

STATE OF MICHIGAN
COURT OF APPEALS

JOHN WAISANEN, Successor Trustee of The
WAISANEN FAMILY TRUST,

FOR PUBLICATION
June 24, 2014

Plaintiff/Counter Defendant-Appellee,

v

TOWNSHIP OF SUPERIOR,

No. 311200
Chippewa Circuit Court
LC No. 09-010688-CH

Defendant/Counter Plaintiff-Appellant.

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

RONAYNE KRAUSE, J. (*concurring*)

I concur with the majority's decision to affirm and, in broad overview, the reasoning employed by the majority that is actually necessary to arrive at that result. I write separately only because I believe the majority's opinion goes beyond what is necessary to resolve this matter.

In 1971, plaintiff purchased Lot Seven of the Jordan Beach, in Superior Township, Chippewa County. Lot Seven is a lakefront parcel, on the shore of Lake Superior to its north. It is bounded to the south by Shenandoah Avenue and to the west by a 40-foot-wide right of way platted as First Street. The plat map depicts First Street as running perpendicular to, and all the way to, the water's edge. Physically, however, a guardrail, installed in 1981 when Shenandoah Avenue was paved, crosses First Street on the lakeward side of Shenandoah Avenue, and a variety of utility equipment is also installed in the right of way. Despite this apparent termination of First Street itself at Shenandoah Avenue, witnesses testified that they had historically used, and continued to use, the First Street right of way to access the beach and water. At issue is plaintiff's encroachment onto the right of way: a 1981 addition to plaintiff's house encroached onto the right of way by 3.25 feet, and a break wall that was already in place when plaintiff purchased Lot Seven encroached onto the right of way by approximately fifteen feet.

The encroachments were discovered, apparently to the surprise of all parties, in 2008, when defendant commissioned a survey of the area. Plaintiff commenced the instant suit, seeking to quiet title to the encroached-upon area on alternate theories of adverse possession and acquiescence. Defendant counterclaimed for possession of that same portion of First Street. The trial court found in plaintiff's favor on both theories. Defendant now appeals, arguing that the trial court erred in its application of both theories.

We review actions to quiet title de novo. *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996). We likewise review a trial court's conclusions of law following a bench trial de novo. *Walters v Snyder*, 239 Mich App 453, 455; 608 NW2d 97 (2000). However, we review the trial court's findings of fact in an equitable action for clear error. *Silich v Rongers*, 302 Mich App 137, 143; 840 NW2d 1 (2013). We will only find clear error if we are definitely and firmly convinced that the trial court made a mistake. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

A claim of adverse possession requires clear and cogent proof that possession of the disputed property has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period. *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). The statutory period for adverse possession is 15 years. MCL 500.5801(4). A claim of acquiescence may be based on, in relevant part, acquiescence for the statutory period. *Walters*, 239 Mich App at 457. “[A] boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys. Fifteen years’ recognition and acquiescence are ample for this purpose.” *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956) (internal quotation marks and citations omitted). Acquiescence merely requires the parties to treat a particular boundary line as the true line. *Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009)

It is beyond dispute that plaintiff has been openly and exclusively using the encroached-upon area since 1971, and predecessors in ownership before that, well in excess of the statutory period for either adverse possession or acquiescence. Indeed, defendant makes no real attempt on appeal to dispute whether plaintiff's actions over the years have at least nominally satisfied the factual prerequisites for either adverse possession or acquiescence as described above. Rather, defendant argues that the First Street right of way is public land, and therefore, pursuant to MCL 600.5821, plaintiff simply may not maintain the instant claims against a municipality such as itself.¹

I agree that the First Street right of way is public ground. “Public ground” is a broad term intended “to protect municipalities from adverse possession claims,” and generally applies to “publicly owned property open to the public for common use.” *Adams Outdoor Advertising v Canton Charter Twp*, 269 Mich App 365, 375; 711 NW2d 391 (2006) (internal quotation omitted). A review of the 1925 plat for Jordan Beach shows that all of the platted streets and alleys, including First Street, were dedicated to the public use. The plat states that “the streets and alleys as shown on said plat are hereby dedicated to the use of the public.” The evidence established that the public had accepted this dedication by using the street for beach access, and by maintaining and providing utility service to the street. Plaintiff notes that the evidence also shows that no member of the public had used the encroached-upon area for nearly 40 years, but

¹ Consequently, I believe it is unnecessary to consider whether plaintiff has satisfied his evidentiary burden of showing either adverse possession or acquiescence. This Court has been asked only to address whether either action is legally cognizable under the circumstances.

that does not change the nature of the encroached-upon property. Plaintiff's motion to quiet title concerns property that was dedicated to, and used by, the public as a public street.

MCL 600.5821 provides in relevant part as follows:

(1) Actions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.

(2) Actions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations.

The most recent revision of MCL 600.5821(1) “reinstated the common-law rule that one cannot acquire title to state-owned property through adverse possession or prescriptive easement.” *Matthews v Natural Resources Dep’t*, 288 Mich App 23, 35-36; 792 NW2d 40 (2010), citing *Gorte v Dep’t of Transportation*, 202 Mich App 161, 165-166; 507 NW2d 797 (1993); see also, *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 647; 528 NW2d 221 (1995) (“we note the Legislature has decided that a claim of adverse possession against state lands is against public policy and, therefore, will not be recognized”).

However, the property at issue here is not owned by the state, but rather by a municipality. In contrast to subsection (1), the plain “language of MCL 600.5821(2) prevents a private landowner from acquiring property from a municipality by acquiescence only if the municipality brings an action to recover the property.” *Mason*, 282 Mich App at 529 (opinion of the Court) and 534 (BECKERING, J, concurring). Because the plain language of MCL 600.5821(2) makes no reference to either acquiescence or adverse possession, I perceive no reason to treat either theory differently.² “The plain language of the statute does not apply in situations where the municipal corporation did not bring the action.” *Mason*, 282 Mich App at 534 (BECKERING, J., concurring).

Defendant contends that it *did* “bring” an action for the recovery of public land because it counterclaimed for that relief. I agree entirely with the majority’s explanation of why, pursuant to the Court Rules, an “action” is “commenced” by filing a “complaint,” but not necessarily by any “pleading.” Consequently, defendant is incorrect: it brought claims, but it did not bring the

² I have not considered *Beach v Lima Twp*, 283 Mich App 504; 770 NW2d 386 (2009), *aff’d* 489 Mich 99 (2011), because the property at issue in that case was not “public ground.”

action within the meaning of the statute. Therefore, MCL 600.5821(2) permits municipalities to *commence actions by filing complaints* for the recovery of public lands at any time, but it does not protect municipalities from actions *against* such municipalities on adverse possession or acquiescence theories.

I concur in affirming.

/s/ Amy Ronayne Krause