COURT OF APPEALS
DECISION
DATED AND RELEASED

June 26, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-3464

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

PETER L. STEINBERG,

PLAINTIFF-RESPONDENT,

v.

MARK G. SUKOWATY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL B. TORPHY, JR., Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

VERGERONT, J. Mark Sukowaty appeals a judgment awarding Peter Steinberg a strip of property by adverse possession. Sukowaty argues that the trial court erred because Steinberg failed to produce testimony from all previous owners of his property for the requisite twenty years and that the trial court erred in not granting his motion for summary judgment. Because we

conclude that Steinberg presented sufficient evidence of adverse possession and that Sukowaty was not entitled to summary judgment, we affirm.

BACKGROUND

Mark Sukowaty and Peter Steinberg are neighbors. In July 1993, Sukowaty purchased an apartment building at 1411-1413 Chandler Street in Madison from Mark O'Brien. In May 1989, Steinberg purchased the property at 1407 Chandler Street which is next to 1411-13 Chandler Street. At the time Steinberg purchased 1407 Chandler Street, a fence separated his property from 1411-13 Chandler Street. The fence ran along an embankment which was one to one-and-a-half feet high and enclosed the backyard of 1411-13 Chandler Street. Steinberg cut down all but one of the trees--a mulberry tree--along the fence, and planted a garden that ran up to the fence.

In the spring and summer of 1990, the fence was taken down by Mark O'Brien, the previous owner of 1411-13 Chandler Street, and a neighbor. After the fence was removed, the fence posts remained in the ground. Steinberg placed cedar rails along the embankment in line with the fence posts as a retaining wall to prevent the embankment from eroding.

In October of 1993, Sukowaty began cutting branches off the mulberry tree because the leaves were getting into his gutter. Steinberg informed Sukowaty that the tree was on his property, and that the lot line was along the embankment where the fence had been. Steinberg filed a complaint in June of 1994 alleging the following: (1) that the west boundary of his lot was marked by the fence and that the fence had been in place for more than thirty-four years; (2) that the previous owners and occupants of 1411-13 Chandler Street exercised exclusive possession and control of the property on the east side of the fence line;

(3) that in addition to the fence, the boundary between the two properties is shown by an elevation of approximately eighteen to twenty-four inches; (4) that beginning in June of 1989 and continuing to the present, he made improvements to his property along the fence line by clearing trees, shrubs, rubble, broken glass and trash, shoring up his soil against erosion, planting flowers, fruit bearing shrubs and trees and creating a vegetable garden. The complaint also alleged that in the fall of 1993, Sukowaty trespassed upon his property to cut down a mulberry tree. He later amended his complaint to plead three causes of action: (1) adverse possession; (2) acquiescence in boundary; and (3) equitable transfer.

Sukowaty filed a motion for summary judgment on the amended complaint, contending there were no genuine issues of material fact and, therefore, he was entitled to judgment as a matter of law. Sukowaty attached a copy of a survey map certified by a registered land surveyor, dated June 3, 1994, and a receipt showing the 1994 property taxes paid for 1411-13 Chandler Street. Steinberg opposed the motion and also moved for partial summary judgment on the ground that a survey conducted by another registered land surveyor provides a legal description of his property which includes the disputed land. The trial court denied both motions, concluding that there was an issue of material fact as to the adverse use of the disputed land.

At the trial, Steinberg testified that from the time he moved in until O'Brien sold the property to Sukowaty, O'Brien observed his (Steinberg's) gardening activities, which extended up to the fence, and made no objections. Steinberg also offered the deposition testimony of one prior owner, Meagan Yost (1973-77), and called two other prior owners, Taylor Elkins (1978-86), and Tim Fenske (1986-89) as witnesses at trial, as well as a neighbor, a former resident of 1411 Chandler Street, and a surveyor. Yost, Elkins and Fenske testified that the

fence was the boundary between the properties when they lived there, that they maintained the property on their side of the fence, and that the owner of Sukowaty's property before O'Brien, Sam Gordon, regarded the fence as the boundary. Sukowaty was the only witness for the defense, and he testified that the retaining wall trespasses on his side of the true lot line.

The trial court found that the base of the retaining wall placed by Steinberg was the location of the fence and was "the boundary by usage" between 1407 and 1411-13 Chandler Street, accepted by the adjoining owners for over twenty years until Sukowaty's purchase of 1411-13 in 1993. In addition, the court found that the fence line was a demarcation of elevation between the two lots, and a demarcation of care and usage by the adjoining property owners for that period of time. Finally, the court found that the fence line was a visual demarcation between the adjacent properties.

DISCUSSION

Sukowaty argues on appeal that the trial court erred in awarding Steinberg the disputed property by adverse possession because Steinberg failed to produce the testimony of the owner of his property from 1977-78.

A claim of adverse possession presents mixed questions of fact and law. When we review a circuit court's decision involving mixed questions of law and fact, we first separate the decision into its component parts and apply different standards of review. ***Herdeman v. City of Muskego***, 116 Wis.2d 687, 691, 343 N.W.2d 814, 816 (Ct. App. 1983). We will affirm the findings of fact unless they are clearly erroneous. ***Id.*** When more than one inference can be drawn from the credible evidence, this court must accept the inference drawn by the trier of fact. *See* ***Noll v. Dimiceli's Inc.,*** 115 Wis.2d 641, 644, 340 N.W.2d 575, 577 (Ct. App.

1983). The question of whether the facts proven are sufficient to amount to adverse possession is a question of law. ***Perpignani v. Vonasek,*** 139 Wis.2d 695, 728, 408 N.W.2d 1, 14 (1987). Although ordinarily we do not defer to the trial court's determination of a question of law, whether a party's activities are sufficient to amount to adverse possession is so intertwined with the factual findings in support of that conclusion that we will give weight to the trial court's legal conclusion, although it is not controlling. *See* ***Wassenaar v. Panos***, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983).

The person claiming adverse possession must show that the disputed property was used for the requisite period of time in an open, notorious, visible, exclusive, hostile and continuous manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his/her own. ***Pierz v. Gorski***, 88 Wis.2d 131, 137, 276 N.W.2d 352, 355 (Ct. App. 1979). In this case, the period of time is twenty years. *See §§* 893.08, 893.09 and 893.10*,* STATS. An adverse claimant may "tack" or add his or her time of possession to that of prior adverse possessors in order to establish a continuous possession for the requisite statutory period. ***Perpignani ,*** 139 Wis.2d at 724-25, 408 N.W.2d at 13. In order to benefit from tacking, the adverse claimant must be in privity with any prior adverse possessor. ***Id.*** at 725, 408 N.W.2d at 13. The privity necessary to enable possessory rights to be tacked is merely a succession of relationships to the same thing. ***Id.*** at 726, 408 N.W.2d at 14.

The trial testimony was as follows. Meagan Yost testified that there was a fence between the apartment building and her yard at the time she lived at 1407 Chandler Street, from June of 1973 until April of 1977. For the entire period during which she lived there, she treated the yard on her side of the fence as her yard and the yard on the other side of the fence as belonging to 1411-13 Chandler

Street. She had a compost pile and grew flowers next to the fence and cut down a dying elm tree that was within a foot of the fence on the 1407 side.

Taylor Elkins testified that his mother was the owner of 1407 Chandler Street and that he lived there from January 1978 until August 1986, although he did not live in the house for part of 1985 and part of 1986. He took care of the property and remembered a white picket fence between 1411-13 Chandler Street and 1407. As far as he knew, the fence marked the line between the two properties. He piled brush and garden waste, gardened with wildflowers, and had a garbage pit, all right up to the fence. The neighbor at 1411-13 never complained about him keeping the garbage pile next to the fence.

Tim Fenske testified that he owned 1407 Chandler Street from August of 1986 until the spring of 1989 when he sold it to Steinberg. A fence ran between the two properties and it was his understanding that the fence was the property line. Fenske maintained his side of the property up to the fence and did not work on the other side of the fence. The occupants of 1411-13 Chandler Street maintained the property on their side of the fence and did not work on his side of the fence.

David Stuiber testified that he lives at 1414 Vilas Avenue, and has resided there since 1969. His property is separated by an alleyway from the properties on Chandler Street. He stated that there was a fence separating the backyards of 1407 and 1411-13 Chandler Street. He also stated that as far as he can remember the fence was there when he first moved into the neighborhood in 1969.

Elizabeth Brodsky testified that she lived at 1411 Chandler Street from June of 1989 until August of 1993. During the time that she lived there a

fence separated the backyards of 1411-13 and 1407 Chandler Street. The fence was removed during the spring or summer of 1990. While living there she mowed the lawn, raked leaves, shoveled snow and trimmed the bushes. She never did any work on the 1407 side of the fence and never saw the owner of 1411 do any work on the 1407 side of the fence. She saw Steinberg doing maintenance on his side of the fence. She never objected to Steinberg doing work up to the fence on the 1407 side of the fence, nor did she ever observe the owner of 1411 object to Steinberg doing work up to the fence.

The trial court's findings that the fence marked the dividing line between 1411-13 and 1407 Chandler Street, and that the fence had been in existence for at least twenty years were not clearly erroneous. The trial court found that Steinberg's possession of the disputed land could be "tacked" on to those of the prior owners of 1407 Chandler Street to fulfill the requirement that there was continuous occupation and possession of the property. The testimony of the three prior landowners is direct evidence of this for the years June 1973-April 1997 and January 1978-August 1993. From the testimony of Meagan Yost, who owned the property until April 1977, and of Taylor Elkins, who lived there beginning in January 1978, the court could draw a reasonable inference that the fence was there from April 1977 until January 1978 and marked the dividing line between the two properties, even without the testimony of the owner during that time period. The evidence and reasonable inferences from the evidence are also sufficient to support the court's finding that the owners of 1411-13 Chandler Street and the owners of 1407 Chandler Street treated the property on their respective sides of the fence as their property during the requisite twenty-year time period. We conclude that the facts as found by the trial court are sufficient to constitute adverse possession.

Sukowaty also contends that the trial court erred in not granting his summary judgment motion because Steinberg failed to show in opposition to the motion any use by the previous owners of his property and thus showed no evidence to allow tacking.

We review summary judgments de novo, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Section 802.08(2) and (6), STATS. In making our determination, we are to draw all reasonable inferences from the evidence in favor of the nonmoving party. ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980). If resolution of specific factual issues is necessary in order to decide the case, summary judgment is inappropriate and should not be granted. ***Cameron v. City of Milwaukee***, 102 Wis.2d 448, 459, 307 N.W.2d 164, 170 (1981).

The trial court stated that, after considering materials submitted in support of and in opposition to Sukowaty's motion, as well as matters of record previously submitted at a hearing on Steinberg's motion for a preliminary injunction,[1] there were issues of material fact as to the adverse use of the disputed land. Our independent review shows that the trial court was correct. At the preliminary injunction hearing, Brodsky testified much as she did at trial, as did Steinberg. Mary Stuiber testified that she lived at 1414 Vilas Avenue since 1969 and she presented much the same testimony that David Stuiber presented at trial.

[1] The trial court denied this motion.

The evidence and the reasonable inferences from this evidence drawn in Steinberg's favor, created genuine issues of material fact as to adverse possession of the disputed property, making summary judgment inappropriate.

By the Court.—Judgment affirmed.

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