[Cite as *Taubert v. Johnson*, 2001-Ohio-3257.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MARGARET N. TAUBERT, PLAINTIFF-APPELLEE VS. HARRY JOHNSON, ET AL., DEFENDANTS/THIRD PARTY PLAINTIFFS-APPELLANTS VS. MICHAEL GLENN JACKSON THIRD PARTY DEFENDANT-APPELLEE	)	CASE NO. 99-CO-64 O P I N I O N

CHARACTER OF PROCEEDINGS:	Civil Appeal from Columbiana County Court of Common Pleas Columbiana County, Ohio Case No. 98-CV-427
JUDGMENT:	Affirmed.
APPEARANCES: For Plaintiff-Appellee:	Atty. Charles L. Payne P.O. Box 114 East Liverpool, Ohio 43920
For Defendants/Third Party Plaintiffs-Appellants:	Atty. Peter Horvath P.O. Box 471 Lisbon, Ohio 44432
For Third Party Defendant/ Appellee:	Atty. Daniel Tychonievich 124 East Fifth Street East Liverpool, Ohio 43920

JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 9, 2001

WAITE, J.

{¶1} This timely appeal arises from the trial court's decision to grant summary judgment to Third Party Defendant-Appellee, Michael Glenn Jackson, against the claim of Defendants/Third Party Plaintiff-Appellants, Harry Johnson, et al. (Appellants), that Appellants owned the property in dispute by way of adverse possession. For the following reasons, we affirm the judgment of the trial court.

{¶2} On January 9, 1996, Anna M. Stull (Stull), executed a quit- claim deed to her grandson, Appellee Michael Glenn Jackson (Jackson), for the property at 931 Cedar Ave., Lot 2, Wellsville, Ohio. As a result of a complaint to quiet title the Columbiana County Common Pleas Court filed a judgment order on December 17, 1997, granting Jackson a fee simple interest in 931 Cedar Ave., Lot Nos. 3, 4, 5, 6, and 7 (the property). By the same order, Stull was to have a life tenancy in the property.

{¶3} On April 30, 1998, Stull entered a lease agreement with Appellee, Margaret N. Taubert (Taubert), for the property for the term of Stull's life estate. Taubert is Stull's daughter. On August 20, 1998, Taubert filed a complaint in trespass against Appellants, Harry and Geneva Johnson, alleging that Appellants' vehicles were upon the property without her

permission and that Appellants refused to remove the vehicles when requested. Taubert sought injunctive relief for the removal of the vehicles and against further trespass by Appellants. Appellant Harry Johnson is Taubert's half-brother.

{¶4} Stull passed away on October 12, 1998, terminating her life estate in the property and the lease. However, on October 15, 1998, the trial court entered default judgment in favor of Taubert and granted the requested relief. On November 2, 1998, Appellant filed a motion for relief from judgment which the trial court granted subsequent to a hearing on November 20, 1998. A transcript of that hearing was filed with the trial court and is part of the record on appeal. Also on November 20, 1998, Taubert and Jackson entered a month to month lease agreement for the property.

{¶5} On January 15, 1999, Appellants filed an answer to Taubert's complaint and filed a third-party complaint against Jackson, essentially arguing that Appellants owned the property by way of adverse possession. Based on Appellants' motion for access to the property, the trial court held a hearing on February 19, 1999. A transcript of that hearing was filed with the trial court and is part of the record on appeal. The trial court denied Appellants' motion for access to the property on February 22, 1999.

{¶6} On April 1, 1999, Jackson filed a motion for summary judgment on the third party complaint arguing that Appellants

failed to produce evidence of all the essential elements of an adverse possession claim, mainly that Appellants had exclusive use of the property, that the use was adverse and that the term of use was continuous for twenty one years. Appellants responded by providing the trial court with several affidavits alleging that Appellants occupied the property for more than twenty one years. Appellant Harry Johnson also cited to his hearing testimony which he claims is evidence that his use of the property was adverse.

{¶7} On May 13, 1999, the trial court filed an opinion and judgment entry granting Jackson's motion for summary judgment. The trial court stated that Appellant Harry Johnson admitted at the hearing that the use of the property was with his mother's permission and that there was no evidence that permission was ever revoked. In concluding that there was no material dispute as to whether Appellants' use was adverse, the trial court noted that the affidavits on which Appellants relied were hearsay and would not be considered, since such hearsay would not be admissible at trial. The trial court ruled also there was no dispute that Appellants' use of the property was not exclusive, citing Appellant's own admission that Taubert continued to use the property and that others used the property for storage. In granting this motion, the trial court also declared Jackson to be the sole owner of the property while explicitly stating that Appellants had no ownership interest in the property.

{¶8} Appellants filed a timely notice of appeal from that judgment entry on June 14, 1999. However, this court subsequently dismissed that appeal as filed prematurely. On August 24, 1999, the remaining parties, Appellants and Taubert, stipulated that the trial court would decide their dispute based on the testimony and evidence from the prior hearings and the arguments and briefs on summary judgment. On August 30, 1999, the trial court permanently enjoined Appellants from trespassing upon the property, thus resolving all disputes between all parties. On September 24, 1999, Appellants filed their notice of appeal. The sole assignment of error alleges:

{¶9} "THE FINDER OF FACT ERRED IN DISMISSING THE MOTION FOR SUMMARY JUDGMENT, FILED BY APPELLEE AND THIRD PARTY DEFENDANT JACKSON, WHEN APPELLANT JOHNSON SUSTAINED THE BURDEN OF COMING FORTH WITH EVIDENCE OF ADVERSE POSSESSION OF THE PROPERTY IN QUESTION."

{¶10} Appellants argue only that the trial court failed to consider the affidavits they offered as proof that the use of the property was without Stull's permission. Appellants do not identify any specific affidavit but argues that Evid.R. 803 provides two exceptions under which the trial court should have accepted hearsay within the affidavits:

{¶11} "(19) * * * Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located."

{¶12} "(22) * * * Judgments as proof of matters of personal, family or general history, or boundaries,

essential to the judgment, if the same would be provable by evidence of reputation."

{¶13} Appellants conclude simply that "* * * his affidavits contra to the motion for summary judgment are admissible and sufficient to create a genuine issue of material fact." (Appellants' Brief p. 5).

{¶14} Neither Jackson nor Taubert have filed briefs on appeal, however, based on the record before us we hold that Appellants' argument lacks merit.

{¶15} When reviewing a trial court's decision to grant summary judgment, an appellate court reviews the evidence *de novo* and applies the same standard used by the trial court. *Varisco v. Varisco* (1993), 91 Ohio App.3d 542, 543, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829; *Bell v. Horton* (1996), 113 Ohio App.3d 363, 365. Summary judgment under Civ.R. 56 is only proper when the movant demonstrates that:

{¶16} "(1) No genuine issue as to any material fact remains to be litigated;

{¶17} "(2) the moving party is entitled to judgment as a matter of law; and

{¶18} "(3) it appears from the evidence that reasonable minds could come to but 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."

{¶19} *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346. These factors make it clear that summary

judgment should be granted with caution, being careful to resolve doubts in favor of the nonmoving party. *Id.*

{¶20} The party seeking summary judgment has the initial burden of informing the court of the motion's basis and identifying those portions of the record showing that there are no genuine issues of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The movant must be able to point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support its claim. *Id.* If this initial burden is met, the nonmoving party has a reciprocal burden to, "* * * set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not respond, summary judgment, if appropriate, shall be granted." *Id.*

{¶21} To prevail on a claim of adverse possession, it is necessary to demonstrate by clear and convincing evidence that the claimant had exclusive, open, notorious, continuous and adverse possession of the disputed property for at least twenty-one years. *Grace v. Koch* (1998), 81 Ohio St.3d 577, 580-581. Appellants assert that certain affidavits disregarded by the trial court contained evidence that their possession of the property was adverse and thus, that they sustained their burden to demonstrate that there was an issue of material fact before the trial court. However, Appellants fail to recognize that it

is immaterial to this matter to determine whether the trial court should have considered those affidavits under the rules of evidence. Appellants have completely failed to set forth evidence of an element necessary to sustain their cause of action in adverse possession.

{¶22} In the motion for summary judgment, Jackson averred among other things that Appellant had not demonstrated that their use of the property was exclusive. Thus, the burden to demonstrate evidence of exclusive use of the property shifted to Appellants. *Dresher v. Burt*, *supra*. Our review of the record reveals that Appellants have not met this reciprocal burden. The record, including pleadings, hearing transcripts and affidavits, contains no claim nor evidence that Appellants had exclusive possession of the property. Rather, Appellant Harry Johnson has admitted that others have used the property. Appellant stated that Taubert planted shrubbery on the property and erected a fence. (Tr. 2/18/99 p. 14). In fact, Appellant testified that he helped Taubert erect the fence. (Tr. 2/18/99 p. 14). Appellant further testified that, "* * * other people was also using them lots at the time for over twenty years." (Tr. 2/18/99 p. 16). Based on the evidence on the record, a reasonable mind could only conclude that Appellants were not in exclusive possession of the property. There being no dispute that Appellants failed to establish an essential element, any dispute over the existence of the remaining elements is

immaterial.

{¶23} Accordingly, summary judgment was proper. Appellants' assignment of error lacks merit and we affirm the judgment of the trial court.

Donofrio, J., concurs.

DeGenaro, J., concurs.