statute of Frauds, T.C.A. 29-2-101, would preclude the Turners from relying on a parol agreement to change the boundary line shown in the parties' deeds. We first point out that, as we understand the record, the Trial Court was not enforcing a parol agreement, but was finding the location of the line originally laid out by Mr. Green and Mr. Turner in accordance with the prayers of the Greens' original complaint. Moreover, we have searched the record and find no advocacy of the Statute of Frauds contention, as it is not mentioned in any of the pleadings nor in the statement of the evidence, and under our jurisprudence cannot be raised for the first time on appeal. *Simpson v. Frontier Community Credit Union,* 810 S.W.2d 147 (Tenn. 1991).

The last issue references T.C.A. 28-2-110(a), contending that the Chancellor erred in not applying it to bar the Turners' counter-claim. In our view this Code Section is inapplicable, as it addresses a suit to recover real estate being barred for non-payment of taxes. The counter-complaint, however, does not seek to recover real estate, but only a judgment for one-half of the cost of erecting a fence in accordance with an agreement the Turners contend was entered into.

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[1] The record reflects that only Mr. Green agreed as to the common boundary line.

[2] It does not appear that a transit or measuring tape was used when the line was initially established and, according to Mr. Turner's testimony, the measurements were made with a stick.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of the judgment rendered in favor of the Turners, and of costs below, and for such other proceedings, if any, as may be necessary. Costs of appeal are adjudged against Terry Green and Linnie Green.

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HOUSTON M. GODDARD, PRESIDING JUDGE