STATE OF MICHIGAN

COURT OF APPEALS

THOMAS R. OKRIE,

Plaintiff/Counterdefendant-Appellant,

v

ETTEMA BROTHERS, TROMBLEY SOD FARM, MRS. TERRY TROMBLEY,

Defendants-Appellees,

and

WILMA ETTEMA, DORIS, ETTEMA, and ELAINE ETTEMA,

Defendants,

and

TERRY TROMBLEY,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
December 13, 2005

No. 260828
St Clair Circuit Court
LC No. 03-002526-CZ

Before: Fort Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants. We reverse.

This case arises out of a property dispute involving neighboring landowners. Plaintiff alleged that he and his predecessor in interest occupied nearly one acre of property without incident. However, in July 2003, it was alleged that the parcel of property occupied by plaintiff was granted to defendants in their deed. Consequently, plaintiff filed suit seeking to quiet title to the property in his name based on the theories of adverse possession or acquiescence. In order to prove his claim, plaintiff sought information from his predecessor in interest, Michael J. Wright, but was unable to locate him. Consequently, plaintiff requested that defendants produce any

discovery regarding the whereabouts of Michael Wright. Specifically, on March 17, 2004, plaintiff submitted a third set of interrogatories to defendants requesting that defendants provide:

a. The phone number and address of Mr. Michael Wright;

b. A description of any statements made by Mr. Michael Wright concerning this cause of action;

c. The date of any statements made by Mr. Michael Wright concerning this cause of action;

d. The names of all persons whom Mr. Michael Wright made statements too [sic] concerning this cause of action;

e. The phone number and address of each person whom Mr. Michael Wright made statements too [sic] concerning this cause of action; and

f. A copy of any statement made by Mr. Michael Wright concerning this cause of action.

Defendant Trombley's response to each of these questions was "unknown" or "N/A." Defendant Ettema Brothers responded, "Defendant has made contact with Mr. Wright who stated that no information would be shared regarding this matter in the absence of an order compelling disclosure of information and pursuant to a protective order". Six months later, however, defendants submitted a motion for summary disposition containing an affidavit from Wright, which stated that he had received permission from Bernard Ettema to use and maintain the buffer on defendants' property.

Plaintiff opposed the motion for summary disposition and also filed a motion in limine, seeking to strike the affidavit of Wright based on the failure to comply with or supplement the discovery request. Defendants claimed that, contrary to plaintiff's allegations in his motion in limine, they had in fact supplemented their responses and told plaintiff's counsel that they planned to call Wright as a witness at trial. Further, defendants claimed that the substance of Wright's testimony was contained in their case evaluation summary served on plaintiff on August 27, 2004. However, neither the supplement to defendants' answers nor the case evaluation summary was in the lower court file, and defendants did not attach a copy of either to their answer to plaintiff's motion. Wright was named on defendants' witness list filed on October 4, 2004, after discovery closed. Defendants faulted plaintiff, alleging that he should have filed a motion to compel defendants to provide Wright's telephone number. Defendants further alleged that Wright had asked that his contact information not be provided to plaintiff for fear of *harassment*.

The trial court did not rule on plaintiff's motion in limine and did not address whether defendants violated their obligation to supplement discovery based on the court rules. The trial court considered the Wright affidavit and utilized it as a basis to grant the defense motion for summary disposition. Following the denial of a motion for reconsideration, plaintiff appeals as of right.

We review the grant or denial of a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "[W]here the truth of a material factual assertion of a movant's affidavit depends on the affiant's credibility, there inheres a genuine issue to be decided at a trial by the trier of fact and a motion for summary judgment cannot be granted." *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201 (1973). Summary disposition is suspect where motive and intent are at issue or where the credibility of the witness is crucial. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994).

In the present case, summary disposition was inappropriate because the credibility of the predecessor in interest, Wright, is at issue. Based on defendants' initial allegations, Wright did not want any involvement or role in the litigation for fear of harassment by plaintiff. However, there is no indication that Wright obtained independent counsel to address his involvement in this litigation. Moreover, it is questionable why Wright would have any basis to fear harassment from plaintiff. Nonetheless, despite this alleged fear, Wright provided an affidavit to defendants that completely supports their position and negates the elements of adverse possession and acquiescence in favor of plaintiff. Wright's affidavit provides, in relevant part:

> … [A]t no time during my ownership of the Property did I exercise any ownership or control over such area in any way that was hostile or adverse to the interests of Ettema Brothers and I was not under any belief that any of such property outside the survey boundaries of my Property as shown on Exhibit A was mine.

Thus, the propriety of summary disposition is completely contingent upon the credibility of the assertions contained in the affidavit. However, plaintiff has never been given the opportunity to question Wright regarding the contents of the affidavit or the representations that were made at the time of sale of the property between plaintiff and Wright. Under the circumstances, summary disposition was inappropriate where credibility, intent, and motive are key issues. *Brown*, *supra*; *Vanguard*, *supra*.

Even considering Wright's affidavit, plaintiff established a genuine issue of material fact as to whether Wright's use of the property was permissive.[1] In her affidavit, real estate agent Joann Peters stated, "Mr. Wright represented to me that his property . . . included both ponds and all the pine trees and that he owned and wished to sell his property. Mr. Wright represented that

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[1] "Adverse possession must be established by clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period . . . hostile and under cover of claim of right." *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957). "Determination of what acts or uses are sufficient to constitute adverse possession depends upon the facts in each case and to a large extent upon the character of the premises." *Id.* "A mere permissive possession or one consistent with the title of another can never ripen into a title by adverse possession." *Id.* at 15. That plaintiff's and Wright's use of the property was "actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period" is not in dispute. Thus, these elements of adverse possession will not be addressed further here. The only fact at issue is whether defendants gave permission to Wright to occupy the disputed buffer.

he had planted the pine trees himself several years earlier as a wind break and to stop eroding soils from impacting his ponds. Mr. Wright represented and showed me that he maintained all of his property by mowing and that the property lines extended South of the trees to his borders. Mr. Wright specifically represented that he owned the entire residentially maintained real property including all of the pond to the East of the property." Peters placed an advertisement in the paper for the property indicating that it included three beautiful acres with two ponds. There is no indication in the advertisement that the transfer of ownership of the ponds would only be in part due to the delineation of the property lines in the deeds. Additionally, plaintiff also testified that it was his understanding that, "What was green was ours. What was dirt was theirs." Based on the alleged representations of Wright to Peters, the trier of fact must determine if Wright was operating under the belief that he owned the property at issue and acting hostile toward the interest of defendants or if he was mistaken as to the true boundary line.

Further, even if there was no issue of fact as to whether Wright's use of the buffer was with defendants' permission, therefore precluding plaintiff from taking title under a theory of adverse possession, plaintiff presented sufficient evidence to establish a genuine issue of material fact under a theory of acquiescence for the statutory period.

> In contrast to a claim of adverse possession that requires a showing by clear and cogent evidence that the possession was "actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of 15 years, hostile and under cover of a claim of right [,]'" . . . a claim of acquiescence to a boundary line based upon the statutory period of fifteen years, MCL 600.5801(4); MSA 27A.5801(4), requires merely a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy regarding the boundary. . . . A claim of acquiescence does not require that the possession be hostile or without permission. [*Walters v Snyder*, 225 Mich App 219, 223-224; 570 NW2d 301 (1997) (*Walters I*) (internal citations omitted).]

"Michigan precedent . . . has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence." *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000) (*Walters II*). Decisions "have merely inquired whether the evidence presented established that the parties treated a particular boundary line as the property line." *Id.* at 458. Acquiescence by predecessors in title may be tacked to that of the parties to the dispute. *Jackson v Deemar*, 373 Mich 22, 26; 127 NW2d 856 (1964).[2]

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[2] With regard to the acquiescence claim, defendants cite to *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 512; 534 NW2d 212 (1995) for the proposition that hostile use must occur to succeed on a claim of acquiescence. On the contrary, in *West Michigan*, the use that occurred involved "property that was acknowledged to belong to plaintiff." *Id*. Unlike the *West Michigan* case, the present case involves the parties' dispute regarding the recognized boundary line versus the boundary line contained in the deeds. The *West Michigan* case does not entitle defendants to summary disposition of the acquiescence

(continued…)

In this case, viewing the evidence most favorably to plaintiff as the nonmoving party, *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005), the mistaken boundary is marked by the demarcation between defendants' cultivated field and the area plaintiff maintained as grass and trees. Further, there is no dispute that at least for the time that plaintiff occupied the property, he thought that the boundary line was the outer edge of the buffer, despite the fact that he had two surveys that should have put him on notice of the true boundary line. Plaintiff and Peters allege that Wright maintained the buffer in the same manner as plaintiff. We note that defendant Ettema Brothers purchased its farm property several months after Wright purchased his residential parcel and Wright apparently did not survey his property at the time of his purchase.[3] Furthermore, the evidence shows that defendants did not commission a full boundary line survey of their property until 2002. One reasonable inference that could be drawn is that Wright and defendant Ettema Brothers were uncertain regarding the precise boundaries of their properties and that from 1984, when Wright and defendant Ettema Brothers purchased their respective properties, until a boundary line survey of defendants' property was performed, they treated the edge of the buffer as the boundary line. Under the circumstances, summary disposition was inappropriate where genuine issues of material fact and credibility were present.[4]

We reverse the trial court's grant of summary disposition in favor of defendants and remand this case for further appropriate proceedings. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Peter D. O'Connell

(…continued)

claim as a matter of law. Moreover, defendants cite no other basis for dismissal of the acquiescence claim.

[3] This fact also evidences why the actual testimony of Wright is a key issue. Wright may have purchased the property without benefit of a survey and believed that he was the owner of property in dispute in this appeal.

[4] We note that plaintiff has urged this Court to strike the affidavit of Wright and grant summary disposition in favor of plaintiff. The trial court did not address the issue of discovery sanctions and whether defendants failed to supplement discovery as required by the court rules. The trial court should resolve this issue on remand. Moreover, plaintiff's counsel also urges this Court to disqualify the trial judge. There is no indication that the trial judge would have difficulty in putting aside previously expressed views. *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004).