STATE OF MICHIGAN

COURT OF APPEALS

DAVID ALAN KAUFFMAN and VICKY LYNN KAUFFMAN, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED November 20, 2007
v	No. 271327 Isabella Circuit Court
IRVING PRESTON and KIMBERLEE K. PRESTON, Defendants/Counter-Plaintiffs-Appellants.	LC No. 05-004020-CH

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

PER CURIAM.

Defendants/counter-plaintiffs ("defendants") appeal as of right from the trial court's judgment, following a bench trial, declaring that plaintiffs/counter-defendants ("plaintiffs") acquired title to the disputed property by adverse possession. We affirm.

I. Basic Facts and Proceedings

Plaintiffs and defendants purchased adjacent parcels of land in 1983, and plaintiffs' property is situated to the north of defendants' property. In 1995, defendant purchased 35 acres of farmland west of plaintiffs' property. The disputed property is a strip of land (approximately 264 feet by 37 feet), which is located to the west of plaintiffs' property. Plaintiffs testified that, since 1983, they continuously exercised exclusive dominion and control over the disputed strip by mowing the grass, maintaining a dog house, storing various items of personal property, and using the property as a backyard. Defendants had the eastern boundary of the farmland surveyed in 2005, and the survey revealed that the disputed strip was actually part of the farmland purchased by defendants. Plaintiffs thereafter brought this action to quiet title, and the trial court determined that plaintiffs acquired title to the disputed property by adverse possession.

II. Adverse Possession

Defendants argue that the trial court erred in concluding that plaintiffs acquired title to the disputed property by adverse possession. We disagree.

A. Standards of Review

Actions to quiet title are equitable and are reviewed de novo, *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993), but the trial court's findings of fact are reviewed for clear error, MCR 2.613(C); *AFSCME v Bank One, NA*, 267 Mich App 281, 293; 705 NW2d 355 (2005). A finding is clearly erroneous if, on all the evidence, this Court is left with a definite and firm conviction that a mistake has been made. *Borgess Medical Ctr v. Resto*, 273 Mich App 558, 576; 730 NW2d 738 (2007).

B. Adverse Possession Claim

To claim by adverse possession, one must provide "clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years." *Wengel v Wengel*, 270 Mich App 86, 92; 714 NW2d 371 (2006), quoting *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993); see also MCL 600.5801. Thus, in the instant case, plaintiffs have "the burden of proving that the statute of limitations has expired" and defendants "had a cause of action for recovery of the land for more than the statutory period." *Wengel*, *supra* at 92, quoting *Kipka*, *supra* at 438. Pursuant to MCL 600.5829(1), a cause of action does not accrue until the property owner of record has been disseised of the land, which occurs "when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership." *Wengel*, *supra* at 92, quoting *Kipka*, *supra* at 439. Additionally, "possession must be hostile and under cover of a claim of right." *Wengel*, *supra* at 92. The term "hostile" does not imply ill will; rather, it requires use that is "with the right of the owner, without permission asked or given," and which "would entitle the owner to a cause of action against the intruder." *Id.* at 92-93 (citations and internal quotations omitted).

To assert a "claim of right," the adverse claimant claims title to the property by "openly exercising acts of ownership, with the intention of holding the property as his own to the exclusion of all others." *Walker v Bowen*, 333 Mich 13, 21; 52 NW2d 574 (1952) (internal quotation omitted); *Connelly v Buckingham*, 136 Mich App 462, 469; 357 NW2d 70 (1984). It is not necessary that the party in possession expressly declare his intention to hold the property as his own, nor need his claim be a rightful one; it is sufficient that his acts and conduct clearly indicate a claim of ownership. *Walker*, *supra* at 21; *Connelly*, *supra* at 469.

The evidence at trial showed that plaintiffs had used the disputed property as their own backyard since 1985. Plaintiffs turned the area into a yard, planted grass seed, maintained the grass, keep family pets there, and stored other items on the property. Plaintiffs continued to use and maintain the property after defendants purchased the adjoining farmland in 1995. We disagree with defendants' argument that a claim for adverse possession was not established because any use was permissive after 1995. Although permissive use defeats a claim of adverse possession, *Kipka*, *supra* at 438, here defendants rely on evidence that defendant Irving Preston allegedly told plaintiff David Kauffman in 1995 that he would not be able to use the disputed property anymore. Even if true, this does not establish permissive use, but rather continued use hostile to defendants' claim of right. Plaintiffs denied ever receiving permission to use the disputed land. Thus, the evidence showed that plaintiffs presented clear and cogent proof that, for more than 15 years, they had "actual, visible, open, notorious, exclusive, continuous, and

uninterrupted" possession. Accordingly, the trial court did not clearly err in finding that plaintiffs established title to the property by adverse possession.

III. The Trial Court's Viewing of The Disputed Property

Defendants also argue that the trial court abused its discretion by viewing the disputed property without the presence of the parties or their attorneys. We review the trial court's decision whether to view the scene for an abuse of discretion. *Gorelick v Dep't of State Hwys*, 127 Mich App 324, 335; 339 NW2d 635 (1983).

"On application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred." MCR 2.513(B). After the close of proofs at trial, the trial court announced its intention to view the disputed property and inquired whether counsel wanted to be present for the viewing. Defense counsel indicated that it would probably be beneficial if the parties were there to answer any questions the court might have, but acknowledged that it was "the court's call." Plaintiffs subsequently contacted the court and requested that none of the parties or counsel be present, and defendants objected, requesting that they be allowed to attend. The trial court thereafter notified the parties that it would be viewing the property without the parties or counsel present.

While we agree that the manner in which the viewing took place was error, it is not error requiring reversal. Unlike the authority cited by defendants, see *Travis v Preston (On Rehearing)*, 249 Mich App 338, 349; 643 NW2d 235 (2002); *People v Eglar*, 19 Mich App 563, 565; 173 NW2d 5 (1969), here there is no evidence that the trial court's viewing of the property tainted its judgment. Although defendants argue that they were deprived of the opportunity to determine whether the trial court was viewing the correct landmarks, numerous photographs of the disputed property and surrounding area were introduced at trial. The trial judge indicated that he was familiar with the area because he lived only a few miles away. Any viewing of the disputed property, even if done properly, was cumulative to the extensive record developed in the trial court.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly