STATE OF MICHIGAN

COURT OF APPEALS

MURDOCH J. HERTZOG and JEANETTE B. HERTZOG,

Plaintiffs-Appellees,

V

ALEXANDER M. TSAKOFF and DARIA TSAKOFF,

Defendants-Appellants.

UNPUBLISHED
June 8, 2004

No. 243538
Cheboygan Circuit Court
LC No. 98-006448-NZ

MURDOCH J. HERTZOG and JEANETTE B. HERTZOG,

Plaintiffs-Appellees,

V

VICTOR L. KOTWICKI, SALLY KOTWICKI and VICTOR L. KOTWICKI, SR.,

Defendants,

and

ALEXANDER M. TSAKOFF and DARIA TSAKOFF,

Defendants-Appellants.

No. 243539
Cheboygan Circuit Court
LC No. 00-006714-CH

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendants Alexander and Daria Tsakoff appeal as of right in these consolidated cases from the judgment of the Cheboygan Circuit Court in favor of plaintiffs after a bench trial in a

quiet title action. The trial court determined that plaintiffs have superior title to the tract of land and fixed the boundary between this tract and a bordering tract owned by defendants. We affirm.

I. FACTS

Both parties trace their claim of ownership to the disputed land to the same developer of lakeshore property, and each bases its claim in part on a quitclaim deed. The land is shown on the developer surveys as submerged beneath an artificial lake. However, the developer was unable to make the lake as deep as planned and so the land was never covered by water.

Therefore, property descriptions saying a line ran from some point "to the lakeshore" were arguably ambiguous – did they mean the *real* lakeshore, or the one *shown* on attached maps? To add to the confusion, the property was developed almost thirty years ago, a number of different companies took part in its development and sale, the companies' sole surviving partner does not recall the original property sales precisely, and there are issues about each party's chain of title. The trial court first found that plaintiffs had valid title to the lot they claim to own. Defendants also claimed title to this property by virtue of alleged defects in plaintiffs' chain of title and through a quitclaim deed the developer gave defendants after the litigation began. It then undertook equitably to draw a line dividing plaintiffs' lot from neighboring lots indisputably owned by defendants through what would have been the lakebed had the lake filled as expected

Plaintiffs testified that they visited the property at least twice each year, sometimes more. The visits generally occurred over the Memorial and Labor Day weekends and lasted three to five days. They would sometimes go there alone and sometimes with friends; they would stay either at the motel next door or in a motor home parked by the motel. Plaintiffs have used the property for walking and fishing. Plaintiffs placed "No Trespassing" signs and a fence on the property in order to keep the ATV drivers out. The fence was put up at the time this lawsuit began. Apart from the fence, the land is undeveloped or "vacant."

Plaintiffs built the fence, which is four feet high, in 1998. The fence ran to the middle of defendants' dock and made access to it difficult for them, so they had it physically removed. The parties stipulated that they had not met each other, and indeed that neither of them had seen the other before the fence was built.

Defendants used the property as a weekend getaway and vacation home, not a fulltime residence. They gave several estimates of their annual time at the property, generally noting substantial weekend time but several full weeks as well From 1979 on, they have made improvements to the property, including seeding and maintaining a lawn, grading a path, and putting in a fire pit. In about 1981, they built a boat dock which is on the disputed land.

Both sides presented expert witnesses. Defendants put on a surveyor who had surveyed the property both for defendants (once) and plaintiffs (twice). The surveyor explicitly disclaimed having an opinion as to where the line between defendants' and plaintiffs' properties lies, calling it a question for "legal eagles not surveyors to decide." He simply marked out what defendants would own if their property line were extended from the planned lakeshore to the actual one, but did not do the same for plaintiffs, as this would have resulted in inconsistent surveys. As to who actually owned the land which the original survey showed as being underwater, he would say

only, "They both own it." He reiterated several times that ownership of the land was disputed or that it was "[n]o-man's land, I guess."

The owner of a title company, Jerome A. Malloy, Jr., also testified for defendants, and gave an opinion as to defendants' chain of title. Malloy opined that plaintiffs lack clear title to Plat 2. He noted that the property was owned by Resort Realty in 1967, and from there, he traced the chain of title essentially as had plaintiff Hertzog. The main difference between his testimony and that of Hertzog was that whereas both noted Resort Realty had given American Land Company an option to purchase the land, Malloy noted something Hertzog did not – the absence of a deed from Resort Realty to American Land. [1] Noting that both the original deed to Hertzog and his 1986 deed from the State of Michigan were quitclaim deeds, Malloy said that his title company would not issue a commitment as to Hertzog's title without a deed from Resort Realty to him. In contrast, Malloy not only was willing to issue a commitment as to defendants' title, but actually did so as to their property including "what is now being the disputed parcel of property," along with insurance in the amount of $200,000.

Malloy also offered an opinion on one matter that eventually became key to the trial court's resolution of the case. On re-cross examination, Malloy acknowledged that defendants' lot is essentially pie-shaped, with the wide arc of the wedge being toward the lake, with the effect that if the lines were extended from the hypothetical lakefront to the actual lakefront, following the lines of the oblique angle, their actual lake frontage would be much larger than originally contemplated. This, Malloy said, would not be appropriate; rather, the proper way to extend the lines would be to draw right angles from the projected lakeshore to the real one, to keep the amount of lake footage the same as originally contemplated.

Another title company president who is also a real estate lawyer, Tom A. Swanson, testified as plaintiffs' expert. Swanson opined that Hertzog owned Parcel 2. He based this view, on his examination of county tax records and of the documents introduced as evidence in the trial. Swanson had not personally traced the chain of title because, contrary to what Malloy believed, he felt that the State of Michigan had acquired good title to the property, and therefore was able to convey it to Hertzog by the quitclaim deed. Therefore, as the title company president, he would be willing to "show it as you owned it, except I'd have certain requirements." Swanson was never asked and did not state what these requirements were.

On cross-examination, Swanson further clarified that he based his opinion upon the fact that the State had conveyed the property by quitclaim deed to Hertzog and that he would assume the State had observed due process requirements in acquiring the property, rather than upon the earlier "wild deed" conveyance in 1981. Until this point, he opined, Hertzog did not own the property. However, he probably had not used the quitclaim deed from the State intentionally as a way of clearing up problems with his earlier chain of title because he had not realized at the time that there were problems with the chain of title.

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[1] Malloy also noted a couple of conveyances among the Kotwicki-related corporations that Hertzog had not.

II. STANDARD OF REVIEW

The procedures to be followed by a trial court in trying an action to quiet title, and by this Court in reviewing the trial court's decision is set forth in *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm,* 236 Mich App 546, 550; 600 NW2d 698 (1999). First, the plaintiffs, who have the burden of proof, must make out a prima facie case that they have title to the property. If the plaintiffs meet this initial burden, the burden then shifts to the defendants to prove that their right or title to the property is superior. On appeal, we employ a de novo standard of review, keeping in mind the equitable nature of quiet title actions. *Id.* However, we reverse factual findings made by the trial court only if clearly erroneous, bearing in mind the trial court's ability to make credibility assessments. *Ingle v Musgrave,* 159 Mich App 356, 361; 406 NW2d 492 (1987).

III. ANALYSIS

A. Clear Title

Defendants assert that the trial court failed to follow the mandate of *Ingle, supra* at 361, and make an initial determination that plaintiffs have shown clear title to the disputed property. This assertion is contradicted, however, by the record. The trial court's opinion clearly states that plaintiffs have clear title to Plat 2 as the result of a deed from the State of Michigan and based this finding upon the testimony of a title examiner. There was no clear error. We note that the only question raised about the ability of the State of Michigan to pass clear title concerned the necessity that it observe due process requirements when it acquired the land through foreclosure on a tax lien. However, no evidence was presented that the State failed to observe these due process requirements.

B. Adverse Possession, Acquiescence and Chain of Title

Defendants next assert that they have demonstrated superior title either through a better chain of title, adverse possession, or acquiescence in their claim by plaintiffs. We disagree. The evidence established that plaintiffs obtained Plat 2 by quitclaim deed from the State of Michigan, which had transferable title, thirteen years before defendants obtained a quitclaim deed to it from the original developer in 1999. Therefore, at the time defendants received their quitclaim deed, the developer had no interest in the property to pass.

As for the claim of adverse possession, the elements of such a claim are actual, hostile, open and notorious, continuous and exclusive possession for the statutory period of fifteen years. See e.g., *Dickens v Gordon,* 61 Mich App 353, 355; 232 NW2d 707 (1975). The element defendants failed to satisfy was that of exclusivity. There was ample testimony that plaintiffs, like defendants, made use of the property. It is true that there was a factual issue and there were credibility questions regarding this use, but such questions are for the trial court to resolve. *Ingle, supra* at 361. There was evidence in the record to support the trial court's ruling. Moreover, although there appears to be no question that defendants made more use of the property than plaintiffs, the fact that their use was greater does not make it exclusive.

Defendants also claim that plaintiffs acquiesced in defendants' ownership of the property. We disagree. Defendants assert that they treated the property line "as the border of the property

for over 15 years, maintaining it in a manner that showed their neighboring property owner what they were doing. For over 15 years [plaintiffs] never objected or complained, thus acquiescing to the boundary." Defendants, however, offer no specific facts to show how they treated the property line now claimed as the border, or how their actions gave notice of "what they were doing." Defendants may not simply state their position, leaving it to the Court to figure out the support for their claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, we find no clear error with the trial court's ruling on this issue.

C. Boundary Line Determination

As we have noted, after determining that plaintiffs had proven clear and superior title to Plat 2, the trial court proceeded to fix the boundary line between this plat and defendants' property. Given the evidence that was presented to the trial court, we cannot find clear error in its factual determinations, nor do we find error in its ultimate ruling that plaintiffs were entitled to 263 feet and defendants to 132 feet of the lakefront. In fact, we note that the award to defendants was actually about thirty percent larger than the 96 feet defendants' expert title examiner apparently was willing to certify as belonging to them.

D. MRPC 3.7

Finally, defendants assert that the trial court erred by permitting plaintiff Murdoch J. Hertzog, an attorney who appeared at trial in propria persona and as counsel for his wife, plaintiff Jeanette B. Hertzog, to testify. We disagree for several reasons.

First, assuming as defendants claim that Hertzog's testimony violated MRPC 3.7, which makes it an ethical violation for an attorney to testify in a trial in which he is counsel unless one of the rule's enumerated exceptions applies, we find no authority that the proper sanction for violation of the ethical rule would be for this Court[2] to vacate the judgment in the case in which the testimony is given.

Second, we note that although defendants now claim that they sought, not the exclusion of Hertzog's testimony, but rather his disqualification to act as counsel in the case, this is not what the record indicates. Rather, an objection was lodged to Hertzog testifying, and no motion to disqualify him from acting as counsel was ever filed. Moreover, our Constitution (Const 1963, art 1, § 13) guarantees citizens the right to appear pro se, and that no distinction is made between lawyers and other citizens with respect to this right. Further, when the exclusion of attorney testimony would work a substantial hardship on a party, MRPC 3.7 calls for a balancing of the rights of the respective parties. Here, we believe, the exclusion of the testimony of Hertzog, who obviously was a key witness to his ownership and use of the property, would have worked far more of a hardship on himself and on Jeanette B. Hertzog, than allowing his testimony harmed defendants. Defendants suggest that the manner in which Hertzog testified

[2] We note that under Chapter 9 of the Michigan Court Rules, the determination of sanctions for attorney ethics violations is not assigned to us, but to the Attorney Grievance Commission, the Grievance Administrator, the Attorney Discipline Board, and our Supreme Court.

allowed him to give misleading testimony which interspersed argument with factual narrative. If this was the case, defendants' remedy was a timely evidentiary objection each time inadmissible testimony was offered. The record indicates, however, that no such timely objections were made. None having been made, any claim of resulting error was waived.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper