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NO. COA01-124

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

WACHOVIA BANK OF NORTH CAROLINA,
N.A., as Trustee under Will of
MARY A. SHAW,
Plaintiff,

v.

New Hanover County
No. 96 CVS 2391

MABEL D.S. WEEKS and husband,
and KAROLYN THOMAS,
Defendants,

SADIE GRAHAM HART,
Intervenor Plaintiff.

Appeal by plaintiff-intervenor from order entered 9 August 2000 by Judge James E. Ragan in New Hanover County Superior Court. Heard in the Court of Appeals 7 January 2002.

Stevens, McGhee, Morgan, Lennon, O'Quinn & Toll, LLP, by Alan E. Toll, and James R. Boykins, for plaintiff-intervenor-appellant.

Burrows & Hall, by Richard L. Burrows, and Sneed & Bonner, by David Sneed, for defendant-appellee.

EAGLES, Chief Judge.

Sadie Graham Hart ("plaintiff-intervenor") appeals from the trial court's order granting summary judgment in favor of Mabel D.S. Weeks ("defendant"). The sole issue on appeal is whether the trial court erred in concluding that defendant was the sole fee

simple owner of the land in dispute by adverse possession. After careful review of the record, briefs, and arguments of counsel, we affirm.

At the center of this controversy is a thirty acre tract of land ("disputed tract") located in New Hanover County, North Carolina. The evidence tends to show the following. The common title to the disputed tract can be traced back as far as 1880; however, for purposes of this appeal, we need only trace the history of the tract back to 1905. In that year, the disputed tract was subject to a partition proceeding. Pursuant to a Report of Commissioners and confirming order of the Clerk of New Hanover County Superior Court, recorded in Division of Lands and Dowers, Book "A," Page 511, the disputed thirty acre tract was partitioned as follows: twenty-six acres to Frank Hill and four acres to Polly Suggs, Mr. Hill's sister. After this partition proceeding, the disputed tract developed two separate chains of title through which plaintiff-intervenor, plaintiffs, and defendant claim title.

First, plaintiff-intervenor claims title to the entire disputed tract through the 1905 Commissioners' Report and the subsequent 1934 transfer of the tract from Frank Hill to Sarah Hill Smith, plaintiff-intervenor's grandmother. In 1934, Frank Hill died intestate. Since Mr. Hill was not married and had no children at the time of his death, the record indicates that his interest in the disputed tract (twenty-six acres) passed to Sarah Hill Smith, his surviving sister.

Conversely, plaintiffs claim title to the entire disputed tract through a 1939 deed ("Graham to Shaw deed") recorded in Book 302, Page 442 of the New Hanover County Registry of Deeds. On 15 December 1939, Sarah Hill Smith's nine grandchildren -- Morris Graham, Frank Graham, Carrie Graham, Harlee Graham, Irine Graham, Leroy Graham, Horace Graham, Mary Allen Graham, and plaintiff-intervenor -- purported to deed the entire disputed tract (thirty acres) to W.L. Shaw as payment for the burial of Janie Smith Graham, their mother and Ms. Smith's daughter. Plaintiff-intervenor contends that this deed was acquired by fraud. The 1939 Graham to Shaw deed, as well as all other deeds in this chain of title, described the land to be transferred as follows:

Beginning at a black gum stump in the Eastern edge of Gum Branch, being a point in James Grant's line and running thence; southwardly with said gum Branch about 1800 ft. to its junction with the said two mile branch, thence Northwardly with the Eastern edge of said Smith's Bay to James Grant Line and thence; with James Grant's line about 60 degrees East 1600 ft. to the beginning, containing about 30 acres.

Subsequently, the disputed tract was deeded to H.B. Shaw and his wife Mary A. Shaw in 1972. Upon H.B. Shaw's death in 1978, Ms. Shaw became the sole fee simple owner of the disputed tract. In 1982, Ms. Shaw died testate, and her will was duly probated in New Hanover County. Under the terms of her will, Ms. Shaw devised fee simple interest in the disputed tract to plaintiff Wachovia Bank of North Carolina, N.A., as trustee for her estate. Pursuant to the will, Wachovia Bank was directed to convey 1/6 interest in the

disputed tract to co-plaintiff Karolyn Thomas. In 1988, Wachovia Bank did in fact convey the 1/6 interest to Ms. Thomas.

Finally, defendant claims title to the entire disputed tract through a 1950 deed ("Swart to Parker deed") recorded in Book 465, Page 18 of the New Hanover County Registry of Deeds. Alternatively, defendant claims title by "adverse possession for a period in excess of twenty years under the provisions of N.C.G.S. § 1-40."

In 1950, Jan Swart deeded 668 acres of land to Hardy R. Parker, Sr., defendant's husband. Included in the 668 acres was the land described as follows:

BEGINNING at a Black gum in the eastern edge of Gum Branch about 1800 feet to its junction with the said Two Mile Branch; thence Northwardly up the Two Mile Branch to Smith's Bay; thence Northwardly with the Eastern edge of said Smith's Bay to James Grant's line; thence with James Grant's line about south 60 degrees East 1600 feet to the point of beginning, containing about 30 acres. This is the same land conveyed to Frank Hill by deed filed for registration May 29, 1906, and recorded in Book 47, at Page 491 of the records of the Register of Deeds of New Hanover County. It is the intention of the parties of the first part hereof to convey unto the party of the second part hereof all right, title and interest in all lands owned by Frank Hill and Polly Suggs which may be situated in Harnett Township, in said County and State, and was allocated to Polly Suggs and Frank Hill by Commissioners on February 20, 1905 in Book of Lands and Dowers, Page 511; and also being the same lands conveyed to M.H. Kennick and wife, Nelson Kennick, by deed recorded June 16, 1943, in Book 353 Page 138, of said New Hanover County Registry.

. . . .

BEGINNING at a Black gum stump in the eastern

edge of a Gum Branch about 1800 feet to its junction with the said Two Mile Branch; thence Northwardly up the Two Mile Branch to Smith's Bay; thence Northwardly with the Eastern edge of said Smith's Bay to James Grant's line; and thence with James Grant's line about South 60 degrees East 1600 feet to the point of beginning; containing about 30 acres. This is the same land conveyed to Frank Hill by deed filed for registration May 29, 1906, and recorded in Book 47, Page 491 of the records of the office of the Register of Deeds of New Hanover County. It is the intention of the parties of the first part hereof to convey unto the party of the second part hereof all right, title and interest in all lands owned by Frank Hill and Polly Suggs which may be situated in said Harnett Township, in said County and State and was allocated to Polly Suggs and Frank Hill by Commissioners February 20, 1903, in Book of Lands and Dowers, Page 511, and also being the same lands conveyed to M.H. Kennick and wife, Nelson Kennick by deed recorded in Book 334, Page 558, of New Hanover County Registry.

This description encompasses the entire disputed thirty acres. Pursuant to the Swart to Parker deed, defendant and her husband took possession of the entire 668 acre tract, including the disputed thirty acres, in 1950. Upon her husband's death in 1967, defendant inherited title to the entire tract, including the disputed thirty acres.

In 1996, plaintiff Wachovia Bank filed a complaint seeking a declaratory judgment quieting title in the disputed tract and determining the ownership interests of the parties. Subsequently, Ms. Thomas was added as a named plaintiff in this action. Thereafter, Sadie Graham Hart was added as a plaintiff-intervenor claiming an interest in the disputed tract adverse to plaintiffs and defendant. Ultimately, defendant filed a motion for summary

judgment and sought declarations that the description in the 1939 Graham to Shaw deed was patently defective and that she was the sole fee simple owner of the disputed tract by adverse possession.

A hearing on the motion was held during the 31 July 2000 Civil Session of New Hanover County Superior Court, the Honorable James E. Ragan presiding. On 9 August 2000, the trial court entered an order granting summary judgment for defendant. Specifically, the trial court granted summary judgment declaring that the description contained in the 1939 Graham to Shaw deed was "patently defective as a matter of law," that defendant was the sole fee simple owner of the disputed tract by adverse possession "free and clear of all claims of the plaintiffs," and dismissing plaintiffs' complaints with prejudice. Plaintiff-intervenor and plaintiffs Wachovia Bank and Ms. Thomas appealed. Subsequent to filing their notices of appeal, plaintiffs assigned all of their rights in the disputed tract and this action to plaintiff-intervenor. Consequently, plaintiff-intervenor is the sole appellant bringing this appeal.

"At the outset, we note that the standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). The moving party "ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). "If the moving party satisfies the burden of proof, then the burden shifts to the

non-moving party to 'set forth specific facts showing that there is a genuine issue for trial.' The nonmoving party 'may not rest upon the mere allegations of his pleadings.'" *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982) (emphasis and citation omitted). "[T]he evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577. Summary judgment is only proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c).

On appeal, plaintiff-intervenor contends that the trial court erred in its grant of summary judgment declaring defendant the sole fee simple owner of the disputed tract by adverse possession. We disagree and affirm.

During the summary judgment hearing, defendant claimed title to the disputed tract by "adverse possession for a period in excess of twenty years under the provisions of N.C.G.S. § 1-40." "In order to acquire title to land through adverse possession, a party must show actual, open, hostile, exclusive and continuous possession of the land claimed for twenty years under known and visible boundaries." *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 460, 490 S.E.2d 593, 596 (1997). "The party attempting to establish title by adverse possession has the burden

of proof." *Town of Winton v. Scott*, 80 N.C. App. 409, 415, 342 S.E.2d 560, 564 (1986).

In their briefs, the parties agreed that a cotenancy existed in the disputed tract. "The possession of one tenant in common is in law the possession of all his cotenants unless and until there has been an actual ouster or a sole adverse possession of twenty years, receiving the rents and claiming the land as his own, from which actual ouster would be presumed." *Morehead v. Harris*, 262 N.C. 330, 343, 137 S.E.2d 174, 186 (1964).

"Although older cases speak of an actual ouster, North Carolina adheres to the rule of constructive ouster." *Casstevens v. Casstevens*, 63 N.C. App. 169, 171, 304 S.E.2d 623, 625 (1983) (citation omitted). The rule of constructive ouster "presumes the requisite ouster 'if one tenant in common and those under who he claims have been in sole and undisturbed possession and use of the land for twenty years when there had been no demand for rents, profits or possession.'" *Id.* (emphasis omitted) (quoting *Collier v. Welker*, 19 N.C. App. 617, 621, 199 S.E.2d 691, 694-95 (1973)). The purpose of this rule "is to prevent stale demands and to protect possessors from the loss of evidence due to lapse of time." *Ellis v. Poe*, 73 N.C. App. 448, 450, 326 S.E.2d 80, 83 (1985).

Here, defendant's husband took actual possession of the land in 1950. Upon his death in 1967, defendant inherited her husband's interest in the entire tract, including the disputed thirty acres. Accordingly, the record reflects that defendant has been in continuous actual possession of the disputed tract since 1950. See

Ramsey v. Ramsey, 229 N.C. 270, 273, 49 S.E.2d 476, 478 (1948) ("The privity necessary to warrant the tacking of the possession of successive claimants by adverse possession must be created by grant, devise, purchase, or descent").

In her affidavit, defendant admitted that "[a]t the time [she] purchased the land [she was] advised by the attorney representing [her] . . . that he was not certain that [she] had obtained a deed for all of the interests in the" disputed tract. After this acknowledgment of the cotenancy in 1950, defendant and her husband (hereinafter collectively "defendant") took immediate steps to act inconsistently with the recognition that title was shared. For instance, defendant had the entire 668 acre tract surveyed and mapped in 1950. This 1950 survey map established the outer boundaries of defendant's property, but the map did not acknowledge the boundaries of the disputed tract which is located within the property's outer boundaries. Also, defendant listed the entire 668 acres, including the disputed thirty acres, for property tax purposes in 1950.

Since 1950, defendant has continuously paid taxes on the 668 acre tract, including the disputed thirty acres. In 1951, defendant moved into a residence on the 668 acre tract. Thereafter, defendant "continually maintained and used a roadway from the house to and through the disputed" tract; during the 1960's, defendant "granted an easement to New Hanover County authorizing it to dig" mosquito control canals on the disputed tract; from 1965 to 1971, defendant sold approximately 200 acres of

her 668 acre tract, including a portion of the disputed thirty acres, to Gregory-Murray Construction Company for construction of Windemere subdivision; in 1953, 1954, 1959, and 1970, defendant granted easements to Carolina Power & Light Company upon the 668 acre tract, including the disputed thirty acres; in 1965 and 1968, defendant conveyed drainage easements upon the disputed tract; in the 1960's, defendant cut and sold timber from the disputed tract; after a 1982 fire, defendant removed damaged timber from the disputed tract and reseeded the area; in 1986, defendant had the remaining timber on the disputed tract cut and thinned; from the 1960's to the 1990's, defendant leased portions of her land, including the disputed thirty acres, to hunters; defendant maintained firelanes on the disputed tract; defendant erected "No Trespassing" signs on the land indicating that she was the owner; and defendant prosecuted trespassers.

"If a cotenant occupies the entire property for twenty years to the exclusion of a cotenant it is presumed there was an ouster at the time of the entry and it is presumed the action of the occupying cotenant during this period includes everything necessary to establish adverse possession." *Herbert v. Babson*, 74 N.C. App. 519, 521, 328 S.E.2d 796, 798 (1985). In order for this presumption to arise, "the sole possession for 20 years must have continued without any acknowledgment on the possessor's part of title in his cotenant." *Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 434, 257 S.E.2d 85, 90 (1979).

Here, aside from the period in 1950 when defendant first took possession of the disputed tract, there was no express or active acknowledgment by defendant of shared title with any cotenant during the ensuing thirty-six years, 1950 to 1986. In 1986, plaintiff Wachovia Bank did request that the New Hanover County tax department note on defendant's tax card that the title to the disputed tract was in dispute. However, this was the first attempt in thirty-six years in which any party asserted any adverse claim to the disputed tract. During the prior thirty-six years, plaintiff-intervenor and plaintiffs never made any demands of defendant for rents, profits, or possession. To that point, defendant had been in sole and undisturbed possession and use of the disputed tract for thirty-six years.

"Once the tenant in common has possessed the land for the requisite twenty year period, the ouster relates back to the initial date of taking of possession." *Ellis*, 73 N.C. App. at 450, 326 S.E.2d at 83. Thus, viewing the evidence in the light most favorable to plaintiff-intervenor, defendant is entitled to the presumption that she constructively ousted all cotenants at her time of entry in 1950 and that her actions included everything necessary to establish adverse possession of the disputed tract for thirty-six years, 1950 to 1986.

Since this was a summary judgment proceeding and defendant satisfied her initial burden of showing adverse possession by means of a constructive ouster, the burden shifted to plaintiff-intervenor to rebut the presumption and to establish that a genuine

issue of material fact existed for trial. See *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366. While the record indicates that the Shaws and plaintiff Wachovia Bank paid taxes on the disputed tract continuously since 1941, no genuine issue of material fact exists as to the fact that plaintiff-intervenor and plaintiffs did not make any claim to the disputed tract until 1986.

In its Responses to Defendant's Discovery, plaintiff Wachovia Bank admitted that it had never "been in actual physical possession of any part of the land in which plaintiffs claim ownership . . . within the past twenty years prior to filing the complaint in this case." Additionally, plaintiff-intervenor testified in her deposition that she had never been to the disputed tract; that since her mother's death in 1939, she never made any claims to the disputed tract; that since 1939, she never paid any property taxes on the disputed tract; that she never cut or sold timber from the disputed tract; and that prior to her involvement in this lawsuit, she never claimed any ownership interest in the disputed tract.

Here, no conflicting evidence exists. Plaintiff-intervenor failed to rebut the presumption that she was constructively ousted in 1950 and that defendant did everything necessary to establish adverse possession in the disputed tract for a period of thirty-six years, 1950 to 1986. Accordingly, we conclude that the trial court correctly granted summary judgment in defendant's favor.

Finally, we note that plaintiffs also assigned error to the trial court's grant of summary judgment declaring the description contained in the 1939 Graham to Shaw deed "patently defective as a

matter of law." However, plaintiff-intervenor did not set out this assignment nor did she present any argument or discussion to support this position in her brief. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(6). Thus, plaintiff-intervenor-appellant has waived any assignment of error relating to the 1939 deed.

In sum, we affirm the trial court's grant of summary judgment declaring defendant the sole fee simple owner of the disputed tract by adverse possession.

Affirmed.

Judges McCULLOUGH and CAMPBELL concur.

Report per Rule 30(e).