FILED
APR 27 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

18

HENRY C. BRYANT and HELEN JEAN BRYANT,

Plaintiffs-Appellants,

vs.

LISLE CORPORATION and PAGE COUNTY, IOWA,

Defendants.

Filed April 27, 1982

LISLE CORPORATION,

Cross-Petitioner,

vs.

CLYDE C. LANDIS and MAXINE LANDIS,

Defendants to Cross-petition.

EVA MAE STEVENS, CLARENCE JUNIOR HULLINGER, and MAXINE LANDIS,

Plaintiffs-Appellants,

vs.

LISLE CORPORATION and PAGE COUNTY, IOWA,

Defendants.

2-73
2-65953

LISLE CORPORATION,

Cross-Petitioner,

vs.

CLYDE C. LANDIS,

Defendant to Cross-petition.

Appeal from Page District Court, Glenn M. McGee, Judge.

Plaintiffs appeal from judgment for defendant in two consolidated quiet-title actions, contending the trial court erred (1) by finding the agreement between plaintiffs' and defendant's predecessors in interest, which purported to relocate

the boundary line from its surveyed location to its present location, did not constitute acquiescence and (2) by concluding plaintiffs failed to establish adverse possession to the disputed strip of land. Defendant contends plaintiffs' failure to plead acquiescence bars consideration of acquiescence as a theory of recovery. Plaintiffs failed to establish the elements of adverse possession and failed to raise the issue of acquiescence at trial. AFFIRMED.

Richard G. Davidson, Clarinda, for plaintiffs-appellants and defendant to cross-petition Clyde C. Landis.

Paul W. Jones of Turner, Jones & Bitting, Clarinda, for defendant-appellee Lisle Corporation.

Stephen P. O'Meara, County Attorney, for defendant-appellee Page County.

Considered by Donielson, P.J., and Snell, and Carter, JJ.

PER CURIAM

Plaintiffs appeal from judgment for defendant in two consolidated quiet-title actions, contending the trial court erred (1) by finding the agreement between plaintiffs' and defendant's predecessors in interest, which purported to relocate the boundary line from its surveyed location to its present location, did not constitute acquiescence and (2) by concluding plaintiffs failed to establish adverse possession to the disputed strip of land. Defendant contends plaintiffs' failure to plead acquiescence bars consideration of acquiescence as a theory of recovery. Plaintiffs failed to establish the elements of adverse possession and failed to raise the issue of acquiescence at trial. We affirm the trial court's dismissal of plaintiffs' petitions.

Plaintiffs Henry C. Bryant and Helen Jean Bryant own the north half of Lot 5, Block 43 in Clarinda, Iowa. Plaintiffs Eva Mae Stevens, Clarence Junior Hullinger, and Maxine Landis own the south half of Lot 5. Defendant Lisle Corporation owns the adjoining Lot 6, east of Lot 5. The two sets of plaintiffs brought the present quiet title actions claiming that the boundary line between Lots 5 and 6 actually runs across Lot 6 and has been marked for forty years by landmarks, which include an iron pipe, an outhouse foundation, trees, and flowerbeds. The disputed strip of land is about 20 feet wide.

The evidence shows the following: In the early 1940's, Rosa Freeman owned Lot 5 and had a life estate in Lot 6. There were three houses on the lots: one on the north half of Lot 5, one on the south half, and one on Lot 6. The three yards were not separated by fences, but there is evidence Rosa drove a white pipe into the ground in 1944 to mark the boundary lines between the yards.

In 1952, Rosa deeded the north half of Lot 5 to her brother and the south half of Lot 5 to her grandson. She reserved a life estate in the south half. When Rosa

died later in 1952, the title to Lot 6 passed to her daughter. In 1953, the new owners of Lots 5 and 6, Rosa's brother, daughter, and grandson, agreed in writing that the titles to the land Rosa had conveyed to them would be "conclusive and vested in the respective grantees" and would not be contested by any of them.

Lot 6 was sold at a tax sale in 1958. Two years later, the owners filed a tax title affidavit pursuant to what is now section 448.15, The Code 1981. There was testimony by at least one plaintiff that the owners of Lot 5 never intended to claim more land than was described in their deeds. No new trees, buildings or other landmarks were established on either lot after 1952.

I. Acquiescence.

On appeal, plaintiffs contend the trial court erred in failing to find the parties' predecessors in interest acquiesced in certain landmarks as being the boundary line dividing plaintiffs' properties from defendant's property. The issue of acquiescence was not plead by plaintiffs. The trial court, in its pretrial order, defined the issue to be tried as "one of adverse possession, plus a counterclaim for money damages if they [defendants] lose the strip of land on the west side of Lot 6." Iowa R. Civ. P. 138 states a court's pretrial order "will control the subsequent course of action relative to the matters it includes, unless modified to prevent manifest injustice." In B-W Acceptance Corporation v. Saluri, 258 Iowa 489, 497, 139 N.W.2d 99, 404 (Iowa 1966), the court in an equity case held a proposition that was neither pleaded nor argued to the court at trial, could not be asserted for the first time on appeal. We think the rules on that issue are clear. Plaintiffs are precluded from arguing acquiescence as a theory of recovery on appeal.

II. Adverse Possession.

Plaintiffs claim title to the disputed strip of land through their predecessors' acts of adverse possession. We disagree.

Our review is de novo. Council Bluffs Savings Bank v. Simmons, 243 N.W.2d 634, 635 (Iowa 1976). The trial court's findings of fact are not binding on this court, but we give weight to its factual findings, especially when considering the credibility of witnesses.

In order to prevail on a claim of adverse possession, the plaintiff must prove all the elements of the cause of action by clear and convincing evidence. Council Bluffs Savings Bank v. Simmons, 243 N.W.2d 634, 637 (Iowa 1976). To establish title by adverse possession, plaintiff "must prove open, exclusive, continuous, actual and hostile possession under claim of right or color of title for at least 10 years." Id. at 636. Proof of claim of right requires proof of an intention to claim adversely, manifested either by words or acts. I-80 Associates, Inc. v. Chicago, Rock Island and Pacific Railroad Co., 224 N.W.2d 8, 11 (Iowa 1976). We conclude plaintiffs have failed to establish their or their predecessors' intent to possess adversely.

Plaintiffs must prove they, or their grantors, intended to claim the disputed portion of Lot 6 adversely to the legal titleholder. The possession of plaintiffs' grantor may be tacked to the possession of plaintiffs in order to satisfy the ten-year statute of limitations. Moffitt v. Future Assurance Associates, Inc., 258 Iowa 1160, 1171, 140 N.W.2d 108, 114 (Iowa 1966). We agree with the trial court's conclusion the statute of limitations could not have started running prior to the time Rosa, plaintiffs' predecessor in interest, divested herself of ownership of one of the parcels of land. The conclusion is derived from the axiomatic principle that an owner of two parcels of land cannot adversely possess one of those parcels to herself. The possibility of the owner of one of the parcels adversely possessing against the owner of the other parcel could not have arisen until the titles to the two parcels were vested in two persons. Since Rosa did not divest herself of the titles to Lots 5 and 6 until 1952, there could have been no claim of adverse possession prior to that time.

Furthermore, under the family settlement agreement dated February 21, 1953, the owner of the north half of Lot 5, the owner of the south half of Lot 5 and the owner of Lot 6 agreed not to contest each other's claim to the property. As evidenced by that agreement, the owners of Lots 5 and 6 agreed not to assert any interest beyond the scope of title granted to them by Rosa. The claimant's claim of right must be as broad as the possession in order to be adverse. Poleske v. Jones, 192 Iowa 1015, 1020 (Iowa 1921). Consequently, any reliance, by the owners of Lot 5, on the white stake, or any other physical monuments, as establishing the boundary lines would not support a claim of adverse possession without some evidence the claimants intended to claim property beyond the scope of his or her title. See Grube v. Wells, 34 Iowa 148, 150-53 (Iowa 1871). In other words, to support a claim for adverse possession, the claimant must possess land beyond the scope of his or her title with the specific intention of possession of land beyond the scope of his or her title. Griffin v. Brown, 167 Iowa 599, 607-08, 149 N.W. 833, 836-37 (Iowa 1914). Since by agreement the parties asserted claims only to the extent of their titles, there was no intent at that time to adversely possess any other property.

Since the record indicates there were no other acts by the owners of the north and south halves of Lot 5 inconsistent with the interests of the owner of Lot 6 after the 1953 agreement, there is no evidence of any intent on the part of the owners of Lot 5 to adversely possess any part of Lot 6. Accordingly, we conclude the trial court properly found the plaintiffs failed to establish the elements of adverse possession with clear and convincing evidence.

AFFIRMED.