STATE OF MICHIGAN

COURT OF APPEALS

STEVEN A. ADAMS and HEATHER L. PHILLIPS,

Plaintiffs/Counterdefendants/
Third-Party Plaintiffs-
Appellants,

v

ANN L. BANNISTER, A/K/A
ANNE L. BANNISTER,

Defendant/Counterplaintiff/
Third-Party Plaintiff-Appellee,

v

AMERICAN TITLE INSURANCE COMPANY,

Third-Party Defendant-Appellee.

UNPUBLISHED
August 9, 1996

No. 177904
LC No. 92-044095-CH

Before: MacKenzie, P.J., and Markey and J.M. Batzer,* JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting defendant's and third-party defendant's motions for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). We reverse.

On appeal, an order granting summary disposition is reviewed de novo. When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), we accept plaintiffs' well-pleaded

* Circuit judge, sitting on the Court of Appeals by assignment.

allegations as true, construe them favorably to plaintiffs, and review all documentary evidence. We affirm the grant of summary disposition where no factual development could provide plaintiffs with a basis for recovery. *Dedes v South Lyon Schools*, 199 Mich App 385, 388; 502 NW2d 720 (1993), rev'd on other grounds *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994). A motion for summary disposition may also be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of all reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995). Plaintiffs argue that the trial court erred in granting defendant's and third-party defendant's motions for summary disposition under the doctrine of acquiescence. According to plaintiffs, the trial court erred by ruling that they acquiesced in the property line established by the metes and bounds description in the warranty deed that plaintiffs received from their predecessors in interest to the property (i.e., the sellers). We agree.

Acquiescence is a doctrine adopted by the courts to assist in the resolution of boundary line disputes. The principle underlying the doctrine is where a boundary line has been accepted by the parties, the line should stand. Cameron, Real Property Law (2 ed), § 12.9, p 412. Where there has been acquiescence between the parties, the boundary becomes fixed. *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956). There are three types of acquiescence as explained by this Court in *Pyne v Elliott*, 53 Mich App 419, 426-428; 220 NW2d 54 (1974): (1) acquiescence for a statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from an intention to deed to a marked boundary. We find no evidence of acquiescence following a dispute and agreement between plaintiffs and their predecessors in interest sufficient to support summary disposition of plaintiffs' claims against defendant and third-party defendant.

In the present case, plaintiffs' and defendant's properties were originally part of a single larger tract upon which the owner constructed the two residences at issue. The homes are located eleven feet apart and are separated by a sidewalk that is equidistant from both houses. Years after plaintiffs had entered into a land contract to purchase their home and property, plaintiffs discovered that their residence encroached over the property line as described in their land contract. In order to solve the encroachment problem, plaintiffs approached defendant with a proposal that defendant convey to plaintiffs a strip of property that would adjust plaintiffs' property line to a point equidistant between plaintiffs' and defendant's residences. This new line would run down the middle of a sidewalk that, to the casual observer, apparently divided the two lots. Defendant declined to convey the property to plaintiffs. Plaintiffs then looked to the sellers for a resolution of the encroachment problem.

The sellers acquired a wedge of property located between plaintiffs' and defendant's property that was needed to close plaintiffs' property description and to prevent plaintiffs' house from encroaching over plaintiffs' property line. Upon entering into a settlement agreement with plaintiffs, sellers conveyed a new warranty deed to plaintiffs containing the revised legal description. The revised

property line was not equidistant between plaintiffs' and defendant's residences, however, and fell a few feet short of the sidewalk's centerline. Plaintiffs then proceeded with this quiet title action in order to resolve whether the parties and their predecessors in interest had acquiesced in the boundary line created by the center line of the sidewalk between the parties' residences.

In the case at bar, the trial court found that acquiescence following a dispute and agreement was established when plaintiffs and their sellers entered into a settlement agreement resolving the disputed southern boundary line of plaintiffs' property. On this basis, the court dismissed plaintiffs' complaint. We disagree. Plaintiffs and sellers exchanged the new warranty deed and reached the settlement agreement as a means of enabling plaintiffs to obtain a mortgage on their property, not to resolve a "dispute" between plaintiffs and sellers as to the actual boundary of plaintiffs' property for purposes of acquiescence. Further, we find no cases where acquiescence was found as between a seller and a buyer of property. Instead, as this Court observed in *Pyne, supra* at 427,

> II. *Acquiescence Following a Dispute and Agreement*. All parties recognized that a surveying error had occurred, and many of them, including the defendants and plaintiff's predecessor in title, entered into the agreement establishing the north boundary line. This agreement, however, was never recorded, but rather, was kept in the defendant's safe deposit box.
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> "'It has been frequently held in this state that where parties by mutual agreement, and for that express purpose, meet and fix a boundary line, and thereafter acquiesce in the line so established *between them, such line will be considered the true line between them*, notwithstanding the period of such acquiescence falls short of the time fixed by the statute of limitations for gaining title by adverse possession.'" [Emphasis added; citations omitted.]

Here, there is no boundary line between plaintiffs and their sellers to which the acquiescence could apply. Defendants' assertions of plaintiffs' acquiescence in a property line cannot succeed because it only addresses one-half of the formula, i.e., without an adjoining property owner with whom plaintiffs could establish a common boundary line, there can be no acquiescence. Plaintiffs' settlement agreement with the sellers only affected plaintiffs' claims against the sellers, not plaintiffs' quiet title claims against defendant. Regardless of plaintiffs' recent recognition of the boundaries established by the revised property description, plaintiffs may still have a claim against defendant regarding acquiescence if plaintiffs can prove that the parties and their predecessors in interest treated the sidewalk as the true boundary line for at least fifteen years and the line should not be disturbed based on a new survey. *Geneja v Ritter*, 132 Mich App 206, 210-211; 347 NW2d 207 (1984); *Pyne, supra* at 426.

We believe that Michigan courts are anxious to resolve boundary disputes by referring to long-established lines of occupancy, which in this case may extend from each lot to the common sidewalk. See Cameron, *supra* at §12.9, p 414. Further, the seller's admissions that they used the sidewalk with

defendant's predecessor's permission is not fatal to plaintiffs' case because permissive use is irrelevant in this context and does not negate an acquiescence claim. *Geneja, supra* at 212. Thus, we believe that the trial court misapplied the doctrine of acquiescence in this case.

Rather, giving the benefit of reasonable doubt to plaintiffs, we find that a record might be developed that would leave open issues upon which reasonable minds could differ, specifically, whether plaintiffs, defendant, and their predecessors in interest maintained the property on their respective sides of the sidewalk and jointly used the sidewalk for at least fifteen years thereby establishing acquiescence in the sidewalk as a common boundary. Because genuine issues of material fact still exist regarding plaintiffs' acquiescence claim against defendant, dismissal of plaintiffs' claims at this juncture is premature. Thus, we reverse the trial court's grant of summary disposition and remand this case for further proceedings consistent with this opinion.[1] We do not retain jurisdiction.

Reversed and remanded.

/s/ Barbara B. MacKenzie
/s/ Jane E. Markey
/s/ James M. Batzer

[1] Because the trial court only addressed the acquiescence issue relative to plaintiffs' settlement agreement with the sellers, we will not review the other issues raised on appeal that go beyond the trial court's ruling.