

STATE OF MICHIGAN
COURT OF APPEALS

EDMUND B. BROWNELL and ELEANOR E.
BROWNELL,

UNPUBLISHED
March 6, 2003

Plaintiffs-Appellants,

v

No. 231480
Benzie Circuit Court
LC No. 99-005479-CH

JOHN M. KILIAN and CATHERINE KILIAN,

Defendants-Appellees.

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

In this quiet-title action, plaintiffs Edmund and Eleanor Brownell (the Brownells) appeal as of right from the trial court's order granting the motion for summary disposition of defendants John and Catherine Kilian (the Kilians) and denying the Brownells' cross-motion for summary disposition. We reverse.

I. Basic Facts And Procedural History

The parties, owners of adjacent lots on Crystal Lake, dispute ownership of a strip of land between their lots. The parties' respective predecessors in interest took from a common grantor, beginning with a conveyance to the Brownells' predecessors in 1922. In 1930, the common grantor conveyed land north of the Brownells' lot to a third party, and at that time recorded a deed restating the original conveyance to the Brownells with slightly different indications to "make descriptions" in the 1922 deed "more definite." The Kilians' chain of title began with a land contract in 1936, which described the parcel in question as "lying immediately south of parcel heretofore sold by vendors herein" to the Brownells' predecessors.

Various conveyances, surveys, and recordings of interests followed over the years, presenting various, sometimes conflicting, descriptions of the boundaries separating the present-day parties' parcels. In 1960, the Kilians commissioned a survey, recorded the 1936 land contract, and engaged in, and recorded, straw transactions, through which they asserted rights over the disputed strip. The Brownells filed suit to quiet title in January 1999, arguing in favor of certain of the conflicting descriptions in the recorded instruments, and asserting theories of adverse possession and acquiescence. The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10).

The trial court granted the Kilians' motion. The trial court ruled that certain language of the corrective deed of 1930, favoring the Kilians, constituted a call superior to other language in

that deed that would have favored the Brownells. The trial court further held that “[t]he failure of the Plaintiffs and their predecessors to assert timely a contrary claim” to the disputed strip “constitutes an acquiescence in the recorded survey and chain of title documents of June 22, 1960.” This appeal followed.

II. The Kilians’ Motion

A. Standard Of Review

The Brownells argue that the trial court erred in allowing the Kilians to proceed with their motion for summary disposition, where the Kilians filed their motion on the eve of the hearing on the Brownells’ own motion. We review a trial court’s general conduct of litigation proceedings for an abuse of discretion.¹ However, we review unpreserved issues for plain error affecting substantial rights.²

B. The Brownells’ Actions

At the hearing on the motions, the Brownells’ attorney showed some displeasure at having to respond to the Kilians’ late-filed motion, but only by stating, “I will attempt to be as to the point as possible but I am given the task of responding to a motion for summary disposition orally rather than having the opportunity to respond in writing.” The Brownells have failed to show that they moved the trial court to strike the Kilians’ motion, moved for an adjournment of the hearing on the motions, or otherwise objected to going forward in the matter. Accordingly, we deem this issue unpreserved.

In their brief argument on this issue, the Brownells fail to indicate precisely how they might have fared better had they had more time to prepare to defend against the Kilians’ motion. The Brownells apparently envisioned no substantial disadvantage in the matter when it arose below, and fail to show any disadvantage on appeal. Thus, not only do they fail to show error below, but they also fail to show that any error that might have occurred was not harmless.³ Nor does the record on its face show that the Brownells suffered any disadvantage in the matter. The failure of preservation below, and of presentation on appeal, is fatal to this issue and we will not entertain it further.

III. Factual Issues

A. Standard Of Review

The Brownells assert that questions of material fact existed to preclude granting summary disposition to the Kilians and proffer interpretations of the evidence different from the trial court’s conclusions. This Court reviews a trial court’s decision on a motion for summary

¹ See *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990).

² *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), citing MRE 103(d).

³ MCR 2.613(A).

disposition de novo as a question of law.⁴ A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim.⁵

The reviewing court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.^[6]

B. The Trial Court's View Of The Evidence

It is apparent that the trial court looked at the evidence objectively, not in the light most favorable to the Brownells, which would have meant presuming the validity of deed descriptions that favored their position rather than choosing between conflicting descriptions. This approach, and the trial court's other enumerated findings of fact, indicate that the trial court improperly granted the Kilians' motion not by reviewing the evidence in the light most favorable to the Brownells, but by resolving contested issues in ways that happened to favor the Kilians.

The Kilians, however, assert that the parties agreed to have the trial court decide the case on the basis of evidence and argument already before it, while the Brownells insist that they never agreed to forego trial and proceed to decision if their own motion was denied. While arguing the motions, the Kilians' attorney stated, "we can't present witnesses, we can't present anybody that is going to change your mind. You have to go back and look at what was intended based on the rules of interpretation, and the logic, the mathematics of those deeds . . ." The trial court asked if the parties agreed "that this case will be decided without any witnesses and based on the arguments and the documents presented . . ." The Brownells' attorney sought clarification, and the trial court stated, "[i]t decides the case, doesn't it? If I grant your summary disposition, you win. If I grant his, he wins," to which the Brownells' attorney replied, "That's what we understand. That's what we are asking for."

A party may not stipulate to a procedure in the trial court and then raise it as an error before this Court.⁷ However, parties may not stipulate to inherently flawed proceedings. "[N]either the common law nor any statute has ever . . . given the least countenance to the notion that parties by stipulation might require the . . . violation of the fundamental principles of procedure."⁸

Our reading of the transcript leads us to conclude that the Kilians' attorney only implied that no further evidence would be brought that would bear on the case, and the Brownells' attorney only conceded that summary disposition, if granted, would decide the case. We conclude that the trial court, on its own initiative, stretched the competing (C)(10) motions into a

⁴ *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

⁵ *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001).

⁶ *Id.* (citations omitted).

⁷ See *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

⁸ *Harris v Sweetland*, 48 Mich 110, 112; 11 NW 830 (1882).

full adjudication on the merits as an expedient. Even if the Brownells failed to object vigorously to this approach, any implied stipulation to conflate the parties' motions with a full trial on the merits of the case is nonetheless invalid as a stipulation to a violation of fundamental principles of procedure.⁹

Moreover, the decision below cannot be considered to be one on stipulated facts. Despite many apparent points of agreement between the parties, they did not submit any formal stipulation for purposes of adjudication.¹⁰ Further, even if the trial court did endeavor to comb the record to identify facts not in dispute, such facts in this case would generally be limited to the wording of the various deeds of record and would not include particulars attendant to the questions of acquiescence or adverse possession. Thus, the apparently agreed-upon facts were not "sufficient to enable the court to render judgment in the action."¹¹

Nor can treating the decision below as a proper adjudication on the merits of the case save it. On appeal, the Brownells challenge some of the trial court's factual findings, including its conclusion that they acquiesced in the Kilians' assertion of right to the disputed strip. The Brownells presented to the trial court a copy of a letter from Edmund Brownell to the Kilians' predecessors in interest, dated August 17, 1960, detailing the history of the parties' parcels, asserting the existence of certain boundary markers at certain times, and concluding with the emphatic statement:

You are hereby notified that Edmund B. Brownell . . . does not acquiesce in or consent to your removal of the certain boundary monuments, nor does he recognize your attempt to change the boundary line long treated and acquiesced in as the true line between the [disputed] lots You are hereby requested to replace the boundary monuments which you removed in the Spring of 1960 to the original position from which you removed them, which for over 15 years has been the accepted and intended boundary line between the . . . lots.

The letter additionally describes a "white lattice-work wooden fence" constructed by the Brownells' predecessor in interest in 1936 "to a point even with the Southeasterly boundary monument" which the common grantor recognized as marking the true edge of the lot, and that, as of the time of writing, "[t]he fence has continued to stand as constructed," and the Kilians' predecessors in interest never "disputed the boundary line thus established." The letter's following assertion bears directly on the Brownells' adverse possession theory:

This boundary line as defined by the wooden fence, the graded portion of the highway, and the boundary monuments were intended by [the Brownells' predecessor in interest] and his successors in title to mark the boundary between the . . . lots. [The Brownells' predecessor] and his successors in title have possessed and claimed ownership of the area, delineated on the south by the south end of the wooden fence and of the graded portion of the highway and the

⁹ *Harris, supra.*

¹⁰ MCR 2.116(A)(1).

¹¹ MCR 2.115(A)(2).

boundary monuments removed by [the Kilians' predecessor] in 1960, in adverse possession for more than 15 years.

The trial court does not acknowledge this letter in its decision, let alone explain its conclusions that are contrary to the letter's assertions. Further, because there was no trial, the trial court never ruled on the admissibility or veracity of the letter. The same problems arise with two other letters appended to the Brownells' motion for summary disposition, in which the Kilians' predecessor in interest, acting as the Brownells' predecessor's attorney for a tax matter in 1952, purportedly accepted the representations of the Brownells' predecessor at face value concerning the now-disputed boundaries.

Finally, we find it difficult even to ascertain the basis for the trial court's key conclusion that a certain call in the "corrective deed" of 1930 prevails over another call in that deed. At issue is the following description:

Beginning at a point 472 feet South 30 deg. West of Northeast corner of Lot Two (2) on meander line of Crystal Lake, said point intended to be 290.9 feet North 30 deg. East of 1/16 line running East and West through said Lot 2, thence South 30 degrees West 308.4 feet

The trial court ruled that the words, "said point intended to be 290.9 feet North, 30 deg. East of 1/16 line running East and West through said Lot 2" constitute the superior call, and thus prevail over the words, "[b]eginning at a point 472 feet South 30 deg. West of Northeast corner of Lot Two (2) on meander line of Crystal Lake" Because this reading favors the Kilians' position, the Brownells, naturally, insist that the language that the trial court deemed inferior should have been ruled superior.

Canons exist for deciding between conflicting surveyor's calls; for example, that monuments prevail over course or distance.¹² General principles of legal language construction come to bear as well, such as that the specific overrides the general.¹³ However, in the exercise above, it is not apparent that the trial court applied any of these principles in deciding between the two conflicting descriptions or, indeed, whether either of the conflicting calls has an advantage.

For these reasons, we conclude that this case was improperly decided on summary disposition and, accordingly, we vacate the decision below and remand the case to the trial court for trial or decision on properly stipulated facts.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra

¹² *Adams v Hoover*, 196 Mich App 646, 653; 493 NW2d 280 (1992); *Boekeloo v Kuschinski*, 117 Mich App 619, 625-626; 324 NW2d 104 (1982), citing *Poch v Urlaub*, 357 Mich 261, 275; 98 NW2d 509 (1959), citing 5A Thompson on Real Property, § 2725, p 1158.

¹³ See *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994).