

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM ROBERT BELONGA and
REBECCA J. BELONGA,

UNPUBLISHED
October 16, 2012

Plaintiff-Appellants,

v

No. 306977
Mackinac Circuit Court
LC No. 10-006947-CH

ELGIE EUGENE DOW and JANICE DOW,

Defendant-Appellees.

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

In this property dispute between neighbors, plaintiffs appeal by right the decision of the circuit court quieting title in favor of defendants following bench trial. The court ordered that the parties' property line dispute be resolved consistent with a survey offered at trial by defendants. We affirm.

The parties own adjoining parcels of land in St. Ignace. The shared boundary line between the properties is the western boundary of plaintiffs' property and defendants' eastern boundary. Plaintiffs filed a complaint to quiet title on a four to five foot strip of land along their western boundary. Plaintiffs and their predecessors in title had used the property for a period of at least 16 years at the time of trial, as one of plaintiffs' predecessors in interest, James Horn, testified that he built a retaining wall on the disputed property in 1994 or 1995. However, Horn also testified that he asked defendants' permission prior to building the wall because he believed it was on defendants' property. Horn's immediate successor in title, Gary Bassett, testified that he maintained the wall and also added a drain to it in order to prevent flooding in his garage, which was attached to the retaining wall. Bassett testified that he asked defendants' permission before adding the drain.

The trial court agreed with defendants that no boundary dispute existed between the parties. Rather, the court found that plaintiffs' dispute regarding overlap was with their neighbors to the east, who were not a party to this case. Without reaching the issue of whether plaintiffs' eastern boundary is a matter of controversy, we agree with the trial court's conclusion quieting title in favor of defendants.

I. SUPERIORITY OF TITLE

Plaintiffs argue first that they are entitled to title to the disputed property because their deed was recorded prior to defendants' deed. Plaintiffs' property is described as follows:

A portion of Private Claim 13, described as follows: The East 98.8 feet as measured along McCann Street on the North and the 20.00 foot alley on the South of the following: Beginning at the intersection of the Southerly boundary line of McCann Street with the Easterly boundary line of Chambers Street in the City of St. Ignace, Michigan; thence North 80° East 193.8 feet along the Southerly boundary line of said McCann Street to the westerly line of the A. L'Hullier lot (monument found at the Northwest corner of said L'Hullier lot); thence South 10° East 156.5 feet along the Westerly line of said L'Hullier lot to an alley 20.00 feet wide (monument found at said Southwest corner of the said L'Hullier lot); thence South 80° West 193.8 feet along the Northerly boundary line of said 20.00 foot alley to the intersection of the Easterly boundary line of Chambers Street; thence North 10° West 156.5 feet along the Easterly boundary line of said Chambers Street to the Place of Beginning.

The recorded description of defendants' property states as follows:

Beginning at the intersection of the S'ly boundary line of McCann St with the E'ly boundary line of ChambersSt [sic] in the City of St. Ignace, Mich; thence N80°E 193.8 ft along the S'ly boundary line of said McCann St to the W'ly line of the A.L'Hullier [sic] lot (monument found at NW corner of said L'Hullier lot); thence S10°E 156.5 ft along the W'ly line of the said L'Hullier lot to an alley 20 ft wide (monument found at said SW corner of the said L'Hullier lot); thence S80°W 193.8 ft along the N'ly boundary line of said 20 ft alley to the intersection of the E'ly boundary line of said Chambers St; thence N10°W 156.5 ft along the E'ly boundary line of said Chambers St to the place of beginning, EXCEPT the East 98.8 feet thereof as measured along McCann Street on the North and the 20 foot alley on the South, and being a portion of Private Claim 13, City of St. Ignace, Michigan.

Plaintiffs argued that their claim to the disputed property was superior because the parties had received their parcels from a common grantor, Alfred and Edith Thibault, and the deed from the Thibaults to plaintiffs' predecessors in title was recorded before defendants' deed was granted or recorded. The trial court did not discuss plaintiffs' theory regarding superiority of title in detail in its written opinion and order; rather, the court stated that it agreed with defendants' conclusion that "no overlap exists, only that the true boundary line has yet to be established on Plaintiff's [sic] east lot line."

Plaintiffs' deed grants them the "East 98.8 feet as measured along McCann Street," beginning at the "Southerly boundary line of McCann Street with the Easterly boundary line of Chambers Street." Although plaintiffs did not offer a survey drawing at trial, defendants offered a survey drawing done by Neil Hill from his August 2010 survey of the property. Hill's survey shows the parties' parcels with Hill's findings regarding boundary lines, as well as a third party's

parcel on the eastern border of plaintiffs' property. Hill testified that he relied on a survey of the properties from 1966 by a surveyor named T.L. Jackson in conducting his own survey. Hill told the court that he found pins marking the southwest, southeast, and northeastern corners of defendants' property, which presumably were placed by Jackson.

Defendants' deed granted them 193.8 feet minus 98.8 feet, or 95 feet, along McCann Street. According to Hill, however, the original combined lot (defendants' and plaintiffs' lots together) did not measure 193.8 feet along McCann Street, because the western boundary of a third party's lot began at a distance of 188.93 feet from the starting point of the parties' deeds located at the northwest corner of the block. In addition, Hill testified that he was not able to find any pins marking the original 193.8 foot parcel. Relying on the pins that he did find, Hill measured defendants' lot at 94.73 feet along McCann Street. Hill testified that he determined the measured distance of plaintiffs' property to be 94.19 feet, not 98.8 feet. Hill did not find a pin marking the eastern boundary of plaintiffs' property, and opined that it was unlikely such a pin had ever been placed there because a concrete driveway was poured near the border by plaintiffs' neighbors to the east, which Hill believed predated Jackson's survey.

Plaintiffs argue that based on the specific language of their deed and their superior claim to title, the trial court should have granted them the full 98.8 feet along McCann Street deeded to them in their warranty deed, instead of giving defendants nearly their full recorded measurement and taking the difference out of their property's description. However, as defendants correctly note on appeal, plaintiffs' claim to superior title is not applicable to the facts of the instant case because a third party's property overlaps the original parcel's measurement, according to Hill's survey. Assuming that Hill's survey is accurate, and plaintiffs did not offer their own survey or survey drawing at trial,¹ some error may have occurred in either the measurement of the combined original parcel, or in the measurement of the third party's lot, because there is a difference of 4.87 feet between the measured length of the original lot and its recorded length. Whatever error may have occurred, it was not error for the court to agree with defendants and find that plaintiffs were not entitled to the disputed area based on superiority of title.

II. ADVERSE POSSESSION

Plaintiffs argue next that defendants were estopped from asserting a defense of adverse possession or acquiescence because defendants had conducted themselves in a manner that caused plaintiffs to believe the retaining wall was the true boundary line. According to plaintiffs, defendants did so by failing to occupy the property east of the retaining wall, by suggesting that the Bassetts build a drain on the property to prevent flooding of their garage, and by acting as though the retaining wall was the boundary line when plaintiffs repaired it.

The circuit court found that defendants were entitled to assert a defense of adverse possession "given [their] activities on the property for a period in excess of 15 years," and based

¹ Plaintiffs offered the testimony of their own surveyor, James Granger, who examined Hill's survey but did not survey the property himself.

on its determination that the Horns and the Bassetts had conceded the location of the property line. The court rejected plaintiffs' argument that defendants were estopped from asserting the defense and found that plaintiffs had failed to perform their own "due diligence" upon purchasing the property to determine the existence of boundary pin locations. The court stated further that "[t]o seek and receive equity requires a reciprocal approach," and plaintiff William Belonga could not expect sympathy from defendants after his own "antagonistic behavior." Plaintiffs do not respond to this part of the court's opinion, but reassert on appeal their argument that the doctrine of equitable estoppel prevents defendants from benefitting from their conduct inducing plaintiffs and their predecessors in title to believe that the retaining wall was the property line.²

Equitable estoppel "arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994).

Plaintiffs' argument that defendants' claim to the disputed property is barred by equitable estoppel is not supported by the available evidence. James Horn testified that in 1994 or 1995 he asked defendant Eugene Dow for permission to build a retaining wall on the disputed property. Horn testified that he believed the property belonged to defendants because Horn apparently recognized the property line being marked by a stake located on the west side of the house that was in line with an ash tree on the land (Tr, 52-53). Gary Bassett testified that *with defendant Eugene Dow's permission*, he installed a drain that went through a hole in the retaining wall onto defendants' property in order to alleviate a flooding problem in his garage. And although plaintiff William Belonga stated that defendant Eugene Dow asked him to repair the wall because "the rock that was supporting the wall was falling onto his property," Dow disputed that he had made such a request. There was also evidence that both parties used and maintained the area around the wall. Under these circumstances, equitable estoppel does not apply.

² Plaintiffs cite the elements of promissory estoppel stated by this Court in *Schipani v Ford Motor Co*, 102 Mich App 606, 612; 302 NW2d 307 (1981), which are as follows:

- (1) a promise;
- (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee;
- (3) which in fact produced reliance or forbearance of that nature; and
- (4) in circumstances such that the promise must be enforced if injustice is to be avoided.

This doctrine is not applicable in the instant case, because no promises were made between the parties or between defendants and plaintiffs' predecessors in title.

As for the defensive use of adverse possession, the trial court did not decide the case on this basis.

To establish adverse possession, the party claiming it must show “clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right.” After the statutory period ends, the record owner’s title is extinguished and the adverse possessor acquires “legal title” to the property. Acquisition of title in this manner includes “the right to defend the possession and to protect the property against the trespass of all others.” [*Beach v Twp of Lima*, 489 Mich 99, 106-107; 802 NW2d 1 (2011).]

In the instant case, the evidence of record shows that neither party’s use of the property was exclusive, as defendants testified that they parked their boats in the area of the retaining wall, and both parties claimed to have maintained it at different times. In addition, neither party’s use was hostile for the requisite 15-year period, as plaintiffs’ predecessors in title testified that they asked defendants’ permission before building the wall and adding the drain, and plaintiffs had occupied the property only for a period of five years at the time of trial. Moreover, if defendants’ claim to the disputed property is that they are the rightful owners of it based on their deed and a survey dating back to 1966, their claim of ownership was a matter of record, and thus a defense of adverse possession is not applicable.

III. GREAT WEIGHT OF THE EVIDENCE

Plaintiffs assert that the trial court’s findings of adverse possession and acquiescence are not supported by the great weight of the evidence. However, the trial court did not indicate that its decision was based on these doctrines. Rather, the court concluded that “no overlap [between the properties] exists, only that the true boundary line has yet to be established on Plaintiff’s [sic] east lot line.” The court also held that defendants’ reliance on two cases, *Flynn v Glenny*, 51 Mich 580; 17 NW 65 (1883) and *Johnson v Squires*, 344 Mich 687; 75 NW2d 45 (1956), was “well founded . . . given the Defendants’ activities on the property for a period in excess of 15 years.” For the reasons discussed above, defendants may not assert a defense of adverse possession in this case. However, we conclude that defendants’ claim that plaintiffs (or their predecessors) acquiesced to the location of the property line has merit.

There are three theories of acquiescence: “(1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from intention to deed to a marked boundary.” *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000).³ “[A]cquiescence to a boundary line may be established where the line is acquiesced in for the statutory period irrespective of whether there has been a bona fide controversy regarding the boundary.” *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). This Court

³ Each of these three theories is explained in *Pyne v Elliott*, 53 Mich App 419, 426-428; 220 NW2d 54 (1974).

explained the first theory of acquiescence in *Kipka v Fountain*, 198 Mich App 435; 438-439; 499 NW2d 363 (1993):

The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land.

In *Flynn*, our Supreme Court held that whether an original survey was done with mathematical accuracy is not dispositive in determining property lines; rather, “[p]urchasers of town lots have a right to locate them according to the stakes which they find planted and recognized, and no subsequent survey can be allowed to unsettle their lines.” *Flynn*, 51 Mich at 584. Further, the Court held that even if survey stakes were not placed with “absolute accuracy,” if stakes “were planted by authority, and the lots were purchased and taken possession of in reliance upon them[, then] . . . they must govern, notwithstanding any errors in locating them.” *Id.*

In *Johnson*, the Court cited with approval previous cases holding that “the acquiescence of predecessors in title can be tacked on that of the parties, and if the whole period of acquiescence exceeds 15 years, the line becomes fixed, regardless of whether there had been a bona fide controversy as to the boundary.” *Johnson*, 344 Mich at 692 (citations and internal quotation marks omitted). The *Johnson* Court further held that

a boundary line long treated and acquiesced in as the true line, ought not to be disturbed on new surveys. Fifteen years' recognition and acquiescence are ample for this purpose and in view of the great difficulties which often attend the effort to ascertain where the original monuments were planted, the peace of the community requires that all attempts to disturb lines with which the parties concerned have long been satisfied should not be encouraged. [*Id.* at 692-693 (citations and internal quotation marks omitted).]

Plaintiffs argue that their predecessors in title did not acquiesce to the location of the eastern boundary line as shown on Hill's survey, but rather thought that the property line was in line with the retaining wall. However, the testimony of plaintiffs' predecessors does not support this argument. James and Colleen Horn both testified that they believed the retaining wall was on defendants' property, and that they asked defendant Eugene Dow for permission to build it there. Colleen Horn also testified that she ascertained her property line using the pin on McCann Street in line with an ash tree on the property. She also testified that she did not tell the Bassetts that the retaining wall had been built on defendants' property and by permission; under *Johnson*,

however, the Bassetts were bound by the property lines that the Horns and defendants believed to be in place. *Id.* at 692. Although Gary Bassett testified that he did not know or care where the property lines on his property were, he also testified that he asked defendant Eugene Dow for permission to build a drain that would flow out onto Dow's property and through a hole in the retaining wall. Therefore, the trial court's finding that plaintiffs' predecessors in title had acquiesced to the property line as defendants located it was not against the great weight of the evidence.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder