

STATE OF MICHIGAN  
COURT OF APPEALS

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HAVEN'S PROPERTY, INC.,

Plaintiff-Appellant,

v

PATRICIA THIERY, f/k/a PATRICIA YONKERS,

Defendant-Appellee.

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UNPUBLISHED

March 16, 1999

No. 207632

Barry Circuit Court

LC No. 96-000513 CH

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment quieting title to certain property in favor of defendant. We affirm.

Plaintiff contends that the trial court erred in finding that the elements of adverse possession were satisfied, as the principal activity by defendant and her tenants was mowing the lawn of plaintiff's property. We disagree. Although actions to quiet title are equitable and subject to review de novo, the trial court's factual findings are reviewed for clear error. *Dobie v Morrison*, 227 Mich App 536, 542; 575 NW2d 817 (1998).

In *Thomas v Wilcox Trust*, 185 Mich App 733, 736-737; 463 NW2d 190 (1990), this Court set forth the elements of a claim of adverse possession:

Adverse possession must be established by clear and cogent proof that the claimant's possession was actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. The possession must be hostile and under cover of a claim of right. [Citations omitted.]

In *Doctor v Turner*, 251 Mich 175, 186; 231 NW 115 (1930), the Supreme Court asserted that "the occasional or periodical entry upon land to cut wild grass is not an act manifesting a purpose to take possession as owner, and does not constitute actual possession." Therefore, the plaintiff failed to be in actual, continuous, open, notorious, hostile and adverse possession by hay cutting which was casual and amounted to little more than an annual trespass. *Doctor, supra*, 251 Mich 187. However, in the

instant case, defendant and her tenants did not occasionally enter onto plaintiff's property for the limited purpose of mowing the lawn of the disputed property. Rather, defendant and her son removed a building which was placed on a cement slab. Thereafter, the slab was used for parking or housing a dumpster. Defendant also paved the driveway which extended onto plaintiff's property. The tenants mowed the disputed property and planted a garden, removed trees, and permitted their children to play in this area by placing a swing set and inflatable pool in the disputed area.

In *Robbins v Eotoff*, 39 Mich App 589, 590-591; 197 NW2d 912 (1972), the defendant believed she owned certain property. As a result of her belief, the defendant fenced in the area in question, placed a billboard on the property, graded the property and seasonally leased the premises for use as a parking lot for a three-year period. This Court held that although the seasonal occupancy was only for a three-year period, the remaining acts, the paving and the placement of the billboard, were of a permanent nature for a fifteen-year period. Therefore, the combination of the acts was sufficient to amount to open, visible and notorious possession. *Robbins, supra*, 39 Mich App 591-592.

In the instant case, the combination of the acts of defendants and her tenants was sufficient to satisfy the elements of the claim of adverse possession. By their actions, defendant and her tenants demonstrated the intent to claim title to a visible, recognizable boundary. *DeGroot v Barber*, 198 Mich App 48; 497 NW2d 530 (1993). Furthermore, the acts of defendant and her tenants provided proof of acquiescence of the use of the property by a preponderance of the evidence. *Walters v Snyder*, 225 Mich App 219, 223; 570 NW2d 301 (1997). Accordingly, the trial court did not clearly err in quieting title to the property to defendant.

Plaintiff also asserts that the requirement of hostile possession was not satisfied because there was no evidence that the predecessor in title to plaintiff's property revoked permission to use his property in a letter. In *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995), this Court addressed the hostile requirement of adverse possession:

The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder. [Citations omitted.]

Defendant and her tenants exercised control over the disputed property by acts which were inconsistent with plaintiff's right and were done without plaintiff's permission. The trial court held that defendant's use was hostile because she did, in fact, receive a letter from the previous land owner revoking consent to use the property. In *Dunlop v Twin Beach Park Association*, 111 Mich App 261, 266; 314 NW2d 578 (1981), this Court stated that "[d]ue regard is given to the opportunity of the trial judge to assess the credibility of the witnesses who appeared before him." Giving deference to the trial court's assessment of credibility, there was sufficient evidence to support a finding of hostile taking of the disputed property.

Finally, plaintiff contends that the trial court erred in failing to grant the motion for a new trial based on newly discovered evidence. Specifically, plaintiff wished to permit testimony that the prior landowner did not revoke his permission to use the disputed property. This evidence does not satisfy the requirement of newly discovered evidence as defendant testified to the contents of the letter in her deposition. Plaintiff, with reasonable diligence, could have produced plaintiff's predecessor in title to rebut the existence of the letter. In fact, the prior land owner was listed on plaintiff's witness list, but not called to testify at trial. Accordingly, the trial court did not abuse its discretion in denying the motion for a new trial on the basis of newly discovered evidence. *Hauser v Roma's of Michigan, Inc*, 156 Mich App 102, 106; 401 NW2d 630 (1986).

Affirmed.

/s/ Michael J. Kelly

/s/ Roman S. Gibbs

/s/ E. Thomas Fitzgerald