[Cite as *IRG Amherst, L.L.C. v. Pennsylvania Lines, L.L.C.*, 2023-Ohio-2805.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

IRG AMHERST, LLC Appellant v. PENNSYLVANIA LINES, LLC, et al. Appellees	C.A. No. 22CA011851 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 19CV199461

DECISION AND JOURNAL ENTRY

Dated: August 14, 2023

STEVENSON, Judge.

{¶1} Appellant IRG Amherst, LLC ("IRG") appeals from the judgment of the Lorain County Court of Common Pleas granting summary judgment in favor of Appellee Norfolk Southern Railway, Co. ("Norfolk"). This Court reverses because factual issues remain and, therefore, summary judgment was improperly granted.

I.

{¶2} This matter involves a property dispute as to ownership of a 1.74-acre strip of land located in Amherst, Lorain County, Ohio ("the Strip"). Norfolk holds record title to the Strip. The Strip is a rectangular parcel that is approximately 1,500 feet long by 50 feet wide. The Strip is surrounded on three sides by property owned by IRG (the "Quarry property"). Property owned by Joseph and Jessie Abraham ("the Abraham farm") abuts the Strip on the fourth side.

{¶3} The Strip formerly contained railroad tracks and was part of a rail line that enabled IRG's predecessors to ship quarried stone by rail. The rail line underwent regulatory abandonment

in 1982, resulting in the cessation of railroad operations and the eventual removal of the railroad tracks. IRG maintains that, after railroad operations ceased, it and its predecessors continuously used the Strip for decades. IRG seeks ownership of the Strip.

{¶4} IRG commenced action seeking ownership of the Strip and asserting claims for adverse possession, prescriptive easement, acquiescence, and declaratory judgment. IRG asserted its claims against Norfolk, Pennsylvania Lines, LLC ("Pennsylvania"), and Consolidated Rail Corporation who was later dismissed. Norfolk filed an answer denying the material allegations of the complaint. As explained in Norfolk's answer, Pennsylvania merged into Norfolk in a 2004 corporate merger and, "[f]or all intents and purposes, Norfolk * * * is Pennsylvania * * *." It is undisputed that Norfolk is the title owner of the Strip.

{¶5} IRG and Norfolk filed cross-motions for summary judgment. IRG did not oppose Norfolk's motion for summary judgment on the acquiescence claim. The trial court granted Norfolk's motion for summary judgment and denied IRG's motion for summary judgment. The trial court dismissed as moot IRG's declaratory judgment claim.

{¶6} IRG appeals the trial court's decision granting Norfolk's motion for summary judgment on IRG's adverse possession and prescriptive easement claims, asserting two assignments of error for review.

I.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE CONCLUDING THAT ADVERSE POSESSION HAD NOT OCCURRED.

{¶7} IRG argues in its first assignment of error that the trial court erred in granting summary judgment in favor of Norfolk and concluding that adverse possession had not occurred.

While the record includes testimony as to IRG's use of the Strip, the testimony creates a factual issue as to whether IRG's use was exclusive, open, notorious, continuous, and adverse for twenty-one years. Accordingly, we conclude that genuine issues exist and that the trial court improperly granted summary judgment in favor of Norfolk.

{¶8} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Ormandy v. Dudzinski*, 9th Dist. Lorain No. 10CA009890, 2011-Ohio-5005, ¶ 7.

{¶9} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can 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.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶10} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party "may not rest upon the mere allegations or denials of the party's pleadings[.]" Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶11} To acquire title to property by adverse possession, the party claiming title "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, 580-581 (1988). The failure of proof as to any of the elements results in failure to acquire title by adverse possession. *Id.* at 581. Clear and convincing evidence is that proof which establishes in the minds of the trier of fact a firm conviction as to the allegations sought to be proved. *Cross v. Ledford*, 161 Ohio St. 469, 477 (1954).

{¶12} "'Exclusive possession' means that the use of the property need only be exclusive of the title owner's or third person's entry upon the land coupled with an assertion of his right to possession or claim of title to the property." *Ormandy*, 2011-Ohio-5005 at ¶ 11. Hence, "the use need not be exclusive of all persons, but rather, exclusive only of those who assert either by word or act any right of ownership or possession of the land." *Id.*

{¶13} "Open use" means that there was no attempt to conceal the use of the property. *Crown Credit Co., Ltd. v. Bushman*, 170 Ohio App.3d 807, 2007-Ohio-1230, ¶ 46 (3d Dist.). Open use is distinguishable from notorious and adverse use in that the latter uses "require more than merely conducting activities on the disputed property where others can observe." *Bushman* at ¶ 48. "To be notorious, a use must be known to some who might reasonably be expected to communicate their knowledge to the owner if he maintained a reasonable degree of supervision over his premises. * * * In other words, the use of the property must be so patent that the true owner of the property could not be deceived as to the property's use." (Internal quotations omitted.) *Id.*

{¶14} To satisfy the "adverse use" element, the claimant "must have intended to claim title, so manifested by his declarations or his acts, that a failure of the owner to prosecute within

the time limited, raises a presumption of an extinguishment or a surrender of his claim." (Internal quotations omitted.) *Bushman* at ¶ 48. This Court has stated that "[a]dverse or hostile use is any use inconsistent with the rights of the title owner." *Vanasdal v. Brinker*, 27 Ohio App.3d 298 (9th Dist.1985).

{¶15} The Ohio Supreme Court has held that "[i]n a claim for adverse possession, the intent to possess another's property is objective rather than subjective," so that the party in possession need not have intended to deprive the owner of the property at issue. *Evanich v. Bridge*, 119 Ohio St.3d 260, 2008-Ohio-3820, syllabus. Instead, the claimant need only have "possessed [the] property and treated it as the claimant's own" for the statutory period to satisfy the element of adverse use. *Id.*

{¶16} The twenty-one-year time period "does not begin to run until there is some act of possession by the adverse claimant '* * * so open, notorious and hostile that it constitutes, in law, notice to the real owner.'" *Montieth v. Twin Falls United Methodist Church, Inc*, 68 Ohio App.2d 219, 225. The statute may be tolled upon the title owner's "unequivocal manifestation of intent to reclaim the property." *Id.* Conversely, "[t]he doctrine of tacking permits adverse possession by successive owners, who are in privity, to be added together to make up the twenty-one years required for title to vest in the current possessor." *Ballard v. Tibboles*, 6th Dist. Ottawa No. 91-OT-013, 1991 WL 251957, *4 (Nov. 8, 1991), citing *Zipf v. Dalgarn*, 114 Ohio St. 291 (1926).

{¶17} IRG claims that it is the owner of the Strip by adverse possession as it and its predecessors have "used the Strip as part of their Quarry operations for decades." IRG maintains that the trial court ignored its contention that the "use of the Strip by IRG and its predecessors in title satisfied every element of * * * adverse possession." (Emphasis in original.) Norfolk

contends that summary judgment was properly granted as IRG "simply has not met the heightened burden on each element of its [adverse possession] claim at all, let alone for a period of more than 21 years."

{¶18} Based on the evidence in the record, we conclude that genuine issues of material fact remain as to IRG's adverse possession claim and that summary judgment was improperly granted. First, a factual issue exists as to whether IRG's use of the Strip was continuous and for the requisite twenty-one-year period. Jason Lichter, vice-president of IRG, testified that IRG's adverse possession period started in 1984 or 1985 and continued, without interruption, until 2019. According to Lichter's testimony, IRG has adversely possessed the Strip for 34-35 years. Henry Bentley and Joseph Abraham, who have been involved with the Quarry property owners since the 1970s and 1980s and were later hired to provide security due to inactivity on the Quarry property, testified that quarry operations ceased in 2000 or 2002. Bentley testified that there was no activity on the Quarry property from 2002 – 2007. Based on Bentley and Abraham's testimony, there was a five-to-seven-year period of inactivity on the Strip. We conclude that, in light of Lichter, Bentley, and Abraham's testimony, there is a factual issue as to whether IRG continuously possessed the Strip for the requisite twenty-one years.

{¶19} Factual issues also remain as to whether IRG's use of the Strip was exclusive, open, and notorious. Bentley and Abraham, security personnel for IRG and its predecessors, testified to the efforts each made to keep people off the Strip. Zachary Carpenter, president of IRG Operating, testified as to IRG's use of the Strip, including the dumping of stone scrap and discard material on the Strip. While this testimony may support an exclusive, open, and notorious use by IRG, Bentley and Abraham acknowledged that neither was asked to provide security for the Strip, place no trespassing or keep out signs on or around the Strip, or erect other barriers to keep people off the

Strip. Further, neither IRG nor Norfolk gave Bentley or Abraham permission to be on the Strip. Abraham also testified to his personal use of the Strip, starting in 1972. There was also testimony pertaining to the Strip's overgrown vegetation, such that one could not easily see the dirt driveways that were once used by an active quarry operation, and that prior dumping on the Strip by IRG and/or its predecessors had been covered or buried. On the other hand, there was testimony that the driveways on the Strip, created by quarry workers, were ten to 15 feet wide; were used on a daily basis when the quarry was in operation; and, according to Bentley, were on the Strip the entire 40-plus years he worked for the quarry. Abraham also testified as to crushed stone quarry workers "used to pile * * * all along the strip." "In order for possession to be considered open, 'the use of the disputed property must be without attempted concealment[.]'" *Franklin v. Massillon Homes II, L.L.C.*, 184 Ohio App.3d 455, 461 (5th Dist.2009), quoting *Kaufman v. Geisken Ents., Ltd.*, 3d Dist. Putnam No. 12-02-04, 2003-Ohio-1027, ¶ 31. Based on the record, factual issues remain as to the exclusive, open, and notorious elements of IRG's adverse possession claim.

{¶20} Lastly, we conclude that a factual issue remains as to whether IRG and its predecessor's use of the Strip was adverse. Bentley testified that "we [quarry workers] used the [Strip] like it was ours because I didn't know it wasn't ours." Carpenter testified that, until this litigation, he thought that the Strip was part of the Quarry property. Lichter testified that, after quarry operations ceased, IRG maintained the Strip as it did the rest of the Quarry property. Solomon Jackson testified, however, that the title owner of the Strip, whether Consolidated Rail Corporation or Norfolk, always paid the Strip's property taxes. There was also testimony as to purchase offers for the Strip. Abraham testified that his son approached Norfolk about purchasing the Strip and Lichter testified that IRG submitted purchase offers to Norfolk for the Strip in 2008

and 2017. Lichter acknowledged in a 2018 e-mail that IRG would continue its development plans without obtaining the Strip. Material issues of fact remain as to whether IRG and its predecessors adversely used the Strip.

{¶21} This Court concludes that genuine issues of material fact exist regarding IRG's adverse possession claim. The record and deposition testimony demonstrate that factual questions exist as to whether IRG and its predecessor's use of the Strip was exclusive, open, notorious, continuous, and adverse for twenty-one years. The finder of fact, not the trial court or this Court, is to judge and consider this evidence. *See Scarvelli v. Melmont Holding Co.*, 9th Dist. Lorain No. 05CA008793, 2006-Ohio-4019, ¶ 14.

{¶22} Accordingly, IRG's first assignment of error is sustained.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE CONCLUDING THAT A PRESCRIPTIVE EASEMENT DID NOT EXIST.

{¶23} IRG argues in its second assignment of error that the trial court erred in granting summary judgment in favor of Norfolk and concluding that a prescriptive easement did not exist. We agree that, because genuine issues of material fact remain, summary judgment on IRG's prescriptive claim was improperly granted in favor of Norfolk.

{¶24} To prevail on a prescriptive easement claim, a plaintiff must establish by clear and convincing evidence that it used the property at issue (1) openly, (2) notoriously, (3) adversely, (4) continuously, and (5) for at least twenty-one years. *Hudkins v. Stratos*, 9th Dist. Summit No. 22188, 2005-Ohio-2155, ¶ 7. Unlike in an adverse possession claim, a plaintiff is not required to prove exclusive possession as part of a prescriptive easement claim. *Id.*

{¶25} As discussed, when addressing IRG's first assignment of error, this Court concludes that genuine issues of material fact remain as to whether IRG and its predecessor's use of the Strip was exclusive, open, notorious, and continuous for twenty-one years. Factual issues remain as to IRG's prescriptive easement claim and, accordingly, summary judgment in favor of Norfolk was improperly granted. IRG's second assignment of error is sustained.

III.

{¶26} Genuine issues of material fact exist regarding whether IRG and its predecessor's use of the Strip was exclusive, open, notorious, continuous, and adverse for twenty-one years. IRG's assignments of error are therefore sustained as summary judgment should not have been granted in Norfolk's favor. The judgment of the Lorain County Court of Common Pleas is reversed, and the cause is remanded for further proceedings.

Judgment reversed,
and the cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

SCOT STEVENSON
FOR THE COURT

SUTTON, P. J.
CARR, J.
CONCUR IN JUDGMENT ONLY.

APPEARANCES:

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