STATE OF MICHIGAN

COURT OF APPEALS

AUSTIN JACOBS AND DOROTHY M. JACOBS,

Plaintiff-Appellees,

v

BAY DEVELOPMENT COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 15, 1997

No. 183964
Alpena Circuit Court
LC No. 92-000183

HOWARD FRENCH, GENEVA EUSTIS FRENCH, HELEN EUSTIS, AND SAMUEL EUSTIS,

Plaintiff-Appellees,

v

BAY DEVELOPMENT COMPANY,

Defendant-Appellant.

No. 183965
Alpena Circuit Court
LC No. 92-00066

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

In these consolidated appeals, defendant Bay Development Company appeals as of right two separate judgments quieting title based on a theory of adverse possession. We affirm.

A railway right-of-way known as the Hillman Line formerly ran through the Jacobs' and Frenches' properties. Operated by Detroit and Mackinac Railway (D&M), defendant's predecessor in title, the Hillman Line started in Alpena and traveled through Paxton, Lachine, and Long Rapids

---

* Circuit judge, sitting on the Court of Appeals by assignment.

Township. The right-of-way was approximately one hundred feet wide. After the line ceased operation in 1929, the railroad tracks were removed, and all that remained was the raised grade.

A portion of the grade runs east-west through the southern edge of the Frenches' property, and through the middle of the Jacobs' property. The two properties are adjacent to one another. Geneva Eustis French, Helen Eustis and Samuel Eustis, inherited the property from their father Orville Blanton Eustis (O.B.), who acquired the property in 1968 from an Albert C. Morrison. Howard French is Geneva's husband. Austin Jacobs' family has held the northern half of their property since the 1930s, and after Austin Jacobs married Dorothy in 1956, they purchased the southern half of their property.

The Jacobs and Frenches brought separate actions to quiet title over the grade, claiming adverse possession for the statutory period. After a consolidated trial, the court entered judgments quieting title to plaintiffs, and ordered that any cloud on their title be removed. On appeal, defendant contends that plaintiffs have not sustained their burden in establishing adverse possession. A suit to quiet title is equitable in nature and is reviewed de novo by this Court. *Connelly v Buckingham*, 136 Mich App 462, 467; 357 NW2d 70 (1984). A reviewing court will give great weight to the findings of fact made by the trial court and will not disturb those findings on appeal unless a reviewing court is convinced that it would have reached a different result. *Id.*

One claiming title by adverse possession has the burden of establishing it. *Simon v School Board, District No.2*, 299 Mich 478; 300 NW 851 (1941). Adverse possession requires a showing, by clear and cogent evidence, that possession of the property was actual, visible, open, notorious, exclusive, and continuous and uninterrupted for the statutory period of 15 years.[1] *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957); *Gorte v Department of Transportation*, 202 Mich App 161, 170; 507 NW2d 797 (1993). The possessor must also hold the property hostile to the true owner under cover of claim of right. *Burns*, *supra*, 348 Mich at 14. The possession must be so open, visible and notorious as to raise the presumption of notice to the world that the right of the true owner was invaded intentionally. *Id*. at 15. Determination of what acts or uses are sufficient to constitute adverse possession depends upon the facts in each case and to a large extent upon the character of the premises. *Id*. at 14.

Defendant argues that the trial court ignored evidence that plaintiffs' use of the grade was not exclusive. Specifically, defendant contends that plaintiffs' possession of the grade was concurrent with its ownership as it has held the grade for future rail service, has paid taxes for the grade, and has leased the grade to a utility company. Exclusive possession means that the adverse possessor does not occupy the land concurrent with the true owner or share possession in common with the public. *Hamilton v Weber*, 339 Mich 31, 53-54; 62 NW2d 646 (1954); *Le Roy v Collins*, 176 Mich 465, 142 NW 842 (1913). Since plaintiffs', including their predecessors', have been the sole occupants on their land since 1929, defendant has not proven concurrent possession.

First, the evidence contradicts defendant's assertion that it retains the property for future reestablishment of rail service. Defendant does not operate railways, and its predecessor in title, D&M,

has ceased operating railways. James Keavey, defendant's representative,[2] testified at trial that the grade was "abandoned" for rail service and that he had not visited the property before the commencement of this action.

Second, defendant argues that the fact that it has paid the property taxes for the grade over the years contradicts these plaintiffs' claims of exclusive possession. In support of this argument, defendant relies upon *Dunlop v Twin Beach Park Assn, Inc*, 111 Mich App 261; 314 NW2d 578 (1981). In holding that the plaintiffs had not established adverse possession, the *Dunlop* panel cited the fact that plaintiffs had not paid property taxes as evidence that plaintiffs' did not claim the disputed property as of right. *Id*. at 267. Yet, this factor was only one piece of evidence that the panel relied upon in reaching its holding. The panel also considered evidence that the subdivision plat included a provision that the disputed property, a shared beachfront, was dedicated for use by the homeowners in the subdivision. *Id*. at 263. The defendant had presented witnesses who confirmed that others used a shared beachfront, which contradicted the plaintiffs' claim that they excluded others from using the beachfront. *Id*. at 267. Because the plaintiffs shared possession of the disputed property with the public, the *Dunlop* panel concluded that they had not possessed the beachfront exclusively. *Id.;* see also *Hamilton*, *supra* at 53-54.[3]

By contrast, in this case, defendant nor others have used the grade since 1929 without the plaintiffs' permission. Hence, defendant's evidence that plaintiffs' have not paid property taxes[4] on the grade does not defeat the overwhelming evidence that plaintiffs have had exclusive *possession* of the grade for the statutory period.

Defendant alternatively maintains that it leased use of the grade to Alpena Power Company (APC). In 1954, D&M granted APC the right to erect use and maintain a pole line along the right of way. Defendant characterizes this right as an easement in gross, relying on *Mumaugh v Diamond Lake Cable*, 183 Mich App 597, 607; 456 NW2d 425 (1990). However, the *Mumaugh* panel was simply construing language in the conveyance that was the subject of the parties' dispute to determine the type of easement that was intended by the conveyance. *Id*. The instrument at issue in *Mumaugh* stated that the company was granted "[t]he right and *easement* to erect, maintain and operate *in perpetuity* a line of poles for the supporting of electric power . . . ." *Id*. at 599 (emphasis added).[5]

In this case, D&M's conveyance to APC was clearly a license. In the instrument, APC is identified as the *licensee*, and in paragraph four, the agreement states that APC is not granted an estate in land. A license evidences permission to do some act or series of acts on the land of the licensor without having any permanent interest in the land. *McCastle v Scanlon*, 337 Mich 122, 134-135; 59 NW2d 114 (1953); *United Coin Meter Inc v Gibson*, 109 Mich App 652, 655; 311 NW2d 442 (1981). A license does not confer a right of possession upon the licensee. *United Coin Meter*, *supra* at 656. Thus, since APC had a license and no real property interest, it had no right to possession of the land, and its entry on the grade did not defeat plaintiffs' exclusive possession of the grade.

In fact, notwithstanding the license from D&M, there was evidence that APC obtained the plaintiffs' permission to enter onto the grade. For example, after the Frenches erected a gate on the grade, APC obtained Geneva French's consent to enter the gate. Since then, APC has placed a padlock on the gate and given the Frenches a key to the padlock. Similarly, the Jacobs granted APC permission to run power lines from the poles to their residence, and also granted APC permission when entering the land to do maintenance.[6]

Next, defendant claims that the plaintiffs' acts on the land were not of adverse or hostile character to defendant. Adverse or hostile use is use inconsistent with the right of the owner, such as use without permission, or such use as would entitle the true owner to a cause of action against the intruder. *Mumrow v Riddle*, 67 Mich App 693, 699; 242 NW2d 489 (1976). In order to claim title by adverse possession, acts of possession must be of open and hostile character. *Monroe v Rawlings*, 331 Mich 49, 53; 49 NW2d 55 (1951). However, it is not necessary that the possessor enclose the land with a fence, or that the possessor cultivate or reside upon the land, or that the possessor erect buildings on the land. *Id*. It is sufficient if acts of ownership are of such character as to openly and publicly indicate an assumed control or use such as is consistent with character of premises in question. *Id*.

Defendant argues that plaintiffs sporadic and recreational use of the grade was not adverse or hostile to its interests. Again the evidence defeats defendant's argument. Regarding the Frenches' property, a fence surrounded the entire property, including the grade, when O.B. Eustis acquired it. Also, O.B. Eustis' predecessor harvested trees on the grade, and refused to stop when asked to by a D&M representative. The Eustises and Frenches have also harvested and even planted trees on the grade. Annually, there are no trespassing signs posted over all the property. Since the 1960s, the Frenches have built deer blinds on the grade for hunting, including a permanent blind. The Frenches and Eustises also used the grades for recreational use; O.B. hired someone to cut a trail on the grade, which he maintained. Lastly, in recent years, the family had rented the dwelling on the property to different individuals, and each lease categorically excluded use of the remaining property, including the grade.

Regarding the Jacobs' property, they used their property to raise cattle for beef over several decades. Before 1946, a cement culvert was placed in the grade, and since that time the grade has been used as part of the farm. The Jacobs used the grade for herding and pasturing cattle, and hauling crops. In 1970, Austin Jacobs built an enormous corral on the grade that was used extensively in their cattle operations. In addition, the Jacobs erected gates and fences that cross the grade.[7] Like the Frenches, the grade was also used for hunting, and blinds were erected on the grade.

Defendant nevertheless contends that plaintiffs use was permissive, and not adverse, because defendant would not object to these uses as it has granted permission in the past to other property owners to use the right of way. Yet, there is no evidence that defendant or its predecessor granted any permission to plaintiffs or its predecessors to use the grade. Also, there is no indication that defendant was even aware of plaintiffs' use of the grade. Mr. Keavey testified that he had not visited the property prior to this litigation.

Therefore, the trial court properly found that plaintiffs' adversely possessed the grade for the statutory period.

Affirmed. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan

[1] See MCL 600.5801(4); MSA 27A.5801(4).

[2] Mr. Keavey is employed by Straits Services Company; this company provides property management services to defendant and is owned by the same parent company as defendant.

[3] The *Dunlop* panel also found that because the subdivision plat gave the plaintiffs explicit permission to use the beachfront, the plaintiffs' use of the beachfront was not adverse or hostile to the true owner. *Id.* at 266; see also *Hamilton*, *supra* at 53.

[4] Defendant argues that the plaintiffs' tax bills clearly indicate that D&M's right of way was excepted from their property taxes. The plaintiffs' tax bills entered as exhibits in the lower court have various notations in the property description section such as "EXC D & M RR R/W," "EXC PART S OF D&M R/W," and "LESS D&M RR R/W." These obscure notations contradict defendant's argument that the exception for its right of way was *clearly* indicated.

[5] The *Mumaugh* panel clarified that " the easement *at issue* is an easement in gross because is not appurtenant to any estate in land, but is a personal interest granted to [the defendant] to use plaintiffs' land for the erection and maintenance of the utility pole line." *Id*. at 607. Moreover, the panel noted that the right was granted "in perpetuity," which was more than authority for temporary use of land, such as a license. *Id*.

[6] There is additional evidence that plaintiffs possessed the land to the exclusion of others. Defendant had leased oil and mineral rights on the grade to Shell Oil Company in 1974. Despite the lease, both the Jacobs and the Frenches refused to permit Shell Oil Company to enter and dig on the land.

[7] See *Davids v Davis*, 179 Mich App 72, 84; 445 NW2d 460 (1989) (erection of fence shows rights inconsistent with another's ownership.)