DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, Judge

CA06-71

December 20, 2006

PAUL MCCAIN APPELLANT	AN APPEAL FROM CRITTENDEN COUNTY CIRCUIT COURT [NO. CV2004-379]
v.	HONORABLE VICTOR HILL,
DANA SULCER, CLIFF SULCER, AND BART TURNER APPELLEES	CIRCUIT JUDGE AFFIRMED

Appellant Paul McCain appeals from an order that denied his adverse-possession claim to 4.5 acres of farm land; enjoined him from entering the land; and awarded appellee Bart Turner treble damages for appellant's destruction of his crop. Appellant argues that the trial court erred in 1) ruling that he failed to prove adverse possession of the 4.5 acres; 2) applying, as res judicata or collateral estoppel, a decision rendered by another court in a prior case; and 3) allowing appellees to pursue a trespass cause of action when they had been out of possession and failed to prove ownership of the property. We affirm.

Appellees Cliff and Dana Sulcer, who are brothers, are the record owners of the 4.5-acre tract. The property is part of a larger, 320-acre parcel—the Northern half of Section 12, Township 7 North, Range 8 East, Crittenden County—that has been owned by the Sulcer

family since at least 1925. From 1966 to 1995, Cliff and Dana's grandmother, Alice Sulcer, owned the Northern half of Section 12 (less a one-acre lot deeded to a third person). According to Cliff, his father, Dana, Sr., farmed that land until his death in 1988. Thereafter, from 1989 until 1995, Alice Sulcer leased the 319 acres in the Northern half of Section 12 to appellee Bart Turner, a farmer. Following Mrs. Sulcer's death, Cliff and Dana, having inherited the property, continued leasing it to Turner through 2003/2004.

According to Turner, he did not initially farm the 4.5 acres even though it was included in the property that he leased. However, a Mr. Louis Steve Griffen testified that, from 1968 to 1977, his father farmed the 4.5 acres, along with several acres to the west in Section 11, although there was no indication that the senior Griffen held title to either parcel. In January 1977, Louis Griffen acquired a deed to the land in Section 11 from the record titleholder (a Mrs. Rosenberg) and thereafter farmed that land, as well as the 4.5 acres, until 1985. Louis Griffen testified that he never held title to or paid taxes on the 4.5 acres and that he mistakenly thought he owned it but that he did not claim the tract adversely.

In January 1986, Griffen deeded his land in Section 11 to Hasselle and Mike McCain, the brothers of appellant, Paul McCain, who then passed title by deed to their business entity, McCain Land Co. However, despite his lack of record title, Griffen also quitclaimed the 4.5 acres to McCain Land Co. As a result, McCain Land Co. possessed a quitclaim deed to property that was already owned by Alice Sulcer. These overlapping deeds led to two lawsuits filed prior to the present action. In 1988, Alice sued Hasselle and Mike McCain, alleging that they wrongfully entered into a portion of the 4.5 acres and planted soybeans.

The brothers answered and admitted possession of the 4.5 acres, but they denied Alice's other allegations. The action was dismissed for want of prosecution on May 19, 1992. Thereafter, in 1994, McCain Land Co. sold its interest in Section 11; its interest in the 4.5 acres was not conveyed.

In 2003, Cliff and Dana Sulcer sued McCain Land Co., seeking to quiet title to the 4.5 acres. They asserted that the 1986 deed from Louis Steve Griffen to McCain Land Co. transferred no interest in the 4.5 acres because Griffen had no interest to convey. McCain Land Co. did not answer or appear, and a default judgment was entered on May 15, 2003, declaring Cliff and Dana to be the owners of the 4.5 acres.

Despite the above mentioned activity on the 4.5 acres by McCain Land Co. and the litigation by the Sulcer family, appellant contends that it was he who had possession of the 4.5 acres from 1986 until the present day. According to him, in the spring of 1986, he was renting/farming McCain Land Co.'s property in Section 11, and he was farming the 4.5 acres in Section 12. He admits that he had no title to the 4.5 acres, never paid taxes on it, and never actually bought or leased the land. However, he said that he "took [the land] over" from his brothers. He testified that his brothers "walked off and left" the 4.5 acres, apparently because they questioned the title to the land and did not want to spend any money on it. He said that they told him, "do whatever you want to," and he then "took the land over." It is not clear from appellant's testimony when these conversations occurred, but he testified that his brothers "threw in the towel" in 1988. Appellant also testified that, when McCain Land Co.

sold its property in Section 11 in 1994, he told his brothers "to make sure and not sell the four and a half acres because I owned that."

According to appellant, he continued to farm the 4.5 acres until 1993. Thereafter, in 1994 and 1995, he leased it to another farmer, Paul O'Neill. Then, beginning in 1996, appellant leased the 4.5 acres to Bart Turner—the same man to whom the Sulcer family had been leasing the entire Northern half of Section 12 since 1989. Turner testified that he knew he was paying rent to both parties but continued to do so because he did not want any trouble and such a small amount of land was involved. However, once Cliff and Dana were declared owners of the 4.5 acres in the 2003 quiet-title action, Turner said he no longer planned to pay rent to appellant. Turner planted a crop on the tract in the 2004 season, and when appellant, who continued to assert a claim to the property, was unable to negotiate with Turner to buy the growing crop, appellant plowed under the crop. According to Turner, appellant's action cost him approximately $600.

After the crops were destroyed, Cliff and Dana Sulcer and Bart Turner sued appellant on July 7, 2004. The complaint asked that appellant be restrained from coming onto the property and that Turner be awarded treble damages for appellant's intentional destruction of his crop. Appellant answered and counterclaimed, asserting that he was the owner of the 4.5 acres by virtue of adverse possession. A trial was conducted on May 11, 2005, and the trial court entered an order in favor of the Sulcers and Bart Turner. The court found that appellant never intended to hold the land adversely to his brothers, whom he believed to be the true owners; that any use appellant made of the land before his brothers "threw in the

towel" in 1988 was permissive; and that, in fact, appellant's use was permissive until 1994, when the brothers abandoned the land and appellant began leasing it to others. The court also found that appellant's actions regarding the land were not notorious but were covert and surreptitious; that appellant's use of the 4.5 acres was not exclusive given that the Sulcers rented the same land to Turner; and that appellant had never paid taxes on the land nor held color of title. Based on these factors, the court ruled that appellant's claim for adverse possession must fail. The court granted the Sulcers' request for injunctive relief and awarded Turner $1785 in treble damages (three times $595). Appellant now appeals from that ruling.

Equity cases involving adverse possession are reviewed de novo on appeal; however, we will not reverse the trial court's findings unless they are clearly erroneous. *See White River Levee Dist. v. Reidhar*, 76 Ark. App. 225, 61 S.W.3d 235 (2001). A finding of fact is clearly erroneous when, although there is evidence to support it, the appellate court is left with the definite and firm conviction that a mistake has been committed. *Id*. Discrepancies in the evidence are matters involving credibility for the trier of fact to resolve. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004).

In order to establish title by adverse possession, a plaintiff has the burden of proving that he (or his predecessors in title) has been in possession of the property in question continuously for more than seven years and that the possession was visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *Id*. Whether possession is adverse to the true owner is a question of fact. *Id*. In 1995, the General Assembly added, as a requirement for proof of adverse possession, that the claimant prove

color of title and payment of taxes on the subject property or contiguous property for seven years. *See* Act 776 of 1995; Ark. Code Ann. § 18-11-106 (Repl. 2003); *Rice v. Welch Motor Co.*, ___ Ark. App. ___, ___ S.W.3d ___ (Apr. 19, 2006). However, if the claimant's rights to the disputed property vested before the law took effect in 1995, he need not comply with the statutory change. *See Schrader v. Schrader*, 81 Ark. App. 343, 101 S.W.3d 873 (2003).

For his first point on appeal, appellant argues that the trial court erred in ruling that he did not prove adverse possession of the 4.5 acres. He admits that he cannot show compliance with Act 776 of 1995, and he does not argue that any possession by the Griffen family should be tacked on to his own. Rather, he claims that he adversely possessed the 4.5 acres during the time of his own alleged usage, beginning in 1986.

Although appellant points to several items of proof to support his claim that he, rather than the Sulcer family, possessed the 4.5 acres, the evidence was in conflict on virtually all of these points. Appellant cites his own testimony that he farmed the 4.5 acres between 1986 and 1993. However, the testimony of an interested party is never undisputed. *See Courtney v. Courtney*, 296 Ark. 91, 752 S.W.2d 40 (1988). Further, appellant's testimony is belied by his brothers' admission in the 1988 lawsuit that *they* possessed the 4.5 acres. The brothers' admission of their own possession additionally supports the trial court's determination that any use that appellant made of the land was permissive rather than adverse. *See Cooper v. Cooper*, 251 Ark. 1007, 476 S.W.2d 223 (1972) (holding that, as between parties holding parental and filial relations, the possession of the land of one by another is presumptively permissive and amicable).

Appellant further states that Bart Turner, in his testimony, agreed that appellant could have been farming the 4.5 acres in 1989. However, Turner was equivocal, first stating that he thought Paul O'Neill was farming the tract in 1989, then stating that it could have been appellant but that he did not remember. Appellant also points to Paul O'Neill's testimony that he rented the tract based on an inquiry from appellant. However, O'Neill said that he had no knowledge as to whether appellant, in orally leasing the land to him, represented McCain Land Co., nor did he know whether the crop rental that he paid went to McCain Land Co.

Additionally, appellant argues that the Sulcers never had possession of or exercised any control over the 4.5 acres until the present lawsuit was filed and that Cliff Sulcer admitted in 1997 that the tract belonged to appellant. However, this argument is not well taken. Cliff Sulcer testified that he could not recall telling appellant that the Sulcers did not claim ownership of the land. Moreover, even though there was evidence that the Sulcer family had not physically been on the property at issue for some time, they held record title and, therefore, constructively possessed the land. Further, they defended their ownership of it: Alice Sulcer filed a trespass/ejectment lawsuit involving the tract in 1988, and Cliff and Dana Sulcer filed a suit to quiet title to the property in 2003. Additionally, the Sulcer family rented the property at issue to a third person. The record contains numerous written leases, beginning in 1989, of the Northern half of Section 12 to Bart Turner.

There was also evidence to support the trial court's determination that any use of the land by appellant was not exclusive. Witnesses testified that each party leased the same 4.5 acres to third persons. Where both parties exercise acts of ownership, the adverse claimant's

use may not be exclusive. *See, e.g., Cooper*, *supra*; *see also* 3 AM. JUR. 2D *Adverse Possession* § 71 (2d ed. 2002) (recognizing that the requirement of exclusive possession is not satisfied if there is mixed or "scrambled" possession such as where occupancy is shared with the owner or with the agents or tenants of the owner).

Considering the proof adduced at trial, and resolving conflicts in favor of the appellees, we cannot say that the trial court's finding that appellant failed to prove adverse possession of the 4.5 acres is clearly erroneous.

Appellant argues next that, in filing their quiet-title action in 2003, the Sulcers did not name appellant as a party. Therefore, he claims, the Sulcers could not use the 2003 default judgment for collateral estoppel or res judicata purposes to resolve the issue of whether appellant owned the 4.5 acres.

Our reading of the trial court's ruling does not indicate that the court accorded a preclusive effect to the 2003 quiet-title judgment. Rather, the court made a factual determination, based on the evidence at trial, that appellant failed to prove the elements of adverse possession. We therefore see no reason for reversal on this point.

Appellant's final argument is stated as follows: "The trial court erred in allowing Appellees to bring a cause of action for trespass against Appellant since Appellees had been out of possession of the property at issue for more than seven (7) years and failed to prove ownership of said property." Appellant cites Ark. Code Ann. § 18-61-101 (Repl. 2003), which contains the seven-year statute of limitations applicable when a person seeks to recover land from an adverse claimant. He appears to argue that, because he was in

possession of the 4.5 acres beginning in 1986, the Sulcers were required to bring their lawsuit against him within seven years of that time.

We first note that the trial court did not rule on this aspect of appellant's argument. If matters are to be considered on appeal, they should be brought to the attention of the trial court for a ruling. *See Britton v. Floyd*, 293 Ark. 397, 738 S.W.2d 408 (1987). In any event, appellant misunderstands the statute. The Sulcers were the record owners of the property, and appellant was the adverse claimant; it was therefore appellant's burden to show that he adversely possessed the property for seven years. Because he failed to do so, the Sulcers' record title stands.

Appellant also contends that the Sulcers did not "deraign title" from the government and therefore did not prove ownership of the land.[1] *See Jones v. Brooks*, 233 Ark. 148, 343 S.W.2d 99 (1961) (stating that, in actions for quiet title, ejectment, and continued trespass, the plaintiff must deraign title from the sovereign). Again, the trial court did not rule on this point; therefore, we do not address it. *Britton*, *supra*; *see also Barclay v. Tussey*, 259 Ark. 238, 532 S.W.2d 193 (1976) (holding that, where a defendant goes to trial without first notifying the trial court that he objected to the plaintiff's failure to deraign title, the defendant waived that objection).

Affirmed.

BIRD and GRIFFEN, JJ., agree.

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[1] The Sulcers produced deeds as far back as 1925, reflecting that their great-grandfather, W.B. Rhodes, acquired the property at issue from the Tennessee Joint Stock Land Bank.