

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT E. MCGOWAN TRUST, by DIANE
WIEGMANN, Successor Trustee and Individually,
ROBERT E. MCGOWAN, JR., and DONNA
GILLUND,

UNPUBLISHED
February 12, 2013

Plaintiffs/Counter-Defendants-
Appellants/Cross-Appellees,

v

No. 306137
Berrien Circuit Court
LC No. 2010-000085-CH

SAMUEL THOMAS and RHONDA THOMAS,

Defendants/Counter-Plaintiffs-
Appellees/Cross-Appellants,

and

EDMUND J. FREZA, CAROL A. FREZA, and
CHEMICAL BANK,

Defendants-Appellees.

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

In this property dispute, plaintiffs, the Robert E. McGowan Trust and Diane Wiegmann, Robert E. McGowan, Jr., and Donna Gillund, who are beneficiaries of the trust, appeal by leave granted the August 29, 2011 order of the trial court that rescinded its May 2, 2011 order granting their motion to strike the jury demand of defendants Samuel and Rhonda Thomas and Edmund and Carol Freza. The Thomases cross-appeal the trial court's March 23, 2011 order denying defendants' motion for summary disposition under MCR 2.116(C)(10) on plaintiffs' claim for acquiescence. We reverse the order denying summary disposition and remand for entry of judgment in favor of defendants.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs and the Thomases are the owners of adjoining lots, Lot 39 and Lot 40, respectively, in the Beachwood on Lake Michigan No. 1 Plat in Hager Township. In 2009, the

Thomases granted the Frezas an easement on Lot 40. The Thomases also constructed stairs on the easement that went down the bluff to the shore of Lake Michigan. Plaintiffs sued the Thomases and the Frezas,¹ claiming that, pursuant to the doctrine of acquiescence, they owned the “Disputed Property” located along the north side of Lot 39 and on and along the south side of Lot 40 and generally extending northwesterly for a distance of approximately 470 feet to the shore of Lake Michigan. The northern boundary line of the Disputed Property, according to a sketch drawn by Wightman & Associates, extends 150 feet from the shore of Lake Michigan and past the end of the steel seawall that Robert E. McGowan, Sr. built in 1994 and then angles southeast to the eastern-most corner of Lot 39.² Plaintiffs alleged that at all relevant times, and at least since 1987, plaintiffs’ predecessors in title, as well as the Thomases’ predecessors in title, treated the northern edge of the Disputed Property as the boundary line between Lot 39 and Lot 40.

The Thomases and the Frezas moved for summary disposition under MCR 2.116(C)(10). They argued that there was no evidence that any party acquiesced to any property line other than the platted boundary line. In addition, the Thomases and the Frezas argued that there was no evidence of a definite and certain property line. Defendant Chemical Bank joined the motion and adopted the arguments of the Thomases and Frezas.

The trial court denied the motion for summary disposition. According to the trial court, there were sufficient facts, generally obtained from the testimony of McGowan, Jr., to withstand summary disposition. It explained that McGowan, Jr. had been knowledgeable about Lot 39 since August 1987 and that McGowan, Jr. testified that he believed that the property line of Lot 39 was the north end of the seawall. It also noted that there was no evidence that anyone disputed that the Disputed Property was part of Lot 39 until the Thomases made the boundary line an issue.

The trial court and the parties subsequently discussed the appropriateness of a trial by jury in this matter, and plaintiffs thereafter moved to strike defendants’ jury demand, arguing that because plaintiffs’ claims were equitable in nature, MCL 600.2932, defendants had no right to a jury trial. Defendants responded that plaintiffs’ action was, in fact, one for ejectment, for which defendants had a right to a jury, notwithstanding MCL 600.2932. The trial court initially granted plaintiffs’ motion to strike³, but later reconsidered that decision.⁴

¹ Chemical Bank was included as a defendant because it owns a mortgage on Lot 40.

² The steel seawall bolstered a previously existing wood seawall that also extended onto Lot 40.

³ The trial court proposed at that time to have a “stand-by jury” present during the trial. It explained that the verdict of the jury, which would be empaneled pursuant to MCR 2.509(D)(1), would be received by a different trial judge, who would seal the verdict. Then, if an appellate court determined that defendants were entitled to a jury trial, the verdict would be unsealed and received as the verdict.

This appeal, by leave granted, of the jury trial issue, and cross-appeal of the denial of summary disposition, followed.⁵

II. STANDARD OF REVIEW

We first address the Thomases' dispositive argument on cross-appeal that the trial court erred in denying defendants' motion for summary disposition on the acquiescence claim. We review a trial court's decision on a motion for summary disposition de novo. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009).

III. THE TRIAL COURT ERRED IN DENYING SUMMARY DISPOSITION TO DEFENDANTS

Acquiescence is a doctrine used to assist in the resolution of boundary disputes. 1 Cameron, Michigan Real Property Law (3d ed), § 12.9, p 427. The touchstone of the doctrine "is the existence of an *agreed line or boundary*. Only when there has been some agreement, whether tacit or overt, as to the location of the boundary line does the question of acquiescence become important." *Wood v Denton*, 53 Mich App 435, 439-440; 219 NW2d 798 (1974) (emphasis in original). There are three theories of acquiescence: (1) acquiescence for the statutory period; (2) acquiescence following 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 theory at issue in the instant case is acquiescence for the statutory period. The statutory period is 15 years. *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993). In *Kipka*, this Court stated:

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

⁴ The trial court held, in part, that MCL 600.2932 was unconstitutional to the extent that it deprived persons who are in possession of real property of the right to trial by jury. The trial court therefore indicated that the jury would be given a special verdict form. If the jury found that the Thomases possessed the Disputed Property at the time plaintiffs filed the lawsuit, the jury would then decide the entire matter. But, if the jury found that the Thomases were not in possession, the jury would be excused and the trial court would decide the matter.

⁵ Although the Frezas and Chemical bank are appellees in this action, they have not filed briefs with this Court and have not joined the Thomases in their cross-appeal.

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. [*Id.* at 438.]

The acquiescence of the parties' predecessors in title may be tacked onto that of the parties to establish the required period of 15 years. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001).

A claim of acquiescence based on the statutory period "requires merely a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy regarding the boundary." *Walters v Snyder*, 225 Mich App 219, 224; 570 NW2d 301 (1997). Possession, for a claim of acquiescence, need not be hostile or without permission. *Id.* Michigan case law "has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence," *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000) (*Walters II*), but case law provides that acquiescence is established when the evidence proves by a preponderance that the parties treated a particular boundary line as the property line. *Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009); *Walters II*, 239 Mich App at 458. "An essential of acquiescence is knowledge." *Maes v Olmsted*, 247 Mich 180, 183; 225 NW 583 (1929) (citation omitted). Other jurisdictions have indicated that a property line must be definite and visible to be acquiesced to as a boundary line. See *Mealey v Arndt*, 206 Ariz 218, 222; 76 P3d 892 (Ariz App, 2003); *Manz v Bohara*, 367 NW2d 743, 746 (ND, 1985).⁶ A party cannot acquiesce to a boundary line that it cannot identify with certainty. *Calthorpe v Abrahamson*, 441 A2d 284, 290 (Me, 1982). Although the parties need not explicitly acknowledge a precise property line, they must at least have "treated" a particular boundary as an approximate property line. *Walters II*, 239 Mich App at 459.

According to plaintiffs, the approximate property line between Lot 39 and Lot 40 was established by a wood fence, trees and other plantings, and landscaping on the top of the bluff. However, the deposition testimony reveals that it was the seawall built by McGowan, Sr. in 1994, rather than the fence, trees and plantings, or landscaping on the top of the bluff, that led to plaintiffs' claim of an acquiesced property line. Wiegmann testified that she thought the

⁶ The Arizona Court of Appeals and the North Dakota Supreme Court opinions collect numerous cases from other jurisdictions in support of their respective statements. Although the decisions of courts in other jurisdictions are not binding on this Court, we may find them to be persuasive authority. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007).

property line was at the end of the seawall, and that was all she really knew. According to her, there was nothing that marked this property line as it extended from the shore of Lake Michigan. Gillund testified that she believed that the seawall marked the property line, but she did not have an opinion of the location of the property line as it extended from the seawall. McGowan, Jr. also testified that he believed the seawall marked the property line.

The Thomases purchased Lot 40 from Jim and Carolyn Palmer in August 2007. Samuel Thomas claimed that he was first introduced to Lot 40 in 2006 and that, since 2006, the platted boundary line between Lot 39 and Lot 40 has been marked with survey stakes. He always believed that the property line between Lot 39 and Lot 40 was the platted boundary line. Plaintiffs presented no evidence to contradict Mr. Thomas's averments and create a genuine issue of material fact that the Thomases believed that the property line was the end of the seawall or anything other than the platted boundary line, or that they ever treated the end of the seawall as the property line.

In addition, there is no evidence to create a genuine issue of material fact whether the Palmers, the Thomases' predecessors in interest, treated the end of the seawall as the property line between Lot 39 and Lot 40. Plaintiffs have no actual knowledge regarding what the Palmers thought was the property line between the two lots. McGowan, Jr. never discussed the property line with the Palmers, and Wiegmann and Gillund never even met them. The only evidence submitted to the trial court concerning the Palmers' belief of the property line between Lot 39 and Lot 40 after 1987, when McGowan, Jr. purchased Lot 39, was the agreement that Carolyn Palmer made with McGowan, Sr. in 1994 (after Lot 39 had been transferred to McGowan, Sr. from McGowan, Jr.). In the agreement, Ms. Palmer granted McGowan, Sr. permission to install the steel seawall extending onto Lot 40. This grant supports the inference that Ms. Palmer knew that the existing wood seawall extended onto Lot 40 and that the steel seawall McGowan, Sr. intended to build also would extend onto Lot 40. There was no evidence regarding how the Palmers used or took care of Lot 40 after McGowan, Sr. built the seawall. Accordingly, there is no evidence to suggest that, after the seawall was installed, the Palmers treated the end of the seawall as the boundary line between Lot 39 and Lot 40.

The touchstone of acquiescence is that there is an agreement, whether tacit or overt, between the parties as to the location of the property line. *Wood*, 53 Mich App at 439-440. The evidence must prove that the parties treated a particular boundary line as the property line. *Mason*, 282 Mich App at 529-530; *Walters II*, 239 Mich App at 458. Because plaintiffs presented no evidence to show that the Palmers, despite knowing that the seawall extended onto Lot 40, treated the end of the seawall as the property line between Lot 39 and Lot 40, they failed to create a genuine issue of material fact that the parties reached an agreement, even a tacit one, that the end of the seawall was the property line between the two lots.

Lack of agreement as to the location of the property line is sufficient ground for the trial court to have granted summary disposition to the Thomases. Additionally, the evidence must prove that the parties treated a *particular* line as the property line. *Mason*, 282 Mich App at 529-530; *Walters II*, 239 Mich App at 458. Even if there was evidence to create a genuine issue of material fact whether the Palmers treated the end of the seawall as the property line between Lot 39 and Lot 40, there is no evidence to suggest that the Palmers treated the northern property line of the Disputed Property, as shown on the sketch prepared by Wightman & Associates, as the

property line between Lot 39 and Lot 40. As previously stated, plaintiffs presented no evidence regarding how the Palmers used or took care of Lot 40. Further, there is no certainty or definiteness to the northern property line of the Disputed Property. *Mealey*, 206 Ariz at 222; *Manz*, 367 NW2d at 746. Even amongst plaintiffs, there was disagreement about the property line between Lot 39 and Lot 40. McGowan, Jr. testified that the sketch of the Disputed Property accurately reflected his understanding of the property line between the two lots. In the sketch, the property line angled southeast after it extended 150 feet from the shore of Lake Michigan and past the seawall. However, Wiegmann believed that the property line extended in a straight line from the seawall to the road. Gillund simply had no opinion on the location of the property line.

Further, the location of the property line of the Disputed Property, as shown in the sketch, did not exist until after the boundary dispute arose. The property line was not marked by anything other than the end of the seawall. McGowan, Jr. and Wiegmann agreed that the property line was not the wood fence; it was north of the fence. Wiegmann testified that nothing marked the property line as it extended from the seawall. According to her, the trees were natural and did not give a property line. McGowan, Jr. never testified that trees and other plantings or any landscaping marked the property line on the top of the bluff. Also, the location of where the property line angled after extending past the seawall was not determined by plaintiffs. McGowan, Jr. testified that he requested that John Kamer, of Wightman & Associates, alter the initial sketch of the Disputed Property because it did not accurately reflect his understanding of the property line. However, he did not tell Kamer where to draw the line. Kamer testified that he revised the sketch of the Disputed Property to reflect that the property line extended 150 feet from the shore of Lake Michigan before it angled, and he had been instructed to make this revision by plaintiffs' attorneys. Under these circumstances, and viewing the evidence in the light most favorable to plaintiffs, plaintiffs have not established a genuine issue of material fact as to whether the parties treated the northern boundary line of the Disputed Property as shown in the revised sketch as the boundary line between Lot 39 and Lot 40. *West*, 469 Mich at 183. Accordingly, defendants were entitled to summary disposition on the acquiescence claim, and the trial court erred in denying the motion.

Because we conclude that the trial court erred in denying the motion for summary disposition on the acquiescence claim, we need not, and do not, address plaintiffs' claim on appeal that the trial court erred in granting the motion for reconsideration on its order striking the Thomases' and Frezas' jury demand (or the constitutional issue subsumed therein). A determination on the issue cannot grant plaintiffs any relief. See *Attorney Gen v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005) ("An issue is moot if an event has occurred that renders it impossible for the court to grant relief.")

We accordingly reverse the trial court's denial of summary disposition in favor of defendants, and remand for entry of judgment for defendants and dismissal of plaintiffs' claim. The Thomases, having prevailed in full in their cross-appeal on the issue of the propriety of summary disposition on plaintiff's acquiescence claim, are entitled to tax their "reasonable costs

incurred in the Court of Appeals” relating to the cross-appeal. MCR 7.219(F).⁷ We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra

⁷ MCR 7.219(A) states that, “[e]xcept as the Court of Appeals otherwise directs, the prevailing party in a civil case is entitled to costs.” MCR 7.219(H) states that “[e]xcept as provided in this rule, MCR 2.625 applies generally to taxation of costs in the Court of Appeals.” MCR 2.625(B)(2) states:

In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.

Because plaintiffs’ appeal has been rendered moot by our resolution of the cross-appeal, no costs on appeal related to the issue raised in plaintiffs’ appeal may be taxed, neither party having prevailed on that issue.