Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-432

JUNE TERM, 2017

John Moyers	}	APPEALED FROM:
	}	
	}	Superior Court, Addison Unit,
v.	}	Civil Division
	}	
	}	
Sheun Lai Poon & Brenda Lee Poon	}	DOCKET NO. 207-11-14 Ancv
		Trial Judge: Samuel Hoar, Jr.

In the above-entitled cause, the Clerk will enter:

In this dispute between adjoining landowners over the rights to a driveway, the trial court granted partial summary judgment in plaintiff's favor, concluding that defendants had not produced sufficient facts to demonstrate adverse possession or a prescriptive easement and subsequently entered judgment in plaintiff's favor stating that defendants had no right to the driveway except for access for deliveries. Defendants appeal, arguing that the summary judgment decision was in error. Plaintiff cross-appeals, arguing that the court erred in failing to grant further and more specific injunctive relief. We affirm the December 12, 2016 final judgment order, but strike the second-to-last sentence in the judgment order enjoining defendants from engaging in uses other than access for deliveries.

Plaintiff filed suit in November 2014 alleging that he owned land in Bristol, Vermont, that included a driveway that provided access to his land from Main Street in Bristol. He further alleged that adjacent to the driveway defendants owned a commercial building located on Main Street that was leased to a tenant and operated as a restaurant. Plaintiff claimed that defendants' tenant used the driveway on plaintiff's land for deliveries and also stored fuel tanks and waste containers on plaintiff's land.[1] Plaintiff argued that defendants' actions amounted to trespass and sought damages and injunctive relief.

In answer, defendants counterclaimed and asserted that they had a right to use the driveway and land behind their building for parking, access, delivery, storage, and other related commercial purposes. With respect to access, defendants alleged that they had a prescriptive easement because, since at least 1997, they or their predecessors in title had used the driveway extending from Main Street and running behind their property for access to the rear entrance of their property. In addition, defendants counterclaimed that they had acquired a possessory interest in the land behind their commercial property through adverse possession. They claimed that they, their predecessors in interest, and past tenants of their property had, since at least 1997, used the area

[1] The land to which plaintiff claimed title included both the driveway along the side of defendants' commercial building and the land immediately abutting the back of plaintiff's building.

located behind defendants' building for parking, access, delivery, storage, and other related commercial purposes. They described the area over which they claimed adverse possession as the lands immediately beyond the south line of defendants' property, extending approximately twenty feet southward between the east and west lines of defendants' property. Defendants noted that their current tenant uses fuel tanks and waste containers located in this area behind the building.

In August 2015, plaintiff filed for summary judgment asserting that he had title to the property and that there was insufficient evidence to support defendants' claims of a prescriptive easement or adverse possession. Plaintiff cited to his own affidavit and a deposition of one defendant to support his facts.

Defendants opposed the summary judgment motion. Defendants asserted that the deposition testimony plaintiff relied on was taken out of context and did not account for the fact that English is that defendant's second language. Defendants claimed that they had established continuous, open, notorious, and hostile use of the driveway and land behind their commercial building during a period prior to plaintiff's acquisition of the property.[2] They supported this assertion with two affidavits by Linda Harmon and Douglas Mack, who are married. For thirty-two years, the pair have owned a commercial building on Main Street two doors down from defendants' building. Harmon averred that from 1983 to 1995 commercial delivery trucks and waste hauling trucks servicing her business used the driveway to access the rear of their property, and that over the course of thirty years the driveway that allowed access to the area behind the commercial buildings was never blocked, gated, or posted with any sign regarding limitations on access or parking. She also stated that since she purchased the building in 1983, there has been a loading dock for delivery, two or three parking spaces and a dumpster along the side of their building, and nobody interfered with their access or use of these. Until recently, nobody had stopped anyone from parking behind the buildings, and the public, owners, and tenants had used the area behind the buildings continuously for decades with no restrictions on use. Mack averred similarly.

Plaintiff responded that several of defendants' factual assertions were not supported by citations to evidence in the record. He further argued that the affidavits by Harmon and Mack did not support defendants' prescriptive claims because the statements showed neither continuous and hostile use nor use by persons in privity with defendants.

The trial court concluded that defendants had not produced any evidence to demonstrate that they had acquired rights over plaintiff's land through either adverse possession or a

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[2] In contrast to their counterclaim, which clearly delineated their prescriptive easement claim for a right to use the driveway for access, defendants' opposition to the summary judgment motion does not differentiate between their claim to a prescriptive easement for access over the driveway and their adverse possession claim with respect to the land behind their property. Instead, defendants' arguments merge these two together and refer generally to "the disputed area," and treat the prescriptive easement and adverse possession arguments as interchangeable. This shift in defendants' approach blurs the line between their claim to use the driveway for access to the rear of their property and their claim that they now have an unrestricted right to place a dumpster and fuel tank on the land behind their building. It also creates some confusion as to their legal theory. See Community Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 155-56 (1989) (explaining that, although elements to establish prescriptive easement are essentially same as elements to establish adverse possession, term "prescription" refers to acquisition of nonfee interests, while "adverse possession" indicates that interest claimed is in fee).

prescriptive easement. The court explained that defendants had not shown fifteen years of their own use and the only evidence of others' use was the affidavits by Harmon and Mack, neither of whom were in privity with defendants. The court granted summary judgment to plaintiff on defendants' counterclaims for adverse possession and prescriptive easement, reserving judgment on the extent of any deeded right to access.[3] The court denied defendants' motions to reconsider.

Following several subsequent motions and a hearing, the court entered final judgment allowing defendants a "right of access for deliveries," but enjoining defendants "from any use of Plaintiff's property other than for access for deliveries."[4]

We begin our analysis with defendants' appeal of the court's order on summary judgment. On appeal from a decision granting summary judgment, we apply the same standard as the trial court and will grant judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); see White v. Quechee Lakes Landowners' Ass'n, 170 Vt. 25, 28 (1999).

As an initial matter, defendants argue that the motion for summary judgment was filed prematurely because defendants had not had an opportunity to complete discovery. Defendants claim that plaintiff had not yet answered defendants' discovery requests and plaintiff had not been deposed.

The record in this case reveals that summary judgment was not filed prematurely. A motion for summary judgment may be filed "at any time until 30 days after the close of all discovery." V.R.C.P. 56(b). Discovery need not be completed before a motion is filed, but there should be an adequate time for discovery. Doe v. Doe, 172 Vt. 533, 534 (2001) (mem.). There was an adequate time for discovery in this case. This action was filed in November 2014 and the motion for summary judgment was filed in August 2015. During that time, one defendant was deposed in February 2015. Although defendants assert they had not had a chance to depose plaintiff, the record shows that the parties agreed on a date for deposing plaintiff in May 2015, but that deposition did not take place after plaintiff sought to delay the deposition and the court granted plaintiff's motion for a protective order. Further, although plaintiff had not responded to defendants' interrogatories and requests to produce at the time he filed for summary judgment, those requests were not sent until July 2015 and plaintiff sent responses in October 2015. Given the time that had passed since the suit was filed and the opportunities to depose the parties, there

[3] Following defendants' lead, in its analysis, the court did not distinguish between their initial prescriptive easement claim for access over the driveway and their adverse possession claim relating to the strip of land immediately behind their building. However, the court noted, based on the state of the evidence at the time, that defendants owned a deeded right to access for deliveries.

[4] Plaintiff's statement of undisputed facts stated that defendants had a deeded right for ingress and egress over plaintiff's property for deliveries. The fact did not include a citation to any part of the record. During briefing that followed the court's summary judgment ruling, no evidence to support this assertion emerged. The court reiterated its conclusion that defendants had no prescriptive easement supporting such access, but concluded that there is no dispute that defendants do enjoy a right of access for deliveries and noted that "whether [this right arose] by deed, necessity, public dedication, or otherwise is immaterial."

was an adequate time for defendants to develop their case before summary judgment was granted in December 2015.[5]

Defendants next argue that plaintiff had the burden of proving his trespass claim as part of the request for summary judgment and that the court erred in shifting the burden to defendants. There was no error because the summary judgment decision was limited to plaintiff's claim that he had title to the property and defendants' counterclaim. Defendants did not challenge plaintiff's assertion in his complaint that plaintiff had record title to the property. Defendants instead asserted in a counterclaim that they had possessory interests in the property through prescription and adverse possession.

Thus the question of disputed facts in plaintiff's motion for summary judgment focused on defendants' counterclaims—that they had acquired possessory interests in the property. The court held that once plaintiff met his initial burden to demonstrate no evidence supporting defendants' claims, the burden shifted to defendants to demonstrate a genuine dispute of fact. We agree that on summary judgment and because defendants bore the burden of proof at trial on their counterclaim, it was sufficient for plaintiff to assert that there was an absence of evidence in the record and it was up to defendants to demonstrate facts supporting their claim. See Ross v. Times Mirror, Inc., 164 Vt. 13, 18 (1995) ("Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact.").

Defendants next contend that the court erred in concluding that defendants did not provide evidence to support their counterclaim of prescription or adverse possession. "To establish a prescriptive easement, [the asserting party's] use of the land must have been open, notorious, continuous for fifteen years, and hostile or under claim of right." Schonbek v. Chase, 2010 VT 91, ¶ 8, 189 Vt. 79 (quotation omitted). The elements of adverse possession are essentially the same except that the party asserting adverse possession must show exclusive possession. Id. Hostile use means use that is "not based on a consensual privilege given by the owner." Patch v. Baird, 140 Vt. 60, 64 (1981). A party asserting prescription may rely on previous periods of use by other individuals through tacking, but privity is required for tacking of adverse use periods in establishing prescriptive easements. Russell v. Pare, 132 Vt. 397, 405 (1974), overruled on other grounds by Lague, Inc. v. Royea, 152 Vt. 499, 502-03 (1989).

Defendants failed to produce evidence to demonstrate a period of fifteen years of open, notorious, and continuous use of the property behind their building by themselves or those in

[5] Defendants also assert that plaintiff could not rely on the deposition of one defendant to support facts at summary judgment because English was not that defendant's first language and his statements were not clear. Deposition testimony may be used to support statements of undisputed or disputed facts accompanying motions for summary judgment. V.R.C.P. 56(c)(1)(A). Objections regarding the competency of a witness that might have been obviated or removed at that time of a deposition are waived if not raised before or during a deposition. V.R.C.P. 32(d)(3)(A). Nor is there any offer to amend testimony. V.R.C.P. 30(e). Defendant's language skills were ascertainable at the time of the deposition. Therefore, having failed to object to or amend the deposition on the grounds now raised, defendants have waived that argument.

privity with them.[6] Defendants asserted that when they acquired the property, there had already been acquisition of possessory rights and supported this assertion with affidavits from Harmon and Mack, who own a neighboring building. To the extent these affidavits describe Harmon's and Mack's own use of the area behind their own building for parking, a dumpster or other purposes, they cannot support defendants' burden because defendants have not produced any evidence that these neighbors were in privity with defendants and thus defendants are not entitled to rely on any period of their use. See id. (explaining that privity is required to tack on periods of prior use). These neighbors owned property on the same block as defendants, and two doors down, but there is no evidence that they ever owned the property now owned by defendants. Whatever use these affiants made of the area behind their own building cannot support defendants' claim to ownership through adverse possession, or usage rights through prescription, over the land behind defendants' building.

To the extent that these affidavits describe the use of the disputed property by the defendants and their predecessors, they are inadequate to meet defendants' burden. The neighbors' affidavits primarily describe their own use of the driveway for parking and their own dumpster. Their testimony about the defendants' property is limited to a general statement that the property was a pharmacy for many years (number and dates unspecified), and that the pharmacist parked in the disputed area for access to the pharmacy; a statement that since defendants have owned the building neighbors have seen them and their tenants and tenants' employees parking in the disputed area;[7] and a statement that their understanding was that the buildings in the block they shared with defendants have been in place since at least the 1920s, and the disputed space behind the buildings generally has been used by the public and by owners and their tenants continuously since that time with no restrictions on use. This general testimony about public access to and use of the driveway area cannot support a finding that defendants, through their predecessors in title, acquired exclusive use of the area where they place their dumpster and propane tank through adverse possession, nor that they acquired a prescriptive easement for placement of their propane tank and dumpster. Therefore, the court properly granted summary judgment to plaintiff on defendants' counterclaims for adverse possession and prescription.

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[6] On appeal, neither party challenges the court's conclusion that this statement amounted to a binding admission by plaintiff. Because their right to use the driveway for access to the rear of their property for deliveries is not in dispute on appeal, we need not determine the basis for that right. Accordingly, we do not reach the trial court's conclusion that defendants failed to produce sufficient evidence to support their claim of a prescriptive easement to use the driveway to access the rear of their building, nor the question of whether defendants' right arises from a binding judicial admission. See Trotier v. Bassett, 174 Vt. 520, 521 (2002) (mem.) (describing requirements of judicial admission).

[7] Defendants do not rely on their own period of ownership to establish the requisite period of adversity, presumably because of apparently undisputed evidence that would undermine that claim. In particular, undisputed record evidence reflects that within seven years of defendants' acquisition of the property, plaintiff objected to defendant's placement of the tanks and dumpster on plaintiff's property. Thereafter, defendant Poon signed an agreement acknowledging that the propane tanks, used oil drums, and dumpster were located on plaintiff's land, agreed to move the propane tank and dumpster to a different location, agreed-to by plaintiff, and, as required by plaintiff, build a cement pad under it and a fence around it. Defendants accordingly argue that they acquired possessory rights through prescription or adverse possession primarily on account of the actions of their predecessors in title.

Plaintiff's cross appeal concerns the court's orders made after the partial summary judgment decision. Following the court's grant of summary judgment to plaintiff on defendants' counterclaim, plaintiff moved to dismiss his claims for damages and injunctive relief.[8] In its order, the court explained that while plaintiff had asserted during summary judgment proceedings that defendants had a deeded right of access to the driveway for deliveries, no evidence was subsequently produced to support that fact. The court held that nonetheless plaintiff had made a binding admission that such right existed and defendants were entitled to the benefit of that admission. The court stated that the scope of the right remained undefined and dismissed the remaining claims. Plaintiff objected, arguing that he did not wish to dismiss his claim for injunctive relief and sought a permanent injunction prohibiting defendants from using the driveway for trash, waste, and fuel storage. The court held a hearing on the request, and issued a final judgment order, which did not incorporate plaintiff's request. The final order stated: "Defendants are hereby enjoined from any use of Plaintiff's property other than for access for deliveries." The court denied plaintiff's subsequent motion to clarify to add that defendants are enjoined from other uses "including Defendant's storage of waste or fuel containers, or parking." Plaintiff filed a motion to reconsider, but the court declined to rule on it, holding that the pending appeal had divested it of jurisdiction.

On appeal, plaintiff contends that the court erred in concluding that it lacked jurisdiction to consider his motion to reconsider because he filed it pursuant to Vermont Rule of Civil Procedure 59 and therefore the time to appeal was tolled. See V.R.A.P. 4(b) (explaining that time to appeal is tolled by "timely fil[ing]" certain motions including those to alter or amend under Rule 59). Rule 59 motions must be filed "not later than 10 days after entry of the judgment." V.R.C.P. 59(e). Final judgment was entered on December 13, 2016, and the motion was not filed until January 10, 2017. Because the motion was filed beyond the ten-day filing period, it was untimely and did not toll the appeal period. See Fagnant v. Foss, 2013 Vt. 16A, ¶ 10, 194 Vt. 405 (explaining untimely Rule 59 motions will not toll appeal period).

In any event, we conclude that there were no grounds in this case to issue an injunction at all, much less a more specific one. A permanent injunction may be awarded to prevent future injury where the asking party has proven a continuing trespass. Evans v. Cote, 2014 VT 104, ¶ 8, 197 Vt. 523. "We review the trial court's grant of an injunction under an abuse-of-discretion standard, and will not reverse unless the findings are not supported by the evidence and the court's decision lacks any legal grounds to justify the result." Id. To prove trespass, plaintiff had to show that defendants had "intentionally enter[ed] or remain[ed] upon land in the possession of another without a privilege to do so." Harris v. Carbonneau, 165 Vt. 433, 437 (1996). Here, there was no determination of trespass on which to base the award of an injunction. The court's summary judgment order was limited to defendants' claims of a prescriptive easement and adverse possession. The summary judgment order did not resolve plaintiff's claim of trespass.[9] Simply

[8] Defendants responded to this motion with a request to amend the summary judgment order and attached several additional affidavits in support. Plaintiff moved to strike those affidavits, but the motion was not resolved by the trial court. On appeal, plaintiff moves to have the affidavits stricken from the record on appeal. Insofar as the affidavits were filed with the trial court, they are part of the record on appeal. V.R.A.P. 10(a)(1). Therefore, the motion to strike is denied.

[9] Plaintiff's motion for summary judgment was accompanied by a statement of undisputed facts, which reiterated the facts relative to plaintiff's interest in the property. Plaintiff stated that he had a deeded interest in the driveway adjacent to his building. Plaintiff asserted that although

because defendants did not have a possessory interest in the property did not amount to a showing that defendants had engaged in a continuous trespass or threat of continuous trespass. See Evans, 2014 VT 104, ¶ 8. Plaintiff subsequently voluntarily moved to dismiss his claim for damages and the court granted this request. Without a finding of trespass, there was no basis for the court to issue an injunction. For this reason, the court erred in enjoining defendants from using plaintiff's property.

The second-to-last sentence of the court's final judgment order of December 12, 2016, is stricken. In all other respects, the judgment is affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

others used the driveway, it was with his permission. He supported this with an affidavit. Citing the deposition of one defendant, plaintiff stated that defendants admitted that their deed did not give them a possessory interest in the driveway. While these facts were relevant to plaintiff's claim for trespass, the court did not issue summary judgment on plaintiff's affirmative claim of trespass and the facts were not yet resolved.