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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002552-MR

CHARLES RAY JEANETTE AND
ANN JEANETTE — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY MORRIS, JUDGE
ACTION NO. 98-CI-003965

LOUISVILLE AND JEFFERSON
COUNTY METROPOLITAN SEWER DISTRICT;
CARROLL F. COGAN, INDIVIDUALLY;
AND CARROLL F. COGAN, f/d/b/a
GLENGARRY UTILITIES, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Charles Ray Jeanette and Ann Jeanette (the Jeanettes) appeal from a memorandum and order of the Jefferson Circuit Court entered September 21, 1999, which granted summary judgment in favor of the Louisville and Jefferson County Metropolitan Sewer District (MSD). We affirm.

The Jeanettes purchased a residence located on Lot 100 of the Zelma Fields Subdivision in 1968. MSD owns Lot 101, which adjoins the Jeanettes' lot. Lot 101 either contains or at some

point in time contained a private sewage treatment plant which provided sewage treatment for neighboring properties. MSD purchased Lot 101 from Glengarry Utilities, Inc. (Glengarry) in 1986 in order to integrate the sewers served by the private treatment plant into MSD's sewer system and close the private treatment plant. Glengarry obtained title to Lot 101 from the C.E. Schmidt Company in 1977.

On July 16, 1998, the Jeanettes filed a complaint against MSD alleging that they had "been in hostile and under claim of right, open, notorious, exclusive, and continuous possession of the westerly 100 feet of said Lot 101 . . . for a period of more than fifteen (15) years prior to the filing of this complaint." The Jeanettes sought a judgment declaring them to be the owners of the disputed strip of land which abuts their property. The Jeanettes later amended their complaint to add Carroll F. Cogan, individually and f/d/b/a Glengarry Utilities, Inc., as a defendant.

MSD propounded interrogatories and requests for production of documents to the Jeanettes during the course of discovery. In response to an interrogatory regarding their use, improvement of, and possession of the property, the Jeanettes responded that since 1968:

> we have planted trees and shrubs, we have kept the property mowed and the plantings trimmed and shaped. We have seeded the property in question at the same time we seeded the rest of our lawn. We have built horseshoe pits for recreation. We have had the area treated when we also had the rest of our lawn treated. We have maintained the gravel road that runs through the property

> and placed retaining logs along that roadway to prevent the gravel from washing away.

When asked to identify any conversations they may have had with any owner of the property, the Jeanettes stated:

> Mr. Schmidt, deceased, who we believe was the owner of the old sewage treatment plant, told us to plant, mow, or use the property in any way whatsoever.

When asked to identify "any and all property boundary markers, fences, or improvements placed on or made to the property, the Jeanettes responded:

> There are no boundary markers or fences placed on the property. Improvements have consisted of plantings and a horseshoe pit. We planted a maple tree in 1970 or 1971. In addition to caring for this tree, we also maintained the pine trees and other plantings on the property by trimming and shaping. We have no maps or blueprints noting same.

The Jeanettes further indicated that they based the allegations contained in their complaint on the fact that they "mowed, planted, and in other ways maintained the property in question continuously since 1968." They also produced numerous photographs showing their use of the property. The Jeanettes' responses to MSD's discovery requests constitute the only evidence contained in the record on appeal.

Following receipt of the Jeanettes' interrogatory answers, MSD filed a motion for summary judgment in its favor on the Jeanettes' claims. MSD argued that (1) the Jeanettes' possession of the property was not hostile or under a claim of right; and (2) possession of real property by permission can never ripen into title by adverse possession. In support of its

motion, the MSD relied on the Jeanettes' discovery responses. In response to MSD's motion, the Jeanettes argued:

> Plaintiffs, by counsel, respectfully submit that there are genuine issues of material facts in that the defendant and its predecessor in title are and had been under notice of Plaintiffs' adverse possession of the subject property and/or defendant and its predecessor abandoned the subject property. [Citations omitted.]
>
> In its motion, Defendant relies solely upon one answer to Interrogatories . . . to incorrectly assert that plaintiffs "began using said property with permission of the man they believed to be the owner." Said answers to Interrogatories . . . do not state that. The fact that a person who may or may not have been a prior owner consented to Plaintiffs' hostile, open, notorious and adverse possession of the subject property together with the failure of the Defendant and its predecessor in title to take any steps to "supervise, control or make use of or claim ownership to the premises" . . . merely sets forth a basis upon which the trier of fact could find adverse possession of the subject property by Plaintiffs and abandonment of same by the record owners. In this case Defendant and its predecessor (neither of whom are Mr. Schmidt) held title under deeds dating from 1977 . . . more than 15 years prior to the commencement of this action.

The Jeanettes attached no affidavits or other evidence supporting their allegations to their response aside from their responses to MSD's discovery requests.

In an memorandum and order dated September 21, 1999, the trial court entered summary judgment in favor of MSD, stating:

> In the present action, the Jeanettes have set forth in their Answers to Interrogatories that the man whom they believe to have been the owner gave them permission to use the land in any way they saw fit. The Jeanettes

> then proceeded to treat the property as their own. At that point, it is clear that the Jeanettes were not possessing the property in a "hostile" manner.
>
> The Jeanettes have not set forth any affirmative evidence of their hostile possession of the property. The fact that they mowed the grass and treated it as their own is not sufficient under Kentucky case law to establish possession. . . . Given that the Jeanettes have not set forth any evidence demonstrating that they satisfy this element of adverse possession, the defendant is entitled to judgment as a matter of law.

This appeal followed.

First, we agree with the Jeanettes that it makes no difference in this case whether they had permission to use the disputed property from a prior owner. "[P]ermission is personal to the grantor and cannot extend beyond that person's ownership[.]" Miller v. Anderson, 964 P.2d 365, 369 (Wash.App.Div.1 1998). As the record shows, Glengarry obtained title to the property from the C.E. Schmidt Company in 1977. Assuming that the "Mr. Schmidt" referred to in the Jeanettes' response to the interrogatories was affiliated with the C.E. Schmidt Company and had the authority to give the Jeanettes permission to use the property, that grant of permission terminated in 1977 when the property was sold to Glengarry. The Jeanettes have never argued that they somehow sought to disavow Mr. Schmidt's putative ownership of the property or convert their permissive use of the property to a hostile one. Because any grant of permission terminated when the property was sold to Glengarry, the Jeanettes need only show that they adversely possessed the property for the fifteen years prior to July 16,

1998, the day the complaint was filed. But having agreed with the Jeanettes that the fact that they may have had permission to use the property makes no difference, we believe that the trial court did not err in granting summary judgment in favor of MSD.

In order to claim title to property by adverse possession, a plaintiff must show that his possession of the property has been hostile, actual, exclusive, continuous, and open and notorious for an uninterrupted period of fifteen years. Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Company, Inc., Ky., 824 S.W.2d 878, 880 (1992). "To make a holding hostile, the claimant must hoist his flag and keep it flying." Chesapeake & Ohio Railway Company v. Rosskamp, Ky., 200 S.W. 496, 498 (1918). "[T]here must have been such open and notorious acts of physical possession as would put the owner upon notice of the assertion of a hostile claim." Miller v. Cumberland Petroleum Co., 108 S.W.2d 514, 515 (1937). Additionally, the nature of the possession must be "so continuous as to furnish a cause of action in ejectment or for trespass every day during the statutory period of fifteen years." Ballard v. Moss, 268 S.W.2d 35, 37 (1954).

Based on the foregoing, we do not believe that the actions of the Jeanettes in regard to their use of the land are sufficient to satisfy the hostility requirement. By their own admission, the Jeanettes have only planted and cared for trees, mowed, seeded, and otherwise cared for the grass, maintained and cared for an already-existing gravel road on the property, and built horseshoe pits. We agree with the trial court that the

fact that the Jeanettes may have cared for the property as if it were their own for the past fifteen years does not satisfy the element of hostility.

Furthermore, the Jeanettes have admitted that there are no fences or boundary markers on the property and we believe that this fact further negates their claim.

> [I]n order to make an adverse claim definite, the adverse possessor must have either some color of title that will show the extent of the claim or there must be a definite boundary. . . .One in the actual adverse possession of a portion of land under a deed is in adverse possession of the entire tract of land described in the deed: while one in adverse possession without color of title must indicate the extent of his claim by well-defined boundaries.

Appalachian Regional Healthcare, Inc., 824 S.W.2d at 880. See also Vaughn v. Holderer, Ky., 531 S.W.2d 520 (1975)(where property sought to be claimed by adverse possession adjoined claimant's property with no boundary marker or line and where fence erected between lots by claimant did not enclose disputed property or cut record owner off from use or access, there was no hostile possession of disputed property by claimant despite fact that she paid taxes on property and cut grass).

The Jeanettes' argument that the trial court's entry of summary judgment was premature because discovery was not complete does not require reversal of the trial court's order. A review of the record on appeal shows that this argument was not made before the trial court; thus, this issue is not preserved for our review. Cabbage Patch Settlement House v. Wheatly, Ky., 987 S.W.2d 784, 786 (1999).

Finally, the Jeanettes contend in their brief on appeal that "the potential issue of abandonment of the property creates an additional issue of fact in need of further exploration." However, short of merely alleging in one sentence that MSD abandoned the property in its response to MSD's motion for summary judgment and in one footnote in a twelve-page brief, the Jeanettes have not set forth any facts which would support their claim of abandonment. Without supporting facts, the Jeanettes' allegation that MSD may have abandoned the property does not require reversal.

The memorandum and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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