

SYLVIA Worley, Appellant

v.

Jamie DUGGER, Appellees.

No. 2006-CA-002207-MR

Court of Appeals of Kentucky

December 14, 2007

NOT TO BE PUBLISHED

David O. Smith, Marcia A. Smith, Corbin,
Kentucky, Brief for Appellant.

John Gary McNeill, Evan Bennett Jones,
Lexington, Kentucky, Brief for Appellees.

Before ACREE and LAMBERT, Judges;
ROSENBLUM,[1] Senior Judge.

OPINION

ROSENBLUM, Senior Judge.

Sylvia Worley appeals from a summary judgment entered by the Whitley Circuit Court in favor of Jamie Dugger. Finding no error, we affirm.

Dugger entered into a logging contract in May 2003 with Tommy Thomas to cut timber from part of her property. During Thomas' cutting, he crossed upon Worley's land and took trees valued at over \$1,300. Worley brought suit against both Thomas and Dugger seeking compensatory damages for the wrongful taking of timber pursuant to KRS[2] 364.130. On August 14, 2006, just prior to a bench trial, Dugger sought and was granted summary judgment. The trial court's dismissal of Dugger was based upon its finding that Thomas was acting as an independent contractor at the time he wrongfully took timber from Worley's property. On December 30, 2003, a default judgment was entered against Thomas on the issue of liability. On August 21, 2006, Worley moved to alter, amend or vacate the summary judgment which was denied just prior to the start of the trial on damages against Thomas. This appeal followed.

Summary judgment "shall be rendered forthwith 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[3] 56.03. The circuit court must view the record "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, Inc.*

v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). On appeal, the standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

Worley argues that the trial court erred in entering the summary judgment in favor of Dugger. We disagree.

Worley contends that genuine issues of material fact remained and thus Dugger was improperly granted summary judgment. The only evidence properly before the trial court when it made the summary judgment ruling were the depositions of Dugger, Thomas, Worley's sons, Wade and Jeff Siler, and two timber purchasers, Keith Rowe and Anthony Hacker. Worley avers that "[i]f all of Thomas' deposition testimony is considered as a whole, he is actually saying that Dugger told him her property line was around the creek' or pretty close to the creek' and that her property line went to some markers that he claimed he could not find." Worley further alleges that this testimony coupled with "Wade Siler's testimony that Thomas told him that Dugger said he could log on the level area where he was logging, was sufficient to create a fact issue that should have defeated Dugger's motion for summary judgment."

In its Findings of Fact and Summary Judgment, the trial court stated:

[t]he sole issue for the Court to decide is whether Tommy Thomas was acting as an independent contractor at the time when he wrongfully took timber from the plaintiff. The Deposition of Tommy Thomas, taken on September 30, 2004, clearly shows Tommy Thomas knowingly cut timber on Plaintiff's property. Mr. Thomas was instructed by Mrs. Dugger not to cut timber on [Worley's] property (Thomas Dep. pg. 28). Thomas, admitted that he was told by defendant Dugger not to go over the creek, a reference to property lines existing between Dugger and Thomas (sic). At his deposition, Thomas was asked... "Okay, so she told you not to go over the creek?" In response to this question, Thomas responded, "That's right. Well she ___ yeah, she said the line was, you know, pretty close to where that creek goes in there." (Deposition of Tommy Thomas, at page 14, numerical lines 1-3). In fact, when Defendant Thomas is asked, "Alright, and she told you not to log over past some markers?" Defendant Thomas admits, "That's right."...

Based upon these findings, the trial court granted summary judgment to Dugger stating that "there is no question that defendant Tommy Thomas acted as an independent contractor at all times when he cut timber from the parties' property...." There were no genuine issues of material fact about whether Thomas was told

not to log beyond the borders of Dugger's property as he admitted as much under oath. Although Worley contends that Siler's deposition testimony raises a genuine issue of material fact, we disagree. During his deposition, Siler stated:

[w]ell, we went over and we was looking and we could hear a log skidder coming out of the woods from the Dugger side, and he come down and we stopped him, and my brother asked him, he said, who told you to cut that he said Jaime. He said Jamie don't own that. He said oh yeah she's going to put trailers on it and rent them. He said no she ain't.

(Emphasis added). Siler's testimony was ambiguous and confusing at best. Moreover, even assuming the truth of Siler's statement, Thomas was upon Dugger's property at the time of the conversation and consequently meant Dugger intended to put trailers upon her own property. Nothing from Siler's testimony leads us to believe that a genuine issue of material fact existed concerning whether Dugger told Thomas to cut timber on Worley's property, especially in light of the uncontroverted admission of Thomas that he was indeed told by Dugger to only cut timber from her (Dugger's) land and not to go beyond the creek and boundary markers. Thus, the only issue then is whether Dugger could still have been held liable for Thomas' actions as an independent contractor.

Worley also alleges that Dugger is vicariously liable for Thomas' wrongful timber harvest because she failed to adequately instruct him. Again, we disagree.

In support of her argument, Worley cites *Gum v. Coyle*, 665 S.W.2d 929 (Ky.App. 1984) wherein this Court held a landowner liable for cutting trees from neighboring land. However, *Gum* is clearly distinguishable upon its facts from the present case. *Gum* was held liable because he cut trees from the neighboring land in spite of not knowing where the boundary lines were located. *Gum*, 665 S.W.2d at 930. Here, Dugger explicitly instructed Thomas to not exceed the boundaries of her property beyond the creek. Thomas, upon his own initiative and contrary to Dugger's instructions, crossed the creek onto Worley's land. Worley also cites cases from other states which we find neither relevant nor binding.

During his deposition, Thomas testified that he was a "Kentucky Certified Master Logger." As a certified logger, Thomas should have been familiar with his duty to observe boundary lines to avoid the possibility of liability pursuant to KRS 364.130.[4] Moreover, Thomas' contract with Dugger clearly identifies him as a "contractor." In Kentucky, as a general rule employers are not vicariously liable for the acts of independent contractors. See e.g., *Turner v. Lewis*, 282 S.W.2d 624 (Ky. 1955); *City of Winchester v. King*, 266 S.W.2d 343 (Ky. 1954). In *Turner* our Kentucky Supreme Court

stated:

[w]e have held consistently that the right of control of the work, and the methods of its performance, are determinative on the question of whether one is a servant or an independent contractor. If the employer retains the right to control the work and the manner in which it is done, those doing the work are servants. On the other hand, if an employee has the right to control the manner of work and the right to determine the means by which results are accomplished, he is deemed an independent contractor and the employer is not responsible for his negligence.

282 S.W.2d at 625 (citations omitted). The exception to the general rule is that if the work to be performed is either a nuisance or is inherently dangerous, the employer will not be absolved from liability. See *Miles Farm Supply v. Ellis*, 878 S.W.2d 803 (Ky.App. 1994).

Section 427 of the Restatement of Torts 2d, in dealing with employers of contractors, provides:

[o]ne who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Worley does not cite, nor are we aware, of any relevant authority holding that timber cutting is "work involving a special danger" as contemplated by the Restatement and *Miles Farm Supply*. Here, the trial court properly found that Thomas was an independent contractor because Thomas controlled the manner of the timber cutting as well as the means he would use to complete the job. Under the facts of this case, the work of cutting timber upon Dugger's land was neither a nuisance nor inherently dangerous. Thus, Dugger could not be held liable for Thomas' negligent work. Accordingly, the trial court properly granted Dugger's motion for summary judgment.

The judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

Notes:

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Revised Statutes.

[3] Kentucky Rules of Civil Procedure.

[4] KRS 364.130 provides, in pertinent part, that:

Except as provided in subsection (2) of this section, any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times the cost of any damages to the property as well as any legal costs incurred by the owner of the timber.
