Court of Appeals, State of Michigan

ORDER

Cvetko Zdravkovski v Gan Gony Inc

Docket No. 246392

LC No. 01-119364-CH

Michael J. Talbot
Presiding Judge

Janet T. Neff

Pat M. Donofrio
Judges

On the Court's own motion, pursuant to MCR 7.216(A)(7), on page 3, second full paragraph, of the unpublished per curiam opinion of this Court issued on April 13, 2004, we insert the following language to correct the incomplete citation. Before the full citation to *Juif v State Hwy Comm'n*, 287 Mich 35, 41; 282 NW 892 (1938) insert:

"*Arnold v Ellis*, 5 Mich App 101, 117; 145 NW2d 822 (1966), quoting 7 Callaghan's Michigan Civil Jurisprudence, Deeds of Conveyance § 28, citing"

Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 14 2004
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

CVETKO ZDRAVKOVSKI, a/k/a STEVE ZDRAVKOVSKI, and TATIJANA ZDRAVKOVSKI,

Plaintiffs/Counterdefendants-Appellants,

v

GAN GONY, INC., RANDA KANDALAFT and ANTOINE KANDALAFT,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
April 13, 2004

No. 246392
Wayne Circuit Court
LC No. 01-119364-CH

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition to defendants, pursuant to MCR 2.116(C)(10), and denying summary disposition to plaintiffs. Plaintiffs argue the trial court erred in determining that defendant was entitled to summary disposition based upon adverse possession, acquiescence, and the equitable right of reformation of their deed. Plaintiffs maintain that the trial court erred in denying their motion for summary disposition based on encroachment. Because the record supports plaintiffs' arguments, we reverse the trial court's orders granting defendants' motion for summary disposition and denying plaintiffs' motion for summary disposition, and remand.

On appeal, plaintiffs first argue that the trial court erred in granting defendants' motion for summary disposition based on adverse possession. We agree.

A trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Quality Products & Concept Co v Nagel Productions, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we review the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000). The motion should be granted if the affidavits or other documentary evidence demonstrate that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Stevenson, supra*, 239 Mich App at 516.

"To establish adverse possession, the claimant must show that its possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years." *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Further, the elements of adverse possession must be shown by "clear and cogent" evidence. *Walters v Snyder*, 225 Mich App 219, 223; 570 NW2d 301 (1997). Permissive use of property cannot ripen into a claim of adverse possession. *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993). "The term 'hostile' as employed in the law of adverse possession is a term of art and does not imply ill will." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000), quoting *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976). Rather, 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." *Prose, supra*, 242 Mich App at 681, quoting *Mumrow, supra*, 67 Mich App at 698.

Friendship Investment Company owned lots 1103 through lots 1111 when the building causing the alleged encroachment was constructed. The DiMaggios purchased the property from Friendship in 1978, fully aware of the encroachment, and gave permission to the person occupying the building to use the east 3.7 feet of lot 1106. Thereafter, plaintiffs purchased the property from the DiMaggios in 1988 and also gave the then-current business owner, and subsequent owners of lots 1107 through 1111, including defendants, permission to use the property. It was not until 1997, when defendants demolished a portion of the building, including the portion that was located on lot 1106, that the permission was rescinded. The use of lot 1106 did not become hostile until defendants rebuilt the structure in the same place as the former structure, without permission. Since defendants' possession has only been hostile since 1997, it does not meet the adverse possession statutory period of fifteen years. Therefore, the trial court erred in granting defendants' motion for summary disposition on this basis.

Plaintiffs next argue that the trial court erred in granting defendants' motion for summary disposition based on acquiescence. We agree.

Michigan recognizes three theories of acquiescence: (1) acquiescence for the statutory period, (2) acquiescence following a dispute and 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 type of acquiescence, "where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line." *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001); see also MCL 600.5801(4). Acquiescence following a dispute occurs when two owners have a bona fide dispute and later reach an agreement concerning the boundary. *Rock v Derrick*, 51 Mich App 704, 708; 216 NW2d 496 (1974). Acquiescence arising from an intention to deed to a marked boundary occurs when a grantor intends to deed property to a physical boundary but mistakenly uses an incorrect legal description in the actual deed. *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960). Thus, in order to support defendant's claim for acquiescence under any of the three theories, defendant must show a mutual mistake in the initial boundary. *Walters v Snyder*, 239 Mich App 453, 458; 608 NW2d 97 (2000). In addition, proof of an agreed-to boundary line is crucial to a claim of acquiescence. *Wood v Denton*, 53 Mich App 435, 439-440; 219 NW2d 798 (1974).

We do not find acquiescence for the statutory period. The parties and their predecessors in interest knew that the true boundary line between lots 1106 and 1107 was not at the edge of

defendants' building. Although a new boundary line may be formed if the parties acquiesce for a period of fifteen years, there is no evidence here that the parties and their predecessors in interest made such an agreement. The fact that plaintiffs gave defendants and their predecessors in interest permission to use the property directly refutes the theory that the parties treated the line running along the edge of defendants' building as the true boundary line. Furthermore, there is no evidence of acquiescence following a dispute and agreement, as no agreement has been reached between the parties regarding the boundary line between lots 1106 and 1107. There is also no evidence of acquiescence arising from an intention to deed to a marked boundary, as there was no mistake in the legal descriptions of the property in any of the deeds.

Plaintiffs contend that the trial court erred in granting defendants' motion for summary disposition based on reformation and clerical error. We agree.

"In the absence of ambiguity, the grantor is presumed to have intended to convey that which he described, and the land conveyed must be controlled by the written description." *Juif v State Hwy Comm'n*, 287 Mich 35, 41; 282 NW 892 (1938). "Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties." *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995), citing *Ross v Damm*, 271 Mich 474, 480-481; 260 NW 750 (1935). Our Supreme Court has held that "reformation of a deed or land contract will not be granted in this state upon the ground of a mistake in drafting unless the mistake is proven by clear and satisfactory evidence and it is one that is mutual and common to both parties to the contract." *Troff v Boeve*, 354 Mich 593, 596-597; 93 NW2d 311 (1958).

There is no ambiguity in the deed between the Kleins and the Kandalafts regarding the property description. Nor is there an ambiguity in the deed between the DiMaggios and plaintiffs regarding the property description. As such, the Kleins are presumed to have intended to convey lots 1107 through 1111 to defendant, the DiMaggios are presumed to have intended to convey lots 1104 through 1106 and the east 3.5 feet of lot 1103 to plaintiffs, and the land conveyed must be controlled by the written description. *Juif, supra*, 287 Mich at 41. Furthermore, reformation is not proper in this situation, as it only applies to parties of the same contract. *Troff, supra*, 354 Mich at 596-597. Defendants are not a party to plaintiffs' contract to purchase lots 1104 through 1106 and the east 3.5 feet of lot 1103, and vice versa. Defendants are entitled to seek reformation only from someone in their chain of title and, even then, formation would not be granted absent mutual mistake or fraud, which defendants have not shown. *Olsen, supra*, 213 Mich App at 30.

Finally, plaintiffs maintain that the trial court erred in denying their motion for summary disposition based on encroachment. We agree.

Encroachment has been defined as "[a]n infringement of another's rights or intrusion on another's property." Black's Law Dictionary (7th ed). Since defendants have neither acquired title to the east 3.7 feet of lot 1106 by adverse possession nor acquiescence, and have failed to show an ambiguity in their deed regarding the legal property description, they have failed to show that they are the rightful owner of the property. Since the property description in plaintiffs' deed includes lot 1106 in its entirety, and since defendants have failed to show a claim in the property, we find that plaintiffs are the rightful owners of the east 3.7 feet of lot 1106. Since

plaintiffs own the property in question and since they denied defendants the right to rebuild on said property, we find that defendants' newly constructed building, which rests upon the east 3.7 feet of lot 1106, constitutes an encroachment upon plaintiffs' property. As such, we must remand the case to the trial court for a determination of the proper remedy for the encroachment.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio