IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-914

Filed: 21 March 2017

Currituck County, No. 10-CVS-275

BETTY P. LEWIS, Plaintiff,

v.

ALLEN TOBY HEDGEPETH, *et al.*, Defendant.

Appeal by defendant from order entered 14 April 2015 by Judge Marvin K. Blount, III in Currituck County Superior Court. Heard in the Court of Appeals 13 January 2016.

Ward and Smith, P.A., by Eric J. Remington & Alexander C. Dale, for plaintiff-appellee.

Vandeventer Black LLP, by Norman W. Shearin & Ashley P. Holmes, for defendant-appellant.

DIETZ, Judge.

This appeal is part of a long-running legal dispute that began when Defendant Allen Hedgepeth bought landlocked property in a scenic area of Currituck County just off the Currituck Sound. Hedgepeth has battled neighboring property owners in

multiple lawsuits as he seeks to establish the existence of a historical easement permitting access to his property from a nearby public highway.

Plaintiff Betty Lewis owns property in the Parker's Landing subdivision adjacent to Hedgepeth's property. She brought this declaratory judgment action seeking to establish that any easement crossing her property was extinguished. The trial court granted summary judgment in Lewis's favor on several legal theories, including application of the six-year statute of limitations for injury to incorporeal hereditaments and the seven-year statute of limitations for claims challenging adverse possession under color of title.

After the trial court ruled, our Supreme Court granted discretionary review in one of the controlling cases from this Court on which the trial court relied in its ruling. We held this case in abeyance pending the outcome of the Supreme Court's review. The Supreme Court later overturned this Court's line of cases. *See Duke Energy Carolinas, LLC v. Gray*, __ N.C. __, 789 S.E.2d 445 (2016).

Applying the now-controlling law from our Supreme Court, we hold that the six-year statute of limitations for injury to incorporeal hereditaments is inapplicable to Lewis's claim, which involves extinguishment of an easement. We also hold that there are genuine issues of material fact with respect to Lewis's claim that the easement is extinguished through adverse possession under color of title.

Accordingly, we reverse the trial court's grant of summary judgment and remand for further proceedings.

Facts and Procedural History

The lengthy factual and procedural history of this long-running legal dispute has been addressed repeatedly in appellate decisions from this Court and the United States Court of Appeals for the Fourth Circuit. *See Hedgepeth v. Parker's Landing Prop. Owners Ass'n*, 388 F. App'x 242 (4th Cir. 2010) (unpublished); *Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc.*, __ N.C. App. __, 781 S.E.2d 822 (2016); *Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc.*, 236 N.C. App. 56, 762 S.E.2d 865 (2014). We thus limit our recitation of the facts to those necessary to resolve this appeal.

Part of the ongoing dispute involves an alleged easement across a portion of Lewis's property that permits access to Hedgepeth's landlocked property. Lewis disputes both the existence and location of this alleged easement. The path of that easement, if located where Hedgepeth claims, presently is obstructed by trees, bushes, and other overgrowth that Lewis contends would prevent passage.

On 9 June 2010, Lewis sued Hedgepeth, asserting various claims for relief and seeking a temporary restraining order to prevent Hedgepeth from clearing a roadway along the path of the easement. Hedgepeth answered Lewis's complaint on 16 May 2011 and asserted various defenses.

On 17 September 2012, Lewis moved for summary judgment. The trial court initially denied her motion but, on a motion for reconsideration, granted partial summary judgment in Lewis's favor, awarding her declaratory and injunctive relief under several legal theories.

The trial court's judgment was based on Lewis's argument that any claims Hedgepeth could assert with respect to his easement rights were barred by the applicable statutes of limitations and Rule 41 of the North Carolina Rules of Civil Procedure. Other claims remain to be resolved in this case and several other lawsuits that the trial court consolidated with it, but the trial court certified its partial summary judgment order for immediate appeal under Rule 54(b). Hedgepeth timely appealed.

Analysis

Hedgepeth challenges the trial court's grant of summary judgment based on application of several separate statutes of limitations. We review the trial court's grant of summary judgment *de novo*. *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). Summary judgment is appropriate when "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 any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). "Ordinarily, the question of whether a cause of action is

barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citations omitted).

Hedgepeth challenges each of the three separate grounds on which the trial court relied to grant summary judgment based on the statute of limitations. We address these arguments in turn.

I. Injury to Incorporeal Hereditament - N.C. Gen. Stat. § 1–50(a)(3)

Hedgepeth first challenges the trial court's reliance on the six-year statute of limitations for claims based on injury to an incorporeal hereditament. When Lewis asserted this argument, and when the trial court considered it, the court was bound by this Court's precedent in *Pottle v. Link*, 187 N.C. App. 746, 654 S.E.2d 64 (2007) and *Duke Energy Carolinas, LLC v. Gray*, 237 N.C. App. 420, 766 S.E.2d 354 (2014). Those cases held that claims involving obstructions to an existing easement were injuries to an incorporeal hereditament (the easement) and were thus subject to the six-year statute of limitations in N.C. Gen. Stat. § 1–50(a)(3). Relying on this precedent, the trial court held that any claims Hedgepeth could assert with respect to the easement were barred because the easement had been obstructed for more than six years.

After the trial court ruled, our Supreme Court allowed discretionary review in *Gray*, and we held this case in abeyance while our Supreme Court considered *Gray*. In its decision in *Gray*, the Supreme Court reversed this Court and overruled our earlier holding in *Pottle*. *Duke Energy Carolinas, LLC v. Gray*, __ N.C. __, __, 789 S.E.2d 445, 448 (2016). The Court held that an easement permitting access across another's property, "while an incorporeal hereditament, is also real property" because it gives the easement holder "a property right to a degree of control over the use of an identified swath of land[.]" *Id.* at __, 789 S.E.2d at 448. The Court further reasoned that a claim to remove an obstruction blocking the easement is "not damages for any injury to the easement," but rather a claim "to regain control over the part of its easement." *Id.* Thus, the Supreme Court held that a claim to remove an obstruction from an easement and regain control over the easement "is subject to the section 1–40 twenty-year statute of limitations" governing actions for recovery or possession of real property, not the six-year statute of limitations in section 1–50(a)(3). *Id.*

This case is indistinguishable from *Gray*. The premise of Lewis's argument is that Hedgepeth's attempts to regain control of the purported easement are claims for injury to the easement and thus are governed by section 1–50(a)(3). Under *Gray*, that assertion is wrong. Hedgepeth's claims are subject to the twenty-year statute of limitations in section 1–40 (or, if appropriate, the seven-year statute applicable to claims challenging adverse possession under color of title). Accordingly, the trial court

erred by relying on expiration of the six-year statute of limitations in section 1–50(a)(3) as a basis for its summary judgment decision.

II. Adverse Possession Under Color of Title - N.C. Gen. Stat. § 1–38

Hedgepeth next challenges the trial court's reliance on the seven-year statute of limitations applicable to claims challenging adverse possession under color of title. *See* N.C. Gen. Stat. § 1–38. Lewis contends that she took possession of her property under color of title and, because Hedgepeth never asserted any claims concerning the easement during the seven-year limitations period, the easement was extinguished and any claim Hedgepeth might have brought is now barred. Hedgepeth responds by arguing that Lewis cannot use adverse possession under color of title to extinguish his easement and, in any event, Lewis does not possess the property under color of title. As explained below, we reject Hedgepeth's first argument but find there are genuine issues of material fact with respect to Hedgepeth's second argument, and thus summary judgment was improper.

Property owners have color of title when they acquire property through a deed or other instrument that purports to pass title but does not do so because of some defect in the seller's title or the method of conveyance. *White v. Farabee*, 212 N.C. App. 126, 132, 713 S.E.2d 4, 9 (2011). Claims challenging a landowner's adverse possession under color of title are subject to a seven-year statute of limitations. N.C. Gen. Stat. § 1–38.

It is well-settled that a landowner can use the general, twenty-year prescriptive period for adverse possession to extinguish an easement on that landowner's property. *Skvarla v. Park*, 62 N.C. App. 482, 488, 303 S.E.2d 354, 358 (1983). Although our State's appellate courts have not yet expressly addressed whether an easement similarly can be extinguished after the shortened, seven-year period for adverse possession under color of title has elapsed, our Supreme Court implicitly approved this approach in *Hensley v. Ramsey*, 283 N.C. 714, 732, 199 S.E.2d 1, 12 (1973).

In *Hensley*, the Supreme Court analyzed a claim to extinguish an easement through adverse possession under color of title. The Supreme Court ultimately rejected the claim because the landowner's chain of title included an express grant of an easement—in other words, it concluded that the landowner did not actually possess the property under color of title because the property owner's chain of title disclosed the easement. *Id.* at 732–33, 199 S.E.2d at 12. But the court analyzed the claim at length, discussing how the seven-year prescriptive period would apply and what steps a purchaser must take to properly review the chain of title. *Id.*

We find it unlikely that our Supreme Court would undertake this analysis if the seven-year prescriptive period were inapplicable to begin with. Moreover, other jurisdictions with similar color-of-title jurisprudence have long held that it is applicable to claims to extinguish an easement. *See, e.g.*, *Kitzinger v. Gulf Power Co.*,

432 So. 2d 188, 191 n.2 (Fla. Dist. Ct. App. 1983); *see also* 1 *Ga. Real Estate Law & Procedure* § 8:28 n.1 (7th ed. 2016) (citing *Wimpey v. Smart*, 73 S.E. 586 (Ga. 1912)). Accordingly, we reject Hedgepeth's argument that the shortened, seven-year prescriptive period for adverse possession under color of title does not apply to claims to extinguish an easement.

We next turn to the factual question of whether Lewis possessed her property, free of any easement, under color of title. Lewis contends that her deed "made no reference to the alleged easement" and provides record citations to that deed and accompanying plat maps. But as our Supreme Court repeatedly has held, one who takes title to real property cannot rely solely on the deed and accompanying plat map conveying the property. *See, e.g.*, *Hensley*, 283 N.C. at 730, 199 S.E.2d at 10. "The law contemplates that a purchaser of land will examine e*ach recorded deed or other instrument in his chain of title*, and charges him with notice of every fact affecting his title which such an examination would disclose." *Id.* (emphasis added).

Here, the immediately preceding deed in Lewis's chain of title expressly references a plat map that the parties call the "Lawrence map." That deed describes the Lawrence map as follows: "[t]he aforedescribed real property being the same tract or parcel of land described from a map or plat entitled 'Nancy Virginia Parker Estate, Poplar Branch Township, Currituck County, N.C.' . . . prepared by David H. Lawrence, . . . said map or plat being incorporated herein by reference for a more

complete and precise description." The Lawrence map, which was duly recorded, contains what it refers to as an "ACCESS LANE" that runs along roughly the same path as Hedgepeth's purported easement.

In addition, in the chain of title, the 1940 deed conveying the property from the Jarvis family to Nancy Virginia Parker references a "lane" that exists between the southern boundary of the Emmett Evans property and the northern boundary of the Jarvis/Parker property—which, again, is roughly the location of Hedgepeth's purported easement.

Finally, in the 1989 Parker's Landing plat map that identifies Lewis's lot within the subdivision (a plat map expressly referenced in Lewis's deed to her property), the notation identifying the adjoining property (now owned by Hedgepeth and then owned by the Belangia family), contains a reference to what the parties call the "Smith Heirs map." The Smith Heirs map contains the clearest description of the purported easement, identifying it as a "25' Easement For Utilities and Ingress & Egress."

To be sure, as Lewis contends, these references to a lane, access road, or easement do not conclusively establish that the easement exists, that it is located where Hedgepeth contends, or that it extends from the public highway to Hedgepeth's property. Indeed, the existence and extent of that easement are the central issues in this protracted litigation. For example, Lewis argues that the Lawrence map, on its

face, places the easement on the property of Emmett Evans, not on the property that is now Parker's Landing subdivision.

But Hedgepeth submitted an affidavit from a surveyor, Carlos Gomez, stating that the access lane shown on the Lawrence map runs "along the common boundary *between* the Parker's Landing Tract and the Evans Tract" and extends to Hedgepeth's property. The map itself (or, at least, the copies submitted by the parties in the record on appeal) are grainy and often illegible, leaving this Court unable to determine as a matter of law which contention is correct. Thus, we agree with Hedgepeth that, at a minimum, there are genuine issues of material fact concerning whether the references to the purported easement in these instruments preclude Lewis's claim that she took the property free of the easement under color of title.

As a result, the trial court could not properly enter summary judgment based on expiration of the seven-year limitations period for claims challenging adverse possession under color of title. The law charges Lewis with notice of every fact affecting her property that is disclosed in her chain of title, *see Hensley*, 283 N.C. at 730, 199 S.E.2d at 10, and we cannot say as a matter of law that Lewis's chain of title discloses no possible easement across her property. Accordingly, the trial court erred in granting summary judgment based on expiration of the seven-year statute of limitations in N.C. Gen. Stat. § 1–38.

III. N.C. R. Civ. P. 41(a)

Finally, Hedgepeth challenges the trial court's ruling that any claims he could bring regarding the easement are barred by Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. On appeal, Lewis argues that such claims are time-barred because Hedgepeth sued Lewis to enforce his easement rights, voluntarily dismissed his claims against Lewis, and failed to refile them within one year. This argument is precluded by this Court's precedent.

Rule 41(a)(1) states that, "[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal." N.C. R. Civ. P. 41(a)(1). But this Court has held that the one-year period provided by Rule 41(a) is merely "an extension of time beyond the general statute of limitation rather than a restriction upon the general statute of limitation. In other words, a party always has the time limit prescribed by the general statute of limitation . . . ." *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 34, 681 S.E.2d 465, 470 (2009). Thus, "Rule 41(a) does not operate to *shorten* the applicable statute of limitations." *Id.* at 35, 681 S.E.2d at 470 (emphasis added).

As a result, Hedgepeth's claims would be barred by the voluntary dismissal and resulting failure to refile within one year only if those claims otherwise would be barred by some applicable statute of limitations. But, as explained above, we hold

that no statutes of limitations asserted by Lewis in this appeal would operate to bar a corresponding claim asserted by Hedgepeth. Accordingly, those claims cannot be barred by Rule 41(a).

In sum, we reject each of the three grounds on which Lewis defends the trial court's grant of summary judgment. We therefore reverse the trial court's order and remand for further proceedings consistent with this opinion.[1]

We note, however, that our ruling does not necessarily mean this case must go to trial. In its ruling, the trial court relied on controlling precedent from this Court that was later overturned by our Supreme Court. As a result, the trial court did not address other, alternative grounds for summary judgment, such as application of the general twenty-year prescriptive period for adverse possession. *See generally Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 635, 272 S.E.2d 374, 377 (1980) ("Where a second motion [for summary judgment] presents legal issues that are different from those raised in the prior motion, such motion would be appropriate."). Although this Court, in its *de novo* review of the ruling, could address these alternative grounds, *see Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 530, 723 S.E.2d 744, 751 (2012), we are reluctant to do so because the quality of the aerial photographs and other evidence in the record on appeal is remarkably poor, with

[1] Because we reverse the trial court's entry of summary judgment, we need not address Hedgepeth's argument that the trial court erred by refusing to consider one of the exhibits attached to Carlos Gomez's affidavit.

some photographs more closely resembling inkblots from a Rorschach test, rather than images of the purported easement. Accordingly, we leave it to the trial court, in the court's discretion, to determine how to proceed with disposition of this case on remand.

Conclusion

We reverse the trial court's order of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).