IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 2, 2016

TIMOTHY TIPPIT, ET AL. v. ANTHONY KIRKLAND, ET AL.

Appeal from the Chancery Court for Monroe County
No. 17828 Jerri Bryant, Chancellor

No. E2015-02176-COA-R3-CV-FILED-MARCH 28, 2017

This is a boundary dispute case in which the trial court determined that defendant property owners did not adversely possess the property in question. Upon a thorough review of the record, we have determined that appellants did not sustain their burden to demonstrate adverse possession; accordingly, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J. and ARNOLD B. GOLDIN, J., joined.

Steven B. Ward, Madisonville, Tennessee, for the appellants, Anthony Kirkland, Melissa Kirkland, Ronald Kirkland, and Annis Kirkland.

John M. Carson, III, Madisonville, Tennessee, for the appellees, Timothy Tippit, and Rosemary Tippit.

MEMORANDUM OPINION[1]

This appeal arises from a complaint filed by Timothy and Rosemary Tippit against Anthony and Melissa Kirkland and Ronald and Annis Kirkland to determine the boundary between their land. The Tippits claim ownership of a 213.06 acre tract of land

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[1] Tenn. R. Ct. App. 10 states:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

in Monroe County; Anthony and Melissa Kirkland own a tract of land of approximately 19 acres adjoining the Tippit's parcel; Ronald and Annis Kirkland own a tract of land of approximately 75 acres adjoining the Tippit's parcel as well as Anthony and Melissa Kirkland's parcel. In addition to an order setting the boundaries for the property, the Tippits sought injunctive relief to restrain the defendants from interfering with the enjoyment of their property and damages. The defendants answered the complaint, admitting the allegations setting forth the chains of title to each parties' property, denying that the land in dispute was the property of plaintiffs, and seeking to have the court establish the boundary counter-claimed, in accordance with their use and possession of the land.

By agreement, the trial was bifurcated, with the boundary line issues to be heard first and the question of damages to be reserved. At the first hearing, the following witnesses testified: Mike Lowe, a surveyor, testified on behalf of plaintiffs; Ronald Kirkland, Annis Kirkland, Anthony Kirkland, Ronald Kirkland's son Brian, Ronald Kirklands' brother Sam Kirkland Jr., and Timothy Tippitt (as an adverse witness) testified on behalf of the defendants. In addition, documents showing the chains of title of the plaintiffs and the defendants to their respective properties, surveys, tax maps, and numerous photographs were entered into evidence. At the conclusion of the proof, the court stated its ruling from the bench, setting the boundary lines as shown on Mr. Lowe's survey and ruling against the defendants on their claim of adverse possession. The ruling was subsequently transcribed and incorporated into an order. A hearing on damages was held several months later, after which the court entered an order awarding plaintiffs the total sum of $7,400.00.[2]

Defendants appeal, asserting that the trial court erred in holding that defendants had not proven that they acquired the property in question by adverse possession.

A. Standard of Review

Review of the trial court's findings of fact is *de novo* upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Kaplan v. Bugalla*, 188 S.W.3d 632, 635 (Tenn. 2006). Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *See Kaplan*, 188 S.W.3d at 635.

[2] The court awarded $1,200.00 for the cost of the survey, $5,000.00 for diminution of property value, and $1,200.00 for value of trees cut on plaintiff's land.

B. Discussion

In its oral ruling the trial court made the following findings and comments relative to defendants' claim of adverse possession:

> The defendants' deed derives its description from the Hayes' survey and sets the line for Anthony - - between Anthony and Tippit. However, the defendant claims land, in addition to that, by adverse possession. He's claiming this is caused by his predecessors in title for over twenty-one years. . . . Neither of the defendants have color of title to the property line below the purple line. They have not paid taxes on that area. There are pieces of fence on the line between Kirkland and Baez-Tippit.
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> ***
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> The defendants have pled that they own this by adverse possession. . . . I do find the big K in the tree to be a new carving. I don't think it's been there for over twenty-one years.
>
> The defendants haven't proven that they have color of title. The defendants -- I don't find Anthony credible when he talks about moving the surveyor's stakes to where the line was. I don't find that his bearings are reliable when he says where they were. He moved the surveyor's stakes and -- when he placed the K on the tree. I do credit the surveyor on the testimony about whether the cabin was there or not. . . . And also, I find that because of the directional aspect of this and the lack of memory, the description of the location on the spring between one party who says it's not there, one party says it's on the right from the brother to the top of the mountain, another one says it's over near the cabin but down, quote, a little bit, end quotes, just shows the confusion about the location and courses and distances in this land.
>
> Since it's the defendants' burden to prove adverse possession, I find that driving four-wheelers on this land is not the equivalent to adverse possession. . . . they have not proven that the cabin was there for twenty years. Nor does this cabin, as the Court views it in this picture, as the stacking of logs because it certainly doesn't form any shelter, as being adverse possession, not or possession. [sic] That there's no proof of claim of ownership that the Kirklands intended to use that -- or to claim that that was their property. There's no proof that there was -- that the hostile -- that the going on it with the four-wheelers was hostile or that they were using this property exclusively.

In their brief on appeal defendants do not take issue with the trial court's adoption of Mr. Lowe's survey, introduced as Exhibit 11, in setting the boundaries of the property of each party. Rather, they contend that that there is evidence that they have adversely possessed "the property in question" in excess of fifty years. They rely on testimony relating to a spring and spring box, which they assert they constructed and used in their homes and to water their cattle. They also assert that construction had begun on a partially completed cabin approximately twenty years before trial. They argue:

> The cabin, along with the use and maintenance of the spring, as well as the building of the road, and as well as the use for recreation and timber meets the requirements of a finding of adverse possession by clear and convincing evidence.

"Adverse possession is the possession of real property of another which is inconsistent with the rights of the true owner." *Wilson v. Price*, 195 S.W.3d 661, 666 (Tenn. Ct. App. 2005). "In order to assert adverse possession, a party must demonstrate that her possession has been exclusive, actual, adverse, continuous, open, and notorious for the required period of time." *Id.* (citing *Hightower v. Pendergrass*, 662 S.W.2d 932, 935 n. 2 (Tenn. 1983)). The requisite elements of adverse possession must be shown by clear and convincing evidence. *Id.* "The hostile possession must be open such that it provides notice to the world that the adverse possessor claims ownership of that property." *Id*. at 667 (citing *Cooke v. Smith*, 721 S.W.2d 251, 254 (Tenn. Ct. App. 1986)). "[T]he possessor must use the property in a manner consistent with its nature and purpose and in such a way as to give notice to the rightful owner that another is asserting dominion over his property." *Id.* (citing *Bensdorff v. Uihlein*, 177 S.W. 481, 483 (Tenn. 1915)).

Our Supreme Court explained the meaning of the "clear and convincing" standard in *In re Estate of Walton v. Young*:

> The "clear and convincing" standard falls somewhere between the "preponderance of the evidence" in civil cases and the "beyond a reasonable doubt" in criminal proceedings. To be "clear and convincing," the evidence must "produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established."

950 S.W.2d 956, 960 (Tenn. 1997) (quoting *Fruge v. Doe*, 952 S.W.2d 408, 412 n. 2 (Tenn. 1997)).

We have reviewed the evidence cited by defendants in support of their argument. The evidence consists of largely uncorroborated testimony of members of the Kirkland family as well as surveys taken at different times by different surveyors that contain

different markings than that adopted by the court.[3] Taken in context and as a whole, the evidence is not clear and convincing that defendants adversely possessed the property within the standards established by the cases cited above. It was defendants' burden to prove adverse possession; the proof upon which they rely does not preponderate against the court's findings that they had no claim of title to the property and that the activity they relied on to establish their dominion and control of the property was insufficient to do so.

C. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court in all respects.

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RICHARD H. DINKINS, JUDGE

[3] In particular, one survey cited by defendants and bearing a 1999 date, has the "spring box used by Ronald Kirkland" located on a portion of plaintiffs' land. Neither Mr. Lowe's survey nor the 1976 survey locates a spring or spring box on the property.