2015 IL App (4th) 140348-U

NO. 4-14-0348

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 6, 2015
Carla Bender
4th District Appellate
Court, IL

CONSTANCE CARSTENS and PATRICIA CHAMNESS,	)	Appeal from
	)	Circuit Court of
Plaintiffs-Appellants,	)	Livingston County
v.	)	No. 10MR75
TIMOTHY AHRENS and MARY AHRENS,	)	
	)	Honorable
Defendants-Appellees.	)	Robert M. Travers,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Pope and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's judgment is affirmed, as its finding that defendants established title to a strip of plaintiffs' property pursuant to adverse possession was not against the manifest weight of the evidence.

¶ 2 Constance Carstens and Patricia Chamness, plaintiffs, own a residential lot on East Kathryn Street in Pontiac, Illinois, adjacent to the residential lot owned by Timothy Ahrens and Mary Ahrens, defendants. Plaintiffs sued defendants for injunctive relief, seeking a judgment prohibiting defendants from encroaching onto their property. After a bench trial, the trial court found defendants' affirmative defense of adverse possession had been sufficiently proved and entered a judgment awarding defendants ownership of the strip of land in question. Plaintiffs appeal, claiming the judgment was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2010, seeking injunctive relief, plaintiffs filed a complaint in the Livingston County circuit court, alleging the location of defendants' driveway (1) had encroached upon plaintiffs' property (count I); (2) created a nuisance (count II); and (3) constituted a trespass onto plaintiff's property (count III). Plaintiffs are sisters who received the property from their father when he died in 2004. Prior to their father's ownership, the house was owned by their uncle.

¶ 5 Defendants are a married couple who reside in the house next door to the west of plaintiffs at 805 East Kathryn Street. Defendants have a gravel driveway on the east side of their residence. When defendants moved into their home in 1984, they placed three landscaping timbers end-to-end along the east edge of their driveway going toward the back of their property from the street. In June 2010, plaintiffs had their property surveyed, which showed defendants' driveway and landscaping timbers encroached no more than two feet upon plaintiffs' property. Defendants built a garage toward the rear of their property approximately 15 years ago. They erected two panels of a privacy fence from the front corner of their garage angled toward plaintiffs' property. A portion of these panels crosses the boundary line. However, it is the original width of the gravel driveway and the placement of the three landscaping timbers that are the subject of this appeal.

¶ 6 The bench trial in this matter was conducted on three separate trial days over the course of four months: November 26, 2013, January 29, 2014, and March 20, 2014. For plaintiffs' case-in-chief, plaintiff Carstens testified she and her sister received (as part of her father's estate in 2004) the property located at 807 Kathryn Street. Her father received the

property from her uncle's estate in 1998. Carstens said she was raised in the house at 809 Kathryn, next door to the east of the subject property.

¶ 7 Plaintiffs presented photographic evidence of the property line and the encroachment of defendants' driveway onto plaintiffs' property. The photos showed defendants' driveway with gravel and landscaping timbers bordering the east side of the driveway near plaintiffs' house, both of which cross the property line. According to Carstens, over the years, defendants added more and more gravel, which effectively increased the height and the width of the driveway. The addition of this gravel caused flooding on plaintiffs' property when it rained or snowed.

¶ 8 Carstens testified defendants built a garage in 2001 toward the rear of their property. The garage itself does not encroach upon plaintiffs' property. However, after they built the garage, defendants also installed two panels of a white privacy fence at an angle from the corner of the garage. A portion of this fence crosses over the property line.

¶ 9 Plaintiffs called defendant Timothy Ahrens as a witness. He said he placed the first three or four landscape timbers starting at the street and moving toward the back of the property soon after he bought the property. The timbers toward the back of the property were placed by his brother-in-law during the time when he and his wife did not reside together, from approximately 1997 through 2005. It was during this time that the garage was built and the privacy fence panels were installed. Ahrens acknowledged, over time, the timbers toward the rear of the property had moved closer to plaintiffs' property, making his driveway wider. He denied plaintiffs ever requested the timbers or the privacy fence panels be moved onto his property. Ahrens also said he used to maintain the yard for the previous owner of his house and he recalled that the gravel driveway was the same width as it is currently. He said he used to

help plaintiffs' father mow the strip of grass between his driveway and their house, which he estimated as a total width of 24 to 26 inches. He testified he has not done anything to change the dimensions or elevation of the driveway with the exception of adding gravel to the existing gravel in 2006. Plaintiffs rested.

¶ 10 Defendants called Timothy Burger, Steve Worthington, Sandy Smith, and Amy Ahrens as witnesses. They each testified defendants driveway had not changed during the entire time defendants have owned the home. Defendants had added gravel one time in 2006 to the existing driveway for maintenance purposes only. Specifically, the witnesses said the driveway had not increased in width.

¶ 11 On April 4, 2014, the trial court entered an order, finding plaintiffs had failed to prove a nuisance or trespass, but had sufficiently proved defendants had encroached upon plaintiffs' property with their driveway. In fact, the court found, defendants did not contest their driveway had encroached upon plaintiffs' property. However, the court found defendants had sufficiently demonstrated they owned a 16-inch strip of plaintiffs' property in fee simple by adverse possession. But, the court found defendants did not prove ownership by adverse possession of that property near the garage since defendants had not encroached upon that part of plaintiffs' property until the garage was built after 2000. Therefore, defendants were ordered to remove that portion of the white vinyl fence, gravel driveway, and landscaping timbers located on plaintiffs' property to the north of plaintiffs' house toward the back of the lot.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Plaintiffs contend the trial court erred by awarding defendants ownership of the strip of land in question when defendants failed to demonstrate all of the necessary elements of a

successful adverse-possession claim. Defendants have not filed an appellees' brief. However, reversal is not automatic when the party who received a favorable ruling in the court below fails to file a brief on appeal. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-32 (1976). "[T]he burden remains on the appellant to show error." *Talandis*, 63 Ill. 2d at 132. This court is "not compelled to serve as an advocate for an appellee" (*In re Marriage of Purcell*, 355 Ill. App. 3d 851, 855 (2005)), but neither are we required to search the record for the purpose of sustaining the trial court's judgment (*Talandis*, 63 Ill. 2d at 133). Where "the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal." *Talandis*, 63 Ill. 2d at 133. We conclude this is a case where the merits of the case can be easily decided, and justice requires that it be done.

¶ 15 To establish title to land under the 20-year adverse-possession doctrine, incorporated in section 13-101 of the Code of Civil Procedure (735 ILCS 5/13-101 (West 2010)), a party must prove that his or her possession of that land was: (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, for a period of 20 years. *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981). All five of these elements must be shown to have existed concurrently for the full 20-year period before the doctrine will apply. *Joiner*, 85 Ill. 2d at 81. Further, although not one of the five elements of possession, the claimant must also prove the exact location of the boundary line of the property they claim. *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 37.

¶ 16 As the doctrine of adverse possession can divest a previous titleholder of ownership, the standard for application is rigorous. All presumptions are in favor of the title owner. *Joiner*, 85 Ill. 2d at 81. In order to rebut the presumption in favor of the titleholder, the

claimant must prove each element of adverse possession by clear and unequivocal evidence. *Knauf v. Ryan*, 338 Ill. App. 3d 265, 269 (2003). "Because the supreme court has not explained the meaning of 'clear and unequivocal evidence,' courts have applied the clear and convincing burden of proof in adverse possession cases." *Brandhorst*, 2014 IL App (4th) 130923, ¶ 38.

¶ 17 We will not disturb the circuit court's findings unless they are against the manifest weight of the evidence. *Brandhorst*, 2014 IL App (4th) 130923, ¶ 38. " 'A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on the evidence.' " *Brandhorst*, 2014 IL App (4th) 130923, ¶ 38 (quoting *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 70). As the trier of fact, the trial judge is in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony. *In re Marriage of Sturm*, 2012 IL App (4th) 110559, ¶ 6.

¶ 18 In this case, plaintiffs dispute the second (hostile or adverse possession) and fourth (open, notorious, and exclusive possession) elements, as well as whether defendants sufficiently proved the exact location of the boundary line to which they claim. We will address plaintiffs' contentions in turn.

¶ 19 A. Open, Notorious, and Exclusive Possession

¶ 20 To satisfy this element, defendants must have demonstrated their possession of the land at issue was open and visible so as to "apprise the world, that the property has been appropriated and is occupied." (Internal quotation marks omitted.) *Brandhorst*, 2014 IL App (4th) 130923, ¶ 56 (quoting *Estate of Welliver v. Alberts*, 278 Ill. App. 3d 1028, 1038 (1996) (quoting *Travers v. McElvain*, 181 Ill. 382, 387 (1899))).

¶ 21 For their argument against defendants' claim of adverse possession, plaintiffs rely on the conflicting testimony presented at trial regarding the width of the strip of grass between plaintiffs' house and defendants' driveway. It is plaintiffs' position that the width of the driveway changed over the years, and therefore defendants had failed to prove they used the strip of land for the required 20-year period. On this subject of the varying width of the driveway and whether the width had changed over time, the trial court found "the most consistent and credible testimony to be that since the mid 1980's, defendants had encroached onto plaintiffs' property to a point 16 inches east of the defendants' east property line." The trial court heard testimony from numerous witnesses over the course of three days and viewed the photographic and documentary evidence produced by both sides in making its determination. Basically, plaintiffs' witnesses and evidence demonstrated the width of the driveway had changed over the years, whereas defendants' witnesses and evidence suggested the width had remained consistent. The court made its findings of fact from this conflicting evidence.

¶ 22 We accept the trial court's findings on this contested issue and reject plaintiffs' claim that the width of the driveway had changed over the years to the point where, only recently, has the driveway actually encroached upon plaintiffs' property. Because the trial court was the trier of fact, we defer to the court's finding on this disputed question, as nothing in the record will support a decision to disturb that finding. We will not substitute our judgment for that of the trier of fact on the resolution of conflicts in the evidence or the credibility of witnesses, as those are the trier of fact's responsibilities. See *People v. Billups*, 318 Ill. App. 3d 948, 954 (2001). We therefore find defendants have openly used 16 inches of plaintiffs' property as their driveway since they moved into their residence in 1984. Accordingly, we find defendants' possession of plaintiffs' property was open, notorious, and exclusive.

¶ 23 B. Hostile or Adverse Possession

¶ 24 The hostility element "does not imply actual ill will, but only the assertion of ownership incompatible with that of the true owner and all others." *Joiner*, 85 Ill. 2d at 81. The claimant must show the use was adverse and not merely permissive, since permissive use can never support a claim of adverse possession. *Brandhorst*, 2014 IL App (4th) 130923, ¶ 42.

¶ 25 Various witnesses testified that since 1984, when defendants moved into their home at 805 East Kathryn Street, there existed a strip of grass between defendants' driveway and plaintiffs' home at 807 East Kathryn Street, which required mowing. This strip of grass was likely, based on witnesses' accounts, between two and four feet wide. Regardless of the width of this strip of grass, as the trial court noted in its order, it "was never seriously contested" that defendants' driveway encroached upon plaintiffs' property. It was likewise never contested that defendants did not have permission to use the 16 inches of plaintiffs' property as their driveway. Plaintiff Carstens testified specifically she did not, "at any time, give [defendants] permission to place landscape timbers in this general area along [her] west property line, inside the property line." Defendant Timothy Ahren testified he and his family used the entire gravel driveway, including the strip of land that was on plaintiffs' property, as their own. They added gravel to the existing gravel for maintenance purposes, they parked cars on this driveway, and used it for ingress and egress to their residence.

¶ 26 From the evidence presented at trial, it was apparent defendants' use of the driveway was incompatible with plaintiffs' ownership of this strip of land when defendants performed maintenance and asserted dominion over the land without permission or an agreement

to do so. According to defendants' witnesses, since 1984, the width of the driveway did not change and defendants acted as if the 16-inch strip of plaintiffs' property was actually part of their driveway. Thus, the trial court could properly conclude defendants asserted ownership over that strip of property was incompatible with that of the true owners.

¶ 27 C. Boundaries of the Area Claimed

¶ 28 Finally, plaintiffs contend defendants failed to establish the exact location of the boundary line claimed. In a case where an adverse possessor is claiming land pursuant to a mistaken or disputed boundary, he bears the burden of establishing by clear and convincing proof the location of the boundary. *Joiner*, 85 Ill. 2d at 83. " 'The proof must be such as to establish with reasonable certainty the location of the boundaries of the tract to which the five elements of adverse possession are applied and all of the elements must extend to the tract so claimed. While it is not necessary that the land should be enclosed by a fence, the boundaries must be susceptible of specific and definite location.' " *Joiner*, 85 Ill. 2d at 83 (quoting *Schwartz v. Piper*, 4 Ill. 2d 488, 493 (1954)). A clearly visible boundary marker is adequate. *Joiner*, 85 Ill. 2d at 79 (tree and bush line formed a "definitely ascertainable boundary"); *Bakutis v. Schramm*, 114 Ill. App. 3d 237, 241-42 (1983) (two markers showing former location of fence formed a definitely ascertainable boundary).

¶ 29 Contrary to plaintiffs' claim, defendants sufficiently proved the boundary of the area claimed as bordered by the landscaping timbers. Defendant, Timothy Ahrens, testified he put in place the first three timbers going away from the street soon after he moved into the home in 1984. The evidence presented at trial and the evidence found credible by the trial court, demonstrated these landscaping timbers formed the outside boundary of defendants' driveway and have been in the same location since being placed.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's judgment.

¶ 32 Affirmed.