STATE OF MICHIGAN

COURT OF APPEALS

W. JOHN ZEMKE and ANNE. C. ZEMKE, husband and wife, HENRY A. LANDERS and MARIE A. LANDERS, husband and wife,

Plaintiffs-Appellees,

v

PETER SHEFMAN, Individually and d/b/a INVESTMENT RARITYS, and C and L, INC., a Michigan corporation, jointly and severally,

Defendants-Appellants.

UNPUBLISHED
March 7, 1997

No. 177380
Washtenaw Circuit Court
LC No. 92-7609-NZ

RAYMOND C. KNIGHT, JR., a/k/a RAYMOND KNIGHT, JR., and MARY M. KNIGHT, his wife,

Plaintiffs-Appellees,

v

PETER SHEFMAN, Individually and d/b/a INVESTMENT RARITYS, and C and L, INC., a Michigan corporation, jointly and severally, and ANN ARBOR ACQUISITION CORPORATION, formerly MICHIGAN INTERSTATE RAILWAY COMPANY, a Michigan railroad corporation,

Defendants-Appellants.

No. 177381
Washtenaw Circuit Court
LC No. 92-43945-CH

FRANCINE J. ALEXANDER and BRIAN J. FUNKHOUSER, JR.,

Plaintiffs-Appellees,

v

No. 177382
Washtenaw Circuit Court
LC No. 92-43986-CZ

PETER SHEFMAN, Individually and d/b/a INVESTMENT RARITYS, and C and L, INC., a Michigan corporation, jointly and severally,

Defendants-Appellants.

HERBERT RAST and KATHLEEN CANNING, husband and wife, ALITA J. MITCHELL, and STEPHEN J. SCHEWE and NANCY J. SCHEWE, husband and wife,

Plaintiffs-Appellees,

v

No. 177383
Washtenaw Circuit Court
LC No. 93-249-CH

PETER SHEFMAN, Individually and d/b/a INVESTMENT RARITYS, and C and L, INC., a Michigan corporation, jointly and severally,

Defendants-Appellants.

Before: Markman, P.J., and O'Connell and D.J. Kelly,* JJ.

PER CURIAM.

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

In these consolidated cases, defendants Peter Shefman, individually and d/b/a Investment Raritys, and C and L, Inc., a Michigan corporation (hereinafter referred to by the singular

"defendant"), claim appeals from a judgment determining interests in certain land and quieting plaintiffs' respective titles. We affirm.

The dispute in these cases involves title to a strip of land behind plaintiffs' residences on Spring Street in Ann Arbor. The land is located at the rear of the residential lots and next to the embankment of a track of the Ann Arbor Railroad Company. In approximately 1840, Ward's Mill Canal, commonly referred to as the "millrace," was constructed in and ran through the general area in which plaintiffs' residences and the railroad track are now located. At the time the millrace was constructed, the area was undeveloped and was not part of the City of Ann Arbor.

Eventually, the millrace became the dividing point between two plats of land. In 1859, Alphias Felch recorded a platted addition (the "Felch plat") located to the west of the City. The Felch plat included the entire millrace. In 1862, James Gott recorded a platted addition (the "Gott plat") located to the west of the City. The Gott plat was located between the City to the east and the Felch plat to the west. The eastern bank of the millrace constituted the boundary between the Felch plat and the Gott plat. At sometime prior to 1900, railroad tracks were laid and the millrace was buried. The visible boundary between the Felch plat and the Gott plat disappeared. The property at issue in these cases was included in the land that constituted the Felch plat.

In 1872, Isaac Handy and others quit claimed a strip of land to the predecessor of the Ann Arbor Acquisition Corporation (AAAC), formerly the Michigan Interstate Railway Company. The strip ran where the railroad existed or was to be located. The deed's granting clause stated that the land was "to be used for the purpose of constructing and maintaining a Railroad and the appurtenances thereto, and one or more lines of telegraph, and for no other purpose whatsoever." Plaintiffs Knight hold title to this and other portions of the disputed area.

In 1878, Gott quit claimed a strip of land to the railroad. The deed conveyed any land that Gott might own in what was in fact the Felch plat area. Gott did not own land located in the Felch plat. The use of the land was limited to the construction and maintenance of a railroad and telegraph lines.

Defendant's alleged ownership of the area is based on two chains of title. In May 1983, certain property allegedly belonging to the railroad, including the disputed area, was sold to the State of Michigan for non-payment of 1980 taxes. Prior to the sale, the Washtenaw County treasurer sent notices to any party who would have an interest in the property. The only party with an interest of which the county was aware was the railroad. The redemption period expired, and on May 1, 1984, the property was deeded to the State of Michigan. On March 25, 1986 the Department of Natural Resources quit claimed the property to defendant.

Defendant's second chain of title resulted from a dispute with the railroad's bankruptcy trustee. To resolve the dispute, defendant quit claimed certain property to the railroad. In return, the railroad quit claimed to defendant all property it owned, if any, located east and west of a line 25 feet from the center of the railroad track between Felch Street and Miller Avenue. This deed purported to convey the disputed area, i.e., the land behind plaintiffs' residences and next to the railroad embankment, to defendant. A note on the deed indicated that the land was in the Gott plat. After defendant entered upon the property and began cutting trees and clearing brush, plaintiffs filed complaints to quiet title and enjoin defendant from trespassing.

Prior to commencement of trial on the consolidated cases, plaintiffs Knight moved for summary disposition on Count I of their complaint, which sought to quiet title to that portion of their property claimed to be subject to the easement held by the AAAC. Plaintiffs asserted that the 1872 Handy deed conveyed an easement only, and not a fee, and that therefore, the AAAC's warranty deed to defendant was of no effect because the AAAC had no ownership interest to convey. The trial court granted the motion. The trial court found that the 1872 deed created an easement and not a fee. The court based this conclusion on the language in the deed to the effect that the land was to be used only for the purpose of constructing and maintaining a railroad and telegraph lines. The deed did not appear to give the grantors the power to eject the railroad if the land was not used for the stated purpose, which power would exist if a fee had been created. *Epworth Assembly v Ludington & Northern Railway*, 236 Mich 565, 573; 211 NW 99 (1926). Acknowledging that *Quinn v Pere Marquette Railway Co*, 256 Mich 143, 150-151; 239 NW 376 (1931), held that a conveyance that is not designated as a right of way is of a fee and not an easement, the court held that the language on the cover of the deed designated it as a right of way. The deed indicated that Handy and the other grantors intended to and in fact did convey an easement. The court concluded that plaintiffs Knight were the owners in fee simple of the property, subject only to the easement conveyed in the 1872 deed.

The nonjury trial featured testimony regarding the location of the millrace, the use of the property by plaintiffs and their predecessors, the propriety of the sale of certain property for non-payment of taxes, and the failure of the railroad to take steps to prevent the property owners from using the disputed area. John Jekabson, plaintiffs' expert, testified that the Felch plat indicated that that subdivision went to the east bank of the millrace. He used the dimensions of the plat to determine the original location of the millrace. After the millrace was abandoned, the various lot lines, including those of the properties in question, were extended to what had been the east bank. Richard Timmons, defendant's expert, opined that the millrace ran between the plats. He acknowledged that in order to reach his original conclusion regarding the location of the millrace, he had to change the dimensions of the Felch plat. Plaintiffs gave extensive testimony regarding the use of their properties by themselves and their predecessors. Plaintiffs indicated that the understood that they owned the property to the railroad embankment, and that they maintained the property to that point. Doris Case of the Washtenaw County Treasurer's Office testified that property thought to be owned by the railroad and sold to the State of Michigan in 1983 for non-payment of 1980 taxes was in fact owned by the State Highway Department and was not subject to taxation; therefore, it should not have been deeded to the State for non-payment of taxes. John Chlipala, an employee of the AAAC, acknowledged that for the fifteen years of which he had knowledge, the railroad had never taken steps to prevent the owners of the Spring Street properties from using the area to the embankment. The records revealed no deed from Felch or his successors to the railroad.

The court issued written findings of fact and conclusions of law. Accepting Jekabson's testimony regarding the location of the millrace as more persuasive than that given by Timmons, the court located the dividing line between the Felch plat and the Gott plat as the east bank of the millrace. The court noted that to accept Timmons' testimony would require a substantial change in the dimensions of the Felch plat and would mean that the historical records compiled by Samuel Pettibone, who drew both plats, were erroneous. Regarding plaintiffs' use of the disputed property, the court found that the evidence showed that plaintiffs and their predecessors occupied the property to the base of the embankment. Plaintiffs believed that they owned the property to that point; the railroad did not establish

that it attempted to assert ownership of the property. Aerial photographs from 1947 and 1960 established that the line of demarcation was the base of the embankment. The court relied on *Hanlon v Ten Hove*, 235 Mich 227, 231; 209 NW 169 (1926), for the proposition that if a boundary line is acquiesced in for the statutory period of 15 years, it becomes the fixed property line. The court found that the statutory period of 15 years was met in these cases. MCL 600.5801(4); MSA 27A.5801(4). In addition, the court found that plaintiffs acquired title to the disputed property by adverse possession. Plaintiffs and their predecessors used the property openly, visibly, notoriously, exclusively, and continuously for a period of at least 15 years. Regarding the erroneous sale of the disputed property for non-payment of taxes, the court held that while the State had not taken steps to compel the return of the land, as permitted by MCL 211.98; MSA 7.151, the validity of defendant's deed was dubious. On that basis, the court questioned defendant's standing to contest the validity of plaintiffs' property rights. In its conclusions of law, the court held that plaintiffs presented clear and cogent proof both that the boundary line was established by acquiescence at the base of the embankment, and that they acquired the property by means of adverse possession.

In the judgment entered on July 6, 1994 the court made specific technical findings regarding the location of the east bank of the millrace. It ordered that the "easternmost boundary of each Plaintiff's property is the furthest east of either the base of the railroad embankment or the eastern bank of the millrace as set forth herein."

Defendant raises six issues on appeal. None merit reversal, and only two warrant discussion.

Initially, defendant argues that the trial court erred when it found that plaintiffs Knight owned a part of their portion of the disputed area in fee simple because the 1872 Handy deed conveyed only an easement to the railroad. Defendant contends that the deed conveyed a fee interest to the railroad. An unequivocal conveyance to a railroad containing no recitations of purpose, use, etc., conveys a fee simple. The deed conveyed a fee simple because it did not refer to a right of way and because the language referring to use for railroad purposes appeared in the habendum clause rather than in the granting clause. *Jones v Van Bochove*, 103 Mich 98, 100; 61 NW 342 (1894). If the deed does not contain a reverter clause, a statement of use does not limit the grant. *Quinn, supra*, at 151. Defendant asserts that the trial court ignored the substance of the deed. The language stating that the land was to be used for railroad purposes was not in the granting clause.

We disagree. The deed conveyed an easement only and not a fee simple title to the railroad. The instrument itself must be examined to determine the nature of the conveyance. *City of Boyne City v Crain*, 179 Mich App 738, 742-743; 446 NW2d 348 (1989). Upon examination of the entire instrument, it appears that the parties contended that an easement only be conveyed. *Putnam v Pere Marquette Railroad Co*, 174 Mich 246, 252; 140 NW 554 (1913). The deed was a quit claim deed, as opposed to a warranty deed, and was entitled "deed of right of way." The deed conveyed the land to be used for maintaining a railroad and telegraph lines. No other use was permitted. Significantly, and contrary to defendant's assertion, the limiting language was located in the granting clause. These features support the trial court's conclusion that the deed was for an easement only, notwithstanding the fact that the deed did not contain a reverter clause. *Quinn, supra*, at 150-151.

Next, defendant argues that the trial court erred by applying the doctrine of acquiescence to adverse possession to find that all plaintiffs held title to the disputed area. Defendant acknowledges that

the trial court applied the particular theory of acquiescence that holds that if parties acquiesce in and treat a boundary as the true line for the statutory period of 15 years, that boundary becomes the true line as a matter of fact and law and will not be disturbed. *Pyne v Elliott*, 53 Mich App 419, 426-427; 220 NW2d 54 (1974). Defendant contends that the trial court erred by doing so. By its nature, a railroad embankment is not equivalent to a fence, a sidewalk, or any other object commonly considered a boundary. Moreover, plaintiffs did not demonstrate privity with their predecessors in interest so as to establish by tacking the necessary successive periods of possession. *Siegel v Renkiewicz Estate*, 373 Mich 421, 425-426; 129 NW2d 876 (1964). The testimony offered by plaintiffs did not establish that the edge of the embankment had ever been specifically recognized as being the true boundary between plaintiffs' lots and the property owned by the railroad.

This issue is without merit. The doctrine of adverse possession involves elements of hostile possession and claim of right, whereas the doctrine of acquiescence requires the existence of an agreed upon boundary line. *Wood v Denton*, 53 Mich App 435, 439-440; 219 NW2d 798 (1974). Contrary to defendant's assertion, the trial court did not apply the doctrine of acquiescence to the doctrine of adverse possession to find that plaintiffs held title to the disputed property. The court applied the doctrine of acquiescence independently, and found that the evidence showed that the parties and/or their predecessors in interest had adhered to the edge of the embankment as the true boundary line for the requisite statutory period. The boundary was fixed at that point as a matter of law. *Hanlon*, *supra*. This theory of acquiescence does not have a dispute as a prerequisite. *Pyne*, *supra*. The evidence supported the court's findings. Aerial photographs, the earliest from 1947, showed that residents used the area to the edge of the embankment as their own property. The testimony of John Chlipala established that the railroad knew that the property was being used in this manner, and did nothing to change the situation. This evidence established that the railroad tacitly agreed to recognize the edge of the embankment as the boundary between its property and that owned by plaintiffs. *Wood*, *supra*, at 439. Plaintiffs themselves testified that they used the property in such a manner. Under these circumstances, a showing of privity was not required. *Siegel*, *supra*. Defendant's contention that an embankment cannot serve as a physical demarcation because it is uneven is unpersuasive. A waterway cannot be said to be even in width or depth; nevertheless, a waterway commonly serves as such a boundary. The finding of acquiescence applies equally to all plaintiffs.

We affirm in all respects the trial court's judgment determining interest in land quieting plaintiffs' titles in the disputed area.

We have reviewed defendant's remaining issues, and find them to be without merit.

Affirmed. Plaintiffs being the prevailing party, they may tax costs pursuant to MCR 7.219.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly