STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Gary Evans and Inis Evans,
Plaintiffs Below, Petitioners

vs) No. 11-1108 (Upshur County 09-C-09)

Dominick LaRosa,
Defendant Below, Respondent

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Gary Evans and Inis Evans, by counsel, Erika Klie Kolenich, appeal the Upshur County Circuit Court order dated June 29, 2011, granting the motion for summary judgment filed by respondent. Respondent Dominick LaRosa, by counsel Macel E. Rhodes, has filed his response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

This case involves two pieces of property totaling 133.28 acres (hereinafter "the property"). Petitioners allege that from 1994 through 2009, they were the only people to use or visit said property. In January of 2009, petitioners filed a civil complaint for adverse possession against respondent who did not record his deed for the property until March 4, 2009, although it had been conveyed to him in 1983. Respondent also sought and was granted an injunction to keep petitioners from posting "no trespassing" signs on the property. After the discovery deadline passed, respondent moved for summary judgment, which was granted. The circuit court found that petitioners never enclosed the property; never paid taxes on it; never built a permanent structure on it; never resided on it; never cultivated the property save planting approximately twenty trees and two to three bushels of ramps, all of which died; and never timbered, forested, or pastured livestock on the property. Petitioners did post several "no trespassing" signs in the name of their company with no telephone number, and did clean some debris. The circuit court also found that petitioners hunted on the property and asked some other hunters to leave the property. The circuit court further found that petitioners admitted that anyone driving by the property would not have been able to see any of their activities. The circuit court concluded that petitioners could not prove the requisite elements for adverse or actual possession of the property, and that their actions on the property were not open, visible, and notorious.

This Court reviews a circuit court's entry of summary judgment under a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo*

review, this Court applies the same standard for granting summary judgment that a circuit court must apply. *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005). Further, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). "'[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor.' *Anderson [v. Liberty Lobby, Inc.]*, 477 U.S. [242] at 252, 106 S.Ct. [2505] at 2512, 91 L.E.2d [202] at 214 [1986]." *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337.

Petitioners initiated this lawsuit based on a claim of adverse possession. This Court has stated as follows:

> "One who seeks to assert title to a tract of land under the doctrine of adverse possession must prove each of the following elements for the requisite statutory period: (1) That he has held the tract adversely or hostilely; (2) That the possession has been actual; (3) That it has been open and notorious (sometimes stated in the cases as visible and notorious); (4) That possession has been exclusive; (5) That possession has been continuous; (6) That possession has been under claim of title or color of title." Syllabus point 3, *Somon v. Murphy Fabrication & Erection Co.*, 160 W.Va. 84, 232 S.E.2d 524 (1977).

Syl. Pt. 2, *Blair v. Preece*, 180 W.Va. 501, 377 S.E.2d 493 (1988). Further, "[t]he burden is upon the party who claims title by adverse possession to prove by clear and convincing evidence all elements essential to such title." Syl. Pt. 2, *Brown v. Gobble*, 196 W.Va. 559, 474 S.E.2d 489 (1996).

On appeal, petitioners argue that they presented evidence which created genuine issues of material fact regarding each requisite element of adverse possession. Petitioners argue that they held the tract of land adversely and without the consent of the titled owner. They also argue that they possessed and used the property in several ways, including clearing brush, filling ruts and holes, constructing ditches, mowing, weedeating, planting ramps and chestnut trees, feeding wildlife, constructing hunting shelters, hunting, and hiking. Petitioners further argue that their possession and use of the land was open and notorious, as they posted "no trespassing" signs and installed property line barricades. Petitioners argue that their use of the land was exclusive, as they never saw anyone on the land besides trespassers, whom they asked to leave. Finally, petitioners argue that their use of the land was continuous from 1995 through 2009, and their use of the land began with the intent to claim the property, which they believed to be abandoned, as their own.

Respondent argues that petitioners did not meet the requirements for adverse possession. First, respondent argues that petitioners admit they never lived on the property, never built a permanent structure on the property, and never enclosed the property. While petitioners posted a "no trespassing" sign under their company name, respondent argues this gave no indication of ownership

or a claim of ownership and, therefore, petitioners did not meet the first prong of the test for adverse possession. Second, respondent argues that petitioners did not hold the land adversely or hostilely, as they did not even know who the true owner of the property was, and there was no physical evidence of possession by petitioners so as to alert respondent that an adverse claim was being made against his ownership. Respondent further argues that the area being mowed by petitioners was not visible to anyone else and only petitioners knew they were mowing it. Third, respondent argues that there was no actual possession of the property because planting two or three bushels of ramps and twenty chestnut trees, all of which died, is not cultivating the land when the land consists of 133.28 acres. Petitioners never took actual possession of the property in any way, as even their hunting shelters were only on the property for approximately three years. Fourth, respondent argues that petitioners failed to show that any possession of the property was open, visible, and notorious, as the only use for the property by petitioners was some hunting and the placement of some "no trespassing" signs which the respondent removed. Additionally, respondent argues that adjoining landowners requested his permission to hunt on the property and inquired into purchasing the property, proving that petitioners' possession was not open or notorious.

The circuit court found that petitioners failed to prove each required element of adverse possession. Specifically, petitioners never held the tracts adversely or hostilely, as they did not know the true owner of the property until at least 2007, and after respondent found out about petitioners' attempts to claim his land, he attempted to stop the process. Further, the circuit court found that the petitioners' possession was not open or notorious, and this Court agrees. Petitioners admit that a passerby would not have noticed their presence on the property, and that they did not erect any permanent structures. Moreover, the evidence shows that at least one neighbor contacted respondent for permission to enter the property, showing that others also failed to notice petitioners' entry onto the property. This Court finds no error in the circuit court's order granting summary judgment in favor of respondent, as petitioners have failed to prove each element required for adversely possessing respondent's property.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh