IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 12/08/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

RALPH REES, an unmarried man, Plaintiff/Appellant, v. SUMMIT INTERNATIONAL, LLC, an Arizona limited liability company, Defendant/Appellee.	1 CA-CV 10-0846 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV20080479 and P1300CV200901660

The Honorable Michael R. Bluff, Judge

VACATED AND REMANDED

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H A L L, Judge

¶1 Ralph Rees appeals from the superior court's judgment dismissing his complaint for quiet title against Summit

International, LLC (Summit). For the reasons discussed below, we vacate the superior court's judgment and remand for proceedings consistent with this decision.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The relevant facts are not disputed. In 1996, Rees acquired title to the "Ophyr Mining Claim." In 2005, Summit acquired title to the "Crowned King Mining Claim." The Ophyr Mining Claim and the Crowned King Mining Claim are separated by a narrow strip of land referred to by the parties as the Forest Service Sliver. At the time Rees acquired the Ophyr Mining Claim, the Forest Service Sliver was owned by the federal government.

¶3 In 1997, Rees applied to the United States Forest Service (Forest Service) to purchase the Forest Service Sliver. On June 29, 1999, the Forest Service replied to Rees' application and included a "collection agreement" setting forth conditions under which the Forest Service would determine the value of the land.

¶4 On September 13, 1999, the Forest Service sent Rees a "Bill for Collection" charging Rees $300.00 to purchase the Forest Service Sliver. Rees purchased a postal money order in the amount of $300.00 and mailed it to the Forest Service's San Francisco office on September 25, 1999. In October or early November 1999, Rees learned that the Forest Service had recorded

the deed with the Yavapai County Recorder's Office on October 19, 1999. Rees did not see the deed before it was recorded.

¶5 On October 16, 2009, Rees filed a complaint to quiet title in the Forest Service Sliver. He asserted that Summit's use of a dirt road on the Forest Service Sliver was adverse to his ownership rights.

¶6 In response, Summit moved to dismiss the complaint. Summit asserted that the dirt road it used to access the Crowned King property had been used by its predecessor-in-interest since 1982 and, under the tacking doctrine, its adverse use of the property therefore dated back to 1982. Summit also argued that Rees had acquired the Forest Service Sliver on September 2, 1999, the date the quit-claim deed was signed by the Forest Supervisor of the Prescott National Forest, and therefore Rees' filing of the complaint to quiet title was time-barred by Arizona Revised Statutes (A.R.S.) section 12-526(A) (2003), which precludes a property owner from bringing an action to quiet title more than ten years after the adverse use began.

¶7 In his response to the motion to dismiss and cross-motion for summary judgment, Rees first noted that Summit's adverse use of the Forest Service Sliver could not commence before he acquired the property because one cannot assert a claim of adverse possession against the United States. *See Sweeten v. United States*, 684 F.2d 679, 682 (10th Cir. 1982)

("The Supreme court has ruled that no title to public land can be obtained through adverse possession[.]") (citing *United States v. California*, 332 U.S. 19, 39-40 (1947)). Rees also argued that, although the Forest Supervisor signed the deed on September 2, 1999, the Forest Service did not intend to transfer title on that date because Rees did not mail payment for the land until September 25, 1999. Moreover, Rees "did not know that the Forest Service Sliver had been transferred to him until after the deed was recorded.

¶8 In its reply, Summit abandoned its claim that its adverse use of the Forest Service Sliver dated back to 1982. It asserted, however, that the "latest effective date" for the conveyance of title was September 30, 1999, "the date on which Rees' payment was received by the Forest Service." Summit further argued that Rees accepted "delivery" of the deed by "entering into the Collection Agreement and by making the payment" for the property. Finally, Summit asserted that, as the owner of a mining claim, it had an implied right to construct a road over public land to access its claim and that Rees knew of the dirt road and therefore took possession of the Forest Service Silver subject to that implied easement.

¶9 On April 12, 2010, the superior court granted Summit's motion to dismiss, finding that Rees failed to file his complaint within ten years of when the cause of action accrued

as required by A.R.S. § 12-526. The superior court stated, in relevant part:

> The Court is persuaded that the fact that the Forest Service signed the Deed on September 2, 1999 and that it was paid for on September 30, 1999, that is when the Forest Service received payment, that even though [] Rees did not have physical possession of the Deed, that is not required.

¶10 Rees then filed a motion for reconsideration, which the superior court denied. On October 29, 2010, the superior court entered a signed judgment granting Summit's motion to dismiss and awarding Summit $8,770.50 in attorneys' fees and $118.00 in costs.

¶11 Rees timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶12 Rees contends that the superior court erred by dismissing his complaint. Because he never received physical possession of the deed, Rees argues it was not "delivered," as required by statute, until it was recorded, and the statutory period for adverse possession therefore did not commence until that time. Summit, on the other hand, asserts that Rees held a legally enforceable interest in the title when his payment for the property was received by the Forest Service on September 30,

1999, and the time period for adverse possession therefore began on that date.

¶13 Summit attached extrinsic evidence to its motion to dismiss and we therefore treat the motion to dismiss as a motion for summary judgment. *See Dube v. Likins*, 216 Ariz. 406, 417 n.2, ¶ 34, 167 P.3d 93, 104 n.2 (App. 2007). "A motion for summary judgment should be granted if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Smith v. Cigna HealthPlan of Arizona*, 203 Ariz. 173, 176, ¶ 8, 52 P.3d 205, 208 (App. 2002) (quoting Ariz. R. Civ. P. 56(c)). "We review de novo a grant of summary judgment, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

¶14 Although the parties focus primarily on the issue of delivery of the deed in their respective briefs, the determinative legal issue before us is when the statutory period for adverse possession commenced. Pursuant to A.R.S. § 12-526(A), "[a] person who has a cause of action for recovery of any lands . . . from a person having peaceable and adverse possession thereof . . . shall commence an action therefor within ten years after the cause of action accrues, and not afterward."

¶15 "The elements of adverse possession are an actual and visible appropriation of land commenced and continued under a claim of right inconsistent with and hostile to the claim of another for a period of 10 years." *Berryhill v. Moore*, 180 Ariz. 77, 83, 881 P.2d 1182, 1188 (App. 1994). The requirement that the adverse use be open and notorious ensures that the "true owner" is placed "on notice that his land is held under adverse claim of ownership." *Knapp v. Wise*, 122 Ariz. 327, 329, 594 P.2d 1023, 1025 (App. 1979).

¶16 "Claims of adverse possession are disfavored and the claimant bears the burden of proof." *Stat-O-matic Retirement Fund v. Assistance League of Yuma*, 189 Ariz. 221, 222, 941 P.2d 233, 234 (App. 1997). "There are no equities favoring the establishment of an adverse possession claim." *Berryhill*, 180 Ariz. at 83, 881 P.2d at 1188.

¶17 Guided by these principles, we first consider when the cause of action "accrued." "As a general matter, a cause of action accrues . . . when one party is able to sue another." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 589, 898 P.2d 964, 967 (1995). Under the traditional construction of that rule, a statutory period of limitations "begins to run when the act upon which legal action is based took place, even though the plaintiff may be unaware of the facts underlying his or her claim." *Id.* at 589, 898 P.2d at

967. To mitigate the harshness the traditional rule sometimes imposed, courts developed the "discovery rule" exception. *Id*. "Under the 'discovery rule,' a plaintiff's cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause." *Id*. "The rationale behind the discovery rule is that it is unjust to deprive a plaintiff of a cause of action before the plaintiff has a reasonable basis for believing that a claim exists." *Id*.

¶18 Given the circumstances here, in which the parties do not dispute that the deed was never physically delivered to Rees, Rees did not receive constructive notice that the deed had been fully executed until it was recorded on October 19, 1999, and the passage of time between Rees' tender of payment and the recordation of the deed was a mere twenty days, we conclude Rees did not know or have reason to know that he was the lawful owner of the Forest Service Sliver with the standing to bring a claim to recover the land until the recording date. Therefore, the superior court erred when it found that more than ten years had elapsed since Summit began adversely using the Forest Service Sliver and concluded that Rees was time-barred from filing a claim for quiet title.

¶19 Because we reverse the superior court's grant of summary judgment, we vacate its award of attorneys' fees to

Summit. Accordingly, we need not address Rees' claim that an award of attorneys' fees under A.R.S. § 12-1103 (2003) was erroneous.

¶20 Finally, we decline Rees' invitation to enter summary judgment in his favor. Summit argued in the superior court that Rees took title to the Forest Service Sliver subject to existing mining easements. The superior court never reached this issue and we leave the matter to the court to resolve in the first instance.

CONCLUSION

¶21 For the foregoing reasons, we vacate the superior court's entry of summary judgment in favor of Summit and remand for proceedings consistent with this decision.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
JON W. THOMPSON, Judge