STATE OF MICHIGAN

COURT OF APPEALS

KYLE W. HINGSTON and SUE E. HINGSTON,

Plaintiffs/Counterdefendants-Appellees/Cross-Appellants,

v

SHEPLER DEVELOPMENT L.L.C.,

Defendant/Counterplaintiff-Appellant/Cross-Appellee,

and

ERNEST A. WHEELER, his heirs legatees, transferees and assigns,

Defendant.

UNPUBLISHED
February 5, 1999

No. 199031
Cheboygan Circuit Court
LC No. 95-005265 CH

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment holding that plaintiffs were entitled to a portion of a railroad right of way based on the doctrine of adverse possession and acquiescence. Plaintiffs cross-appeal as of right and claim that more land was actually adversely possessed than declared by the trial court and that they had superior title to the parcel in dispute given a 1926 tax deed, which they maintain extinguished the railroad right of way. We reverse in part, affirm in part and remand for the entry of a judgment in accordance with this opinion.

Defendant first argues that the trial court clearly erred in finding that plaintiffs had adversely possessed the land in dispute for the requisite fifteen years. We agree. See *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996) (applying clearly erroneous standard to trial court's factual findings). To establish adverse possession, the claimant must show by clear and cogent evidence that possession was actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the fifteen-year statutory period. *Walters v Snyder*, 225 Mich App 219, 223-224; 570 NW2d 301 (1997). Clear and cogent evidence is evidence that clearly establishes

the fact of possession and leaves little doubt in the mind of the trier of fact concerning the proper resolution of the issue. *McQueen v Black*, 168 Mich App 641, 645 n2; 425 NW2d 203 (1988). "Thus, where there is any reasonable dispute, in light of the evidence, over the question of possession, the party has failed to meet his burden of proof." *Id*.

Defendant claims that the only evidence provided by plaintiffs concerning when plaintiffs began to adversely possess was Kyle Hingston's testimony that the house was placed on the property sometime "after Labor Day" of 1980. Because plaintiffs' claim was filed on August 21, 1995, defendant asserts that the fifteen year period had not yet passed. Plaintiffs claim that the proper time frame to examine is either from the time they began clearing the property in late 1979 to the time their action was filed or, alternatively, from when the house was placed on the property "after Labor Day of 1980" to October 4, 1995, the date that defendant filed a quiet title claim.

With regard to the commencement date, the trial court found that plaintiffs had not maintained the yard, the dog pen, or the garden for the requisite fifteen years. This finding appears proper because these activities were conducted after the installation of the house on the property which occurred in 1980. Without expressly making a finding as to when the house was actually placed on the property, the trial court then found that the house had remained on the property for more than fifteen years. The only testimony on the record regarding this date was Hingston's statement that the house was placed on the property after Labor Day of 1980, in September 1980. However, the record also indicates that plaintiffs did not begin to place the house on the property until the building permit was granted on October 7, 1980. Thus, the record indicates a commencement date range of September to October 1980.

With regard to which final date is appropriate for the purposes of measuring the statutory period, we note that plaintiffs filed their claim based on adverse possession on August 21, 1995 and defendant filed a counterclaim to quiet title on October 4, 1995. In *Kipka v Fountain*, 198 Mich App 435, 441; 499 NW2d 363 (1993), this Court determined that the proper date was the date that the defendants took action to regain possession of the land, which, as in this case, was the filing of a counterclaim, albeit one for trespass. Thus, in this case, it was plaintiffs' burden to show that their cause of action first accrued before October 4, 1980. As explained in *Kipka, supra*, "[a]ll we can conclude with any certainty is that plaintiffs did not meet that burden." The dispossession of defendant took place between September to October, 1980, but plaintiffs did not establish that it happened before or after October 4.

In their cross-appeal, however, plaintiffs claim that the commencement date should have been late 1979 when they cleared the property. Further, they claim that the amount of property adversely possessed should have extended to the railroad grade, not just the fence line, because they cleared to the grade in late 1979. The trial court made no specific holding with regard to these 1979 activities. However, it has been stated that the acts required to establish a claim of adverse possession vary with the character of the land. *Caywood v Dep't of Natural Resources*, 71 Mich App 322, 331; 248 NW2d 253 (1976). For instance, more may be required to advance a claim of adverse possession where the land is remote and undeveloped and "visible acts of possession are normally few and far between." *Id*. at 336 (Danhof, CJ., concurring). In this case, there was evidence that the railroad right

of way was inspected approximately twice a month, primarily to ensure that the actual tracks and railroad grade were not obstructed, thereby allowing the trains to pass. There was also evidence that the railroad rarely required abutting landowners to seek permission from the railroad to clear the right of way and in fact encouraged this activity because it saved the railroad the expense of clearing the land itself. Accordingly, we conclude that the fact of clearing the land, under the circumstances of this case, did not necessarily rise to the clear and cogent evidence needed to establish the elements of an adverse possession claim.

Defendant also argues that the trial court erred in finding that the parties had acquiesced to a fifty-foot boundary on either side of the railroad tracks as evidenced by an old fence line. We agree. The "proper standard applicable to a claim of acquiescence is proof by a preponderance of the evidence." *Walters, supra* at 223. There are three theories of acquiescence: (1) acquiescence for the statutory period, MCL 600.5801(4); MSA 27A.5801(4); (2) acquiescence following a dispute and an agreement; and (3) acquiescence arising from an intention to deed to a marked boundary. *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). Under the first theory, "acquiescence to a boundary line may be established where the line is acquiesced in for the statutory period irrespective of whether there has been a bona fide controversy regarding the boundary." *Id*. In *Kipka*, *supra* at 438-439, this Court explained:

> The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land.

Unlike adverse possession, a claim of acquiescence does not require that the possession be hostile or without permission. *Walters*, *supra* at 224.

In the present case, the trial court based its determination that the parties acquiesced to the fence line as a boundary on the old fence line. This rationale appears flawed. First, there is no evidence that the railroad built the fence. Second, the "old fence line" does not even extend to plaintiffs' property. Third, the record is completely devoid of any evidence that the railroad at any time regarded this fence line as a property line. Although the doctrine of acquiescence requires the lesser standard of proof by a preponderance, plaintiffs failed to provide sufficient evidence to show that defendant or its predecessor railroad acquiesced to the fence line as a boundary line. Cf. *Sheldon v Michigan Central Railroad Co*, 161 Mich 503, 514; 126 NW 1056 (1910).

Finally, plaintiffs argue that the trial court erred when it determined that defendant's claim of title was superior to that of plaintiffs. We disagree. The origin of the title to the disputed property began with an 1882 deed conveying a 200 foot wide railroad right of way to the Lansing Saginaw Railway. Also in 1882, the grantor recorded a plat in which no reference was made to the railroad right of way. In 1926, because of delinquent taxes, the entire block five of the plat (inclusive of the disputed property) was deeded to the state. The state then conveyed the property to plaintiffs' predecessor in interest. Although all subsequent deeds excepted the railroad right of way, plaintiffs argue that defendant's right of way was extinguished as a result of the 1926 tax sale.

MCL 211.67b(1); MSA 7.112(2)(1), added by 1964 PA 86, provides as follows:

> Notwithstanding any other provision of law, any land sold for taxes shall remain subject to any visible or recorded easement, right of way, or permit in favor of the United States, the state, any political subdivision or agency of the state, or any public authority or drainage district, or granted or dedicated for public use or for use by a public utility.

However, as explained in *Boyne City v Crain*, 179 Mich App 738, 745; 446 NW2d 348 (1989), before this statute was enacted, "the rule was that, for any land taken by the state because of the nonpayment of taxes, any subsequent conveyance of title in fee to that land by the state was free of any encumbrances, thus extinguishing any easements which existed at the time the state took title to the property. See *Moceri v St Clair Shores*, 366 Mich 380, 384-385; 115 NW2d 103 (1962); *Frey v Scott*, 224 Mich App 304, 308-309; 568 NW2d 162 (1997).

The parties debate whether defendant's predecessor obtained an easement or a fee. The character of the title taken, i.e., easement or fee, to a railroad right of way depends on the language of the conveyance. *Boyne City, supra* at 743. In this case, the conveyance was a quit claim deed from the original grantor that conveyed any interest, if any, that the grantor had in the property. This deed presumably conveyed fee title because this was the same grantor who platted this portion of Mackinaw City. Also, railroads are generally exempt from paying property tax, see, generally, MCL 211.7v; MSA 7.7(4s), and defendant's predecessor would therefore have been exempt from a tax sale initiated by delinquent property taxes. Finally, plaintiffs' deed (and all in their chain of title provided to this Court) acknowledged and excluded the railroad's right of way. Therefore, we conclude that the trial court correctly held that defendant had superior title.

In summary, we reverse in part, affirm in part and remand for the entry of a judgment in accordance with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

Reversed in part, affirmed in part and remanded.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Henry William Saad