# STATE OF MICHIGAN

# COURT OF APPEALS

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RONALD F. SCHILLING and SANDRA J. SCHILLING,

Plaintiffs/Counter-Defendants-Appellants,

v

TOMASZ ZOLTEK and ALICE ZOLTEK,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellees,

and

JOHN MEYERS and AGATHA MEYERS,

Defendants,

and

THOMAS PIPER and MARY PIPER,

Third-Party Defendants.

UNPUBLISHED
January 10, 2006

No. 254455
Oakland Circuit Court
LC No. 01-036111-CH

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Before: O'Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting defendant Zolteks' motion for summary disposition and dismissing plaintiffs' claims of acquiring a 25' by 227' strip of land through adverse possession. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs claim they presented sufficient evidence, through an affidavit, photographs, and depositions, to establish a genuine issue of material fact warranting a trial. They assert that the trial court erred in viewing the circumstances in a light most favorable to defendants, disregarding plaintiffs' evidence that was in direct conflict with defendants' assertions. We agree.

Under MCR 2.116(C)(10), if the non-moving party cannot present sufficient evidence to support its claim, the moving party is entitled to judgment as a matter of law. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). When reviewing a motion that tests the factual support for a claim, this Court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Further, this Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998), mod in part on other grounds *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999).

On April 1, 1979, plaintiffs moved into their new home at 2122 Pear Tree Lane in Oakland County. The northern end of their lot was adjacent to the southern end of a single lot owned by Philip Johnson, which was later split into two parcels. Plaintiffs alleged that they began using a 25' by 227' strip of land on the southern part of Johnson's property by trimming weeds, mowing grass, caring for existing trees, building a playhouse, building a sandbox, storing dirt, grass, and tree clippings, and creating a running track. Plaintiffs assert that, by these activities, they have exclusively and continuously maintained the strip of property for over twenty years.

In 1986, Johnson sold a portion of his property to John and Agatha Meyers, who settled out of this case at the trial level. The other half of the property was eventually sold to Mary and Tom Piper, who owned what is now the "Zoltek" lot from approximately 1994 to 1999, after which defendants Zoltek purchased the property. Before selling the property to the Zolteks in 1999, the Pipers signed a warranty deed, swearing that no other party had asserted a claim on the land. Defendants Zoltek also had the land surveyed, which reported no visible encroachments.

After Tomasz Zoltek informed Sandra Schilling of his intention to cut down the trees she had planted on the property in order to build a fence, plaintiffs commenced this suit to quiet title to the 25' by 227' strip of land on a theory of adverse possession or, in the alternative, the doctrine of acquiescence. The Zolteks brought a motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), arguing that no factual development could justify recovery on plaintiffs' part or, in the alternative, that plaintiffs could not show any genuine issue of material fact. During the motion hearing, the court received a letter from the Pipers denying that they knew anything about plaintiffs' use of the property. The court found that there had "been no real discovery done" and that plaintiffs had not met their burden of proof regarding adverse possession. The court noted further that it did not "feel there was any acquiescence . . . because, especially in light of the answer of the Pipers, but also in light of the facts and circumstances . . . ." Thus, the trial court granted the motion for summary disposition.

Although the trial court granted summary disposition on plaintiffs' claim of acquiescence, plaintiffs do not take issue with that decision on appeal. Further, even if plaintiffs had raised this issue, we find that no facts were shown in the record to warrant a reversal of the trial court's ruling regarding the acquiescence claim. Regarding plaintiffs' claim under the doctrine of adverse possession, we hold that the trial court erred in granting defendant Zolteks' motion for summary disposition because plaintiffs presented sufficient evidence to create a genuine issue of material fact such that defendants were not entitled to judgment as a matter of law.

In Michigan, adverse possession is made up of several elements: it must be under a claim of right, and the possession must be open, notorious, hostile, continuous, and uninterrupted for the fifteen-year statutory period. MCL 600.5801(4); *West Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). While the trial court correctly stated these elements in the motion hearing, it made two errors in its application of the law. First, the trial court erred in making factual conclusions regarding plaintiffs' adverse possession claim, which it was forbidden to do. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, the court must "review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Id*. In dismissing the case, however, the trial court stated, "I feel that the satisfaction necessary to be advanced . . . has not been satisfied."

Second, the trial court erred when it viewed all evidence in a light most favorable to defendants and ostensibly ignored plaintiffs' disputed facts. Our Supreme Court stated in *Maiden, supra* at 120, that "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits . . . set forth specific facts that there is a genuine issue for trial." It is true that the nonmovant's pledge to produce factual support for a claim at trial is not sufficient to survive a motion for summary disposition, *id.* at 121, and plaintiffs in this instance failed to depose their witnesses in the time allotted for discovery. Nonetheless, we do not believe plaintiffs merely relied on allegations or denials to show a genuine issue of fact for trial.

In dismissing plaintiffs' claims, the trial court relied heavily on the Piper's letter denying any knowledge of plaintiffs' use of the disputed strip of land, apparently to defeat plaintiffs' claim that their possession was open, notorious, and hostile. The trial court also depended largely on the survey done on the Pipers' land prior to defendants' purchase; "[t]he last survey that was done . . . show[s] that there was nothing that's done . . . . [A]s of the time of the survey when the sale was done in '99 there was nothing that would indicate that anything was trespassing."

The trial court failed to properly consider plaintiffs' affidavits, which directly contradicted both the survey and the Pipers' letter. In their affidavit, plaintiffs asserted that "[s]ince 4/1/79, Plaintiffs have exclusively and continuously maintained and used the portion of the 25' x 227' strip of property involving the Defendants, Zolteks [sic] portion of the property." Moreover, the trial court also overlooked the thirty-six color photographs depicting plaintiffs' backyard and their use of the disputed property over the years. At the motion hearing, plaintiff Ronald Schilling protested the trial court's ruling, but the court cut him off, stating that the pictures simply do not rise to the level of adverse possession.

Not only was the trial court's statement indicative of an impermissible factual conclusion, but it also illustrates the manner in which the court viewed all of the evidence in a light most favorable to defendants. Having reviewed the record, including all thirty-six of plaintiffs' photographs, we conclude that there is a visible and obvious boundary line between the disputed property, which plaintiffs have mowed and planted, and defendants' wild and uncut field. The photographs clearly contradict the survey, the Pipers' letter, and even defendants' own statement that they walked the property prior to their purchase and did not notice any encroachments. Even without plaintiffs' affidavit, the photographs alone would raise a genuine issue of material

fact warranting a trial, particularly in light of the fact that the photographs were taken over a twenty-year period.

Plaintiffs have not merely promised to bring adequate evidence to trial. Rather, they have set forth sufficient evidence to withstand summary disposition through their affidavit, exhibits, and depositions. Because this Court must be liberal in viewing the affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party (here, plaintiffs), *Marlo Beauty Supply, supra* at 320, the trial court's order granting defendants' motion for summary judgment must be reversed.

Reversed and remanded for further proceedings on plaintiffs' claim of adverse possession. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot