

NOTICE
Decision filed 04/16/19. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2019 IL App (5th) 180460-U

NO. 5-18-0460

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

JAMES E. KECK, Individually; JAMES E. KECK,)	Appeal from the
as Trustee of the James Keck and Carolyn Keck; and)	Circuit Court of
Revocable Living Trust Dated June 29, 1999; and)	Clay County.
DORIS Y. KNOWLES, as Trustee of the Doris Y.)	
Knowles Grantor Revocable Trust Dated May 31,)	
1991,)	
)	
Plaintiffs-Appellees,)	
)	
v.)	No. 16-CH-4
)	
FLOYD WAYNE CARDER, DARRELL R.)	
CARDER, DARLENE M. NEVINS, DENNIS K.)	
CARDER, LLOYD CARDER, and DORIS)	
CARDER,)	Honorable
)	Michael D. McHaney,
Defendants-Appellants.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* Order granting summary judgment in favor of the plaintiffs on their claim for adverse possession reversed where credibility determination is required based on the contradictory facts set forth in the affidavits and counteraffidavits regarding the history of the use of the land in question as between the parties.

¶ 2 The defendants, Floyd Wayne Carder, Darrell R. Carder, Darlene M. Nevins, Dennis K. Carder, Lloyd Carder, and Doris Carder, appeal the March 9, 2018, order of the circuit court of Clay County that granted summary judgment in favor of the plaintiffs, James E. Keck, individually; James E. Keck, as trustee of the James Keck and Carolyn Keck Revocable Living Trust Dated June 29, 1999; and Doris Y. Knowles, as trustee of the Doris Y. Knowles Grantor Revocable Trust Dated May 31, 1991, on count I of their first amended complaint (complaint). For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 **FACTS**

¶ 4 On September 12, 2016, the plaintiffs filed the complaint against the defendants in the circuit court of Clay County. The plaintiffs are record owners of eight acres of land (Keck Land) pursuant to a chain of title dating back to 1941. The defendants are record owners of an adjacent tract of land (Carder Land) pursuant to a chain of title also dating back to 1941. The complaint alleges that on or about October 15, 1941, Marguerite Keck, as a predecessor in title to the plaintiffs, was deeded the Keck Land, at which time she, along with her husband, entered upon and began farming approximately 3.43 acres of the Carder Land (Disputed Land). In addition, the complaint alleges that at the same time, Marguerite Keck and her husband entered upon and began accessing the Keck Land and the Disputed Land on, over, and through approximately one acre of the Carder Land (Disputed Access). The complaint contains legal descriptions of the Keck Land, the Carder Land, the Disputed Land, and the Disputed Access.

¶ 5 The complaint alleges that, from October 1941 to March 1982, the plaintiffs' predecessors in title entered onto and farmed the Keck Land and the Disputed Land and accessed both on, over, and through the Disputed Access and treated both the Disputed Land and the Disputed Access as their own property. Furthermore, the complaint alleges that from March 1982 until the spring of 1990, the plaintiff, James E. Keck (James), personally farmed the Disputed Land and used the Disputed Access, treating both as the plaintiffs' own property. Finally, the complaint alleges that, from the spring of 1990 until the fall of 2015, the plaintiffs rented the Keck Land, the Disputed Land, and the Disputed Access to Myron Weidner, who farmed the Disputed Land and used the Disputed Access in the same manner as had James and the predecessors in title. According to the complaint, at no time in the approximately 73 years prior to the filing of the complaint had the plaintiffs' possession and ownership of the Disputed Land and Disputed Access been questioned, halted, or challenged. Rather, since James helped his father farm in the 1940s, the Disputed Access has been used as the boundary line between the Keck Land and the Carder Land.

¶ 6 According to the complaint, prior to the harvest of the 2015 crop, the defendants approached the plaintiffs regarding the boundary line issue, and after a review of the title work, it appeared that the plaintiffs and the plaintiffs' predecessors in title were adversely possessing the Disputed Land and Disputed Access. Count I of the complaint sought to quiet title in the Disputed Land and to confirm an ingress and egress easement on, over, and through the Disputed Access in the plaintiffs' favor. The remaining counts of the complaint are not at issue in this appeal.

¶ 7 On June 19, 2017, the plaintiffs filed a motion for summary judgment as to count I of the complaint. Exhibit A to the motion is James's affidavit, wherein he avers as follows. From March 1982 until the spring of 1990, a time span of approximately eight years, he personally farmed the Keck Land and the Disputed Land on, over, and through the Disputed Access, as legally described in the complaint, and treated both the Disputed Land and the Disputed Access as his own property. He based his farming of the Keck Land and the Disputed Land, and his use of the Disputed Access, upon his understanding and knowledge of the farming conducted by his predecessors in title, including but not limited to his knowledge from assisting his father in farming in the 1940s. The Disputed Access has been used as the boundary line between the Keck Land and the Carder Land since at least that time.

¶ 8 In his affidavit, James further avers that, from the spring of 1990 until the fall of 2015, a time span of a little more than 25 years, he rented the Keck Land, the Disputed Land, and the Disputed Access to Myron Weidner. During that time period, Myron Weidner farmed both the Keck Land and the Disputed Land and accessed both on, over, and through the Disputed Access. James continues by averring that, for a minimum period of approximately 33 continuous years, he and his tenant farmer have had and maintained exclusive and actual physical possession of the Disputed Land and the Disputed Access by farming and leasing the Disputed Land and by using the Disputed Access as access to the Keck Land and the Disputed Land. At no time from March 1982 through fall of 2015 was the plaintiffs' possession and ownership of the Disputed Land and Disputed Access ever questioned, halted, or challenged. For all purposes, including

but not limited to leasing, herbicide spraying, fertilizer and lime applications, and tilling, planting and harvesting of crops, James and the other plaintiffs have used, possessed, and maintained the Disputed Land and the Disputed Access as their own property.

¶ 9 James's affidavit continues by stating that he had obtained aerial photographs from the United States Department of Agriculture (USDA) Farm Service Agency office in Louisville, Illinois, showing crop production on the Keck Land.¹ These are attached to his affidavit, and he avers that the photographs are consistent with his memory and observations of the farming operations on the Keck Land as he has described in his affidavit. James also avers that he has reviewed aerial photographs of the Keck Land from the office of the Clay County Supervisor of Assessments, which are also attached to his affidavit and are part of the record on appeal. James avers that these aerial photographs are consistent with his memory and the farming operations he has described as well.

¶ 10 Exhibit B to the motion for summary judgment is the affidavit of Myron Weidner, who avers that he has been the tenant farmer of the Keck Land, is familiar with the Carder Land, has personally farmed the Keck Land and the Disputed Land from 1990 until 2015, and has accessed both from the Disputed Access, treating both the Disputed Land and the Disputed Access as the property of his landlords. He at all times has treated the Disputed Access as the boundary line between the Keck Land and the Carder Land. At no time during this timeframe has his farming of the Disputed Land and use of the

¹The copies of these photographs that are contained in the record on appeal are in black and white, making it impossible for this court to ascertain the crop lines they depict, which are indicated using a color key.

Disputed Access on behalf of the plaintiffs been questioned, halted, or challenged. He too avers that the aerial photos from the USDA Farm Service Agency and the Clay County Supervisor of Assessments are accurate depictions of farm operations on the relevant parcels. Exhibit C to the motion for summary judgment is a Plat of Survey conducted by Shawn Taylor of Charleston Engineering, Inc., depicting the Disputed Land and the Disputed Access.

¶ 11 On October 10, 2017, the defendants filed a response to the motion for summary judgment. The defendants attached a survey of the Carder property and the affidavit of Darrell R. Carder to the response. In his affidavit, Mr. Carder avers that he has farmed the Carder Land for approximately 29 years by himself and 5 years with his son, Shane Carder. Mr. Carder further avers as follows:

“Over the course of affiant farming the property, affiant has had discussions with both Myron Weidner and James Keck regarding the confusion of the boundary line between Plaintiffs’ property and Defendants’ property. Affiant, James Keck, and Myron Weidner have been aware that both Plaintiffs and Defendants have been farming property that may not have been on the surveyed line, but there has never been any acknowledgment of a recognized boundary between Plaintiffs’ and Defendants’ properties. *** Affiant and/or affiant’s predecessors in title have been paying taxes on the property defined by the survey, which would be Defendants’ deeded property, for many years last past. No other person, including Plaintiff, has ever paid taxes on Defendants’ deeded property, which includes the disputed ‘roadway.’ ”

¶ 12 The affidavit of Shane Carder, also attached to the defendants’ response to the plaintiffs’ motion for summary judgment, avers as follows:

“Affiant is the son of Darrell R. Carder, one of the parties herein, and affiant has farmed Defendants’ property for approximately 5 years by himself and for approximately 5 years with his father, Darrell R. Carder. Over the course of affiant farming the property, affiant has had discussions with both Myron Weidner and James Keck regarding the confusion of the boundary line between Plaintiffs’ property and Defendants’ property. Affiant, James Keck[,] and Myron Weidner have been aware that both Plaintiffs and Defendants have been farming property that may have not been on the surveyed line, but there has never been any acknowledgment of a recognized boundary between Plaintiffs’ and Defendants’ properties. *Over the years, the area recognized by the parties as a boundary line has shifted from time to time and the precise area to which each party has farmed has not been consistent.*” (Emphasis added.)

¶ 13 The discovery depositions of Myron Weidner, taken August 31, 2017, and Shawn Taylor, the engineer who performed the survey of the Disputed Land and Disputed Access, were also part of the record before the circuit court when it considered the plaintiffs’ motion for summary judgment. No transcripts of any hearing on the motion for summary judgment are included in the record on appeal.

¶ 14 On March 9, 2018, the circuit court entered an order granting the plaintiffs’ motion for summary judgment as to count I of the complaint, finding that the plaintiffs had established that they were the owners, by adverse possession, of the Disputed Land,

and entitled to a prescriptive easement as to the Disputed Access. On March 21, 2018, the circuit court entered an amended order granting the plaintiffs' motion for summary judgment. On April 4, 2018, the defendants filed a motion to reconsider, which the circuit court denied on May 8, 2018.

¶ 15 On June 8, 2018, the defendants filed a motion for a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). On August 21, 2018, the circuit court entered an order granting the motion. On September 17, 2018, the defendants filed a notice of appeal.

¶ 16 ANALYSIS

¶ 17 “We review the trial court’s grant of summary judgment *de novo*.” *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 15. The standards governing summary judgment are as follows:

“The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material facts exists. [Citation.] Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [Citation.]

Because summary judgment is a drastic means of disposing of litigation, a court must exercise extraordinary diligence in reviewing the record *** [and summary judgment] should only be granted when the right of the moving party is

clear and free from doubt.” *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305-06 (2005).

¶ 18 The following principles inform our analysis of the circuit court’s order granting summary judgment with respect to the plaintiffs’ claim of adverse possession of the Disputed Land and Disputed Access:

“To establish title by adverse possession under the 20-year statute (735 ILCS 5/13-101 (West 2006)), the party asserting adverse possession must establish possession of the property for the entire statutory period, and that possession must have been ‘(1) continuous; (2) hostile or adverse; (3) actual; (4) open, notorious, and exclusive; and (5) under claim of title inconsistent with that of the true owner.’ [Citation.] ‘All presumptions are in favor of the title owner, and the party claiming title by adverse possession must prove each element by clear and unequivocal evidence.’ ” *Davidson v. Perry*, 386 Ill. App. 3d 821, 824-25 (2008) (quoting *Knauf v. Ryan*, 338 Ill. App. 3d 265, 269 (2003)).

¶ 19 Here, James’s affidavit, along with the affidavit of Myron Weidner, establishes, with specificity, all of the elements of adverse possession set forth above. Accordingly, in the absence of a counteraffidavit, the plaintiffs would be entitled to summary judgment. See *MidFirst Bank v. Riley*, 2018 IL App (1st) 171986, ¶ 34 (“ ‘[f]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion’ ” (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986))). However, the defendants did file two counteraffidavits in response to the plaintiffs’ motion for summary judgment. We

recognize that these counteraffidavits contain very general statements regarding the parties' use of the land at issue, to the effect that "[o]ver the years, the area recognized by the parties as a boundary line has shifted from time to time and the precise area to which each party has farmed has not been consistent." Nevertheless, we find that these counteraffidavits required a credibility determination to be made by the circuit court and require the same from this court in conducting a *de novo* review. Because neither this court nor the circuit court may make such a determination at the summary judgment stage (see, e.g., *Gulino*, 2012 IL App (1st) 102429, ¶ 25), we must reverse the order of the circuit court that granted the motion for summary judgment and remand this cause for further proceedings on the plaintiffs' complaint.

¶ 20

CONCLUSION

¶ 21 For the foregoing reasons, we reverse the March 21, 2018, order of the circuit court of Clay County that granted summary judgment in favor of the plaintiffs on count I of the complaint and remand for further proceedings.

¶ 22 Reversed and remanded.