STATE OF MICHIGAN

COURT OF APPEALS

NEWFIELD TOWNSHIP,

Plaintiff-Appellee,

v

GEORGE MORNINGSTAR,

Defendant-Appellant.

UNPUBLISHED
January 24, 1997

No. 186335

Oceana Circuit Court
LC No. 93-004536-CH

Before: Fitzgerald, P.J., and MacKenzie and A.P. Hathaway,* JJ.

PER CURIAM.

Defendant appeals as of right the order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff township and defendant own adjacent parcels of real property fronting on Blodgett Lake in Oceana County, with plaintiff's parcel located due west of defendant's parcel. Various surveys of the area, including a survey completed by plaintiff's surveyor, Claude Stover, in 1958 to 1959 (hereinafter the "Stover survey"), have located the boundary line between the parcels in one of two different locations. The Stover survey erroneously mislocated, by twenty-five feet to the west, the north-south boundary between plaintiff's parcel and what was then an unplatted parcel owned by defendant's predecessor-in-interest. Further, the record indicates that the parcel eventually acquired by defendant was subdivided from that unplatted parcel in 1961, with reference to the erroneous Stover survey line. Plaintiff brought this action to settle the matter. The trial court granted plaintiff's motion for summary disposition based on plaintiff's licit ownership of the disputed area, as described in plaintiff's deed. We review a trial court's grant or denial of summary disposition de novo. *Kennedy v Auto Club of Michigan*, 215 Mich App 264, 266; 544 NW2d 750 (1996). We affirm.

As noted, the record reveals that the disputed property lies within the proper boundaries of plaintiff's parcel as described in plaintiff's deed, notwithstanding any indication to the contrary by the erroneous Stover survey.[1] Defendant nonetheless maintains that he is the rightful owner of the disputed

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

area, and he presents several theories in support. Defendant first contends that the erroneous boundary line located by the Stover survey has become the legal boundary because the doctrine of "acquiescence" so dictates.

The doctrine of acquiescence contemplates at least three distinct ways that a dispossessed landowner may lose legal title to the opposing possessor, i.e., (1) when the adjoining parties resolve a border controversy by agreeing on the location of a physical boundary, *Jackson v Deemar*, 373 Mich 22, 26; 127 NW2d 856 (1964); (2) when a physical boundary, though erroneous, is acquiesced in by the dispossessed party for the statutory period, *Jackson*, *supra* at 26; *Kipka v Fountain*, 198 Mich App 435, 437-439; 499 NW2d 363 (1993); or (3) when a land conveyance has been made with intent to reference it from a physical boundary, marked on the ground, to which adjoining land owners have previously acquiesced, *Daley v Gruber*, 361 Mich 358, 363; 104 NW2d 807 (1960). Defendant asserts that the latter two scenarios apply to this case.

Defendant first argues that a genuine issue of fact remains regarding whether plaintiff acquiesced in the mistaken physical boundary for the statutory period of fifteen years. We disagree. We first note that, although one of defendant's predecessors-in-interest erected a wire fence along the Stover survey line in 1969 to 1970, there is no evidence in the record that plaintiff ever even knew that the fence had been erected. Meanwhile, the fence fell into disrepair. The only other evidence proffered by defendant to support a finding of acquiescence by plaintiff is that, at some point, plaintiff caused an access road to be cleared and graded west of the disputed area. However, the mere fact that plaintiff cleared a road somewhere west of the disputed line certainly does not mean that plaintiff thereby assented to that line, especially since the only *physical* boundary line -- the wire fence -- may no longer have even existed at the time. Furthermore, any *passive* disregard by plaintiff of the exact physical location of the boundary does not implicate the doctrine of acquiescence. In other words, the mere *act* of acquiescence is not to be confused with the *doctrine* now being discussed. Unlike the doctrine of adverse possession, more than mere passivity on the part of a dispossessed party must be shown to invoke the doctrine of acquiescence.[2] Instead, an affirmative assent is necessary. See *Kipka*, *supra* at 437-439.

Defendant next argues that a genuine issue of fact remains regarding whether there was ever intent to convey land with reference to the Stover survey line. We disagree. Indeed, defendant misapplies this aspect of the doctrine. The doctrine is not implicated by the fact that one of defendant's predecessors-in-interest subdivided a large parcel of land into several smaller parcels, including defendant's parcel, with physical reference to the Stover survey line. Rather, this aspect of the doctrine only applies when a conveyance is made with reference to a "boundary marked on the ground . . . between adjoining owners" that has been previously "established." *Daley*, *supra* at 363. As we have previously noted, there never existed an established physical boundary coincident with the Stover survey line to which plaintiff had acquiesced.[3]

Because there was no proof by which defendant could have proved acquiescence, i.e., affirmative assent by plaintiff, the trial court did not err when it granted summary disposition for plaintiff. *Kennedy*, *supra* at 266.

Defendant nonetheless contends that equity compels a different result because the trial court's decision will result in either his lake frontage being reduced by twenty-five feet or the displacement of the parcels owned by his neighbors to the east. We disagree. First, nothing in the record indicates that plaintiff affirmatively led any person or entity, including defendant or his predecessors-in-interest, to believe that plaintiff owned land that it in fact did not own, or that plaintiff did not claim land that it in fact did own. On the other hand, the record indicates that defendant and his predecessors knew that the Stover survey was erroneous as early as 1973 and failed to take any action to correct the error. Indeed, it appears that defendant and his predecessors kept their knowledge of the Stover survey mistake to themselves, so as to avoid opening the proverbial can of worms.[4] In any case, the record indicates that plaintiff has offered defendant either a zoning variance or to purchase defendant's remaining property. We find no inequity.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Amy Patricia Hathaway

[1] Defendant makes an issue of the fact that plaintiff itself actually commissioned the Stover survey; however, defendant does not allege, and there is no evidence to suggest, that plaintiff did so for any reason other than its own use, or that plaintiff was somehow charged with insuring the accuracy of the Stover survey.

[2] Governmental entities are generally immune from adverse possession actions. MCL 600.5821; MSA 27A.5821; *Goodall v Whiterfish Hunting Club*, 208 Mich App 642, 647; 528 NW2d 21 (1995). Moreover, at the summary disposition motion hearing, defendant disavowed any claim of adverse possession against plaintiff.

[3] We also note that there is no basis to defendant's argument that plaintiff implicitly acknowledged that the disputed area belonged to defendant when plaintiff alleged that *it* had been in continuous use of the area for over fifteen years. While it appears that plaintiff brought this action under the mistaken initial impression that it was required to show that *it* had adversely possessed the disputed area in order to "recover" it, plaintiff obviously need not have adversely possessed its own property.

[4] We also note defendant's argument that public policy favors giving effect to a recorded survey even though it later proves to be erroneous. However, the case upon which defendant relies, *Adams v Hoover*, 196 Mich App 646, 648; 493 NW2d 280 (1992), involved a survey completed by the office of the Mason County Surveyor. As such, it was presumptive evidence of the facts contained therein. MCL 54.97; MSA 5.1023. Nothing in the instant record indicates any similar significance of the Stover survey.