STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1028

In the Matter of the Application of Anthony E. Sampair and Laurie K. Sampair to register the title to the following described real estate situated in Washington County, Minnesota, namely: Lots 1 and 2, Block 1, Lakewood Park Third Division, applicants,
Respondents,

vs.

Josephine Berg Simes, et al.,
Appellants,

State of Minnesota, et al.,
Defendants.

Filed April 22, 2013
Reversed and remanded
Rodenberg, Judge

Washington County District Court
File No. 82-C7-06-2146

Mark E. Greene, Sarah L. Krans, Bernick, Lifson, Greenstein, Green & Liszt, P.A., Minneapolis, Minnesota (for respondents)

Frederic W. Knaak, Knaak & Associates, P.A., St. Paul, Minnesota (for appellants)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

In this appeal following a supreme court decision reversing and remanding a previous award of summary judgment against appellants, appellants argue that the district court erred by again granting respondents' motion for summary judgment. Because the additional evidence developed following remand did not materially alter the facts presented to the supreme court, we reverse and remand for trial.

FACTS

This case arises from an application by respondents Anthony Sampair and Laurie Sampair to register a lakeshore property in Washington County as Torrens property under Minnesota Statutes Chapter 508 (2012). Respondents are the present owners of the property. Appellants Josephine Berg Simes, James Berg, and the estate of Frima Bender own nonlakeshore property in the area and claim ownership of an express easement to access White Bear Lake across respondents' property. Appellants' easement was deeded to their predecessors in interest in 1909. A number of other easements were also granted over respondents' property in the early twentieth century. Respondents contend that appellants' easement should be extinguished by operation of the Minnesota Marketable Title Act (MTA). *See generally* Minn. Stat. § 541.023 (2012).

This case was the subject of a prior supreme court decision which affirmed the district court's grant of summary judgment against the holders of the other easements. *See generally Sampair v. Vill. of Birchwood*, 784 N.W.2d 65 (2010). However, with respect to appellants, the supreme court concluded that, while "[t]he possession alleged in

the Simes affidavits is not described in any detail" and "[a] trier of fact might ultimately find that . . . appellants' claimed use of the easement is not credible," the affidavits "raise genuine issues of material fact as to the possession of [appellants] during the entirety of the possession period." *Id.* at 76. Accordingly, the supreme court reversed the award of summary judgment as to appellants and remanded for further proceedings. *Id.*

As relevant to the remaining claim of respondents after the supreme court's decision, a deed dated August 30, 1909, grants the owners of real property now owned by appellants an appurtenant easement over real property now owned by respondents. The easement granted the owners of the dominant estate a right of way over the servient estate "for the purpose of giving said grantee access to the shore of White Bear Lake for the purpose of boating and bathing." Ms. Berg Simes' parents acquired the dominant estate sometime in the early 1940s.

In a 2008 affidavit, Ms. Berg Simes asserted that her family has used the dominant estate as a summer home for the past 60 years. She stated that "she does not remember a year in which the Easement was not used by a member of the Berg family or their guests for purposes of accessing White Bear Lake."

In addition, Ms. Berg Simes submitted an affidavit in favor of her sister, Frima Bender, who also held real property with an easement over the property.[1] In this affidavit, Ms. Berg Simes stated that she had "seen [her] sister use the lakeshore easement continuously over the past sixty years."

[1] After the death of Ms. Berg Simes' and Ms. Bender's father in the late 1980s, the dominant estate was subdivided into two lots, each of which appears to have continued to benefit from the easement.

In an affidavit, Mr. Berg stated that his family has used the dominant estate as a summer residence for his entire life and that his first visit to the property was as a newborn in the early 1960s. Mr. Berg asserted that "for as long as the Berg family has owned the property . . . they have, every year, used the Easement for the purpose of accessing the lake and their boats on the lake." He asserted that he "has had occasion numerous times over the past forty years, to witness members of the Berg family, himself included, use the easement for purposes of accessing their boats and the shore of White Bear Lake." Mr. Berg's affidavit also conceded that during this period, the family has also "used the adjoining dock association property dock as the location of their docked boats on White Bear Lake."

Following remand from the supreme court, Ms. Berg Simes was deposed. In her deposition, Ms. Berg Simes testified that her father built a dock on the easement property in the 1940s and maintained it until at least the early 1950s. In addition, Ms. Berg Simes and her husband kept a rowboat on the shore of the servient property from 1947 to 1951. She testified that the family stopped using the servient property for docking purposes when the family started using the dock association docks in the adjoining public access. However, she stated that the family continued to carry boats across the easement and use it as a boat launch because the public access docks did not have water access for boats and the only other public boat launch was on the other side of the lake. She stated that her sister and uncle would hire boys at the local hardware store to carry boats across the easement to the water. She stated that although the family used the dock association docks, "that doesn't mean we weren't on the shore [of the easement] with the kids

playing in the sand." However, Ms. Berg Simes was unable to identify "how often after [August 30, 1949]" she had used the easement for the purpose of accessing the lake. Nor was Ms. Berg Simes able to identify the last time she had personally used the easement or the last time she had personally observed a member of her family use the easement.

Respondents again moved for summary judgment after this additional discovery. They argued that the affidavits already reviewed by the supreme court and Ms. Berg Simes' deposition testimony were insufficient to raise a genuine issue of material fact. In opposing the motion, appellants submitted an additional affidavit from Ms. Berg Simes. The district court awarded summary judgment, holding that appellants had not provided sufficient evidence to create an issue of material fact for trial, noting that "Ms. Berg Simes' recollection . . . is not specific enough as to time and date." This appeal followed.

D E C I S I O N

The MTA provides that an interest in land whose source of record is more than 40 years old cannot be invoked in an action affecting title or possession of real estate unless, within the 40-year period after the interest was created, a special notice is recorded. Minn. Stat. § 541.023, subd. 1. If the required notice is not filed within the 40-year period, then the claimed interest is "conclusively presumed to have [been] abandoned." *Id.*, subd. 5. In this case, it is uncontested that appellants' easement was created more than 40 years ago and that the required notice was not filed.

However, a number of exceptions apply to the presumption of abandonment, including an exception that exempts from the presumption "any person . . . in possession of real estate." *Id.*, subd. 6. Easements are among the interests in land that may be

eliminated by the MTA, and the possession exception may be invoked by easement holders even though easements are not possessory estates. *Sampair*, 784 N.W.2d at 69. In order to invoke the possession exception, the party seeking protection of the exception has the burden of proving possession beginning at or before the deadline for filing the MTA notice (the fortieth anniversary of the creation of the interest the claimant seeks to enforce) and continuing through the filing of the action in which the interest is being enforced. *Id.* at 73, 74. For the purpose of the MTA's possession exception, "possession" of an easement means "use sufficient to put a prudent person on notice of the asserted interest in the land, giving due regard to the nature of the easement at issue." *Id.* at 70.

Appellants argue that, following remand from the supreme court, the district court erred in awarding summary judgment to respondents based on its determination that they had not produced sufficient evidence of possession of the easement during the entirety of the possession period. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. Summary judgment is not appropriate if the nonmoving party is able to point to or identify evidence which, if fully believed by the trier of fact, would support the nonmoving party's position on a material issue. *See Geist-Miller v. Mitchell*, 783 N.W.2d 197, 201–02 (Minn. App. 2010) (stating this proposition more generally and asking only whether the nonmoving party's evidence, if fully believed, would "support a

claim"). The nonmoving party "is not required to demonstrate or prove [its] claim in order to avoid summary judgment," but merely "furnish evidence creating genuinely disputed material facts." *Id.* at 202.

"Weighing the evidence and assessing credibility on summary judgment is error." *Hoyt Props., Inc. v. Prod. Res. Grp., LLC*, 736 N.W.2d 313, 320 (Minn. 2007). However, the district court "is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). We review an award of summary judgment de novo. *Sampair*, 784 N.W.2d at 68.

Here, the district court based its grant of summary judgment on a determination of the weight of the testimony of Ms. Berg Simes and her son, appellant James Berg. In its decision, the district court observed that it was not "discount[ing] the testimony of Ms. Berg Simes and Mr. Berg" and that Ms. Berg Simes' testimony "[a]rguably . . . would create fact questions." The district court noted "the lack of specificity of her memories," and that "[t]his is a close case" in awarding summary judgment.

If believed by the trier of fact, the contentions of Ms. Berg Simes and Mr. Berg would support a finding that they have met their burden of proving possession of the easement for the relevant period. *Cf. Geist-Miller*, 783 N.W.2d at 201–02. The district court's statements also indicate that *the district court* was of the opinion that the evidence put forward was not sufficient to prove possession. However, appellants were not required to prove possession to the district court in the context of a motion for summary

judgment. *See id.* at 202. Instead, they need only put forward evidence sufficient to create a genuine issue of material fact. *See id.* Because the district court weighed the evidence and credibility of the affiants, the award of summary judgment was reversible error. *See Hoyt Props.*, 736 N.W.2d at 320.

Our review of the submissions persuades us that appellants have produced evidence that, if believed by the trier of fact, would support a conclusion that appellants have been in possession of the easement for the entire possession period. The assertions in the affidavits, although general, state the facts that appellants would need to establish in order to prevail. *Sampair*, 784 N.W.2d at 76.

The evidence adduced by the additional discovery conducted after remand from the supreme court neither materially alters nor definitively undercuts the affidavits reviewed by the supreme court. Nor do the affidavits of previous owners and neighbors of the servient estate, who deny having seen appellants use the easement, negate the existence of a fact issue. Instead, these opposing affidavits demonstrate that there is a genuine factual controversy for a trier of fact to resolve.

In sum, while respondents now argue that the alleged use of the property was insufficient to provide the notice required under *Sampair*, the supreme court has already applied that standard to the affidavits in this matter and determined that appellants have produced sufficient evidence to proceed to trial. *Id.* Therefore, because appellants have produced sufficient evidence to survive summary judgment and proceed to trial, we reverse and remand for trial.

Reversed and remanded.