Cite as 2011 Ark. App. 732

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-451

Opinion Delivered November 30, 2011

ROBERT CARR AND MARJORIE CARR
APPELLANTS

V.

JAMES GILLAM
APPELLEE

APPEAL FROM THE VAN BUREN COUNTY CIRCUIT COURT
[CV-2009-123]

HONORABLE MICHAEL A. MAGGIO, JUDGE

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

DAVID M. GLOVER, Judge

Appellants Robert and Marjorie Carr obtained their property in 1983 by warranty deed from Mrs. Carr's mother. Appellee James Gillam acquired contiguous property in 2004, and soon thereafter began construction of a house, which was completed in March 2007. The Carrs filed an action for ejectment and trespass on April 6, 2009, alleging that Gillam's fence and a portion of his house and driveway encroached on the Carrs' property. A bench trial was conducted on September 23, 2010, and by order entered on December 6, 2010, the trial court concluded that the Carrs did not meet their burden of proof to establish "title to the property on which [Gillam] has built his fence, his driveway, and his home," and credited the survey prepared by Gillam's surveyor, Jeffrey Housley, as correct. As their sole point of appeal, the Carrs contend that the trial court erred in holding that they failed to carry their

burden of proof establishing title to the land upon which Gillam built his house, driveway, and fence. We affirm in part and reverse in part.

Background

Marjorie Carr testified that she received her property by warranty deed from her mother in 1983; that her grandfather had purchased the property in the 1920s or 30s and that the property had been in her family's possession continuously since that time. She explained that Gillam purchased contiguous property to the north. She was clear that for the past ninety years, there had been a fence along the boundary between the properties. According to her, she last saw the fence along the north line in approximately 2002 or 2003; the fence is now gone; she had not been to the property for awhile because her husband had throat cancer and they were in and out of the hospital for two years; she first noticed the fence was missing sometime around 2006; and she also noticed the house had been built and some timber was missing. She testified that Gillam called her in 2004 after he purchased his property and told her he wanted to build a house there but needed a few more feet in order to build his plan; she told him her property was not for sale. She said that when she later saw the house, she had concerns about the property line. She testified that "she knew it wasn't right," so she hired Aaron Rasburry to conduct a survey; Rasburry's survey revealed that Gillam had built over the line.

Joey Carr, their son, testified that he was familiar with his parents' property; that Gillam had called him in the early months of 2005 and told him he needed just a little bit more land to complete what he wanted to build. According to Joey, Gillam asked if he

would sell a portion of the Carr property so that he (Gillam) could construct his house, and Joey referred him to his mother.

Aaron Rasburry, the Carrs' surveyor, testified about the manner in which he conducted his survey for the Carrs. He explained that in accordance with his survey, he had noticed encroachments by Gillam upon the Carrs' property, which included "the well or the pump house approximately 1/4 of a mile east of the northwest corner of the property surveyed, a concrete driveway, and a portion of a house to the west of the well." Specifically, he testified that a portion of the house crosses over the line 3.3 feet and that there are several "jogs in and out" so there are other portions of the house that are over the line 2.2, 2.4, 3.3, and 1.9 feet. He also stated that the concrete is 20.3 feet from the property line to the edge of the concrete "at this point," and noted that Housley's survey reflected an encroachment of seven feet at the same point. He then explained that "the difference between my reflected twenty-foot encroachment and Housley's seven-foot encroachment is based in part upon Mr. Housley's single proportion computation." Rasburry referred to the 1973 manual of survey instructions from the Department of the Interior, and the supplemental guide, *The Restoration of Lost Corners*, in stating that a lost interior corner of four sections will be restored by double proportionate measurements; that double-proportionate measurements mean that, rather than just running a north/south line and proportioning, you also run an east/west line. He testified that he knew the corner Housley set was based on the wrong corner and that, because of the error, it placed all the lines in question.

Jeffrey Housley, Gillam's surveyor, testified that Gillam hired him to survey his property prior to beginning construction of the house. He acknowledged that the corner Rasburry found for the southeast corner "fit better," and that he adjusted his survey accordingly. He concluded, however, that it did not affect the north/south line, just the east/west distances. It was his stated opinion that the property line he placed was the correct line as opposed to Rasburry's "because I used the methods called for by the State standards." Regarding the concrete drive, however, he acknowledged,

> At 627 feet from the corner is where the concrete drive starts. At this point, my property line is two feet south of the concrete drive on the west end of the drive. At 738 feet from the corner, my property line is about three feet south of the concrete drive. At 848 feet from the corner, the concrete drive is 2.2 feet across my property line. So far as the concrete drive is located, I agree with Mr. Rasburry that it encroaches on the Carr's property, but my property line is different from Mr. Rasburry's by about 12 or 13 feet. The drive encroaches seven feet over my property line at 867 feet. At 937 feet it starts curving back and at that point is 6.8 feet over my line. Finally down where the well house is, it is up on Mr. Gillam's property by about two feet.

Housley testified that he used the single proportionate method to determine the corners and that his method was correct. He acknowledged that the procedures call for double proportion, but offered his own explanation why that was not necessary in this case. Specifically, he explained, "because the corner was not totally lost with no evidence," "the corner was not totally lost as far as the alignment that I used. . . . I had local evidence there of stones and fence corners and things that I used for alignment."

Gillam testified about the purchase of his property. He acknowledged that he was aware Mr. Carr had throat cancer at the time of the purchase and that Mrs. Carr did not want

to deal with fences or surveys because she was so concerned about her husband. He also confirmed that a portion of his driveway encroached on the Carrs' property based even on Housley's survey.

In its December 6, 2010 order, the trial court held in pertinent part:

> After a bench trial on September 23, 2010, and listening to the testimony of the parties, reviewing the evidence, viewing the property line in dispute and examining the surveys presented by both sides, the Court finds that the Plaintiffs have not met their burden of proof establishing title to the property on which the defendant has built his fence, *his driveway*, and his home. The Housley survey line, which roughly corresponds to the old fence line, which is obvious upon an inspection of the property, is the correct survey line and it will remain as such.

(Emphasis added.)

Discussion

The location of boundary lines is a question of fact, and we affirm a trial court's finding of the location of a boundary line unless the court's finding is clearly erroneous. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite conviction that a mistake was committed. *Id.*

Here, both surveyors were accepted as experts. Accordingly, the trial court had before it two surveys, each fixing the boundary line between the properties at different locations. Rasburry noted problems with the manner in which Housley conducted his survey, but Housley countered that his methods were correct. The trial court determined that the Housley survey showed the correct boundary line. We might have found differently had we been the trier of fact, but that is not our role in review.

Accordingly, faced with two competing surveys and the differing testimony of the two competing surveyors, we find no clear error in the trial court's acceptance of the boundary fixed by Housley. *See*, *e.g.*, *Witkowski v. White*, 248 Ark. 298, 451 S.W.2d 749 (1970). We do find clear error, however, in a portion of the trial court's order. Our review of the evidence in this case has left us with the definite and firm conviction that the trial court made a mistake in finding that the Carrs did not establish their title to the property on which Gillam built a portion of his driveway. Our conviction in this regard is supported by the testimony of both Gillam and his own surveyor, Housley, acknowledging that a portion of the driveway encroaches on the Carrs' property. Moreover, we are not convinced by Gillam's argument in reply that the Carrs did not argue or get a ruling from the trial court regarding the admittedly encroaching portion of the driveway. By ruling that the Housley line establishes the correct boundary, the trial court necessarily determined that those portions of the driveway that extend beyond that line encroach on the Carrs' property. Neither are we convinced that the Carrs should be estopped from making their claim because they did not raise it soon enough. The trial court did not base its decision in any way on estoppel. For us to do so, we would have to engage in additional fact-finding, which we will not do. Therefore, we reverse the portion of the trial court's order that holds in favor of Gillam concerning the section of the driveway that lies beyond the boundary established by the Housley survey as encroaching upon the Carrs' property and remand for proceedings in accordance with this opinion.

Affirmed in part; reversed and remanded in part.

HART and MARTIN, JJ., agree.