IN THE COURT OF APPEALS OF IOWA

No. 1999-104 (9-291) / 98-1832
Filed June 23, 1999

MAHLER CONCRETE SERVICES, INC.,

Plaintiff-Appellee,

FILED
JUN 23 1999
CLERK SUPREME COURT

vs.

WEINDRUCH MEADE, INC.,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Jr., Judge.

Defendant appeals from the district court order denying its claim to a disputed tract of property. **AFFIRMED.**

Edward N. Wehr of Wehr, Berger, Lane & Stevens, Davenport, for appellant.

Cheryl J. Newport and Stephen W. Newport of Newport & Newport, P.L.C., Davenport, for appellee.

Considered by Huitink, P.J., and Streit and Mahan, JJ.

MAHAN, J.

Defendant-appellant Weindruch Meade, Inc. (Weindruch) appeals from the district court order denying its claim to a disputed tract of property. Weindruch contends the district court should have found it had acquired the disputed tract of property either by acquiescence or adverse possession. We affirm.

Mahler Concrete Services, Inc. (Mahler) and Weindruch own adjoining property. The property owned by Mahler is to the east of property owned by Weindruch. Weindruch purchased its property in June 1975; Mahler purchased its property in July 1994. The property in dispute is a strip of land 8.72 feet by sixty feet (the strip) which is legally described as the North 8.72 feet of Lot 20 in Keller's Subdivision. The strip runs along the southern portion of Weindruch's property and has been used by Weindruch to store vehicles and semi-trailers.

It is undisputed this strip is included in the deed to the Mahler property and excluded from the property description in the Weindruch deed. It is also undisputed Weindruch ordered a survey in 1977 which conclusively showed the strip was not part of the Weindruch tract. Weindruch continued to use the strip despite the survey.

In February 1998, Mahler moved Weindruch's vehicles to construct a fence around the strip and to pave it. Weindruch attempted to remove the fence claiming ownership of the strip. Mahler filed for and received an injunction barring removal of the fence. Weindruch filed a counterclaim requesting the court find the strip had inured to Weindruch's benefit under a theory of acquiescence or adverse possession.

The district court concluded Weindruch failed to prove a good faith claim of right to the strip and also concluded Mahler's predecessors allowed Weindruch and its predecessors to use the strip. The district court denied both the acquiescence and the adverse possession claims. Weindruch appeals.

I. STANDARD OF REVIEW. The parties' disagree about the proper standard of review in this case. Mahler contends the case was tried as a legal action; Weindruch maintains it was tried at equity. The legal or equitable nature of the proceeding is to be determined by the pleadings, the relief sought, and the nature of the case. *Carstens v. Central Nat'l Bank & Trust Co. of Des Moines*, 461 N.W.2d 331, 333 (Iowa 1990).

We are satisfied this action was tried as an equitable action. Even though it was carried on the district court's law calendar, it was a bench trial in which the court reserved rulings, this action began with a request solely for injunctive relief, and there is no evidence either party requested the case be transferred to the law calendar. These are indications of an equitable trial. *See* Iowa R. Civ. P. 320; *Allied Mut. Ins. Co. v. Costello*, 557 N.W.2d 284, 286 (Iowa 1996); *Mensch v. Netty*, 408 N.W.2d 383, 385 (Iowa 1987). Therefore, our review is de novo.

II. ACQUIESCENCE. Weindruch contends it proved by clear evidence that Weindruch, its predecessors, and Mahler's predecessors acquiesced in a different boundary line for a period of over ten years. We disagree.

Boundary lines contrary to the legal description of the property may be established under Iowa Code chapter 650 if the landowner can show the boundary line has been recognized and acquiesced in for a period of ten years. Iowa Code § 650.14. The acquiescence of predecessors in interest for the statutory period is binding upon subsequent purchasers. *Dart v. Thompson*, 261 Iowa 237, 241, 154 N.W.2d 82, 84 (1967).

Acquiescence requires proof of (1) a definitely marked dividing line (2) which is known to both adjoining landowners or their predecessors in title (3) to which both landowners have consented. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994). Acquiescence is a fact-specific determination and must be proved by clear evidence by the party seeking to establish a boundary line other than the boundary line in accordance with a survey. *See id.* at 806, 808.

We agree with the district court's findings and conclusions that Weindruch's use of the strip was permissive. Weindruch became aware two years after purchasing the property that their tract did not include the strip. Weindruch has failed to establish the elements of acquiescence by clear proof and cannot make a claim by simply showing permissive use of the strip. *Carpenter v. Ruperto*, 315 N.W.2d 782, 784 (Iowa 1982); *Mitchell v. Daniels*, 509 N.W.2d 497, 499 (Iowa App. 1993); *Harvey v. Platter*, 495 N.W.2d 350, 352 (Iowa App. 1992). We conclude Weindruch failed to prove acquiescence by clear evidence.

III. ADVERSE POSSESSION. Weindruch contends the preponderance of the evidence established Weindruch or its predecessor had acquired title to the strip through adverse possession prior to 1977. We disagree.

One claiming title by adverse possession must establish hostile, actual, open, exclusive, and continuous possession under a claim of right or color of title, for at least ten years, by clear and positive proof. *Carpenter*, 315 N.W.2d at 784. Because the law presumes possession under regular title, the doctrine is strictly construed. *Id.* Weindruch concedes adverse possession cannot be established after 1977 because it knew it did not have title or claim to the strip. *See id.* at 785.

Weindruch also cannot establish adverse possession prior to 1977 because Weindruch's predecessors' use of the strip was not hostile to the true owner. There is no showing Weindruch's predecessors intended to occupy an area beyond the true lot line. *Huebner v. Kuberski*, 387 N.W.2d 144, 146 (Iowa App. 1986). Nor does the evidence negate the probability that the use of the strip was by permission of Mahler's predecessors. Permissive use is not adverse or under a claim of right. *Mensch*, 408 N.W.2d at 387. Continued use does not, by mere lapse of time, become hostile or adverse. *Id.*

Carpenter contained facts similar to the instant case. In that case, our supreme court stated:

> We believe plaintiff failed to prove a good faith claim of right in the present case. She knew her lot did not include the cornfield north of it. She knew someone else had title to it and she had no interest in it or claim to it. This is not a case of confusion or mistake. At the time

> she entered possession of the disputed land, plaintiff knew she had no legal right to do so. To say that one can acquire a claim of right by merely entering possession would recognize squatter's rights. Possession for the statutory period cannot be bootstrapped into a basis for claiming a right to possession.

Carpenter, 315 N.W.2d at 786.

We conclude Weindruch failed to prove adverse possession by a preponderance of the evidence.

For these reasons, we affirm the denial of Weindruch's acquiescence and adverse possession claims.

AFFIRMED.

No. 98-1832. [1999-104 (9-291)] MAHLER CONCRETE SERVICES, INC. v. WEINDRUCH MEADE, INC.

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Jr., Judge. **AFFIRMED.** Considered by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Mahan, J. (6 pages $2.40)

Weindruch and Mahler own adjoining properties. Weindruch claims it owns the disputed strip of land either by acquiescence or adverse possession. It is undisputed this strip is included in the deed to the Mahler property and excluded from the property description in the Weindruch deed. It is also undisputed Weindruch ordered a survey in 1977 which conclusively showed the strip was not part of the Weindruch tract. Weindruch continued to use the strip despite the survey until Mahler constructed a fence around the strip and paved it in February 1998. The district court concluded Weindruch failed to prove a good faith claim of right to the strip and also concluded Mahler's predecessors allowed Weindruch and its predecessors to use the strip. The district court denied both the acquiescence and the adverse possession claims. **OPINION HOLDS: I.** ***Standard of Review.*** The parties disagree about the proper standard of review in this case. We are satisfied this action was tried as an equitable action. Therefore, our review is de novo. **II.** ***Acquiescence.*** We agree with the district court's findings and conclusions that Weindruch's use of the strip was permissive. Weindruch has failed to establish the elements of acquiescence by clear proof and cannot make a claim by simply showing permissive use of the strip. **III.** ***Adverse Possession.*** Permissive use is not adverse or under a claim of right. Continued use does not, by mere lapse of time, become hostile or adverse. We conclude Weindruch failed to prove adverse possession by a preponderance of the evidence.