

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS W. PFEIFFELMANN, Trustee of the
THOMAS W. PFEIFFELMANN Revocable Trust,

UNPUBLISHED
June 1, 2010

Plaintiff-Appellee,

v

No. 289965
Mackinac Circuit Court
LC No. 08-006523-CH

FIRST NATIONAL BANK OF ST. IGNACE,

Defendant,

and

DENNIS H. BRODEUR, Trustee of the
BRODEUR Family Living Trust,

Defendant-Appellant.

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

In this boundary line dispute, appellant appeals by right an order of the circuit court granting summary disposition to appellee pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm.

Appellant and appellee own adjacent properties on Mackinac Island. Appellee purchased his property from appellant in 1969. Appellee then purchased the adjacent lot in 1992 from Richard and Joanne Bagbey, who had owned the lot since 1968. Associated with the lots were areas referred to as “bottomlands” that extended from the lots’ southerly plat lines to the shore of Lake Huron. Appellee received a deed for his portion of bottomlands from the Department of Natural Resources (DNR) in 1992, and he received a deed from the DNR for his portion in 2003. In 1971, appellee built a fence spanning from the southern portion of his property and onto the bottomlands within 12 feet of the lake. Appellee claimed that he immediately knew the fence was not on the property line, and had discussions with appellant’s successor in interest regarding the fence not representing the property line. Appellant, however, alleged that the fence line has always been treated as the boundary between the properties, and that he has a claim to the area that was between the fence line and the surveyed boundary. In 2004, the fence was taken down during construction on the property and trees were planted in its place.

Appellant argues on appeal that the trial court incorrectly held that he did not have an interest in the disputed area for 15 years, and that the trial court erred in not finding that there were material issues of fact regarding his claims of acquiescence and laches. A trial court's determination of a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Both adverse possession and acquiescence require that the interest in land sought endured for at least 15 years. MCL 600.5829; MCL 600.5801(4). A party may satisfy the 15-year requirement by accumulating the acquiescence or possession of predecessors in interest. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). In addressing the cross-motions for summary disposition, the trial court made a parenthetical reference to the length of the time period in issue being less than the statutory period. This was the court's only reference to the statutory period, and the court did not provide reasoning for its finding. Given the lack of a complete record on this particular issue, and following our review of the trial court's decision in its entirety, we opine that the trial court adopted appellee's argument that appellant acquired title to the portion of property that the fence was located near in 2003, and that his predecessor in interest to this land, the State, did not dispute the property boundary.

While it is true that appellant did not receive a deed to the bottomlands from the DNR until 2003, it is also true that the deed he received from the Bagbeys in 1992 and the deed that appellee received from appellant in 1970 included title to the bottomlands of the two lots. In addition, appellee, appellant, and the Bagbeys apparently acted on the lands in accordance with the belief that they had interests in the bottomlands. Not only was the fence constructed primarily on the bottomlands, but there was also other development, including residences built on the bottomlands prior to either party obtaining their deeds from the State. Further, testimony indicated that plaintiff and Richard Bagbey had discussed the misplacement of the fence in 1971. Therefore, the trial court erred in finding that the dispute had not endured the requisite 15 years. However, for the reasons set forth in this opinion, this finding by the trial court was not dispositive, or even central to the trial court's ultimate judgment, and thus does not require reversal of the dismissal.

Appellant next argues that the trial court erred in not considering his laches defense. Laches is an affirmative defense based primarily on circumstances where undue delay render it inequitable to grant relief to a dilatory plaintiff. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). For laches to apply, a defendant must prove (1) a lack of diligence on the plaintiff's part and (2) prejudice to the defendant. *Regents of Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 734; 650 NW2d 129 (2002).

On this issue, appellant has failed to create a material question of fact that there was a lack of diligence by appellee. While it is true that appellee did not assert a legal right to the disputed area for many years, there was also no known evidence of a dispute regarding the area until after the fence was torn down in late 2004. As previously stated, appellee and appellant's successor in interest both understood that the fence did not constitute the proper boundary line.

During these years, the parties had agreed that appellee would mow the grass and otherwise care for the area that is now in dispute. However, appellant failed to produce any factual evidence that there was a dispute between appellee and any of appellant's successors in interest over the correct boundary line. As a consequence, we are unable to find any evidence that appellee lacked diligence in claiming ownership to the surveyed boundary where there was no indication that the right was in question.

Similarly, we are unable to find a genuine issue of fact that appellant has suffered prejudice. Appellant argues that he was prejudiced because the only two witnesses that could substantiate appellee's assertion that he knew the fence was not built on the true property line when he first saw it, had passed away when the claim was filed. However, there was no evidence that the witnesses would have contradicted appellee's testimony. Further, the trial court noted that there was no indication in the record that appellant asserted any claim to the property, paid taxes on the property, or made any improvements to the property. While the court stated these observations in context of concluding that appellant had not acted in a manner that would alert appellee to a potential claim to the area, they also go to the issue of prejudice, i.e., appellant had not taken any affirmative action or incurred any expense in association with an unenforced right. We find no error in the trial court's ruling.

Appellant also argues that the trial court erred in finding no genuine issue of material fact regarding his claim that the fence line was acquiesced to as the property line. The purpose of the rule of acquiescence is to promote the peaceful resolution of boundary disputes. *Killips*, 244 Mich App at 260. If the owner of a property that is contained within the recorded boundaries of her property does not take action against the possession of this property by another within the statutory period, the owner is barred from disputing the new property line because she acquiesced in its establishment. *Sackett v Atyeo*, 217 Mich App 676, 681-682; 552 NW2d 536 (1996).

Appellant argues that the trial court erred in finding that he was precluded from proving an acquiescence defense because it failed to produce direct evidence of mutual mistake or an actual acknowledgment from appellee that the fence line constituted the boundary between the properties. There is no specific set of elements required to satisfy a claim of acquiescence. *Walters v Snyder (After Remand)*, 239 Mich App 453, 458; 608 NW2d 97 (2000). Our Supreme Court has said "a boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys. . . . Fifteen years' recognition and acquiescence are ample for this purpose." *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956) (internal quotation marks and citations omitted). Appellant is correct that passive assent to a boundary does not have to be based on the continuous existence of an objective transaction. *Walters*, 239 Mich App at 457.

While the relevant inquiry is whether the evidence presented demonstrates that the parties treated a particular boundary line as the property line, *id.* at 458, the trial court's reference to appellee's knowledge (or lack thereof) of the true boundary was not error. The trial court cited *Kipka*, 198 Mich App at 438, which states, "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" to support its requirement for a mistake. Additionally, *Kipka* noted that both parties must merely think that the boundary is the property line and treat it as such. *Id.* at 438-439. In other words, *Kipka* recognized that the concept of

acquiescing to an erroneous boundary line often is predicated on an error in knowledge about the true location of the property line.

The trial court found that the true property line between the parties had not deviated from the line established in the previous deeds of the properties or the surveys of record, that appellee had never acknowledged the fence line as the true property line, and that appellant never asserted a claim to the disputed property. The trial court found that appellee had proven that he knew where the true boundary was, and noted that appellant conveyed the deed to appellee for appellee's property before defendant purchased the adjacent property. These findings are supported by the record. Appellee's silence and inaction beyond his 1971 conversation with Richard Bagbey about the misplacement of the fence is not evidence that he treated the fence as the boundary between the plots, but rather that he was satisfied that the fence's misplacement was not problematic. As the trial court found, and appellant conceded, there was no evidence that appellee considered the fence as the property boundary. Accordingly, because there was never a mistake regarding the true property line, the trial court properly ruled that appellee's acquiescence defense was not applicable.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Stephen L. Borrello