[Cite as *Bass v. Herbster*, 2012-Ohio-1393.]

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

Richard F. Bass	Court of Appeals No. L-11-1098
Appellant	Trial Court No. CI0200805798
v.	
Paul B. Herbster, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: March 30, 2012

* * * * *

William T. Maloney, for appellant.

James D. Valtin, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Plaintiff-appellant, Richard Bass, appeals the May 4, 2011 judgment of the Lucas County Court of Common Pleas which granted summary judgment in a quiet title action against appellant and in favor of defendants-appellees, Michael and Jeanne Koschalk ("appellees") and Brian and Karen Rakosik and multiple defendants/property owners in the Reno Beach Lands subdivision in Lucas County, Ohio. Because we find that issues of fact remain, we reverse.

{¶ 2} Appellant is the owner of multiple lots in the Reno Beach Lands subdivision which borders Lake Erie. Relevant to this appeal, in 1992 appellant and his late wife purchased lots 14 and 15, known as 11847 Dyke Road, which includes his residence, on a land installment contract. They acquired title to the property in 1996. After his wife's passing in 1998, appellant became the sole owner of the property. Adjacent to his property, is a 150-foot wide parcel bordering Dyke Road and Lake Erie which was dedicated in 1917 as a park for use by the subdivision lot owners.

{¶ 3} In March 2008, appellant had his property surveyed. According to the survey conducted by John Musteric, a licensed surveyor, a portion of appellant's property, including 14 feet of his residence, his utility sheds, and the front yard area were located on approximately half of the park or common area property ("the Premises").

{¶ 4} Based on the survey's results, on July 29, 2009, appellant commenced the instant action naming approximately 157 defendant property owners. In his complaint, appellant requested that title be quieted in his favor to the Premises.

{¶ 5} The majority of the defendants failed to answer the complaint after either mail service or service by publication. Ultimately, appellant was granted default judgments as to these defendants. Approximately ten defendants filed written answers from September to October 2008.

{¶ 6} On August 10, 2009, appellant filed a motion for summary judgment. Appellant argued that from at least 1984, appellant and his predecessors maintained the Premises. Appellant stated that adverse possession to the Premises was established by

the fact that his residence is on a portion of it, he maintained the yard including the bushes and trees, and that two utility sheds, used solely by him and his predecessors, are on the Premises. Appellant contended that the boundaries of the yard were readily discernible and were readily discernible when he purchased the property in 1992. Appellant further stated that when he purchased the property there was shrubbery marking the eastern boundary and that, after the shrubs died, they were replaced by a fence. Appellant supported the motion with his affidavit.

{¶ 7} On September 9, 2009, appellees filed their opposition to the motion for summary judgment. Appellees expressed their belief that appellant's survey was inaccurate and that, as a co-tenant with the other subdivision property owners, appellant was required to exert continuous use over the property to the exclusion of the other co-tenants. Appellees submitted their affidavits in support. Property owner/defendant Joseph Herr also filed an affidavit in support.

{¶ 8} With leave of court, on October 19, 2009, appellant filed an amended complaint to include prior unnamed defendants. On January 15, 2010, appellees filed a motion to dismiss appellant's amended complaint. Appellees argued that because appellant misidentified his property, he could prove no set of facts as to that property which would entitle him to relief. In a letter sent to the court, the Rakosiks supported the motion to dismiss. Appellant opposed the motion arguing that his claim should not be dismissed based upon a clerical error. On March 24, 2010, the court converted the motion to a motion for summary judgment and allowed further briefing.

{¶ 9} On May 10, 2010, appellant filed a renewed motion for summary judgment. Appellant argued that the fact that there are conflicting surveys was immaterial and that although the surveys differ as to where the lot lines fall, the parcel of property to which he is claiming title by adverse possession was clearly discernible and properly identified by both surveyors. Appellant argued that appellees failed to produce any evidence disputing appellant's open and continuous use of the property for the requisite period of time. In support, appellant attached his affidavit, the affidavit of the prior owner, Eugene Stitzel, the affidavit of a long-time resident, Eddie Luce, and an affidavit from surveyor, John Musteric.

{¶ 10} In response, the Rakosiks submitted a letter disputing the Musteric survey and asserting that appellant was attempting to gain the park property by "squatter's rights." Appellees' opposition argued that the dispute between the two surveyors was relevant and that appellant's continued failure to properly identify the property at issue, and, thus, notifying the affected subdivision property owners, should preclude the Premises being titled in his favor.

{¶ 11} On August 4, 2010, at the request of the court, the parties filed a stipulation which provided:

> 1. The Plat of Reno Beach Lands Subdivision (the "Subdivision") was received for record July 7, 1917 at 10:45 a.m. and recorded in Volume 32 of Plats, page 15. Said plat sets forth the following recital:

"The undersigned owners of the herein described lands adopt this subdivision into lots and dedicate the parks and ways therein for the use of the owners of lots in this subdivision only."

2. Pursuant to the Plat, a 150-foot wide parcel adjacent to and southeast of Lot 15, as shown on the plat, was designated as a "park." The "Premises" as described in the Complaint, * * * includes a portion of one of the areas designated in the Plat as "Park."

3. The effect of "Park" designations in the Plat was to assign rights of ownership in and to areas designated as "Park" to owners of the lots in the Subdivision and these rights are appurtenant to the acquisition of rights of ownership in and to each individual lot in the Subdivision.

4. As a result, the owners of record of the portion of the Park that is occupied by the Premises are the owners of record of the lots in this Subdivision.

{¶ 12} On May 4, 2011, the trial court issued its opinion and judgment entry granting appellees' motion for summary judgment and denying appellant's motion. The court found that because appellant and the other subdivision property owners are co-tenants, appellant was required to demonstrate not only use of the Premises, but ouster of the other subdivision property owners. Additionally, the court vacated its default judgments against the non-answering defendants. This appeal followed.

{¶ 13} Appellant now raises the following assignments of error for our consideration:

Assignment of Error No. 1: The lower court erred in granting summary judgment for the defendants.

Assignment of Error No. 2: The lower court erred in failing to grant summary judgment for the plaintiff.

Assignment of Error No. 3: The lower court erred in vacating the final judgments entered in this action on April 28, 2009 and on June 10, 2009.

{¶ 14} Appellant's first and second assignments of error are related and will be jointly addressed. This court shall employ a de novo standard in reviewing the grant of a motion for summary judgment. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). The trial court's judgment is not afforded any deference, and this court applies the same test, set forth in Civ.R. 56(C), as the trial court. Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that no genuine issue as to any material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, it appears from the evidence that reasonable minds can come but to one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Turner v. Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123 (1993).

{¶ 15} In order to establish adverse possession, "a party must prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years." *Grace v. Koch*, 81 Ohio St.3d 577, 692 N.E.2d 1009 (1998), syllabus. Because the parties stipulated that the owners of the park or common area, including the Premises, are the owners of the lots in the subdivision we will consider their ownership a co-tenancy. A co-tenant "cannot assert title by adverse possession against his co-tenant, unless he shows a definite and continuous assertion of adverse right by overt acts of unequivocal character clearly indicating an assertion of ownership of the premises to the exclusion of the right of the co-tenant." *Gill v. Fletcher*, 74 Ohio St. 295, 305-306, 78 N.E. 433 (1906). *See Grace*, 81 Ohio St.3d at 579, fn. 1.

{¶ 16} The question becomes, then, what steps were appellant and his predecessors required to take to establish title in the Premises to the exclusion of the other subdivision property owners. In his motion and renewed motion for summary judgment appellant outlined the history of the relevant land usage. Appellant's affidavit states that his residence was built in 1932 and that it encroaches on the Premises by approximately 18 feet. A portion of his front yard, as well as two utility sheds sits on the Premises; the sheds had been in that location since at least 1984. The affidavit further provides that a row of shrubbery, in place in 1992 when the property was purchased, mark the eastern boundary of the Premises. The shrubs died and were replaced by a fence.

{¶ 17} Eugene Sitzel, the owner of the property immediately prior to appellant stated that he and his wife purchased the property in 1980. He stated that at that time, one of the utility sheds was present. In 1980, pursuant to the lot description given by the seller, Sitzel stated that he planted a hedgerow along the eastern boundary just east of the shed. Sitzel stated that during his ownership of the property he mowed the lawn, used the shed, maintained a garden, and landscaped the area. Sitzel stated that he had exclusive use of the property and stated that the prior owner did as well.

{¶ 18} Eddie Luce, a neighbor who had resided in the subdivision since childhood and was, growing up, close friends with Sitzel's grandson stated in an affidavit that in the summer of 1984, he spent a lot of time at the Sitzel's residence and in the yard. Luce confirmed the location of the Premises and that the sheds were located thereon. Luce further stated that appellant's adjacent property and the Premises were maintained as a single property from, at least, 1984.

{¶ 19} Finally, appellant relies on two affidavits from appellant's surveyor, John Musteric. The first affidavit describes his survey findings. The second affidavit acknowledges Steven Coder's conflicting survey. Musteric stated that he disagreed with Coder's survey but that, despite differing placement of the lot lines, in both surveys the location of the Premises remained consistent.

{¶ 20} Conversely, appellees' affidavits stated that in their "layperson" review of Musteric's survey they believed that it was unreliable because the survey pins may have been relocated during sewer construction work in 2004-2005. Appellees stated that they

were unaware that appellant's use of his property was in any way inconsistent with the reservation of the park area for the use and enjoyment of the residents and to provide access to Lake Erie. Resident/ defendant Joseph Herr submitted an affidavit in support which stated that over the past 30 years he, his wife, children and grandchildren had utilized what he believed to be a portion of the Premises for "recreational purposes" and for access to Lake Erie.

{¶ 21} Appellees' surveyor, Stephen Coder, disputed the accuracy of the Musteric survey and contended that the entirety of appellant's residence was contained on his property. Coder noted that Musteric's survey resulted in a gap on one side of the park area and an overlap on the other side.

{¶ 22} We note that conflicting surveys have defeated summary judgment because such conflicts are to be resolved by the trier of fact. *See Green v. Lemarr*, 139 Ohio App.3d 414, 425, 744 N.E.2d 212 (2d Dist.2000). Although the determination of which survey is, in fact, correct is not critical to the establishment of adverse possession in this case, it is relevant. If appellant's residence is located on a portion of the Premises it would certainly be a use inconsistent from the rights of the other subdivision property owners. Further, the fencing, although a consistent property use for a co-tenant, is inconsistent with the purpose of the dedication of the plat which was use and enjoyment and access to Lake Erie by appellant and the other co-tenants.

{¶ 23} Based on the foregoing, we find that issues of fact remain, precluding summary judgment as to all parties, as to whether an ouster has occurred. Accordingly,

we find that appellant's first assignment of error is well-taken and appellant's second assignment of error is not well-taken.

{¶ 24} Appellant's third assignment of error challenges the trial court's judgment vacating the default judgments against several of the defendants. Appellant contends that the trial court lacked authority to vacate the judgments as they were final and appealable orders. Conversely, appellees argue that although the judgments contained the requisite Civ.R. 54(B) language the orders were not "final" when considering R.C. 2505.02 and due to the relationship between appellant and defendants/co-tenants.

{¶ 25} In determining whether an order is final, the requirements of both Civ.R. 54(B) and R.C. 2505.02 must be met. R.C. 2505.02 provides, in part, that an order is final where it "affects a substantial right in an action that in effect determines the action and prevents a judgment."

{¶ 26} The court's order relied on its award of summary judgment to appellees. The court recognized that the default judgments granted in favor of appellant conflicted with the summary judgment granted in favor of the remaining defendants. It is elementary that appellant has either established adverse possession and the court quiets title in his favor or he has not. Accordingly, while we find that the court did not err by vacating the default judgments, we must conclude that, based upon our disposition of appellant's first assignment of error, appellant's third assignment of error is well-taken.

{¶ 27} On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Lucas County Court of Common Pleas is

reversed and the matter is remanded for a trial on the disputed issues. Pursuant to App.R. 24, appellees are ordered to pay the costs of this appeal.

Judgment reversed.

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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE