In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00215-CV

ANITA REED, LEE PERRY, GERALD WAGNER, JUANITA WAGNER JAMES, FRANSY LENA WAGNER, FRANKYE WAGNER JOHNSON, FRANK WAGNER, JR., DONETTA WAGNER JACKSON, JOHNETTA WAGNER FOLEY AND THE HEIRS AND UNKNOWN HEIRS, EXECUTORS, SUCCESSORS OR ASSIGNS OF JEFF FREEMAN, LISSIE MAE HOOD, CURLIE HOOD WAGNER, KELSEE HOOD, EMMET FREEMAN, SUSAN BEARD, MOLLIE FREEMAN, MARY FREEMAN AND SALLIE HOOD,
Appellants

V.

JOHN C. RICE, AS EXECUTOR OF THE ESTATE OF JEWEL RICE, Appellee

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On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. CIV24385

MEMORANDUM OPINION

The descendants of Jeff Freeman appeal an adverse judgment on the adverse possession claim brought by Jewel Rice. We affirm the trial court's judgment.

Jeff Freeman held a 160-acre tract of land out of the Alfred Holcomb Survey.[1] Jeff died intestate. Jeff had three children with his wife, Mollie. One child, Pressfitt, died without issue. A second child, Rosabelle, and her daughter, Lillie Mae McQueen are the source of Rice's title, having conveyed 130 acres to Opal Rice and Jewel Rice in a deed dated March 27, 1958. A third child, Bobbie, had two children, Sherman Hubert and Thelma Hubert. Sherman conveyed the 130-acre tract to John Handley on September 19, 1972. Thelma conveyed the same 130-acre tract to John Handley on February 17, 1976. The Handleys and the Rices partitioned the 130-acre tract in 1973, and Jewel and her husband took title in the "69.454" acre tract that is the subject of this litigation. Thus, Jewel holds the property under color of title through the legitimate heirs of Jeff Freeman.

In 1921, Jeff, Rosabelle, Pressfitt, and Bobbie conveyed thirty acres out of the 160-acre Freeman tract to Sallie Hood in consideration for her having raised and cared for Rosabelle, Pressfitt, and Bobbie for fifteen years. Sallie Hood had three children: Lissie, who died intestate without issue; Kelsee, who also died intestate without issue; and Curlie Mae Hood Wagner, who is the mother of appellants Gerald Wagner, Anita Wagner Reed, Juanita Wagner James, Fransy Lena Wagner Walker, Viola Wagner Drake, Frankye Wagner Johnson, Frank Wagner Jr., Donetta Wagner Jackson and

[1] J.C. Feagin conveyed a 160-acre tract to Jeff Freeman in a deed dated December 4, 1885, but the deed records do not contain a conveyance into Feagin. The State issued a patent for 116.56 acres in 1973. The document states that the "lands herein described being occupied and claimed by O.C. Rice and presently called a portion of the Wm. H. Glover Pre-emption Survey, A-1104[.]" The metes and bounds description recites that the Holcomb survey was performed in 1853 and filed in 1856 and the Glover survey was performed in 1875 and filed in 1876.

Johnetta Wagner Foley. In 2005, a judgment in declaration of heirship decreed that Curlie's children were the grandchildren of Jeff Freeman. At the time of Jeff Freeman's death, children born out of wedlock could not inherit through the laws of descent and distribution. *See generally Jeter v. McGraw*, 218 S.W.3d 850, 852-53 (Tex. App.—Beaumont 2007, pet. denied).

Jewel's daughter, Cathie Rice Smith, testified that her family had kept the property posted since they acquired the property from Rosabelle and Lillie Mae in 1958. Although the Rices lived nearby on a separate tract of land, since 1958 the Rice family has paid the taxes on the property annually, fenced the 130 acres, hunted on the land, harvested the timber four times, cut a thirty-foot wide fire lane around the perimeter, had people removed from the property two or three times, and made visible use and control of the property.

In 1964, several members of the Freeman family granted a power of attorney to a lawyer named Jones and conveyed a one-third interest in the 160-acre Freeman tract to the attorney in consideration for his employment in perfecting their title to that real property. Those who executed conveyances included Curlie Wagner, acting in her capacity as guardian of Lissie Hood's and Kelsee Hood's estates, Curlie in an individual capacity and joined by her husband, Sherman Hubert, Thelma Hubert, and Lillie Mae, acting in her capacity as Rosabelle's guardian. The instruments signed by Sherman and Thelma specifically mention that a title dispute had arisen with Opal Rice. The lawyer

acted as counsel of record in a suit filed against Opal and Jewel by Lillie Mae in her capacity as Rosabelle's guardian. The petition sought to set aside the 1958 conveyance by Rosabelle and Lillie Mae to the Rices. The Rices asserted title by limitation in their answer to the suit. Lillie Mae and Rosabelle eventually non-suited the case. Anita admitted that the suit did not proceed to trial and judgment. Rosabelle and Lillie Mae moved off of the property in 1958, when they sold to the Rices, and none of the members of the Appellants' family lived on the property after that date. To contradict the claims of exclusion, Anita testified that she was able to freely walk onto the property by walking around the barriers.

Juanita Wagner James recalled that Curlie once confronted Jewel in an effort to make the Rices get off of the property, and that Jewel held a gun on Curlie. Within the past few years, one of the members of the Rice family found Juanita on the property claimed by Rice and told Juanita to leave. Juanita testified that since the 1960's the family knew they needed to file a suit, but the lawyers always withdrew.

In 1972, Curlie, acting in her individual capacity and as Lissie's and Kelsee's guardian, executed oil, gas, and mineral leases to Belco Petroleum Corporation for the 130-acre tract and the thirty-acre tract. In 1973, the Rice family and Belco Petroleum were involved in getting the patent issued to Alfred Holcomb on the 116.56-acre tract that includes the "69.454" acres at issue in this case. Opal died in 1980 and left his entire estate to Jewel. Jewel's daughter testified that sometime after 1980 her family had the

sheriff remove a timber cutter from the property. The Reed family had authorized the timber cutter to cut timber on the Sallie Hood thirty-acre tract.

Anita started researching the title in 1993. She wrote a letter to Jewel in 1995. In this letter, Anita mentions that the Rices had posted the property with no-trespassing signs. Anita states that her family's records indicate that the family owned 160 to 166 acres, and acknowledges that Jewel and her husband obtained ownership through Rosabelle. The letter reveals that at that time Anita was aware that Jewel claimed to own the entire 130 acre tract outright, and asserts that "as you know we have rejected your claim to our property since 1958, in the 1960's, 1970's, and 1980's until now." She adds, "[w]e do not deny that you have warranty deeds, deeds of trust, oil leases, gas leases, assignments, conveyances, abstracts, surveyors, and whatever else it takes to clearly steal and rob us of our property." The letter concedes "[perhaps] you own 42 acres, but we cannot see you owning all of our 160-166 acres."

Jewel filed this suit in 2008. At trial, she produced a survey map that located the Sallie Hood thirty-acre tract on the northwest end of the Freeman tract, placed Handley's subdivided tract immediately southeast of the Sallie Hood thirty acres, and placed the property in dispute in this case at the southeast end of the 160-acre Freeman tract.

In their first issue, Appellants contend that Jewel failed to prove by a preponderance of the evidence that she maintained actual and visible possession of the property. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.021(1) (West 2002) (defining

"adverse possession" as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person."). To establish adverse possession, the claimant must prove an actual and visible appropriation of the land of such a character as to unmistakably assert a claim of exclusive ownership. *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990). Cathie Rice Smith testified that her family fenced the property shortly after Rosabelle and Lillie Mae executed the conveyance to Opal and Jewel in 1958. Cathie claimed the property was posted. Consistent with that claim, Anita's 1995 letter mentions that the property is "posted with no trespassing signs, keep out signs and no hunting signs" and complains to Jewel that "it appears from all the signs, cables, chains, and wire along with elected officials and [officers] of the Law that you have no plans to abandon your claim to our land." The trial court could find that the Rices' purpose in erecting the fence and posting the property was to visibly display their claimed ownership of the property. *Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 439 (Tex. App.—Texarkana 2006, no pet.) ("The fencing of land has long been recognized as visible appropriation."); *Stafford v. Jackson*, 687 S.W.2d 784, 787 (Tex. App.—Houston [14th Dist.] 1985, no writ) (finding evidence that a fence was built and repaired established that the property was designedly enclosed).

Appellants argue that they are Jewel's co-tenants and contend that the record contains insufficient evidence of ouster. "[A] co-tenant may not adversely possess

against another co-tenant unless it clearly appears he has repudiated the title of his co-tenant and is holding adversely to it[.]" *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 756 (Tex. 2003). When co-tenants partition the whole of the property, to the exclusion of a non-participating co-tenant, the act of partition affects an ouster of the excluded cotenant. *Id.* Here, John Handley acquired the interest of Jeff's heir, Bobbie, and Opal and Jewel acquired the interest of Jeff's heir, Rosabelle. Their duly recorded 1973 partition deed repudiated any co-tenancy with appellants. *See id.*

The trial court received ample evidence that Curlie and the members of her family had notice that Jewel's possession of the property was hostile to them. In 1964 Curlie conveyed an interest in the property to a lawyer as consideration for legal services. The suit filed by the lawyer attempted to set aside Jewel's deed. Curlie confronted Jewel with her claim of ownership of the property and Jewel responded with a show of force. In her letter, Anita tells Jewel that "[y]our deed expresses Rosabell[e] Freeman and Lillie Mae McQueen selling you 130 acres out of the Alfred Holcombe 320 acres survey as though Bobbie Freeman, Lissie Hood Freeman, Curlie Hood Freeman, and Kelsee Hood Freeman were not a part of the ownership of the 160 acres originally owned by their father Jeff Freeman." She further states that "we are serving notice to you again as in 1964 that you have no legal right to our property. Since you never lived on the property we cannot ask you off, but we are asking you to remove the barriers set up by you to keep us off of our property." Referring to the 1964 litigation, Anita states that "Lillie Mae

joined us in 1964 to establish our continued ownership of the land, 130 acres that you [supposedly] purchased from her and of which we tell you that she never owned." As the finder of fact, the trial court could infer from this letter that the appellants were aware that Jewel claimed the property to the exclusion of whatever interest they might hold in it. We overrule issue one.

In their second issue, appellants contend that the trial court erred in granting judgment for adverse possession based upon a patent from the State acquired in 1973. The issuance of a patent is a mere ministerial act that does not defeat vested legal rights. *Atl. Refining Co. v. Noel*, 443 S.W.2d 35, 39 (Tex. 1969). The 1973 patent issued to Alfred Holcomb, his heirs and assigns. Jeff Freeman's deed purported to convey a portion of the property within the A. Holcomb Survey. Although there is a break in the chain of title between Holcomb and Jeff's grantor, presumably the patent issued to a common predecessor in title to both Jewel and the appellants. Appellants' complaint that the State issued a patent outside of the prior landowner's chain of title is not supported by the record. We overrule issue two and affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on May 27, 2011
Opinion Delivered September 29, 2011

Before McKeithen, C.J., Kreger and Horton, JJ.