STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2119

Donald R. Watkins, et al.,
Appellants,

vs.

Lois Y. Patch, et al.,
Respondents.

Filed July 15, 2013
Affirmed in part, reversed in part, and remanded
Klaphake, Judge[*]

Stearns County District Court
File No. 73-CV-12-1133

Cally R. Kjellberg, Michael C. Rajkowski, John H. Wenker, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for appellants)

Gerald Von Korff, Keri A. Phillips, David J. Meyers, Rinke Noonan, St. Cloud, Minnesota (for respondents)

Considered and decided by Stoneburner, Presiding Judge; Rodenberg, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KLAPHAKE, Judge

This case arises out of a boundary-line dispute between appellants Donald and Janet Watkins and respondents Lois and Richard Patch, owners of adjacent lots in Stearns County's Peanut Hill Addition. Appellants acquired lots 9-11 in 1972, along with an easement over the western edge of lot 7. Respondents acquired lot 7 the following year through a foreclosure sale, which they claim extinguished appellants' easement. A gravel road generally divides the property appellants were using from respondents' property to the east. In 2001, a survey revealed that the boundary line between the lots is not located on the gravel road but actually lies westerly of the road and runs at a northwest angle through the property appellants were using, resulting in a portion of appellants' garage, driveway, and yard being on lot 7.

Appellants sued respondents, claiming title to the land between the real boundary line and the gravel road by adverse possession or boundary by practical location or, in the alternative, an easement over the disputed land. The district court granted summary judgment to respondents. On appeal, appellants challenge the district court's determination that (1) their easement was extinguished by the 1973 foreclosure; (2) their boundary-by-practical-location claims failed as a matter of law; and (3) their claims of adverse possession and prescriptive easement failed because they had permission to use the disputed land. Because there are genuine issues of material fact as to "hostility" in appellants' use of the disputed land, we reverse the district court's dismissal of

appellants' adverse-possession and prescriptive-easement claims and remand for further proceedings. We affirm the remainder of the district court's decision.

D E C I S I O N

We review a district court's summary-judgment decision de novo to determine whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We view the evidence in the light most favorable to the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). "No genuine issue of material fact exists when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* (quotation omitted). Summary judgment "is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted).

Easement-reformation claim

Appellants first challenge the district court's dismissal of their easement-reformation claim, arguing that their easement over lot 7 survived the 1973 foreclosure due to a defect in notice and should now be reformed to reflect the conduct of the parties.

Reformation is the amendment of a written agreement to reflect the parties' true intent at the time of its creation. *See Jablonski v. Mut. Serv. Cas. Ins. Co.*, 408 N.W.2d 854, 857 (Minn. 1987).

> To reform a deed, a claimant must show (1) that a valid agreement existed between the parties that expressed their real intentions, (2) that the written instrument failed to

> express the parties' real intentions, and (3) that this failure resulted from the parties' mutual mistake, or a unilateral mistake accompanied by the other parties' fraud or inequitable conduct.

Slindee v. Fritch Invs., LLC, 760 N.W.2d 903, 911 (Minn. App. 2009). Appellants were thus required to establish the continued existence of their easement over respondents' property to have a claim for reformation.

In Minnesota, a "valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage . . . and whose holders are properly joined or notified." *In re Crablex, Inc.*, 762 N.W.2d 247, 253 (Minn. App. 2009) (quoting Restatement (Third) of Property (Mortgages) § 7.1 (1996)), *review denied* (Minn. Apr. 29, 2009). Minn. Stat. § 580.03 (2012) provides the notice requirements for foreclosures by advertisement in Minnesota:

> Six weeks' published notice shall be given that such mortgage will be foreclosed by sale of the mortgaged premises or some part thereof, and at least four weeks before the appointed time of sale a copy of such notice shall be served in like manner as a summons in a civil action in the district court upon the person in possession of the mortgaged premises, if the same are actually occupied.

See also Gerdin v. Princeton State Bank, 384 N.W.2d 868, 871 (Minn. 1986) (noting that although some states require notice by mail or personal service to all persons with a recorded interest in the land being foreclosed, Minnesota "requires only 6 weeks' published notice and service thereof upon the person in possession of the mortgage premises"). Although the statute does not define "person in possession," this court has stated, "[i]f one of the occupants had a superior interest in the property, courts have

uniformly held that only the occupant with the superior property interest need be served." *Farm Credit Bank of St. Paul v. Kohnen*, 494 N.W.2d 44, 48 (Minn. App. 1992), *review denied* (Minn. Feb. 25, 1993).

In 1966, Roger Norberg granted Paul Doerner a mortgage on lot 7. Then, in 1972, Norberg conveyed lots 9-12 to appellants, along with an easement "for all purposes connected with the use and enjoyment of said land . . . to pass and repass along, over, and across" the western 33 feet of lot 7. In 1973, Doerner assigned the mortgage to respondent Lois Patch's deceased husband, Charles Alexander, who foreclosed on the mortgage by advertisement. Appellants claim that their easement survived the foreclosure because they were not personally served with notice. But a junior interest holder is not entitled to personal notice of a foreclosure by advertisement in Minnesota. *See id.* And Alexander satisfied the statutory notice requirements by publishing notice of the foreclosure sale for six weeks, between September 25 and October 30, 1973.

Furthermore, any such defective-notice claim would be barred by Minn. Stat. § 580.20 (2012), which provides the statute of limitations for challenging a foreclosure by advertisement on the basis of a defect in notice:

> No such sale shall be held invalid or be set aside by reason of any defect in the notice thereof, or in the publication or service of such notice, or in the proceedings of the officer making the sale, unless the action in which the validity of such sale is called in question be commenced, or the defense alleging its invalidity be interposed, with reasonable diligence, and not later than five years after the date of such sale . . . .

See also Gallaher v. Titler, 812 N.W.2d 897, 903 (Minn. App. 2012), *review denied* (Minn. July 17, 2012) (describing section 580.20 as a "statute of limitations, barring pursuit of any remedy based on defects in the notice of a foreclosure sale or the publication of that notice five years after the date of the foreclosure sale"). Because appellants' challenge is based on a "defect in the notice" of the 1973 foreclosure, it is barred by section 580.20.

Boundary-by-practical-location claims

Appellants also challenge the district court's dismissal of their boundary-by-practical-location claims. "A party can establish a boundary by practical location in three ways: (1) by acquiescing in the boundary for a sufficient period of time to bar a right of entry under the statute of limitations; (2) by expressly agreeing with the other party on the boundary and then by acquiescing to that agreement; or (3) by estoppel." *Slindee*, 760 N.W.2d at 907 (citing *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977)). Appellants claim that they established a boundary by practical location in all three ways.

To establish a boundary by practical location through acquiescence, "a person must show by evidence that is clear, positive, and unequivocal that the alleged property line was acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations," which is 15 years in Minnesota. *Britney v. Swan Lake Cabin Corp.*, 795 N.W.2d 867, 872 (Minn. App. 2011) (citing Minn. Stat. § 541.02) (quotations omitted). "The acquiescence required is not merely passive consent but conduct from which assent may be reasonably inferred." *Id.* Besides arguing that respondents acquiesced in the gravel road as the boundary line because they knew about the garage,

concrete slab, and shrubs on the land in dispute and did not object, appellants did not present any evidence of conduct on the part of respondents from which to infer that they acquiesced in the new boundary line. Accordingly, the district court did not err in determining that appellants failed to provide evidence of direct conduct, as opposed to mere passive consent, from which assent could be reasonably inferred.

To establish a boundary by practical location through express agreement, a person must prove that "an express agreement between the landowners set an 'exact, precise line' between [their properties] and that the agreement had been acquiesced to 'for a considerable time.'" *Slindee*, 760 N.W.2d at 907 (quoting *Beardsley v. Crane*, 52 Minn. 537, 546, 54 N.W. 740, 742 (1893)). "Without a specific discussion identifying the boundary line or a specific boundary-related action clearly proving that the parties or their predecessors in interest had agreed to a specific boundary, a boundary is not established by practical location based on express agreement." *Id.* at 910. "[A]n express agreement requires more than unilaterally assumed, unspoken and unwritten mutual agreements corroborated by neither word nor act." *Id.* at 909 (quotations omitted). Appellants argue that the district court "failed to recognize the specific boundary-related actions of the parties, including [their] maintenance of the yard up to the road, the construction of a garage, and the placement of a cement slab up to the road, all with no objection by [r]espondents." But again, appellants failed to present evidence that respondents agreed to the new boundary line beyond their passive failure to object to appellants' use of the disputed land.

Finally, to establish a boundary by practical location through estoppel, a person must show that "the parties whose rights are to be barred . . . silently looked on, with knowledge of the true line, while the other party encroached upon it or subjected himself to expense in regard to the land which he would not have had the line been in dispute." *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. App. 2001) (quoting *Gifford v. Vore*, 245 Minn. 432, 436, 72 N.W.2d 625, 628 (1955)). "[E]stoppel requires knowing silence on the part of the party to be charged and unknowing detriment by the other." *Theros*, 256 N.W.2d at 859. Because neither party claims to have had knowledge of the true boundary line between their properties prior to the 2001 survey, the district court correctly determined that appellants' estoppel claim fails as a matter of law.

Adverse-possession and prescriptive-easement claims

Finally, appellants challenge the district court's summary-judgment dismissal of their adverse-possession and prescriptive-easement claims, arguing that the district court inappropriately relied on a 1976 letter they received from Alexander's counsel in determining that they failed to establish the element of hostility necessary to prevail on either claim.

On March 31, 1976, Alexander's attorney sent a letter to appellants, which stated, in relevant part,

> If you will recall, there had been some previous conversations between your attorney . . . and myself and Mr. Alexander concerning your right to use a portion of Lot 7 to provide you with access to your adjacent lot. At the time of the original discussions, the status of title was somewhat in doubt in that Mr. Alexander had acquired a mortgage on the Norberg lot and was in the process of foreclosing. The

> foreclosure process has now been completed and title is in Mr. Alexander and any rights that you acquired from Mr. Norberg, after the date of the mortgage, were in effect, extinguished by the foreclosure.
>
> So that there is no misunderstanding, this letter is to advise you that you no longer have any easement rights over Lot 7 of Peanut Hill Addition, but that Mr. Alexander will allow you and your family the personal right to use the access route until such time as this permission is revoked. Mr. Alexander, of course, reserves the right to revoke such permission at any time.

Relying on this letter, the district court found that "the use of the land [by appellants] was permissive . . . rather than hostile . . . ." Appellant argues that the letter was not determinative of the lack of hostility on their part and that hostility remains a material fact in dispute, making summary judgment inappropriate. We agree.

We conclude that the letter is ambiguous in two respects: (1) the scope or type of use for which permission was given, and (2) the area of the permitted use.

Appellants' claim of hostility arises out of their long-term use of the disputed land by building a garage partially on it, pouring a concrete approach to the garage on it, planting a hedge on it, and generally using and maintaining the land in dispute. For summary judgment we, as must the district court, view the evidence in the light most favorable to appellants. Doing so, we conclude that a reasonable fact-finder could determine that the 1976 letter in context was limited "to provide . . . access to [appellants'] adjacent lot" and did not extend to landscaping or garage and driveway construction. As such, the letter is not determinative of the scope or type of the permission granted to appellants.

Moreover, the 1976 letter is imprecise as to the area of land to which permission was extended. The reference is to an "access route." Again, a reasonable fact-finder could determine that the area of permitted use was the exact access route in existence in 1976, the gravel road. If so, the fact-finder could also determine that the permission given to appellants did not extend to the disputed area lying westerly of that route.

Accordingly, there are genuine issues of material fact that preclude summary judgment on appellants' adverse-possession and prescriptive-easement claims.

Affirmed in part, reversed in part, and remanded.