

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Bruce Korenko, et al.

Court of Appeals No. E-09-020

Appellants

Trial Court No. 2004-CV-0355

v.

Kelleys Island Park Development
Company, et al.

DECISION AND JUDGMENT

Appellees

Decided: February 19, 2010

* * * * *

William H. Smith, Jr., for appellants.

D. Jeffery Rengel and Thomas R. Lucas, for appellees
David and Sally Yeager; Martin J. Holmes, Jr., for
appellees Robert and Kathleen Keaton and Margaret Alaburda.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas which granted summary judgment in favor of appellees and against appellants on

an adverse possession claim between the parties. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellants, Bruce and Leslie Korenko, set forth in the following five assignments of error:

{¶ 3} "NO. 1 THE TRIAL COURT ABUSED ITS DISCRETION IN APPLYING THE INCORRECT STANDARD IN RULING ON THE APPELLEES [SIC] MOTIONS FOR SUMMARY JUDGMENT.

{¶ 4} "NO. 2 THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT TO THE APPELLEES YEAGER, KEATONS, AND ALABURDA.

{¶ 5} "NO. 3 THE TRIAL COURT IMPROPERLY GRANTED THE PROPERTY TO ALL APPELLEES THROUGH ADVERSE POSSESSION.

{¶ 6} "NO. 4 THE TRIAL COURT IMPROPERLY DENIED THE APPELLANTS [SIC] MOTION TO AMEND THEIR COMPLAINT.

{¶ 7} "NO. 5 THE TRIAL COURT IMPROPERLY VACATED THE NOVEMBER 16, 2004 DEFAULT JUDGMENT ENTRY."

{¶ 8} The following undisputed facts are relevant to the issues raised on appeal. This case stems from a protracted property dispute centering upon a small triangular shaped vacant lot owned by a long defunct real estate development company located upon the Lake Erie resort destination of Kelleys Island. Appellees are comprised of the three adjacent property owners, while appellants reside across the street from the disputed parcel.

{¶ 9} On June 7, 2004, appellants filed a complaint to quiet title and acquire the lot via adverse possession against the property owner of record, the now defunct Kelleys Island Park Development Company. Appellants, Bruce and Leslie Korenko, reside across the street from the vacant lot.

{¶ 10} On September 16, 2004, counsel for Robert and Kathleen Keaton filed a motion to intervene. The Keatons reside immediately adjacent to the disputed parcel. On November 16, 2004, the trial court granted a default judgment to appellants. On December 15, 2004, counsel for David and Sally Yeager likewise filed a motion to intervene. The Yeagers similarly reside immediately adjacent to the disputed parcel. On March 9, 2006, the trial court denied the motions to intervene. The Keatons and the Yeagers appealed the denial of their requests to intervene.

{¶ 11} On May 4, 2007, this court reversed the trial court, thereby granting the right of intervention to the Keatons and the Yeagers. *Korenko v. Kelleys Island Park Dev. Co.*, 6th Dist. No. E-06-029, 2007-Ohio-2145. On June 18, 2008, counsel for Margaret Alaburda also filed a complaint to quiet title and acquire the disputed parcel via adverse possession. Alaburda, like the Keatons and Yeagers, resides immediately adjacent to the disputed parcel. Alaburda's complaint was consolidated with the related pending cases.

{¶ 12} On December 1, 2008, counsel for the Yeagers filed for summary judgment. On December 2, 2008, counsel for the Keatons and Alaburda likewise filed a joint motion for summary judgment. Appellees asserted entitlement to ownership of the

three respective portions of the vacant lot directly adjacent to and sharing a boundary with their three properties via adverse possession. Appellees simultaneously disputed appellants' adverse possession complaint and rebuked appellants' various claims of conduct argued to be sufficient in support of appellants' adverse possession claim.

{¶ 13} In support of their motions for summary judgment, appellees furnished affidavits, photographic evidence, and deposition testimony delineating their connection to and use of the lot for purposes of establishing the requisite legal elements of adverse possession.

{¶ 14} On January 16, 2009, appellants filed a brief in opposition to appellees' summary judgment motions and restated their claimed entitlement to the parcel via adverse possession premised, in significant part, upon the November 16, 2004 default judgment entry in their favor.

{¶ 15} On March 12, 2009, the trial court granted summary judgment in favor of appellees and against appellants. In conjunction with this summary judgment ruling, the trial court simultaneously vacated the conflicting November 16, 2004 default judgment entry. Timely notice of appeal was filed.

{¶ 16} In their first assignment of error, appellants maintain the trial court abused its discretion in purportedly applying an incorrect legal standard in its summary judgment ruling. In support, appellants specifically assert that the trial court "confused the burden of proof for establishing an adverse possession claim and the standard for determining the validity of a Motion for Summary Judgment as set forth in Civ.R. 56."

{¶ 17} Notably, appellants concede both that the trial court properly set forth the summary judgment standard and likewise properly set forth the burden of proof on an adverse possession claim. Nevertheless, appellants claim that the trial court improperly applied the clear and convincing adverse possession standard in reaching its summary judgment decision.

{¶ 18} In support of this position, appellants fundamentally rely upon their interpretation of a portion of the ruling in which the court stated in relevant part that, "this plaintiff has failed to show exclusive possession that was open, notorious, continuous, and adverse for 21 years and since every element must be satisfied by clear and convincing evidence there is no need to proceed further in explanation of why Defendant's Motion for Summary Judgment is GRANTED."

{¶ 19} We have carefully reviewed and considered the trial court's March 12, 2009 summary judgment opinion and judgment entry to determine the propriety of appellants' claim that the summary judgment determination itself relied upon the incorrect legal standard. Closer examination of the opinion reveals that appellants' argument does not reflect the full and complete content of the ruling. On the contrary, it takes the relied upon portion of the ruling wholly out of context.

{¶ 20} Significantly, immediately following the portion of the ruling relied upon by appellants, the trial court unambiguously concludes and states, "Under Civil Rule 56 (C) this Court concludes that there are no genuine issues as to any material fact. The occasional use by plaintiffs of the triangular lot does not rise to the level of adverse

possession and the Yeager defendants are entitled to judgment as a matter of law. It would be futile for this Court to again engage in the above stated analysis. For all practical purposes the scrutiny as it relates to the Korenkos v. Keatons and Alaburda would remain the same. Plaintiffs have failed to set forth evidence by clear and convincing evidence that their possession was open, notorious, continuous and adverse for 21 years and therefore there remains no genuine issue as to any material fact and the defendants Keatons and Alaburda's motion for summary judgment is granted."

{¶ 21} Read and interpreted in the full context of the summary judgment ruling in its entirety, as relevantly excerpted above, we find that the record clearly demonstrates that the trial court utilized the proper Civ.R. 56 legal standard in reaching its summary judgment determination and expressly stated so in its opinion. We find appellants' first assignment of error not well-taken.

{¶ 22} We will next address appellants' second and third assignments of error. These two assignments will be reviewed simultaneously given their common legal premise that the trial court's summary judgment ruling was improper. Appellants' second assignment of error contends that the trial court erred in granting summary judgment to appellees. Appellants' third assignment of error more specifically contends that the trial court erred in granting title via adverse possession to appellees in its summary judgment ruling.

{¶ 23} Appellants assert that the trial court erred in its summary judgment ruling in favor of appellees. Thus, we note at the outset that an appellate court reviews the trial

court's granting of summary judgment on a de novo basis, applying the same standard as that utilized by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment must be awarded when there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 24} In applying this guiding summary judgment legal standard to the specific facts and circumstances of this case, we first reiterate that this matter emanates from four property owners claiming entitlement to title to a vacant triangular lot via adverse possession on Kelleys Island. Appellees, the three immediately adjacent property owners, each similarly assert that they are entitled to the respective portions of the triangular lot immediately adjacent to their own property as against the conflicting claim of entitlement to the entire lot via adverse possession of appellants, who reside across the road from the lot. We further note that the record makes clear appellees' not untenable belief that the actual underlying motive by appellants, all Beach Road residents, in pursuing their claim to the lot is to block the decades long practice of appellees and their predecessors-in-interest of accessing Beach Road via the vacant lot.

{¶ 25} It is well established in Ohio that to succeed in acquiring title via adverse possession, a claimant must show exclusive possession that is open, notorious,

continuous, and adverse for at least 21 years. *Evanich v. Bridge*, 119 Ohio St.3d 260, 2008-Ohio-3820.

{¶ 26} Given the de novo nature of summary judgment review, we have thoroughly reviewed the record of evidence before the trial court and considered it anew to determine whether any of the parties conclusively demonstrated these elements of adverse possession such that no genuine issue of material fact remained.

{¶ 27} We find that the record contains unambiguous and undisputed evidence in the form of affidavits, depositions, and photographic evidence successfully establishing that the Yeagers, Keatons, and Alaburdas engaged in conduct with respect to the triangular parcel sufficient to be found to be open, notorious, continuous, and adverse for more than 21 years. These families cleared paths across the lot, regularly traversed it to access Beach Road, harvested firewood from the site, traveled across the site on bicycles and motorcycles, and engaged in numerous uses of the parcel for over three decades that were clearly open, notorious, continuous and adverse. They equally treated the property as part of their own for approximately three decades and did nothing to conceal this treatment wholly consistent with the elements of adverse possession.

{¶ 28} On the contrary, appellants, who live across Beach Road from and not adjacent to the parcel, failed to similarly establish that their actions should be deemed open, notorious, continuous and adverse for more than 21 years. Appellants claim without any relevant legal support that a now deceased salesman verbally represented to them when they purchased their lot in 1978 that they also owned the disputed triangular

lot across the street. On the contrary, the record reflects that they never took title to the parcel. In terms of their conduct over the years towards the lot across the road from their home, appellants claimed to have planted some flower bulbs at some point years in the past, occasionally removed debris from the parcel, parked a boat on the site for a time in the early 1980s, and have played fetch on the site with their dogs. These isolated claims fail to constitute the elements of adverse possession.

{¶ 29} We find that the record of evidence establishes that appellees engaged in a consistent pattern of conduct for more than 21 years that was open, notorious, continuous, and adverse with respect to the disputed triangular vacant lot adjacent to their respective properties. Conversely, we find that the record of evidence fails to establish a consistent pattern of conduct for more than 21 years that was open, notorious and adverse with respect to the disputed parcel on the part of appellants. As such, we find that no genuine issue of material fact remained regarding the conflicting adverse possession claims between the parties. Appellees were entitled to title via adverse possession of the disputed parcel. Appellants were not. We find appellants' second and third assignments of error not well-taken.

{¶ 30} In appellants' fourth assignment of error, they allege that the trial court erred and abused its discretion in denying their motion to amend their complaint.

{¶ 31} Civ.R. 15(A) provides that a party may seek leave of court to amend a pleading and that such leave generally should be freely given. However, given that a determination on whether to grant or deny a motion to amend lies well within the trial

court's discretion, appellate court review is conducted pursuant to the abuse of discretion standard. *Turner v. Cent. Local School Dist.* (1999), 85 Ohio St.3d 95, 99. An abuse of discretion connotes more than a mere error of law or judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 32} As applied to the instant case, we need not belabor our analysis. Given the four-year span of time that elapsed between the filing of appellants' complaint and their motion to amend, we cannot say that the trial court's denial of the motion was arbitrary, unreasonable or unconscionable. We find appellants' fourth assignment of error not well-taken.

{¶ 33} In appellants' fifth assignment of error, they argue that the trial court erred in vacating the November 16, 2004 default judgment entry in its March 12, 2009 summary judgment ruling.

{¶ 34} Given this court's 2007 reversal of the trial court's initial denial of intervention, enabling appellees to intervene subsequent to the 2004 default judgment, the 2004 default judgment in favor of appellants was rendered void as a matter of law. Otherwise, it would stand in direct conflict with the subsequent orders of this court. As such, the trial court possessed authority to comport with this court's May 4, 2007 ruling by vacating the conflicting 2004 default judgment in its 2009 summary judgment ruling. We find appellants' fifth assignment of error not well-taken.

{¶ 35} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. Appellants are ordered to pay the cost of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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