Affirmed and Opinion filed August 17, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00405-CV

———————————

MARY COCKRELL, JO McNEIL, WESLEY McNEIL, ALFRED COCKRELL, JOHN McNEIL AND HENRIETTA McNEIL (MARY MACKLIN AND ELIZABETH WALER), Appellants

V.

JAMES D. MULLINS, TRUSTEE, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 97,065

O P I N I O N

Mary Cockrell, Alfred Cockrell, Jo McNeil, Wesley McNeil, John McNeil, Henrietta McNeil, Elizabeth Walker and Mary Macklin ('appellants') appeal from a judgment entered in favor of James Mullins in a trespass-to-try-title lawsuit. In three points of error, appellants contend that the trial court abused its discretion in denying their plea in abatement and motion for continuance. They also argue that the evidence was insufficient to support the trial court's finding of adverse possession. We affirm the judgment of the trial court.

On June 30, 1995, Mullins purchased 69.37 acres from Carl and Stella Bentley. About the time Mullins obtained the deed from the Bentleys, he became aware of a potential title

problem; the Bentleys were not the sole owners of the 69-acre tract. Mullins discovered that members of the McNeil family and Alfred Cockrell held title to 4/16th's of the 69-acre tract.

A brief history of the title is necessary to clarify the positions of the parties. In 1930, L.A. Briscoe acquired an undivided 12/16 interest in the tract from George and Roberta McNeil. The remaining 4/16 interest was held by the children of George and Roberta McNeil and Alfred Cockrell.[1] After Briscoe acquired title, he took possession of the entire tract, not just his 12/16 interest, and used the land for raising cattle. When he died in 1935, Briscoe devised the entire tract to his wife, Lucy A. Briscoe.

Lucy Briscoe died in 1949. She devised the property to her four children, who partitioned the tract that same year. Minnie Gibson, the daughter of L.A. and Lucy Briscoe, obtained title to the property under the partition deed in 1949. A year later, Gibson conveyed the 69-acre tract to her son, Carl Bentley.

Bentley used the land from 1950 to 1995 for raising cattle and cultivating crops. He fenced the entire tract and posted notices to keep trespassers off the property. He also paid taxes for the property each year. In 1995, Mullins acquired the 69-acre tract through a recorded deed from Bentley. Since the purchase, Mullins continued to maintain the fence, raise cattle, and pay taxes for the property.

The trial court found that Mullins was the owner of fee simple title to an undivided 12/16 interest in the tract. As to the remaining 4/16 interest, the court found that Mullins held title under the twenty-five year adverse possession statute, or alternatively under the ten year, five year, or three year statutes.

Adverse Possession

In their third point of error, appellants contend that the evidence was insufficient to support the trial court's finding of adverse possession; they argue that Mullins, and those with

[1] Wesley McNeil, Joe McNeil, Mary Jo McNeil (Cockrell), and Alfred Cockrell each held a 1/16 interest in the tract.

whom he shared privity of estate, did not give sufficient notice that they were claiming the property adversely to the appellants. We disagree and find that Mullins gave appellants a proper repudiation of title.

Adverse possession is "an actual and visible appropriation of real property, commenced and continued under a claim or right that is inconsistent with and is hostile to the claim of another person." TEX. CIV. PRAC. & REM. CODE ANN. § 16.021 (Vernon 1986). To claim a property interest through adverse possession against a cotenant, there must be a repudiation of title or ouster by the cotenant claiming adverse possession.[2] *See Todd v. Bruner*, 365 S.W.2d 155, 160 (Tex.1963); *Southern Pine Lumber Co. v. Hart*, 161 Tex. 357, 340 S.W.2d 775 (1961). A clear ouster and repudiation takes place when one cotenant conveys the entire property to a third party who enters into possession under a recorded deed. *See Thedford v. Union Oil Co. of California*, 3 S.W.3d 609, 614 (Tex. App.–Dallas 1999, pet. denied); *Cf. Todd v. Bruner*, 365 S.W.2d at 159 ("[i]nsofar as the true owner of the property is concerned, there is a vast difference between the notice of adverse claim conveyed by the presence of a stranger in possession and that of a cotenant in possession").

Under the facts in our case, the evidence conclusively shows that any cotenancy was repudiated when Bentley, then Mullins acquired title to the entire 69-acre tract. The record shows that Bentley had a duly recorded warranty deed from Minnie Gibson purporting to convey title to the entire 69-acre tract in 1950. In 1995, Mullins acquired the entire 69-acre tract through a recorded deed from Bentley. The recorded deed and the possession constituted constructive notice that Bentley, then Mullins claimed all that the deeds purported to convey.

The record also shows that Mullins and his predecessors held the land exclusively, openly, notoriously, and in a manner inconsistent with the existence of title with the appellants. In 1950, Minnie Gibson deeded the property to Carl Bentley. Bentley paid taxes from 1950 - 1995. He used the entire 69-acre tract during that period for raising cattle and cultivating crops. Bentley fenced the entire tract and posted notices to keep trespassers off the property. He even mortgaged the entire property on two occasions. Mullins purchased the property in

[2] The only exception to this rule is when the adverse occupancy and claim of title "is so long-continued, open, notorious, exclusive, and inconsistent with the existence of title in others, except the occupant, that the law will raise the inference of notice to the cotenant out of possession." *Mills v. Vinson*, 342 S.W.2d 33, 40 (Tex. Civ. App.– Texarkana 1960, writ ref'd n.r.e.).

1995. Since the purchase, he continued to maintain the fence, raise cattle, and pay taxes for the entire tract. None of the appellants ever made claim to the land until Mullins filed a lawsuit to clear the title. Appellant's third point of error is overruled.

Plea in Abatement

In their first point of error, appellants contend the trial court erred in denying their plea in abatement. Specifically, they argue that Hubert and Elijah McNeil were indispensable parties under Texas Civil Procedure Rule 39. Hubert and Elijah McNeil are grandson's of George and Roberta McNeil and are the brothers of Mary Macklin, one of the parties to the lawsuit.

We will review the trial court's action in denying appellants' plea in abatement based on the abuse of discretion standard. *See Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988). A trial court abuses its discretion if its decision "is arbitrary, unreasonable, and without reference to [any] guiding [rules and] principles." *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997)(*citing Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996)). We find that Rule 39 of the Texas Rules of Civil Procedure did not require the compulsory joinder of Hubert and Elijah McNeil to this lawsuit.

The emphasis of Rule 39 is on pragmatism and practicality; the court's focus should be on whether the court ought to proceed with the parties before it, not on whether the court has jurisdiction. *See Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982); *Jones v. LaFargue*, 758 S.W.2d 320, 324 (Tex. App.– Houston [14th Dist.] 1988, writ denied.). The Texas Supreme Court has held that fundamental error exists under the rule only when (1) the record shows on its face that the court lacked jurisdiction; or (2) the public interest, as declared in the Texas Constitution and statutes, is directly and adversely affected. *See Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982). "Under the provisions of our present Rule 39 it would be rare indeed if there were a person whose presence is so indispensable in the sense that his absence deprives the trial court of jurisdiction to adjudicate between the parties already joined." *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200, 204 (Tex. 1974).

This is not one of those rare cases. The lack of Hubert and Elijah did not deprive the trial court of jurisdiction. Hubert and Elijah McNeil could still maintain a lawsuit over the

disputed property; the evidence from the record, however, does not indicate that they would. Hubert McNeil testified at the abatement hearing that he had knowledge that a lawsuit was filed. He never asked to be joined. Macklin testified that the two were not ready to participate in the lawsuit. The attorney appointed to represent the defendants cited by publication was aware of both men, but did not request to join either of them to the lawsuit. The court may have considered these factors in determining its own interest and those of the public in complete, consistent, and efficient settlement of controversies. Furthermore, appellants failed to show that they or Hubert and Elijah McNeil had suffered any harm by not being included in the lawsuit. We overrule appellant's first point of error.

Motion for Continuance

In his second point of error, appellants contend that the trial court abused its discretion by denying their Motion for Continuance.

In their motion, appellants alleged that their discovery was not complete. During the hearing on the motion, appellant's trial counsel argued that "there were some people out there that can testify" about how the property was used. No witnesses were called and no evidence was entered into the record. The court had previously postponed the trial in order for appellants to obtain counsel and to prepare for trial. Mullins opposed the continuance and the trial court overruled the motion.

We will not disturb a trial court's denial of a motion for continuance unless the trial court has committed a clear abuse of discretion. *See Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex.1986); *Levinthal v. Kelsey-Seybold Clinic, P.A.*, 902 S.W.2d 508, 510 (Tex. App.–Houston [1st Dist.] 1994, no writ). To obtain a continuance, the moving party has the burden of establishing both (1) that the need for the continuance is not due to fault or lack of diligence of the moving party or that party's counsel, and (2) that the failure to grant a continuance will result in substantial harm or prejudice to the moving party in the presentation of the party's case or defense. *See, e.g., Commercial Standard Ins. Co. v. Merit Clothing Co.*, 377 S.W.2d 179, 181 (Tex. 1964); *Standard Sav. Ass'n v. Cromwell*, 714 S.W.2d 49, 51 (Tex. App.–Houston [14th Dist.] 1986, no writ). Appellants failed to satisfy their burden.

Appellant's motion sought additional time to complete discovery. The motion, however, did not allege the people appellants wanted to depose or testify, whether their testimony would be material, or what they expected to prove. *See* TEX. R. CIV. P. 252. Appellants failed to introduce any evidence to show the need for the continuance was not due to a lack of diligence or that failure to grant the continuance would result in substantial harm to their case. We find that the trial court did not abuse its discretion in denying the appellant's motion. Appellant's second point of error is overruled.

Having overruled all of the appellants points of error, we affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed August 17, 2000.
Panel consists of Justices Draughn, Cannon, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe L. Draughn, Bill Cannon, and Norman R. Lee sitting by assignment.