STATE OF MICHIGAN

COURT OF APPEALS

ALEXIS BECK,

Plaintiff-Appellant,

v

TIMOTHY HEWITT and NANCY HEWITT,

Defendants-Appellees.

UNPUBLISHED
September 28, 2010

No. 291772
Oakland Circuit Court
LC No. 2008-095706-CH

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

In this property border dispute, plaintiff appeals as of right from a circuit court order granting defendants summary disposition pursuant to MCR 2.116(C)(7) and (10). We reverse and remand for further proceedings.

Plaintiff and defendants own adjacent parcels of residential property in Pleasant Ridge. The parties' rear yards abut one another. A chain-link fence separates the parties' parcels, although the fence sits on plaintiff's property, within several feet of plaintiff's rear yard border. In Spring 2003, defendants erected a privacy fence along a portion of plaintiff's property on their side of the chain-link fence, and plaintiff filed a quiet title action. Defendants sought summary disposition on the grounds that plaintiff's claim was time-barred and that they had acquired title by acquiescence to the disputed property. The circuit court granted defendants' motion, explaining in pertinent part:

> . . . Defendants assert by way of affidavit that the chain link fence at issue has been in place for 38 years. . . . [The] affidavit . . . indicates defendants and the prior owner of plaintiff's lot had agreed to treat the chain link fence as the true boundary line between the parties.
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> The Court finds that it's not possible for a reasonable juror to return a verdict in favor of the plaintiff so I'm going to grant the summary disposition.

We review de novo the circuit court's summary disposition ruling. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). A court may grant a party summary disposition under MCR 2.116(C)(7) when a period of limitation bars a claim asserted against him. "Whether a period of limitation applies to preclude a party's pursuit of an action constitutes a question of law that we review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671

NW2d 150 (2003). When considering a motion brought under subrule (C)(7), a court must consider any substantively admissible supporting evidence submitted by the parties. "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "If the pleadings demonstrate that one party is entitled to judgment as a matter of law, or if affidavits and other documentary evidence show that there is no genuine issue of material fact concerning the running of the period of limitations, the trial court must render judgment without delay." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 720; 742 NW2d 399 (2007). The burden of proving that a claim is time-barred rests on the party asserting the defense. *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 5; 555 NW2d 496 (1996). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

A litigant must file an "action for the recovery or possession of any lands" within 15 years of the claim's accrual date. MCL 600.5801(4). According to MCL 600.5829(1), "Whenever any person is disseised, his right of entry on and claim to recover land accrue at the time of his disseisin . . . ." "Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership." *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). Notwithstanding that plaintiff acquired her property 15 years and one day before she filed this action, plaintiff presented evidence establishing that the disseisin occurred in 2003, when defendants erected their privacy fence. In an affidavit, plaintiff attested that before 2003 defendants had done nothing to indicate that they claimed an interest in her land on their side of the chain-link fence:

> 5. When I purchased the property I was informed by the seller's real estate agent . . . that the actual property line was approximately ten feet beyond the chain link fence at the rear of the property.
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> 6. I observed that the Defendants' wooden privacy fence on the east side of their property stopped approximately ten feet from the chain link fence at the rear of the property.
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> 7. Defendants never used or developed the disputed portion of the property and never provided me with any indication that they thought it was their property until they ran their wooden privacy fence over the disputed area [on] or about May 5, 2003, ten years after I purchased the property.
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> * * *
>
> 10. I never had any idea that Defendants were claiming they owned my portion of property that lay beyond my fence until they ran a fence across it.

Defendant Timothy Hewitt averred in his affidavit that "since the Plaintiff has owned the property, the chainlink fence [sic] has served as the boundary between the parties' properties," and that plaintiff's predecessor in interest told Hewitt "that the chain link fence would be the boundary line between the parties as he had a double lot and did not need the small amount of

property." Because Hewitt did not specifically contest plaintiff's averments concerning the 2003 disseisin, plaintiff timely filed her quiet title complaint within 15 years of the 2003 disseisin, unless defendants adversely acquired title to the disputed strip of land before plaintiff filed suit.

Defendants invoke the doctrine of acquiescence in support of their position that the chain-link fence constituted the boundary line between the parties' parcels. The doctrine of acquiescence intends to promote peaceful resolution of boundary disputes. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). Unlike an adverse possession claim of title to property, "a claim of acquiescence does not require that the possession be hostile or without permission." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Three theories of acquiescence exist: "(1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from intention to deed to a marked boundary." *Id*. at 457. Defendants here rely on the first theory.

> A claim of acquiescence to a boundary line based upon the statutory period of fifteen years, MCL 600.5801(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. This theory of acquiescence does not require that the possession be hostile or without permission as would an adverse possession claim. Further, the acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years. Although Michigan precedent has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence, caselaw has held that acquiescence is established when a preponderance of the evidence establishes that the parties *treated* a particular boundary line as the property line. [*Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009) (citations and internal quotation omitted, emphasis in original).]

The evidence presented in the circuit court does not reasonably tend to establish that plaintiff and defendants ever had an agreement among themselves that the chain-link fence would serve as the common boundary line. Plaintiff expressed that she knew when she purchased the property that the chain-link fence did not mark the actual boundary line of her property, while Hewitt's affidavit reflects that the only boundary-related agreement he made was with plaintiff's predecessor. As noted, Hewitt recalled that plaintiff's predecessor told him "that the chain link fence would be the boundary line between the parties as he had a double lot and did not need the small amount of property."

With respect to Hewitt's proffered recollections of hearsay statements by plaintiff's predecessor in title, evidence submitted in support of a dispositive motion must qualify as admissible in substance or content, if not in form, MCR 2.116(G)(6); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009). Affidavits must state "facts admissible as evidence" and "show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit." MCR 2.119(B)(1)(b) and (c). Plaintiff's predecessor's statement to Hewitt constitutes hearsay, MRE 801(c), which "is not admissible except as provided by these rules." MRE 802. Although the predecessor's hearsay statement could potentially be admissible as a statement against interest if the predecessor was unavailable to testify, MRE 804(a) and (b)(3); *Sackett v Atyeo*, 217 Mich

App 676, 683-684; 552 NW2d 536 (1996), the instant record contains no evidence or indication that the predecessor is unavailable for some reason, and defendants have not shown any other legal basis for admitting the hearsay statement. Absent our consideration of plaintiff's predecessor's hearsay declaration, nothing in the record substantiates that defendants and plaintiff's predecessor had agreed to treat the chain-link fence as a boundary and had done so for at least 15 years. Therefore, the circuit court improperly granted defendants' motion for summary disposition regarding their acquiescence theory.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher