STATE OF MICHIGAN

COURT OF APPEALS

PAULINE SPRAGUE, PAUL WOODFORD, and SUSAN WOODFORD,

Plaintiffs/Counter-Defendants-Appellants,

v

ESTATE OF JAMES H. HASLETT

Defendant-Appellee,

and

CHARTER TOWNSHIP OF MERIDIAN

Intervening-Defendant/Counter-Plaintiff/Third-Party-Appellee,

and

ALDEN P. THOMAS, MARY JOSEPHINE VAN VECHTEN, CAROL INGALL, and NORTH SHORE CONDOMINIUM ASSOCIATION,

Intervening-Defendants.

UNPUBLISHED
October 16, 2001

No. 222786
Ingham Circuit Court
LC No. 97-85874-CH

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs, who sought title to a parcel of land on the north shore of Lake Lansing in Meridian Township under a theory of adverse possession, appeal as of right the order awarding title to Meridian Charter Township (the township). The township intervened in this case and pleaded facts suggesting that it, rather than plaintiffs, had adversely possessed the parcel and that it acquired a prescriptive easement over the parcel. Ultimately, the trial court found that the township acquired the parcel under a default by the record titleholder. We affirm.

Plaintiffs first argue that the trial court erred in denying their motions for summary disposition against the Township. We review de novo a trial court's grant or denial of summary disposition. *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 730; 625 NW2d 804 (2001). A motion brought under MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to state a valid defense to the claim asserted against it. *In re Smith Estate*, 226 Mich App 285, 288; 574 NW2d 388 (1997). A motion brought under this subrule is tested by the pleadings alone, with the court accepting all well-pleaded allegations as true. *Id*. The test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery. *Id*.

When reviewing a trial court's grant or denial of a motion for summary disposition for failure to state a valid defense, both the affirmative defenses and the denials of the allegations in the complaint may be taken into consideration. See *Hanon v Barber*, 99 Mich App 851, 855-856; 298 NW2d 866 (1980). If a defendant denies an allegation in the complaint that is crucial to a plaintiff's case – so that if the defendant were to prove the allegation false the plaintiff would not prevail – then summary disposition for failure to state a valid defense should be denied. *Id*. See, e.g., *August v Poznanski*, 383 Mich 151, 155; 174 NW2d 807 (1970) (the Court set aside a summary judgment not because of disputed facts, but because the denial of material facts constitutes the pleading of a valid defense).

To establish adverse possession, a claimant must show that its possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Plaintiffs' amended petition to quiet title claimed an interest by adverse possession and set forth facts in support of this claim. The township denied all or part of eight of plaintiffs' fourteen allegations in the petition. If the township were to prove that the allegations in these paragraphs were false, plaintiffs could not prevail on their adverse possession claim. Hence, the trial court properly denied the motion for summary disposition pursuant to MCR 2.116(C)(9) because the interveners stated a valid defense by denying the material facts in plaintiffs' complaint. *Hanon, supra*.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Asset Acceptance, supra* at 730. A court may rely on affidavits, pleadings, depositions, or any other documentary evidence in deciding whether a genuine issue of material fact exists. *Id.* If the opposing party presents documentary evidence establishing the existence of a material factual dispute, the motion should not be granted. *Id.* The township presented affidavits from eight local residents that contradicted plaintiffs' claims that their possession was visible, open, notorious, exclusive, and uninterrupted. These affidavits alone established the existence of a material factual dispute, thus precluding a grant of summary disposition under MCR 2.116(C)(10).

Plaintiffs next argue that the trial court erred when it granted the township's motion for summary disposition under MCR 2.116(C)(10). Adverse possession must be proved with clear and cogent evidence. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). Clear and cogent evidence

> is more than a preponderance of evidence, approaching the level of proof beyond a reasonable doubt. That is to say, the standard is much like "clear and convincing evidence." Thus, in an adverse possession case, for a party to establish possession by "clear and cogent evidence," the evidence must clearly establish the fact of possession and there must be little doubt left in the mind of the trier of fact as to the proper resolution of the issue. Thus, where there is any reasonable dispute, in light of the evidence, over the question of possession, the party has failed to meet his burden of proof. [*McQueen v Black*, 168 Mich App 641, 645 n 2; 425 NW2d 203 (1988).]

As noted, two of the elements required for adverse possession are exclusivity and hostility. *West Michigan*, *supra* at 511. Even where a plaintiff shows continuous and uninterrupted use, the element of exclusivity can be undermined by evidence that others used the property, were not prevented from trespassing, and paid some of the property taxes. *Dunlop v Twin Beach Park Ass'n, Inc*, 111 Mich App 261, 267; 314 NW2d 578 (1981). The township presented affidavits from eight local residents stating that they often entered on and used the disputed parcel and were not prohibited from going on the land. One local resident indicated that she paid the 1992 and 1993 taxes on the parcel. Although plaintiffs argued that these affidavits were inaccurate or not dispositive, the affidavits more than make it clear that under the "clear and cogent evidence" standard, plaintiffs would not have been able to prove that their possession was exclusive. Therefore, the township's motion for summary disposition under MCR 2.116(C)(10) was properly granted.

Plaintiffs next argue that the trial court erred when it failed to rule on their motion for summary disposition of the township's counterclaim under MCR 2.116(C)(8). Plaintiffs presented only the most cursory explanation of their position and cited no authority to support it. Although plaintiff failed to properly present this issue, *Mann v Mann*, 190 Mich App 526, 536-537; 476 NW2d 439 (1991), we may review the record for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id*.; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The record clearly reveals that the trial court failed to explicitly rule on plaintiffs' motion under MCR 2.116(C)(8). The question, however, is whether the court's failure to rule on plaintiffs' motion affected their substantial rights.

The township claimed it acquired title to the land under the theories of either adverse possession or prescriptive easement. With regard to adverse possession and prescriptive easements, this Court has stated:

> To establish adverse possession, the claimant must show that its possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years. An easement by prescription requires similar elements, except exclusivity. Mutual use or occupation of property with the owner's permission is insufficient

> to establish adverse possession. Further, permissive use of property, regardless of the length of the use, will not result in an easement by prescription. [*West Michigan Dock, supra* at 511. (Citations omitted.)]

The township's counterclaim alleged that the disputed parcel had been used as a park and as a public access to Lake Lansing by township residents, that the township's possession of the disputed parcel had been actual, visible, open, notorious, exclusive, continuous, and uninterrupted, and that the township had possessed, maintained, and used the disputed parcel for over fifteen years. It set forth specific factual allegations in support of these general allegations. It set forth specific factual allegations regarding the utility lines that the township had installed under the disputed parcel. The township's statement of title, as required under MCR 3.411(C), was attached to the counterclaim. The township therefore alleged all the required elements of both adverse possession and prescriptive easement and set forth specific facts in support of each claim. Had the trial court considered plaintiffs' motion under MCR 2.116(C)(8), the motion would have been properly denied. Therefore, because plaintiffs' two other motions under MCR 2.116(C)(9) and (10) were denied, allowing the township's claims to stand, plaintiffs' substantial rights were not affected. The failure to rule on plaintiffs' motion does not require reversal.

Plaintiffs also contend that the trial court erred in finding that the township acquired a prescriptive easement over the disputed parcel. In a quiet title action, we review the trial court's factual findings for clear error. *Gorte v Dep't of Transportation*, 202 Mich App 161, 171; 507 NW2d 797 (1993). A finding of fact is clearly erroneous only if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 232-233; 428 NW2d 353 (1988). Actions to quiet title are equitable, and this Court reviews the circuit court's holdings de novo. *Gorte, supra* at 165.

The township submitted proposed findings of fact and conclusions of law that the trial court adopted in toto. The record substantially supports the thirty-four allegations set forth by the township. Thus, no mistake has been made and this Court will not reverse the trial court's adopted findings. Plaintiffs also argue that *Bachus v W Traverse Twp, Emmet Co (On Remand),* 122 Mich App 557; 332 NW2d 535 (1983), precluded a judgment in favor of the township. However, *Bachus* does not address the relationship between assessed taxes and the requirements for a prescriptive easement and, therefore, it completely fails to support plaintiffs' argument. Further, and fatal to plaintiffs' stance on this issue, is the fact that plaintiffs never disputed that the township may have had a utility easement. The trial court did not err in finding that the township acquired a prescriptive easement.

Lastly, plaintiffs argue that the trial court erred when it quieted title to the disputed parcel in the township. Plaintiffs' argument that the township failed to prove that the quitclaim deeds from the heirs of the record titleholders conveyed good title to the township is misplaced. Plaintiffs did not contest the validity of these default judgments. Where a default judgment has been entered against a party, the court may grant the relief requested in the complaint. See MCR 2.601(A) and (B). The trial court properly quieted title in the township against the interests of the defaulted third-party defendants.

Plaintiffs argue here, too, that *Bachus, supra* at 557, precluded a judgment in favor of the township. The present case is distinguishable from *Bachus* because plaintiffs were not record titleholders of the disputed parcel. They were, instead, claimants under adverse possession, just as the township was. Plaintiffs voluntarily assumed responsibility for maintaining the disputed parcel, whereas in *Bachus* the defendant usurped portions of the plaintiffs' parcels to create a township park. *Bachus, supra* at 560-561. Here, plaintiffs voluntarily chose to pay the taxes on the disputed parcel without first establishing ownership, whereas in *Bachus* the plaintiffs were already owners of their parcels and were being taxed as an incident of their ownership. *Id*. Contrary to plaintiffs' assertions, *Bachus* does not stand for the general proposition that a township is always precluded from adversely possessing a parcel on which it assesses taxes.

Finally, plaintiffs state, without supporting argument, that MCL 600.5801, the statute of limitations for real actions, somehow defeats the township's claim of adverse possession. Nothing in MCL 600.5801 applies in any way to the merits of this case. The trial court committed no error of fact or law when it quieted title in the township.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald