

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001155-I

BEHR PROPERTIES, LLC, THE BEER TRAPPE, INC.,
AND BEHR ENTERPRISES, LLC

MOVANTS

v.

MOTION FOR INTERLOCUTORY RELIEF
PURSUANT TO CR 65.07
ACTION NO. 17-CI-02156

ASHLAND PROPERTIES, LLC, RUNNING AWAY, LLC,
JOHN SENSING AND MELODY MARSHALL

RESPONDENTS

ORDER
DENYING MOTION FOR INTERLOCUTORY RELIEF

** ** * ** * ** *

BEFORE: JOHNSON, JONES, AND MAZE, JUDGES.

Movants, Behr Properties, LLC, The Beer Trappe, Inc., and Behr Enterprises, LLC, filed a motion for interlocutory relief pursuant to Kentucky Rules of Civil Procedure (CR) 65.07 from an order denying their motion for

temporary injunction. Having considered the motion for interlocutory relief, the response, and being otherwise sufficiently advised, the Court ORDERS that the motion be, and it is hereby, DENIED.

As a preliminary matter, Respondents, Ashland Properties, LLC, Running Away, LLC, John Sensing, and Melody Marshall, filed a motion for additional time to file a response to the motion for interlocutory relief. Having considered the motion for additional time, the response, and being otherwise sufficiently advised, the Court ORDERS that the motion be, and it is hereby, GRANTED. The tendered response is ORDERED FILED as of the date of entry of this order.

This case involves a dispute over access to a commercial parking lot. Movants and Respondents are adjoining property owners. Movants' property faces Euclid Avenue in Lexington, Kentucky. Respondents' property faces South Ashland Avenue. Respondents are the fee simple owners of a parking lot. The parking lot has an "apron," which leads from South Ashland Avenue into the parking lot. This apron primarily leads onto property owned by Respondents, but also leads onto property that is owned by other non-party businesses. The Respondents have entered into agreements with these non-party businesses to use the apron for access to their respective properties.

Movants are renovating a former nightclub for use as a restaurant. During the renovation, Movants have been using the apron and parking lot to allow construction vehicles and deliveries to access the rear of their property. Respondents objected to this use of the apron and gave Movants notice of their intention to erect a barrier to prevent Movants from utilizing the apron for access to the rear of Movants' property.

Movants filed a declaratory judgment action in Fayette Circuit Court seeking a determination that Movants have the right to use the apron for access under alternate theories of prescriptive easement and easement by necessity. Movants also sought to enjoin Respondents from erecting a barrier. Respondents filed a cross-motion for temporary injunction to restrain the Movants from further trespass. Following a hearing, the trial court denied Movants' motion for temporary injunction and granted Respondents' cross-motion for temporary injunction in an order entered on June 27, 2017. This motion for interlocutory relief followed.

The standard of review for the issuance of a temporary injunction is well-established:

First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible

detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the actual overall merits of the case are not to be addressed in CR 65.04 motions. Unless a trial court has abused its discretion in applying the above standards, we will not set aside its decision on a CR 65.07 review.

Maupin v. Stansbury, 575 S.W.2d 695, 699 (Ky. App. 1978).

Movants first argue that the trial court erred by concluding that Respondents had established irreparable injury. We disagree.

It has long been held that injunctive relief is available to remedy a continuing trespass to land. *McCloskey v. Doherty*, 17 Ky.L.Rptr. 178, 97 Ky. 300, 30 S.W. 649, 650 (1895). The trial court found that Movants have been continuously trespassing upon Respondents' property. Therefore, we conclude that the trial court properly found that Respondents have demonstrated irreparable injury.

Movants next argue that the trial court erred in weighing the equities. Movants further argue that the trial court improperly decided the ultimate issue in the case by concluding that the equities weighed against Movants because Movants had no rights to use Respondents' property. We disagree.

The temporary injunction in this case maintains the status quo because it returns the parties to their positions before the disputed use of the property. Movants further argue that the construction of a barrier alters the status quo. However, the Respondents are the undisputed fee simple owners of the property. Movants have no written rights of access upon Respondents' property. The trial court took into account the history of the dispute and the actions of the parties. The trial court's findings are based on evidence of record. We cannot conclude that the trial court erred in its weighing of the equities. Further, we cannot conclude that the trial court improperly decided the ultimate issue. The trial court simply found that Movants had not made the clear showing of right, which is necessary to support a temporary injunction. *Maupin*, 575 S.W.2d at 698.

Movants next argue that Respondents failed to present a substantial question on the merits. Here, the trial court found that Movants were continually trespassing upon the property of Respondents. It is undisputed that Respondents are the fee simple owners of the disputed property. It is further undisputed that Movants do not have any written rights to use Respondents' property for access. Rather, Movants claim their rights through prescription or necessity. We cannot conclude that the trial court erred by finding a substantial question on the merits.

Movants next argue that the injunction is overly broad and improperly decided the ultimate issues in the case. As stated above, temporary injunctions do

not resolve a case on the merits and doubtful cases should await trial on the merits. Here, Respondents are the fee simple owners of the disputed property. Movants have only alleged rights of access through prescription or necessity. The trial court did not find such alleged rights to be clearly proven. The trial court properly applied the *Maupin* factors. We cannot conclude that the trial court abused its discretion.

Movants next argue that the trial court ignored the applicable law on prescriptive easements and the public's right of way. Movants further argue that the temporary injunction amounts to an improper judicial taking. These arguments go to the merits of the case and are beyond the scope of a temporary injunction. Further, Movants have other means of access to their property. The trial court properly applied the *Maupin* factors, which govern the grant or denial of temporary injunctions.

Accordingly, the Court ORDERS that the motion for temporary injunction be, and it is hereby, DENIED.

ENTERED: 09/20/17



JUDGE, COURT OF APPEALS

2017-CA-001155
CARROLL M. REDFORD III
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Samuel Givens, Jr
Clerk

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RECEIPT NOTICE

2017-CA-001155
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TO: CARROLL M. REDFORD
FROM: Samuel Givens, Jr, Clerk
DATE: 09/20/2017
RE: 2017-CA-001155

BEHR PROPERTIES, LLC, ET AL

APPELLANTS

V.

ASHLAND POPERTIES, LLC, ET AL

APPELLEES

The document listed below has been received and filed in
this office today in the above case:

RESPONDENTS RESPONSE TO MOTION FOR INTERLOCUTORY RELIEF

CC: WILLIAM W. ALLEN
FILE COPY

GUY M GRAVES