

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM C. GAGE,

UNPUBLISHED
February 13, 1998

Plaintiff-Counterdefendant-
Appellant/Cross-Appellee,

v

No. 196380
Oakland Circuit Court
LC No. 95-498764 CZ

GIOVANNI CORTESE and LUCIA CORTESE,

Defendants-Counterplaintiffs-
Appellees/Cross-Appellants.

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). Defendants cross-appeal the trial court's refusal to grant sanctions pursuant to MCR 2.114. We affirm both decisions.

This case arises out of a dispute between plaintiff and defendants concerning the boundary line between their adjoining parcels of land. Plaintiff and defendants lived in a platted subdivision. A bed containing several plantings of trees ran between their properties. Plaintiff stated that it was his belief that the property line ran through the middle of the bed. Plaintiff asserted that he had maintained the trees and yard on his side of the bed since he purchased his home in 1978. The previous owner of the home stated that from 1972 to 1978 he had done likewise.

Defendants moved into their home in November 1991. Some time after they moved in, they hired someone to trim some dead branches from trees located in the bed. When plaintiff observed the trees being trimmed, he asked defendants to stop, asserting that he owned the trees. Plaintiff and defendants agreed to share the costs of a survey to determine the true boundary line. The survey revealed that the disputed property belonged to defendants and confirmed the results of previous surveys on the property. Plaintiff filed an action to quiet title, asserting that he owned the disputed property by adverse possession.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Int'l Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 442; 543 NW2d 25 (1995). A motion pursuant to MCR 2.116(C)(10) tests the factual support for a claim and may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* Giving the benefit of any reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would present an issue upon which reasonable minds could differ. *Id.*

Plaintiff contends that the trial court erred in granting summary disposition because his actions and his predecessor's actions concerning the disputed property were sufficient to establish adverse possession. We disagree. To claim land by adverse possession, a party must present "clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right." *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957). Possession that is permissive or consistent with another person's title cannot constitute adverse possession. *Id.* at 15. Plaintiff asserts that he exclusively cut the grass and watered the property. Plaintiff also stated that he maintained the bushes and trees on the property. Even accepting plaintiff's assertions, this is insufficient to avoid summary disposition. Our Court has held that building a retaining wall and mowing grass that was thus separated from the property were not sufficient to deprive an owner of possession because such actions were consistent with being good neighbors. *Kipka v Fountain*, 198 Mich App 435, 440; 499 NW2d 363 (1993). Similarly, we conclude that plaintiff's actions did not provide adequate notice to the record owners, defendant and their predecessors, that plaintiff intended to possess the property.

Plaintiff also argues that this case fits under this Court's prior rulings in which adverse possession may be established by a claimant's intent to claim title to a visible, recognizable boundary. In *DeGroot v Barber*, 198 Mich App 48, 49; 497 NW2d 530 (1993), for example, the plaintiffs were told that the southern boundary of their property was marked by a road. Although the road was not the actual boundary, this Court held that the plaintiffs had proved adverse possession because their actions demonstrated an intent to claim title to a visible, recognizable boundary. *Id.* at 53. However, unlike *DeGroot* and similar cases, the present case does not involve a definite, recognizable boundary such as a road or fence. Rather, in the present case, plaintiff can only posit an amorphous line somewhere among several plantings of trees scattered throughout a bed.

Plaintiff also contends that he is entitled to the property under the similar doctrine of acquiescence. However, a review of the record shows that plaintiff failed to raise this claim in the trial court. Issues raised for the first time on appeal are not ordinarily addressed by the appellate court. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Therefore, we decline to review this issue.

On cross-appeal, defendants argue that the trial court erred in refusing to grant sanctions pursuant to MCR 2.114. We disagree.

Because a trial court's decision to grant or refuse sanctions under MCR 2.114 involves findings of fact, this Court reviews the trial court's findings to determine whether they were clearly erroneous.

Contel Systems Corp v Gores, 183 Mich App 706, 711; 455 NW2d 398 (1990). A finding of fact is clearly erroneous if, after review, this Court is firmly convinced that a mistake has been made. *Id.* A court must impose sanctions when it determines a document was signed in violation of MCR 2.114(E). *Id.* at 710-711. Under MCR 2.114(F), a party is also subject to costs as provided in MCR 2.625(A)(2) for pleading a frivolous claim or defense. A claim is frivolous if:

(1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party's position was devoid of arguable legal merit. [*Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266-267; 548 NW2d 698 (1996).]

After reviewing the evidence, we cannot conclude that the trial court's refusal to impose sanctions was clearly erroneous. While the trial court ultimately rejected plaintiff's adverse possession claim, plaintiff did present evidence on each element of his claim. Therefore, one cannot conclude that plaintiff's claim had no basis in law or fact. Plaintiff also made a reasonable argument that his interest in the property vested prior to the survey because he was allowed to tack his period of possession to that of the prior owners, the Cohens. Therefore, it was not improper for the plaintiff to file his claim after the survey revealed the true boundary of the property.

We affirm.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman