



Reed v. Rogers Group

2009 | Cited 0 times | Court of Appeals of Kentucky | July 2, 2009

NOT TO BE PUBLISHED

OPINION

AFFIRMING

BEFORE: ACREE AND MOORE, JUDGES; KNOPF,¹ SENIOR JUDGE.

John and Shirley Reed appeal from the dismissal of their claim for damages against Rogers Group, Inc. (Rogers Group) and Austin Powder Company (Austin Powder) as time barred by the statute of limitations. We affirm.

In 1967, the Reeds purchased a home and approximately 15 acres of land on Hopkinsville Road in Caldwell County, located just behind what was then the Kentucky Stone Quarry. Blasting began in the quarry in the late 1980's and about that same time, the quarry owner began to build a berm (hill of rocks) that separated the quarry from the Reeds' property. Mr. Reed claims that in 1991 detonations in the quarry would send rock, mud and other debris onto his property. However, he also admits that no debris has come upon his property since 1993.

In December of 2000, Rogers Group purchased the subject quarry from Hanson Aggregates Midwest, Inc. (Hanson Aggregates). Austin Powder has served as the blasting agent for Rogers Group since either August 2002 or January 2004 (both dates having been stated in pleadings or memoranda).

The Reeds first filed suit in 1991 against multiple parties not including Rogers Group or Austin Powder. The 1991 case was settled.

The current action was filed on October 13, 1998, against Kentucky Stone Company and Dynablast, Inc., alleging the quarry operations resulted in: (1) assault and battery; (2) trespass; (3) strict liability for damages to the Reed home; (4) nuisance; and (5) punitive damages. On February 8, 2002, Rogers Group was added as a party to this action. On April 3, 2002, Kentucky Stone Company and its successor in interest, Hanson Aggregates, settled with the Reeds and were dismissed from the suit. Austin Powder was added to the suit on November 29, 2005.

Rogers Group and Austin Powder, respectively, filed motions to dismiss the suit pursuant to KRS 413.120(4) which requires any action for "trespass on real or personal property" be "commenced



Reed v. Rogers Group

2009 | Cited 0 times | Court of Appeals of Kentucky | July 2, 2009

within five (5) years after the cause of action accrued". On January 7, 2008, the Caldwell Circuit Court granted the motions. The Reeds filed a motion to alter, amend or vacate the trial court's judgment which was denied. This appeal followed.

The trial court found that no debris had come upon the Reeds' property since 1993 and neither Reed had ever sustained personal injury as a result of actions by the Appellees. Because any damages resulting from trespass or nuisance by either of the Appellees would have occurred more than five years before the claims were asserted against them,² the trial court concluded both Appellees were entitled to summary judgment on the trespass and nuisance claims.

"Once the statute of limitations is raised, the burden falls on the complainant to prove such facts as would toll the statute." *Southeastern Kentucky Baptist Hospital, Inc. v. Gaylor*, 756 S.W.2d 467, 469 (Ky. 1988). The Reeds have offered no reason why the limitations period should be tolled. They offer no proof to substantiate their allegations that Rogers Group was expressly organized as the successor entity of the selling corporation, Hanson Aggregates, and that Rogers Group thereby remains liable as the successor-in-interest of Hanson Aggregates. See *Pearson ex rel. Trent v. National Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

Further, Hanson Aggregates settled with the Reeds and was dismissed from the suit on April 3, 2002. The agreed order stated:

The complaint and all amended complaints against defendant, Kentucky Stone Company, and its successor in interest, Hanson Aggregates Midwest, Inc., are each absolutely dismissed with prejudice, and said parties are released from all past, present or future claims, or [sic] any kind or nature, whether now existing or hereinafter arising by reason of the property which is the subject of this litigation.

Additionally, the Reeds do not address in this appeal why the statute of limitations should be tolled in their claim against Austin Powder.

The burden of proof was on the Reeds to prove that the statute of limitations should be tolled. They did not meet that burden. Consequently, the judgment of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

1. Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

2. The amended complaint against Rogers Group having been filed February 8, 2002, and the amended complaint against Austin Powder having been filed November 29, 2005.

