STATE OF MICHIGAN

COURT OF APPEALS

RICHARD FOX and DOROTHY FOX,

Plaintiffs-Appellees,

v

MARY MAYER and ELIZABETH MAYER,

Defendants-Appellants.

UNPUBLISHED
December 11, 2003

No. 241379
Van Buren Circuit Court
LC No. 01-047982-CH

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order awarding plaintiffs a parcel of land, title of which was disputed. Plaintiffs acquired ownership of Lot 2 of the Street Beach Plat in Van Buren County in 1967. Defendants acquired possession of Lot 1 in 1981 and acquired title through warranty deed in 1992. Sometime in July 2000, defendants ordered a survey of the adjoining lots to determine proper boundary lines. The surveyor concluded that the three lots he surveyed did not measure as platted. To resolve this discrepancy, the surveyor prorated an eight-foot shortfall among the three lots. Defendants quickly asserted ownership over a portion of the parcel used by plaintiffs by demanding that plaintiffs remove their well along with sections of their deck, porch, and sidewalk. Plaintiffs then commenced an action to quiet title by alleging ownership under the theories of acquiescence, adverse possession, and prescriptive easement. Following a two-day bench trial, the trial court held that plaintiffs and their predecessors "possessed the disputed property adversely[and] hostilely to the exclusion of others" and that title to the property should be quieted to plaintiffs. In lieu of awarding plaintiffs all the disputed property, the trial court fashioned its own boundary lines. Shortly thereafter, the trial court entered an amended judgment, holding that plaintiffs prevailed on theories of adverse possession and acquiescence. Because of its resolution of the claim on those theories, the trial court dismissed plaintiff's allegation of prescriptive easement as unnecessary.

On appeal, defendants raise three issues. First, they contend that the trial court used an improper standard of proof to hold that plaintiffs adversely possessed the land. Second, defendants allege that the trial court committed error in granting both plaintiffs' adverse possession and acquiescence claims. Finally, defendants allege that the trial court erred by refusing to grant them leave to amend their pleadings to allege trespass. We hold that although the court erred in its statement of the legal standard of proof for adverse possession, sufficient evidence existed to sustain the trial court's findings on the issue of acquiescence. Last, we find

that the trial court did not err by refusing to allow defendants to amend their complaint (on the eve of trial) because the trial court clearly indicated on the record that it would consider such an action without benefit of amendment. We therefore affirm.

Actions to quiet title are equitable; therefore, the trial court's holdings are reviewed de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001), citing *Bowen & Buck v Fur Hunting Club*, 217 Mich App 191, 191-192; 550 NW2d 850 (1996). We review factual issues for clear error. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990).

Defendants first contend that the trial court erred when it found that plaintiffs were entitled to judgment pursuant to the doctrine of adverse possession because they had proved their case by a preponderance of the evidence. The proper standard of proof in such cases is "clear and cogent proof of possession." *McQueen v Black*, 168 Mich App 641, 643; 425 NW2d 203 (1988). Thus, even though we agree that the trial court applied an improper standard of proof, we find nonetheless that the trial court found, by the proper standard of proof, that plaintiffs were entitled to the disputed land through the doctrine of acquiescence.

The relevant facts adduced at trial indicated that plaintiffs planted lilac bushes and trees in the disputed area as far back as the 1960's. Defendant John Mayer testified that when he took possession of his lot in 1981, plaintiffs' apple trees were on the area in question. Further, plaintiffs testified that a wire fence, a picket fence, and the fence marking the south line of Lot 3 had been in place from 1963 to 1993. Plaintiffs also testified that a large portion of the larger of the two shaded areas depicted on the 2000 survey went undisturbed and unchallenged from 1948 until the 2000 survey. Plaintiffs had installed a picket fence that ran perpendicular from the wire fence to the east-west fence running along plaintiffs' northerly boundary with Lot 3. This picket fence, located within the disputed property, was replaced in 1993 when the house was rebuilt. The sidewalk in question was built alongside plaintiffs' home in the early 1960's on part of the disputed property.

The doctrine of acquiescence provides that where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line. *Killips*, *supra* at 260. The underlying reason for the rule of acquiescence is to promote peaceful resolution of boundary disputes. *Id.* at 60, citing *Shields v Collins*, 83 Mich App 268, 271-272; 268 NW2d 371 (1978). Here, the proper standard of proof was a preponderance of the evidence. *Id.* at 260, citing *Walters v Snyder (After Remand)*, 236 Mich App 453, 455; 608 NW2d 97 (2000). Additionally, unlike adverse possession, acquiescence does not require that the possession be hostile or without permission. *Walters*, *supra* at 456-457.

Defendants argue that privity of estate for an uninterrupted fifteen-year period is required to prevail on an acquiescence claim. We disagree. "Proof of privity is not necessary . . . . to employ tacking of holding to obtain the fifteen year minimum under the doctrine of acquiescence." *Siegel v Renkiewicz*, 373 Mich 421, 426; 129 NW2d 876 (1964). The acquiescence of predecessors in title can be tacked on to that of the party in question to establish the period of fifteen years. *Killips*, *supra* at 260.

Here, plaintiffs and their predecessors actively used the disputed land since the 1960's. During that time, neither defendants nor their predecessors in interest did anything to stop the

usage. In fact, defendants did nothing to assert any rights to the property in question until the 2000 survey, nineteen years after defendants took possession of their property. Therefore, the trial court did not err in finding that plaintiffs had acquired the property by acquiescence.

Last, defendants contend that the trial court erred in refusing to grant defendants leave to amend their pleadings to include a claim of trespass against plaintiffs. Because we have determined that the trial court was correct in awarding the disputed property to the plaintiffs, this claim is moot. But even if the claim were not moot, the trial court did not abuse its discretion by denying leave to amend on the eve of trial because the trial court clearly stated that as a court acting in equity, it would consider a remedy for trespass despite the fact the claim was not made. A court acting in equity "looks at the whole situation and grants or withholds relief as good conscience dictates." *Hunter v Slater*, 331 Mich 1, 7; 49 NW2d 33 (1951). The fact that the trial court reached its own remedy by drawing new boundary lines indicates that the trial court was fully cognizant of its powers to fashion equitable remedies. In any event, once the trial court found for plaintiffs, an action for trespass could not lie against plaintiffs for using their own property.

Affirmed.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello