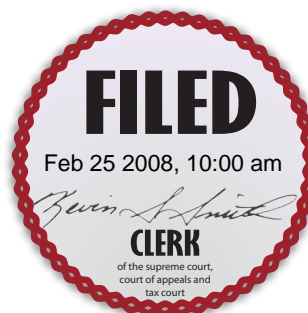


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

JOHN A. HARGIS
Wagoner Ayer & Hargis
Rockport, Indiana

JANE H. RUEMMELE
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MARTHA SUE MILLER,

Appellant-Plaintiff,

vs.

ERIC WILLIAMS,

Appellee-Defendant.

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No. 62A05-0708-CV-435

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Lucy Goffinet, Judge
Cause No. 62C01-0306-PL-293

February 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Mary Sue Miller appeals the trial court's entry of summary judgment in favor of Eric Williams. We reverse.

Issue

Miller raises one issue, which we restate as whether there are questions of fact precluding summary judgment for Williams on Miller's claim of adverse possession.

Facts

In 1962, Miller and her husband acquired a sixty-six-acre parcel of property in Perry County from her husband's parents. Miller farms the sixty-six-acre parcel. A smaller adjoining parcel of property is surrounded by Miller's property on three sides and a road on the fourth side. Williams acquired the smaller parcel in 1996.

Miller and the subsequent owners of the smaller parcel believed that the "mow line" demarked the property line between the smaller parcel and the sixty-six-acre parcel. In June 2004, Williams had his property surveyed and learned that he actually owned 3.827 acres—substantially more than what the "mow lines" indicated.

On June 25, 2003, after Williams obstructed Miller's entry onto the property beyond the "mow line," Miller filed a complaint requesting a temporary restraining order and an injunction and seeking to quiet title to the property she had been farming that abutted the "mow lines." In 2005, Miller filed a motion for summary judgment, which was denied. On April 26, 2007, Williams filed a motion for summary judgment on Miller's claim of adverse possession. On April 27, 2007, Miller filed a cross-motion for summary judgment as to issues regarding Williams's survey of the property and her

claim of adverse possession. On July 3, 2007, after a hearing on the parties' motions, the trial court granted summary judgment for Miller on the survey issue and granted summary judgment for Williams on the adverse possession issue. In granting judgment for Williams, the trial court reasoned, "Plaintiff's acts of farming the real estate that is the subject of this litigation for the past 40 years do [sic] not satisfy each and every one of the elements of adverse possession and as such, Plaintiff's adverse possession claim must fail." App. p. 12. Miller now appeals.

Analysis

On appeal, Miller claims that there are genuine issues of material fact, making summary judgment improper. Summary judgment is appropriate only where the evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Bushong v. Williamson, 790 N.E.2d 467, 473 (Ind. 2003) (citing Ind. Trial Rule 56(C)). "All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party." Id. Our review is limited to those materials designated to the trial court.

Summary judgment terminates litigation about which there can be no factual dispute and which may be determined as a matter of law. Id. at 474. "We will affirm a grant of summary judgment if it can be sustained on any theory or basis in the record, even if the trial court has entered findings and conclusions in support of its ruling." Arnett v. Cincinnati Ins. Co., 864 N.E.2d 366, 368-69 (Ind. Ct. App. 2007), trans. denied. The fact that the parties filed cross-motions for summary judgment does not alter our

standard of review. City of Crown Point v. Misty Woods Properties, LLC, 864 N.E.2d 1069, 1075 (Ind. Ct. App. 2007).

The doctrine of adverse possession entitles a person without title to obtain ownership to a parcel of land upon clear and convincing proof of control, intent, notice, and duration. Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005). The Fraley court defined the common law elements as follows:

(1) Control-The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of “actual,” and in some ways “exclusive,” possession);

(2) Intent-The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of “claim of right,” “exclusive,” “hostile,” and “adverse”);

(3) Notice-The claimant’s actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant’s intent and exclusive control (reflecting the former “visible,” “open,” “notorious,” and in some ways the “hostile,” elements); and,

(4) Duration-the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former “continuous” element).

Id. The claimant must also satisfy the requirement of the adverse possession tax statute, Indiana Code Section 32-21-7-1, by showing that he or she has a reasonable and good faith belief that the claimant is paying the taxes during the period of adverse possession. Id. at 493.

Here, the trial court concluded in part:

2. [Miller's] act of farming the real estate that is contiguous to the property of [Williams] is not sufficient to satisfy each and every element of adverse possession as required under Indiana law.
3. [Miller's] use of the real estate in dispute was permissive

App. pp. 11-12. Miller argues that in granting Williams's motion for summary judgment the trial court acted as the trier of fact and made factual determinations. We agree that numerous questions of fact must be decided before a determination may be made regarding Miller's claim of adverse possession.

Williams asserts that Miller was the "original grantor" of the smaller parcel and that her use of the land was permissive because it is "the reasonable and legal presumption." Appellant's Br. pp. 8, 10. Assuming that Miller was the original grantor of the two-acre parcel¹ and that presumption exists,² Miller was permitted to rebut the

¹ Although at one point Miller owned both parcels, it does not appear that she owned all of the property at issue as one parcel and divided it up. Instead, it seems that her in-laws divided the property.

² Regarding the adverse possession of a grantor, our supreme court has stated:

But it is well settled that a grantor of land may originate a possession adverse to his grantee, and that such possession differs from that originated by a stranger only in requiring stronger proof to sustain it. The grantor must manifest his intention to hold adversely by some unequivocal act of hostility. As a rule, continued open and notorious possession by a grantor will be deemed to be adverse where it is of such a character as to be entirely inconsistent with the rights of the grantee. Thus the grantor's entry after conveyance must be deemed to be adverse where there is no evidence that he entered for or under the grantee, but where he acted in all respects as the sole owner, making leases, receiving rents, paying taxes, improving the property, etc.

Fort Wayne Smelting & Refining Works v. City of Fort Wayne, 214 Ind. 454, 463-64, 14 N.E.2d 556, 560 (1938) (quotations and citations omitted).

presumption with her evidence that she and her predecessors had continually farmed the disputed land for forty years. Whether this evidence is sufficient to rebut the alleged presumption is a question of fact improper for summary judgment.

Williams also argues that the ten-year period of adverse possession did not begin to run until he became aware of Miller's trespass. He asserts Miller never expressly communicated that she claimed the disputed land or exercised control over it except to farm it. Generally, the notice element of adverse possession does not require the party of title to have actual notice. Garriott v. Peters, 878 N.E.2d 431, 442 (Ind. Ct. App. 2007), trans. pending. "Instead, '[w]hen hostile acts are so manifest and notorious that a reasonable owner should have been aware of them, no further notice is required.'" Id. (citation omitted) (alteration in original). Whether certain acts constitute constructive notice generally is a question of fact, but when evidence is particularly clear constructive notice may be found as a matter of law. Id.

Here, it is undisputed that Miller and her family farmed the disputed land since the 1960's. This act in and of itself should have put Williams on notice that Miller claimed an interest in the disputed land. Assuming, however, that Miller has not established constructive notice to Williams as a matter of law, a question of fact remains regarding whether Miller's act of farming constituted constructive notice to Williams.

Finally, Williams points to various other fact patterns and argues that Miller's farming of the land was insufficient to establish the element of control. To prove control, however, Miller was required to exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land. See Fraley, 829

N.E.2d at 486. The land at issue here was farmland. Miller farmed the land. Whether this use of the land was sufficient to establish the element of control was a question of fact for a fact finder and is not appropriate for summary judgment.

Williams has not established as a matter of law that Miller cannot prove the elements of adverse possession. The factual questions associated with this case preclude the grant of summary judgment.

Conclusion

The trial court improperly granted summary judgment in favor of Williams. We reverse.

Reversed.

SHARNACK, J., and VAIDIK, J., concur.