

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0963

LEBLANC LAND COMPANY, LLC, LOUIS P. LEBLANC, JR.,
AND MERRILL LEBLANC CORNAY

VERSUS

THE DOW CHEMICAL COMPANY, CLIFTON ASSUMPTION, LLC,
CLIFTON LAND CORPORATION, CLIFTON MINERALS, LLC,
LANDSOURCE INCORPORATED AND CHAD A. MORRIS

JEW
RHP, by JEW
WFK

Judgment Rendered: APR 10 2013

Appealed from the
23rd Judicial District Court
In and for the Parish of Assumption, Louisiana
Trial Court Number 30,859

Honorable Aivin Turner, Jr., Judge

Kenneth H. Hooks, III
H. Price Mounger, III
Charles G. Blaize, Jr.
Baton Rouge, LA
and
Lee J. Amedee, III
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Defendant – The Dow
Chemical Company

BEFORE: PARRO, WELCH, and KLINE,¹ JJ.

¹ Hon. William F. Kline, Jr., retired, is serving as judge *ad hoc* by special appointment of the Louisiana Supreme Court.

WELCH, J.

Plaintiffs, LeBlanc Land Company, LLC, Louis P. LeBlanc, Jr., and Merrill LeBlanc Cornay, appeal a judgment granting The Dow Chemical Company's motion for an involuntary dismissal and dismissing their petitory action with prejudice. We affirm.

BACKGROUND

At issue in this lawsuit is the ownership of approximately 11.6 acres of land in Assumption Parish. On March 19, 2008, plaintiffs filed a lawsuit against Dow, Dow's predecessor in title, and other defendants, asserting ownership of the disputed tract and seeking to be restored in possession of the property. In the petition, plaintiffs asserted that in 2007, Dow began extensive soil evacuation operations on the 11.6 acre tract to construct a pond to transfer and store up to 3 million gallons of brine water. Plaintiffs further alleged that Dow's predecessor in title, improperly sold their 11.6 acre tract to Dow. They asked the court to order Dow's eviction from the property and sought to recover damages to evaluate and remediate any contamination or pollution impacting or threatening their land as a result of the storage of brine water on their property. In an amended petition, plaintiffs asserted they were in possession of the disputed tract.

Dow filed an exception of improper cumulation of actions, submitting that pursuant to La. C.C.P. art. 3657,² plaintiffs' assertion of ownership converted the action to a petitory action. The trial court sustained the exception and converted the action to a petitory action, deeming the possessory action waived.

The disputed tract is located between a tract of land owned by plaintiffs (referred to herein as the "LeBlanc tract") and a tract of land owned by Dow's predecessor in title, Clifton Land Corporation (referred to herein as "the Clifton

² Louisiana Code of Civil Procedure article 3657 provides that a plaintiff may not cumulate the petitory and possessory actions in the same lawsuit or plead them in the alternative, and when he does so, he waives the possessory action.

tract"). The LeBlanc tract is bounded on the east by the Clifton tract and the Clifton tract is bounded on the west by the LeBlanc tract.

Prior to trial, plaintiffs acknowledged in a joint pre-trial order that Dow purchased the disputed tract from Clifton Land Corporation by act of sale dated July 28, 2005. Plaintiffs claimed that they had become owners of the disputed tract by virtue of acquisitive prescription prior to the date of Dow's purchase. They asserted that their possession of the disputed tract had been continuous, uninterrupted, peaceable, public, and unequivocal for over fifty years.

A three-day bench trial was held, during which plaintiffs offered the testimony of three farmers, the testimony of Dow's general manager in charge of a construction project undertaken by Dow on the disputed tract after its purchase, and the testimony of one of the owners of the LeBlanc tract. Plaintiffs sought to establish that they had been in possession of the disputed property for more than the ten or thirty years necessary to acquire title by acquisitive prescription pursuant to La. C.C. articles 3475 and 3486. To support their claim, plaintiffs relied principally on the farming operations conducted by farmers on the disputed tract and the presence of oil and gas wells on the LeBlanc tract. The farmers testified that for years those farming the two adjoining tracts believed that a ditch in the cane field separated the two tracts and that the farmers farming the LeBlanc tract farmed up to that ditch. The farmers identified the disputed tract on an aerial photograph of the property showing the individual fields or blocks of farmed or fallow land. The plaintiffs did not introduce evidence of an actual survey showing the location of the disputed property, and no expert testified regarding the dimensions of the disputed tract or the exact location of the disputed property.

At the close of plaintiffs' case, Dow moved for an involuntary dismissal pursuant to La. C.C.P. art. 1672(B) on the basis that plaintiffs failed to prove they owned the property by a preponderance of the evidence. Dow pointed out that

plaintiffs did not introduce a survey showing the property described in their title was actually ascertainable. They further urged that plaintiffs' entire case was premised on precarious possession up to a ditch; however, this ditch was not identified in a property description in anyone's chain of title, it was never referenced on any survey, and the exact location of the ditch was not identified with coordinates or by the testimony of a surveyor or other expert. In short, Dow urged, there was no evidence to determine the location of the ditch in order to determine the extent of the plaintiffs' possession. Dow further contended that even if the farming operations relied on by plaintiffs to establish possession were open and obvious, they could not establish the requisite thirty-years possession dating back to the 1950s, because there was an interruption of prescription by acknowledgment in 1979, when the plaintiffs signed a right of way document, to which a survey was attached, showing that the Clifton tract had a frontage of 959 feet.

The trial court agreed with Dow's position and granted the motion, dismissing plaintiffs' lawsuit with prejudice. In lengthy written reasons for judgment, the trial court observed that the evidence demonstrated that the LeBlanc tract, the Clifton tract, and the disputed tract have all been used for sugar cane farming for many decades. The trial court found that plaintiffs failed to establish that they had continuous, uninterrupted, peaceable, public, and unequivocal possession of the disputed tract for the requisite amount of time to acquire ownership by acquisitive prescription of ten or thirty years. Because of its ruling on the possession element, the court stated it was unnecessary to discuss the just title and good faith elements of ten year acquisitive prescription, although it had indicated earlier that it was undisputed that the parties had overlapping titles to the disputed tract. The trial court found the following flaws in plaintiffs evidence: (1) although some of the farmers believed a ditch served as a boundary between the

Leblanc and Clifton tracts for their farming operations, the evidence did not establish that the owners had that same understanding; (2) the ditch the tenant farmers claimed constituted the boundary was not staked by the plaintiffs, and in fact, the testimony established that the ditch was not different in any way from all the other ditches that existed in the cane fields; (3) there was no survey or other evidence to establish that the location of the ditch could be ascertained to determine the extent of the possession; and (4) even if the court was to determine that the farmers possessed on behalf of the plaintiffs up to the ditch, the ditch was not identified in terms of its coordinates, it was not referenced in plaintiffs' chain of title, and its location was thus uncertain. Finally, the court concluded that the farming in this case was not sufficient adverse possession to support a claim of acquisitive prescription because there were no external signs giving notice that the plaintiffs' tenants were claiming the land for their landlord, observing that there were no fences, stakes, roads, or any clear signs giving notice to the public that the tract was being claimed for the plaintiffs through their tenants. Instead, the trial court found, the evidence showed that the adjoining tracts and the disputed tract appeared to be and were in fact farmed as one contiguous tract, as the LeBlanc and Clifton tract farmers testified that they shared equipment between the two farms.

Alternatively, the trial court concluded that even if it was to find that plaintiffs' possession through the tenant farmers was sufficient to satisfy the requirements of acquisitive prescription, prescription had been interrupted in 1979 by virtue of a right-of-way agreement executed by plaintiffs in favor of Union Carbide, thereby preventing the accrual of either ten or thirty year acquisitive prescription. The court noted that a map was filed in the public records, along with the right-of-way, showing that the Clifton tract contained 959 feet frontage and found the document evidenced the LeBlanc tract owners' belief that Clifton Land Corporation owned the disputed tract, not the plaintiffs. The court concluded that

the right-of-way agreement constituted an acknowledgment of Clifton Land Corporation's ownership of the disputed tract, which prevented the accrual of acquisitive prescription for as long as the acknowledgment remained on the public records.

This appeal, taken by plaintiffs, followed.

DISCUSSION

Louisiana Code of Civil Procedure article 1672(B) provides the basis for an involuntary dismissal after the plaintiff has completed the presentation of his evidence in a lawsuit tried by a trial court without a jury. In determining whether an involuntary dismissal should be granted, the appropriate standard is whether the plaintiff has presented sufficient evidence on his case-in-chief to establish his claim by a preponderance of the evidence. **Robinson v. Dunn**, 96-0341 (La. App. 1st Cir. 11/8/96), 683 So.2d 894, 896, writ denied, 96-2965 (La. 1/31/97), 687 So.2d 410. In making this determination, a trial court is free to evaluate the evidence and render a decision based on the preponderance of the evidence, without any special inferences in favor of the party opposed to the motion. Id. Proof by a preponderance of the evidence means that, taking the evidence as a whole, the evidence shows the fact or cause sought to be proved is more probable than not. Id.

A judgment of involuntary dismissal based on La. C.C.P. art. 1672(B) should not be reversed on appeal in the absence of manifest error. **Robinson**, 96-0341, 683 So.2d at 896. In applying the manifest error-clearly wrong standard of review, an appellate court does not determine whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Banks v. Industrial Roofing & Sheet Metal Works, Inc.**, 96-2840 (La. 7/1/97), 696 So.2d 551, 556. If the factfinder's findings are reasonable in light of the record reviewed

in its entirety, a court of appeal may not reverse, even if convinced that had it been the trier of fact, it would have weighed the evidence differently. Id.

The record reflects that in 1931, by virtue of two acts of sale, Dr. Henry LeBlanc purchased four tracts of land in Assumption Parish. One of those tracts is a 120 acre tract described in the acts of sale as measuring ten arpents in width by fourteen arpents in depth; bound North by the second described tract and lands of Ulysse Boudreaux, East by lands of Estate of C.C. Clifton, South by lands of Armelise Pltg. Co., and West by lands of Thomas Dugas, said tract of land being situated in the N.E. $\frac{1}{4}$ of Section 45, T-12-S, R-13-E. The property purchased by Dow from Clifton Land Corporation is described in that act of sale as having a front of five arpents, more or less, a depth of 14 arpents, and bounded to the west by the lands of Paul Aucoin (plaintiffs' ancestor in title).

Plaintiffs attempted to establish the location of the disputed tract through the testimony of Keith Dugas, a farmer, who stated that he began farming the disputed tract in 2002. Mr. Dugas was asked to locate the disputed tract on an aerial photograph of the area, which was admitted into evidence over objections by Dow as to its authenticity, lack of foundation, and hearsay. The aerial photograph contains no date or coordinates of any type, but depicts a plat showing numbers on plots of land. According to Mr. Dugas, the photograph represented individual fields or blocks of land on a certain tract and is very similar to maps Mr. Dugas used to report the acreage he farmed to the Farm Service Agency (FSA) to record whether there is cane on the property or whether the ground is fallow. After some confusion, Mr. Dugas identified the disputed tract on the plat as bearing the field numbers 1, 13, and 20. He further stated that he began farming nine acres of this tract in 2002 and continued until 2005. He testified that the property in question had been previously farmed by the LeBlanc Brothers, from whom he purchased the leasing rights, and that he had farmed with the LeBlanc Brothers when they farmed

the disputed tract. Mr. Dugas testified that he believed that the LeBlancs were the owners of the tract of land he had been farming.

Mr. Dugas testified that there was a clear line of demarcation between the two properties: a ditch. According to Mr. Dugas, the ditch divided the tracts owned by the LeBlancs and the Cliftons and had been there since he had been a young boy in the 1980s. Mr. Dugas marked a red line on the aerial photograph to represent the location of the ditch. Mr. Dugas testified that he was paid for a percentage of the sugar cane production by the local sugar mill, which took 1/5 of the crop revenue and sent it to the landowner. He admitted he did not know who the mill sent the money to, but assumed it was sending the money to the LeBlancs, from whom he believed he was leasing the property.

On cross examination, Mr. Dugas admitted that he never met any of the plaintiffs in this case until 2007 and never saw any of the plaintiffs on the property. He further admitted that all of the lines shown on the aerial photograph represented ditches in the cane field, that the ditch he identified as constituting the boundary between the LeBlanc and Clifton tracts was no different from any of the other ditches on the other plots of land, and that there were no fences or other enclosures to mark the boundary. Mr. Dugas acknowledged that the disputed tract contained two acres of trees that he never farmed. He also testified that when he farmed the LeBlanc tract, his brother, Buster Dugas, farmed the Clifton tract on the other side of the ditch, and that while they had different landowners, they basically had one operation, sharing the same equipment and employees. According to Mr. Dugas, there was nothing distinct between their farming operations, and on any given day, he could be seen on a tractor farming the Clifton tract and his brother could be seen farming the LeBlanc property.

Jessie Dugas, who farmed the Clifton property from 1950 to 1973 with his father and who continued farming the Clifton tract until 1990, also testified. He

identified the Clifton tract on the aerial photograph admitted into evidence and stated that the red line thereon represented a ditch he had been told represented the boundary between the LeBlanc and Clifton tracts. Jesse Dugas admitted he did not know who owned the LeBlanc tract, but he knew that when he was farming the Clifton tract, the LeBlanc tract had been farmed by a Mr. Alleman, Jules Russo, and the LeBlanc Brothers. Jesse Dugas testified that he had written leases with the Clifton Land Corporation to farm the Clifton tract and two leases executed in 1963 and 1973 were introduced into evidence. Jessie Dugas testified that when they started farming the Clifton tract, there was a marker on the property line somewhere near the end of the ditch that was either an iron pipe or a stob.

Another witness, Keith LeBlanc, who is not related to any of the plaintiffs, testified that he farmed the LeBlanc tract with his father in the 1970s until Keith Dugas bought them out around 2004. He identified tracts 1, 13, and 20 on the aerial photograph as the tracts they farmed. Keith LeBlanc testified that he met Dr. Louis Leblanc, whom he knew as the owner of the disputed tract and that he and his father farmed the tract on behalf of Dr. Louis LeBlanc. He believed that the ditch represented the property line between the Clifton tract and the tract of land he farmed and stated that he farmed all the way to that ditch. He admitted that he never saw any markers on the property and that he and Dr. Louis LeBlanc did not walk the property or discuss the boundary of the property. He also acknowledged that the ditch in question was no different than the other ditches on the property and that at no point in time was there a fence along the boundary line between the LeBlanc property and the former Clifton land.

The only plaintiff to testify at trial was Albert LeBlanc, Jr., a resident of Michigan, who left Louisiana in 1970. Prior to 2006, Mr. LeBlanc visited the property once in the early 1950s when he was ten years old. He testified that his grandfather showed him an oil well on the property and that the wellhead remained

on the property for many years. Mr. LeBlanc and his mother own LeBlanc Land Company, which owns an interest in the LeBlanc tract, but he admitted that his company is not authorized to act as an agent for the co-owners. Mr. LeBlanc identified the tracts labeled on the aerial photograph as 1, 13, and 20 as portions of the disputed tract, which he testified formed part of the 120 acre tract he and his family members owned. He acknowledged that he did not give this particular piece of property much attention until this boundary dispute arose. According to Mr. LeBlanc, when the LeBlanc Brothers farmed the property, the owners were paid by check, and when Keith Dugas took over, they received checks directly from the sugar mill for rent. He also stated that they paid their property taxes each year through Dr. Louis LeBlanc, Sr., who received the tax bills, and after he died, Dr. Louis LeBlanc, Jr. received the bills, and the owners paid their share to him. Mr. LeBlanc had no knowledge of the lease arrangements with the farmers of the property and admitted there was nothing in writing from which he could direct the tenant farmers as to the specific acreage of the property or of a property description. Plaintiffs introduced a tax assessment listing Dr. Henry LeBlanc as the owner of 120 acres of property identified as "Section 45 T12SR13E."

Mr. LeBlanc testified that he first found out about Dow's activities and the boundary dispute in October of 2006 when he was working on a proposed oil and gas lease. Mr. LeBlanc later walked the property and observed that Dow had put up a chain link fence. He estimated that the old boundary had been moved between 175 and 225 feet. Mr. LeBlanc and other family members hired an attorney to contact Dow to cease its activities on their property. The LeBlancs later hired a law firm with a real estate specialist, and a survey was done and completed in the summer of 2007. This survey was not introduced into evidence.

Besides the farming activities, plaintiffs sought to establish possession of the disputed tract by the existence of oil wells thereon. Plaintiffs introduced oil, gas,

and mineral leases executed by Dr. Henry LeBlanc for property identified as covering 120 acres in Section 45, Township 12 South, Range 13 East. These leases were executed in 1945 and 1950. Mr. LeBlanc testified that he recalled his grandfather showing him a bottle containing crude oil from one of the wells on the property and showing him the actual well. Mr. LeBlanc believed that the wells were drilled prior to 1953 because that is the year Dr. Henry LeBlanc died. Mr. LeBlanc stated that two of the wellheads he saw when he went out to the property in the 1950s were still in existence, noting that he had not walked the property in about a year prior to trial. He located the two oil wells on a map of the LeBlanc property prepared in 1950. Mr. LeBlanc testified that the well he marked as No. 1 on the map was closer to the Clifton boundary than the well he marked as No. 2. During Mr. LeBlanc's cross examination, he was shown a right of way agreement granted by plaintiffs to Union Carbide covering the 120 acre LeBlanc tract. The agreement is dated October 1, 1979. Mr. LeBlanc identified the signatures of his mother and father on the document. A map attached to the agreement apparently prepared on behalf of Union Carbide depicts the LeBlanc tract and the Clifton tract and states that the Clifton tract has a width of 959 feet. The trial court relied on this document in finding that an interruption of prescription occurred in 1979 and precluded the plaintiffs from establishing ownership by acquisitive prescription of either ten or thirty years.

The only other witness to testify was called by plaintiffs on cross examination. Stephen Smith, Dow's land management specialist, testified regarding his familiarity with the disputed tract and the acquisition by Dow of the Clifton property. Mr. Smith acknowledged that the disputed 11.6 acres now contains part of the Dow Brine Plant. Mr. Smith also testified that when Dow purchased the property in 2005, he walked the property and saw many ditches thereon, none distinct from the other. Mr. Smith engaged a company to perform a

survey to perform a metes and bounds survey, to locate any encumbrances on the property such as pipelines and wells, and to locate any encroachments on the property. He had the company stake out the boundaries of the property and set the property corners.

Mr. Smith contacted Keith Dugas to get an estimate of how many acres of crop were going to be damaged by Dow's acquisition of the Clifton tract. Dow introduced two documents informing farmers Keith Dugas and Buster Dugas that they were being reimbursed for 9.51 and 36.5 acres, respectively, of sugar cane cultivation in Section 45, T-12-S, R-13-E that would be lost as a result of Dow's purchase and construction of its brine pond. According to Mr. Smith, Dow paid Keith Dugas for crop damages on the property that had been staked out by a surveying company hired by Dow as the property Dow had purchased. Mr. Smith testified that he never asked Keith Dugas who owned the land he was farming because he believed that Dow owned that property.

In this appeal, plaintiffs contend that the trial court's conclusion that they failed to show they possessed the disputed tract for the requisite years to acquire ownership by acquisitive prescription is "absolutely erroneous and contrary to evidence and all applicable law." They submit that the proof presented at trial as to their ownership of the LeBlanc tract, including the disputed tract now possessed by Dow, was substantial. Plaintiffs argue that their evidence shows that Dr. Henry LeBlanc exercised corporeal possession on the entire LeBlanc tract commencing in 1951 through oil leases, oil drilling and production, and tenant farming operations, which they insist were continuous, uninterrupted, public, unequivocal, and with the intent to possess as owner through 2005. They submit that such acts of possession were sufficient to perfect ownership of the disputed property to the LeBlancs through ten-year acquisitive prescription by 1961. They further insist that the evidence overwhelmingly proves that since at least as early as the 1950s, their land

was corporeally possessed by agents acting on their behalf, stressing that farmers who farmed the Clifton tract and the LeBlanc tract testified as to the identical property boundary, identifying the ditch that separated their individual farming operations and each others crops.

By asserting ownership in the possessory action filed against Dow, plaintiffs converted the action to a petitory action, judicially confessed Dow's possession, and must prove title good against the world in order to prevail. See La. C.C.P. art. 3657; **Chevron U.S.A. Inc. v. Bergeron**, 551 So.2d 746, 749 (La. App. 1st Cir.), writ denied, 553 So.2d 465 (La. 1989). Plaintiffs did not attempt to prove an unbroken chain of valid transfers from the sovereign or a common ancestor, but instead sought to demonstrate that they acquired ownership of the disputed tract by acquisitive prescription.

The party asserting acquisitive prescription bears the burden of proving all the facts that are essential to support it, including possession for the requisite years. **McClendon v. Thomas**, 1999-1954 (La. App. 1st Cir. 9/22/00), 768 So.2d 261, 264. To support a claim of acquisitive prescription, the possession must be continuous, uninterrupted, peaceable, public, and unequivocal. La. C.C. art. 3476. Whether a party has possessed property for the purposes of acquisitive prescription is a factual determination by the trial court and will not be disturbed on appeal unless it is clearly wrong. **George M. Murrell Planting & Manufacturing Company v. Dennis**, 2006-1341 (La. App. 1st Cir. 9/21/07), 970 So.2d 1075, 1081.

After reviewing the entire record, we are unable to find that the trial court's conclusion that plaintiffs failed to prove they acquired ownership of the disputed tract through acquisitive prescription is manifestly erroneous. While plaintiffs offered testimony of farmers who believed that a ditch separated the tracts of land they farmed, there was no evidence that the owners of the two contiguous tracts

ever considered the ditch to be the boundary separating their two properties. Furthermore, plaintiffs offered no evidence to establish the actual location of the ditch and the record does not contain an accurate description of the eastern boundary of the LeBlanc tract. There was no survey evidence or expert evidence which would have provided a basis for the court to determine the boundary between the contiguous tracts of land even if the court had found plaintiffs proved possession up to the ditch for the requisite period of time. In the absence of such evidence, we cannot say that the trial court manifestly erred in finding that plaintiffs did not meet their burden of establishing they acquired ownership of the disputed tract by acquisitive prescription under all of the facts of this case.³

CONCLUSION

For the foregoing reasons, the judgment appealed is affirmed. All costs of this appeal are assessed to the plaintiffs-appellants.

AFFIRMED.

³ Because of this ruling, we find it unnecessary to address the parties' arguments regarding whether plaintiffs proved the just title element required by La. C.C. art. 3475 for acquisitive prescription of ten years.