STATE OF MICHIGAN

COURT OF APPEALS

ANDREW SAMOSIUK, JEANNE SAMOSIUK, RAND KULKIS and SHARON KULKIS, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED July 9, 2002
v DALE H. RAFFLER and DALE E. RAFFLER, Defendants/Counter-Plaintiffs-Appellants.	No. 223986 Oakland Circuit Court LC No. 98-007242-CH

ANDREW SAMOSIUK, JEANNE SAMOSIUK, RAND KULKIS and SHARON KULKIS, Plaintiffs/Counter-Defendants-Appellees,	
v DALE H. RAFFLER, Defendant/Counter-Plaintiff-Appellant.	No. 224843 Oakland Circuit Court LC No. 98-007242-CH

Before: White, P.J., and Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

This consolidated case stems from a boundary line dispute. In Docket No. 223986, defendants[1] appeal as of right from the trial court's opinion and order granting summary disposition in favor of plaintiffs. In Docket No. 224843, defendant appeals by leave granted an order of the court awarding plaintiffs Andrew and Jeanne Samosiuk attorney fees. We affirm, but vacate the award of attorney fees to the Samosiuks.

[1] Dale E. Raffler is the father of Dale H. Raffler

Defendants own some vacant land in Oakland County. Plaintiffs own adjoining land immediately to the west. Since at least 1971, an old wire fence ran north and south in the vicinity of the parcels' common border. However, the fence actually lay several feet east of the correct survey line. Tennis courts and other structures built by plaintiffs west of the fence line actually encroached on defendants' property. In June 1998, plaintiffs brought suit to quiet title under the doctrines of adverse possession and acquiescence. In August of that same year, defendant Dale H. Raffler filed his counter-complaint, alleging fraud and trespass. In June 1999, the trial court granted Dale H. Raffler's motion to amend his counter-complaint to include a claim of negligence. On plaintiffs' motion, defendant Dale E. Raffler was subsequently added as a necessary party defendant to the case. The parties filed cross-motions for summary disposition. The trial court denied defendants' motion. Regarding plaintiffs' motion, the court summarily dismissed defendants' counter-complaint, and granted summary disposition in plaintiffs' favor on their adverse possession claim.[2]

Defendants first argue that the trial court's judgment is void against Dale E. Raffler because he was never served with process. However, while Dale E. Raffler was not personally served, the record shows that he nonetheless had actual notice of the claim. Where a party receives actual notice of a claim, the fundamental requirements of due process are satisfied and a trial court will not be deprived of personal jurisdiction. *Alycekay Co v Hasko Const Co, Inc*, 180 Mich App 502, 506; 448 NW2d 43 (1989). Additionally, defendants' counsel agreed on the record that Dale E. Raffler would be added as a party. Thereafter, plaintiffs' motion to add Dale E. Raffler was granted by the trial court, and defendants' counsel consented to the language contained in that order. Further, defendants' counsel filed responsive pleadings on behalf of both Dale H. Raffler and Dale E. Raffler. We believe these actions constitute a general appearance by Dale E. Raffler in the proceedings. A party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections. See *Penny v ABA Pharmaceutical Co*, 203 Mich App 178, 181-182; 511 NW2d 896 (1993). Accordingly, we find this argument to be without merit.

Defendants next argue that the trial court erred in granting summary disposition in favor of plaintiffs because material questions of fact existed regarding plaintiffs' adverse possession of the disputed property. We disagree. Because the trial court examined evidence outside the pleadings when rendering its decision, the issue will be reviewed under the legal standard applicable to (C)(10) motions. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633, n 4; 601 NW2d 160 (1999). This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any

[2] The court also specifically denied granting plaintiffs summary disposition on the basis of acquiescence.

reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. *Thomas v Rex A Wilcox Trust*, 185 Mich App 733, 736; 463 NW2d 190 (1990). The possession must be hostile and under cover of a claim of right. *Id*. at 736-737. Tacking a prior owner's adverse use to fulfill the statutory time requirement is permitted. *Caywood v Dep't of Natural Resources*, 71 Mich App 322, 332; 248 NW2d 253 (1976). The true owner of the property need not actually be aware of the adverse use; instead, acts of ownership that openly and publicly indicate an assumed control or use consistent with the character of the premises are sufficient to establish adverse possession. *Id.* at 331-332. A mistake regarding the true boundary line does not defeat a claim of adverse possession. *DeGroot v Barber*, 198 Mich App 48, 53; 497 NW2d 530 (1993).

Even when viewing the evidence in a light most favorable to defendants, we agree with the trial court that no issues of material fact existed on plaintiffs' claim of adverse possession. The undisputed evidence in the record establishes that the Samosiuks acquired 33-1/3 acres of land immediately west of the Raffler parcel in 1971. In 1974, they split the property into five parcels, selling all but one approximately 13-acre parcel that they retained for themselves. Since 1974, the Samosiuks mowed the grass, moved brush, and dug dirt up on their property to the west side of the wire fence. They also corralled animals, housed dogs, and walked in this area. In 1980, they built a tennis court and driveway that encroached on the Raffler property. In 1987, the Samosiuks split approximately five acres off from their 13-acre parcel and sold it to the Kulkises. Privity of estate having been clearly established, the Kulsises are permitted to tack on the Samosiuks' prior possession in order to satisfy the statutory time period. *Caywood, supra* at 334. On their remaining eight acres, the Samosiuks built a second tennis court that also encroached on the Raffler's property. The Kulkises put up a shed and a dog pen close to the Raffler fence.

Defendants argue that plaintiffs' adverse use did not begin until 1980, but the record does not support this argument. Although defendants argue that plaintiffs' use was not hostile because they were not intentionally occupying defendants' land, this argument is also without merit. *DeGroot, supra at* 53. Further, although defendants assert that they did not know about the adverse use until 1997, their assertions are not helpful to them because it is the character of the use rather than the actual knowledge of the true owner that decides adverse possession. *Caywood, supra* at 331-332.

Having concluded that the trial court correctly granted summary disposition to plaintiffs on their claim of adverse possession, we necessarily reject defendants' argument that their trespass causes of action are still valid.

Defendants next argue that they presented enough evidence with respect to plaintiffs' alleged fraud to preclude dismissal of their fraud claim on summary disposition. We disagree. The elements of common law fraud are that (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, it was known to be false, or was made recklessly, without any knowledge of its truth and was made as a positive assertion; (4) the defendant made the representation with the intention that it should be acted on

by the plaintiff; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered damages as a result. *H J Tucker & Associates, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 571-572; 595 NW2d 176 (1999). Defendants argue that Dale H. Raffler relied on plaintiffs' failure to notify him that they had moved some survey stakes. However, Raffler admitted that he had no evidence whatsoever that any of the plaintiffs actually moved any of the survey stakes. Further, the record is completely devoid of any evidence showing that defendants relied on any statements made by plaintiffs regarding the boundary between their respective properties. Defendants cannot establish reliance, so their fraud claim was properly dismissed. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 187; 405 NW2d 88 (1987).

Defendants next argue that plaintiffs did not meet their burden of proof with respect to when defendants' negligence claim accrued, asserting that they could not have known of plaintiffs' alleged negligence until 1997. Again, we disagree. Defendants' negligence cause of action accrued on the date of the injury, not the date that defendants discovered or should have discovered the cause of action. MCL 600.5805(9); *Dunlap v Sheffield*, 442 Mich 195, 198-199; 500 NW2d 739 (1993). Dale H. Raffler himself asserts that the negligence that gave rise to his cause of action occurred in 1987. Therefore, defendants' negligence claim, which should have been filed no later than 1990 but was in fact not filed until 1998, was barred by the statute of limitations.

Finally, defendants argue that the trial court should not have ordered them to pay attorney fees to the Samosiuks after the claim of appeal had been filed. We agree. This Court reviews a trial court's decision to award attorney fees for clear error, *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997), and the award itself for an abuse of discretion, *Septer v Tjarksen*, 233 Mich App 694, 704; 593 NW2d 589 (1999).

The claim of appeal was filed on December 8, 1999. Neither the opinion and order on the parties' motions for summary disposition nor the judgment quieting title expresses an intention to grant attorney fees. The order awarding attorney fees was entered on January 10, 2000. Pursuant to the court rules in place at all times relevant to resolution of this issue, we conclude that it was clear error for the trial court to grant attorney fees to the Samosiuks. *Wilson v General Motors Corp*, 183 Mich App 21, 41; 454 NW2d 405 (1990); *Vallance v Brewbaker*, 161 Mich App 642, 647-648; 411 NW2d 808 (1987).

The grant of summary disposition in favor of plaintiffs is affirmed. The order of attorney fees in favor of the Samosiuks is vacated.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.