

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 141080-U  
NO. 4-14-1080

**FILED**  
November 6, 2015  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

KATHLEEN STRAWBRIDGE,	)	Appeal from
Plaintiff and Counterdefendant-Appellant,	)	Circuit Court of
v.	)	Macoupin County
WAYNE SCHAFER and DAVID SCHAFER,	)	No. 11CH142
Defendants and Counterplaintiffs-Appellees.	)	
	)	Honorable
	)	Joshua A. Meyer,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Justices Turner and Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed, concluding the trial court properly (1) granted defendants' motion for summary judgment, (2) denied plaintiff's motion for summary judgment, and (3) described the disputed property in its order quieting title.

¶ 2 In September 2011, plaintiff and counterdefendant, Kathleen Strawbridge, filed a complaint against defendants and counterplaintiffs, Wayne and David Schafer, seeking the removal of a fence encroaching on a portion of her property (disputed property). In November 2011, defendants filed an answer, asserting plaintiff's claim was barred by the statute of limitations, and a counterclaim to quiet title, alleging they acquired title to the disputed property by adverse possession. Both parties moved for summary judgment. In August 2014, the trial court granted defendants' motion for summary judgment and denied plaintiff's motion for summary judgment. Plaintiff appeals, asserting the trial court erred in (1) denying her motion for summary

judgment, (2) granting defendants' motion for summary judgment, and (3) not clearly defining the disputed property in its order quieting title. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 In September 2011, plaintiff filed a complaint against defendants, who owned real estate located to the immediate west of plaintiff's property, seeking a permanent injunction (1) ordering the removal of a fence encroaching on her property and (2) preventing further trespasses. Specifically, plaintiff alleged defendants, "at some point in the past," installed a fence that encroached onto her property. Plaintiff requested defendants remove the fence or, alternatively, permit her to remove the fence, which request was denied or ignored. Plaintiff alleged "the fence [was] in disrepair and ha[d] not been maintained by \*\*\* [d]efendants." Plaintiff asserted, if the trial court did not order defendants to remove the fence and cease their continuing trespass, she would be "irrevocably harmed in that she will lose the use and potential title to a portion of her property." (Plaintiff attached a survey plat to her complaint.)

¶ 5 In November 2011, defendants filed an answer to plaintiff's complaint, asserting plaintiff's claims were barred by the statute of limitations, and a counterclaim to quiet title, alleging they acquired title to the disputed property by adverse possession.

¶ 6 In April 2013, defendants filed a motion for summary judgment on their counterclaim. Attached to their motion was an affidavit of codefendant Wayne Schafer. The affidavit stated as follows:

"1. That on August 13, 1980, the affiant and his father, David Schafer, acquired title to the real estate described in [the Executor's Deed,] 'Exhibit 1', which is attached hereto and made a part hereof.

2. That on August 30, 2011, affiant's father, David Schafer, transferred his interest in the real estate described in paragraph 1 above to himself, as Trustee of the David L. Schafer Trust, pursuant to the Warranty Deed in Trust, which is attached hereto as 'Exhibit 2', and made a part hereof.

3. That the affiant, Wayne Schafer, and his father, David L. Schafer, as Trustee of the David L. Schafer Trust, own the real estate described in paragraph 1 above.

4. That in 1980, the affiant and his father installed the 5-strand barbed wire fence, approximately 5 feet in height, complained of in Plaintiff's Complaint filed herein.

5. That said fence has been in the same location since it was installed in 1980.

6. That the location of said fence has been obvious and visible since 1980.

7. That since 1980, the affiant and his father, on several occasions, have caused said fence to be repaired and maintained at the current location.

8. That since 1980, the affiant has kept cattle and horses on the real estate enclosed by said fence.

9. That since 1980, adjoining owners of the real estate immediately east of said fence were not permitted by

the affiant and his father to use, and did not use the real estate west of said fence.

10. That the Plaintiff acquired the real estate east of said fence in 2007 by deed, a copy of which is attached hereto and made a part hereof as 'Exhibit 3'.

11. That the affiant and his father have never permitted the Plaintiff to use or occupy the real estate west of said fence.

12. That the affiant and his father have caused fence posts to be removed, which Plaintiff caused to be placed west of said fence.

13. That since 1980, the affiant and his father have claimed ownership of the real estate west of said fence.

14. That since 1980, the affiant and his father's possession of the real estate west of said fence has been open, notorious, hostile, continuous, adverse, visible, and exclusive under their claim of ownership of it, inconsistent with that of the real estate owners to the east of said fence."

¶ 7 In May 2013, plaintiff filed a motion for summary judgment on her claim. Plaintiff argued she was entitled to injunctive relief as she established (1) she owned the disputed property, (2) defendants had trespassed on the property in the past, and (3) defendants were likely to continue trespassing in the future. Plaintiff "acknowledge[d] that the [c]ourt still need[ed] to determine whether [d]efendants ha[d] adverse possession rights," but she asserted the elements

of her claim were established, entitling her to summary judgment entered in her favor. Plaintiff also filed a response to defendants' motion for summary judgment. As to the allegations raised in defendants' motion and supported by their affidavit, plaintiff asserted she was without sufficient information to admit or deny such allegations. Plaintiff did not attach counteraffidavits to her motion for summary judgment or response to defendants' motion for summary judgment.

¶ 8 In July 2013, defendants filed a response to plaintiff's motion for summary judgment. In relevant part, defendants asserted they established they acquired title to the disputed property by adverse possession through their affidavit and information contained in their motion for summary judgment, which plaintiff failed to rebut through counteraffidavits or other documents.

¶ 9 In August 2014, the trial court denied plaintiff's motion for summary judgment and granted defendants' motion for summary judgment, finding, based on the affidavit of codefendant Wayne Schafer, defendants had established they acquired title to the disputed property by adverse possession. The court noted plaintiff failed to provide counteraffidavits to contradict the facts alleged in defendants' affidavit. The court ordered "[t]itle to the real estate west of the barbwire fence located on the westerly side of [plaintiff's property] is adjudged to be the [d]efendants, \*\*\* free and clear of any claim of [plaintiff,] \*\*\* and is quieted in said [d]efendants."

¶ 10 In September 2014, plaintiff filed a motion to reconsider, requesting the trial court hold an evidentiary hearing to determine (1) whether the elements of adverse possession had been established, or (2) alternatively, the exact legal description of the property acquired by defendants. Following a November 2014 hearing, the court denied plaintiff's motion, finding (1) defendants established, based on their affidavit and plaintiff's lack of counteraffidavits, they ac-

quired title to the disputed property by adverse possession; and (2) the description of the disputed property in the order quieting title was appropriate given the facts of record.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, plaintiff asserts the trial court erred in (1) denying her motion for summary judgment, (2) granting defendants' motion for summary judgment, and (3) not clearly defining the disputed property in its order quieting title.

¶ 14 A. Standard of Review

¶ 15 We review a trial court's ruling on a motion for summary judgment *de novo*. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 41, 978 N.E.2d 1132. Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Howle*, 2012 IL App (4th) 120207, ¶ 41, 978 N.E.2d 1132.

¶ 16 B. Defendants' Affidavit

¶ 17 In her initial brief, plaintiff asserts her complaint alleged the fence was in disrepair and had not been maintained, thereby raising a question of fact as to defendants' continuous use of the disputed property. In response, defendants assert (1) the facts set forth in their affidavit stand as admitted because plaintiff failed to file counteraffidavits, and (2) plaintiff cannot rely on her complaint to rebut allegations of fact set forth in a supporting affidavit. In her reply brief, plaintiff asserts the statements contained in defendants' affidavit cannot be relied on as they are not well-pleaded facts but conclusions unsupported by the record.

¶ 18 After a motion for summary judgment has been filed, the "nonmovant cannot rely simply on his or her complaint or answer to raise an issue of fact when the movant has supplied facts that, if not contradicted, would entitle him or her to judgment as a matter of law." *Davidson v. Perry*, 386 Ill. App. 3d 821, 824, 898 N.E.2d 785, 788 (2008). "[W]here a party moving for summary judgment relies on supporting affidavits containing well-pleaded facts, and the party opposing the motion files no counteraffidavits, the material set forth in the movant's affidavits stand as admitted." *Lappin v. Costello*, 232 Ill. App. 3d 1033, 1040, 598 N.E.2d 311, 316 (1992). Affidavits used in connection with motions for summary judgment are governed by Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013). Such affidavits must not consist of mere conclusions but of facts admissible in evidence. Ill. S. Ct. R. 191 (eff. Jan. 4, 2013); *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 22, 10 N.E.3d 339. Rule 191 is satisfied where it appears the affidavit is based upon the personal knowledge of the affiant and a reasonable inference appears the affiant could competently testify to its contents at trial. *US Bank, National Ass'n*, 2014 IL App (1st) 121759, ¶ 22, 10 N.E.3d 339.

¶ 19 After reviewing the contents of defendants' affidavit, we find the following facts sufficiently well pleaded to satisfy the requirements of Rule 191: (1) in 1980, defendants installed the fence complained of in plaintiff's claim; (2) since 1980, the fence has remained in the same location and has been repaired and maintained on several occasions; (3) since 1980, codefendant Wayne Schafer has kept cattle and horses on the property enclosed by the fence; (4) since 1980, plaintiff's predecessors in interest were not permitted to, and did not, use the property enclosed by the fence; (5) in 2007, plaintiff acquired by deed the legal title of the property enclosed by the fence; (6) since 2007, defendants have not permitted plaintiff to use the property enclosed by the fence; and (7) defendants have caused fence posts installed by plaintiff in the

area enclosed by the fence to be removed. As plaintiff filed no counteraffidavits, these well-pleaded facts set forth in defendants' affidavit stand as admitted, and plaintiff cannot rely on the allegations contained in her complaint to rebut these facts or create a material issue of fact.

¶ 20

### C. Adverse Possession

¶ 21 Having found the well-pleaded facts contained in defendants' affidavit stand as admitted, we next determine whether, as a matter of law, those facts are sufficient to establish by clear and unequivocal evidence defendants acquired title to the disputed property by adverse possession, thereby entitling them to summary judgment. See *Komater v. Kenton Court Associates*, 151 Ill. App. 3d 632, 636, 502 N.E.2d 1295, 1298 (1986) ("[E]ven where the party opposing the motion fails to file counteraffidavits, the movant is not entitled to summary judgment unless his motion and supporting affidavits establish his right to judgment as a matter of law.").

¶ 22

To establish title to land by adverse possession, the party asserting adverse possession must establish possession of the property for the entire statutory period (20 years) (735 ILCS 5/13-101 (West 2012)) and such possession was (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. *Davidson*, 386 Ill. App. 3d at 824-25, 898 N.E.2d at 788. "All presumptions are in favor of the title owner, and the party claiming title by adverse possession must prove each element by clear and unequivocal evidence." *Knauf v. Ryan*, 338 Ill. App. 3d 265, 269, 788 N.E.2d 805, 808 (2003). As our supreme court has not explained the meaning of "clear and unequivocal evidence," courts have applied the clear and convincing burden of proof in adverse possession cases. *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 38, 12 N.E.3d 198.

¶ 23

Plaintiff argues defendants failed to establish the "continuous" element of adverse possession. Specifically, plaintiff contends the assertion defendants caused the fence to be re-



paired and maintained on several occasions is insufficient to satisfy this element. Plaintiff argues defendants provided no evidence of repairs made, supplies bought, or use of outside help to improve the property. (We note, on appeal, plaintiff does not address the other elements of adverse possession or assert they were not met.)

¶ 24 In 1980, defendants installed the fence. Since 1980, the fence has remained in the same location and has been repaired and maintained on several occasions. Since its construction, codefendant Wayne Schafer has kept cattle and horses on the property enclosed by the fence. No evidence indicates defendants' use or possession of the disputed property was interrupted during the 20-year adverse possession period (1980-2000). Based on these facts, we find defendants have demonstrated by clear and unequivocal evidence they used the property enclosed by the fence continuously for over 20 years.

¶ 25 Although plaintiff does not address the other elements of adverse possession, we find they were satisfied. Defendants' possession of the disputed land was hostile and adverse. The "hostility" element "does not imply actual ill will, but only the assertion of ownership incompatible with that of the true owner and all others." *Joiner v. Janssen*, 85 Ill. 2d 74, 81, 421 N.E.2d 170, 174 (1981). "Although evidence of the use and control over land is the typical manner by which any claimant establishes title by adverse possession, it must be clearly shown that the use of the land was adverse and not merely permissive, since permissive use of land, no matter how long, can never ripen into an adverse possessory right." *Mann v. La Salle National Bank*, 205 Ill. App. 3d 304, 309-10, 562 N.E.2d 1033, 1037 (1990). By constructing a fence and using the property enclosed by the fence for cattle and horses without the true owners' permission and by using the property to the exclusion of plaintiff and her predecessors, defendants asserted ownership inconsistent with that of the true owner and all others. See, e.g., *Knauf*, 338 Ill.

App. 3d at 269, 788 N.E.2d at 808-09. Defendants' possession of the disputed property was also actual, open, and notorious; the fence was sufficient to place the community on notice of the defendants' possession and exclusive use and enjoyment of the property. See *Beverly Trust Co. v. Dekowski*, 216 Ill. App. 3d 732, 739, 576 N.E.2d 1049, 1054 (1991). Finally, the evidence established a claim of title inconsistent with that of the true owner; defendants erected a fence on plaintiff's and her predecessors in interest's property, prevented plaintiff and her predecessors in interest from using the property enclosed by the fence, and have kept cattle and horses on the property enclosed by the fence. We find these facts sufficient to prove by clear and unequivocal evidence the elements necessary to establish title to land by adverse possession. Summary judgment granted in favor of defendants and against plaintiff was proper.

¶ 26

#### D. Trial Court's Order

¶ 27

Plaintiff asserts, even if the trial court was correct in its grant of summary judgment against her, this court should remand the matter as the description provided in the order quieting title is vague. Specifically, plaintiff asserts the trial court's order insufficiently describes the property she has forfeited because (1) the "fence in the description is the same fence which has been the subject of dispute and which has not been maintained or prevented from falling into disrepair"; and (2) "[w]ith continued neglect by [d]efendants, the boundary provided by the trial court may become more unclear and ambiguous, leaving [her] with an uncertainty to the property that [defendants] hold title to." As previously addressed, the uncontradicted assertions contained in defendants' affidavit stand as admitted—since 1980, the fence has remained in the same location and has been repaired and maintained on several occasions. We agree with the trial court, based on the information presented by the parties, the fence is sufficient to mark the boundary of the disputed property. Plaintiff further asserts it is unclear from court's order who has title to the

95-foot gap of land between the end of the fence and the southernmost border of plaintiff's property. We find the trial court's order is clear; defendants hold title only to the property west of the barbed wire fence located on the westerly side of plaintiff's property.

¶ 28

### III. CONCLUSION

¶ 29

We affirm the trial court's judgment.

¶ 30

Affirmed.