Circuit Court for Cecil County
Case No. C-07-CV-18-264

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0655

September Term, 2020

PATRICIA WATTS-DOWD

v.

SJH PROPERTY MANAGEMENT, LLC

Shaw Geter,
Wells,
Ripken,

JJ.

Opinion by Shaw Geter, J.

Filed: July 9, 2021

This is an appeal from the denial by the Circuit Court for Cecil County of appellant, Patricia Watts-Dowd's, Complaint to Quiet Title by adverse possession of land owned by appellee SJH Property Management. LLC. Following a bench trial, the court granted appellees' counter complaint for a declaratory judgment regarding the properties' boundary line.[1] Appellant presents the following question for our review:

> 1. Did the trial court clearly err in denying the appellant's adverse possession claim on the basis that there was not evidence to establish where the alleged boundary would be such as to declare it adversely possessed?

BACKGROUND

The parties own adjacent properties in the North East Harbors waterfront community. Appellant's property is known as 100 Iroquois Drive ("Lot 8") and was acquired by her in September 2005 from Acorn Investments. The property had been purchased by Acorn Investments from Donald and Beverly Dunn in 2004, who owned the property since 1972. Appellee's property is known as 82 Iroquois Drive ("Lot 7") and was acquired in April 2006. The prior owners were Edward and Anne Protesto, who purchased the property in November 1998. It was previously owned by the Celliis Family, who acquired it in August 1996.

In March of 2018, appellee approached appellant, after the completion of an elevation survey by the PELSA company, requesting the removal of a white vinyl fence that was located, according to his surveyors, on his property. Appellee discussed his plans

[1] The declaratory judgment was not appealed.

to erect a new fence that would be on the actual property line. During their discussion, appellant offered to purchase the property between the fence and the boundary line. She later described it as "my knee jerk reaction." The parties were unable to reach an agreement and in June 2019, appellee removed the white vinyl fence and erected a black iron fence at the property line determined by his surveyor.

On May 23, 2018, appellant filed a Complaint to Quiet Title in the Circuit Court for Cecil County. Appellee then filed a counter complaint requesting the court issue a declaratory judgment that the boundary between the property of the parties was consistent with the PELSA survey. A bench trial was held March 5–6, 2020, where both sides presented witnesses and exhibits.

Charles Bruemmer, a witness for appellant, testified that he was familiar with the area because he "did quite a bit of work in that development starting in the early 1990's." He testified that he installed sewer systems and hook-ups on Iroquois Drive and he recalled specifically working on Lots 7 and 8. When asked if there was a fence on the property "back in the early '90's," his response was "I want to say it was a wooden fence. And as far as it being white, I'm not completely sure that that was the definitive color. It could have been a little off-white. I do remember a fence being there and I do remember the swale that it kind of was near." When shown an aerial photograph from 1990 and 1996, he admitted that a fence could not be seen.

Edward Protesto, who owned the property prior to appellee, testified that he acquired Lot 7 on November 13, 1998, and that he stayed at the property about "14 or 15 weekends out of the year." Mr. Protesto stated no fence was present on the property when

he purchased it and that he erected a fence several years later. He did not want to incur the expense of a survey, so he placed it in what "seemed like it was a natural spot."

Both parties testified as well as the two surveyors hired by each party. Leo Balzerett testified and provided photographs of the properties from various sources, but he could provide no information about whether a fence existed at the property during the 1998 timeframe. In addition, aerial photographs were admitted into evidence from the Cecil County Office of Planning and Zoning for the years: 1990, 1996, 2003, 2005, 2008, 2010, 2013, and 2016. An aerial image acquired from the United States Department of Agriculture ("USDA") from February 10, 1998 was also admitted into evidence.

Following arguments of counsel, the court held the matter *sub curia*. The court issued its Memorandum Opinion and Order on July 31, 2020, denying appellant's adverse possession claim. In the Opinion, the court first determined that appellee was "the rightful owner of the Disputed Property" and then examined whether appellant had sustained her adverse possession claim. The court determined that "Plaintiff regularly treated the 100 Iroquois Drive side of the fence as her own and exercised dominion and control over it." The court then reasoned:

> To sustain the adverse claim the adverse possession claim, the 20-year period must have begun on at least March 1998. Mr. Bruemmer testified that a white wooden fence was installed and erected between Lot 7 and Lot 8 as early as 1992. He further testified that he was rototilled Lot 7 in either 1994 or 1995 along the fence line and that Plaintiff's predecessor-in-interest complained of the noise. However, Mr. Protesto's testimony refutes the existence of the fence, stating that no fence existed at the time he purchased Lot 7 in November 1998, and that he erected the fence a "couple years" after. Plaintiff submitted several photographs maintained by the United States Department of Agriculture as well as photos maintained by the Cecil County Office of Planning and Zoning. The [c]ourt finds discrepancies in both

> testimonies. In the 1990 and 1996 aerial photographs, no fence line is visible. In the February 1998 USDA photograph, a white fence is clearly visible in the photo. Mr. Protesto's fence was set away from the boundary line. However, there has been no testimony about where the fence from the 1998 USDA photograph was located. Without any evidence indicating where that fence was located, the Court finds that Plaintiff has failed to meet its burden by a preponderance of the evidence that she and her predecessor-in-interest had dominion over the Disputed Property for the statutory period of 20 years. Therefore, Plaintiff's claim of adverse possession must be denied.

Appellant noted this timely appeal.

STANDARD OF REVIEW

Maryland Rule 8-131(c) provides, when a case is solely tried by a judge we are to "review the case on both the law and the evidence. [We] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." "Thus, we give deference to the factual findings of the trial judge and will reverse only for clear factual error." *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 576 (2007). "A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it." *Id.* "Questions of law, however, require our non-deferential review. When the trial court's decision 'involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct . . . .'" *Clickner v. Magothy River Ass'n Inc.*, 424 Md. 253, 266 (2012) (quoting *White v. Pines Community Improvement Ass'n, Inc.,* 403 Md. 13, 31 (2008)).

DISCUSSION

Appellant argues the trial court erred in denying her claim for adverse possession.

She maintains the 1998 USDA picture established that a fence was on Lot 7 for the statutory period. She furthers argues that appellee's expert's survey, included a scale from which the location of the fence can be determined and "functionally divided" the property. Appellee counters that the court did not err as appellant failed to establish her claim.

"'Adverse possession is a method whereby a person who was not the owner of property obtains a valid title to that property by the passage of time.'" *Hillsmere Shores Improvement Ass'n, Inc. v. Singleton*, 182 Md. App. 667, 691 (2008) (quoting Md. Civ. Pattern Jury Instr. 2:1 (MPJI–Civ.)). "'To establish title by adverse possession, the claimant must show possession of the claimed property for the statutory period of [twenty] years . . . . Such possession must be actual, open, notorious, exclusive, hostile, under claim of title or ownership, and continuous or uninterrupted' for the twenty-year period.'" *Breeding v. Koste*, 443 Md. 15, 28, 115 A.3d 106, 113–14 (2015) (quoting *White v. Pines Community Improvement Ass'n, Inc.,* 403 Md. 13, 36 (2008)). "The burden of proving title by adverse possession is on the claimant." *Purnell v. Beard & Bone, LLC*, 203 Md. App. 495, 527 (2012) (quoting *Costello v. Staubitz*, 300 Md. 60, 67 (1984)).

"Broadly, the elements of adverse possession can be placed in three groups: possession must be (1) actual, open and notorious, and exclusive; (2) continuous or uninterrupted for the requisite period; and (3) hostile, under claim of title or ownership." *Senez v. Collins*, 182 Md. App. 300, 334 (2008). All elements must be satisfied. "Determination of whether a claimant is in actual possession of the claimed land is a fact-intensive inquiry." *Id.* at 325. "[S]omething more than mere occasional use of land is needed. But, the character, location, and use of lands vary, and the type of possessory acts

necessary to constitute actual possession in one case may not be essential in another." *Id.* at 326. "The element of 'open and notorious' pertains to the concept of constructive notice to the title owner. Possession must be visible and notorious, so that the owner may be presumed to have notice of it." *Id.* at 325 (internal quotation omitted). "'Exclusive possession means that the claimant must possess the land as his own and not for another.'" *Id.* (quoting *Orfanos Contractors, Inc. v. Schaefer*, 85 Md. App. 123, 130 (1990)).

"[T]he term 'hostile' signifies a possession that is adverse in the sense of it being 'without license or permission,' and 'unaccompanied by any recognition of . . . the real owner's right to the land.'" *Yourik v. Mallonee*, 174 Md. App. 415, 429 (2007) (quoting *Hungerford v. Hungerford*, 234 Md. 338, 340 (1964)). "The type of 'recognition of right' that destroys hostility is not mere acknowledgment or awareness that another claim of title to the property exists, but rather, **acceptance** that another has a **valid right** to the property, and the occupant possesses subordinately to that right." *Id.* (emphasis in original).

A claimant seeking to acquire land by adverse possession must establish they have held the property continuously or uninterrupted "[w]ithin 20 years from the date the cause of action accrues." Md. Code Ann., Cts. & Jud. Proc. § 5-103(a). When "no single adverse possessor" has adversely possessed the land for the statutorily required twenty-year period, courts are required to determine if the "successive periods of adverse possession may be tacked together to meet the requisite duration. Tacking is permitted where there is privity of estate between the successive adverse possessors." *Senez*, 182 Md. App. at 332. "'The law is clear that such privity may be created by a sale and conveyance and possession under it as well as by descent.'" *Id.* (quoting *Gore v. Hall*, 206 Md. 485, 491 (1955)).

> For tacking to apply, the land in dispute need not be included in the deed by which the last occupant claims title, provided the land in question [is] contiguous to that described in a deed, and that lands both titled and untitled [are] part of a close, apparent by reason of physical boundaries such as fences or hedges. [T]wo possessions will be tacked if it appears that the adverse possessor actually turned over possession of that part as well as of that portion of the land expressly included in his deed.

Id. at 332–33 (internal citations and quotations omitted) (alterations in original).

In the present case, the statutory period to be established began, at least in March 1998 and ran until March 2018, when appellant filed her complaint in the Circuit Court. Appellant acquired her lot in 2005 and sought to tack on years when the property was owned by others. *See Senez*, 182 Md. App. at 332. Appellant produced no witnesses who were her predecessors in title to testify about the presence of a fence. Her witness, Charles Bruemmer recalled seeing a fence on the property in 1992, but he did not specifically testify that he saw a fence within the March 1998 timeframe. He also could not identify a fence when shown aerial photographs from the Cecil County Office of Planning and Zoning. Mr. Protesto, who owned the adjacent lot from November 1998 until appellee acquired it in April 2006, testified that there was no fence on the lot when he purchased the property.

We observe that no specifics could be discerned from the photographs as to the length or distance of the fence from the houses or other landmarks on the properties. Appellee's surveyor, Jill Myers, testified that "[t]he fence line at the furthest part from the property line scales at roughly fifteen feet from the property line. At the lagoon it scales at roughly eleven feet from the property line." However, neither appellant's surveyor or appellee's surveyor provided testimony about the specific dimensions of the fence that existed in 1998.

In her opinion, the judge concluded "there has been no testimony about where that fence . . . was located." We agree. Here, the court carefully applied the elements of adverse possession to the factual testimony and evidence presented and determined that appellant had not established her claim. The court gave full credit to the testimony of the witnesses, but found the evidence conflicting and lacking as to whether appellant had acquired the property continuously for the twenty-year period and, further, appellant did not establish the specific area of the property she contended was hers. Appellant's argument that the court could have used the surveys to determine the property lines ignores Mr. Protesto's unrefuted testimony that there was no fence when he purchased the property as well as Myers' testimony that approximated the length of the fencing erected in 2000 from the boundary line.

The witness' testimonies created a reasonable inference that there were two different fences placed on the property, one prior to the February 1998 photo, which was removed, and one in 2000. The fence seen from the aerial photograph does not distinctly define the area and no witnesses provided detail about the fence's dimension or placement in relation to the boundary lines. On this record, we hold the court did not err in its factual findings and we hold its conclusion was legally correct.

We further note the court did not address the element of hostility in its analysis as it determined that appellant failed to establish continuous possession. However, appellant's claim also failed because she admitted that she asked to purchase the disputed property during her discussions with appellee. Her admission constituted an acknowledgement that appellee was the true owner, and therefore, it negated her hostile claim. *See Hillsmere*

Shores Improvement Association, Inc., 182 Md. App. at 711–12 (citing *Stump v. Henry*, 6 Md. 201, 208–09 (1854)) (where the Court of Appeals found that "the putative adverse possessor had done more than acknowledge that title in the disputed property was held by another; during the statutory period, the claimant had sought to purchase the title from the title owners. The Court determined that this was an acknowledgment of the title owner's right of possession.").

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.