2012 IL App (4th) 110918-U

Filed 6/5/12

NO. 4-11-0918

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

NONA HARRISON LONG, Plaintiff-Appellee, v. THE DELMAR E. LADAGE AND BETTY J. LADAGE REVOCABLE LIVING TRUST, Dated May 8, 2009; and DELMAR E. LADAGE and BETTY J. LADAGE, Trustees, Defendants-Appellants.	))))))))	Appeal from Circuit Court of Sangamon County No. 11CH23 Honorable John Schmidt, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting plaintiff's motion for summary judgment where, in the absence of adequate evidence to the contrary, the public land survey system descriptions in the parties' deeds controlled the boundaries of the parties' land.

¶ 2 Defendants, Delmar E. Ladage and Betty J. Ladage, appeal the trial court's grant of plaintiff, Nona Harrison Long's, motion for summary judgment, arguing the trial court erred in finding the public land survey system descriptions controlled the parties' boundaries. Defendant contends the court should have instead determined the parties' boundaries by (1) parol agreement and possession, (2) an agreement implied from unequivocal acts and declarations of the parties and acquiescence for a considerable period of time, or (3) in the absence of any agreement, by undisturbed possession for more than 20 years. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 28, 2009, defendants funded the defendant trust, the Delmar E. Ladage and Betty J. Ladage revocable living trust, by filing a warranty deed in trust conveying three parcels of land. Two of those parcels are relevant for purposes of the instant appeal. Defendants' deed describes the land by the public land survey system as follows:

> "The Southeast Quarter of the Northeast Quarter of Section 31 Township 14 North Range 6 West of the Third Principal Meridian.
>
> ***
>
> AND
>
> The Southwest Quarter of the Northeast Quarter of Section 32 in Township 14 North Range 6 West of the Third Principal Meridian."

¶ 5 On September 23, 2009, plaintiff purchased 80 acres of farmland from United Community Bank as well as John S. Narmont, Robert A. Narmont, and Barbara Anne Narmont Cassidy, the coexecutors of the estate of Luriel L. Narmont. Like defendants' deed, plaintiff's deed also describes her land using the public land survey system. Plaintiff's deed describes her land as follows:

> "The South Half of the Northwest Quarter of Section 32, Township 14 North, Range 6 West of the Third Principal Meridian."

Plaintiff's land is located between defendants' two parcels of land, *i.e.*, defendants' land borders plaintiff's land along the east and west sides. (We note the complete descriptions for all of the lands at issue include "Township 14 North Range 6 West of the Third Principal Meridian." However, for simplicity's sake, we will hereinafter only reference the quarter and section

coordinates of the public land survey system.)

¶ 6 On January 7, 2011, plaintiff filed a complaint against defendants to quiet title to the land she purchased in September 2009, alleging defendants' tenants had trespassed on plaintiff's land. According to plaintiff's pleadings, plaintiff rented the land to a farmer who planted crops to the border of her property. Thereafter, defendants' agent entered the land, destroyed the crops, and made claim to portions of plaintiff's land along both the east and west boundaries of her property. According to defendants' pleadings, ownership of approximately one-quarter of one acre of land is in dispute. Plaintiff's complaint alleged the boundaries of her land were established by a survey prepared by registered land surveyors, Greene and Bradford, Inc., based on the actual section lines. Plaintiff attached a copy of that survey, dated July 27, 2009, to her complaint (plaintiff's exhibit A). Plaintiff alleged defendant had no lawful claim to the land in dispute and asked the court to declare she had title to that land.

¶ 7 On February 18, 2011, defendants filed their answer to plaintiff's complaint denying plaintiff's allegations. We note at no point did defendants file any affirmative defenses or counterclaims.

¶ 8 On March 1, 2011, plaintiff filed a motion for summary judgment, requesting the trial court take judicial notice of defendants' deed, which was recorded on May 28, 2009. Plaintiff attached an affidavit from Richard Tonellato, the surveyor from Greene and Bradford who prepared plaintiff's survey. Like the parties' deeds, Tonellato's survey described the boundaries of plaintiff's land using the public land survey system. According to Tonellato's affidavit, his survey described plaintiff's land to the east of defendants' land as "the Southwest Quarter of the Northwest Quarter of Section 32." Tonellato's survey also described plaintiff's

land to the west of defendants' land as "the Southeast quarter of the Northwest Quarter of Section 32." The two parcels together collectively comprise "the South Half of the Northwest Quarter of Section 32." Further, according to Tonellato's affidavit, a pipe located at the northwest corner of plaintiff's land "describes, and is co-terminus with" the northeast corner of defendants' land to the west of plaintiff's land. According to plaintiff's brief, the term "co-terminus" means "having the same or co-incident boundaries." Similarly, Tonellato's affidavit states a pipe located at the northeast corner of plaintiff's land "describes, and is co-terminus with" the northwest corner of defendants' land to the east of plaintiff's land.

¶ 9 On April 11, 2011, plaintiff filed an amended complaint against defendants to quiet title, again alleging defendants' tenants had trespassed on plaintiff's land. Where plaintiff's original complaint described her land as two adjoining quarter section parcels, plaintiff's amended complaint reiterated the same description but added a description of the land as also being "The South Half of the Northwest Quarter of Section 32."

¶ 10 On April 29, 2011, defendants filed their amended answer to plaintiff's amended complaint, admitting the public land survey system described the location of their property to the east and west of plaintiff's property.

¶ 11 Also on April 29, 2011, defendants filed their "superceding response" to plaintiff's motion for summary judgment. Defendants cited *Kandlik v. Hudek*, 365 Ill. 292, 6 N.E.2d 196 (1936) for the proposition parol evidence or evidence of acquiescence may be used to locate boundary lines. Defendants also cited *McLeod v. Lambodin*, 22 Ill. 2d 232, 174 N.E.2d 869 (1961) for the proposition the public land survey system is only a means of describing the location of a party's tract of land and the system does not preclude a party from proving the

recognized boundary line was other than the one described by the system. Defendant then cited *McLeod* again for the proposition where a boundary line is in dispute the true 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, or third, in the absence of any agreement, by undisturbed possession for more than 20 years.

¶ 12 Defendants attached to their response an affidavit from defendant, Delmar E. Ladage, which defendants argued "establishes, at a minimum, a factual dispute as to the location of the boundary lines between Plaintiff and Defendants' properties, [which] if not controverted by credible evidence from Plaintiff, would warrant entry of summary judgment in Defendants' favor." We note, however, defendant never filed a cross-motion for summary judgment. According to Ladage's affidavit, he was "familiar" with plaintiff's property because his family "has either owned or been the tenant farmer on this ground from 1937 until the property was purchased by [plaintiff] in 2009" and also because Ladage has "lived in the proximity of [plaintiff's property] since his birth in 1932." Ladage's affidavit went on to state the following:

> "4. That [Ladage's] father purchased the property adjoining the west division line of [plaintiff's property] in approximately 1937 and the property adjoining the east division line of [plaintiff's property] in approximately 1944. The adjoining properties have been farmed and owned by [Ladage's] family, including [Ladage,] continuously since the original purchases.
>
> 5. That the west division line of [plaintiff's property] when [Ladage's] father purchased the adjoining land was based on an

existing fence line and the location of such fence line and the location of such fence line has been the recognized, accepted[,] and utilized division line for over 50 years, the end points of this fence line being the two posts identified and referenced on [Tonellato's] survey.

6. Prior to Plaintiff's purchase in 2009, all owners abutting the northwest corner of [plaintiff's property,] including their tenants, have for more than 20 years, recognized the post identified on [Tonellato's] survey as the property corner.

7. That the eastern division line of [plaintiff's property] when [Ladage's] father purchased the adjoining land was the line coincident with a line connecting the two pipes referenced on [Tonellato's] survey and such line has been the recognized, accepted[,] and utilized division line for over fifty (50) years. The pipe placed in the ditch in the northeast corner of [plaintiff's property] had been previously marked by a wooden post.

8. The post located 9.5 feet east of the northeast [corner] of [plaintiff's property,] as noted on the [Tonellato's] survey, was an offset marker for the actual northeast corner of [plaintiff's property] since this corner is located in a ditch."

¶ 13 On May 11, 2011, plaintiff filed a motion to strike the Ladage affidavit and defendants' "superceding response" to plaintiff's motion for summary judgment. Plaintiff argued the Ladage affidavit was irrelevant.

¶ 14 On July 1, 2011, defendants filed a revised Ladage affidavit as well as an affidavit from Donald Dufour. Ladage's revised affidavit corrected Ladage's original statement that his "family has either owned or been the tenant farmer on this ground from 1937 until the property was purchased by [plaintiff] in 2009" to clarify there was a period of time "in the late 1980's and/or early 1990's when [Ladage's] family neither owned or was the tenant farmer."

¶ 15 Dufour's affidavit stated for the past 22 years he farmed land owned by a Dufour family trust. According to the public land survey description used by Dufour in his affidavit, the Dufour land consists of 40 acres and appears to border plaintiff's property to the north and Ladage's property to the east. According to Dufour's affidavit, he has always "recognized an old, solitary fence post as the southwest corner of the Dufour Land."

¶ 16 On July 16, 2011, plaintiff filed a motion to strike Dufour's affidavit as well as portions of Ladage's revised affidavit, arguing Dufour's affidavit was "irrelevant in its entirety" because "it refers only to other lands and a supposed corner to other lands and is devoid of any reference to the lands in question here." Plaintiff also argued defendants were collaterally estopped from asserting a boundary different from that established by their own deed where (1) defendants' deed used the public land survey system to describe their land and (2) defendants' deed makes no reference to any fence, post, or any other point used to describe defendants' boundary lines. While plaintiff filed various motions to strike, we note it does not appear from the record any of those motions were ruled on by the trial court.

¶ 17 The August 9, 2011, docket entry indicates the trial court called the cause and both plaintiff and defendants were present at that time. Later that same day the trial court made another docket entry granting plaintiff's motion for summary judgment. Specifically, the court's

docket entry reflects the following:

> "Court has considered the pleadings and arguments of counsel. Court holds that the Government Public Land Survey controls the boundaries for the land in dispute. Therefore there is no issue of fact in dispute and the Plaintiff is entitled to Summary Judgment as a matter of law. Plaintiff's motion for summary judgment is GRANTED."

¶ 18 On August 12, 2011, defendants filed a motion to reconsider. The record indicates a hearing on that motion was held and arguments were heard. However, no report of the proceedings for this hearing is included in the record on appeal. Following that hearing, the trial court denied defendants' motion.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendants argue the trial court erred in granting summary judgment for plaintiff. Specifically, defendants contend the trial court erred in basing its decision on the public land survey system descriptions. Defendants maintain the court should have instead determined the parties' boundaries by (1) parol agreement and possession, (2) an agreement implied from unequivocal acts and declarations of the parties and acquiescence for a considerable period of time or (3) in the absence of any agreement, by undisturbed possession for more than 20 years. We disagree.

¶ 22 A. Standard of Review

¶ 23 "Summary judgment is appropriate where the pleadings, depositions, admissions[,]

and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106, 879 N.E.2d 305, 308 (2007); see 735 ILCS 5/2-1005(c) (West 2008). Thus, we will affirm a summary judgment where the record reveals no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). An issue is "genuine" if the record contains evidence to support the position of the nonmoving party. *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 670, 601 N.E.2d 1347, 1354 (1992). "We review *de novo* the trial court's grant of summary judgment." *Reppert v. Southern Illinois University*, 375 Ill. App. 3d 502, 504, 874 N.E.2d 905, 907 (2007).

¶ 24 B. Sufficiency of the Record

¶ 25 It is the burden of the defendants, as the appellants, to supply this court with an adequate record on appeal. *Corral v. Mervis Industries*, Inc., 217 Ill. 2d 144, 156, 839 N.E.2d 524, 531 (2005). Illinois Supreme Court Rule 323(a) (eff. Dec. 13, 2005) provides the appellant has the responsibility to ensure the record on appeal contains a report of proceedings, a bystander's report, or an agreed statement of facts including all the evidence pertinent to the issues on appeal (see Ill. S. Ct. Rs. 323(c), (d) (eff. Dec. 13, 2005)). In this case, no report of the proceedings for either the summary judgment hearing nor the hearing on defendants' motion to reconsider is included in the record on appeal. Defendants have also failed to include a bystander's report or an agreed set of facts. "Without an adequate record preserving the claimed error, the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law." *Corral*, 217 Ill. 2d at 157, 839 N.E.2d at 532

(court should resolve doubts arising from the incompleteness of the record against the appellant). On the record before us, we have no way of knowing what took place during the summary judgment hearing nor the arguments made during the hearing on defendants' motion to reconsider. As a result, we must assume, absent evidence to the contrary, the trial court's ruling was in conformity with the law.

¶ 26 D. Merits of the Appeal

¶ 27 Defendants argue the trial court erred in basing its decision to grant plaintiff's motion for summary judgment on the public land survey where the court instead should have determined the boundaries by (1) parol agreement and possession, (2) an agreement implied from unequivocal acts and declarations of the parties and acquiescence for a considerable period of time, or (3) in the absence of any agreement, by undisturbed possession for more than 20 years. Specifically, defendants appear to contend the trial court should have determined the boundary by unequivocal acts and declarations of the parties and acquiescence for a considerable period of time.

¶ 28 In support of their argument, defendants cite our supreme court's decisions in *McLeod* and *Kandlik.* In *Kandlik*, the supreme court found "[t]he adoption of a division line between the owners of adjoining lands may be implied from their acts and declarations and by acquiescence in respect thereto" and "[a]fter the recognition of such division line as the true boundary for the statutory period of limitation, the parties and their privies are estopped from asserting that it is not the true line." *Kandlik*, 365 Ill. at 299, 6 N.E.2d at 199. The *McLeod* court, following *Kandlik,* set forth three ways a boundary line *may* be established when the line is unascertained or in dispute: (1) by parol agreement and possession; (2) by an agreement implied

from the parties' unequivocal acts, declarations, and acquiescence for a considerable period of time; and (3) in the absence of any agreement, by undisturbed possession for more than 20 years, *i.e.*, adverse possession. *McLeod*, 22 Ill. 2d at 235, 174 N.E.2d at 871. In both *McLeod* and *Kandlik*, the court concluded a fence line had been established as the boundary line under the second method, which is known as the doctrine of boundary by acquiescence. *McLeod*, 22 Ill. 2d at 235-36, 174 N.E.2d at 871-72; *Kandlik*, 365 Ill. at 299, 6 N.E.2d at 199.

¶ 29 Plaintiff argues defendants have forfeited any boundary-by-acquiescence argument because they did not raise it in the trial court. See *In re Marriage of Minear*, 181 Ill. 2d 552, 564, 693 N.E.2d 379, 384 (1998). While we agree defendants' never raised an affirmative defense or filed a counter-claim in this case, defendants did cite both *McLeod* and *Kandlik* regarding the location of an alternative boundary. Similarly, in defendants' motion to reconsider, defendants argue the trial court should have determined an alternative boundary by acquiescence. However, while it appears defendants raised the boundary-by-acquiescence issue in the trial court, defendants failed to provide sufficient evidence from which the trial court, or this court, could apply the doctrine.

¶ 30 "To prevail in a quiet title action, plaintiffs must establish title superior to that of defendants." *Marlow v. Malone*, 315 Ill. App. 3d 807, 812, 734 N.E.2d 195, 200 (2000). Here, plaintiff's evidence showed the public land survey system descriptions contained in plaintiff's and defendants' respective deeds demonstrated plaintiff's land shared common borders with defendants' land. In fact, defendants never disputed the description of the land contained in their deed and even admitted the description in their answer to plaintiff's amended complaint. Tonellato's affidavit further strengthened this evidence by showing the parties' land shared

common "co-terminus" boundary points.

¶ 31 Defendants, on the other hand, neither filed a counter-claim to quiet title in their favor nor any affirmative defense. Defendants also never pleaded an alternative boundary and instead relied on their affidavits in an attempt to establish the location of the parties' boundaries. However, a defense or claim not properly pleaded is deemed waived even where support for that defense or claim may appear in the evidence. See *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 984 684 N.E.2d 816, 823 (1997). Moreover, both of defendants' affidavits are largely irrelevant for purposes of an alternative-boundary argument. In addition to Ladage's affidavit being undeniably self-serving, neither affidavit states with any specificity how the prior owners, *i.e.*, the ones who sold the land to plaintiff, treated the boundaries between the adjoining properties or for how long they had done so. For example, while Dufour's affidavit states he has always "recognized an old, solitary fence post as the southwest corner of the Dufour Land," the affidavit does not reference plaintiff's land.

¶ 32 In addition, Ladage's affidavit attempts to create the impression his family owned plaintiff's property since 1937 by stating his familiarity with the property was because his family "has either owned or been the tenant farmer on this ground from 1937 until the property was purchased by [plaintiff] in 2009." However, it is not clear from the affidavit what "this ground" refers to, *i.e.*, to plaintiff's property, the property bordering plaintiff's property on the east and west, or both. Further, at no point do defendants, either in their pleadings before the trial court or in their briefs on appeal, ever affirmatively state the time period or duration of their ownership of plaintiff's land. In fact, Ladage's amended affidavit admitted there was a general period of time "in the late 1980's and/or early 1990's when [Ladage's] family neither owned or was the tenant

farmer." Defendants' pleading stated the error in Ladage's affidavit would be addressed during Ladage's "live testimony at the scheduled July 6, 2011[,] hearing." As best as we can tell from the common law record, it appears this hearing was continued to August 9, 2011. In either case, we are without the benefit of a transcript of what, if any, testimony was presented at this or any other hearing.

¶ 33 Further, defendants' argument depends almost entirely on the location of a corner post, as depicted on plaintiff's exhibit A, as the accepted corner of plaintiff's property. However, a largely illegible copy of exhibit A is included in the record, rather than the original survey itself. Thus, we cannot be certain as to what that survey depicts. As stated, the appellant has the burden of showing error and any doubt arising from incompleteness of the record will be resolved against the appellant. *People v. Kirkpatrick*, 240 Ill. App. 3d 401, 406, 608 N.E.2d 256, 259 (1992); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459 N.E.2d 958, 959 (1984) (we must resolve any doubts arising from incompleteness of the record against the appellant and presume the trial court's order was in conformance with the law and supported by the evidence).

¶ 34 In the absence of any relevant evidence to the contrary, we cannot say the trial court erred in granting summary judgment to plaintiff. Accordingly, the trial court did not err in denying defendants' motion to reconsider.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's decision to grant plaintiff's motion for summary judgment.

¶ 37 Affirmed.