STATE OF MICHIGAN

COURT OF APPEALS

LYLE LADUKE,

Plaintiff-Appellant,

v

THOMAS DAVID STAPERT and DAWN M. STAPERT,

Defendant-Appellees,

and

SARAH SCHURING-BALLE, MARY WEEKS, CATHY WEEKS, WILLIAM E. SPARKS, RANDOLPH W. NOEL, DEBORAH D LOOMIS, FRANK W. SMETANA, MARY A. SMETANA, JOHN P. MORRIS, JERALD REITENOUR, JUDGY REITENOUR, DOUGLAS KIRK, KATHY KIRK, DAVID T. HUTCHINS, CRYSTAL A. BRIDEN, and KELLY S. BRIDEN,

Defendants.

UNPUBLISHED
February 13, 2018

No. 338239
Kalamazoo Circuit Court
LC No. 2015-000334-CZ

Before: MARKEY, P.J., and M. J. KELLY and CAMERON, JJ.

PER CURIAM.

Plaintiff, Lyle LaDuke, appeals by right the trial court order granting defendants, Thomas and Dawn Stapert's, motion for summary disposition on LaDuke's claims for adverse possession and prescriptive easement under MCR 2.116(C)(10).

I. BASIC FACTS

This case involves a property dispute between neighboring property owners in Vicksburg, Michigan. Since 1984, the Staperts have owned the property located at 4115 East Y Avenue, and since 1989 they have owned the property located at 4080 Kimble Lake Drive. In 1995, LaDuke purchased the property at 4075 Kimble Lake Drive from Mark and Tammy Stafford.

LaDuke's property is bordered on three sides by property owned by the Staperts; the fourth side is bordered by Lake Kimble.

Two easements exist on the Staperts' properties: the westerly right-of-way and right-of-way X. The westerly right-of-way was created in 1949 by a warranty deed. Right-of-way X was created in 1992 by a judgment entered following litigation. The 1992 judgment required the Staperts to remove a shed, propane tank, connections, wood pile, and other property owned by them off of right-of-way X. The judgment specified that the Staperts maintained an easement for ingress and egress over right-of-way X that was not to be restricted by "plaintiffs," i.e. LaDuke's predecessors-in-interest. It also entitled LaDuke's predecessors-in-interest to use right-of-way X for ingress and egress and for "all other reasonable uses, except that Plaintiffs are not entitled to construct any permanent structures above or below ground on right-of-way X. The judgment provided that both the Staperts and LaDuke's predecessors-in-interest maintained the right to use the westerly right-of-way "for ingress and egress."

At issue in this case is LaDuke's use of a portion of the westerly right-of-way. LaDuke contends that a strip of land running the length of the southern border of his property and extending 14.5 feet into the westerly right-of-way belongs to him by virtue of adverse possession or that he had the right to use it because he has a prescriptive easement over it. In 2015, LaDuke filed a complaint to quiet title in his favor to the disputed property.[1]

In October 2016, the Staperts filed a motion for summary disposition. The Staperts contended that LaDuke's claim for adverse possession failed because he could not adversely possess property that he had an easement over or, alternatively, because his use was not hostile, exclusive, or continuous and uninterrupted. They asserted that the prescriptive easement claim failed because LaDuke could not unilaterally expand the easement he already held for ingress and egress, or alternatively, because his use was not hostile or continuous and uninterrupted. The Staperts supported their motion for summary disposition with an affidavit stating that from 1995 until 2010 they granted LaDuke permission to park on the right-of-way so long as it did not impede their ability to use the right-of-way for ingress and egress.

In response, LaDuke challenged the Staperts' legal argument, contending that he could adversely possess property that he had an easement over and that he could, in fact, obtain a prescriptive easement over property that he already had an easement over. With response to the argument that his use was not hostile, he asserted that he had "clearly shown that his use of the disputed property has been hostile and continuous and uninterrupted for fifteen years," but he

[1] In an amended complaint, LaDuke also brought a claim for intentional infliction of emotional distress based on allegations that while LaDuke's house was burning down in February 2016, Thomas Stapert stood on his property line, stated "God works in mysterious ways," and heckled, laughed, and jeered LaDuke and his girlfriend as their home was burning. That claim, however, was dismissed following the Staperts' motion for summary disposition, and LaDuke does not challenge the dismissal on appeal. Accordingly, this Court will not address it further.

failed to direct the trial court to the facts supporting that statement.[2] Further, although he attached a number of documents to his response, none of them addressed whether or not he had permission from the Staperts to park on the disputed property or whether he had occasionally been forced by the Staperts to move his vehicles from it. LaDuke's lawyer asserted at oral argument that the documents attached to his response to summary disposition were all that he needed to survive summary disposition under MCR 2.116(C)(10).

Following oral argument, the trial court took the matter under advisement. Subsequently, on February 13, 2017, the trial court entered an opinion and order granting in part and denying in part the Staperts' motion for summary disposition.[3] With regard to the adverse possession claim and prescriptive easement claim, the trial court held that the Staperts had provided an affidavit stating that they gave LaDuke permission to park on the property from 1995 until 2010. The court noted that LaDuke had failed to come forward with evidence to dispute that claim. As a result, the court reasoned that LaDuke's permissive use of the property was insufficient to support his claims that he had hostilely possessed the property for the statutory period. The court also stated that the Staperts presented uncontroverted evidence that they forced LaDuke to move his vehicle from the westerly right-of-way when he restricted their ingress or egress, which defeated LaDuke's contention that his use was continuous and uninterrupted. Given the lack of a genuine issue of material fact with regard to the hostility element and the continuous and uninterrupted element of both adverse possession and a prescriptive easement claim, the trial court held that summary disposition was proper as a matter of law under MCR 2.116(C)(10).

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

LaDuke argues that the trial court erred by dismissing his claims for adverse possession and prescriptive easement under MCR 2.116(C)(10). We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). A party moving for summary disposition under MCR 2.116(C)(10) must support the motion with enough detail that the opposing party is on notice of the need to respond. *Id.*; see also MCR 2.116(G)(4) (stating that the moving party must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact"). The motion must be supported "with affidavits, depositions,

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[2] Although LaDuke argued that discovery had yet to be completed so a motion for summary disposition under MCR 2.116(C)(10) was premature, the trial court addressed the issues surrounding discovery when it heard the summary disposition motion. The court ruled that it would not issue a ruling on the summary disposition motion until the close of discovery, and that it would permit the parties to supplement their briefs after the close of discovery. LaDuke did not do so. As such, we see no reason to suspect that the trial court's February 2017 order granting summary disposition under MCR 2.116(C)(10) was premature.

[3] The trial court did not grant summary disposition on count I of the Staperts' complaint, which called for enforcement of the 1992 judgment. Count I was later dismissed by stipulation.

admissions, or other documentary evidence in support of the grounds asserted." *Barnard Mfg*, 285 Mich App at 369; MCR 2.116(G)(3)(b). A properly supported motion for summary disposition shifts the burden to the opposing party to establish that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In doing so, the nonmoving party cannot rely on mere allegations or denials, but must instead, "by affidavits or as otherwise provided in [MCR 2.116], set forth specific facts showing that there is a genuine issue for trial." *Barnard Mfg*, 285 Mich App at 374 (quotation marks and citations omitted).

B. ANALYSIS

The statutory period of limitations for adverse possession is 15 years. MCL 600.5801(4). "The 15-year period begins when the rightful owner has been disseised of the land." *Canjar v Cole*, 283 Mich App 723, 731; 770 NW2d 449 (2009). "Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership." *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). "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." *Waisanen v Superior Twp*, 305 Mich App 719, 731; 854 NW2d 213 (2014). It must also be "hostile" use. *Id*. In order to constitute "hostile" use, the property must be used "without permission and in a manner that is inconsistent with the rights of the true owner." *Jonkers v Summit Twp*, 278 Mich App 263, 273; 747 NW2d 901 (2008). "Mutual use or occupation of property with the owner's permission is insufficient to establish adverse possession." *West Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). "Peaceable occupation or use by acquiescence or permission of the owner cannot ripen into title by adverse possession, no matter how long maintained. Hostility is of the very essence of adverse possession." *King v Battle Creek Box Co*, 235 Mich 24, 35; 209 NW 133 (1926).

"A prescriptive easement requires elements similar to adverse possession, except exclusivity." *Matthews v Dep't of Natural Resources*, 288 Mich App 23, 37; 792 NW2d 40 (2010). Thus, an easement by prescription arises from a use of the servient estate "that is open, notorious, adverse, and continuous for a period of fifteen years." *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995). Mere permissive use of another's property will not create a prescriptive easement. *Banach v Lawera*, 330 Mich 436, 440-441; 47 NW2d 679 (1951).

In this case, the Staperts supported their motion for summary disposition with an affidavit, that stated in pertinent part:

> 14. From 1995-2010, we permitted LaDuke to park within the Westerly Right-of-Way so long as he did not restrict our ingress and egress. We had allowed the neighbor before him to park in a similar fashion prior to 1995.
>
> 15. At certain instances between 1995-2010, we forced LaDuke to move his vehicle from the Westerly Right-of-Way when he restricted our ingress and egress.

16. One such instance was in 2006, when we had to make LaDuke move his vehicle from the Westerly Right-of-Way because it was blocking our builders from accessing and using our property to build our home at 4115 East Y. Avenue. Our builders had to make LaDuke move his vehicle on a weekly basis.

17. We had multiple confrontations with LaDuke between 1995-2010 over making him move his vehicle from its position within the Westerly Right-of-Way and his improper uses of the Westerly Right-of-Way and Right-of-Way X.

18. Other than these confrontations that occurred when our ingress and egress was blocked, we still permitted LaDuke to park on the Westerly Right-of-Way until 2010, at which point we learned, based on information and belief, that LaDuke had poisoned our dog.

19. As a result of this information, we notified LaDuke that we were withdrawing our permission to let him use the easement to park on the Westerly Right-of-Way.

Coupled with the arguments raised in their motion for summary disposition, the Staperts specifically identified the issues relating to permissive use and to a lack of continuous and uninterrupted use with enough detail to put LaDuke on notice of the need to respond. See *Barnard Mfg*, 285 Mich App at 369. Stated differently, the Staperts' motion was properly supported.

As such, the burden shifted to LaDuke to come forward with evidence beyond mere allegations or denials to establish that there was a genuine issue for trial. *Quinto v Cross*, 451 Mich at 362; *Barnard Mfg*, 285 Mich App at 374. In his response to the motion for summary disposition, LaDuke asserted that he "provided clear and cogent proof that he possessed the property in dispute for a period of greater than fifteen years and that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted." He also contended that he had deprived the Staperts of possession and displaced them by exercising the powers and privileges of ownership. With regard to the prescriptive easement claim, LaDuke asserted that he "has clearly shown that his use of the disputed property has been hostile and continuous and uninterrupted for fifteen years." LaDuke also submitted a number of documents in support of his response, none of which addressed the Staperts' evidence showing that his use was permissive.

First, he submitted an affidavit from Deborah Loomis and Randolph Noel that stated, "Lyle LaDuke has parked on the property immediately to the south of his property—"on the easement." This affidavit, however, is silent on the issue of whether LaDuke's use of the property was with or without permission. It also fails to state a time period for LaDuke's use. Thus, it is insufficient to counter the Staperts' evidence that LaDuke's use was permissive and interrupted by their demands that he move his vehicle when it blocked their ingress and egress.

Next, LaDuke submitted a copy of a letter purportedly sent from Randolph Noel to Thomas Stapert. The letter clearly detailed that there was hostility between LaDuke and Thomas Stapert. It also provided "Lyle and Kate have been parking on the easement for years. You and Dawn have been taking pictures of this for years. No one can deny that." However, like the

affidavit from Noel and Loomis, the letter does not provide any evidence regarding whether the use of the property was with or without permission, nor does it state that the use was uninterrupted.

LaDuke also submitted an affidavit from Mark Weeks that stated "Lyle LaDuke has been parking his cars in front of his house for as long as he has lived there. Lyle LaDuke has kept the Stapert's [sic] off his parking area." Although this letter provides a timeframe, it is silent with regard to whether LaDuke was parking in front of his house with or without the Staperts' permission. Thus, it is insufficient to create a genuine issue of material fact on the issue of hostility.[4]

Finally, LaDuke submitted his own affidavit, which contained numerous assertions related to his use of the disputed property. He contended that, like the people he purchased the property from, he had continuously parked on the disputed property. He stated that he told all his neighbors that he intended to continue using the property indefinitely. LaDuke also averred that he had maintained the strip of land by removing snow and mowing the grass, that he had "excluded all other persons" from accessing the strip of land for 20 years, and that he made people move tangible property left on the strip of land or moved the property himself. LaDuke concluded that "[a]ll persons in my neighborhood know that for twenty years I have claimed the right to park my vehicles and to exclusively use that property."

Despite the myriad of factual allegations raised in his affidavit, the only statement that gives us pause is LaDuke's claim that he has "been requested by Thomas D. Stapert on numerous occasions over the last twenty years to not park my vehicles in that fourteen and a half foot area." Viewed in the light most favorable to LaDuke, the nonmoving party, this statement allows for an inference that he has not always had permission to use the property, given that he has been asked not to park on it on numerous occasions over a twenty year period. However, this statement, without more, is insufficient to counter the Staperts' affidavit. First, LaDuke's statement does not actually state that he never moved his vehicle in response to the request; instead, it only states that he was asked to move it. Thus, the Staperts' statement that they successfully asserted their ownership of the property over the disputed property as late as 2006, is uncontroverted. Next, LaDuke's affidavit does nothing to negate the Staperts' claim that he had their permission to park on the disputed property—save for when he blocked ingress or egress—from 1995 until 2010. Even viewed in the light most favorable to LaDuke, his statement is silent on whether, save the times he was asked to move his vehicles, he had the Staperts' consent to park on the disputed property.

Finally, at oral argument, LaDuke's lawyer promised to bring in "quite a few witnesses" at trial "to talk about 20 years of massive hostility and 20 years of Lyle LaDuke barring all other persons from that parking area." However, a mere promise to present evidence is insufficient to defeat a motion for summary disposition. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

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[4] LaDuke additionally submitted an affidavit from Rob Homan; however, it related solely to a show cause motion unrelated to the issues raised on appeal.

In sum, although LaDuke presented evidence that he used the disputed property to park his vehicles for twenty years, and although he presented evidence that his relationship with the Staperts was contentious, he did not present any evidence to contradict the Staperts' claim that his use of the property was permissive until 2010. Because permissive use defeats a claim that a use was hostile, *Banach*, 330 Mich at 440-441; *West Mich Dock & Market Corp*, 210 Mich App at 511, the trial court did not err by granting summary disposition on the claims for adverse possession and prescriptive easement.[5]

Affirmed. The Staperts, as the prevailing parties, may tax costs. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Thomas C. Cameron

[5] On appeal, LaDuke also argues that the trial court erred by denying his motion for reconsideration. However, it appears that his motion only directed the court to the same evidence attached to his response to the summary disposition motion. As noted above, that evidence was insufficient to create a fact question in this case. Thus, given that LaDuke was unable to "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from the correction of the error," see MCR 2.119(F), we conclude that the trial court did not abuse its discretion by denying the motion.