

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD J. DELEKTA,

Plaintiff-Appellee,

v

EDWARD M. MULAK,

Defendant-Appellant.

UNPUBLISHED

August 14, 2012

No. 305169

Macomb Circuit Court

LC No. 2009-003036-CH

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff's motion for summary disposition and quieting title to a disputed strip of land in favor of plaintiff under the doctrine of adverse possession. Defendant argues that the trial court erred because plaintiff failed to establish that his possession of the disputed land was actual and hostile. We affirm.

This case arises from a dispute over ownership of a 12 foot wide strip of land located between plaintiff's residential parcel and defendant's farmland. On appeal, defendant contends that the trial court erred in granting plaintiff's motion for summary disposition. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In an equitable action, this Court reviews the trial court's factual findings for clear error, and it reviews the trial court's legal conclusions de novo. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007).

To establish adverse possession, the party must show by clear and cogent proof that its possession of the property was "actual, visible, open, notorious, exclusive, hostile, under cover of a claim or right, continuous, and uninterrupted for the statutory period of 15 years." *Beach v Lima Twp*, 283 Mich App 504, 512; 770 NW2d 386 (2009); MCL 600.5801. Generally, "the true owner must have actual knowledge of the hostile claim or the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally." *Burns v Foster*, 348 Mich 8, 15; 81 NW2d 386 (1957).

Defendant first argues that plaintiff failed to establish actual possession of the disputed strip of land. "The owner of the record title need not, of course, take any affirmative possession of his property, but may simply hold it for future use or sale. However, one claiming title by adverse possession must show positive and affirmative acts of ownership." *Barley v Fisher*, 267

Mich 450, 453; 255 NW 223 (1934). Defendant contends that plaintiff's actions of cutting the grass, planting trees and grass seed, constructing a berm, and leaching pond water onto the land are insufficient to establish actual possession. We disagree. Defendant relies on *Doctor v Turner*, 251 Mich 175, 186; 231 NW 115 (1930), to assert that plaintiff's maintenance of the disputed area as residential land was "not an act manifesting a purpose to take possession as owner, and does not constitute actual possession." While occasional or periodical entry upon land to cut grass is insufficient to constitute actual possession, the entry and use must be examined in light of the character of the premises and is contingent on the facts and circumstances of the case. *Jonkers v Summit Twp*, 278 Mich App 263, 273; 747 NW2d 901 (2008).

In this case, plaintiff's conduct extended beyond the mere occasional or periodical entry to cut wild grass. In the 1970's, plaintiff acquired farmland adjacent to the disputed strip of land. He altered his land from farmland to residential by planting grass seeds and trees and building a home. Similarly, he planted grass and trees on the disputed strip of land. In 1973, he constructed a berm that partially extended onto the disputed strip of land. Plaintiff also built a pond on his land that leached water onto the disputed strip of land. Since the 1970's, plaintiff used his land, including the disputed strip of land, for residential purposes. For more than 30 years, plaintiff maintained the disputed strip of land by trimming the trees, sowing grass seed, mowing the grass, and maintaining the berm. His entry upon the strip of land was not occasional or periodical. Rather, it was purposeful and recurrent. He entered the disputed area to mow and maintain the grass and trees in a manner consistent with how residential lawns are maintained. Plaintiff thus deliberately altered the character of the land, and maintained that altered character by his positive and affirmative acts of ownership.

Defendant directs this court to our decision in *Semon v Chomin*, unpublished opinion per curiam of the Court of Appeals, decided April 26, 2005 (Docket No. 253958). Notwithstanding the fact that *Semon* is not binding on this panel, MCR 7.215(C)(1), we find it distinguishable. *Semon* involved a claim that the plaintiffs had acquired defendant's easement on their property through adverse possession. *Id.*, unpub op at 2. Although the panel stated that plaintiffs' actions in "planting trees, building a berm on part of the property, and 'maintaining a drainage ditch'" were insufficient to establish adverse possession of the easement, the panel found it more important that plaintiffs had failed to satisfy the statutory time period of fifteen years. *Id.* Additionally, no evidence was presented in *Semon* that the plaintiffs altered the essential character of the land, or even that their actions rendered the easement unusable.

Here, in addition to plaintiff's act of altering the character of the land from farmland to residential, extending a berm onto the disputed property and maintaining the property as a residential lawn, plaintiff's pond continuously leached onto the disputed strip of land. While Charles Cryderman (the former owner of defendant's property) and David Ruczynski (defendant's lessee) attested that they had never "witnessed" plaintiff using the disputed strip of land, their testimony also indisputably establishes that they were aware that plaintiff used it, because the overflow from his pond precluded their use of the land for farming purposes. Plaintiff's entry and use satisfies the actual, open, visible, and notorious elements of adverse possession because plaintiff's actions gave "notice to the world that the right of the true owner is invaded intentionally." *Burns*, 348 Mich at 15.

Defendant also argues that plaintiff failed to establish that his possession was hostile. We disagree. For purposes of establishing adverse possession, the possession must be hostile and under cover of a claim of right. *Wengel v Wengel*, 270 Mich App 86, 92; 714 NW2d 371 (2006).

The term hostile, as employed in the law of adverse possession is a term of art and does not imply ill will; rather, hostile use is that which is inconsistent with the right of the owner, without permission asked or given, and which would entitle the owner to a cause of action against the intruder. [*Id.* at 92-93 (citations and internal quotation marks omitted).]

The acts or uses sufficient to constitute adverse possession are contingent on the facts and circumstances in each case and, to some extent, depend upon the character of the premises. *Jonkers*, 278 Mich App at 273.

In this case, plaintiff used the disputed land in a manner inconsistent with the rights of the owner. In the 1970's, plaintiff changed the character of the land. He planted grass, trees, and constructed a berm that extended onto the disputed strip of land. Also, plaintiff allowed his pond to leach onto the disputed land. Plaintiff's use of the land prevented the owners, including defendant, from using the land to farm. In fact, Cyderman and Ruczynski testified that the disputed strip of land was not suitable for cultivation because it was too wet from the leaching pond. Plaintiff thus "exercised the powers of ownership in such a way that they deprived [defendant] . . . of any meaningful possession of the land." *Kipka v Fountain*, 198 Mich App 435, 441; 499 NW2d 363 (1993).

We therefore conclude that the elements of adverse possession were met, and that the trial court properly granted summary disposition in favor of plaintiff.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra