2013 IL App (5th) 130042-U

NO. 5-13-0042

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NANCY WOOD McELMEEL, Plaintiff and Counterdefendant-Appellee, v. JAMES SHEDELBOWER and CHU CHA SHEDELBOWER, Defendants and Counterplaintiffs-Appellants (Mary Wagner; The Unknown Heirs, Legatees, or Assigns of the Following Named Decedents: Frank J. Huber, Theodore Joseph Huber, Veronica M. Long, Frederick W. Huber, Magdalena C. Totten, Christine Martin, Henry C. Huber, Unknown Owners, and Nonrecord Claimants, Defendants and Counterdefendants).	)	Appeal from the Circuit Court of Jasper County. No. 11-CH-15 Honorable S. Gene Schwarm, Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Stewart and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly entered judgment in favor of the plaintiff regarding her action to quiet title to a 40-acre tract of land, finding that the defendants had failed to prove that they adversely possessed the land in dispute.

¶ 2 This is an action to quiet title to a 40-acre tract of land located in Jasper County, Illinois (the Property). The plaintiff sued to quiet title, alleging five counts in her second amended complaint: count I–quiet title: 40-year limitation on claims to real estate (735 ILCS 5/13-118 (West 2012)); count II–quiet title: payment of taxes with color of title (735 ILCS 5/13-109 (West 2012)); count III–quiet title: 20 years–recovery of land (735 ILCS 5/13-101

(West 2012)); count IV–contract (back rent for the defendants' free use of the real estate since 1968–this count was abandoned and dismissed by the plaintiff); and Count V–quiet title: 75-year limitation (735 ILCS 5/13-114 (West 2012)).

¶ 3 Two of the defendants, James Shedelbower, and his wife, Chu Cha Shedelbower (the defendants), claimed ownership over the Property by virtue of adverse possession. A bench trial was conducted, after which the circuit court found that the defendants had not adversely possessed the Property because they had been given permission to use and reside on it. The circuit court further found that the plaintiff had proven her claim to title under both sections 13-118 and 13-114 of the Illinois Code of Civil Procedure (735 ILCS 5/13-118, 13-114 (West 2012)). The defendants appealed, arguing that the circuit court erred in finding that their possession was permissive and that it also erred in awarding the plaintiff title to the Property when she merely owned a fractional interest. For the following reasons, we affirm the ruling of the circuit court.

¶ 4 BACKGROUND

¶ 5 The farthest back the parties were able to trace the chain of title to the Property begins with a quitclaim deed to Thomas Huber (Huber Sr.), dated February 11, 1888. The Property is described as: "The South East quarter of the North East quarter of Section Thirty (30) in Town Six (6) North of Range Fourteen West" in Jasper County, Illinois. Huber Sr. passed away in 1894. He had eight or nine children, including Thomas Huber (Huber Jr.). The title search for the Property further revealed two quitclaim deeds executed in 1911 and another quitclaim deed executed in 1913, the three of which list Huber Jr. as the grantee and presumably three of his siblings as the grantors.

¶ 6 Huber Jr. passed away in 1937, leaving a surviving spouse, Susan Huber, and his eight children, one of whom was his son, Leo Thomas Huber (Leo). Leo was the father of Evelyn Wood Smith (Evelyn), who was the plaintiff's mother. The next record in the chain of title

is a warranty deed, dated August 22, 2010, listing Evelyn as the grantor and the plaintiff as the grantee. A search of the county records found no affidavits of heirship or records of estate proceedings regarding the estate of either Huber Sr., Huber Jr., Susan Huber, or their children.

¶ 7 Two of Huber Jr.'s children continued to occupy the house on the Property after he and Susan passed away. The other children left upon reaching adulthood in order to seek employment. One of those children was Theodore Huber (Theodore), who resided there until his death in 1961. Theodore had disabilities, so sometime in the 1950s, his sister, Christine Martin (Christine), moved into the house to care for him. She continued to reside there after Theodore's death in 1961 until she relocated to Effingham, Illinois, sometime in 1963.

¶ 8 James Shedelbower grew up across the street from the Property. He even helped care for Theodore before his death and would often stay at the house because Christine did not like to be alone there. James Shedelbower served in the military from 1966 to 1968. As Christine was already residing in Effingham, she allowed James Shedelbower to move into the house on the Property with his wife when he returned in 1968. He also began farming the Property at that time. James Shedelbower testified that Christine basically told him that "[the Property] is yours." James Shedelbower testified that he and his wife maintained a friendship with both Christine and one of her other brothers, Henry Huber (Henry), who was the plaintiff's great-uncle. Henry would often come down to visit the Property regularly in the summer, and the defendants would regularly go to visit Christine in Effingham.

¶ 9 The defendants have continued to reside on and farm the Property since 1968, and later on, with their two sons, Jim Shedelbower, Jr., and Daniel Shedelbower. The house on the Property burned down some time ago. Thereafter, the defendants moved a mobile home onto the Property and continue to reside in it (though testimony revealed that they no longer reside there continuously throughout the year). A second mobile home was later moved onto

the Property, in which Daniel and his wife now reside. No evidence was introduced that the defendants ever made any improvements on the Property or erected any other permanent fixtures or buildings, aside from extending the garage.

¶ 10 Henry paid the real estate taxes on the Property from 1945 until his death in 1986. Henry Huber left a will naming Evelyn as his sole legatee. In 1986, the defendants paid the real estate taxes and were later reimbursed by the plaintiff's mother, Evelyn, who continued to pay real estate taxes on the Property until her death in 2011. The plaintiff has since assumed this obligation.

¶ 11 Though Evelyn never visited the Property, in 2009, she sent a farm lease agreement to the defendants, who claim they never received it. It was never returned to sender nor was it signed by the defendants. James Shedelbower testified that he made several attempts, legally, to obtain marketable title to the Property, but was advised that the best resolution would be to allow the Property to sell for taxes and buy it then. However, because Henry had promised that he would always pay taxes on the Property, he could not let them lapse but that after he passed, the defendants could do whatever they chose to do about the real estate taxes. However, Evelyn paid the real estate taxes on the Property after Henry's passing, and James Shedelbower testified that because of this, he was unable to pay the taxes because "[the County] won't take them twice."

¶ 12 In filing this action to quiet title, the plaintiff has brought suit against not only the defendants, but also against the unknown heirs and legatees of the following named decedents: Frank J. Huber, Theodore Joseph Huber, Veronica M. Long, Frederick W. Huber, Magdalena C. Totten, Christine Martin, and Henry C. Huber, as well as other unknown owners and nonrecord claimants. Notice by publication was given, evidenced by the plaintiff's affidavit of publication, filed November 1, 2011. The only unknown heir or legatee to answer was Mary Wagner, who filed an entry of appearance in the case but elected,

during the bench trial, not to participate in the litigation. The court thereby found the unknown heirs and legatees named in the plaintiff's suit, along with the other unknown owners and nonrecord claimants, besides the defendants James and Chu Cha Shedelbower, to be in default. The defendants counterclaimed to quiet title in their favor pursuant to adverse possession of the Property. The circuit court found the defendants did not meet all the elements to establish adverse possession because their possession was not "hostile or adverse," but was instead, permissive via the consent of both Christine and Henry. In other words, the "[d]efendants' actions were consistent with that of a tenant with an absentee landlord." The circuit court further found that "the actions of the parties were consistent with the title to the property remaining with the true owner, the Huber family heirs."

¶ 13 ANALYSIS

¶ 14 The ultimate issue on appeal is whether the plaintiff can quiet title to the Property (and to two lots located in the Village of Ste. Marie in Jasper County, which are not at issue herein) or whether the title to the Property should be granted to the defendants based upon their theory of adverse possession. Stemming from this issue is whether the defendants' possession of the property was permissive, as the circuit court found, or adverse to all of the other co-owners of the property who did not give the defendants permission to live there, rent-free.

¶ 15 The standard of review for a judgment rendered from a bench trial is whether the circuit court's findings are against the manifest weight of the evidence. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 12; *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 51 (2009). A judgment is only found to be against the manifest weight of the evidence if the "opposite conclusion is clearly evident." *Gambino*, 398 Ill. App. 3d at 51.

¶ 16 A fundamental element to a quiet title action is that the plaintiff must possess title to

the property at issue, whether it be legal or equitable title, and it must be superior to other claimants, though the plaintiff need not establish a perfect title to prevail. *Dudley v. Neteler*, 392 Ill. App. 3d 140, 143 (2009). The circuit court found that the plaintiff proved the elements required by the following statutes to quiet title, including that the defendants had not adversely possessed the Property. The first statute was section 13-118 of the Illinois Code of Civil Procedure, as pled in count I of the plaintiff's second amended complaint, which reads in part:

> "Forty year limitation on claims to real estate. No action based upon any claim arising or existing more than 40 years before the commencement of such action shall be maintained in any court to recover any real estate in this State or to recover or establish any interest therein or claim thereto, against the holder of the record title to such real estate when such holder of the record title and his or her grantors immediate or remote are shown by the record to have held chain of title to such real estate for at least 40 years before the action is commenced, unless such claimant, by himself or herself, or by his or her attorney or agent, or if he or she is a minor or under legal disability, by his or her guardian, trustee, either parent, or any other person acting in his or her behalf shall within 40 years after the claim upon which such action is based arises, file in the office of the recorder of the county wherein such real estate is situated, a verified statement definitely describing the real estate involved, the nature and extent of the right or interest claimed, and stating the facts upon which the same is based. However, the holder of the record title to such real estate shall not be entitled to the protection of Sections 13-118 through 13-121 of this Act if the real estate is in the adverse possession of another." 735 ILCS 5/13-118 (West 2012).

¶ 17 The other quiet title statute the circuit court found applicable, as pled in count V of the plaintiff's second amended complaint, was section 13-114 of the Code of Civil Procedure,

which reads in part:

> "Seventy-five year limitation. No deed, will, estate, proof of heirship, plat, affidavit or other instrument or document, or any court proceeding, order or judgment, or any agreement, written or unwritten, sealed or unsealed, or any fact, event, or statement, or any part or copy of any of the foregoing, relating to or affecting the title to real estate in the State of Illinois, which happened, was administered, or was executed, dated, delivered, recorded or entered into more than 75 years prior to July 1, 1872, or such subsequent date as the same is offered, presented, urged, claimed, asserted, or appears against any person hereafter becoming interested in the title to any real estate, or to any agent or attorney thereof, shall adversely to the party or parties hereafter coming into possession of such real estate under claim or color of title or persons claiming under him, her or them, constitute notice, either actual or constructive of any right, title, interest or claim in and to such real estate, or any part thereof, or be, or be considered to be evidence or admissible in evidence or be held or urged to make any title unmarketable in part or in whole, or be required or allowed to be alleged or proved as a basis for any action, or any statutory proceeding affecting directly or indirectly the title to such real estate." 735 ILCS 5/13-114 (West 2012).

¶ 18 To establish adverse possession of real property, the proponent must establish that their possession of the real estate 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); *Davidson v. Perry*, 386 Ill. App. 3d 821, 824-25 (2008). " '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*, 386 Ill. App. 3d at 825 (quoting *Knauf v. Ryan*, 338 Ill. App. 3d 265, 269 (2003)).

¶ 19 The circuit court found that the defendants failed to prove that the elements of adverse possession were continuously met for the statutory period in that their use was permissive by way of Christine's allowing them to live on the Property and consistent with the title of the true owner in that the defendants did not pay the real estate taxes, which were instead paid by Huber heirs. The only contested element on appeal is whether the defendants' possession of the Property was "hostile or adverse." This element does not require one to act with animosity or display willfully tortious conduct, but merely using the property as if the true owner is sufficient. *Guinzy v. Krantz*, 28 Ill. App. 3d 500, 504 (1975). Yet, when use of the Property is permissive, then the "hostile or adverse" element cannot be met. *Davidson*, 386 Ill. App. 3d at 827.

¶ 20 The defendants do not dispute that they took possession of the Property with the permission of Christine and Henry Huber. However, they argue that the circuit court erred in finding that their possession was not adverse to all the remaining co-owners of the Property (because Christine and Henry each only held title in a fractional interest of the Property) and their heirs, including Leo, Evelyn, and the plaintiff. The defendants cite to the *Guinzy* case for their assertion that Christine and Henry's permission for the defendants to use the Property constituted an act of ouster of the other cotenants (the remaining children of Huber Jr. or their heirs) and commenced the period for the defendants' adverse possession of the Property. *Guinzy*, 28 Ill. App. 3d at 503-04. This is the only case the defendants cite in this regard. This argument does little to advance the defendants' adverse possession claim.

¶ 21 First, the *Guinzy* case stands for the proposition that a tenant in common can oust other cotenants by some outward act of ownership, which then commences the period for adverse possession by the ousting cotenant. *Id*. at 503 (citing *Simpson v. Manson*, 345 Ill. 543, 551 (1931)). This disseizin or ouster is an exception to the general rule that possession by one tenant in common is considered possession by all cotenants. *Id*. *Simpson* also stated

that "if one tenant in common holds exclusive possession, claiming the land as his, and his conduct and possession are of such a character as to give notice to his cotenant that his possession is adverse, the statute of limitations will run." *Simpson*, 345 Ill. at 551 (citing *Tillotson v. Foster*, 310 Ill. 52, 58 (1923)). Further, "the possession of one tenant in common, the sole receipt of the rents and profits and the payment of all the taxes" are not enough to constitute an outward act of ownership on the part of one tenant in common. *Tillotson*, 310 Ill. at 57. However, the adverse possession runs to the ousting tenant in common, not to an outsider who was given permission by the tenant in common to use the real estate. Therefore, if the defendants' theory is correct and Christine and Henry did oust the remaining cotenants of the Property, it is *they* who could have adversely possessed the Property if all the required elements were found to be met, *not* the defendants. In fact, the defendants concede that they were given permission to use the Property by Christine and Henry (whether they be full titleholders via ouster or merely tenants in common), which flies in the face of establishing that the defendants adversely possessed the Property, as their use was permissive the entire time, just as the circuit court held. The defendants fail to assert that Henry and Christine, once they had allegedly adversely possessed the property, thereafter gifted the Property to the defendants thereby making their claim to title superior to the plaintiff's. Nor do they assert that they somehow inherited the Property from either Henry or Christine so that they could continue the statutory period of adverse possession on either of their behalves.

¶ 22 Second, the circuit court found that the real estate taxes on the Property had always been paid by someone in the Huber family and that Evelyn promptly reimbursed the defendants for their one-time payment of the real estate taxes on the Property in 1986. This act is inconsistent with the defendants' claim of adverse possession, but instead, more squarely aligns with the circuit court's finding that the Huber heirs, including the plaintiff,

"continued to exercise one of the primary incidents of ownership in real estate, the payment of real estate taxes on the real estate."

¶ 23 The defendants also argue that the circuit court erred in quieting title in the plaintiff's favor when she only proved a fractional interest in title to the Property. The circuit court's rationale was expressed in its order as follows: "The court also believes that an equitable result has been reached. *** A Huber heir, who has gone to the trouble and expense to quiet title to the subject real estate, has done so. Further, [the] [d]efendants have had the use, enjoyment and income from the [P]roperty for 45 years without the payment of rent." The defendants fail to further develop their argument with case law except to object to the fact that Henry Huber's will was admitted into evidence during the bench trial, but that no evidence was shown that the will was ever probated, making it ineffective and not valid evidence. Henry's will named Evelyn, the plaintiff's mother, as his sole legatee. Therefore, the defendants assert that the plaintiff's "only legitimate claim to fractional ownership was, as she testified, from Leo Huber, her grandfather, and not Henry Huber, her grandfather's brother." However, this matters little as the requirements of quieting title only require that the plaintiff possess *some* title that is superior to another claimant, not that it be perfect. The record shows that the plaintiff properly gave notice to any and all potential claimants of title interest in the Property and that the circuit court found them to be in default. Therefore, the plaintiff showed that she possessed superior title to known or unknown claimants, as well as to the defendants' failing adverse possession claim. Accordingly, the circuit court did not err in granting judgment in favor of the plaintiff.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Jasper County is affirmed.

¶ 26 Affirmed.