

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN L. GALLAGHER,

Plaintiff-Appellee,

v

SHERI FIROSZ,

Defendant-Appellant,

and

TONY AMOUD & ASSOCIATES, INC.

Defendant.

UNPUBLISHED

June 10, 2004

No. 242945

Oakland Circuit Court

LC No. 2001-029978-CH

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Following a bench trial, defendant Sheri Firoz ("Firoz") appeals the trial court's judgment in favor of plaintiff Susan Gallagher ("Gallagher"). We affirm.

I.

INTRODUCTION

For almost 30 years, a fence continuously stood and was treated as the boundary line between two adjacent residential properties in Birmingham, lot 27, now owned by plaintiff/appellee Gallagher and lot 26, now owned by defendant/appellant Firoz. However, in 2001 the current owner of lot 26, Firoz, (1) purchased the property, (2) surveyed it for purposes of establishing proper boundaries to demolish the current house and build a new house, and (3) determined that the platted boundary included a small piece of Firoz's property on Gallagher's side of the fence. The trial court ruled the parties' predecessors in title (and their lessees) treated the fence as the boundary line between lot 27 and lot 26, for the statutory 15-year period and thus ruled that the disputed portion of property on Gallagher's side of the fence is Gallagher's property and Firoz now appeals this ruling and we affirm.

II.

FACTS AND PROCEDURE

This dispute arose between the parties when Gallagher learned that Firoz planned to tear down the fence as part of her home construction plans. Gallagher filed this quiet title action and asked the court to determine the proper boundary between the parties. Firoz says she is entitled to that portion of her property that lies on Gallagher's side of the fence. Gallagher says because the parties (and their predecessors) treated the fence as the boundary line for over fifteen years, the court properly quieted title by ruling that the fence line is the proper boundary between lots 26 and 27.

At trial, Gallagher, and her mother, Ruth Gallagher, who owned lot 27 from 1958 until 1999, when she conveyed it to Gallagher, testified that a fence was in the same location from 1964 until the time of trial, and that all persons that owned the lots from that time onward treated the fence as the boundary line. Also, Ruth Gallagher testified that she planted various plants in the area on her side of the fence and maintained the area for the entire time she owned the property. She also testified that the fence remained from 1964 to 1971 when she moved out. Further, her tenants continued to similarly maintain the property from 1971 until 1979, when Ruth Gallagher's daughter, Susan Gallagher, moved into the house. Likewise, Gallagher has maintained the property in the same fashion through the pendency of this suit.

Additionally, Ruth Gallagher testified that all of Firoz's predecessors treated the property as though the fence represented the boundary line between lots 26 and 27 and that Firoz's predecessors did not exert any ownership or control over the property on Gallagher's side of the fence.

Firoz purchased the property in 2001 from David Fee, the previous owner. Mr. Fee testified that he was aware, in 1990, when he purchased the property, that the fence was not the true boundary. But, he also testified that he never said anything to Gallagher regarding this knowledge. And, only once did he perform any maintenance on the property--when a limb destroyed part of the fence, he repaired it. Firoz offered no testimony or other evidence regarding the property from 1964 to 1990.

Expressly relying upon the testimony of Gallagher and her mother, the trial court found that there was tacit agreement between the various owners of lot 27 and lot 26 that the fence was the boundary for at least the statutory period of fifteen years. Therefore, applying the doctrine of acquiescence, the trial court held that the boundary is the fence line, at the pickets.¹

Following the trial court's decision, Firoz filed a motion for attorney fees, which the trial court denied.

On appeal, Firoz claims that the trial court erred in (1) applying the doctrine of acquiescence; (2) finding the pickets to be the boundary line, and not the posts of the fence; and

¹ The court also terminated the preliminary injunction it had earlier ordered, which prohibited Firoz from taking the fence down.

(3) denying Firosz's motion for attorney fees based on Gallagher's allegedly frivolous preliminary injunction.

III.

ANALYSIS

An action to quiet title is equitable in nature. This Court reviews the trial court's findings of fact for clear error, and its conclusions of law de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). Clear error exists when the reviewing court is left with a firm and definite conviction that a mistake has been made. *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

"There are three theories for acquiescence. They include: (1) acquiescence for the statutory period [15 years]; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary." *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). The trial court used the 15-year statutory period to find acquiescence.

The doctrine of acquiescence provides that where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line. *Killips, supra* at 260. The underlying reason for the rule of acquiescence is the promotion of peaceful resolution of boundary disputes. *Id.* The standard applicable to a claim of acquiescence is proof by a preponderance of the evidence. *Id.* The acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years. *Id.*

"Only when there has been some agreement, whether tacit or overt, as to the location of the boundary does the question of acquiescence become important." *Wood v Denton*, 53 Mich App 435, 439-440; 219 NW2d 798 (1974).

The doctrine is further explained as follows:

The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land. [*Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993).]

And regarding the mode of analysis for acquiescence this Court has stated:

Michigan precedent, however, has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence. Rather, the courts have discussed the doctrine in more general terms. For example, our Supreme Court has noted: "It has been repeatedly held by this court that 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), quoting *Dupont v Starring*, 42 Mich 492, 494; 4 NW 190 (1880) (citations omitted). This Court has most recently indicated that applicability of the doctrine commonly arises where "[a]djoining property owners [mistakenly] treat a boundary line, typically a fence, as the property line." *Sackett, supra* at 681-682, quoting *Kipka v Fountain*, 198 Mich App 435, 438, 499 NW2d 363 (1993). [*Walters v Snyder*, 239 Mich App 453, 457-458; 608 NW2d 97 (2000).]

The trial court found that there was the tacit agreement between the owners of lots 26 and 27 that the fence was the boundary line. For this finding, the court stated that it relied upon (1) photographs and testimony presented by Gallagher and her mother that they planted and maintained the disputed property; and (2) the evidence that Firosz's predecessors in title, the owners of lot 26, always behaved as if the fence was the property line for the entire length of the respective properties.

Firosz offered the testimony of Fee who owned lot 26 between 1990 and 2000. He stated that he knew from a survey he perused in 1990 that the fence was not the property line. However, as the trial court noted, despite this knowledge, he also behaved as if the fence was the property line.

Moreover, even if there were some doubt regarding a tacit agreement during the period of Fee's ownership of lot 26, Firosz failed to present evidence to contradict Ruth Gallagher's testimony regarding the existence of a tacit agreement from the time the fence was installed in 1964 until Fee's purchase of the property in 1990. Thus, acquiescence for the fifteen-year statutory period was satisfied before Fee owned the property.

Accordingly, the trial court properly ruled that the disputed portion of property is the property of Gallagher under the doctrine of acquiescence.

At trial, Firosz also argued that the posts and not the pickets should act as the property line. Firosz argues that because the fence belongs to Firosz, so should all of the property that the fence occupies. However, Gallagher provided testimony from a surveyor who stated that the usual method for measuring from a fence is from the fence material, not the posts. Firosz failed to provide any evidence to contradict the surveyor's testimony. Moreover, as Gallagher testified, and the photographs show, Gallagher planted and maintained the property right up to the pickets, not the posts.²

² Firosz also says that the trial court erred in failing to grant Firoz's attorney fees regarding (continued...)

Affirmed.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Stephen L. Borrello

(...continued)

Gallagher's injunction. We do not find that the court abused its discretion by failing to award attorney fees to Firoz.