IN THE COURT OF APPEALS OF IOWA

No. 5-398 / 94-1540

LAURA SAUERBRY,

Appellee.

vs.

ROY INGLES,

Appellant.

FILED
SEP 22 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Delaware County, Alan L. Pearson, Judge.

Roy Ingles appeals from a district court judgment quieting title in Laura Sauerbry to a portion of a former railroad right-of-way which encroaches on her property. **AFFIRMED.**

William D. Werger of Hanson & Werger, Manchester, for appellant.

Timothy G. Goen, Cedar Rapids, for appellee.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

CADY, J.

This is an appeal from a district court order quieting title in plaintiff Laura Sauerbry to a portion of a former railroad right-of-way and denying defendant Roy Ingles' counterclaim for adverse possession. We affirm the district court.

Sauerbry and Ingles dispute the ownership of a portion of an abandoned railroad right-of-way in the Delaware County town of Greeley. In 1879, a warranty deed from Jerome and Sarah Baker to the Davenport and St. Paul Railroad Company was filed. The deed provided title would revert back to the Bakers, their heirs or their assignees if the railroad permanently abandoned the route.

A plat was later filed for Baker's Addition to Greeley, Iowa, which included lot five of block four. The plat showed the railroad but not the limits of the railroad easement. Sometime later an unknown person penciled in the edge of the railroad easement on the plat, reflecting the easement overlap on the eastern boundary of lot five. This area of encroachment is the subject of the present dispute.

In 1977, a real estate contract was filed showing Laura Sauerbry purchased lot five. Also in the late 1970's, the successor railroad abandoned the right of way. Roy Ingles purchased a portion of the right-of-way, from the railroad including the part which encroaches on lot five, and received a quit claim deed on October 1, 1979.

Ingles apparently became aware of the overlap of the right of way and lot five when he had the land surveyed in 1979. Ingles bulldozed and flattened the railbed after taking possession that year. He also mowed and later grew hay on the right-of-

way property. In the interim years, Sauerbry and others walked across, mowed a path through and planted trees on the right-of-way area. She also maintained a septic system on the property located within the encroachment.

In 1990, Ingles built a fence along the right-of-way boundary. The fence passes within six inches of Sauerbry's house and blocks her front door.

Sauerbry subsequently filed a petition in equity asking the district court to order Ingles to remove the fence. Ingles filed an answer and two counterclaims. The first counterclaim asked the court to order abatement of a nuisance consisting of an unsafe septic tank on Sauerbry's property. The second counterclaim asked the court to grant him quiet title to the right-of-way property.

The district court concluded the portion of the right-of-way which encroaches on lot five reverted to Sauerbry. The court recognized Ingles demonstrated color of title to the subject property, but found his possession, if any, was only open and exclusive since 1990. The court quieted title to the area in Sauerbry and rejected Ingles' adverse possession claim. The court also ordered Sauerbry to abate the nuisance.

Ingles now appeals contending he has possessed the land openly and exclusively since 1979 when he surveyed the boundaries and cleared the property. He further argues that at a minimum the court should have quieted title for the balance of the right-of-way in him which does not overlap with Sauerbry's land.

I. Standard of Review

In this equity action our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). *Mitchell v. Daniels*, 509 N.W.2d 497, 499 (Iowa App. 1993).

II. Adverse Possession

Because the original warranty deed given by Jerome and Sarah Baker provided title to the right-of-way would revert to themselves, their heirs or their assignees if the railroad permanently abandoned the route, Sauerbry has title to the encroachment to lot five. However, Ingles claims he has a valid right to the property by means of adverse possession. We are only concerned with who has legal title to the small portion of the encroachment onto lot five.

A claimant must prove his or her adverse possession by "clear and positive evidence." *C.H. Moore Trust Estate v. City of Storm Lake*, 423 N.W.2d 13, 15 (Iowa 1988); *Mitchell*, 509 N.W.2d at 499; *Carpenter v. Ruperto*, 315 N.W.2d 782, 784 (Iowa 1982). Such proof cannot be made by inference. *Lawse v. Glaha*, 253 Iowa 1040, 1046, 114 N.W.2d 900, 903 (Iowa 1962).

Moreover, adverse possession claims must be strictly construed, since the law presumes possession is under a regular title. *C.H. Moore*, 423 N.W.2d at 15; *Moffit v. Future Assurance Assoc., Inc.*, 258 Iowa 1160, 1170, 140 N.W.2d 108, 114 (Iowa

1966). Adverse possession is a recognized, but not favored, method of proving title. 2 C.J.S. *Adverse Possession* § 5 (1972).

In order to prove adverse possession, a claimant must establish, under claim of right or color of title, hostile, actual, open, exclusive, and continuous possession for at least ten years. *Mitchell*, 509 N.W.2d at 499; *Marksbury v. State*, 322 N.W.2d 281, 287 (Iowa 1982). The nature of adverse possession is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right of color of title. 3 Am. Jur. 2d *Adverse Possession* § 3 (1986).

A. Color of Title

We find, as did the district court, Ingles has proven color of title for his adverse possession claim. Color of title is "that which in appearance is title but in reality is no title." *Grosvenor v. Olson*, 199 N.W.2d 50, 52 (Iowa 1972). Ingles obtained a quit claim deed from the railroad believing it gave him title to the right-of-way, including the encroachment on lot five. A deed from one who has no authority to convey, taken in good faith, affords sufficient color of title to support a claim for adverse possession. *Id.* The railroad had no authority to convey the right-of-way property to Ingles, as the land was to revert to Jerome and Sarah Baker, their heirs or their assignees. However, we find Ingles' quit claim deed sufficient to satisfy the color of title element of adverse possession.

B. Hostile, Actual, Open, Exclusive, and Continuous Possession for Ten Years

Again, Ingles must prove by clear and positive evidence he had hostile, actual, open, exclusive, and continuous possession of the encroachment on lot five for the requisite ten years. Ingles contends the district court erred when it found he had not proven possession of the encroachment, or if there was possession, it was not open nor exclusive prior to 1990 when the fence was erected.

While a person need not "live upon the land, or to enclose it with fences, or to stand guard at all times upon its borders, to oppose the entry of trespassers or hostile claimants" for ten years to adversely possess the property, he or she must "maintain such possession and exercise such open dominion as ordinarily marks the conduct of owners in general." *Whalen v. Smith*, 183 Iowa 949, 953, 167 N.W. 646, 647 (1918). In order to prove hostile, actual, open, exclusive and continuous possession, Ingles must prove by clear and positive evidence he exercised open dominion over the sliver of land which overlapped onto lot five.

We find Ingles' claim falls short of the necessary standard. There is little evidence to support Ingles' open dominion prior to 1990 over the portion of land specifically overlapping lot five. He bulldozed and levelled the railbed on the former right-of-way property prior to 1990, but there is no indication any of this activity took place on the encroachment through lot five. Ingles also mowed the land for a period of time and then chose to let it grow and cut hay. Again, there is no indication Ingles mowed or cut hay specifically on the overlap area. We find no clear and positive

evidence proving open and actual possession of the area in question.

Moreover, Ingles must prove he had exclusive possession of the encroachment for ten years. Exclusive possession does not mean absolutely exclusive use of the land by the claimant. 2 C.J.S. *Adverse Possession* § 54 (1972). Occasional intrusions by others onto the property does not destroy the exclusive nature of this possession. *Huebner v. Kuberski*, 387 N.W.2d 144, 146 (Iowa App. 1986).

Here however, Sauerbry's actions do not amount to mere occasional intrusions. She and others walked through the right-of-way, mowed the grass to clear a path, planted two or three trees, and maintained a septic system all within the encroachment area. We find Ingles failed to meet his burden of proving his possession of the encroachment was exclusive for ten years.

We find Ingles did not prove by clear and positive evidence he adversely possessed the portion of the former right-of-way that runs through lot five. To find otherwise would be contrary to the nature of the doctrine of adverse possession, which is to protect those who have maintained the possession of property for the full time period specified by the statute. We find actual and legal title for lot five of block four rests with Laura Sauerbry. Since Ingles has no interest in this property, we find he must remove his fence to the extent it encroached upon lot five.

III. Quiet Title for Remaining Right-of-Way Property

The purpose of a suit to quiet title or remove a cloud is to determine the existing title to property and the validity of adverse claims thereto. 74 C.J.S. *Quieting*

Title § 1 (1972). It is unclear who possesses title and owns the property adjacent to lot five. As no evidence exists indicating potential adverse claimants, and no additional parties were brought into the suit, we cannot quiet title in Ingles for the remaining property located within the former railroad right-of-way. The evidence does not sufficiently prove title should rest with Ingles in the remaining property.

We find the district court properly denied Ingles' request for quiet title to the right of way adjacent to the property.

AFFIRMED.