2013 IL App (5th) 110573-U

NO. 5-11-0573

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SALLY SANDERS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Williamson County.
	)	
v.	)	No. 09-CH-119
	)	
FRED WILLIAMS,	)	Honorable
	)	James R. Moore,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Wexstten and Cates concurred in the judgment.[1]

ORDER

¶ 1 *Held*: The record supports the finding that defendant had adversely possessed the property for over 20 years (735 ILCS 5/13-101 (West 2010)) and had paid the taxes on the property under color of title for at least 7 consecutive years (735 ILCS 5/13-109 (West 2010)).

¶ 2 Plaintiff, Sally Sanders, filed a complaint in the circuit court of Williamson County against defendant, Fred Williams, for injunction and trespass regarding a strip of land where their properties bordered. Defendant counterclaimed asserting adverse possession. After a bench trial, the court entered judgment in favor of defendant. On appeal, plaintiff raises issues as to whether the trial court erred in (1) finding that defendant and his predecessors had adversely possessed the property for over 20 years in a manner pursuant to section

[1]Originally, Justice Donovan was assigned to this case. Justice Cates was later substituted on the panel and has read the briefs and listened to the audiotape of oral argument.

13-101 of the Code of Civil Procedure (Code) (735 ILCS 5/13-101 (West 2010)) and (2) finding that defendant had paid the taxes on the property under color of title for at least 7 consecutive years pursuant to section 13-109 of the Code (735 ILCS 5/13-109 (West 2010)).

¶ 3 We affirm.

¶ 4 FACTS

¶ 5 Plaintiff and defendant live next to each other in Williamson County, Illinois–plaintiff to the south, defendant to the north. The boundary line is the matter of dispute.

¶ 6 In 1922, the area was surveyed by G.I. Evans. The survey identified the southernmost boundary of an "Outlot 1." Outlot 1 and other adjacent property were eventually purchased by defendant's parents and then became the property of defendant.

¶ 7 In 1962, Sedfred and Reba Williams, defendant's parents, purchased real estate with the street address of 16552 Duncan Road, Johnston City, Illinois. Defendant testified that when his family moved in, there was a fence line running east to west that defined the southern boundary of their property and the northern boundary of their neighbors, the Wall family. Defendant admitted that the fence has since reached a state of disrepair, with trees growing through the line, but that the fence line was always respected as the boundary between defendant and the Wall families. In 1980, defendant's family built a red shed on their property several feet away from the southern boundary. In 1998, defendant became the owner of his parents' property.

¶ 8 Defendant described his family's use of the disputed area:

> "Q. [Attorney for defendant:] Okay. All right. In regards to the use of the property though the years, had your family maintained and/or controlled the property that is directly north of the fence?
>
> A. Yeah.
>
> Q. Okay. It's correct that you mowed it in the front; is that right?

A. Mowed it in the front, and it was cropped at certain times and also used as pasture, you know, back when I was a kid, you know.

Q. There were some mules that were placed back there I guess?

A. That was later on.

Q. Uh-huh.

A. First, we had milk cow and calf or two. That was for that part, and they crop Outlot 2 basically."

On cross-examination, defendant testified that he has mowed the front part of the disputed area for years, but that he basically just let trees grow in the back part after planting a few hazelnut and pecan trees. Photographs taken in 1972, 1986, and 2010 were described by defendant to the trial court.

¶ 9 On July 31, 2006, plaintiff purchased, by warranty deed, real estate bordering defendant's property on the south. Plaintiff testified that the previous owner, Marvin Wall, walked part of the land with her and told her that defendant's red shed defined the northern boundary line. Upon purchasing the property, plaintiff and her family began to clear the land, including what later became the disputed strip. Plaintiff testified that they removed brush and large debris, such as tires and TV sets, from the strip. She testified that neither defendant nor anyone else on his behalf approached her during this clean-up. Plaintiff believed the debris was from the Wall family, as some of it matched the yellow siding of the Wall house. Plaintiff stated that there was some rolled-up barbed wire in the area, but no remnants of a fence. After clearing the land, plaintiff installed a barbed wire fence running approximately 20 feet south of the red shed. She installed this fence to retain cows and left room to the north for a truck path.

¶ 10 In January 2008, plaintiff retained Jerry Trover Surveying Company, Inc. Trover found that the 1922 survey was approximately 15 feet off, with Outlot 1 in the 1922 survey

inaccurately measured as overlapping into the property described in the deed owned by plaintiff. Trover described the land along the survey line as wooded with no farming done in recent times. On cross-examination, Trover testified that he saw an old fence running east to west which corresponded to the inaccurate description of Outlot 1, with a front part being around a decade old, and the back part in disrepair and at least 20 years old.

¶ 11 Eventually, the neighbors litigated the dispute. Plaintiff's complaint was for injunction and trespass. Defendant asserted adverse possession. After a bench trial, the circuit court entered judgment in favor of defendant.

¶ 12 Plaintiff appeals.

¶ 13 ANALYSIS

¶ 14 The trial court found defendant and his family had adversely possessed the disputed strip for an excess of 20 years. 735 ILCS 5/13-101 (West 2010). The trial court also found that defendant had paid the taxes on property for at least seven years under color of title. 735 ILCS 5/13-109 (West 2010). The trial court's rulings were supported by the record.

¶ 15 As the doctrine of adverse possession can divest a previous titleholder of ownership, the standard for application is rigorous. In order to rebut the presumption in favor of the titleholder, the claimant must prove each element of adverse possession by clear and unequivocal evidence. *Knauf v. Ryan*, 338 Ill. App. 3d 265, 269, 788 N.E.2d 805, 808 (2003). Nonetheless, the trial court must still determine the value and weight of the evidence presented. *Dwyer v. Love*, 346 Ill. App. 3d 734, 740, 805 N.E.2d 719, 724 (2004). On review, the determination of the trial court will not be disturbed unless it is against the manifest weight of the evidence. *Knauf*, 338 Ill. App. 3d at 269, 788 N.E.2d at 808.

¶ 16 The trial court first ruled in defendant's favor under the statutory definition of adverse possession based on occupancy for over 20 continuous years. 735 ILCS 5/13-101 (West 2010). The party asserting the doctrine must prove that the possession was: (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. *Joiner v. Janssen*, 85 Ill. 2d 74, 81, 421 N.E.2d 170, 174 (1981). The elements must be concurrent during the 20-year period. *Joiner*, 85 Ill. 2d at 81, 421 N.E.2d at 174.

¶ 17 On appeal, plaintiff essentially contests each of these elements. Plaintiff asserts that any possession by defendant was not hostile or adverse. Plaintiff questions the existence of the old fence and tree line asserting that, at best, there are remnants of an old fence for part of the line. Nonetheless, plaintiff asserts that, even if defendant's description of the old fence as a respected boundary is accurate, the actions were not hostile.

¶ 18 Hostile possession does not rest on ill will between persons, but conflict between the claim and the title. *Peters v. Greenmount Cemetery Ass'n*, 259 Ill. App. 3d 566, 569, 632 N.E.2d 187, 190 (1994). Hostility requires the claimant's assertion of ownership to be incompatible with that of the titleholder. *Tapley v. Peterson*, 141 Ill. App. 3d 401, 404, 489 N.E.2d 1170, 1172 (1986). Defendant's description of the respect between the Williams and Walls families fits this description. Mistaken belief is sufficient for adverse possession. *Joiner*, 85 Ill. 2d at 81, 421 N.E.2d at 174.

¶ 19 Plaintiff contends that neither defendant nor his predecessors asserted actual possession over the disputed area. At trial, plaintiff testified that she and her family cleaned debris from the strip and saw no old fence. Other evidence counters plaintiff's account. For instance, plaintiff's surveyor, Trover, testified to the old fence and tree line. On appeal, plaintiff argues that, at best, there is a remnant of a fence. Defendant admitted that the old fence was in disrepair, but also documented its existence and the formation of a tree line.

¶ 20 Plaintiff incorrectly asserts that defendant's own testimony indicates that defendant did not actually possess the area between the red shed and the old fence line. This misinterpretation becomes clearer if the disputed strip is seen as having both a front part near

the house and a back part behind the house, as discussed by several witnesses and illustrated in the photos presented to the trial court. Defendant testified that he personally "mowed it in the front." In the back, and in Outlot 2, defendant's family had a milk cow, and some mules, when he was a kid, but he admitted he had not mowed the back part for 20-plus years. Instead, defendant testified he had planted some pecan and hazelnut trees.

¶ 21 The trial court's finding of actual possession of the back part of the strip by defendant, and his family before him, is supported by the record. The record indicates that the old fence and tree line had guided the division of fields back to at least when the Williams and the Walls first became neighbors in 1952, if not to the survey of 1922. See *Bugner v. Chicago Title & Trust Co.*, 280 Ill. 620, 631, 117 N.E. 711, 716 (1917). Defendant testified that his family had farmed the area, having a milk cow and mules. This supports the finding that defendant's family made improvements and exercised exclusive management over the area to let those of the immediate neighborhood know the boundary of the old fence and tree line. Furthermore, defendant testified that the old fence had been respected as the boundary for decades. The testimony of other longtime area residents, Chuck Bowman and Don Eberhardt, supports this assertion. Even in a dilapidated state, the old fence and tree line were notice of actual possession by defendant. *Hauer v. Van Straaten Chemical Co.*, 415 Ill. 268, 272, 112 N.E.2d 623, 625 (1953).

¶ 22 Moreover, defendant testified that after personally taking ownership, he planted nut trees in this back area. Plaintiff's rebuttal that these trees were not pruned or managed may call into question the value that defendant placed on the property, but, given the demarcation of the old fence and tree line, it does not undermine defendant's claim to actual possession before his immediate neighbors. The finding that defendant himself had asserted actual ownership is not against the manifest weight of the evidence.

¶ 23 Likewise, the record supports the finding that defendant's possession was open,

notorious, and exclusive. Here, plaintiff points to the testimony of witnesses called by defendant. Bowman and Eberhardt both grew up in the neighborhood and both testified that back part of the old fence was in disrepair and basically became a tree line under defendant's ownership. This, however, does not negate adverse possession, nor the element of open possession. Indeed, Eberhardt, who had rented and farmed the Walls' property in the early 1980s, testified that when farming the Walls' property he stopped plowing at that line because "[w]here the old fence was always been what I consider the property line."

¶ 24 Plaintiff also asserts that any possession by defendant was not continuous. Plaintiff claims that defendant did not even properly maintain his house. This claim lacks support and is irrelevant. The question is not whether defendant was a good neighbor, but an actual neighbor. Plaintiff also asserted that in spring of 2009, after she called the sheriff, defendant had asked and was granted permission to plant some strawberries in the front part of the disputed strip. Nonetheless, defendant's claim of adverse possession had long since accrued. Even accepting plaintiff's account, an attempt at accommodation would not undermine defendant's claim that he, and his family, had long possessed the property in a manner conflicting with plaintiff's assertion of title. See *Beard v. Henn*, 28 Ill. 2d 11, 13, 190 N.E.2d 345, 346 (1963).

¶ 25 The record also supports the trial court's determination that defendant had ownership under section 13-109 of the Code (735 ILCS 5/13-109 (West 2010)).

> "§ 13-109. Payment of taxes with color of title. Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who for 7 successive years continues in such possession, and also, during such time, pays all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of such lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by

purchase, legacy or descent, before such 7 years have expired, and who continue such possession, and continue to pay the taxes as above set forth so as to complete the possession and payment of taxes for the term above set forth, are entitled to the benefit of this Section." 735 ILCS 5/13-109 (West 2010).

¶ 26 Plaintiff contends that the record is unclear. Plaintiff makes two particular claims. First, she asserts that the tax documents presented by defendant failed to show exact acreage. Second, plaintiff argues that defendant had failed to present any evidence that she had not also paid taxes for the disputed strip.

¶ 27 The record supports the conclusion that defendant had paid taxes with color of title and met the statutory requirements. Defendant himself testified to actual possession under color of title. *Payne v. Williams*, 91 Ill. App. 3d 336, 343, 414 N.E.2d 836, 841 (1980). Defendant presented evidence of the other elements, and addressed the arguments raised by plaintiff on appeal, through the testimony of Douglas Marlow, assistant supervisor for the Williamson County assessor's office. Marlow testified that defendant had been assessed according to the footage of the 1922 survey. Marlow concluded with this review:

"Q. [Attorney for defendant:] Okay. And so for the record to make it clear, Mr. [Marlow], the top portion of this section here is the greater half is the northern portion as far as tax purposes go?

A. It is the northern, yes.

Q. Okay. [Plaintiff] is being taxed just for 660 feet, but since this is a longer section, she is not being taxed for any overage over 660 feet? For example if the half way point was 673 feet, let's say, and there is a strip of ground that's 13 or 14 feet north of that 660 feet, bottom line, who's paying taxes on it?

A. On the top part?

Q. Yep.

A. [Defendant]."

¶ 28 The record strongly supports the conclusion that defendant, and his parents before him, had long occupied the property up to the old fence line in a manner consistent with the survey of 1922.

¶ 29 Accordingly, the judgment of the circuit court is hereby affirmed.

¶ 30 Affirmed.