[Cite as *Martin v. Yheulon*, 2009-Ohio-2606.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Joseph Martin, Jr., et al.	Court of Appeals No. OT-08-048
Appellants	Trial Court No. 06-CV-496-H
v.	
Arlene M. Yheulon, etc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: June 5, 2009

* * * * *

Ruth M. Gulas, for appellants.

John A. Coppeler, for appellees.

* * * * *

SINGER, J.

{¶ 1} Appellants bring this accelerated appeal from a summary judgment issued by the Ottawa County Court of Common Pleas in a property dispute.

{¶ 2} In 1945, Lawrence Vogt recorded a plat for a subdivision located in Ottawa County's Danbury Township. The Vogt subdivision consisted of a rectangle beginning at Ohio Route 163 and extending to, but not including, the shoreline of East Harbor in Lake Erie.

{¶ 3} In 1946, Ray and Susan Yheulon and Ignatius and Mary Zadravec purchased 18 lots in the Vogt subdivision. These lots were located along Park View Lane, nka Hamilton Drive, including a lot adjacent to the shoreline and a 20 foot shoreline adjacent strip. In 1947 and 1949, the Zandravecs sold their interest in these properties to the Yheulons.

{¶ 4} According to an affidavit of Ray Yheulon, Jr., his parents rented boats to tourists. These boats were stored on the unplatted shoreline property in dispute in this matter. In 1988, Lawrence Vogt transferred all of the shoreline land to Susan Yheulon by quit claim deed. According to the affidavit of Susan Yheulon's son, she subsequently transferred the shoreline land, except for the disputed strip, to the other shoreline adjacent lot owners.

{¶ 5} Appellants, Joseph Martin, Jr., Joanne R. Sutton, Jerome D. Thomas and Mary M. Thomas, now own property in Vogt's subdivision near that of appellees. Appellees, Arlene M., Allan T., and Ray Yheulon, Jr., are heirs of Ray and Susan Yheulon. On September 30, 2006, appellants sued appellees, seeking a declaration that appellants had acquired a prescriptive easement for use of a 50 foot wide strip of land extending north from the platted portion of Park View Lane to the shoreline. Appellants claimed that they or their predecessors in interest had used the land for social and recreational purposes for in excess of 21 years. Appellees responded to the suit, denying that any such easement had arisen.

{¶ 6} The matter was eventually submitted to the court on cross-motions for summary judgment. Appellants supported their motion with the affidavit of a former resident and their own affidavits that they had for a number of years used the disputed land to launch boats, walk dogs, burn debris and watch sunsets. Appellants also submitted the affidavit of Norman Peters who averred that since 1946, he had owned a waterfront lot near the disputed land. According to Peters, he personally observed appellants and previous owners of various lots use the land at issue for social and recreational purposes, to burn debris, launch boats and watch sunsets. Peters also testified that for more than 62 years he had himself engaged in such activity.

{¶ 7} Appellees supported their cross-motion with affidavits from themselves and various extended family members who averred that the Yheulons had always considered the disputed property as theirs, with the elder Yheulons using it for storage during the years that they rented boats to visitors. Others testified that they had occupied year round the cottage nearest the water from 1955 until the mid-1960's and had never seen any of the activities appellants claimed to have occurred there. None of the Yheulons recollect ever seeing anyone outside their family using or attempting to use the property for any purpose until recently when appellants tried to come on to the property. As some point, "No Trespassing" signs were posted.

{¶ 8} On consideration, the trial court found that appellants had failed to establish their claim to a prescriptive easement by clear and convincing evidence, denied their

summary judgment motion and granted appellees'. From this judgment, appellants now bring this appeal, setting forth the following two assignments of error:

{¶ 9} "Assignment of Error No. 1:

{¶ 10} "The lower court erred in concluding that no genuine issue of material fact could be established from the evidence and that summary judgment should be granted to defendants.

{¶ 11} "Assignment of Error No. 2:

{¶ 12} "The lower court erred by failing to conclude that Plaintiffs' and their predecessors in title use of the disputed property had ripened into prescriptive easement more than thirty years ago."

{¶ 13} Appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 14} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 15} A party seeking summary judgment must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112,

syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶ 16} "An easement is a right, without profit, created by grant or prescription, which the owner of one estate, called the dominant estate, may exercise in or over the estate of another, called the servient estate, for the benefit of the former." *Trattar v. Rausch* (1950), 154 Ohio St. 286, paragraph one of the syllabus. Easements may be created by express or implied grant or by prescription. Id. at paragraph two of the syllabus. The claim in this matter is that appellants acquired a prescriptive easement over appellees' property.

{¶ 17} Prescriptive easements are not favored in law because they deprive the legal property owner of rights without compensation. *Cadwallader v. Scovanner*, 12th Dist. No. CA2007-06-072, 2008-Ohio-4166, ¶ 55. "One who claims an easement by prescription has the burden of proving by clear and convincing evidence all the elements essential to the establishment thereof." *McInnish v. Sibit* (1953), 114 Ohio App. 490.

One obtains a prescriptive easement for a specific use of another's property when he or she uses that property in such a manner, "* * * (a) openly, (b) notoriously, (c) adversely to the neighbor's property rights, (d) continuously, and (e) for at least twenty-one years." *J.F. Gioia, Inc. v. Cardinal American Corp.* (1985), 23 Ohio App.3d 33, 36-37. "As to the requirement that the use be continuous for a twenty-one year period in order to establish a prescriptive easement, it is well settled that an individual may 'tack' his adverse use with the adverse use of his predecessors in order to meet this requirement. In order to tack the adverse uses of one's predecessors, it must be established that the party and his predecessors are in privity; the property was sequentially and continuously used; the property was used in the same or similar manner; and the use was open, notorious and adverse to the title holder's interest." *Willett v. Felger* (Mar. 29, 1999), 7th Dist. No. 96 CO 40. (Citations omitted.)

{¶ 18} Appellees argue that with respect to appellants Joseph Martin and Joanne Sutton, their acquisition of the land they claim as the dominant estate was from James and Ilse Lyons who had purchased the property from Ray and Susan Yheulon in 1984. Citing *Gioia*, supra at 37, for the proposition that an owner of property cannot use that property adversely to the owner's own interest, appellees maintain that the earliest any interest could have been adverse to that of the Yheulons was 1984. Since the affidavits of Ray Yheulon, Jr. and Charlette Yheulon that before 2005, they advised Joseph Martin and Joanne Sutton that the disputed property was private are uncontradicted, appellees

insist that, even had there been adverse use, it could not have matured for the necessary 21 years.

{¶ 19} Concerning appellants Jerome and Mary Thomas, appellees point to property records to show that no house was built on the lot that would become the Thomases' until 1976. Appellants contend that prior to this construction, the vacant lot could not have been the dominant estate to adverse use of the disputed land. Moreover, appellants again point to the affidavits of Ray, Jr. and Charlette Yheulon whose undisputed testimony is that in 1977, 1996 and August 1997 through 2002 there were no uninvited guests on the property who were not informed that it was private and asked to leave. Thus, appellants insist, it was not possible for the predecessors in interest for Jerome and Mary Thomas to have completed 21 uninterrupted years of adverse use on the disputed land.

{¶ 20} An easement, including a prescriptive easement, is the right of use over the property of another. It belongs to "* * * the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner." Black's Law Dictionary (6 Ed.Rev.1990) 509. An easement constitutes a servitude to the burdened estate in favor of a benefit for a dominant or benefited estate. Both the burden and the benefit run with the land, meaning that the, "* * * right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs." 1 Restatement of the Law 3d, Property-Servitudes (2000) 8, Section 1.1.

{¶ 21} With respect to appellants Martin and Sutton, prior to 1984, the land that they claim as the dominant estate to their prescriptive easement belonged to the predecessors in interest to appellees. Since one who owns property cannot use it in a manner adverse to the property owner's interest, *Giori*, supra, at 37, the earliest the 21 year prescriptive period could have begun is 1984.

{¶ 22} In support of their motion for summary judgment, appellees submitted affidavits from Charlette and Ray Yheulon, Jr., who testified that well prior to 2005, they had found appellants Martin and Sutton on the disputed property, advised them that the land was private and asked them to leave. According to the affidavits, appellants Martin and Sutton complied. Nothing in the material submitted by appellants contradicts this account.

{¶ 23} For a prescriptive easement to mature, the adverse use of the land must be continuous and effectively uninterrupted for the full 21 years. 1 Restatement of Law, Property – Servitudes, supra, at 280, Section 2.17, Comment j. The undisputed testimony was that the Yheulons ordered Martin and Sutton off the land, Martin and Sutton vacated the land and did not return for some time. This is sufficient to effectively interrupt appellants Martin and Sutton's adverse use and defeat their claim for a prescriptive easement. *Turoff v. Stefanac* (Nov. 14, 1985), 8th Dist. No. 49674, 50590. Accordingly, appellees were entitled to summary judgment with respect to appellants Martin and Sutton. Both of appellants Martin and Sutton's assignments of error are found not well-taken.

{¶ 24} Appellants Jerome and Mary Thomas purchased their property in the Vogt subdivision from Josephine Howard in 1997. According to the affidavit of Charlette Yheulon, the Howard lot was vacant until 1976 when Howard constructed the house now owned by the Thomases. It is not clear how long prior to this time that Howard owned the land.

{¶ 25} Appellees insist that the adverse use cannot precede the construction of Howard's house. We find nothing in the law to support this proposition. It is the land, not the structure that acts as the dominant estate in a prescriptive easement. See 1 Restatement, supra, at 8. Consequently, if it can be shown that Josephine Howard, as predecessor in interest to appellants Thomas, met the requirements necessary to establish a prescriptive easement on the disputed property either solely for the period of maturity or in combination with appellants Thomas by tacking, then appellants Thomas have established their claim.

{¶ 26} Appellees have submitted an array of affidavits containing uniform testimony that, with the exception of the latter day encounters with appellants Martin and Sutton, they did not see, nor were they aware of any such activity as appellants claim occurred on the disputed land: no fires, no dog walking, no boat launching, no sunset watching.

{¶ 27} Appellants submitted their own affidavits and that of Norman Peters in opposition. Peters is not a party to this action, but averred that he owned the lakefront property across the street from the Yheulons' lakefront lot since 1946. Peters testified

that for 60 years he observed the disputed property and the activities going on there by persons including Josephine Howard. According to Peters, "[T]he Thomases as well as the persons who owned the property prior to them use[d] this area for various social, recreational and personal uses, including, but not limited to walking and playing with various dogs and other pets, burning yard debris, watching sunsets, watching boat traffic, as far back as the late 1940's." Peters stated that these uses had "* * * continued without interruption to the present time."

{¶ 28} Appellees argued, and the trial court found, that Peters' affidavit was too vague or, when weighed against overwhelming testimony to the contrary, was insufficient for appellants to meet their burden to show prescriptive use by clear and convincing evidence. This determination was erroneous. The threshold to the issuance of a summary judgment is that is there is no genuine issue of material fact. Civ.R. 56. In this matter, there is an affidavit from a seemingly neutral, competent witness who avers that appellant Thomases' predecessor in interest met the elements of creating a prescriptive easement for such a period of time as to make the claim mature. Since appellees submitted affidavits contradicting this testimony, a question of material fact exists, precluding the issuance of a summary judgment. Accordingly, with respect to appellants Thomas, their first assignment of error is well-taken. Their second assignment of error is moot.

{¶ 29} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to said

court for further proceedings consistent with this decision. Appellants Martin and Sutton and appellees are ordered to each pay one half the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE