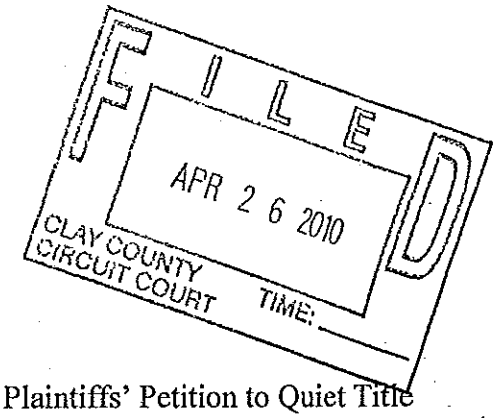
IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
LIBERTY, MISSOURI

J.C. RUPP AND REBECCA RUPP,	)	
Plaintiffs,	)	Case Number: 07CY-CV06997
vs.	)	Division II
SEAN MULLINS, AND JANE MULLINS, et al.	)	
Defendants.	)	



JUDGMENT

On the 13th day of May, 2009, came before the Court the Plaintiffs' Petition to Quiet Title by Adverse Possession and to obtain Injunctive Relief. The Plaintiffs appeared in person and by their attorney, Ward K. Brown. The Defendants, Sean and Jane Mullins, appeared in person and by their attorneys, Gary K. Patton and Breahn R. Vokolek. The Defendant, CitiMortgage, Inc., appeared by its attorneys, Jennifer A. Donnelli and Richard L. Martin. At the close of Plaintiffs' evidence, Defendants, Sean and Jane Mullins, filed a Motion for Directed Judgment in Favor of Defendants. On June 9th, 2009, the Court entered Judgment in favor of Defendants. On June 22, 2009 Plaintiffs filed a Motion for New Trial or to Amend, Modify or Reconsider the June 9, 2009 Judgment. On September 17, 2009 the Court set aside its prior Judgment. On February 11, 2010, evidence was resumed and concluded.

The Court, having heard the evidence and statements of counsel, reviewed the trial briefs and other filings of the parties and taken this matter under advisement to this 26th day of April, 2010, now makes the following findings of fact and conclusions of law and enters judgment pursuant thereto:

FINDINGS OF FACT

1. The Plaintiffs, John and Rebecca Rupp, are the owners of the real property located at 8613 Nebo Hills Road, Liberty, Clay County, Missouri (hereinafter the "Rupp Property").

2. The Defendants, Sean and Jane Mullins, are the owners of the real property located at 8621 Nebo Hills Road, Liberty, Clay County, Missouri, (hereinafter the "Mullins Property").

3. The Mullins Property is located directly north of and abuts a portion of the Rupp Property.

4. The Mullins Property is subject to a thirty (30) foot wide easement for ingress and egress in favor of the Rupp Property. The easement is accurately depicted on Exhibit #5.

5. The Rupps purchased their property from Randall and Stephanie Hartzler on September 18th, 1997.

6. At the time the Rupps purchased their property, Walter Valverde was the owner of and resided on the Mullins Property.

7. Located within the easement is a gravel road, which provides the only means of access to the Rupp Property.

8. Prior to December 31st, 2007, there was never a dispute between the parties regarding the boundary between their properties.

9. On or about December 31st of 2007, a dispute arose between the Rupps and the Mullins regarding the discharge of fireworks.

10. In July of 2007, the Mullins, obtained a survey of the boundary between the Rupps' and Mullins', property, and survey stakes were placed on the boundary line by a surveyor.

11. That on the day the stakes were placed on the boundary line, John C. Rupp approached Sean Mullins, and, in the presence of Mr. Mullins' young son, called Sean Mullins, a "son of a bitch" and inferred that he was the worst neighbor a person could have.

12. On July 27, 2007, the Rupps filed a two-count Petition in the Circuit Court of Clay County attempting to: (1) quiet title by adverse possession to a fifty (50) foot wide "disputed area" running adjacent to the northern boundary of the Rupp Property and (2) obtain injunctive relief against the Mullins preventing them from using and enjoying the disputed area.

13. When the Rupps filed suit in this matter on July 27, 2007, they had not owned the Rupp Property for a period of ten (10) years, and, therefore, were required to "tack" their possession to the possession of their predecessors in title, Randall and Stephanie Hartzler.

14. On October 1, 2008, the Rupps filed their First Amended Petition to add the following interested parties as defendants: First Magnus Financial Corporation, Trusted Title and Escrow, Mortgage Electronic Registration Systems, Inc., Citibank, NA, and Ralph O. Collins.

15. The Rupps later amended their First Amended Petition to name CitiMortgage, Inc. as the proper party Defendant in place of First Magnus Financial Corporation, Trusted Title and Escrow, Mortgage Electronic Registration Systems, Inc., Citibank, NA, and Ralph O. Collins.

16. At the commencement of trial, the Rupps abandoned the majority of their claim for adverse possession and now claim that they have adversely possessed a narrow strip of the

Mullins' property located between the northern boundary of the Rupps' property line and the southern boundary of the "gravel road" from the eastern-most fir tree to the North/South fence.

17. All of the property the Rupps are now claiming to have adversely possessed is wholly contained within the easement, which, by its terms, grants the Rupps permission to use that property.

18. At trial, the only evidence the Rupps presented regarding their possession of the disputed area was: (1) that they mowed and sprayed for weeds and poison ivy within the disputed area; (2) that they partially parked vehicles within the disputed area; (3) that they trimmed tree branches within the disputed area; and (4) that a portion of some existing railroad ties lie within the disputed area.

19. The Rupps admitted that both the mowing and trimming of trees were seasonal activities.

20. The Rupps also admitted that the vehicles they parked within the disputed area were driven from the property regularly.

21. The railroad ties were not even visible in a photograph taken in the fall of 2008, because they were covered with leaves.

22. The Rupps admitted that the trees that they claim to have trimmed were not located within the disputed area, but that they trimmed branches that hung from trees, which were actually located on the Rooney's property (the Rupps' neighbor to the east and the Mullins' neighbor to the south).

23. The Rupps also claimed that they planted flowers within the disputed area, but on cross-examination admitted that the flowers were not within the disputed area, but rather, were located on the Rupps' own property.

24. The Rupps testified that they never prevented the Mullins or their predecessor in title, Walter Valverde, from ever using or entering the disputed area that is within the easement.

25. The Rupps also admitted that they did not erect a fence or any other structure which would make access to the disputed area difficult nor did they ever take any action to exclude the Mullins or Mr. Valverde from the disputed area, and that the Mullins and Valverde always had access to the disputed area and did, in fact, continue to use the disputed area.

26. Both Mr. Mullins and Mr. Valverde testified to also mowing in the disputed area.

27. At trial, Randall Hartzler testified that the only thing he did in the disputed area was mow, weed and park vehicles.

28. Mr. Hartzler also testified that he occasionally mowed neighboring properties, because he was just being "neighborly" and he had the equipment to do so.

29. Mr. Hartzler testified that he never erected a fence or any other structure which would make access to the disputed area difficult, that he never took any action to exclude Mr. Valverde from the disputed area, and that Mr. Valverde always had access to the disputed area and did, in fact, use the disputed area.

30. Mr. Hartzler also testified that he never intended to adversely possess any of the Mullins Property, including the disputed area.

CONCLUSIONS OF LAW

31. "An easement may be extinguished by adverse possession." Creech v. Noyes, 87 S.W.3d 880, 885 (Mo. App. 2002).

32. "Whether an easement is extinguished by adverse possession is determined by applying principles that govern acquisition of title by adverse possession." Id.

33. "To establish title to a tract of land by adverse possession, a claimant must prove that his possession of the property was: (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for ten years." Watson v. Moore, 8 S.W.3d 909, 911 (Mo. App. 2000).

34. The burden of proving each element by a preponderance of the evidence is on the Plaintiff, and ***failure to prove even one element defeats the claim***. Id. (emphasis added).

35. Possession is considered hostile when it is done with "antagonism to the claims of others with the intent to possess the land as the possessor's own." Crowe v. Horizon Homes, 116 S.W.3d 618, 622 (Mo. App. 2003).

36. The burden is on the claimant to show the adverse character of the use. Fassold v. Schamburg, 350 Mo. 464 (Mo. 1942).

37. "Permissive use will not support a claim of adverse possession because hostile possession is lacking." Brokhausen v. Wabaunsee, 65 S.W.3d 598, 600 (Mo. App. 2002).

38. "The mere use of the land of another without his consent, but with his knowledge, is not adverse, but permissive." Dipasco v. Prosser, 364 Mo. 1193, 1201 (Mo. 1954).

39. An easement, by its very nature, is permissive.

40. Use that is permissive in its inception can "ripen into a prescriptive right if the claimant has made a distinct and positive assertion of a right hostile to the owner." Dobbs v. Knoll, 92 S.W.3d 176, 182 (Mo.App. 2002).

41. In determining whether possession is hostile, the Court may consider whether the landowners' use of the property "exceeded a reasonable exercise of their right to use the [property]." Id.

42. To establish the element of actual possession, the claimant must show "the present ability to control the land and the intent to exclude others from such control." Dobbs, 92 S.W.3d at 181; Whites v. Whites, 811 S.W.2d 844, 847 (Mo. App. 1991).

43. A combination of continuing acts of occupying, clearing, cultivating, pasturing, erecting fences or other improvements on the property can serve as evidence of actual possession, though these acts are not conclusive. Id.

44. To establish that a claimant's possession was open and notorious, the claimant must show "an occupancy that is so well recognized as to be inconsistent and harmful to the true owner's rights." Pinewoods Assoc. v. W.R. Gibson Dev., 837 S.W.2d 8, 12 (Mo. App. 1992).

45. The possession or occupancy must be conspicuous, widely recognized and a matter of common knowledge. Id.

46. For a claimant to prove his possession was open and notorious, he must show that his possession was of such an open and visible character as would have been calculated to give notice to the owner and the neighborhood generally that the claimant was exercising exclusive dominion and control over the strip of land, under claim of title, adversely to any claim of the true owners or anyone else. Creech v. Noyes, 87 S.W.3d 880, 886 (Mo. App. 2002).

47. For possession to be exclusive, "the claimant must hold the possession of the land for himself, as his own, and not for another." Whites v. Whites, 811 S.W.2d 844, 847 (Mo. App. 1991).

48. A claimant must prove "that he wholly excluded the owner from possession for the required period." Macchoz-Parks v. Suddath, 884 S.W.2d 705, 708 (Mo. App. 1994).

49. The burden is on the claimant to prove that the property was not open to the use of others and was not jointly possessed with others. Id.

50. The general rule is that exclusive possession cannot be based on use or occupation in common with neighbors, third persons, or the public generally." Wilton Boat Club v. Hazell, 502 S.W.2d 273, 275 (Mo. 1973).

51. The final element required for adverse possession is continuous possession of the property for a period of ten years. Mo. Rev. Stat. § 516.010.

52. A claimant may tack his or her period of adverse possession to his predecessors in title to establish the requisite ten-year period. Brokhausen v. Wabaunsee, 65 S.W.3d 598, 600 (Mo. App. 2002).

53. Because the Rupps did not own the Rupp Property for a period of ten years before they filed their Petition, they were required to prove that their predecessors in title, Randall and Stephanie Hartzler, also adversely possessed the disputed area. See Mo. Rev. Stat. § 516.010

54. The Missouri Supreme Court has held that the construction of a garage within an easement is sufficient to satisfy the elements of adverse possession, but the pavement of a driveway is not sufficient because it was compatible with the easement and "would not have interfered with the holder's reasonable enjoyment of the easement." Loumar Development Co. v. Redel, 369 S.W.2d 252, 258 (Mo. 1963).

55. Missouri Courts have also concluded that a fence line, berry patch and signage were not permanent improvements comparable to a garage or deck and, therefore, were not sufficiently adverse to extinguish part of an easement. Peasel v. Dunakey, No. ED91014 (Mo. App. E.D. March 3, 2009).

56. The Court may consider whether there is evidence that the claimant took any action to wholly exclude the other party from using the easement. Id.

CONCLUSION

57. Based on the foregoing facts and case law, Plaintiffs have not established that they or their predecessors, the Hartzlers, maintained hostile possession of the disputed area for the requisite period of time. The easement on the property granted them permission to use the disputed area, and they made no "distinct and positive assertion" that they were changing their permissive use to hostile. On this basis alone, it is proper for this Court to enter Judgment in favor of Defendants.

58. The Plaintiffs have not maintained actual possession of the disputed area. They have done nothing to control the area or to exclude the Defendants or their predecessor, Walter Valverde, from controlling the area. Although the Plaintiffs testified that they mowed this area, they did nothing to keep the Mullins or Mr. Valverde from also mowing and traveling within the disputed area.

59. The Plaintiffs have not met their burden of proving that they "wholly excluded" the Defendants from possession of the disputed area. The Plaintiffs took no actions whatsoever to manifest their intent to exclude Defendants or Mr. Valverde from the disputed area. They built no fence or structure which would place the Defendants on notice of their possession. As a result, the Defendants and Mr. Valverde always had access to the disputed area and have continued to use the disputed area.

60. The actions taken by the Plaintiffs do not rise to the level required to establish open and notorious possession of the disputed area. Again, the Plaintiffs only mowed and trimmed trees during certain months of the year. The vehicles they claim to have parked partially within the disputed area were also driven from the property regularly. The railroad ties that they

claim are located partially within the disputed area are not even visible when covered with leaves or tall grass. These acts do not constitute open and notorious possession.

61. The Rupps, Randall Hartzler, Walter Valverde and Ruth Ann Rooney also testified regarding the "friendly" nature of the property, and that both parties would have occasion to mow property not belonging to them. As such, any visible mowing by the Plaintiffs would not necessarily have put the Defendants on notice of their intended possession.

62. The Plaintiffs purchased the Rupp Property in September 18th, 1997, and they filed suit in this matter on July 27th, 2007. It is clear, therefore, that at the time they filed their Petition, the Plaintiffs could not maintain that they had continuous possession of the disputed property for a period of ten years. For the Plaintiffs to establish this element of their claim, they would have to tack any presence they may have had on the disputed property with the prior owners, Randall and Stephanie Hartzler.

63. The Plaintiffs bear the burden of proving that Randall or Stephanie Hartzler had hostile, actual, open and notorious and exclusive possession of the disputed property for the required period of time. Randall Hartzler testified at trial that the only activity he took with respect to the disputed area was that he mowed. He also testified that he never intended to take or adversely possess any of the Mullins Property. Regardless of any actions taken by the Plaintiffs with respect to the disputed area, it is clear that the Hartzler's limited activities within the disputed area are not sufficient to satisfy the elements of adverse possession. Therefore, Plaintiffs cannot satisfy the ten-year requirement.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of all Defendants and against Plaintiffs in all respects on Plaintiffs' Petition.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this action, including, but not being limited to, the filing fee, deposition costs, special process server fees and witness fees are assessed against the Plaintiffs, jointly and severally.

DATED: 4-26-2010

Anthony Rex Gabbert
Division II
Clay County Circuit Court

ATTEST: