2015 IL App (2d) 140779-U
No. 2-14-0779
Order filed June 25, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LUCILLE CORRELL, Indiv. and as Trustee of the Lucille Y. Correll Revocable Declaration of Trust dated September 1, 2010,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CH-2041
VILMA I. PEREZ,	)	Honorable David R. Akemann,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted plaintiff summary judgment on her claims for adverse possession and a prescriptive easement: in noting that plaintiff had submitted "competent evidence," the court did not apply an improper standard of proof; plaintiff's certified statement of facts sufficiently complied with Rule 191(a); and the pertinent undisputed facts established the necessary elements.

¶ 2 Plaintiff, Lucille Correll, and defendant, Vilma I. Perez, are neighboring landowners. Defendant appeals a judgment awarding plaintiff, individually and as the trustee of a trust in her name, title to property by adverse possession and an easement by prescription. We affirm.

¶ 3 Plaintiff's three-count complaint, filed September 11, 2013, alleged as follows. On November 30, 1962, she and her husband Edgar purchased the property at 418 Weston Avenue (Correll property) in Aurora. Edgar died in 2007; plaintiff is now the sole owner. In 2010, she conveyed the property to a trust in her name. In 1955, Peter and Cynthia Sellen obtained title to the property at 420 Weston, next door. They maintained it as their sole residence until September 20, 2011, when they conveyed it to defendant.

¶ 4 The complaint alleged further as follows. Since November 30, 1962, there had existed a concrete sidewalk that began at the front door of plaintiff's house, curved along the eastern boundary of the Correll property, and extended north through the backyard toward the public alley and alongside the eastern boundary of the detached garage on the property. At all times between November 30, 1962, and approximately June 19, 2012, the portion of the sidewalk running from the front door to the rear of plaintiff's house (Front Sidewalk) was open and unencumbered by any obstruction, and the portion of the sidewalk extending north from the rear of the house (Rear Sidewalk) was similarly open and unencumbered. In 1985, plaintiff installed a picket privacy fence that started at the northeastern corner of her house, ran north along the western boundary of the Rear Sidewalk, and ended at the southeast corner of the detached garage. The fence had a gate, which was kept unlocked at all times, and by which plaintiff and her family accessed the Rear Sidewalk and the side entrance to the detached garage.

¶ 5 The complaint alleged further that, between November 30, 1962, and approximately June 19, 2012, plaintiff exclusively used and maintained the Front Sidewalk, removing snow from it, resurfacing it, and replacing it as needed. During the same period, she used the Front Sidewalk exclusively to access the east side of her house for routine gutter clearing, maintenance, and the like. Between November 30, 1962, and September 21, 2011, plaintiff and the Sellens jointly

used and maintained the Rear Sidewalk; plaintiff used it daily to access the detached garage. Plaintiff and the Sellens believed that the Rear Sidewalk was located on both the Correll property and 420 Weston. Therefore, they agreed that the Sellens would remove snow and perform routine maintenance and that plaintiff would repair or resurface the Rear Sidewalk as needed. Also, between November 30, 1962, and approximately June 12, 2012, plaintiff maintained both the Front and Rear Sidewalks at her expense. From September 21, 2011, through June 12, 2012, she regularly maintained and used the entire sidewalk as she had since 1962.

¶ 6 The complaint alleged further that, between June 7, 2012, and June 19, 2012, defendant installed a fence that ran east-west between plaintiff's house and defendant's house. Plaintiff first noticed the fence when she returned from a two-week vacation in June 2012. The fence traversed the Front Sidewalk and completely blocked her access to the east side of her house. Also, it encroached on her property and lay against her house's siding and foundation, damaging them. Further, defendant erected an extension to the existing privacy fence; the extension continued past plaintiff's detached garage to the boundary line, and it now completely blocked plaintiff from accessing the side door of the detached garage. Defendant also nailed the gate shut, cutting off plaintiff's access to the Rear Sidewalk.

¶ 7 The complaint alleged further that, in August 2012, plaintiff, through counsel, demanded that defendant remove the new fence and advised her that plaintiff had acquired interests in the entire sidewalk by adverse possession. In December 2012, defendant, through counsel, informed plaintiff that she would not remove the fence or allow plaintiff to use either the Front Sidewalk or the Rear Sidewalk. Defendant placed garbage and other matter on the Correll property. In May 2013, a City of Aurora (City) official inspected defendant's fence and determined that it extended onto the Correll property. The City ordered defendant to relocate the fence post to her

side of the property line. In order to comply, defendant removed a portion of the fence. However, she then added slats to the fence, cutting off plaintiff's access to the Front Sidewalk and to her property, and she continued to place garbage and other matter on the Correll property.

¶ 8 Count I of the complaint sought a declaratory judgment (see 735 ILCS 5/2-701 (West 2012)) that plaintiff had acquired title to the Front Sidewalk by adverse possession. In addition to the facts previously pleaded, it alleged as follows. Plaintiff had used and possessed the Front Sidewalk daily, without interruption, for approximately 50 years. Her use and exclusive maintenance of the Front Sidewalk had been inconsistent with any grant of permission. Further, she had maintained, resurfaced, and removed snow from the Front Sidewalk for 50 years. Her use of the Front Sidewalk had been "open, notorious, hostile and exclusive," as the land on which the Front Sidewalk was located had always been visible to neighbors. From November 30, 1962, until defendant installed the new fence, plaintiff had paid all expenses associated with the Front Sidewalk. Thus, she had established adverse possession for approximately 30 years more than the statutory minimum of 20 years (see 735 ILCS 5/13-101 (West 2012)).

¶ 9 Count II of the complaint sought a declaratory judgment that plaintiff had acquired an easement by prescription over the Rear Sidewalk. In addition to the facts pleaded earlier, it alleged as follows. For approximately 50 years, plaintiff had possessed and used the Rear Sidewalk continuously, openly, and exclusively for egress from the rear of her house to the detached garage; had openly and exclusively resurfaced the Rear Sidewalk as needed; and had used the Rear Sidewalk in an "adverse and hostile manner" with the Sellens' knowledge and acquiescence but without their permission, agreement, or consent. Plaintiff had used, maintained, and accessed the Rear Sidewalk as if it had been jointly owned since November 30, 1962, for more than the 20-year statutory minimum (see 735 ILCS 5/13-101 (West 2012)).

¶ 10 Count III of the complaint sought damages for trespass, alleging (in addition to the facts previously pleaded) that defendant's fence unlawfully encroached on her property; that defendant intentionally constructed the fence, and later added the slats, in disregard of plaintiff's property rights; that defendant had unlawfully placed garbage and other matter onto plaintiff's property; and that defendant had defied plaintiff's demands to remove the fence and otherwise cease trespassing. The complaint attached various exhibits, including numerous photographs.

¶ 11 On November 5, 2013, defendant filed a *pro se* answer, responding to most of the complaint's numbered allegations with "N/A" and attaching several photographs.

¶ 12 On February 19, 2014, plaintiff moved for summary judgment (735 ILCS 5/2-1005(c) (West 2012)) on the first two counts only. The motion attached plaintiff's certified statement of facts and defendant's deposition. It asserted generally that defendant's answer had not pleaded facts to contradict the complaint's allegations and that, in her deposition, defendant had admitted that she had never seen either property before 2011 and knew nothing about plaintiff's or the Sellens' use of the two properties before then.

¶ 13 Plaintiff's motion alleged specifically that the undisputed material facts established that she had title to the Front Sidewalk by adverse possession, which required proof that, for at least 20 years, her possession of the land had been (1) continuous; (2) hostile (adverse); (3) actual; (4) open, notorious, and exclusive; and (5) under a claim of title inconsistent with that of the true owner. See 735 ILCS 5/13-101 (West 2012); *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981). Relying primarily on her certified statement of facts, she argued as follows.

¶ 14 First, as plaintiff knew personally, she had used the Front Sidewalk continuously from November 30, 1962, through September 21, 2011, for ingress and egress between the front door of her house and the rear of the house. Defendant knew nothing about how the Front Sidewalk

had been used in this period, and she had admitted as much in her deposition. Second and third, in the 49-year-plus period, plaintiff's use of the Front Sidewalk had been hostile (adverse), *i.e.*, implying ownership incompatible with that of the true owner and all others (see *Joiner*, 85 Ill. 2d at 81-82), and actual. The adverse and actual use included repair, resurfacing, snow removal, and landscaping, at her sole expense, and accessing the Front Sidewalk in order to maintain part of her residence. Again, defendant had admitted knowing no facts that would refute the allegations of adversity and actuality.

¶ 15 Fourth, the motion argued, between November 30, 1962, and September 21, 2011, plaintiff's use of the Front Sidewalk was open, notorious, and exclusive. Relying on the certified statement of facts, the motion noted that, during the long period, nobody other than plaintiff (including the Sellens) had used the Front Sidewalk, and plaintiff had used and maintained the Front Sidewalk as though it were wholly her own. Again, the motion noted that defendant had admitted knowing no facts that would contradict plaintiff's assertions.

¶ 16 Plaintiff's motion next alleged that the undisputed material facts established that she had a prescriptive easement over the Rear Sidewalk, which required proof that, for at least 20 years, her use of the land had been (1) continuous; (2) hostile (adverse); (3) exclusive; and (4) under a claim of right. See 735 ILCS 5/13-101 (West 2012); *Petersen v. Corrubia*, 21 Ill. 2d 525, 530 (1961). Relying again on plaintiff's statement of facts, the motion argued in part that there was no dispute that, every day for 49 years, plaintiff had maintained the Rear Sidewalk and used it to get from the Front Sidewalk to her back yard, the detached garage, and the public alley. Further, she argued that, as a matter of law, her use of the Rear Sidewalk had been hostile (adverse), as for 49 years, she had daily used it, with the Sellens' knowledge and acquiescence (but not their

permission); had installed a privacy fence with a gate that was always left open; and had made visible and obvious improvements.

¶ 17 Next, plaintiff argued that, as a matter of law, her use of the Rear Sidewalk had been open, notorious, and exclusive for 49 years, as for all of that period the Rear Sidewalk had been open and unencumbered; plaintiff had used it daily; and she had made numerous improvements. Plaintiff noted that exclusivity meant not that only she had used the Rear Sidewalk continuously for at least 20 years, but merely that her use did not depend on the existence of a like right in others (see *Petersen*, 21 Ill. 2d at 531). Finally, plaintiff argued that, as a matter of law, her use of the Rear Sidewalk had been under a claim of right inconsistent with that of the true owner, given her conduct and that the Rear Sidewalk straddled the property line. As with her claim to title to the Front Sidewalk, plaintiff noted that defendant had admitted knowing no facts that would contradict the claim to an interest in the Rear Sidewalk.

¶ 18 Plaintiff's certified statement of facts repeated most of the factual allegations of her motion for summary judgment. We note the following particulars. "To the best of [plaintiff's] knowledge," the Sellens "purchased 420 Weston in February 1955" and "continuously owned [it] from 1955 to on or about September 21, 2011." When she and Edgar purchased 418 Weston, the Front Sidewalk was present; it was then and still was "located between [the Correll property] and 420 Weston but the western boundary" was located "directly against [plaintiff's] residence."

¶ 19 Plaintiff stated that, at all times from November 30, 1962, to about June 19, 2012, with one exception, the Front Sidewalk was open and unencumbered. In early 2011, the Sellens caused to be erected a temporary fence that traversed the Front Sidewalk between the two houses. They did so with plaintiff's knowledge and consent after she told them that neighboring children were using the Sellens' newly vacant home as a " 'hang-out.' " The temporary fence

never impeded plaintiff's ability to access the Front Sidewalk, and she continued to use it daily. After a few weeks, the wind blew down the temporary fence. It was never replaced.

¶ 20 Plaintiff also stated that, "sometime between 1985 and 2000 or so," she installed the picket privacy fence, which had a gate that was always unlocked. Plaintiff and her family used the open gate daily for access to the Rear Sidewalk and the side entrance to her garage. Plaintiff discovered the new fence, which defendant had erected, only on June 19, 2012, when she returned from a two-week vacation. She had not known that defendant had intended to build the fence, and she had never consented to it. In all the time that she and Edgar had lived at 418 Weston, the dimensions of the Front and Rear Sidewalks had not changed. As noted, plaintiff also repeated most of the other factual allegations of her complaint and her summary-judgment motion, including those relating to her use and maintenance of the Front and Rear Sidewalks.

¶ 21 In her deposition, as pertinent here, defendant testified as follows. She first inspected 420 Weston in June 2011. The house was vacant at that time. She never spoke to the Sellens. She had no idea when or by whom the Front and Rear Sidewalks had been installed. In June 2012, defendant installed the fence between the two properties, and that summer she nailed shut the gate to the privacy fence. She testified that the new fence replaced an old, worn fence. Defendant admitted that, after the privacy-fence gate was nailed shut, plaintiff could no longer use it to access the sidewalk. Defendant explained that, in her answer to the complaint, she used "N/A" to mean that she had no idea as to the truth of a particular allegation. In those instances, she was unaware of any facts by which to dispute the allegations.

¶ 22 Defendant also filed a *pro se* two-paragraph unsworn response to plaintiff's motion for summary judgment. In the response, defendant stated that she had purchased 420 Weston in a

short sale after the Sellens had abandoned it and their mortgage obligation. Defendant raised no objection to plaintiff's certified statement of facts.

¶ 23 On May 29, 2014, after hearing arguments, the trial court issued a written order granting plaintiff's motion for partial summary judgment. The order stated in part, "With respect to Count I, Plaintiff *** has proved by competent evidence" that she was entitled to ownership of the Front Sidewalk, as she had proved all the elements of adverse possession. Next, "[w]ith respect to Count II, Plaintiff ha[d] proved by competent evidence" that she was entitled to an easement by prescription as to the Rear Sidewalk. Finally, per Illinois Supreme Court Rule 192 (eff. Jan. 1, 1967), the order postponed the entry of judgment until "the remainder of the issues" were resolved. The order continued the cause to June 25, 2014. On that date, the court continued the cause again, to July 31, 2014, for a hearing or trial on count III.

¶ 24 Plaintiff moved to amend the order by adding that she was entitled to ownership of the Front Sidewalk "in fee simple" and to "an easement by prescription, which shall run with the land, over and across" the Rear Sidewalk. She explained that her title insurer had requested the changes. On July 28, 2014, the trial court amended the order as requested, purportedly "*nunc pro tunc*."[1] Also that day, the court granted plaintiff's motion to dismiss count III voluntarily.

[1] The trial court's use of the term "*nunc pro tunc*" was incorrect. " 'A *nunc pro tunc* order is an entry now for something previously done, made to make the record speak now for *what was actually done then*.' " (Emphasis in original.) *Harreld v. Butler*, 2014 IL App (2d) 130165, ¶ 13 (quoting *Kooyenga v. Hertz Equipment Rentals, Inc.*, 79 Ill. App. 3d 1051, 1055 (1979)). A *nunc pro tunc* order may reflect only what the court actually did on the prior date but was omitted by clerical error. *Harreld*, 2014 IL App (2d) 130165, ¶ 13. Here, the trial court's order did not supply anything inadvertently omitted in the earlier order, but rather added

¶ 25 On appeal, defendant contends that (1) the trial court applied an improper standard of proof to plaintiff's claim of adverse possession; (2) plaintiff's certified statement of facts did not satisfy Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013); (3) plaintiff did not prove adverse possession; and (4) plaintiff did not prove an easement by prescription.[2] We disagree in all respects.

¶ 26 In contending that the trial court applied the wrong standard of proof to plaintiff's claim of adverse possession, defendant notes that the court's order stated that plaintiff had proved her claim "by competent evidence." Defendant asserts that this was error, because a claim of adverse possession requires "clear and convincing" evidence (*Dotson v. Former Shareholders of Abraham Lincoln Land & Cattle Co.*, 332 Ill. App. 3d 846, 855 (2002)).

¶ 27 As plaintiff points out, defendant's contention confuses apples and oranges. "Competent evidence" does not refer to a standard of proof; it means only "admissible evidence." Black's Law Dictionary 595 (8th ed. 2004). Thus, the order simply noted that plaintiff proved that she was entitled to summary judgment by evidence that would have been admissible at trial. Defendant has failed entirely to overcome the strong presumption that the trial court applied the correct law. See *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 30.

¶ 28 We turn next to defendant's contention that plaintiff's certified statement of facts did not conform to Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), which requires that affidavits

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something new. Unlike in *Harreld*, the omission was not crucial, as the trial court's earlier order did not become appealable until plaintiff voluntarily dismissed count III and, by operation of the earlier order, judgment was entered on counts I and II.

[2] For ease of discussion, we have deviated from the order in which defendant presented the arguments in her brief.

in support of (or in opposition to) a motion for summary judgment "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; *** shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Defendant contends that plaintiff's statement did not meet these standards, because it was based not on admissible evidence or specific facts but on plaintiff's conclusions as to her use and maintenance of both the Front and Rear Sidewalks.

¶ 29 Plaintiff responds in part that defendant has forfeited this challenge to the statement, as she failed to raise it in the trial court. See *Soderlund Brothers, Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 623 (1995). We agree, and we further conclude that, regardless, defendant has forfeited the challenge by failing to support her claim of error with meaningful argument based on citations to the pertinent pages of the record (see Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)). See *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 19. Mentioning only a few paragraphs of plaintiff's certified statement, and citing the text of none, defendant argues that, because the only independent documentation that plaintiff provided was a handful of invoices from contractors for July 2011, her statement was "conclusory as to her claims that she exclusively maintained the property ***." In contending that the certified statement was insufficient to support the claim of an easement by prescription, defendant's brief does even less: it rests on its own conclusion with no discussion of the certified statement. This court is not a depository into which an appellant may dump the burden of argument and research. *Gakuba*, 2015 IL App (2d) 140252, ¶ 19.

¶ 30 Even were we to disregard the forfeiture, we would agree with plaintiff that her certified statement was sufficient. Although the 65-paragraph document does include some conclusions of law, it also contains factual allegations to support plaintiff's claims. We look at the (only)

four paragraphs that defendant references at all. Paragraph 17 states, "At all times from November 30, 1962, through September 21, 2011, I exclusively used and maintained the Front Sidewalk. No one else, aside from my family, my guests and me, used or maintained the Front Sidewalk as it abuts my home." Paragraph 19 states, "At all times from November 30, 1962, through September 21, 2011, the Front Sidewalk was used exclusively by me and others acting on my behalf to access the east side of my residence to perform routine maintenance, gutter cleaning, removal of storm windows in the house, and the like." Paragraph 22 states, "At all times from November 30, 1962, through September 21, 2011, I acted and believed, and the Sellens acted and, to the best of my knowledge, believed, that a majority of the Rear Sidewalk was on the Property. I never asked permission to use the Rear Sidewalk nor did the Sellens ever give me permission." Paragraph 23 states, "At all times from November 30, 1962, through September 21, 2011, based on that belief, I used the Rear Sidewalk."

¶ 31 Of these four paragraphs, the only one that is even arguably conclusional is paragraph 22, which theorizes about the character of plaintiff's and the Sellens' beliefs as to the status of the Rear Sidewalk. The other three paragraphs contain categorical statements, but not bare conclusions. Also, the remainder of plaintiff's certified statement supplies much of the detail about the matters mentioned in the four paragraphs that defendant actually cites, and a great deal of specific factual matter that supported plaintiff's partial-summary-judgment motion in numerous other respects. Thus, even were we to disregard defendant's forfeiture of the issue, we would conclude that her challenge to plaintiff's certified statement has no merit.

¶ 32 We turn to defendant's remaining arguments, which address whether the trial court erred in granting summary judgment on counts I and II of the complaint. We note generally that summary judgment is proper when the pleadings, depositions, affidavits, and other matters on

file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). Our review is *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102.

¶ 33 Defendant argues that the trial court erred in granting plaintiff summary judgment on her claim to title to the Front Sidewalk by adverse possession, because plaintiff failed to establish the element of adversity. Defendant relies on plaintiff's statement that, in 2011, with her permission and consent, the Sellens erected a temporary fence traversing the Front Sidewalk. Defendant asserts that plaintiff's use of the Front Sidewalk "might have been merely permissive because of her admission that she not only allowed but encouraged her neighbor to erect a fence over this same sidewalk."

¶ 34 Defendant's argument does not persuade us. At the most, the statement on which she relies suggests that *the Sellens'* use of the Front Sidewalk was "permissive" rather than hostile, as they received plaintiff's permission to put up the temporary fence. This case, however, is not about whether the Sellens had a claim of adverse possession against plaintiff, but whether plaintiff has such a claim against the Sellens' successor, defendant. We see no error in the trial court's holding that, under the undisputed facts, she does.[3]

¶ 35 Finally, defendant argues that plaintiff failed to establish that she had obtained an easement by prescription to the Rear Sidewalk. Defendant notes plaintiff's statement that, between 1985 and 2000, she installed the privacy fence, which contained a gate that she and her family used daily to access the Rear Sidewalk. Defendant then contends, without elaboration, that this does not prove all the elements of a prescriptive easement. This bare (and obscure)

[3] Also, the temporary fence was erected more than 48 years after November 30, 1962. At that time, plaintiff had long since satisfied the 20-year requirement for adverse possession.

conclusion does not require our consideration; the issue is forfeited. See *Gakuba*, 2015 IL App (2d) 140252, ¶ 19. In any event, having reviewed the record, we agree with the trial court that the pertinent uncontradicted facts established a prescriptive easement.

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 37 Affirmed.