STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA S. OLDS, as Trustee for the VIRGINIA S. OLDS DECLARATION OF TRUST,

Plaintiff/Counter-Defendant-Appellant,

v

ROBERT P. THOMASMA, and BETTE JO THOMASMA,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellees,

and

OAK MORTGAGE, LLC. and STURGIS BANK & TRUST COMPANY,

Defendants,

and

MARK ALLEN STEVENS, ANNE STEVENS, PHYLLIS ANN STEVENS, and HEIRS/DEVISEES/ASSIGNS,

Third-Party Defendants.

UNPUBLISHED
September 12, 2013

No. 306662
St. Joseph Circuit Court
LC No. 08-000599-CH

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff/counter-defendant, Virginia S. Olds, the trustee for the Virginia S. Olds Declaration of Trust, appeals as of right the trial court's order quieting title and ordering plaintiff to remove encroachments on the property of defendants/counter-plaintiffs, Robert and Bette Thomasma. For the reasons stated in this opinion, we affirm.

This case involves a dispute over the boundary between the parties' adjacent properties along Klinger Lake. Olds' parcel is part of the Plat of Midway subdivision, and is described as lot 13 and the southern 10 feet of lot 14. The Thomasmas' parcel is located in the same subdivision, and is described as lot 14 except the southern 10 feet and the northern 15 feet. The Thomasmas' parcel is a small strip of land, about 15 feet at its widest part. The disputed boundary is between the south line of the Thomasmas' property and the north line of Olds' property.

The chain of title is not in dispute for either parcel. Lot 13 has been owned by Olds, either individually or as trustee, since 1989. Lot 13 was purchased by Olds from Ralph Fireoved, who owned the property from 1971 until 1989. The Thomasmas have owned lot 14 since 1974. They purchased lot 14 from Lawrence Hecht in 1974. Neither party had their property surveyed when they purchased it, and both parties testified that they relied on information passed on by their respective sellers to determine where the property line was located. Neither party ever had a dispute regarding the property line until the instant case. The boundary line dispute between the parties that is the subject of this case arose after Olds decided to tear down the small cottage that had been on lot 13 for many years and construct a new, much larger home.

Construction of the new home began in 2000, and the home was completed by 2002. However, in 1999 before beginning construction on her home, Olds hired Mostrom & Associates to survey her property. The survey showed that a concrete retaining wall extended over the property line onto the Thomasmas' property, and that a shed also encroached onto the Thomasmas' property.[1] As part of the survey, iron stakes were placed at all four corners of Olds' property to mark the boundary lines as identified by the survey. Both Olds and Thomas Vernon, the builder she hired to construct her home, testified that the intention was always to build within the survey lines. The building plans also recognized the survey line as the property line and the home was designed to fit entirely within the survey line. Further, Vernon obtained a setback variance from the township on the basis of the property line as depicted by the survey.

As construction progressed, the Thomasmas testified that they became concerned that Olds' home was encroaching on their property. In 2004, after construction was completed, the Thomasmas hired Mostrom & Associates to conduct a survey of their property. The 2004 survey ordered by the Thomasmas depicted the property line between their property and Olds' property in the same location as Olds' 1999 survey, but also showed several encroachments resulting from the construction of the new home. In particular, the 2004 survey showed two sprinkler heads extending 0.8 feet, one sprinkler head extending 0.3 feet, one sprinkler head extending 0.4 feet, plastic pads extending 0.09 feet and 0.3 feet, seawalls extending 0.16 feet and 0.02 feet, a drain extending 0.1 feet, and two corners of the stone patio extending 0.15 feet and 0.1 feet, respectively.

[1] The retaining wall extended 1.15 feet over the property line, the northwest corner of the shed extended 0.23 feet over the property line, and the northeast corner of the shed extended 0.15 feet over the property line.

Eventually, in 2008, the Thomasmas constructed a fence along what they believed was the property line as depicted by the survey.[2] In response, Olds filed a complaint to quiet title on the basis of adverse possession and acquiescence. The Thomasmas filed a counter-complaint to quiet title and for injunctive relief. The Thomasmas claimed that Olds' seawall, stone patio, four sprinkler heads, and a drain encroached on their property. Further, the Thomasmas asserted the affirmative defenses of judicial estoppel and clean hands.

Following a bench trial where the parties' presented their equitable claims, the trial court issued its ruling on the record, and a conforming order was entered. Plaintiff moved to set aside or modify the trial court's judgment, and following a hearing on the motion, the trial court denied most of plaintiff's requests, but it slightly modified its judgment. An amended judgment was later issued containing the trial court's complete findings of fact and conclusions of law. In the amended judgment, the trial court first concluded that Olds failed to meet her burden of proof in regard to her acquiescence claim and her adverse possession claim. It noted that the testimony regarding the property line "went both ways," and found that Olds had not established her alleged boundary line by a preponderance of the evidence as required for acquiescence, nor had she met the higher standard of clear and cogent evidence for adverse possession. The trial court then found that the evidence proved that the survey line was accurate and reliable, and that the property line depicted by the surveys constituted the actual boundary line between the two properties as intended by the platters and as expressed in the parties' deeds. Accordingly, the trial court held that it was denying plaintiff's acquiescence and adverse possession claims and finding that the property line was the line as surveyed and set out by the property stakes and survey irons.

Next, the trial court addressed defendants' request for a permanent injunction. The trial court found that the trespass was intentional. It noted that the builder and Olds were aware of where the survey line was, and they were aware that the building was going to go right up to the line. Thus, the trial court concluded that the builder must have known, and therefore, must have intended, that once the stone facing was placed on the patio it would encroach over the line. Accordingly, it found that the trespass was intentional and it held Olds responsible for the builder's actions as a principal. The trial court further found that the encroachments were not de minimis because the property itself was very small, and therefore, any encroachment, however slight, was significant, and on that basis, the trial court ordered that the injunction would be permanent and the remedy would be plaintiff's removal of the encroachments. The trial court further rejected plaintiff's clean hands and judicial estoppel arguments. Plaintiff now appeals as of right.

Plaintiff first argues that the trial court erred by rejecting the evidence that the retaining wall and the shed both extended over the property line identified by the survey, and that contrary to the trial court's opinion and order, this evidence proved her acquiescence and adverse possession claims.

[2] The Thomasmas eventually conceded that the fence was not actually along the survey line. The fence has been removed, and is not an issue on appeal.

We review de novo actions that are equitable in nature. *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). Acquiescence and adverse possession claims are equitable in nature. *Beach v Lima Twp*, 283 Mich App 504, 508; 770 NW2d 386 (2009); *Sackett v Atyeo*, 217 Mich App 676, 680-681; 552 NW2d 536 (1996). Quiet title actions are also equitable in nature. *Canjar*, 283 Mich App at 727. We review the trial court's factual findings for clear error. *Id.* "A trial court's findings are clearly erroneous only when the appellate court is left with a definite and firm conviction that a mistake has been made." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007).

There are three theories of acquiescence: (1) acquiescence for the statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary. *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000). Only statutory acquiescence is at issue in this case. Regarding statutory acquiescence, this Court has explained that "[t]he doctrine of acquiescence provides that, where adjoining property owners acquiesce to a boundary line for a period of at least fifteen years, that line becomes the actual boundary line." *West Mich Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). While there are no defined elements necessary to prove acquiescence, this Court has explained that acquiescence "is established when a preponderance of the evidence establishes that the parties treated a particular boundary line as the property line." *Id.* at 529-530 (emphasis, quotation marks and citations omitted).

"In order to establish a claim of adverse possession, a plaintiff must provide 'clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years.'" *Canjar*, 283 Mich App at 731, quoting *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). The 15-year statutory period begins when the rightful owner has been "disseised" of the land. MCL 600.5829. "Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership. *Canjar*, 283 Mich App at 731, quoting *Kipka*, 198 Mich App at 439.

First, we conclude that the trial court did not "reject" the evidence that the retaining wall and shed encroached on defendants' property as plaintiff claims. Rather, the trial court recognized that the 1999 survey, which was admitted into evidence, depicted these items and showed that they encroached on the Thomasmas' property. Thus, we find no clear error in the trial court's factual determinations.

Moreover, with respect to plaintiff's claim that the encroachments established a new boundary line under the theories of acquiescence and/or adverse possession, we agree with the trial court that the encroachments did not constitute a boundary line that the parties both recognized and treated as the actual boundary line. Nor did the encroachments establish a line that clearly defined a boundary alternative to the surveyed boundary line between the two properties that was actual, visible, open, notorious, exclusive, continuous, and uninterrupted. To the contrary, these encroachments were located next to each other and encroached by different distances. Further, relative to the approximately 117 feet of the property from the road to the lakeshore, the space occupied by the encroachments was insignificant, and therefore, did not establish a boundary line. Moreover, the testimony admitted during trial does not support the

conclusion that these encroachments were recognized by the parties and treated as marking the boundary between the properties.

Next, plaintiff argues that the trial court erred by quieting title in favor of defendants on the basis of the property line depicted by the survey. Specifically, plaintiff argues that the trial court's recognition of the survey line as the property line was error because she maintains that defendants did not prove the survey line was the actual property line and because the surveys were based on an "equitable distribution" of the property and not on the actual plat.

Again, we review de novo equitable actions such as actions to quiet title. *Canjar*, 283 Mich App at 727. We review a trial court's factual findings for clear error. *Id.*

First, we disagree with plaintiff's characterization of the trial court's decision quieting title. The trial court did not award defendants additional property after finding that they failed to meet their burden of proof. Rather, having concluded that plaintiff failed to prove adverse possession or acquiescence, the trial court quieted title by relying on the property line depicted by the surveys.

Moreover, the testimony submitted at trial supported the trial court's conclusion that the survey line accurately depicted the property line between the two parcels as intended by the original plat and reflected by the parties' deeds. Wayne Mostrom testified that he was "very confident" about the accuracy of the survey in regard to the property at issue in this case because some of the monuments marking the original plat locations were located in an earlier road commission survey. Mostrom explained that he was able to relocate the points on the corners of the lots at issue on the basis of the location of the original monuments. Thus, we find no error in the trial court's reliance on the property line depicted by the survey.

Next, plaintiff argues that the trial court erred by concluding that the encroachment of the stone facing attached to the patio was intentional. Plaintiff also argues that the trial court abused its discretion by ordering removal of the stone facing because the encroachment is de minimis and does not interfere with defendants' use of their property.

In this case, the trial court concluded that the stone facing encroachment was intentional, finding that the builder and Olds were aware of where the survey line was, and they were aware that the building was going to go right up to the survey line. Thus, the trial court concluded that the builder must have known, and thus, must have intended, that once the stone facing was placed on the patio it would encroach over the survey line. Accordingly, it found that the trespass was intentional and it held Olds responsible for the builder's actions as a principal.

We review for an abuse of discretion a trial court's decision to grant injunctive relief. *Taylor v Currie*, 277 Mich App 85, 93; 743 NW2d 571 (2007). "An abuse of discretion occurs when a trial court's decision is not within the range of reasonable and principled outcomes." *Id.* We review a trial court's factual findings for clear error. *Canjar*, 283 Mich App at 727.

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Kernen v Homestead Dev Co*, 232 Mich App 503, 509, 591 NW2d 369 (1998), quoting *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264, 489 NW2d 211 (1992). Generally, "the court will

balance the benefit of an injunction to plaintiff against the inconvenience and damage to defendant, and grant an injunction or award damages as seems most consistent with justice and equity under all the circumstances of the case." *Wiggins v City of Burton*, 291 Mich App 532, 558-559; 805 NW2d 517 (2011), quoting *Kratze v Indep Order of Oddfellows*, 442 Mich 136, 143 n 7; 500 NW2d 115 (1993). See also *Kernen*, 232 Mich App at 514. However, "a court is not bound to engage in a balancing of the relative hardships and equities if the encroachment resulted from an intentional or wilful act . . . ." *Kratze*, 442 Mich at 145.

Plaintiff first specifically argues that the trial court erred by making the factual finding that the stone facing encroachment was intentional, and thus, should have applied the balancing test considering the benefit of an injunction in light of the inconvenience and damage of an injunction as described in *Kernen*, 232 Mich App at 514, and *Kratze*, 442 Mich at 143. Further, plaintiff argues that even if the trial court was correct that the builder's actions were intentional, the trial court erred by holding Olds vicariously liable for the builder's actions. We disagree.

This Court rejected a similar argument in *Wiggins*, 291 Mich App at 557, where this Court concluded that the defendants were liable in trespass for the unauthorized installation by city employees of a drain on the plaintiff's parcel. This Court also granted a permanent injunction in favor of the plaintiff. *Id.* The defendants argued that they did not trespass because they simply requested drainage relief from the city, and the city's agents constructed the drain that gave rise to the trespass on the plaintiff's land. *Id.* This Court rejected that argument, noting that it "is a well-established principle of law that all persons who instigate, command, encourage, advise, ratify, or condone the commission of a trespass are cotrespassers and are jointly and severally liable as joint tortfeasors." *Id.* This Court noted that because it was "beyond factual dispute" that the defendants "specifically requested drainage relief from the city and either authorized or subsequently ratified the installation of the drain and drainpipe by the city or its agents," the defendants' conduct "was sufficient to constitute the intentional tort of trespass." *Id.* at 557-558. This Court noted that the fact that the drain would belong to the defendants after its installation further supported its conclusion that defendants intentionally trespassed. *Id.* at 558.

This case is analogous. While Olds herself did not construct any of the encroaching items, she authorized and/or ratified the encroachments. Olds hired the architect and builder and approved all the building plans. The builder testified that he intended to build the patio right up to the property line because he believed he was entitled to do so under the relevant regulations. Once the stone facing was placed on the patio, the patio encroached on the Thomasmas' property. Olds and the builder both acknowledged that the survey line was marked and plainly visible during construction of the home. While Olds and the builder both testified that they did not intend to cross the line, it does not change the fact that the builder's intentional actions specifically resulted in encroachments on the Thomasmas' property. Olds is responsible for the encroachments because, like the defendants in *Wiggins*, she authorized the building project, accepted the finished product, and is now the owner of the home and all the encroachments.

Accordingly, we find no clear error in the trial court's determination that the encroachment was intentional. Moreover, because the encroachment was intentional, the trial court did not err by declining to apply the balancing test. *Kratze*, 442 Mich at 145. Finally,

Wiggins, as discussed *supra*, clearly establishes that the trial court did not err by holding Olds vicariously liable for the builder's actions.

Plaintiff also specifically argues that the trial court abused its discretion by ordering removal of the stone facing encroachment in light of the fact that the encroachment was de minimis and did not interfere with defendants' use of their property. The trial court addressed this argument in its oral opinion, stating that while the encroachment was a matter of inches the encroachment was not de minimis because defendants' property was only 15 feet wide at its largest point. The trial court concluded that the encroachment was significant in light of the small size of defendants' property. While this case presents a close question, we cannot conclude that the trial court's decision to order removal of the stone facing encroachment was outside the range of reasonable and principled outcomes in light of its reasoned explanation regarding the significance of the encroachment. Thus, we conclude that the trial court did not abuse its discretion by ordering removal of the encroachment.

Next, contrary to the trial court's ruling, plaintiff argues that on de novo review we should apply the clean hands doctrine because defendants acted inequitably by erecting a fence on her property, allowing maintenance employees to trespass on her property, and removing some of her plants.

We review de novo actions in equity, including the application of the clean hands doctrine. *Stachnik v Winkel*, 394 Mich 375, 383; 230 NW2d 529 (1975).

Our Supreme Court has explained that "[n]o citation of authority is necessary to establish that one who seeks the aid of equity must come in with clean hands." *Stachnik*, 394 Mich at 382, quoting *Charles E Austin, Inc v Secretary of State*, 321 Mich 426, 435; 32 NW2d 694 (1948). The Court explained that the clean hands maxim

> is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be the abettor of iniquity. [*Id.* (citation and quotation omitted).]

The clean hands doctrine applies to quiet title actions. *McFerren v B & B Investment Group*, 253 Mich App 517, 523; 655 NW2d 779 (2002). "A court acting in equity looks at the whole situation and grants or withholds relief as good conscience dictates." *Id.* at 522 (quotation marks and citation omitted).

During trial, defendants admitted that they erected a fence and removed some of Olds' plants. Both Bette and Robert explained that they intended to build their fence along the survey line, but because the survey stakes were gone at that time, they accidentally installed the fence on Olds' property. The fence was removed before trial and is not an issue on appeal. Similarly, Bette admitted during trial that she removed some plantings, but testified that those plantings

were on her property. Finally, testimony at trial demonstrated that guests and/or employees of both plaintiff and defendants briefly trespassed on the respective adjoining properties.

In light of these facts, and looking "at the whole situation" to grant or withhold relief "as good conscience dictates," *McFerren*, 253 Mich App at 522, on de novo review, we agree with the trial court and likewise decline to apply the clean hands doctrine to bar relief to the Thomasmas. The Thomasmas testified that the trespasses they committed were unintentional because they always believed they were on their own property, and the fence installed by the Thomasmas has been removed. Thus, the Thomasmas' most egregious misconduct has already been remedied, while Olds' encroachments still remain. Moreover, both parties had agents who walked across the other parties' property. Thus, because both parties are "guilty" of this trespass, we cannot conclude that the brief trespasses should bar the Thomasmas relief in equity.

Finally, the Thomasmas' misconduct was relatively slight in relation to the kind of misconduct this Court has previously relied on to apply the clean hands doctrine to bar equitable relief. For example, in *McFerren*, this Court affirmed the trial court's application of the clean hands doctrine when the plaintiff attempted to conceal assets from the federal government and his wife, committed fraud during his divorce proceedings by failing to record his property deed, and represented to others that he leased the property. This Court found that the plaintiff's misconduct placed a cloud on the plaintiff's title, and it refused to grant equitable relief. *Id.* at 523.

Similarly, in *Weller v Weller*, 344 Mich 614, 619-620; 75 NW2d 34 (1956), the Court held that the clean hands doctrine barred relief when the plaintiff attempted to conceal his interest in property from his wife during their divorce proceedings. The plaintiff antedated the deed from the vendors and the mortgage for the purpose of indicating that the transaction took place before the marriage. The Court held that under those circumstances, a court of equity would not "lend its aid to the parties to the fraud," and denied relief. *Id.* at 623.

The misconduct in this case did not amount to fraud, and was not as egregious as the misconduct that has previously been the basis for applying the clean hands doctrine. We conclude that it would be inequitable to deny relief to either party under the circumstances of this case on the basis of the clean hands doctrine.

Finally, plaintiff argues that the trial court erred by declining to apply judicial estoppel to bar defendants from arguing that the survey accurately depicted the property line.

Again, we review de novo the application of equitable doctrines such as judicial estoppel. *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). However, the findings of fact supporting an equitable decision are reviewed for clear error. *Id.*

The equitable doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 251; 792 NW2d 781 (2010) (quotation and citation omitted). Applicable in this case, the "prior success model" of judicial estoppel prevents "a party who has *successfully* and unequivocally asserted a position in a prior proceeding . . . from asserting an inconsistent position in a subsequent

proceeding." *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 480; 822 NW2d 239 (2012) (quotations omitted, emphasis in original), citing *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994).

In this case, Olds argued that the Thomasmas should be judicially estopped from claiming that the survey line accurately defined the boundary between their two properties because in a previous boundary dispute case the Thomasmas prevailed by asserting that significant deficiencies in the Plat of Midway rendered the boundary lines established by surveys inaccurate and unreliable. The trial court rejected this argument, finding that the previous case involved different properties and that the testimony about the reliability of the surveys was different in the two cases.

We agree with the trial court that the doctrine of judicial estoppel is not applicable in this case. The record demonstrates that the facts of the two cases were sufficiently different to avoid judicial estoppel. Claims must be "wholly inconsistent" for judicial estoppel to apply. *Spohn*, 296 Mich App at 480. In the previous case, the Thomasmas argued that the surveys were not reliable in regard to different parcels of property due to different circumstances. Two different surveyors conducted surveys in the previous case, and the surveyors disagreed about the boundary lines. In this case, the Thomasmas maintained that the survey was reliable because different parcels of property are involved, both surveys depicted the line in the same location, and the surveyor testified that he was confident about the survey's accuracy.

Moreover, it is also not clear that the Thomasmas actually prevailed on the argument that the survey was unreliable in the previous case because the judgment granting them relief in the previous case quiets title in favor of the Thomasmas on the theories of adverse possession and acquiescence. The trial court in the previous case specifically stated in the written judgment that it "is not necessary for the court to determine the original boundary line . . . ." It then mentioned that such a line may be impossible to locate due to errors in the plat, but its holding and the relief granted is clearly not based on that presumption. Moreover, the trial court did not affirmatively conclude that the line was impossible to locate; rather, it just stated that it "may be impossible to locate." Therefore, we agree with the trial court's determination that judicial estoppel was not applicable.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck