STATE OF MICHIGAN

COURT OF APPEALS

MARTHA A. SAMPLES and VIRGINIA E. SAMPLES,

Plaintiffs/Counter-Defendants-Appellants,

v

HUGH B. WEST and ROBERT B. BAKER,

Defendants-Appellees,

and

ROBERT M. DAILY, JR. and JOHN R. NAUM, Co-Trustees of the ANCHORAGE TRUST AGREEMENT,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
June 2, 2005

No. 255516
Mackinac Circuit Court
LC No. 2003-005656-CH

Before: Murray, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). This case arose from a dispute over a boundary line between two vacation properties. We affirm.

Plaintiffs purchased lot 41 of the Boothman, Gleason, and Company (Boothman Gleason) plat from defendants on March 19, 1988. Defendants owned lot 42 in the same plat along with lot 1 of the Tassier addition to the original plat. Lot 42 is located adjacent and west of plaintiffs' lot and lot 1 is located west of, and adjacent to, lot 42.

In 1989, plaintiffs commissioned a survey of their property. The 1989 survey showed the boundary between lots 41 and 1 in accordance with the Tassier addition to the Boothman Gleason plat. Because the survey showed the Tassier addition overlapping the original plat, lot 42 was removed from the survey drawing. This survey also indicated that the boundary line ran through a portion of defendants' cottage.

When they attempted to sell lot 41 in 2002, plaintiffs commissioned another survey and apparently discovered the overlap between the original Boothman Gleason plat and the Tassier addition. The later survey showed the boundary between lots 41 and 42, in accordance with the Boothman Gleason plat, running between the lots and through a deck plaintiffs had built on the side of their cottage. The second survey also indicated that several of plaintiffs' outbuildings, a portion of their deck, and a fence were on lot 42. The parties did not dispute that the second survey, not the 1989 survey, was the correct representation of the true boundary between the properties.

Plaintiffs filed suit on April 4, 2003, and alleged that since their purchase of lot 41, they had occupied a portion of lot 42, openly, continuously, notoriously, and adverse to defendants' interest. Plaintiffs further alleged that neither plaintiffs nor defendants knew the true boundary between lots 41 and 42 at the time of plaintiffs' purchase of lot 41, due to a mutual mistake. Plaintiffs therefore requested a reformation of the deed to reflect a "logical" boundary between lots 41 and 42.

In the alternative, plaintiffs argued that defendants acquiesced to the mistaken boundary between the lots and asked that the court quiet title to the portion of lot 42 that plaintiffs had occupied since 1988. Defendants denied all of plaintiffs' allegations and filed a counter-complaint for ejectment, requesting the court to order plaintiffs to remove all encroachments from lot 42. At the close of discovery, defendants filed a motion for summary disposition. The trial court found that plaintiffs failed to establish a genuine issue of material fact on any of their claims and granted defendants' motion.

Plaintiffs sole claim on appeal is that the lower court erred in granting summary disposition in favor of defendants, when plaintiffs established a genuine issue of material fact that they owned the disputed property under a theory of mutual mistake, acquiescence, or adverse possession. We disagree.

We review actions to quiet title de novo, Sackett *v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996), as well as the trial court's granting of a motion for summary disposition. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999).

Plaintiffs first claim that reformation of the deed is justified under a theory of mutual mistake or under a theory of acquiescence by intent to deed to a marked boundary.

> In order to decree the reformation of a written instrument on the ground of mistake, that mistake must be mutual and common to both parties to the instrument. The burden of establishing such mistake is upon the party who seeks reformation. The evidence must be convincing and must clearly establish the right to reformation. [*Stevenson v Aalto*, 333 Mich 582, 589; 53 NW2d 382 (1952).]

Plaintiffs failed to provide clear evidence of a mutual mistake regarding the boundary line sufficient to justify reformation of plaintiffs' deed.

Plaintiff Martha Samples testified that she never discussed with defendants how many feet of road frontage she was buying nor did she discuss the boundary between the lots or

commission a survey before the purchase. Samples stated that she was "not concerned" about the boundary line between the cottages and that she had no idea of its location before the purchase. Samples contacted a surveyor a year after her purchase of the property because she wanted to place a fence on the boundary and needed a surveyor to fix the property line.

Hugh West, a trustee of defendant Anchorage Trust, testified that he had no idea what the boundary was between the two lots at the time of the sale of lot 41 to plaintiffs. West was also aware of the overlap between the original plat and the addition. West claimed that at the time of the sale, the sellers' intent was to convey "the guest cottage" and the lot it was on, and retain everything else. West also testified that defendants had no intent to deed to a specific line at the time of the sale to plaintiffs.

In cases where our Supreme Court has ordered reformation of a deed based on mutual mistake of a boundary line, the record has indicated some discussion between the parties about a specific boundary that both parties mistakenly assumed was correct. See, e.g., *Stevenson*, *supra* at 585-586; Zomerhuis *v Blankvoort*, 235 Mich 376, 377; 209 NW 56 (1926), and *Cline v Daniels*, 346 Mich 375, 378-379; 78 NW2d 102 (1956). In contrast, both parties here testified that at the time defendants conveyed lot 41 to plaintiffs, no one had any idea of the exact location of the boundary line; the parties simply assumed the boundary to be between the cottages. Although the parties' understanding and intent were imprecise, there was no mistake. The boundary line determined by the second survey was in fact located between the cottages,[1] albeit closer to plaintiffs' cottage than either party had thought.

These same facts preclude plaintiffs' argument that defendants intended to deed to a marked boundary. Acquiescence from an intention to deed to a marked boundary occurs when a grantor intends to deed to a physical monument, but the deed contains an incorrect legal description that does not properly reference the monument. *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960). Although mutual understanding of the intended boundary is not required under this theory, the evidence is clear that defendants only intended to convey lot 41 of the Boothman Gleason plat that contained plaintiffs' cottage and boathouse. Moreover, it is also clear that there was no physical marker between the lots and that defendants did not know the location of the boundary between lots 41 and 42, thus could not have had any intent to convey to some particular line.

We also disagree with plaintiffs' argument that there is a genuine issue of material fact on their claim to the disputed property under theories of adverse possession or acquiescence for the statutory period. Plaintiffs only provided evidence of occupation of the disputed property for approximately thirteen years and nine months, short of the fifteen-year statutory period required for adverse possession or for acquiescence.

> A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and

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[1] The side deck, which is shown encroaching on lot 42, was apparently added after plaintiffs purchased the property.

> uninterrupted for the statutory period of fifteen years. These are not arbitrary requirements, but the logical consequence of someone claiming by adverse possession having the burden of proving that the statute of limitations has expired. To claim by adverse possession, one must show that the property owner of record has had a cause of action for recovery of the land for more than the statutory period. A cause of action does not accrue until the property owner of record has been disseised of the land. [*Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993) (internal citations omitted).]

Acquiescence requires the same elements as adverse possession, except the possession need not be hostile or without permission. *Walters v Snyder*, 225 Mich App 219, 224; 570 NW2d 301 (1997). In addition, the burden of proof to show acquiescence is by preponderance of the evidence. *Id.* at 223.

Martha Samples testified that she and her family occupied the cottage from April until October every year, and that she had put a greenhouse on a portion of lot 42 in 1990 or 1991. She and her husband also erected a utility shed in 1989 and a woodshed in 2000. Samples recalled cutting some trees in the disputed area in 1990. Samples also testified that she had "marked" the boundary line with a row of flowerpots beginning in 1990, but had not erected a fence until 1999. Samples claimed that when he was still well enough to do so, her husband had mowed the area between the cottages as a favor.

Plaintiffs' evidence alone demonstrates that there was no occupation of the disputed property until 1989 when they built a shed on the disputed portion of the lot. The lawsuit was filed in April 2003 – at least one year before the fifteen-year statutory period for adverse possession or acquiescence had ended. Thus, plaintiffs' claims under these theories must fail.

Next, plaintiffs claim that they own the disputed portion of property under a theory of acquiescence following dispute and resolution. To prevail on this theory, plaintiffs were required to show that there was some disagreement about the boundary, which the parties resolved by an agreement with respect to the location of the line. *Hanlon v Ten Hove*, 235 Mich 227, 230; 209 NW 169 (1926).

Martha Samples testified that her late husband had discussed the boundary line in the 1989 survey with defendant Hugh West, and that she had witnessed the conversation. After learning that the boundary ran through a portion of his house, Samples claimed that West asked if they could move the survey stakes ten feet to the east. Samples' husband responded that that would be illegal. Samples testified that the conversation ended there and that later in the day, West commented that plaintiffs were "the owners of a two bedroom cottage now."

West testified that after the 1989 survey was completed, plaintiffs showed him a survey stake located approximately four feet from the side of defendants' cottage. West testified that plaintiffs indicated that this was the lot line. West claims that he disagreed and told plaintiffs that he did not think that the line was correct because he did not think the cottage would have been constructed so close to the property line. West also claimed that was the extent of the conversation. West did not recall ever telling plaintiffs that his bathroom was over the lot line.

Evaluating the evidence in a light most favorable to the non-moving party, there is no genuine issue of material fact that, although there was a dispute about the boundary line, there was no resolution of the problem by the parties. West's comment that plaintiffs were now "the owners of a two bedroom cottage" was not sufficient to constitute an agreement to treat the 1989 survey line as the boundary and, as the trial court pointed out, it was certainly inadequate to bind the Anchorage Trust.

Plaintiffs last argue that the equitable defense of laches should apply and that defendants should be estopped in their action for ejectment because they waited almost fifteen years before they disputed plaintiffs' use of lot 42. Meanwhile, plaintiffs relied to their detriment on the incorrect boundary line established by the 1989 survey.

We find that the lower court did not err in refusing to apply laches to defendants' claim for ejectment. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998). Laches requires, "the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant." *Kuhn v Secretary of State*, 228 Mich App 319, 334; 579 NW2d 101 (1998). And, as our Supreme Court observed in *Grix v Liquor Control Commission*, 304 Mich 269, 273; 8 NW2d 62 (1943):

> Mere delay in asserting a claim for a period less than the statute of limitations does not, in the absence of exceptional circumstances, constitute such laches as will defeat plaintiff's recovery either in law or in equity.

In its memorandum of decision, the trial court noted that the acquiescence claim and laches defense were interrelated and observed:

> Plaintiff's [sic] proceeded to act unwittingly as if Defendant had accepted the Bischer survey but did so at their own risk. It is unrealistic to believe that Defendant's [sic] would accept the fact that the western boundary of Lot #42 went through their cottage. Though Defendant's [sic] appeared to bury their heads in the sand while the Plaintiff went about improving and adding structures to their perceived property.

As discussed previously, there was no agreement by defendants that the results of the 1989 survey were accurate. Thus, there was insufficient evidence to show that there was any representation by defendants regarding the location of the boundary line such that plaintiffs were justified in relying on the 1989 survey.

Finally, we note that the trial court's remedy was to declare the westerly property line between lots 41 and 42 to be as depicted in the Boothman Gleason plat, but with an adjustment "to accommodate the deck of the plaintiffs' cottage that encroaches upon lot 42." The adjustment was to be made by a licensed surveyor. Although no adjustment has been made, the appropriate remedy consistent with the trial court's intent and declarations would be to draw a new westerly line going from the northeast corner of lot 1 to the southwest corner of lot 42. Such a line would ensure that plaintiffs' deck is accommodated, along with one of the two buildings placed on the lot by plaintiffs. Such a line also would not interfere with any sale of lot 41 or 42, and is a straight line, which will assist in any future boundary issues. We therefore

remand this matter to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

Plaintiffs' remaining claims are unpreserved for our review.

Affirmed but remanded.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio