



FILED
LORAIN COUNTY

2022 MAR -9 P 2:25

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY

Hon. D. Chris Cook, Judge
Hon. David Muhek, Magistrate

Date March 9, 2022

Case No. 19CV199461

IRG Amherst LLC

Plaintiffs

Plaintiff's Attorney

VS

Pennsylvania Lines, LLC, et. al.

Defendant

Defendant's Attorney

This case was transferred to this Court and the matter is now before the Court on competing motions for summary judgment. Plaintiff, IRG filed a Motion for Summary Judgment on January 28, 2021. The Defendant, Norfolk, filed a Motion for Summary Judgment on Plaintiff's Complaint, on January 29, 2021. Thereafter, on March 2, 2021, Plaintiff's Opposition to Defendant's Motion for Summary Judgment was filed and, on March 10, 2021, Norfolk's "Reply Brief in Support of its Motion for Summary Judgment" was filed.

The Motion for Summary Judgment of Plaintiff IRG Amherst, LLC is DENIED and its claim for a declaratory judgment is dismissed as moot.

The Motion for Summary Judgment of Defendant Norfolk Southern Railway, Co. is GRANTED. This case is dismissed.

See Decision attached. Costs taxed equally. No Record.

THIS IS A FINAL APPEALABLE ORDER

To the Clerk: THIS IS A FINAL APPEALABLE ORDER.
Please serve upon all parties not in default for failure to appear; Notice of the Judgment and its date or entry upon the Journal

MAGISTRATE David Muhek

JUDGE D. Chris Cook

cc: counsel of record



FILED
LORAIN COUNTY

2022 MAR -9 P 2:25

IN THE
LORAIN COUNTY COURT OF COMMON PLEAS
GENERAL DIVISION

COURT OF COMMON PLEAS
TOM ORLANDO

Date: March 9, 2022

Case No.: 19CV199461

IRG Amherst LLC

MAGISTRATE: David Muhek

Plaintiff

JUDGE: D. Chris Cook

vs.

-DECISION-

Pennsylvania Lines LLC, et. al.

Defendant

INTRODUCTION & PROCEDURAL HISTORY

Plaintiff, IRG Amherst, LLC (sometimes referred to hereinafter as “IRG”) filed a Complaint on October 3, 2019 containing four counts: (i) adverse possession, (ii) prescriptive easement, (iii) acquiescence, and (iv) declaratory judgment. The named defendants are Pennsylvania Lines, LLC (“Pennsylvania”) and Norfolk Southern Railway, Co. (hereafter sometimes referred to as “Norfolk”). Norfolk is a successor in interest to Pennsylvania Lines, LLC with respect to the subject matter of this litigation—a land-locked strip of land surrounded by property mostly owned by IRG.¹

This matter is before the Court on competing motions for summary judgment. Plaintiff IRG filed a Motion for Summary Judgment on January 28, 2021. The Defendant, Norfolk, filed a document, styled as a “Motion for Summary Judgment on Plaintiff’s Complaint”, on January 29, 2021. Thereafter, on March 2, 2021, Plaintiff’s

¹ Norfolk’s ‘motion for summary judgment indicates, at footnote 1 thereof, that “...the property at issue is currently titled in the name of Pennsylvania Lines, LLC which merged into Norfolk Southern in 2004. **Pennsylvania Lines, LLC’s business, along with the property, is now the property of Norfolk Southern**”. (emphasis added). That claim is undisputed by IRG. A predecessor to Norfolk, Consolidated Rail Corp., was voluntarily dismissed on July 31, 2020.



Opposition to Defendant's Motion for Summary Judgment was filed and, on March 10, 2021, Norfolk's "Reply Brief in Support of its Motion for Summary Judgment" was filed.

The Defendant's Motion for Summary Judgment essentially argues that Plaintiff is unable to meet its burden with respect to its claims and concludes that Norfolk is entitled to judgment as a matter of law on both of IRG Amherst's claims of adverse possession and prescriptive easement and that acquiescence is inapplicable to the instant case². Norfolk's motion maintains that it is the valid title holder of the strip of land that is the subject of each motion for summary judgment.

This case was referred to the Court's mediation department; however, the parties' mediation efforts were unsuccessful.

Neither party's motion for summary judgment included affidavits; however, seven depositions were docketed in this case on December 4, 2020 and variously referenced in both motions. The evidentiary value of the pleadings were reviewed together with the depositions. The depositions are identified herein by deposition dates, as follows:

1. August 20, 2020 deposition transcript of **Justin Lichter** (hereafter "**JL**"—employed by Industrial Realty Group, formerly with a subsidiary, IRG Realty Advisors);
2. August 20, 2020 deposition transcript of **Henry Allen Bentley** (hereafter "**HB**"—lived near and worked in the Quarry Property);
3. August 21, 2020 deposition transcript of **Joseph Abraham** (hereafter "**JA**"—has lived on Quarry Road since 1989);
4. August 21, 2020 deposition transcript of **Zachary Carpenter** (hereafter "**ZC**"—president of 'IRG Operating' dba Cleveland Quarries, an affiliate of IRG);
5. August 21, 2020 deposition transcript of **Gregory Hipp** (hereafter "**GH**"—employed by IRG Realty Advisors);
6. September 28, 2020 deposition transcript of **Solomon Jackson** (hereafter "**SJ**"—an employee of Norfolk and director of real estate);
7. October 8, 2020, the second deposition of **JL**³.

² Page 31 of Defendant Norfolk's Brief in Support of its Motion for Summary Judgment.

³ This October 8, 2020 deposition transcript of Justin Lichter was filed twice: first, on December 4, 2020, with exhibits attached, by Defendant Norfolk and a second time by Plaintiff IRG on December 16, 2020. Additionally, Civ. R. interrogatories and Admissions were propounded.



RELEVANT FACTS

The lawsuit involves an undeveloped, landlocked, rectangle parcel of real estate owned by Norfolk. Said real estate is identified by Plaintiff IRG, in its Motion for Summary Judgment, as the “Strip”—a parcel of land that is largely surrounded by the Plaintiff’s property. Defendant Norfolk identifies that same subject parcel as the “NS Property” in its Motion for Summary Judgment. For clarity, the Court will continue to refer to the disputed parcel as “Strip”.

It is undisputed that the Strip is a parcel of land (with railway tracks removed) that is approximately 50 feet wide and 1,500 feet long that was once used as a railway spur that served the quarry⁴. Additionally, both Plaintiff IRG and Defendant Norfolk identify, in their respective motions, a parcel of Plaintiff’s property that partially surrounds the “Strip” as the “Quarry Property”⁵. The Quarry Property was purchased by IRG in December, 2007 from a third party. (Complaint, at ¶6).

IRG seeks a summary judgment determination that that it has acquired ownership in the Strip through adverse possession⁶ that has been tacked through its predecessor in interest in the Quarry Property. IRG acknowledges that its legal title to the Quarry property does not include the Strip⁷,

IRG’s arguments for its claim is, essentially, that (i) Norfolk and its railway predecessors have not exercised ‘possessory rights’ since track was removed in 1987 and the Strip became landlocked and (ii) that possession by IRG and its predecessors

⁴ See, the Norfolk Motion for Summary Judgment’s supporting Brief, at page three, therein and *cf.* to Plaintiffs Brief supporting its Motion for Summary Judgment, at page three, therein.

⁵ The subject “Strip” also borders a 50 feet wide parcel of land that is owned by neighbors, Joseph & Jessie Abraham.

⁶ IRG has also advanced alternative claims towards that same goal with claims of prescriptive easement and acquiescence.

⁷ Plaintiff’s Complaint at ¶ 8, therein. Legal title to the subject parcel (the Strip) appears undisputed. Plaintiff’s complaint includes the legal descriptions, deeds and historical information tracing ownership ultimately to Norfolk, attached as Exhibits 1 through 11, culminating in the preliminary judicial report (Ex.11, therein) showing ownership of the Strip as belonging to Pennsylvania Lines, LLC. Norfolk’s director of real estate, Solomon Jackson (“SJ”) testified in his deposition that the strip is owned by Norfolk. (SJ 18:11-12). The Strip was conveyed by Conrail to Pennsylvania Lines, LLC in 1999. Pennsylvania Lines merged into Norfolk in 2004. See, SJ 19:6 -20:25. See, also August 20, 2020 deposition of Justin Lichter (“JL”) an employee of Industrial Realty Group (JL 25:24). Moreover, the legal description in the deed conveying title in the Quarry Property to IRG does not include title to the Strip. See, Plaintiff’s Complaint Ex. “C” therein, at ¶¶6-8 and Exhibit 1, thereto (the Quarry Property deed). Indeed, IRG tried to purchase the Strip. August 20, 2020 deposition (JL 62:-63:17).



occurred when the rail spur was decommissioned and the railway tracks removed (*See*, SJ deposition).

Quarrying operations on the Quarry Property ceased since approximately the year 2000. (HB 15:10-22:10) & (JA 42:16- 43:1).

IRG's main contention is that the strip was landlocked and that Norfolk, a successor in interest to the landlocked parcel, did not venture on it or do anything to prevent transient crossing or use its Strip over the years. This lawsuit was filed by IRG in 2019 after its proposed purchase of the Strip from Norfolk did not occur (*See*, e.g., JL 55:21-24).

Norfolk notes that the rock quarry—within the Quarry Property—was inactive and had not been operational since about three to five years prior to IRG's purchase of the Quarry Property (in December, 2007). (HB 15:10-19). Norfolk asserts that it has paid taxes on the Strip following its acquisition. (SJ 21:5-14).

LAW AND ANALYSIS

Adverse Possession

Plaintiff IRG's principal cause of action, count one, claims adverse possession. The elements of adverse possession, as stated by the Ohio Supreme Court, have been summarized as follows:

"To acquire title by adverse possession, the party claiming title must show exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years. [string citations omitted]. Failure of proof as to any of the elements results in failure to acquire title by adverse possession. Pennsylvania Rd. Co. v. Donovan, 111 Ohio St. at 349–350, 145 N.E. at 482b"

Grace v. Koch, 81 Ohio St.3d 577, 579, 692 N.E.2d 1009, 1011 (1998) (emphasis added).



Moreover, the quantum of proof has been declared by the Ohio Supreme Court to be that of a 'clear and convincing evidence' standard. *Grace*, supra⁸. The Court, in *Grace*, went on to explain the high proof bar set for a litigant to prevail on a claim of adverse possession:

"A successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation. Such a doctrine should be disfavored, and that is why the elements of adverse possession are stringent". *Grace*, supra.

The doctrine is disfavored and the burden of proof on each element is rigorous. *Ormandy v. Dudzinski*, (9th Dist. Lorain) No. 10CA009890, 2011-Ohio-5005. Moreover, each case of adverse possession must be determined on its particular facts and any such claim must be strictly construed in favor of the title owner. *Montieth v. Twin Falls United Methodist Church, Inc.* (1980), 68 Ohio App.2d 219; *Ormandy*, supra.

Prescriptive Easement

IRG has also advanced a second cause of action for a 'prescriptive easement' of the Strip. The Ninth District Court of Appeals has stated--and other courts have also articulated--the elements of a prescriptive easement:

*"In order to prevail on a claim of prescriptive easement, a plaintiff must establish that the plaintiff used the property at issue (1) openly, (2) notoriously, (3) adversely to his neighbor's property rights, (4) continuously, and (5) for at least twenty-one years ***Unlike an adverse-possession claim, the element of exclusive possession of property is not required in a prescriptive-easement claim".* *Hudkins v. Stratos*, (9th Dist) 2005-Ohio-2155.

See, also, Beaver v. Williams (9th Dist.) 2001 WL 169089; *Olive Oil, L.L.C. v. Cleveland Elec. Illum. Co.*, (8th Dist.), 2021-Ohio-2309; *Harris v. Dayton Power & Light Co.*, (2d Dist.), 2016-Ohio-517; *JF Gioia, Inc. v. Cardinal Am. Corp.*, 23 Ohio App.3d 33 (8th Dist.1985). Moreover, a party, to prevail on a successful prescriptive easement claim, must also do so by clear and convincing evidence. *Hudkins*, supra.

⁸ The doctrine of acquiescence (IRG's third count) also requires clear and convincing evidence and applies in instances where adjoining land owners occupy their respective properties up to a certain line and mutually recognize and treat that line as if it were the boundary separating their properties, as discussed, *infra*.



Acquiescence

The doctrine of acquiescence—IRG's third and final count—also requires clear and convincing evidence and applies in instances where adjoining land owners occupy their respective properties up to a certain line and *mutually recognize and treat* that line as if it were the boundary separating their properties.

*“Various jurisdictions tend to delineate different elements for acquiescence because this doctrine is frequently confused with and mingled with the elements of the separate doctrines of adverse possession, estoppel and agreement. Generally, however, the following two requisites must be present in order to apply the doctrine of acquiescence. First, the adjoining land owners **must mutually respect and treat a specific line as the boundary to their property**. Second, that line must be treated as such for a period of years, usually the statutory time period required for adverse possession.” (Citations omitted.) Ballard v. Tibboles (Nov. 8, 1991), 6th Dist. No. 91-OT-013”.*

Thomas v. Wise, 6th Dist. Sandusky No. S-06-043, 2007-Ohio-3467. See, also, *Gaskill v. Baughman*, (3rd Dist.) 2012-Ohio-2130, ¶ 14.

Summary Judgment

The standard of review for summary judgment in Ohio is well-settled. The Ninth District Court of Appeals has recently stated the standard of review for summary judgment:

“This Court reviews an award of summary judgment de novo. Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105 (1996). This Court uses the same standard that the trial court applies under Civ. R. 56(C), viewing the evidence in the light most favorable to the nonmoving party and resolving any doubt in favor of the non-moving party. See Viock v. Stowe Woodward Co., 13 Ohio App.3d 7, 12 (6th Dist.1983).

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

Petroskey v. Martin, 9th Dist. Lorain No. 17CA011098, 2018-Ohio-445, at ¶ 15.



Moreover, the Ninth District has stated:

“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 (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. 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 moving 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 (1996), 75 Ohio St.3d 447, 449, 663 N.E.2d 639.” (Emphasis added) Ormondy, supra.

The facts in the Ninth District *Ormandy* case are similar to the present case. There, plaintiffs filed suit against defendants, seeking to quiet title to a strip of land between their respective properties under the theory of adverse possession.⁹ Both parties filed competing motions for summary judgment.

Based on a review of Norfolk's evidence, Norfolk has met its initial burden, demonstrating that IRG did not use the Strip to the exclusion of any person who could assert a right of ownership or possession. IRG, on the other hand, has not met a reciprocal burden of responding by setting forth specific facts demonstrating that a “genuine triable issue” exists to be litigated for trial. See, *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447; *Ormandy v. Dudzinski*, (9th Dist. Lorain), 2011-Ohio-5005.

“This state “has always considered property rights to be fundamental and concluded that “the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.” Green v. Helms, (9th Dist.), 2013-Ohio-2075, quoting State ex rel. Merrill v. Ohio Dept. of Natural Resources, 130 Ohio St.3d 30 (quoting Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799

⁹ the doctrine of acquiescence was also pled, as well as estoppel with respect to asserting any right, title, or claim to the property.



Moreover, occasional use of land by plaintiffs does not rise to the level of adverse possession. See, e.g., *Korenko v. Kelleys Island Park Dev. Co.*, (6th Dist) 2010-Ohio-572. “...A successful claim of adverse possession results in the legal titleholder's forfeiture of his ownership interest in the property, the doctrine is disfavored and the burden of proof on each element is rigorous.” *Ormandy, supra*.

DECISION

In the instant case, nothing submitted by IRG by way of permissible Civ. R. 56 evidence has established, by clear and convincing evidence, that IRG has prevailed, as a matter of law, in its quest to have Norfolk forfeit its ownership in the Strip to IRG.

IRG has failed to meet its ‘clear and convincing’ burden of proof with respect to the common elements in each of these adverse possession and prescriptive easement claims: open, notorious, continuous and for a period of twenty-one or more years. ‘Exclusive use’ is the only element of adverse possession lacking in a prescriptive easement claim.

A review of the evidence in support of the motions in the instant case leads this Court to conclude that the doctrine of acquiescence is inapposite on the facts: that is, there is no mutual recognition and respect of any particular boundary line(s), contrary to any legal description. Both parties here apparently agree on the legal boundary lines of the Strip—it is the ownership of the entire parcel that is disputed, with IRG seeking forfeiture of the ownership interest of Norfolk in and to the Strip.

Plaintiff has failed to meet its burden by clear and convincing evidence with respect to each of its claims in its Complaint. The law is stringent and disfavors forfeiture, except via clear and convincing evidence in support thereof.

Defendant Norfolk has met its burden with respect to summary judgment on Plaintiff's adverse possession claim, inasmuch as Plaintiff has failed to clearly and convincingly demonstrate that it established open, notorious, continuous uses for more than 21 years. *Demmitt v McMillan*, 16 Ohio App. 3d 138 (1984).

The Motion for Summary Judgment of Plaintiff IRG Amherst, LLC is DENIED. The claim of IRG for a declaratory judgment is dismissed as moot.



The Motion for Summary Judgment of Defendant Norfolk Southern Railway, Co. is GRANTED. This case is dismissed.

Costs taxed equally.

THIS IS A FINAL APPEALABLE ORDER

It is so ordered.

No Record.

To the Clerk: THIS IS A FINAL
APPEALABLE ORDER.
Please serve upon all parties not
in default for failure to appear;
Notice of the Judgment and its
date or entry upon the Journal

Magistrate David Muhek

Judge D. Chris Cook