

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

ELIZABETH V. KOLB,

Plaintiff,

v.

THOMAS F. DOWNEY, III, et al.,

Defendants.

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Case No. 2107CC-03874

Division No. 14

FILED

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**JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. In June 2004, Plaintiff Elizabeth V. Kolb purchased 18720 Victor Acres Drive which includes a twenty foot right of way for the private road known as Victor Acres Drive, the legal description of which is as follows:

Lot 4 of VICTOR ACRES, a subdivision in St. Louis County, Missouri, according to the plat thereof recorded in Plat Book 181 Pages 22 and 23 of the St. Louis County Records.

2. Victor Acres Drive services a number of properties, including the residences of the Downeys and the Teagues. The Teagues own 1927 Wild Horse Creek Road, which is bordered by Wild Horse Creek Road to the east, Victor Acres Drive to the south and the Downeys (18723 Victor Acres Drive) to the west.

3. Plaintiff brought this action to quiet title to Victor Acres Drive. The Defendants claim that they have obtained rights to parts of Victor Acres Drive by adverse possession.

4. The Defendants, and their predecessors in interest, have acknowledged Plaintiff's (or Plaintiff's predecessors in interest) superior rights in and to Victor Acres Drive:

- (a) The original conveyances of the Teague and Downey tracts in 1931 and 1939 respectively included “an easement for road purpose [sic] over a strip of land 20 feet wide...”;
- (b) In 1987, the Teagues’ immediate predecessors in interest and the Downeys signed a Private Road Easement and Maintenance Agreement acknowledging that “there presently exist [sic] a twenty (20) foot wide private road for ingress and egress to and from Wild Horse Creek Road”;
- (c) On May 27, 1992, the Teagues’ immediate predecessor in interest reaffirmed the 1931 easement in a Consent by Interested Parties;
- (d) In May 2000, the Teagues obtained a survey of their lot that (i) showed the southern boundary of their property as the northern boundary of Victor Acres Drive and (ii) re-affirmed the “20 foot wide easement adjacent to the south line of the surveyed parcel” (the “Vincent Survey”);
- (e) In October 2000, the Teagues submitted an application for a variance to the City of Wildwood that included the Vincent Survey acknowledging Victor Acres Drive as the southern boundary of their property and did not dispute the City’s conclusion that their property consisted of 212 feet of frontage along Victor Acres Drive;
- (f) In June 2005, the Teagues submitted an application for a variance to the City of Wildwood that included Vincent Survey

acknowledging Victor Acres Drive as the southern boundary of their property and did not dispute the City's conclusion that their property consisted of 212 feet of frontage along Victor Acres Drive;

- (g) In response to a direct question from Plaintiff's counsel at trial, Michael Teague testified that Victor Acres Drive constituted the southern boundary of his property.

5. Plaintiff orally objected to Defendants' encroachment upon Victor Acres Drive by 2006 and sent formal notice in 2007 (P.Ex. 14), less than 10 years after:

- (a) The Downeys completed the paved portion of their turn-around in 1998;
- (b) The Downeys constructed the mulch berm in 2003-04; and
- (c) The Teagues completed the paved portion of their driveway and constructed the rock retaining wall near their garage in 2002.

6. Both the Defendants and Plaintiff have maintained the grassy areas within the Victor Acres Drive right of way adjacent to the Defendants' property¹ and Plaintiff and her predecessors have occasionally parked cars on the grassy areas during inclement weather.

7. Defendants' asserted adverse possession of Victor Acres Drive consisted of

- Maintaining grassy areas
- Maintaining gravel driveways
- Maintaining shrubs (the testimony on this point was not entirely clear)

¹There was some dispute over when Plaintiff began maintaining the grassy areas and to what extent. More important, however, Defendants did not testify that they objected to Plaintiff's work on what they are now claiming is their property, or that they voiced any objection at the time.

- Maintaining a tie wall

8. Defendants also assert that they maintained a rock wall, a mulch berm and paved driveways within the right of way. However, each of these uses was established less than 10 years prior to Plaintiff's objection to the encroachments.

9. The use of portions of Victor Acres Drive by Defendants and their predecessors in interest was, prior to Plaintiff's involvement, with the actual or tacit permission of the prior owners' of Plaintiff's home arising out of the neighborly and friendly relationship then existing among the owners. In most cases, the Defendants' uses were both consistent with their easement privileges of ingress and egress (i.e., driveway and turn around uses) and not otherwise incompatible with Plaintiff's right of way.

10. Defendants did not introduce any survey, legal description or other competent description of the area that they claim to adversely possess.

11. Defendants and their witnesses gave varying and numerous accounts of the location, height, existence and condition of a tie wall located somewhere near the Teagues driveway prior to 2002 (the year that the Teagues constructed the rock wall that exists today). Delmar Vincent, the surveyor called by Plaintiff, testified that he would have included anything structurally significant on the Vincent Survey and that he considered walls 3 foot tall or more significant. Vincent did not include reference to any tie wall near the Teague's gravel driveway and the grades shown on his survey do not suggest the need for such a wall. In any case, the Court concludes that, to the extent that a tie wall existed on the Teagues' property and encroached upon Victor Acres Drive, it was not of any structural or permanent significance to support any claim for adverse possession.

Conclusions of Law

A. "To succeed on their quiet title action, [Plaintiff] had the burden of proving that [she] had title to the disputed tract, which title was superior to that of the [Defendants]." *Rodgers v. Threlkeld*, 22 S.W.3d 706, 709 (Mo.App. 1999).

B. Plaintiff's burden under the ejectment statute is similar:

§ 524.080. What plaintiff must show to recover

To entitle the plaintiff to recover, it shall be sufficient for him to show that, at the time of the commencement of the action, the defendant was in possession of the premises claimed, and that the plaintiff had such right to the possession thereof as is declared by this chapter to be sufficient to maintain the action.

C. Plaintiff established that she is the sole owner of Victor Acres Drive as shown on Plat Book 181 Pages 22 and 23 of the St. Louis County Records.

D. Absent a colorable defense, Plaintiff is entitled to a judgment quieting title to Victor Acres Drive and removing Defendants' encroachments:

§ 524.140. Judgment in such cases

In such case the judgment shall be for the recovery of the premises, the damages assessed and the accruing rents and profits, at the rate found by the jury, from the time of rendering the verdict until the possession of the premises is delivered to the plaintiff.

E. The elements of an adverse possession claim are well-settled:

"To establish title to a tract of land by adverse possession, a claimant must prove by a preponderance of evidence that his possession of the land was (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for a period of ten years." Failure to establish any one of these elements will defeat a claim for adverse possession. When determining if the facts warrant a finding that the elements of adverse possession have been met, each case is viewed in light of its own unique circumstances. Much depends on the

location, character, and use to which the property in question can reasonably be put.

Leonard v. Robinson, 276 S.W.3d 868, 875 (Mo.App. 2009)(citations omitted).

F. Uses put in place less than 10 years before Plaintiff objected to the encroachment—here, the rock wall, mulch berm and paved portions of the driveway—are not legally significant to Defendant’s adverse possession claim. *See, e.g., Loumar Development Co. v. Redel*, 369 S.W.2d 252, 258 (Mo. 1963) (“The carport was also constructed on the land reserved for the easement, but there is no contention that that fact would support this defense because it was constructed in 1958 and therefore had not existed for the required statutory period of ten years”).

G. “[T]o extinguish an easement by adverse possession, a landowner’s use must be incompatible with the easement holder’s right of use.” *Peasel v. Dunakey*, 279 S.W.3d 543, 546 (Mo.App. 2009). The *Peasal* Court discussed the types of uses that would be legally inconsistent with a right of way easement:

Relevant precedent suggests that, to extinguish an easement by adverse possession, a landowner's use must be incompatible with the easement holder's right of use. In *Loumar Development Co. v. Redel*, 369 S.W.2d 252 (Mo. 1963), landowners paved a driveway and constructed a garage on parts of an easement. The Supreme Court of Missouri held that the driveway was not "of such an adverse character as would extinguish the easement" because it "was compatible with the right-of-way easement and would not have interfered with the [holder's] reasonable enjoyment of the easement." *Id.*, at 258. By contrast, the Court also found that the construction and possession of the garage was sufficiently adverse to extinguish the easement as to that portion. *Id.* In *Frain v. Brda*, 863 S.W.2d 17 (Mo.App. E.D. 1993), landowners sodded and maintained a portion of an easement as their back yard but refrained from building a deck on it in recognition of the easement holders' right of use. Noting that *Loumar* involved the construction of a permanent improvement, this court held that the easement was not extinguished by the owners' mere use of part of the tract as their yard.

Peasel, 279 S.W.3d at 546. The Court concluded in that case that a “[t]he fence line, berry patch, and signage are not permanent improvements comparable to a garage or deck” and did not constitute adverse possession of a road. *Id.*

H. Under *Peasel* and its progeny, none of the uses by Defendants or their predecessors support Defendants’ adverse possession claim. Defendants’ uses either were not incompatible with Plaintiff’s ownership of Victor Acres Drive or were not of sufficient permanence and therefore do not constitute adverse possession of any portion of Victor Acres Drive.

I. Permissive uses of another’s property cannot, by their nature, be adverse and, once a use is permissive, it remains so until there is a positive act of defiance. *Leonard*, 276 S.W.3d at 874. To a person, each of Defendants’ witnesses testified to a communal use and maintenance of the “unimproved portions” Victor Acres Drive for as long as they could remember. The inhabitants of Victor Acres Drive apparently got along well enough that neither Defendants nor their predecessors gave any thought to whether their “use” of Victor Acres Drive was contrary to the owner’s right of way. They “knew where the property lines were, and agreed to co-exist there.” *Harris Land Development, LLC v. Fields*, 139 S.W.3d 275, 279 (Mo.App. 2004).

J. In that respect, this case is similar to *Blue Pool Farms, LLC v. Basler*, 239 S.W.3d 687 (Mo.App. 2007). Blue Pool Farms accessed its property over a roadway that passed through the defendants’ property and sought to establish a prescriptive easement to continue the use. The Court ruled the use was permissive, stating:

Here, the trial court found that BPF's use and BPF's predecessor's use of Roadway "was permissive in origin and remained permissive." At trial, multiple witnesses testified to the cordial nature of Horton's relatives and

BPF's predecessors in title. In fact, one testified, "Back then . . . [i]t was a neighborly thing to use the roads. My dad wouldn't have turned anyone away. And if they had wanted access back there, he would let them."

Blue Pool Farms, LLC, 239 S.W.3d at 692. See also, *De Bold v. Leslie*, 381 S.W.2d 816, 820 (Mo. 1964)(finding a permissive use based in part upon the fact that "[t]hey were apparently friendly, co-operative neighbors then").

K. In order for adverse possession to be hostile, the "claimant must occupy the land with the intent to possess it as his own and not in subservience to a recognized, superior claim of another." *Weaver v. Helm*, 941 S.W.2d 801 (Mo.App. 1997). See also, *Peasel v. Dunakey*, 279 S.W.3d 543, 546 (Mo.App. 2009)(court relies in part upon the fact that the parties' original deeds referenced the right of way easement). Defendants and their predecessors recognized Plaintiff's superior easement rights in various deeds, easements, maintenance agreements and municipal submissions over the period beginning in 1931 and continuing through 2005. Mr. Teague testified outright that he understood that the southern boundary of his property stopped at Victor Acres Drive.

L. An adverse possession claimant must provide the Court with the specific description of the property allegedly possessed:

An adverse possession suit cannot be sustained unless the claimant can establish the precise boundaries of the property claimed, and absent such proof, the judgment is void and rests on speculation and conjecture. One overriding requirement to establish adverse possession to a particular piece of property is that the precise location of the land claimed be identified in such a way that the boundaries may be ascertained and recognized. Absent proof by claimant of the exact location of lands claimed, any judgment would be void, because it would rest entirely on speculation and conjecture.

Weaver v. Helm, 941 S.W.2d 801, 805 (Mo.App. 1997)(citations omitted). As more recently stated by the Eastern District Court of Appeals:

The trial court denied the Roths' claim to the pasture land that comprised the northern portion of the tract because the Roths failed to produce any evidence of the dimension, or legal description, of that portion of the tract. The trial court held the Roths had the burden of proving the portion of property actually used by them. **The Roths' failure to present evidence of the dimension or legal description of the property they claimed to have adversely possessed defeated their claim.**

Leonard v. Robinson, 276 S.W.3d 868, 877 (Mo.App. 2009)(emphasis added).

M. Defendants did not offer any survey, legal description or other competent evidence of the exact dimensions of the property they claimed to adversely possess.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that

A. Judgment is entered in favor of Plaintiff and against Defendants on her claims to quiet title and for ejectment;

B. Judgment is entered in favor of Plaintiff and against Defendants on their claims for rights by virtue of any prescriptive easement or adverse possession of any portion of Victor Acres Drive;

C. Plaintiff is hereby decreed the sole owner in fee simple of all of the real property known as: Lot 4 of VICTOR ACRES, a subdivision in St. Louis County, Missouri, according to the plat thereof recorded in Plat Book 181 Pages 22 and 23 of the St. Louis County Records, including the full extent of the 20' right of way for Victor Acres Drive as shown thereon;

D. Defendants are hereby ordered to remove the following physical encroachments from the 20 foot right of way constituting Victor Acres Drive:

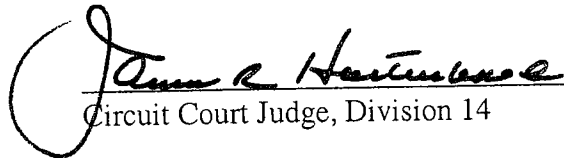
- The rock wall on the Teague property

- Any trees or shrubs
- The dilapidated fence post near the southwest corner of the Teague's property

E. Defendants are further ordered to refrain from establishing any further physical encroachments within the 20 foot right of way of Victor Acres Drive;

F. The parties stipulated that they would not proceed on their respective claims for trespass and, therefore, both Plaintiff's and Defendants' trespass claims are dismissed with prejudice;

G. Costs are assessed against Defendants, jointly and severally.


Circuit Court Judge, Division 14

11-30-09
Date