

STATE OF MICHIGAN
COURT OF APPEALS

NORMAN F. TOMKOWSKI,

Plaintiff-Appellee,

UNPUBLISHED
April 20, 2001

v

JACQUELYN ISH,

Defendant-Appellant.

No. 218394
Wayne Circuit Court
LC No. 97-728058-CH

Before: Holbrook, Jr., P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying her motion for summary disposition and granting plaintiff's motion for summary disposition. We reverse.

Plaintiff and defendant are neighboring landowners in the City of Westland. Plaintiff alleged that defendant erected a fence that encroached on plaintiff's property. When defendant refused to cure, plaintiff filed a complaint to quiet title. In response to the complaint, defendant filed a countercomplaint alleging that she had acquired title to the property through adverse possession. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). She alleged that she purchased the property on September 26, 1978, and the fence was in its present location at the time of purchase. Defendant could not identify the exact date of placement, but within approximately two years of acquiring the property, she poured a cement strip alongside her driveway that extended onto the property of plaintiff. There had been no objections by plaintiff's predecessors in title to defendant's possession and control of the property for the period required to obtain title through adverse possession, or in the alternative, through the doctrine of acquiescence. In support of summary disposition, defendant presented an affidavit to affirm the statements contained in her brief.

Plaintiff opposed the motion for summary disposition and also moved for summary disposition pursuant to MCR 2.116(C)(10). The motion alleged that defendant purchased her property in 1978, and "some fourteen years later," plaintiff purchased the lot and home next door. Plaintiff alleged that the encroachment was discovered when a survey was performed in accordance with plaintiff's application for a mortgage. Plaintiff argued that his purchase of the property interrupted the statutory period, and defendant could not rely on the "mixed" or combination period of adverse possession and acquiescence to obtain title to the property. Plaintiff also argued that defendant's failure to identify the exact date of the placement of the

cement slab was fatal to any claim. Plaintiff did not present any documentary evidence in support of or in opposition to the cross-motions for summary disposition contrary to MCR 2.116(G)(4). The trial court denied defendant's motion for summary disposition by stating that the fence was not necessarily indicative of a boundary line. The trial court then granted plaintiff's motion for summary disposition without explanation. The trial court denied defendant's motion for reconsideration.

Defendant argues that the trial court erred in granting plaintiff's motion for summary disposition. We agree. Appellate review of a trial court's decision regarding a motion for summary disposition is reviewed de novo. *Carnaghi, Inc v Amwest Surety Ins Co*, 241 Mich App 686, 690; 617 NW2d 49 (2000). Documentary evidence must be presented to demonstrate that there is no genuine issue of material fact. MCR 2.116(G)(4), (G)(5). Once the motion is made and supported, then the adverse party has an obligation to demonstrate, with documentary evidence, that a genuine issue for trial has been raised. MCR 2.116(G)(4); *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 363-365; 480 NW2d 275 (1991). While plaintiff argued that his purchase of the property, "some fourteen years" after 1978, interrupted the statutory period for adverse possession, there was no documentary evidence submitted to support the allegations. Furthermore, there was no documentary evidence presented to support the allegation that plaintiff objected to the encroachment in 1992. In fact, the only evidence of an objection to defendant's use is the filing of this lawsuit in 1997. Accordingly, the trial court erred in granting plaintiff's motion for summary disposition. MCR 2.116(G)(4), (G)(5); *SSC, supra*.

Defendant next argues that the trial court erred in denying her motion for summary disposition. We agree. In *Thomas v Rex A 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 the present case, defendant alleged that her use of the disputed property was established by driving into her backyard to access her garage and that she planted honeysuckle and vines on the fence.¹ Defendant's exercise of control over her driveway, the planting of various plants in the area in dispute, and the placement of the cement slab within two years of occupancy in 1978, would amount to actual, visible, open, exclusive, continuous and uninterrupted use. Defendant has established that her use was for a period in excess of the required fifteen years for adverse possession pursuant to MCR 2.116(G)(4) and (G)(5), and plaintiff has failed to present documentary evidence to refute that allegation.²

¹ This assertion of gardening type activities is supported by the photographs submitted to the trial court, and plaintiff did not object, at any time, to this assertion.

² Plaintiff did not take issue with the requirement that the use be hostile. However, case law provides that hostile use is merely use inconsistent with the rights of the owner. *Goodall v* (continued...)

In *Robbins v Eotoff*, 39 Mich App 589, 590-591; 197 NW2d 912 (1972), the defendant believed that 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. Likewise in the present case, defendant exercised control over the area in dispute by the use of her driveway, the planting, and the placement of a cement slab in an area where defendant or her guests had to exit a vehicle onto the grass.³

We note that, in the record below, plaintiff⁴ alleged that the case of *De Hollander v Holwerda*, 45 Mich App 564; 207 NW2d 187 (1973), precluded summary disposition in favor of defendant. In that case, the plaintiffs' and the defendants' predecessors in title had erected a fence by mutual consent. This Court held that the plaintiff failed to show sufficient acts to establish title by acquiescence because mutual mistake and subsequent acquiescence under the mistake of fact does not establish the boundary. *Id.* at 567. In the present case, neither party presented documentary evidence from the predecessors in title to the neighboring properties. Accordingly, how the fence was erroneously established in the first place is subject to dispute, and application of the doctrine of acquiescence based on a mutual mistake would be speculative at best. In the present case, the only documentary evidence available came from defendant and provided that she had established the elements of a claim for adverse possession. Plaintiff has failed to bring forward any documentary evidence from predecessors in title to create a genuine issue regarding permissive or hostile use or mutual mistake. In any event, as previously noted, hostile use merely requires use inconsistent with the right of the owner. *Goodall, supra*. Defendant's exercise over the disputed area was inconsistent with the rights of the owner. Accordingly, based on plaintiff's failure to present documentary evidence regarding the nature of the use or the treatment of the area by predecessors in title to the property, the trial court erred in denying defendant's motion for summary disposition.

(...continued)

Whitefish Hunting Club, 208 Mich App 642, 646; 528 NW2d 221 (1995).

³ Plaintiff, in the record below, continually attacked defendant's failure to identify an exact date of the placement of the cement slab. However, defendant moved into the premises in 1978. Plaintiff conceded, but did not attach, defendant's deposition testimony that provided that the cement slab was placed within two years of the date of the move into her home. If the cement slab was placed in 1980, there is no indication of an issue regarding ownership of the disputed area until the filing of this 1997 complaint. Accordingly, plaintiff has failed to create a genuine issue with respect to the placement of the cement slab with documentary evidence. Even if plaintiff had presented evidence to the contrary, the evidence merely would have presented a credibility issue that would have made summary disposition inappropriate, and the issue would have to be submitted to the trier of fact. *SSC, supra*.

⁴ Plaintiff has not filed a brief on appeal.

Reversed and remanded for entry of an order granting summary disposition and quieting title to the property in favor of defendant. We do not retain jurisdiction.

/s/ Donald E. Holbrook

/s/ Harold Hood

/s/ Janet T. Neff