

STATE OF MICHIGAN
COURT OF APPEALS

KATHERINE A. SMOLARZ and STEVE J.
SMOLARZ,

UNPUBLISHED
May 23, 2013

Plaintiffs-Appellants,

v

ROBERT D. HIGLEY, SUSAN HIGLEY a/k/a
SUZANNE HIGLEY, and RONALD C.
FORMAN,

No. 311484
Otsego Circuit Court
LC No. 09-913287-CH

Defendants-Appellees.

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs Katherine Smolarz and Steve Smolarz claimed title to approximately 50 feet of defendants Robert and Susan Higley's and Ronald Forman's property based on a boundary line dispute. Following a bench trial, the circuit court properly rejected the Smolarz plaintiffs' claim because there was no credible evidence that the Higleys, Forman or their predecessors-in-interest acquiesced to a new property line at any time. We affirm.

I. BACKGROUND

Contested in this case is the boundary line between two parcels of property to the north owned by defendants Robert and Susan Higley and defendant Ronald Forman and a large property to the south owned by plaintiff cousins Katherine Smolarz and Steve Smolarz. The Smolarz' property has been in their family since 1937, and they claim that Katherine's father erected a barbed wire fence along the perceived boundary in the 1950s. The Smolarz plaintiffs assert that the fence line was maintained through 2009.

Defendants Robert and Susan Higley purchased a large parent parcel in the mid-1980s via land contract from the Cottrell family. The Cottrells had owned the land since 1953. Robert Higley testified that he worked as a farm laborer on the land in the early 1970s and never saw a fence along the Smolarz property line. Robert indicated that there was no standing fence until Steve Smolarz erected one in 2009.

In 1999 and 2002, Robert Higley had his parent parcel surveyed, after which he divided the land, keeping only a small portion for himself. Steve Smolarz removed the survey stakes

showing the legal boundary line and placed them even with the purported fence line. The Smolarz plaintiffs believed their northern border was approximately 50 feet beyond the legal limit of their neighbors' property.

In 2009, the parties filed separate actions, which were consolidated in the circuit court. The Smolarz plaintiffs sought equitable relief, contending that the neighbors had acquiesced to a new border along the fence line for the statutory 15-year period. The Higleys and Forman sought damages to have the property surveyed again and the survey stakes reset. After hearing conflicting testimony about the existence of the subject fence, the court concluded that the fence had previously existed but had long been abandoned before Steve Smolarz tried to resurrect it in 2009. Moreover, there was no evidence that the Higleys, Forman or the Cottrells ever saw the fence (as it was in a densely wooded area), let alone ever acquiesced in the fence line being the boundary between the properties. Accordingly, the court denied the acquiescence claim and granted the Higleys and Forman their requested damages.

II. LEGAL PRINCIPLES

We review de novo a trial court's resolution of an equitable action. *Mason v Menominee*, 282 Mich App 525, 527; 766 NW2d 888 (2009). We also review de novo the trial court's underlying legal conclusions. *Id.* We review the court's underlying factual findings for clear error. *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008).

The doctrine of acquiescence provides a manner for quieting title when neighbors have acquiesced to a boundary line between their properties. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). The claimant must establish acquiescence by a preponderance of the evidence. *Id.* "There are three theories of acquiescence . . . : (1) acquiescence for the statutory period; (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 theory in issue here is acquiescence for the statutory 15 years. See *Killips*, 244 Mich App at 260; MCL 600.5801(4). "The acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years." *Killips*, 244 Mich App at 260. Under this theory the claimant is not required to establish any preceding controversy over the property line. Rather, the claimant must only show "that the parties *treated* a particular boundary line as the property line." *Mason*, 282 Mich App at 529-530, quoting *Walters v Snyder*, 239 Mich App 453, 457-458; 608 NW2d 97 (2000) (emphasis in original).

III. ANALYSIS

The Smolarz plaintiffs did not establish that the Higleys, Forman or the Cottrells treated the fence as the property line. Katherine Smolarz claimed that she knew the Cottrells and her father each maintained their sides of the fence in the 1950s and 1960s. She conceded at trial, however, that she never saw any Cottrell representative near the fence and only saw her father repair the fence twice. Katherine and Steve Smolarz admitted that they made assumptions about fence maintenance based on farming traditions. The photographic evidence showed the

remnants of a long-abandoned fence. Rusted barbed wire lay on the ground covered by “rotted out” fallen trees. A tree had grown around another length of wire. Fence posts lay on the ground in a state of decomposition. There was no evidence that the fence had been maintained for any 15-year period and the evidence contradicted that the fence remained standing from the 1950s through 2009.

There is no record indication that the Higleys, Forman, or Cottrells treated the fence, if it existed at the time, as the property line. The Higleys twice had the property surveyed and thereafter treated the legal boundary as the property line. Before that, Robert Higley actually believed his southern border was marked by a hill on the Smolarz plaintiffs’ land based on a representation by a Cottrell family member. There is no proof that defendants or their predecessors-in-interest knew that a fence had ever existed. The Smolarz property is densely wooded and the forest continues into the northern parcel. The fence ran through the woods where it may have gone unnoticed. Robert Higley and Forman definitively testified that they never saw the fence.

This Court will “defer to the trial court’s superior position to observe and evaluate witness credibility.” *Marshall Lassar, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). The trial court gave greater credence to the Higleys’ and Forman’s claims that neither they nor their predecessors treated the Smolarz plaintiffs’ claimed fence as the property line. Given the lack of record evidence to the contrary, we have no ground to interfere with that judgment.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Elizabeth L. Gleicher

/s/ Mark T. Boonstra