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STATE OF MICHIGAN

COURT OF APPEALS

LORRAINE HUNTER,

Plaintiff-Counterdefendant-Appellee,

v

DENNIS M. TURKETTE and MICHELLE TURKETTE,

Defendants-Counterplaintiffs-Appellants.

UNPUBLISHED
September 17, 2020

No. 351960
Oakland Circuit Court
LC No. 2019-171025-CH

Before: RIORDAN, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's opinion and order granting summary disposition to plaintiff and dismissing defendants' counterclaims. We affirm.

I. BACKGROUND

This case arises out of a property dispute between plaintiff and defendants. Plaintiff's property and defendants' property back-up against one another, so the back of plaintiff's property borders the back of defendants' property. Both parties acquired their respective properties in 2015. Defendants' property was previously owned by defendant Dennis Turkette's parents. Dennis lived there as a child but moved out as an adult. According to Dennis, he eventually moved back and lived on the property "on and off since [his] father's death" in March 2004. Defendants eventually acquired the property in 2015 after his mother passed away; the property was conveyed to them through a trust.

Plaintiff's property is vacant, and defendants' property has a residence. In 2015, plaintiff obtained a survey (the Kennedy Survey) in preparation for building a residence on her property. The survey showed possible encroachments onto plaintiff's property by defendants. A letter from Oakland Township confirmed that there appeared to be encroachments by defendants onto plaintiff's property, and the letter informed plaintiff that the township would not recommend approval of her site plan until some type of agreement about these encroachments was reached.

Plaintiff contends that there are several encroachments on her property: a water well, a portion of a concrete driveway, part of a shed, and an electrical conduit. Documents produced during discovery show that the water well was installed in 2005, and Dennis represented that the concrete driveway was poured in 1986, the shed on the property was constructed between 1987 and 1990, and the electrical conduit servicing the hot tub on defendants' property was installed between 1999 and 2003.

The parties were unable to reach an agreement about what to do about these alleged encroachments, which led plaintiff to file this action for quiet title on January 10, 2019. On February 15, 2019, defendant counterclaimed for quiet title, and alternatively claimed that they had acquired the disputed property through adverse possession, or had acquired a prescriptive easement for the continued use of the disputed property.[1]

The parties each obtained surveys of the property. Plaintiff's survey (the Kennedy Survey) showed that defendants were encroaching on plaintiff's property. Defendants' survey (the White Survey) had two lines depicting the boundary between the parties' property; one line was labeled "S. line sec. 4/N. line of sec. 9" (the "Surveyor's Note" refers to this line as the "south line of section 4," which is what this opinion will refer to the line as), and the other line was labeled the "line of occupation." If the boundary of the defendants' property was the "south line of section 4," then there were encroachments onto plaintiff's property, but if the boundary was the "line of occupation," then all of the alleged encroachments were actually on defendants' property.

The parties filed competing motions for summary disposition. Plaintiff argued that every survey that had been submitted—including the White Survey submitted by defendants—confirmed that the alleged encroachments were in fact on plaintiff's property. She maintained that the "line of occupation" on the White Survey could not be the true boundary line of defendants' property because it was not based on any recording of land and actually conflicted with several recordings of land. Plaintiff also argued that defendants' claims of adverse possession and prescriptive easement must fail because defendants could not establish the necessary 15-year possession of the disputed property.

Defendants, on the other hand, argued that their deed and the White Survey both confirmed that the alleged encroachments were wholly on defendants' property, contrary to plaintiff's claims. They further argued that it was undisputed that they satisfied the elements to have adversely possessed the disputed property—the water well was originally built in 1985 (re-dug in 2005) and had been maintained in an open and obvious manner since then; the driveway was poured in 1986 and had remained open and obvious since that time; and defendants' use of the property since those times had always "been actual, visible, open, notorious, hostile, exclusive, continuous, and uninterrupted."

[1] Defendants' counter-complaint also alleged intentional infliction of emotional distress, abuse of process, and defamation, but the parties later stipulated to dismiss those counts, and they are not relevant to this appeal.

The parties appeared before the trial court on November 13, 2019, to present their arguments. During oral arguments with respect to defendants' claim of adverse possession, defendants conceded that the well was moved in 2005 so "[f]ifteen years has not elapsed on the well." Ultimately, the trial court took the matter under advisement.

On December 4, 2019, the trial court issued an opinion and order granting summary disposition to plaintiff. The trial court held that plaintiff's deed established that she owned the disputed property, and that this was confirmed by both the Kennedy Survey and the White Survey. The court found "no merit" to defendants' argument that the "line of occupation" on the White Survey was "the true boundary line." Turning to whether defendants established superior title through adverse possession or prescriptive easements, the trial court concluded that they had not. First addressing the water well, the trial court ruled that there was no question that it existed on plaintiff's property for less than the required 15 years because it was installed in 2005. Similarly, for the other encroachments, the trial court ruled that there was no question that defendants did not possess the disputed property for the required 15 years, and there was nothing to establish the privity of estate necessary to tack on defendants' predecessor's occupation. The trial court further concluded that even if defendants established privity, they could not show that their possession was notorious or adverse because plaintiff's property was vacant before she took title, and nothing supports that plaintiff or her predecessor-in-interest had knowledge of defendants' "or their predecessors' hostile claim."

This appeal followed.

II. STANDARD OF REVIEW

Appellate courts review de novo a trial court's grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). The trial court granted defendants summary disposition under MCR 2.116(C)(10).[2] In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), our Supreme Court explained the review of a motion under MCR 2.116(C)(10) as follows:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120.]

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[2] Defendant contends that the trial court also granted summary disposition under MCR 2.116(C)(8), but this is incorrect. While plaintiff did move for summary disposition in part under MCR 2.116(C)(8), that was with respect to defendants' claims of intentional infliction of emotional distress, abuse of process, and defamation, which defendants stipulated to dismiss before the trial court issued its opinion. Moreover, it is clear from the trial court's opinion and order that it granted summary disposition exclusively under MCR 2.116(C)(10).

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

Defendants argue that the trial court erred by granting summary disposition to plaintiff because, based on the White Survey, there is at least a question of fact whether plaintiff established title to the disputed property. We disagree.

Plaintiff brought an action for quiet title under MCL 600.2932(1). "In an action to quiet title, the plaintiff has the burden of proof and must make out a prima facie case." *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999).

Plaintiff contends that she established title to the contested property by virtue of her recorded deed. In support of her claim, she produced the Kennedy Survey, which shows that there are encroachments on her property by defendants. In an attempt to counter plaintiff's claim of title to the disputed property, defendants produced the White Survey, which they contend shows that the alleged encroachments are on their property, not plaintiff's. Contrary to defendants' argument, however, the White Survey shows that the encroachments are *not* on defendants' property.

The White Survey shows two lines depicting the back of defendants' property; one labeled the "south line of section 4" and the other labeled the "line of occupation." If the true boundary of defendants' property is the south line of section 4, then defendants are clearly encroaching on plaintiff's property, but if the true boundary is the line of occupation, then they are not. The White Survey states that the south line of section 4 was retraced with reference to "Liber 48258, page 534," which is a reference to plaintiff's deed. In contrast, the White Survey states that the line of occupation was determined by "using found concrete monuments" that form "the area of the existing residence . . . as indicated by the placement of improvements (well, driveway, and the house proximity to said line)." Thus, the line of occupation was not determined with reference to any recording of land.

More importantly, the line of occupation conflicts with defendants' recorded deed. Defendants' deed describes defendants' property as "Lot(s) 6 and 7 of Tamarack Heights, as recorded in Liber 65 of Plats, page 38, Oakland County Records." In the trial court, defendant provided the plans for the subdivision that defendants' property is in, and the plans are labeled "Lieber 65, pg 38." The plans show that the west side of defendants' property measures 588 feet, and the east side measures 563.5 feet. Thus, pursuant to defendants' deed, the recorded measurement of the west side of their property is 588 feet, and the recorded measurement of the east side of their property is 563.5 feet.[3] Yet, when looking at the White Survey, the measurement of the west side of defendants' property when measured from the "line of occupation" is 602.2

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[3] The White Survey notes that these are indeed the recorded measurements of defendants' property; it states that the recorded measurement of the west side of defendants' property is 588 feet, and the recorded measurement of the east side is 563.5 feet.

feet, and the measurement of the east side measured from the "line of occupation" is 575.34 feet. In comparison, the west side of defendants' property on the White Survey when measured from the south line of section 4 is 587.65 feet, and the east side measures 566.11 feet. Clearly, defendants' property measured from the south line of section 4 conforms with the dimensions of defendants' property as reflected in defendants' deed, while defendants' property measured from the line of occupation does not.

This fact, combined with the fact that the south line of section 4 was measured by reference to a recording of property (plaintiff's deed) while the line of occupation was not, leads us to conclude that no reasonable juror could find that the non-recorded "line of occupation" on the White Survey was the true boundary line of defendants' property. Thus, based on (1) the filing of plaintiff's deed and (2) the Kennedy and White Surveys, there is no question of material fact that plaintiff has title to the disputed property.

Once a plaintiff makes out a prima facie case of title, the defendant has the burden of proving superior title. *Beulah*, 236 Mich App at 550. Defendants argue that, assuming the disputed property is encompassed by plaintiff's deed, there is at least a question of fact whether they acquired superior title to the property through adverse possession or a prescriptive easement. We disagree.

"A party claiming adverse possession must show clear and cogent proof of possession that is actual, continuous, open, notorious, exclusive, hostile, and uninterrupted for the relevant statutory period." *Marlette Auto Wash, LLC v Van Dyke SC Properties, LLC*, 501 Mich 192, 202; 912 NW2d 161 (2018). The relevant statutory period in this case was 15 years. See MCL 600.5801(4). "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000).

First addressing the water well, defendants conceded in the trial court that "[f]ifteen years has not elapsed on the well." This was confirmed by Dennis, who admitted that the current water well was installed in 2005 in a location different from where the old water well was. Defendants filed their counter-complaint in 2019, so the 15 years necessary for defendants to establish a claim of either adverse possession or a prescriptive easement with respect to the water well had not elapsed.

Likewise, the necessary 15 years had not elapsed for any of the other encroachments. Defendants acquired their property in 2015, so they could not have possessed the contested property for the required 15 years. This by itself is not dispositive, however, because "[a] party may 'tack' on the possessory periods of predecessors in interest to achieve this fifteen-year period by showing privity of estate." *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001) (discussing privity with respect to prescriptive easements). See also *Connelly v Buckingham*, 136 Mich App 462, 474; 357 NW2d 70 (1984) (discussing privity with respect to adverse possession). For both adverse possession and prescriptive easements, "privity may be shown in one of two ways, by (1) including a description of the disputed acreage in the deed or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance." *Killips*, 244 Mich App at 259 (citations omitted). See also *Siegel v Renkiewicz Estate*, 373 Mich 421, 426; 129 NW2d 876 (1964). Defendants deed does not reference the

disputed property, and defendants do not contend that there were any parol statements made at the time of conveyance transferring the disputed property to them.[4] Thus, defendants cannot establish privity of estate, so they cannot tack on the possessory period of their predecessors in interest so as to satisfy the 15-year requirement for their claims of adverse possession or prescriptive easement. The trial court therefore properly dismissed defendants' claims.

In sum, plaintiff established title to the disputed property, and defendants failed to establish superior title. Thus, summary disposition to plaintiff on her claim for quiet title was proper.

Affirmed.

/s/ Michael J. Riordan
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle

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[4] As noted by the trial court, defendants' predecessors (Dennis's parents) were deceased when the property was conveyed to defendants, so they could not have made any parol statements at the time of the transfer.