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2011 IL App (3d) 110019-U

Order filed November 10, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

JOSEPH THOMPSON and RB FAMILY	)	Appeal from the Circuit Court
FARMS, INC., an Illinois corporation,	)	of the 9th Judicial Circuit,
	)	Warren County, Illinois
Plaintiffs-Appellees,	)	
	)	Appeal No. 3-11-0019
v.	)	Circuit No. 07-CH-45
	)	
PHILLIP R. MOORE,	)	
	)	Honorable Dwayne Morrison,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.

Justice O'Brien concurred in the judgment.

Justice McDade specially concurred.

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**ORDER**

¶ 1 Held: The trial court's finding that plaintiffs established the elements of adverse possession by clear and unequivocal proof is against the manifest weight of the evidence. Reversed.

¶ 2 Plaintiffs, Joseph Thompson and RB Family Farms, Inc, brought this action in the circuit court of Warren County to quiet title to a tract of rural real estate. Defendant, Phillip Moore, filed a counterclaim also seeking to quiet title to the property and a declaration that he is the rightful owner of the property. Following a trial, the circuit court entered judgment in plaintiffs' favor on counts I and II of their amended complaint which alleged 20 years' adverse possession of the property. The circuit court found against plaintiffs on count III of their amended complaint which alleged 7 years' adverse possession with color of title. Defendant appeals only from the findings relevant to counts I and II of the amended complaint, claiming the trial court's findings that plaintiffs established all the elements of adverse possession by clear and unequivocal evidence are against the manifest weight of the evidence. Defendant further claims that the trial court improperly considered the effect a mortgage foreclosure action had on this dispute.

¶ 3 **FACTS**

¶ 4 The disputed tract of land is a narrow sliver of property bordered by a fence line on the north and a creek on the south. The width of the property varies from 15 feet to 100 feet. The entire tract of land totals less than an acre and a half. The interested parties hold title to the land adjacent to the disputed tract. Three owners claim right of possession to the disputed area.

¶ 5 Defendant (Moore) claims ownership of the entire area. Moore's property borders the entire span of the disputed property to the north.

¶ 6 Plaintiff Thompson claims ownership of the eastern portion of the disputed tract. Thompson's property borders the disputed tract on its south and east. Thompson property sits

east of the RB Family Farms, Inc. property.

¶ 7 At various times throughout the litigation, the parties interchangeably referred to Ronald Byers and RB Family Farms, Inc., as the same entity. The corporate structure of defendant RB Family Farms, Inc., is not at issue in this appeal. For clarity, we will refer to defendant RB Family Farms, Inc., as Byers. Byers owns property adjacent to the south and west portion of the disputed property.

¶ 8 The property immediately to the south of the disputed tract is divided into two lots. Plaintiff Thompson obtained title to his property, Lot 1, on June 8, 1994. Plaintiff Byers obtained titled to his property, Lot 2, on October 28, 1994. All of the deeds in the chain of title to the Thompson and Byers' property refer to Lot 1 and Lot 2 of the 1895 plat of survey. The certificate of plat of that survey describes Lot 1 and Lot 2 as being located "South of the North Bank of Cedar Creek." Cedar Creek is also known, or has been known, by many names including Piciyune Creek, Cedar Creek and the Cedar Fork of Spoon River.

¶ 9 Defendant Moore obtained title to his property on September 6, 1996, by sheriff's deed following a mortgage foreclosure action. The sheriff's deed described the property, in pertinent part, as "lying and being North of the Cedar Fork of Spoon River." The Hustons owned the property prior to Moore.

¶ 10 Byers testified at trial that he previously rented Lot 1 and Lot 2 to run cattle. He rented Lot 1 from 1985 until Thompson bought Lot 1 in 1994. Byers rented Lot 2 in 1985 and 1986 then purchased Lot 2 in 1994. Bill Downin rented Lot 2 from 1986 to 1994.

¶ 11 Byers stated at trial that while he rented Lot 2 in 1985 and 1986, a fence existed on the north side of Picinyune Creek which was in bad need of repair. This fence was located very, very close to the creek and in one spot had slightly washed out. The fence was replaced with a newer fence in either 1985 or 1986. The person who repaired the fence gained access to it from the property now owned by Moore to the north. There was no evidence as to who paid for the new fence.

¶ 12 Byers acknowledged during his testimony that at the time the fence was repaired, Pat Huston owned all the property north of the creek. Byers indicated the new fence was constructed with high tensile wire and was located slightly north of the location of the old fence line. Byers did not graze cattle on Lot 1 after Thompson bought it in 1994. In 2001, Byers had a conversation with Moore about putting barbed wire in the tensile fence.

¶ 13 Thompson testified that he "has never run any cattle" on Lot 1. He uses Lot 1 for recreation. About "half a dozen times" a year, Thompson walks on the disputed property. In 2004, he talked to Moore about the boundaries of Lot 1.

¶ 14 Thompson described the fence which runs along the entire north side of the creek, spanning both his property and Byers'. There are gates in the fence line allowing access to the disputed area from the north. In 2005, Moore approached him about the placement of deer stands in the disputed area. Moore let him know that Moore had tree stands between the fence and the creek. Thompson stated this was the first he knew that any stands existed on the south side of the fence. That same week, Moore brought Thompson documents "from the courthouse."

Moore used the documents to show Thompson that Moore owned the land all the way to the north bank of the creek. Thompson testified that he had, on at least one prior occasion, witnessed Moore mowing the disputed property between the creek and the fence. He believed this mowing took place after his conversation with Moore in 2005.

¶ 15 Janice Hamberg from the Warren County Assessor's office testified that she is employed as supervisor of assessments. She indicated that Moore has been paying property taxes on the disputed area since he acquired the property. Thompson and Byers are paying real estate taxes on the property south of the north bank of the creek.

¶ 16 Richard Eaton testified that he worked for the Hustons from 1989 until 1994. He is familiar with the fence on the south part of the Moore/Huston property. It was Eaton's understanding that Huston owned the property north of the creek, not just north of the fence.

¶ 17 Moore testified he farmed the property he now owns as a tenant in 1972 and 1973. He has always understood Piciyune Creek to be the south border line of the property. After he purchased the property in 1996, he noticed three gates in the fence line on the north side of the disputed area. In 1996, he completed approximately six weeks worth of work in the disputed area, clearing brush so that it would not impede the water flow of the creek. When water in the creek leaves its banks, it cuts across Moore's property and, at times, causes the fence to lie down. Moore indicated he would mow the grass in the disputed area every year to keep the grass down. Starting in 2005, he used the disputed area for hunting purposes and started a creek stabilization project in 2007 through the United States Department of Agriculture. Moore paid all the real

estate taxes on the disputed area since 1996.

¶ 18 Based upon the testimony at trial, the court made specific findings of fact. The trial court noted that Cedar Creek, Cedar Fork of Spoon River and Piciyune Creek all refer to the same creek. The plats and titles to all property indicated that Moore owned the land north of the creek and Thompson/Byers owned the land south of the north bank of the creek. The current fence was built in 1985 or 1986, which replaced a fence that was closer to the creek. "The use of the property by the respective parties' predecessors in title indicates that this fence was to be a division fence." In 2005, following a discovery of a deer stand on the disputed property, plaintiffs and defendant began discussions concerning ownership of the disputed property. In 2007, Moore commenced construction work on the fence and creek. Shortly thereafter, this lawsuit commenced.

¶ 19 Based on these findings, the court held plaintiffs proved adverse possession of the property for at least 20 years. It noted that Byers and his predecessor used the disputed land from 1985 to present (December 8, 2010) and that while the parties discussed the dispute starting in 2005, Moore "took no other substantial actions in regards to possession" until 2007.

¶ 20 The court noted the "issue is closer on Thompson's property" since no cattle ran on the disputed property since 1994. However, the court noted Thompson's "infrequent visits upon the land are sufficient for possession especially with the absence of any substantial use by the defendant."

¶ 21 The court ordered title quieted in favor of Byers and Thompson. It further enjoined

defendant and his tenants, employees or agents from removing the division line fence, damaging the fence or trespassing upon plaintiff's property. This appeal followed.

¶ 22

#### ANALYSIS

¶ 23 Defendant claims that the trial court erred in finding that plaintiffs satisfied their burden of proving every element of adverse possession by clear and unequivocal evidence. We agree.

¶ 24 "Property is not taken by adverse possession unless the following elements exist concurrently for 20 years: (1) continuous, (2) hostile or adverse, (3) actual, (4) open, notorious, and exclusive possession of the premises, (5) under claim of title inconsistent with that of the true owner." *Illinois District of American Turners, Inc. v. Rieger*, 329 Ill. App. 3d 1063, 1073 (2002); 735 ILCS 5/13-101 (West 2008). "Presumptions are in favor of the title owner, and the burden of proof upon the adverse possessor requires that each element be proved by clear and unequivocal evidence."<sup>1</sup> *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981). On review, a court will not

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<sup>1</sup>In *Joiner*, our supreme court stated that adverse possessors must prove all elements of their claim by clear and unequivocal evidence. Thereafter, appellate courts have noted, "Because our supreme court has never detailed a 'clear and unequivocal' standard, courts have applied the 'clear and convincing' burden of proof in adverse possession cases." *Estate of Welliver*, 278 Ill. App. 3d 1028, 1036 (1996); see also *Sierens v. Frankenreider*, 259 Ill. App. 3d 293, 298 (1994) and *Dwyer v. Love*, 346 Ill. App. 3d 734 (2004). We find the term "unequivocal" quite easy to wrap one's brain around. On the other hand, "convincing" begs the question, "convincing to whom?" We all have different limits on how far we are willing to stretch credulity.

disturb the findings of a trial court as to the proof of these elements unless the findings are against the manifest weight of the evidence. *Estate of Welliver v. Alberts*, 278 Ill. App. 3d 1028 (1996).

¶ 25 Defendant argues that the circuit court failed to make a specific finding regarding who is the actual title holder of the property in question. We disagree. In the "Findings" section of the trial court's order, the court stated, "Moore's deed and those of his predecessors in title identify the property he owns as being north of Cedar Fork of Spoon River." This signifies to us that the trial court correctly understood that Moore held title to all property north of the creek. Plaintiffs neither contest nor concede this fact. The record renders indisputable the facts concerning title ownership.

¶ 26 All parties stipulated that Lot 1 (Thompson's property) and Lot 2 (Byers' property) are described in the plat of survey as part of a 50 acre tract located "south of the north bank of Cedar Creek." Moore's deed describes his property as "lying and being North of Cedar Fork of Spoon River." Janice Hamberg from the Warren County Assessor's office testified that property tax bills are issued from her office. The assessor's office reviews deeds, legal descriptions of property, the plat of survey and the certificate of plat attached to the plat of survey to determine who owns what property for property tax purposes. Using these items to determine Byers' and

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Nevertheless, the *Joiner* court's statement is clear: those seeking adverse possession of a piece of property must prove each element by clear and unequivocal evidence. As such, that is the standard to which the trial court should have held Thompson and Byers.

Thompson's "assessment line" for property tax purposes, the assessor's office considered their property lied "south of the north bank of Cedar Creek." The evidence in the record on appeal overwhelmingly indicates that Moore is the title holder to the property in question. As such, the law is clear that Moore is entitled to have all presumptions and inferences drawn in his favor. *Davidson v. Perry*, 386 Ill. App. 3d 821, 825 (2008).

¶ 27 Our review of the record indicates the trial court neither drew all presumptions and inferences from the evidence in favor of Moore nor required plaintiffs to prove all elements of adverse possession by clear and unequivocal evidence. It "is well established that use of vacant, or wild and undeveloped and unoccupied land is presumed to be permissive and not adverse."

*Estate of Welliver*, 278 Ill. App. 3d at 1037 (citing *Monroe v. Shrake*, 376 Ill. 253, 256 (1941)).

In *Welliver*, the parties claiming adverse possession of certain "woods" ran a tractor through the woods to create trails, maintained the trails by snipping away encroaching vegetation, and use the woods for walking, horseback riding, cycling, snowmobiling and camping. *Estate of Welliver*, 278 Ill. App. 3d at 1033, *appeal denied*, 168 Ill. 2d 587 (1996). While the trial court found evidence of such activity satisfied the adverse possessors burden, the *Welliver* court stated:

"[T]he trial court's decision is still against the manifest weight of the evidence. The plaintiffs did not prove, by clear and convincing evidence, that their possession of the woods was open, notorious, and exclusive. See *Joiner*, 85 Ill. 2d at 83. Our supreme court stated that the adverse possessor's actual possession must indicate

to persons residing in the immediate neighborhood who has the exclusive management and control of the land. [Citation.] It must also be of such open and visible character as to apprise the world, that the property has been appropriated and is occupied. [Citation.] The adverse possessor must figuratively unfurl his flag on the land, and keep it flying." (Internal quotation marks omitted.) *Id.* at 1038.

¶ 28 There is no dispute that the land was vacant, undeveloped, wild, and unoccupied. As such, Thompson and Byers "use" of the land is presumed to be permissive and not adverse. Plaintiffs simply did not put forth sufficient evidence to clearly and unequivocally rebut this presumption.

¶ 29 Thompson testified that he never ran cattle on the property and, at most, walked on it six times a year. Thompson further testified that his "use" of the disputed property was solely for recreational purposes. While he could walk to the property by fording the creek if the creek was shallow enough, he could get no motorized vehicles to the disputed property without the use of Moore's property north of the fence. Thompson also testified that while he had seen Moore mowing on the property, he himself has never made any improvements to the property or the fence. Thompson's momentary walks across the property every other month for recreational purposes do not constitute clear and unequivocal evidence of actual or exclusive possession of the property.

¶ 30 "Exclusivity [] demands the adverse possessor deprive the rightful owner of all possession." *Davidson v. Perry*, 386 Ill. App. 3d at 825. To prove "actual" possession of the land, the adverse possessor must prove that they made improvements or performed acts of dominion sufficient to provide the reasonably diligent owner with visible evidence of another's exercise of dominion and control. *Joiner v. Janssen*, 85 Ill. 2d 74 (1981); *Augustus v. Lydig*, 353 Ill. 215 (1933); *Estate of Welliver*, 278 Ill. App. 3d at 1037. Thompson acknowledged he made no improvements on the property and further that he observed Moore mowing on the property.

¶ 31 Nevertheless, plaintiffs argue that the existence of the fence, which they term a division line fence, was sufficient evidence in and of itself of their dominion over the disputed property. Byers further identifies his acts of modifying the fence in 2001 and running cattle on the property as additional evidence of his dominion over the property.

¶ 32 Byers' own testimony, however, belies any notion that the fence in question was, in fact, a division line fence. Byers specifically acknowledged that Pat Huston, Moore's predecessor in title, "owned the property north of the creek and north of the fence" in 1985 and 1986 when he rented Lots 1 and 2 as a tenant farmer. At that time, Brooks (Byers' predecessor) owned Lot 2 and Meiller (Thompson's predecessor) owned Lot 1. Byers testified that he was present "as a representative" of Brooks, when the fence was rebuilt. Byers specifically stated that "the old fence, was very, very close to the creek, and one spot the creek had washed under it slightly" so "Lester Brooks, Pat Huston and \*\*\* Robert Cunningham \*\*\*, made a decision to rotate the fence at one point a few feet to avoid the creek so you could build a good, solid, stable fence."

¶ 33 Byers' own testimony indicates that he knew Pat Huston owned the property north of the creek and that the fence was moved, not to act as a new boundary line for Huston's property, but instead to keep the fence from washing out. While the trial court found that the "use of the property by the respective parties' predecessors in title indicates that this fence was to be a division fence," there is simply no evidence in the record to support this finding. Byers' testimony belies such a finding. Sharon Cunningham testified that she was present at a meeting between her "husband, Pat Houston, and Lester Brooks" when they discussed moving the fence. However, Cunningham stated she "didn't listen, pay attention" to anything said at the meeting and that she "really didn't get in on the conversation." Certainly, nothing allegedly said during the meeting with the predecessors in title regarding moving the fence could be used as evidence that they intended the new fence to be a division line fence. At best, the evidence shows the fence was moved away from the creek bank to avoid having to make constant repairs as a result of the bank eroding. Plaintiffs did not show evidence of either an intent by Moore's predecessor to cede the disputed property to his neighbors to the south or adverse possession by those neighbors. We hold, in light of the burden of proof, the trial court's finding that the fence in question was intended to be a division line fence by the predecessors in title is against the manifest weight of the evidence.

¶ 34 Undoubtedly, the changes Byers made to the fence in 2001 and the fact that he ran cattle on the disputed property evince some level of dominion and control over the property. However, as noted above, one must do more than merely exert some nominal control over property to prove

adverse possession. Control of the property must be to the exclusion of the rightful land owner and deprive that land owner "of all possession." *Davidson*, 386 Ill. App. 3d at 825. Not only did Byers acknowledge the fence contained gates in it, allowing Moore access to the creek, but Byers called Moore to discuss the fence prior to making the 2001 changes in the fence. Again, use of wild and undeveloped land by someone other than its titleholder is presumed permissive (*Estate of Welliver*, 278 Ill. App. 3d at 1037) and "[p]resumptions are in favor of the title owner, and the burden of proof upon the adverse possessor requires that each element be proved by clear and unequivocal evidence." *Joiner*, 85 Ill. 2d at 81. It is impossible to conclude based on the evidence that Byers or anyone else, clearly and unequivocally, exerted exclusive control over the property. We hold that the trial court's finding that plaintiffs proved adverse possession by clear and unequivocal evidence is against the manifest weight of the evidence. As such, we need not address defendant's second argument that acquiring title to the property through foreclosure barred plaintiffs' claims of adverse possession. Defendant is clearly the title holder to the disputed property.

¶ 35

#### CONCLUSION

¶ 36 The judgment of the circuit court of Warren County in favor of plaintiffs is reversed.

¶ 37 Reversed.

¶ 38 JUSTICE McDADE, specially concurring:

¶ 39 I concur in the majority's decision reversing the finding of the circuit court of Warren County that the plaintiffs had proven adverse possession by clear and unequivocal evidence. I write separately to express my opinion that it was unnecessary to undertake the adverse

possession analysis because reversal would be statutorily required regardless of the determination regarding that issue.

¶ 40 In the trial court and here on appeal, defendant has alleged that his purchase of his property at the foreclosure sale results in his title being free from any adverse possession claims regardless of validity. When purchasing his property, defendant named all unknown owners and nonrecord claimants as parties to the foreclosure action. The unknown owners and nonrecord claimants were served by publication. Defendant contends that because plaintiffs were served as "nonrecord claimants" they are barred from asserting any claims to the strip of land.

¶ 41 Section 15-1509(c) of the Mortgage Foreclosure Law (735 ILCS 5/15-1509(c) (West 2010)) expressly provides that "vesting of title by foreclosure or by deed \*\*\* shall be an entire bar of (i) all claims of parties to the foreclosure and (ii) all claims of any nonrecord claimant who is given notice of the foreclosure." (735 ILCS 5/15-1509(c) (West 2010)).

¶ 42 Here, plaintiffs qualify as nonrecord claimants as they have clearly asserted that they have a claim to the property under adverse possession, and such claim is not of record. Plaintiffs, as nonrecord claimants, were given notice of the foreclosure. Notice by publication is sufficient to satisfy the notice requirement. 735 ILCs 5/15-1502 (West 2010). Thus, plaintiffs are barred, under section 15-1509(c), from asserting any claim to the strip of land.

¶ 43 For this reason, the judgment of the trial court must be reversed and the matter remanded for further proceedings.