

NOT DESIGNATED FOR PUBLICATION

**DOROTHY BRATSAS AND
LEONA BERSADSKY**

*

NO. 2003-CA-1288

*

COURT OF APPEAL

VERSUS

*

FOURTH CIRCUIT

**MAURICE MICKEY
DEMORUELLE AND AARON
D. HANZ**

*

STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-6299, DIVISION "F"
Honorable Yada Magee, Judge**

*** * * * ***

Judge Dennis R. Bagneris, Sr.

*** * * * ***

(Court composed of Judge Charles R. Jones, Judge James F. McKay, III,
and Judge Dennis R. Bagneris Sr.)

William F. Wessel
WESSEL & ASSOCIATES
127 Camp Street
New Orleans, LA 70130
COUNSEL FOR PLAINTIFF/APPELLEE

John A. E. Davidson
Mark M. Bonura
JOHN DAVIDSON AND ASSOCIATES
2901 Independence Street
Metairie, LA 70006
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

Defendants/Appellants, Maurice Mickey Demoruelle and Aaron Hanz (“Defendants”), appeal a summary judgment finding Plaintiffs, Dorothy Bratsas and Leona Bersadsky (“Plaintiffs”), the owners, by way of thirty years acquisitive prescription, of approximately a 2.6 feet alley between 2024-26 Burgundy Street and 2028-30 Burgundy Street. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

On March 12, 1999, Defendants purchased the property located at 2024-26 Burgundy Street, Lot 10, Square 262, in the 3rd District of the City of New Orleans, Parish of Orleans, State of Louisiana. After the acquisition thereof, Defendants informed Plaintiffs of the adjacent piece of property located at 2028-30 Burgundy Street, New Orleans, Louisiana, that they intended to remove a fence which was located on the property they had purchased in order to allow the defendant, Mr. Demourelle, wheelchair access to the premises he acquired.

Upon being informed of Defendants’ intentions, Plaintiffs, on April 16, 1999, filed a Petition for Injunction in which it was alleged that they had

acquired by acquisitive prescription a portion of the Defendants' property and therefore the fence could not be removed. Thereafter, a temporary restraining order was issued until May 7, 1999.

On June 6, 2000, Defendants filed a Motion to Dismiss or in the Alternative of Summary Judgment. In their memorandum in support of Motion for Summary Judgment, Defendants alleged that: (1) Plaintiffs have failed to offer proof of actual possession; (2) Plaintiffs were aware that they did not own the subject property because their act of sale specifically mentioned the encroachment and because Plaintiffs did not pay real property tax on the encroached land; (3) Plaintiffs did not possess the subject property for thirty years; and (4) the case is moot because the original Plaintiffs sold their residence on Burgundy Street. In support of this motion, Defendants submitted, as exhibits, the following: (1) a copy of Defendants' March 15, 1999 Act of Sale; (2) a copy of the May 26, 1999 Cash Sale between Plaintiffs, Ms. Bratsas and Ms. Bersadsky, and William Camp Robard Morrison and his wife, Kay McCaskill; (3) a copy of the September 27, 1979 Sale of Property by Miss Concetta Lala to Plaintiffs; (4) the March 7, 1977 Real Property Tax Report filed by Ms. Lala, the previous owner of Plaintiffs' property; (5) a copy of the August 12, 1981 Real Property Tax Report filed by Plaintiffs.

On September 6, 2000, Plaintiffs filed an Opposition to Motion for Summary Judgment and/or Motion to Dismiss arguing that the fence that separates Defendants' property at 2024-26 Burgundy Street from the Plaintiffs' property at 2028-30 Burgundy Street has been in existence since August 13, 1954; thus, the fence has been standing on the Plaintiff's property for over the required thirty years needed for acquisitive prescription. Further, Plaintiffs argue that Defendants' contention that the case is moot because the property was sold does not pass muster because of the fact that the current Plaintiffs in this case have substituted the original Plaintiffs. The attached exhibits included: (1) a copy of the September 19, 1946 F.G. Stewart survey, which was recertified on August 13, 1954, and October 29, 1963; (2) a copy of the September 25, 1979 survey by Gilbert Couturie; (3) the affidavit of Thomas LeBlanc; (4) the affidavit of Nat Mary Allison Marks; and (5) the affidavit of Mitchel Osborne.

On September 7, 2000, Defendants filed a Supplemental Memorandum in Support of Motion for Summary Judgment in which they argued that although the submitted surveys and affidavits establish the location of the fence for over thirty years, the Plaintiffs have failed to establish the adequate intent to adversely possess. Specifically, Defendants alleged that the previous owner of Lot 11, Conchetta Lala, did not file an

affidavit or provide any evidence whatsoever that she intended to adversely possess the disputed 2.9 feet of land. Further, Defendants argued that Conchetta Lala did not transfer the contested 2.9 feet in the Act of Sale to Plaintiffs, but rather she declared that there was an encroachment. Thus, Defendants argued that the Plaintiffs and their ancestors in title were not in possession of the property for thirty years and may not claim ownership to the subject property by acquisitive prescription.

On July 9, 2002, Plaintiffs moved for Summary Judgment, alleging that they and their ancestors in title have had “continuous, uninterrupted, peaceable, public, and nonequivocal” possession of 2.9 feet of property beyond Defendants’ title on their side of the fence separating 2028-30 Burgundy Street from 2024-26 Burgundy Street for well beyond the thirty (30) years required to transfer title. In support of this motion, Plaintiffs submitted as exhibits: (1) a copy of the “Act of Cash Sale” by which Defendants acquired the property; (2) a copy of the September 27, 1979 Cash Sale by Conchetta Lala to Plaintiffs Dorothy Bratsas and Leona Bersadsky; (3) a copy of a survey of 2024-26 Burgundy by F.G. Stewart, originally dated September 19, 1946 and recertified as correct on August 13, 1954 and October 29, 1963; (4) a copy of the May 14, 1999 Cash Sale by Plaintiffs Bratsas and Bersadsky to William Morrison and his wife, Kay

Caskill; and (5) a copy of the July 16, 2001 Cash Sale by the Morrisons to Petitioners Michael Lawrence King and his wife, Monika Miguel Guerra; (6) the affidavit of Nat Mary Allison Marks; (7) the affidavit of Mitchel Osborne; (8) the affidavit of Camp Morrison; and (9) three photos of the fence between the subject properties.

Thereafter, on September 19, 2002, Defendants filed another opposition to Plaintiffs' Motion for Summary Judgment, arguing that the Plaintiffs and their ancestors in title did not have possession of the disputed land for a period in excess of thirty years. Specifically, Defendants alleged that the documents failed to indicate that Plaintiffs and their ancestors had the intent necessary to possess the disputed land through acquisitive prescription.

On September 27, 2002, cross motions for summary judgment were heard in the trial court. On October 4, 2002, summary judgment was rendered in favor of Plaintiffs, recognizing them as owners by acquisitive prescription of approximately 2.6 feet of alley, formerly a part of Defendants' property. It was further ordered that the preliminary injunction be made permanent, prohibiting Defendants from removing the fence. Defendants now appeal this final judgment of the trial court.

STANDARD OF REVIEW

Appellate courts review the grant or denial of a motion for summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p. 7 (La. 2/29/00), 755 So.2d 226, 230. A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 (B). A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Id.*

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966 (A)(2). Summary judgments are favored, and the summary judgment procedure shall be construed to accomplish those ends. *Id.* La. C.C.P. art.

966(C)(2) provides that where, as in the instant case, the party moving for summary judgment will not bear the burden of proof at trial, his burden does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. Thereafter, if the adverse party fails to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law.

DISCUSSION

In their sole assignment of error, Defendants contend the trial court erred in granting summary judgment in favor of Plaintiffs and in finding that Plaintiffs own approximately 2.6 feet of the property which Defendants purchased. Defendants argue that “[t]he affidavits provided by Plaintiffs merely state that a fence was built and in place, they do not however show an intent by Ms. Bratsas or Ms. Bersadsky or previous owners of the property to possess the property as their own.”

Ownership and other real rights in immovables may be acquired by the prescription of thirty years without the need of just title or possession in good faith. La. C.C. art. 3486. To acquire possession, one must intend to

possess as owner and must take corporeal possession of the thing. La. C.C. art. 3424. If a party and his ancestors in title possessed for thirty years without interruption, within visible bounds, more land than their title called for, the boundary shall be fixed along these bounds. La. C.C. art. 794. The possession of the transferor is tacked to that of the transferee if there has been no interruption of possession. La. C.C. art. 3442.

A person pleading prescription of thirty years bears the burden of proving unequivocal, continuous, uninterrupted, public and adverse possession by a preponderance of the evidence. *Gelpi v. Shall*, 355 So.2d 1014, 1016 (La.App. 4 Cir. 2/14/78), citing, *Bradford v. Thomas*, 344 So.2d 717 (La.App.2 Cir. 3/21/77). In such cases, every presumption is in favor of the holder of the legal title. *Bradford*, 344 So.2d at 719. However, despite this presumption there is a strong public policy embodied in the law that where one possesses for thirty years within visible bounds, the boundary must be fixed according to the limits of possession, rather than title. *Rathborne v. Hale*, 95-1225, (La.App. 4 Cir 1/19/96), 667 So.2d 1197, 1200, citing La. C.C. art. 794.

This Court, in *Gelpi v. Shall*, stated the law relative to acquisitive prescription as follows:

The requirements for establishment of the prescription of thirty years are clearly stated in *Sessum v. Hemperley*, 233 La. 444, 96 So.2d 832 (1957), and most recently reiterated by our Supreme

Court in *William T. Burton Industries, Inc. v. Wellman*, 343 So.2d 996 (La.1977):

[W]here there is a visible boundary which has been in existence for thirty years or more and the defendant in a boundary action and his predecessors in title have, in addition to the land described in the title, actually possessed land extending to that visible boundary, a plea of prescription of thirty years should be sustained. It is our view that for the rule to be applicable two conditions must concur: First, there must be a visible boundary, artificial or otherwise; second, there must be actual uninterrupted possession, either in person or through ancestors in title, for thirty years or more of the land extending beyond that described in the title and embraced within the visible bounds.

355 So.2d at 1016.

Thus, the possessor, in order to claim ownership by acquisitive prescription, must have corporeal possession. The possession must be continuous, uninterrupted, public, peaceable, and unequivocal. La.C.C. art. 3476. Where a party claims only the corporeal detention without title, he must show an adverse possession within enclosures. *Suire v. Vermilion Parish School Bd.*, 614 So.2d 203, 205 (La.App. 3 Cir. 2/3/93); La.C.C. art. 3487. He must also show a positive intention to take and commence possession of the property as owner. *Levatino v. Williams*, 396 So.2d 380, 381 (La.App. 1 Cir. 3/2/81); La.C.C. art. 3424. Under La. C.C. art. 3427, “[o]ne is presumed to intend to possess as owner unless he began to possess

[the property] in the name of and for another.” Further, the mere fact that a non-owner has physical possession of the land provides sufficient notice to the record owner and the public at large that a non-owner intends to possess the property for himself as owner. *See Chevron U.S.A., Inc. v. Landry*, 558 So.2d 242, 244 (La. 3/12/90).

An enclosure does not require a fence but it does require that the land possessed as owner may be established with certainty, either by natural or artificial marks, sufficient to give notice to the world of the character and the extent of the possession, as well as its full identity and its certain boundaries. *Suire*, 614 So.2d at 205 (citing *Alford v. Jarrell*, 471 So.2d 970 (La.App. 1 Cir.1985)).

Additionally, a title holder may acquire more land than his title calls for by possessing property beyond his title for thirty years without interruption and within visible bounds by “tacking” on the possession of his ancestor in title. La.C.C. art. 3442. As stated under La. C.C. article 794:

When a party proves acquisitive prescription, the boundry shall be fixed according to limits established by prescription rather than titles. If a party and his ancestors in title possessed for thirty years without interruption, within visible bounds, more land than their title called for, the boundary shall be fixed along these bounds.

Thus, under La. C.C. article 794, one may utilize tacking to prescribe beyond title on adjacent property to the extent of visible boundaries.

In this case, Plaintiffs are seeking ownership in excess of what is called for in their title. As such, Plaintiffs bear the burden of proving, by a preponderance of the evidence, that they and their ancestors in title possessed the 2.6 feet alley, as owners, for a period of thirty years. We find that the evidence is sufficient to carry their burden.

Plaintiffs have produced: (1) an affidavit from Mitchel Osborne, the owner of the property adjacent to the Plaintiffs, stating that he knows the property was enclosed by a fence since he purchased his property in 1975 and that the fence is in the same position as shown in the September 19, 1946 F.G. Stewart survey, which was recertified on August 13, 1954 and October 29, 1963 ; (2) an affidavit by Nat Mary Allison Marks, the owner of the Defendants' property from 1964 to 1976, stating that she knew of the existence of the fence during that period and that the fence is in the same position as shown in the September 19, 1946 F.G. Stewart survey, which was recertified on August 13, 1954 and October 29, 1963 ; (3) an affidavit by Camp Morrison, who purchased the property at 2028-30 Burgundy Street from Dorothy Bratsas and Leona Bersadsky and who in turn sold the property to Michael Lawrence King, and his wife, Monika Miguel Guerra, stating that he took the three photographs attached to the Motion for Summary Judgment in May 2001; (4) a copy of the September 27, 1979

Cash Sale by Concetta Lala to Plaintiffs Dorothy Bratsas and Leona Bersadsky; (5) a copy of the May 14, 1999 Cash Sale by Plaintiffs Bratsas and Bersadsky to William Morrison, and his wife, Kay Caskill; (6) a copy of the July 16, 2001 Cash Sale by the Morrisons to Petitioners Michael Lawrence King, and his wife, Monika Miguel Guerra; and (7) a copy of the September 19, 1946 F.G. Stewart survey of 2024-26 Burgundy, which was recertified as correct on August 13, 1954, and October 29, 1963, and which reflects the existence of the encroachment at that time. We find this evidence sufficient to satisfy Plaintiffs burden that they and their ancestors in title have had “continuous, uninterrupted, peaceable, public, and unequivocal” possession of the 2.6 feet of property beyond their title on Defendants’ side of the fence separating 2028-30 Burgundy Street from 2024 –26 Burgundy Street for well beyond the thirty years required to transfer title.

We therefore affirm the trial court’s judgment granting summary judgment in favor of Plaintiffs and recognizing Plaintiffs as owners, by thirty year acquisitive prescription, of the 2.6 feet of alley space between 2024-26 Burgundy Street and 2028-30 Burgundy Street.

AFFIRMED