

STATE OF MICHIGAN
COURT OF APPEALS

RUSSELL SEMON and KIMBERLY SEMON,

Plaintiffs/Counter Defendants-
Appellants,

v

JOHN CHOMIN and CATHERINE FERRARA,

Defendants/Counter Plaintiffs-
Appellees.

UNPUBLISHED

April 26, 2005

No. 253958

Livingston Circuit Court

LC No. 02-019528-CK

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

In this real property dispute between neighbors, plaintiffs appeal by right two orders granting defendants summary disposition. We affirm.

Defendants' property rights include a recorded easement across part of plaintiffs' property. This dispute arose after defendants decided to subdivide their property into three lots for development. To access the lots, defendants needed to make use of their easement. When defendants told plaintiffs they intended to begin using the easement, plaintiffs filed the instant suit.

Plaintiffs argue that the trial court erroneously granted defendants' motion for summary disposition after concluding that defendants had not abandoned the easement. After de novo review of the documentary evidence in a light most favorable to plaintiffs, we disagree. See MCR 2.116(C)(10); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

The essential elements of abandonment are an intent to relinquish the property and acts putting that intention into effect. *Strong v Detroit & Mackinac Ry Co*, 167 Mich App 562, 569; 423 NW2d 266 (1988). Nonuse by itself is insufficient to show abandonment. *Id.* Plaintiffs have failed to show by clear and cogent evidence that defendants intended to relinquish their recorded easement. First, defendants repeatedly asserted to the trial court that they had always planned on using the easement when they subdivided their property. Defendants' affidavits also support that they planned on using the easement and did not intend to abandon it. Plaintiffs offered no evidence to the contrary. Second, defendants' placement of a partial fence over the easement is not clear evidence that they intended to abandon it. At his deposition, defendant Chomin testified that he built the fence "to stop motorcycles and kids [from] riding their dirt

bikes and cars from driving down there.” Finally, plaintiffs’ acts are irrelevant to whether defendants intended to abandon their easement. The proper question is whether defendants’ actions showed their clear intention to abandon their easement. We find that plaintiffs have not raised a genuine issue of material fact with regard to whether defendants’ actions showed a clear intention to abandon the easement. See MCR 2.116(C)(10); *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Plaintiffs next argue that the trial court erred when it failed to conclude that they acquired defendants’ easement through acquiescence. We disagree. The doctrine of acquiescence promotes peaceful resolution of boundary disputes and applies when property owners mistakenly treat something, such as a fence, as the property line. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001); *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000). Although there does not have to be a bona fide dispute about the property, a mistake about the boundary line is central to the majority of cases involving acquiescence in Michigan. *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). Here, acquiescence does not apply because nothing in the record indicates that plaintiffs or defendants were mistaken about the boundary line or that the location of the boundary was disputed.

Plaintiffs also claim that the trial court erroneously concluded that they failed to acquire the easement through adverse possession. We disagree. To establish adverse possession the claimant must prove by clear and cogent evidence that its possession was actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years, as well as hostile and under a claim of right. *McQueen v Black*, 168 Mich App 641, 643; 425 NW2d 203 (1988). Plaintiffs’ attempts to establish adverse possession of defendants’ easement simply by planting trees, building a berm on part of the property, and “maintaining a drainage ditch” are insufficient. See *Nicholls v Healy*, 37 Mich App 348, 349; 194 NW2d 727 (1971). More importantly, plaintiffs have failed to satisfy the statutory time period of fifteen years.

Finally, plaintiffs argue that the trial court erred when it failed to conclude that they acquired the easement by prescription. We disagree. This legal theory is inapplicable here because a landowner does not acquire an easement by prescription over the landowner’s own property. An easement is the right to use land of another for a specified purpose. *Schadewald v Brulè*, 225 Mich App 26, 35-36; 570 NW2d 788 (1997). In this case, plaintiffs are trying to dispossess defendants of their easement over plaintiffs’ property; they are not trying to acquire an easement by prescription.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage