

NOTICE

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2015 IL App (4th) 140103

NO. 4-14-0103

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 17, 2015
Carla Bender
4th District Appellate
Court, IL

JESSICA LAPINSKI,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Macoupin County
COREY N. LAW and MARRISSA M. LAW,)	No. 11MR12
Defendants-Appellees,)	
and)	Honorable
RICHARD A. ANDREWS,)	Patrick J. Londrigan,
Third-Party Defendant.)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.

Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed the trial court's grant of summary judgment for the defendants, concluding that conflicting affidavits created a genuine issue of material fact as to whether the plaintiff had continuously possessed a disputed strip of land to which she claimed title by adverse possession and boundary by acquiescence.

¶ 2 In August 2011, plaintiff, Jessica Lapinski, brought a quiet-title action against her neighbors, defendants, Corey N. Law and Marriッサ M. Law. Plaintiff alleged, in pertinent part, that an old wire fence, which ran roughly east to west, marked the southern boundary of her property and the northern boundary of defendants' property. To the extent that the property line described in the deed differed from the path of the fence, plaintiff alleged that she acquired title to all the land on her side of the fence through the doctrines of adverse possession and boundary by acquiescence.

¶ 3 In July 2013, defendants filed a motion for summary judgment, alleging that in

2005, an attorney representing the former owners of defendants' property sent plaintiff a letter stating that the fence lied 20 to 30 feet south of plaintiff's southern property line. Defendants asserted that this letter—along with plaintiff's subsequent abandonment of the disputed property following her receipt of the letter—broke the continuity of plaintiff's possession of the disputed land, thereby defeating her adverse-possession and boundary-by-acquiescence claims. The trial court granted defendants' motion for summary judgment.

¶ 4 Plaintiff appeals, arguing that the trial court erred by granting defendants' motion for summary judgment because a genuine issue of material fact existed as to whether plaintiff continuously possessed the disputed land for the 20-year statutory adverse-possession period. See 735 ILCS 5/13-101 (West 2010). We agree and reverse.

¶ 5 I. BACKGROUND

¶ 6 The following facts were gleaned from the parties' pleadings, affidavits, and other supporting documents filed in the trial court.

¶ 7 A. The Undisputed Facts

¶ 8 In March 1990, plaintiff purchased her 70-acre parcel of land in rural Macoupin County, north of the Village of Shipman. At that time, Edna Bounds owned the 60-acre parcel directly south of plaintiff's property (hereinafter, the Bounds property) and lived there with her son, Dale Bounds, and Dale's wife, Sherrie Bounds. On or near the boundary between the two properties ran an old, crude fence made of barbed wire and wooden and metal posts. Over the years, the fence became dilapidated and overgrown with mature trees and brush.

¶ 9 In March 2005, plaintiff sent a letter to Dale Bounds asserting that he was responsible for a share of the repairs to the "divisional fence between [the] adjoining properties." Several days later, Richard Bertinetti—an attorney representing the Bounds—sent a letter to plain-

tiff, explaining, in pertinent part, that (1) the southern boundary of plaintiff's property was actually 20 to 30 feet north of the fence and (2) a registered land surveyor would be coming out to the property to verify the boundary line.

¶ 10 Later in March 2005, Dale Bounds hired surveyor Carl Nail to survey the "front half" of the property line between plaintiff's property and the Bounds property. According to Nail's survey, the wire fence was just *north* of the property line and entirely on plaintiff's property.

¶ 11 In March 2010, defendants purchased the Bounds property by warranty deed from Richard Andrews. (Although not material to the issues in this appeal, we note that the record does not reveal the chain of title between Edna Bounds and Andrews.)

¶ 12 In May 2010, the firm of Hutson & Associates, Inc., prepared a survey of the Bounds property, which found—contrary to the Nail survey—that the wire fence was *south* of the property line. According to the Hutson survey, the fence did not directly follow the east-west property line described in the deed. Instead, the Hutson survey found that the fence began at the southeast corner of plaintiff's property and ran gradually southwest onto the Bounds property. Over the 2,600-foot length of the fence, the far west end was approximately 30 feet farther south than the east end. This resulted in an extremely narrow triangle-shaped piece of land between the fence and the purported southern border of plaintiff's property. On the face of the Hutson survey map were several notes, one of which stated, "It is the recommendation of Hutson & Associates, Inc., that the client seek an attorney's opinion regarding his/her rights associated with the area between the north line of [the Bounds property] and the existing fence."

¶ 13 B. Proceedings in the Trial Court

¶ 14 In March 2011, plaintiff filed her five-count complaint. In the first count, plaintiff

sought to quiet title over the disputed land, alleging, in pertinent part, that she gained ownership through the doctrines of adverse possession or boundary by acquiescence. The remaining four counts sought (1) damages for trespass, (2) damages for violations of the Fence Act (765 ILCS 130/1 to 21 (West 2010)), (3) damages for violations of the Wrongful Tree Cutting Act (740 ILCS 185/1 to 7 (West 2010)), and (4) injunctive relief. (Plaintiff acknowledges that the remaining four counts depended upon her successfully establishing title to the disputed land.)

¶ 15 In September 2011, defendants filed a counterclaim against plaintiff seeking (1) to quiet title to the disputed strip of land and (2) damages for trespass. Defendants also filed a third-party complaint against Andrews, alleging breach of warranty based upon the warranty deed conveying title of the Bounds property to defendants. (Andrews is not a party to this appeal.)

¶ 16 In May 2012, plaintiff filed a motion for partial summary judgment as to her quiet-title claim, asserting that the unrebutted evidence in the record established all the elements of adverse possession and boundary by acquiescence. In opposition to plaintiff's motion, defendants argued that genuine issues of material fact existed as to (1) the exact location of the boundary line and (2) plaintiff's continuous possession of the disputed land for the 20-year statutory adverse-possession period. The trial court denied plaintiff's motion for partial summary judgment.

¶ 17 In July 2013, defendants filed a motion for summary judgment, asserting that following the 2005 Bertinetti letter, which stated that the fence was on the Bounds property, plaintiff "acquiesced to the superior title of the Bounds." In support of this assertion, defendants provided affidavits from Sherrie Bounds and Rodney McQuaid (an acquaintance of Edna Bounds who "lived in the area") stating that following the Bertinetti letter, plaintiff did not tend to the fence line until defendants purchased the property in 2010. Defendants argued that because

plaintiff abandoned her possession of the disputed land in 2005, she could not prove continuous possession for the full 20-year statutory adverse-possession period.

¶ 18 In response to defendants' motion for summary judgment, plaintiff completed and filed an affidavit in which she asserted, in pertinent part, that (1) the 2005 Nail survey indicated that the fence was on plaintiff's property; (2) following the Nail survey, plaintiff told Bertinetti to tell his clients (the Bounds) to stay off of plaintiff's property; (3) no one interrupted plaintiff's possession of the disputed land until 2010, when defendants took possession of the Bounds property; (4) since plaintiff purchased her property in 1990, she maintained the grass and brush located between the fence and her dirt access road (which ran parallel to and just north of the fence) by mowing more than twice per year; (5) in 2005, plaintiff built a tree stand along the fence line; (6) in 2007, plaintiff removed a gate from the fence (which she had installed in 1991); and (7) in 2009, plaintiff cut trees along the fence line.

¶ 19 In addition to her own affidavit, plaintiff provided the affidavit of Bruce Pinkerton, who stated that in August 2009, plaintiff hired him to cut trees and brush along the north side of the fence. No one attempted to stop Pinkerton or assert that the fence was not on plaintiff's property. Plaintiff also provided the affidavit of Duane Loy, who stated that he (1) has farmed plaintiff's land since 1992, (2) understood the southern boundary line of plaintiff's property to be coterminous with the fence, and (3) had never seen anyone other than plaintiff use or occupy the property north of the fence.

¶ 20 In September 2013, following a hearing (the transcript of which is not included in the record), the trial court granted defendants' motion for summary judgment as to all five counts in plaintiff's complaint. The court recorded its judgment in a docket entry without stating its reasoning.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Plaintiff argues that the trial court erred by granting defendants' motion for summary judgment because a genuine issue of material fact existed as to whether plaintiff continuously possessed the disputed land for the 20-year statutory adverse-possession period. We agree.

¶ 24 Summary judgment is appropriate only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). We review *de novo* a trial court's entry of summary judgment. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15, 989 N.E.2d 591.

¶ 25 A. Plaintiff's Adverse-Possession Claim

¶ 26 This court recently explained the elements of an adverse possession claim, as follows:

"To establish title by adverse possession, the claimant must prove possession of the property for the entire 20-year statutory period (735 ILCS 5/13-101 (West 2010)), and that possession must have been (1) continuous; (2) hostile or adverse; (3) actual; (4) open, notorious, and exclusive; and (5) under claim of title inconsistent with that of the true owner. [Citations.] Further, although not one of the five elements of possession, the claimant must also prove by clear and convincing evidence the exact location of the boundary line to which they claim. [Citation.]" (Internal quotation marks omitted.) *Brandhorst v. Johnson*, 2014 IL App (4th)

130923, ¶ 37, 12 N.E.3d 198.

¶ 27 In this case, defendants' motion for summary judgment was based entirely upon their assertion that plaintiff's possession of the disputed land was not continuous for the 20-year statutory period because (1) the Bounds asserted ownership over the disputed strip of land in 2005 (through the Bertinetti letter) and (2) plaintiff thereafter abandoned her possession of the land. Defendants maintain these same arguments on appeal, which we address in turn.

¶ 28 1. *The Effect of the 2005 Bertinetti Letter*

¶ 29 Defendants seem to argue that the mere issuance of the Bertinetti letter somehow interrupted plaintiff's adverse possession as a matter of law. We reject this contention.

¶ 30 Defendants cite no authority for the proposition that a titleholder disrupts an adverse claimant's possession by merely reminding the adverse claimant that she does not hold title to the disputed property. Indeed, "[t]he essence of the doctrine of adverse possession is the holding of the land adversely to the true titleholder." *Joiner v. Janssen*, 85 Ill. 2d 74, 80, 421 N.E.2d 170, 173 (1981). " 'A party, claiming title by adverse possession, always claims in derogation of the right of the real owner. He admits that the legal title is in another. He rests his claim not upon a title in himself, as the true owner, but upon holding adversely to the true owner for the period prescribed by the Statute of Limitations.' " *Id.* at 80-81, 421 N.E.2d at 173 (quoting *White v. Harris*, 206 Ill. 584, 592, 69 N.E. 519, 522 (1903)).

¶ 31 As the supreme court noted in *Janssen*, 85 Ill. 2d at 81, 421 N.E.2d at 174, "[t]o hold that because the possessor knows or should know that record title is in another precludes any possibility of the possessor's title being adverse is the antithesis of the doctrine of adverse possession as it has existed in this State." Defendants essentially conflate the assertion of title over the land (the Bertinetti letter) with an exertion of possession over the land. These are two

very distinct concepts. A claim of adverse possession requires the claimant to establish, among other things, continuous and exclusive *possession* of the land. *Brandhorst*, 2014 IL App (4th) 130923, ¶ 57, 12 N.E.3d 198. A true owner's assertion of *title ownership* over the land, standing alone, is a meaningless gesture under the doctrine of adverse possession unless it results in the adverse claimant dispossessing the land. Defendants' argument in this case—namely, that the Bertinetti letter broke plaintiff's continuous possession of the land—is directly contrary to the law of adverse possession. Assuming, as we must at the summary judgment stage, the truth of plaintiff's assertion that she continued to possess the disputed strip of land after receiving the Bertinetti letter, her actions were entirely consistent with adverse possession.

¶ 32 *2. Plaintiff's Alleged Abandonment of the Land*

¶ 33 In support of their factual assertion that plaintiff abandoned the disputed strip of land following the 2005 Bertinetti letter, defendants cite to (1) the affidavits of Sherrie Bounds and McQuaid, which asserted that plaintiff stopped tending to the fence after receiving the Bertinetti letter, and (2) four undated photographs showing alleged deterioration of the fence.

¶ 34 "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). Plaintiff responded to defendants' motion for summary judgment by providing affidavits from herself and Pinkerton stating that plaintiff continued to maintain the disputed strip of land, including the fence, following the Bertinetti letter. Plaintiff asserted that she built a tree stand, removed a gate, trimmed trees and brush, and mowed the disputed strip more than twice per year following the Bertinetti letter. Construing the affidavits in plaintiff's favor, it is clear that a genuine issue of material fact exists as to whether plaintiff abandoned the disputed

strip of land following the Bertinetti letter. Accordingly, the trial court erred by granting defendants' motion for summary judgment.

¶ 35 We note that in addition to arguing that the trial court properly granted their motion for summary judgment, defendants contend in their brief on appeal that the court properly denied plaintiff's May 2012 motion for summary judgment. (Plaintiff clarifies in her reply brief that she is not appealing the court's denial of her May 2012 motion for summary judgment, which was not a final and appealable order (see, e.g., *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 57, 981 N.E.2d 951).) In an apparent attempt to defend the court's denial of plaintiff's motion for summary judgment, defendants assert in their brief that "[a] factual dispute was created by the plaintiff's claim that she tended [to] or maintained the fence for the entire statutory period." Although we are perplexed that defendants are making this argument given the procedural posture of this case, we agree that a factual dispute existed as to the extent and continuity of plaintiff's possession of the disputed land, which is exactly why the court should not have granted summary judgment for either party.

¶ 36 B. Plaintiff's Boundary-by-Acquiescence Claim

¶ 37 "Where a boundary between two tracts is unascertained or in dispute, the line may be established, first by parol agreement and possession; second, by an agreement implied from unequivocal acts and declarations of the parties and acquiescence for a considerable period of time; and third, in the absence of any agreement, by undisturbed possession for more than twenty years." *McLeod v. Lambdin*, 22 Ill. 2d 232, 235, 174 N.E.2d 869, 871 (1961). Plaintiff appears to claim boundary-by-acquiescence under each of the three aforementioned alternative tests of *McLeod*. The evidence in the record supporting plaintiff's boundary-by-acquiescence claim overlaps significantly with the evidence supporting her adverse-possession claim. Although de-

fendants do not address plaintiff's boundary-by-acquiescence claim in their brief to this court, we conclude that genuine issues of material fact precluded the trial court's entry of summary judgment as to that claim as well.

¶ 38 Nail's 2005 survey noted the presence of historical markers along the south side of the fence, indicating that the fence was north of the historic boundary line. Although the Hutson survey conflicted with the Nail survey as to the location of the boundary line, this inconsistency only deepened the issue of material fact. Defendants essentially argue on appeal that the trial court properly disregarded the Nail survey because it was performed in a sloppy manner. However, at the summary judgment stage the court is to construe the evidence strictly against the movant and liberally in favor of the party opposing summary judgment. *Manchester*, 228 Ill. 2d at 417, 888 N.E.2d at 9. Whether the Hutson survey is more accurate than the Nail survey is a matter of credibility to be resolved at trial.

¶ 39 C. Plaintiff's Quiet-Title Claim Generally

¶ 40 Finally, we note that plaintiff's quiet-title claim is somewhat of a mishmash of various alternative legal claims all intended to establish that plaintiff owns the fence and the land north of it. In addition to her adverse-possession and boundary-by-acquiescence claims, plaintiff also seems to allege in her complaint—consistent with the Nail survey—that the true, historic, legal boundary line of her property lies just south of the fence. We acknowledge that if the Nail survey is accurate and the true historic boundary line is south of the fence, plaintiff's adverse-possession claim is moot because plaintiff cannot adversely possess property to which she holds title. Similarly, if plaintiff establishes that the wire fence itself has become the boundary line through the doctrine of boundary by acquiescence, the discrepancies between the Nail and Hutson surveys will be rendered inconsequential.

¶ 41 We mention these points only to make clear the limited scope of our decision in this appeal. We merely conclude that genuine issues of material fact precluded the trial court's entry of summary judgment, which is "a drastic measure and should be allowed only 'when the right of the moving party is clear and free from doubt.' " *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335, 821 N.E.2d 227, 231 (2004) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986)). In concluding that a genuine issue of material fact existed regarding plaintiff's adverse-possession and boundary-by-acquiescence claims, we do not intend to foreclose any additional alternative bases for plaintiff's quiet-title claim, nor do we pass judgment on the weight or veracity of the evidence in favor of either party.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 44 Reversed and remanded.