STATE OF MICHIGAN

COURT OF APPEALS

GYLL STANFORD and DIANA B. STANFORD,

Plaintiffs-Appellees,

v

JOSEPH BAUBLIS,

Defendant-Appellant.

UNPUBLISHED
April 17, 2008

No. 270751
Washtenaw Circuit Court
LC No. 05-000064-CK

Before: Wilder, P.J., and Murphy and Meter, JJ.

PER CURIAM.

In this property line dispute, plaintiffs filed suit against their neighbor seeking to quiet title by adverse possession and acquiescence, or alternatively to be granted an exclusive prescriptive easement over the disputed property, as well as to obtain damages for trespass. The trial court entered judgment for plaintiffs on the claims of adverse possession and trespass, but did not award damages. Defendant appeals of right. We affirm.

Defendant's predecessor in interest owned the property when plaintiff Gyll Stanford ("Stanford") purchased his property in 1979. Stanford soon noticed that his driveway extended onto his neighbor's land. Stanford continued to use and maintain this disputed area, making improvements at some point in the early 1980s, which included planting a garden, erecting a fence, and relaying the driveway. Defendant and plaintiffs became neighbors in 2001 when defendant purchased the property next to plaintiffs'.

In January 2005, defendant removed part of the brick driveway and constructed a fence half-way through the disputed area on the recorded boundary line. Defendant's actions precipitated this lawsuit. At the conclusion of the bench trial, the court found that plaintiffs had established the elements of adverse possession, awarded plaintiffs title to a portion of the disputed land, and ordered defendant to remove the encroaching fence. The trial court did not address plaintiffs' prescriptive easement and acquiescence claims.

Defendant first argues that the trial court erred in concluding that all the elements of adverse possession were established. We disagree.

In an equity action, this Court reviews the lower court's conclusions of law de novo, and its findings of fact for clear error. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). Factual findings are clearly erroneous when there is no evidentiary support for them or

when "the reviewing court is left with the definite and firm conviction that a mistake has been made." *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 222; 707 NW2d 353 (2005) (citations and internal quotation marks omitted).

To establish adverse possession, the claimant must show clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for 15 years (the limitations period for an action for the recovery or possession of land). *Gorte v Dep't of Transportation*, 202 Mich App 161, 170; 507 NW2d 797 (1993); MCL 5801(4). On the totality of the record, we agree with the trial court's conclusion that the elements of adverse possession were established.

The evidence established that Stanford disseised defendant's predecessor of the disputed land once Stanford purchased his residence and started using the driveway. Soon after Stanford bought the property, he realized that the driveway extended onto defendant's property but Stanford continued to use the driveway and surrounding area as if he owned it. Plaintiffs parked their car on the driveway, and cleared it of snow when necessary. Plaintiffs mowed the grass, planted vegetation, and trimmed back shrubs in the disputed area. Plaintiffs re-laid the driveway, extending it even farther onto defendant's property. Plaintiffs erected a fence in the early 1980s, partially blocking defendant's access to the disputed area from behind the garage. There was no evidence that plaintiffs asked permission from the previous owner before engaging in any of these acts. We conclude, therefore, that plaintiffs' acts and conduct were enough to establish their intent to hold onto the property regardless of the recorded property line. *Smith v Feneley*, 240 Mich 439, 441-442; 215 NW 353 (1927). It is inconsequential that plaintiffs' occupation of the disputed area may have benefited defendant.

Defendant's assertion that plaintiffs lacked actual control of the area because they did not fence the entire area off is unpersuasive. "To constitute possession it is not necessary that the land should be enclosed with a fence . . . ." *Monroe v Rawlings*, 331 Mich 49, 53; 49 NW2d 55 (1951) (citations and internal quotation marks omitted). Moreover, defendant's contention that plaintiffs' use was not visible and open, because an observer from the sidewalk could not see an obvious property line, is similarly deficient. "It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as are consistent with the character of the premises in question." *Id.*

Defendant's argument that plaintiffs' use was not notorious also fails. For an adverse possession claim, notorious means that the possession is "so conspicuous as to impute notice to the true owner." Black's Law Dictionary (7th ed). Put another way, "the true owner must have actual knowledge of the hostile claim or the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally." *Burns v Foster*, 348 Mich 8, 15; 81 NW2d 386 (1957). In this case, the record supports the conclusion that plaintiffs' possession of the disputed property was so conspicuous as to raise a presumption of notice. There is nothing in the record to suggest that observers would not be able to see the contours of plaintiffs' driveway and garden. Even though an observer would not likely have knowledge of recorded boundary lines, an observer could certainly conclude that plaintiffs were claiming a right to the disputed property, based on their use of the garden and driveway. As such, defendant's predecessor had imputed notice that his property had been invaded.

Defendant's argument that plaintiffs' use was not continuous and uninterrupted, because plaintiffs did not attend to the garden and driveway on a daily basis, is also without merit. While "acts amount[ing] to no more than occasional trespasses or [occasional] acts of ownership . . . do not constitute continuous possession," *Bankers Trust Co v Robinson*, 280 Mich 458, 465; 273 NW 768 (1937), continuous possession also does "not mean constant use," *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971). The law of adverse possession does not require a claimant to use the land on a daily basis; it requires a claimant to use the land in a manner consistent with ownership. *Rose v Fuller*, 21 Mich App 172, 175; 175 NW2d 344 (1970). Plaintiffs' acts were more than mere intermittent acts of ownership.

Defendant also asserts that the trial court's finding that plaintiffs' use was exclusive was not sufficiently supported, because the only testimony of exclusivity was plaintiffs' testimony. However, Stanford's testimony on this point, in the absence of conflicting testimony, is sufficient. Under these circumstances, there is no reasonable dispute on the element of exclusivity. *McQueen v Black*, 168 Mich App 641, 645 n 2; 425 NW2d 203 (1988).

Much of defendant's argument is based on his assertion that the previous owner of his property consented to plaintiffs' use and maintenance of the disputed area. Permissive use of property, or mutual occupation with permission, will not establish a claim of adverse possession. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Stanford testified that he never discussed the driveway and garden with defendant's predecessor in interest. On cross-examination, Stanford admitted that the complaint stated that the previous owner had consented to plaintiffs' use. The act of consenting, however, does not necessarily imply permissive use. While that is one meaning that can be applied to the word, another is the notion of compliance. *Random House Webster's College Dictionary* (1997). Compliance is "the act of conforming, acquiescing, or yielding." *Id.* A person can yield to the actions of another without having given permission. Deferring to the trial judge's superior position to assess the credibility of witnesses, *Ingle v Musgrave*, 159 Mich App 356, 361; 406 NW2d 492 (1987), we will not disturb the trial court's finding based solely on plaintiff's use of the term consent in the complaint.

Defendant also argues laches, but he raises this argument for the first time on appeal.[1] Accordingly, we reject this unpreserved claim. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) ("Issues raised for the first time on appeal are not ordinarily subject to review."); *Coates v Bastian Bros, Inc*, 276 Mich App 498, 510; 741 NW2d 539 (2007).

Accordingly, the trial court did not err in concluding that plaintiffs established the elements of adverse possession.

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[1] In addition, laches is an equitable defense, and a party must raise affirmative defenses in its first responsive pleading or motion prior to its first responsive pleading; otherwise, they are waived. MCR 2.111(F)(2) and (3); *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 351 n 2; 711 NW2d 801 (2005).

Lastly, defendant argues that the trial court erred in failing to dismiss plaintiffs' claim, and in failing to grant a default judgment against plaintiffs, because plaintiffs failed to produce discovery-requested materials until the day before trial. Instead, the trial court excluded some of plaintiffs' proposed trial exhibits as a sanction for their untimely production. We disagree with defendant's contention.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). We also review decisions regarding discovery (including sanctions for discovery violations) for an abuse of discretion. *Borgess Medical Ctr v Resto*, 273 Mich App 558, 582-583; 730 NW2d 738 (2007). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A party may obtain discovery of materials prepared for trial. MCR 2.302(B)(3). If the party receiving such a request does not respond, then the requesting party may move to compel discovery. MCR 2.313(A). Here, although plaintiffs did not respond to defendant's discovery requests until the day before trial, defendant had not moved to compel discovery under MCR 2.313(B). Moreover, because the trial court had not issued a discovery order, plaintiff's failure to timely respond to defendant's discovery requests did not constitute a violation of an order of the trial court. When plaintiffs attempted to introduce the evidence at trial, defendant objected on the ground that he had requested it and plaintiffs had not timely delivered it. The trial court upheld the objection as to photographs proposed as exhibits, but denied the objection as to a survey of plaintiffs' property, as well as a drawing depicting the corner of plaintiffs' property and approximately one half of defendant's property.

We reject defendant's argument that the trial court should have dismissed the case or entered a default judgment under MCR 2.313(B)(2)(c). Sanctions under MCR 2.313(B) are not applicable in the absence of a discovery order. *Brenner v Kolk*, 226 Mich App 149, 158-159; 573 NW2d 65 (1997).

Even in the absence of statute or court rule addressing certain misconduct, however, this Court has recognized the inherent power of a trial court to sanction litigant misconduct "based on a court's fundamental interest in protecting its integrity and that of the judicial system." *Id.* at 159.' We conclude from the record that even if defendant may have been prejudiced by the admission of the first drawing and the survey, such prejudice did not rise to the level necessary to impose the extreme sanction of a default judgment. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). Dismissal, or entry of a default judgment, would not have been commensurate with plaintiffs' relatively modest malfeasance. Accordingly, the trial court's decision was within the principled range of outcomes. *Maldonado, supra* at 388.

Affirmed.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Patrick M. Meter