

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001575-MR

STEPHEN R. NICELY AND
JEFFREY S. NICELY

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 11-CI-00981

CLAUDIA HARMELING

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON, JONES, AND VANMETER, JUDGES.

VANMETER, JUDGE: Stephen R. Niceley and Jeffrey S. Niceley appeal from the order of the Kenton Circuit Court granting Claudia Harmeling's motion for summary judgment and denying the Niceleys' motion for summary judgment, - thereby quieting title via adverse possession to a strip of land between the

properties owned by Harmeling and the Niceleys. For the following reasons, we affirm.

This case involves a dispute concerning ownership of a wedge-shaped strip of land between two properties: 11 Price Avenue, a commercial property owned by the Niceleys and 13 Price Avenue, a residential property owned by Harmeling. Both properties are rectangular and share a property line, which is at the back of the Niceley property and side of the Harmeling property. The contested wedge of property runs the length of Harmeling's driveway, with a width beginning at 66 inches wide and tapering to 30 inches wide. Harmeling has owned her property since 1984. In 1985, the Niceleys' predecessors in title, Hamann and Cain, erected a fence to separate the two properties. However, this fence was not built on the actual property line, but rather four feet into the 11 Price Ave. plot, thereby placing this wedge-shaped piece of the property on the same side of the fence as Harmeling's property. This fence sat approximately five feet away from Harmeling's driveway, and ran the length of the driveway. In 1997, Kidd, another previous owner of 11 Price Ave., had the land surveyed and placed wooden stakes along the actual property line on Harmeling's side of the fence. Although Harmeling saw the stakes and asked Kidd what they were, she was never actually informed that the stakes marked the true boundary as determined by the survey, nor did Kidd make any attempt to regain that strip of land or to stop Harmeling from her continued use of the wedge. Harmeling testified that she did not know the original fence was not on the exact property line until the 1997 survey

conducted by Kidd, which was thirteen years after purchasing her property and twelve years after the fence was built. Harmeling has consistently used and maintained this strip of land as a garden and part of her driveway since 1985, when the fence was erected.

In 2009, the Niceleys purchased the property from Kidd, at which point Harmeling told them that the fence was the property line. In 2010, the Niceleys conducted a second survey of land, which determined the same boundary as the 1997 survey. When the Niceleys filed an application with the city of Erlanger to complete the fence on all other sides of the property, they were informed that the original fence was considered a nonconforming legal structure that would have to be moved to the actual property line if the fence was altered in order to comply with modern Erlanger zoning code. In 2011, the Niceleys moved the fence onto the actual property line, thus moving the wedge of land from Harmeling's side of the fence to the Niceley side of the fence. Harmeling then brought suit claiming adverse possession of the wedge. The Kenton Circuit Court granted Harmeling's summary judgment motion and quieted title to this strip. This appeal followed.

CR¹ 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v.*

¹ Kentucky Rules of Civil Procedure.

Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed de novo. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

The Niceleys argue the trial court erred in denying their motion for summary judgment and in granting Harmeling's motion for summary judgment because Harmeling did not prove all elements of adverse possession by clear and convincing evidence. They make three arguments:² (1) a genuine issue of material fact remains as to whether Harmeling's possession of the property was "actual," (2) a genuine issue of material fact remains as to whether the possession was "hostile," and (3) the lower court's ruling is inconsistent with prior case law, *United Hebrew Congregation v. Bolser*, 244 Ky. 102, 50 S.W.2d 45 (1932). We disagree and affirm the lower court's decision.

The elements of adverse possession are well-established: (1) possession must be hostile and under claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous. *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955). The claimant has the burden to prove the elements of adverse possession by clear and convincing evidence. *Moore v.*

² Harmeling argues in her brief that the Niceleys may only appeal the finding of the lower court in regards to the element of hostility as this was the specific issue cited on the Court of Appeals "Civil Appeals, Prehearing Statement" form filed with the court. However, we will address all issues the Niceleys raise in their brief, since the trial court made findings on all five elements of adverse possession.

Stills, 307 S.W.3d 71, 78 (Ky. 2010). Here, elements three, four, and five are undisputed.

First, the Niceleys argue a genuine issue of material fact remains as to whether Harmeling's possession of the wedge was "actual." The Niceleys rely on *Moore v. Stills* to support the claim that "it is not enough [to reduce a claim to actual possession] that one merely stretch one's boundary to include property beyond one's deed." *Id.* at 78. However, the court in *Moore* stated that "actual" possession is "evidenced by such use and occupation of the claimed property as to establish a clear dominion over it. *Id.* In this case, a fence separated the rest of the Niceley property from Harmeling's property, thus limiting access to Harmeling. Harmeling exclusively used that land for her own purposes, which included a new driveway and a flower garden. We agree with the trial court that Harmeling took actual possession of the strip of land after the fence was built in 1985, and she used that land in a manner consistent with the rest of her property sufficient to show actual possession.

Second, the Niceleys argue a genuine issue of material fact remains as to whether Harmeling's possession was hostile. The possession must be "hostile and under a claim of right." *Tartar* at 152. To address whether the claim of right exists, the possessor "must have either some color of title that will show the extent of the claim or there must be definite boundary." *Appalachian Reg'l Healthcare, Inc. v. Royal Crown Bottling Co.*, 824 S.W.2d 878, 880 (Ky. 1992). If one is in adverse possession of a portion of land without color of title, he must "indicate the

extent of his claim by well-defined . . . boundaries.” *Id.* In this case, the original fence created a definite boundary separating this contested wedge of land from the rest of the Niceley property and placing it on Harmeling’s side of the fence. Therefore, although Harmeling did not have color of title, this strip of land was on her side of a well-defined boundary, and thus satisfies the requirement for claim of right.

To address the more contested issue of hostility, the Niceleys argue that even if Harmeling did actually possess the wedge of land under claim of right, because she did so with the implied permission of the previous owner, her possession cannot be hostile. Hostile possession means possession that “is without permission of the one legally empowered to give possession, usually the owner.” *Henninger v. Brewster*, 357 S.W.3d 920, 927 (Ky. App. 2012). If one is given permission by the property owner to enter or possess the land, then he “does not possess the property hostile to that owner’s interest.” *Id.* at 926-27 (citing *Cowherd v. Brooks*, 456 S.W.2d 827, 829 (Ky. 1970)). A property owner's mere knowledge of a claimant's adverse possession can be relevant; however, that alone will not destroy hostility. *Henninger*, 357 S.W.3d 920. “To say that an owner's knowledge that a third party is adversely holding possession of property, standing alone, negates the ‘hostile’ element finds no support in Kentucky jurisprudence.” *Id.* at 930. Harmeling testified she only asked Kidd about the wedge of land twice, and in limited scope: once about her flowers growing through the fence and once about repaving her driveway. Kidd either did not answer at all or merely

responded that he did not mind flowers growing into the fence. No other conversations between Kidd and Harmeling regarding permission to use the wedge of land occurred. Without some other evidence to show Kidd granted permission to Harmeling for her continued use of his land, permission cannot be implied by his mere knowledge that she was using his property.

In order for possession to be adverse, a possessor must “openly evince a purpose to hold dominion over the property with such hostility that will give the non-possessory owner notice of the adverse claim.” *Appalachian Reg’l Healthcare*, 824 S.W.2d at 880. Neither party contests that when the Niceleys bought the property from Kidd, Harmeling told them that the fence was the property line, thus evincing her intent to possess this wedge of land. “[T]he character of the property, its physical nature and the use to which it has been put,” determines the type of action necessary by the claimant “to put the true owner on notice that a hostile claim is being asserted.” *Ely v. Fuson*, 297 Ky. 325, 329, 180 S.W.2d 90, 92 (1944). Harmeling used that wedge of land for her own purposes, including a garden and driveway, which were not in the interest of the Niceleys or Kidd. Additionally, her use of the contested property is consistent with the size and character of the land, as well as with the rest of her property. Therefore, without permission from Kidd, Harmeling’s use of the land for her own purpose to the exclusion of others satisfies the requirement for hostile possession.

Third and finally, the Niceleys argues that the lower court’s decision is inconsistent with *United Hebrew Congregation v. Bolser*, 244 Ky. 102, 50 S.W.2d

45 (1932). In *Bolser*, the court stated that when “one claims under color of title and is in actual possession of a part of the land within his well-defined boundary, the law, by construction, carries his possession to the full extent of his boundary, except that as against actual adverse possession this rule will not prevail[.]” *Id.* at 108, 50 S.W.2d at 47. The Niceleys contend that because they were in actual possession of the substantial majority of the backyard of 11 Price Avenue, the law carries their possession to the full extent of the property line, including the contested wedge of land. Although the court in *Bolser* held that a “possession by permission or license from the owner is not adverse and cannot ripen into title, no matter how long continued or however exclusive it may be,” *Id.* at 108, 50 S.W.2d at 47, the case at bar is distinguished from *Bolser* in two important ways.

First, unlike the current case, in *Bolser*, no fencing existed on the property line when appellees bought and entered upon their property. *Id.* at 107, 50 S.W.2d at 46-47. The Niceley and Harmeling properties were separated by a fence, and the contested strip of land was on Harmeling’s side of the fence, not the Niceleys’. Second, in *Bolser*, both property owners knew the true location of their division property line and the respective widths of their adjoining lots. *Id.* at 105, 50 S.W.2d at 46. Only after a second survey, commissioned by the Niceleys in spring of 2010, was Harmeling officially informed the fence was not on the property line. Since an actual fence separated the properties, and Harmeling did not know the true boundaries of her property, *Bolser* is therefore distinguishable from the case at bar.

As discussed above, Harmeling meets all five of the elements required for a showing of adverse possession as a matter of law. Accordingly, we affirm the trial court's order granting Harmeling's motion for summary judgment, denying Niceleys' summary judgment, and quieting title to this strip of land.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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