

STATE OF MICHIGAN
COURT OF APPEALS

MAUREEN BURTON, f/k/a MAUREEN
BURTRUM,

Plaintiff-Appellant,

v

SHELLEY E. DYE,

Defendant-Appellee.

UNPUBLISHED
February 19, 2009

No. 282895
Oakland Circuit Court
LC No. 2007-081079-CH

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition on the theory of acquiescence in this boundary line dispute. We affirm.

Plaintiff purchased property in August 2004 from Dennis Cannon, who owned the property for approximately thirty years before the sale. In 2006, plaintiff obtained a survey of the property and purportedly discovered that the neighboring property owner, defendant, extended her driveway, fireplace, roof, air conditioning unit, seawall, and shrubbery onto plaintiff's property. Consequently, plaintiff filed a complaint seeking declaratory and injunctive relief.

Defendant moved for summary disposition relying on the doctrine of acquiescence. In support of the motion, defendant submitted the affidavit of her predecessor in interest who resided in the home for 32 years. In this affidavit by Muriel Mercer, she attested that a survey was completed prior to construction of the home, and therefore, plaintiff's theory of an encroachment was without merit. Defendant alleged that her 21-years of ownership coupled with the Mercer ownership satisfied the statutory period. In response, plaintiff asserted that factual issues precluded summary disposition, relying upon the affidavit of her predecessor, Dennis Cannon. Therein, Cannon stated that he did not agree to the boundary line delineated by defendant. Plaintiff claimed that the lack of a mutual agreement precluded summary disposition. The trial court granted defendant's motion, and plaintiff appeals as of right.

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). When reviewing a summary disposition decision, the evidence is viewed in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). The moving party has the initial

burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of material fact exists for trial. *Id.* Affidavits, depositions, and documentary evidence offered in support of and in opposition to a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

Acquiescence is an “instance of the law of estoppel by words or conduct.” *Thompson v Enz*, 385 Mich 103, 108; 188 NW2d 579 (1971). It is defined as the “general rule that if a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.” *Id.* There are three theories of acquiescence: (1) acquiescence for a statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary. *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). Acquiescence to a boundary line for a statutory period “may be established where the line is acquiesced in for the statutory period irrespective of whether there has been a bona fide controversy regarding the boundary.” *Id.* Michigan precedent has not identified a specific set of elements necessary to satisfy the doctrine of acquiescence. *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000). Rather, the doctrine arises when a boundary line, long treated and acquiesced in as the true line, should not be disturbed on new surveys after being recognized for a 15-year period. *Id.* at 458.

In *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993), we explained:

The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner’s land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land.

Unlike a claim relying on adverse possession, the claim of acquiescence does not require that possession be hostile or without permission. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). Furthermore, the required 15-year period may be established by tacking the acquiescence of predecessors in title onto the period of ownership by the parties. *Id.*

Based on the record presented, the trial court did not err in granting defendant's motion for summary disposition.¹ Defendant presented the affidavit of her predecessor in interest, which set forth that the property was owned by her parents. When her parents decided to construct a home on the property in 1948, a survey was conducted before the construction. She attested that Cannon's predecessor in interest never objected to the location of the home, seawall, trees and other items placed upon the property. She maintained forsythia and hedge bushes as well as daylilies on the property that she planted. Further, she declared that Cannon planted the hedgerow, but only maintained the property on the north side of this row. The affidavit provided that she lived there for 32 years, more than ample time to establish the statutory period. Thus, defendant met her initial burden to support her claim for summary disposition by establishing that boundaries were generally followed without objection, despite the fact that there was no fencing or other specific marked boundary. *Quinto, supra*.

In opposition to the motion, plaintiff alleged that the affidavit of Cannon created genuine issues of material fact. However, Cannon's affidavit did not refute the Mercer affidavit wherein she established 32 years of maintenance of the property and the unmarked boundaries without objection by Cannon's predecessor in interest or Cannon for that matter. Cannon's affidavit merely provided that, at no time during his occupancy, did he agree or grant permanent access to anyone regarding the property. However, acquiescence does not require an express agreement. Rather, the treatment of the boundary determines whether a party has acquiesced to the line for a 15-year period without any requirement of hostile possession or permissive use. *Thompson, supra; Killips, supra; Walters, supra*. Furthermore, irrespective of the content of Cannon's affidavit, review of Cannon's deposition testimony revealed that he had no idea where the boundary lines were located. Rather, when he constructed a shed on his property, he built it where he thought it would be located on his property because he "didn't know where the boundary line was." Additionally, when asked about an agreement or meeting to determine the location of boundary lines, Cannon testified that he never had any discussion about moving property lines and he "never really knew where the property line was."

Thus, plaintiff's contention that factual issues were presented is without merit. Cannon's affidavit and deposition testimony failed to contradict the Mercer affidavit regarding the use of the property for a 32-year period and subsequent use by defendant since her purchase. Further, we note that plaintiff contends that multiple items encroach upon her property. However, plaintiff failed to present any evidence regarding when the various items were placed upon the property such that they would be subject to a different statutory period. The Mercer affidavit set forth that the home was built in 1948. Yet, plaintiff failed to contest whether the other encroaching items were placed at different times. *Quinto, supra*. Consequently, the trial court did not err in granting summary disposition.

¹ Although the trial court may have erred in referring to exclusive use of the property, we may affirm the trial court albeit on other grounds. *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 12; 708 NW2d 778 (2005).

Lastly, plaintiff contends that the trial court erred in excluding evidence regarding tags removed from bushes on the property indicating that defendant recently planted them. This information was raised at oral argument on the motion for summary disposition. In light of the fact that defendant relied upon the occupancy of her predecessor in interest's 32-year occupancy to establish the 15-year period which may be tacked to defendant's occupancy, *Killips, supra*, any recent planting by defendant would have no bearing on the acquiescence that occurred during that initial time period. Accordingly, the trial court did not err in refusing to consider this evidence.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood