UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0479

September Term, 2016

GUY NIMRO

v.

JANE W. HOLDEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF DAN WESTLAND

Eyler, Deborah S.
Arthur,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: April 10, 2017

This appeal arises from an Amended Complaint to Quiet Title for Adverse Possession. In that complaint, appellant claimed both a prescriptive easement over and title by adverse possession to seven unimproved and unbuildable lots (Lots 1, 2, 3, 84, 85, 86, and 87) in the Fairview Section One subdivision in Anne Arundel County. Those lots are adjacent to the front of appellant's residential property at 511 South Drive and separate his lot from Herring Bay. Dan Westland, appellant's neighbor, held legal title to the lots from 1989 until his death in 2006, at which point title vested in Westland's Estate, of which appellee is the personal representative.

BACKGROUND

Appellant's initial complaint was filed in September 2013. In Count 1, for adverse possession, appellant alleged that for 20 years he and his predecessors in title had been in open, exclusive, and hostile adverse possession of the seven lots, under a claim of right, by maintaining them, cutting the grass, removing trees, filling in low areas, and using some of the lots for occasional parties. He never paid any taxes on the lots, insured them, fenced them, or posted signs on them. In Count 2, for prescriptive easement, appellant alleged that, since 1952, he and his predecessors had used the lots actively, openly, notoriously, visibly, exclusively, and continuously as an extension of his/their front lawn and for access to the Herring Bay beach.

The Circuit Court initially dismissed the complaint upon its conclusion that the claim, which was (and remains) against the personal representative of Westland's Estate, was barred under Md. Code, Estates and Trusts Article, §8-103(a) because it was not

filed with the personal representative within the time allowed by that statute. This Court reversed that judgment and remanded the case for further proceedings. *Nimro v. Holden*, 222 Md. App. 16 (2015).

On remand, discovery ensued, and, following the taking of appellant's deposition, appellee moved for summary judgment, offering evidence with respect to the adverse possession claim that (1) Westland and the Estate had paid all taxes on the lots, had carried insurance on the lots, and had maintained them, (2) any grass-cutting or tree removal appellant had done was without Westland's or the Estate's knowledge or consent, (3) appellant had never attempted to exercise ownership rights to the lots by fencing them, planting gardens or shrubbery, restricting anyone's trespassing on them, constructing erosion devices, installing a pier, etc.,[1] (4) when, in 2013, appellant erected a flagpole on one of the lots, the Estate demanded that he remove it and he did so, (5) appellant had acknowledged several times that he had taken care of the property because he believed (erroneously) that he had a right of first refusal to purchase it and wanted it to be kept up, (6) since 2010, the Estate had actively attempted to sell the property and had placed "No Trespassing" signs on it, (7) appellant knew of the signs and never attempted to remove them, and (8) until filing his lawsuit in 2013, appellant had never disputed Westland's or the Estate's title or communicated to them any claim on the property.

[1] In his deposition, appellant claimed that he had planted a "little Japanese maple" tree on Lot 84.

With respect to the prescriptive easement claim, the Estate pointed out that (1) the deed to appellant's residential property makes no reference to any easement across the lots, (2) traversing the lots is not necessary to gain access to Herring Bay, as there is another means of access that appellant and others use, and (3) a prescriptive easement is not available simply to maintain a view, but even if it were, an easement is not necessary for appellant or others to maintain their view of the water because the lots are unbuildable, so no improvements could be built to obstruct that view. Attached to the motion were a number of supporting exhibits, including an affidavit of appellee and deposition testimony from appellant.

Three days before the hearing on the motion, appellant filed a response, which made reference to statements in his answers to interrogatories and in his deposition testimony. In his answer to interrogatories, he stated that, since he purchased his property (in 1990), he had "maintained the property in issue as mine by mowing, removing fallen trees, filling in ruts, landscaping and grading over lot 84, laying topsoil on and sodded same," that he had filled part of lot 85, and had "exclusively used the property in question as mine for parties, social events such as, by example, and keep boats on it." His position was that there was a genuine dispute with respect to who maintained the lots, and that was sufficient to deny the motion.

The court, through Judge Jaklitsch, heard argument on the motion, but because the judge had not seen appellant's response until the morning of the hearing, she did not make an immediate decision. On March 2, 2016, Judge Jaklitsch entered a brief order

granting the motion for summary judgment, concluding that there was no genuine dispute of material fact and that appellee was entitled to judgment as a matter of law. In a footnote, the judge cited two cases -- *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 738 (1993) for the proposition that "the mere scintilla of evidence in support of the plaintiff's claim is insufficient to preclude the grant of summary judgment" and *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381 (1997) for the proposition that "formal denials of conclusory allegations are insufficient to prevent summary judgment." The order was docketed the next day, March 3, 2016. The docket entry reads, in relevant part, "ORDERED that the Defendant's Motion for Summary Judgment is GRANTED." [2]

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[2] Neither party has raised any issue as to whether, as worded, the Order signed by Judge Jacklitsch, as docketed by the clerk, suffices to constitute the rendition and recording of a judgment. The Order does not explicitly state that judgment is entered for appellee; nor does it direct that the clerk enter such a judgment. On its face, it merely grants the motion for summary judgment, and that is what the docket entry dutifully reflects. In *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989), the Court of Appeals made clear that, to constitute an appealable judgment, a court order must possess three attributes: "(1) it must be intended by the court as an unqualified final disposition of the matter in controversy, (2) unless the court properly acts pursuant to Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties; and (3) the clerk must make a proper record of it in accordance with Md. Rule 2-601. Subsequent to the decision in *Rorhbeck*, a fourth requirement was added by Rule. The judgment must be set forth in a separate document, although, for purposes of an appeal, that requirement may be waived. *Hiob v. Progressive Amer. Insurance*, 440 Md. 466 (2014); *URS Corp. v. Fort Myer Constr. Corp.*, Md. (S.T. 2016, No. 31, Op. filed 3/24/17).

The first two elements noted in *Rohrbeck* turn on "whether the court indicated clearly that it had fully adjudicated the issue submitted and reached a final decision on the matter at that time." *Davis v. Davis*, 335 Md. 699, 710-11 (1994); *Hiob, supra*, at 485. In that regard, the *Davis* Court noted that "whether a judgment has been rendered in a particular case is an inquiry that must be made on a case-by-case basis and which

On April 1, 2016 – 29 days after that entry -- appellant filed a Motion to Reconsider, arguing that there was, indeed, a genuine dispute regarding who maintained the lots – more than a mere scintilla and more than a formal denial of conclusory allegations. On April 18, 2016, the Court, through Judge Kiessling, entered an order summarily denying that motion. That order was docketed on April 21, and this appeal was noted on May 18, 2016.

DISCUSSION

In his brief, appellant presents the single issue "did the court err in the ruling that there were no disputes as to material fact and that the appellee was entitled to a granting of summary judgment as a matter of law?" Respectfully, that issue is not before us, at least not directly, because no timely appeal was taken from the order granting summary

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focuses upon the actions and statements of the court." That statement, of course, must be read in light of the "separate document" requirement.

It certainly would have been better had the March 3 Order not only granted the motion but also directed that judgment be entered for the appellee and had the docket entry reflected both of those decisions. We are convinced, however, as apparently are the parties, that the clear intent of Judge Jaklitsch was to express a final determination on the only issue before her – whether, on the evidence presented, appellee was entitled to judgment as a matter of law that appellant had failed to present a legally sufficient case of adverse possession or prescriptive easement. It is abundantly clear that nothing further remained to be decided and nothing, even of a procedural nature, remained to be done. No further order was anticipated. Indeed, appellant recognized that a judgment had been entered by filing his motion for reconsideration pursuant to Rule 2-535, which is a post-*judgment* motion. We therefore shall construe the March 3 Order as directing that judgment be entered for appellee, which was the singular intent of the Order. So that the record will reflect this determination, to avoid any confusion henceforth, we shall, in our mandate, direct that the March 3 docket entry be amended *nunc pro tunc* to add that judgment was entered for appellee.

judgment. Except as otherwise provided in Md. Rule 8-202, a notice of appeal must be filed within 30 days after the entry of the judgment or order from which the appeal is taken. Md. Rule 8-202(a). In the context of this case, the only exception to that requirement would be if appellant had filed a motion under Rule 2-534 to alter or amend the judgment, which must be filed within ten days after entry of the judgment. That was not done. The motion to reconsider was filed 29 days after entry of the judgment, which put it under Rule 2-535. All that is before us is the appeal timely taken from the order denying appellant's motion for reconsideration, and, because a decision whether to grant such a motion is ordinarily within the sound discretion of the trial court, the only issue on appeal is whether that court abused its discretion in denying the motion. *See Furda v. State*, 193 Md. App. 371, 377, n.1 (2010); *Wilson-X v. Human Resources*, 403 Md. 667, 674 (2008).

Saving only for the footnote added to the March 3 Order, no reasons were enunciated by the court, either in the Order granting the motion for summary judgment or in the Order denying the motion to reconsider that Order. There was a hearing on the motion for summary judgment, and Judge Jaklitsch had before her not only the oral presentations of the parties but written memoranda as well. The undisputed standard for determining whether to grant such a motion is whether (1) construing all inferences against the moving party, the pleadings, discovery material, affidavits, or other "evidence" properly before the court establish any genuine dispute of *material* fact, and (2) if not, the movant is entitled to judgment as a matter of law. Md. Rule 2-501(a) and

(f). To establish a right to title through adverse possession, it was incumbent upon appellant to show actual, open, notorious, exclusive, hostile, continuous, uninterrupted possession of the property for the statutory period of 20 years. *White v. Pines Community*, 403 Md. 13, 36 (2008); *Costello v. Staubitz*, 300 Md. 60, 67 (1984); *Breeding v. Koste*, 443 Md. 15, 28 (2015); *Senez v. Collins*, 182 Md. App. 300, 323-24 (2008); *Barchowsky v. Silver Farms*, 105 Md. App. 228, 241 (1995).

As this Court explained in *Senez*, these elements fall into three groups. The elements of "open" and "notorious" pertain to "the concept of constructive notice to the title owner." *Senez*, at 325. Although actual notice is not required, the acts of dominion over the land by the adverse possessor must be "sufficient to charge the record owner with knowledge that the land is adversely possessed." *Id*, quoting *Miceli v. Foley*, 83 Md. App. 541, 561 (1990). Whether the adverse possessor's possession is "actual," depends, to some extent, on the nature of the property, but generally "something more than 'mere occasional use of the land' is needed." *Senez*, at 325-26, quoting *Porter v. Schaffer*, 126 Md. App. 237, 277 (1999). For the possession to be "hostile," it must be under a claim of title or ownership, without permission and "unaccompanied by any recognition of . . . the real owner's right to the land." *Senez*, at 339-40, quoting *Yourik v. Mallonee*, 174 Md. App. 415, 429 (2007)

Appellant's entire case rested on his assertions that, dating back to when he purchased his property in 1990, he had mowed the grass, occasionally planted a tree (only

one of which survived), had some parties on one or more of the lots, and put a removable bench near the beach on one of the lots.

Assuming the truth of that – notwithstanding some dispute regarding it – there was no evidence that any of that activity was open, notorious, or hostile. Until this suit was filed, appellant never advised Westland or the Estate that he had done any of the things he said he had done or that Westland or the Estate were otherwise aware of those activities.

Most telling are his several admissions that his occasional maintenance of the lots, such as it was, was based on his expectation that, at some time in the future, he would be able to purchase the lots if Westland or the Estate ever decided to sell them, through a right of first refusal that appears in none of his (or anyone else's) title documents. That entirely subjective surmise, emerging from his own lips, shows rather conclusively a recognition on his part that Westland and later the Estate had good title to the property. Further recognition of that fact also came from appellant's admission that, on two occasions during the 20-year period, he offered to purchase the property from Westland, once orally, which Westland rejected, and once in a letter to which Westland never responded. The activity he described in support of his adverse possession claim was therefore not hostile to Westland's or the Estate's ownership but constituted nothing more than occasional trespasses on his part. If the correctness of the granting of summary judgment were before us, we would have no hesitation in affirming it.

As noted, however, that issue is not directly before us, only whether Judge Kiessling abused her discretion in denying the motion to reconsider, a purely discretionary call on her part. Judge Kiessling had before her appellant's motion and a three-page memorandum citing excerpts from his deposition and answers to interrogatories. She had as well appellee's response noting that the motion was nothing more than a rehashing of the arguments that Judge Jaklitsch had considered and rejected, and that there was no dispute of *material* fact sufficient to warrant reconsideration of her decision. We find no abuse of discretion in Judge Kiessling's denial of the motion to reconsider and shall therefore affirm the judgment below.

JUDGMENT AFFIRMED; CASE REMANDED FOR AMENDMENT TO MARCH 3, 2016 DOCKET ENTRY TO REFLECT THAT JUDGMENT WAS ENTERED FOR DEFENDANT; APPELLANT TO PAY THE COSTS.