

IN THE COURT OF APPEALS OF IOWA

No. 0-983 / 10-0895
Filed February 9, 2011

GEORGIA PACIFIC GYPSUM, L.L.C.,
Plaintiff-Appellee,

vs.

NEW NGC, INC. d/b/a
NATIONAL GYPSUM COMPANY,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt Wilke,
Judge.

The defendant appeals from the district court's grant of summary
judgment in favor of the plaintiff in a boundary dispute. **AFFIRMED.**

Eric Eide, Fort Dodge, and F. Richard Lyford and Brant M. Leonard of
Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellant.

Ernest Kersten, Fort Dodge, for appellee.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

MANSFIELD, P.J.

Two adjoining property owners disagree as to whether they (or their predecessors) acquiesced in a fence line as the boundary between their respective properties within the meaning of Iowa Code chapter 650 (2009). We find that such acquiescence was established as a matter of law and therefore affirm the district court's grant of summary judgment to the plaintiff.

I. Background Facts and Proceedings.

The summary judgment record contains the following undisputed facts. Georgia-Pacific Gypsum, L.L.C. (Georgia-Pacific) and New NGC, Inc. d/b/a National Gypsum Company (National) own adjoining properties in Webster County. National has owned the south property since the 1950s. A farmer, Kenton Ricke, owned the north property for many years until selling it to Georgia-Pacific in 1998.

From the 1950s until 2007, a wire fence separated the two properties. Ricke farmed the north property up to the fence line for the fifteen years preceding his sale of that property to Georgia-Pacific. Thereafter, Georgia-Pacific leased the property to Ricke, who continued to farm it to the fence line until 2003. In 2004, Georgia-Pacific began caring for the property by seeding and mowing it to the fence line.

In 2000, National had the south property surveyed. From that survey, it learned the fence encroached on the property it actually owned according to the legal description. National sent a letter to Georgia-Pacific regarding the survey findings; Georgia-Pacific did not respond. In 2007, over Georgia-Pacific's objection, National removed the entire fence.

On March 3, 2009, Georgia-Pacific filed a petition seeking to establish the fence line as the boundary between the parties' properties under Iowa Code chapter 650. Georgia-Pacific subsequently moved for summary judgment. National resisted the motion by submitting an affidavit which stated that (1) it never had "any knowledge that the Plaintiff was claiming the fence as a boundary between the parties' parcels," and (2) it "never consented to the treatment of the fence as the true boundary." A hearing was held, during which National did not dispute the existence of the fence, and its counsel stated, "I don't think either party recognized that the fence was not on the boundary line."

The district court found it was undisputed that the fence was in place from 1952 to 2000. It granted summary judgment to Georgia-Pacific and observed:

While the Defendant urges that it has never recognized the fence as the boundary, it offers only that it has always paid the real estate taxes on, and insured, the portion of its land for which the Plaintiff now claims ownership. The telling portion of the Defendant's affidavit is paragraph 8 where Mr. Peterson states that when Defendant became aware that the fence was not located on the legally described boundary, a letter was sent to the Plaintiff disputing the fence's location. In essence, the Defendant admits that prior to that time it assumed that the fence was the boundary line.

....

By undisputed affidavits it is clear that from 1952 to 2000 the parties on both sides of the fence mutually recognized the fence as the dividing line between them, and both parties treated the fence line as the boundary. This Court therefore concludes that no genuine issue of material fact exists and that as a matter of law the Plaintiff is entitled to summary judgment.

National filed a motion to enlarge or modify findings pursuant to Iowa Rule of Civil Procedure 1.904(2). It also submitted a motion for summary judgment of its own, accompanied by a deposition transcript. Another hearing was held, after which the district court denied National's motions. National appeals.

II. Standard of Review.

We review a district court's ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.907. Summary judgment should be granted when the entire record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Davis v. Comito*, 204 N.W.2d 607, 608 (Iowa 1973) (explaining that a court determines if "a fact issue is generated by the pleadings, depositions, affidavits or other instruments before the court").

Thus, on review, we examine the record before the district court to decide whether any material fact is in dispute, and if not, whether the district court correctly applied the law. In considering the record, we view the facts in the light most favorable to the party opposing the motion for summary judgment.

Shriver v. City of Okoboji, 567 N.W.2d 397, 400 (Iowa 1997) (citations and quotation omitted).

III. Analysis.

A. Boundaries by Acquiescence.

Georgia-Pacific brought this action under Iowa Code chapter 650 (Disputed Corners and Boundaries). Section 650.14 provides, "If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established." The supreme court has said:

The meaning of "acquiescence" under section 650.14 is well settled. It is the mutual recognition by two adjoining landowners for ten years or more that a line, definitely marked by fence or in some manner, is the dividing line between them. Acquiescence exists when both parties acknowledge and treat the line as the boundary.

When the acquiescence persists for ten years the line becomes the true boundary even though a survey may show otherwise and even though neither party intended to claim more than called for by his deed.

Sille v. Shaffer, 297 N.W.2d 379, 381 (Iowa 1980).

For there to be acquiescence, a party must have “knowledge of the conditions,” but does not have to have specific knowledge that the fence was not located on the legally-described boundary line. *Ashton v. Burken*, 403 N.W.2d 52, 55 (Iowa Ct. App. 1987); see also *Sille*, 297 N.W.2d at 381 (explaining that neither party must have knowledge it is claiming more than its deed). The supreme court has recognized the following presumption in acquiescence cases:

[T]he reciprocal recognition of and acquiescence in a fence as marking the boundary through occupation and exercise of exclusive dominion thereto by the respective adjoining owners for a period of 10 years raise a conclusive presumption of an agreement upon the line so marked as the boundary.

Sieck v. Anderson, 231 Iowa 490, 498, 1 N.W.2d 647, 650 (1942). *But see Harvey v. Platter*, 495 N.W.2d 350, 352 (Iowa Ct. App. 1992) (“[A]cquiescence in the existence of a fence as a barrier, not as a boundary, is not such recognition as will establish it as a true line.”).

National first argues that Georgia-Pacific failed to prove a prima facie case of acquiescence because the Georgia-Pacific affidavits did not claim the fence was located anywhere other than on the legally-described boundary line. We disagree. The affidavits submitted by Georgia-Pacific demonstrated that both it and National exclusively maintained and used the land on their respective sides of the fence. See *Sille*, 297 N.W.2d at 381 (finding a party’s improvements and maintenance of the property on her side of the fence to be evidence that the

fence was recognized as a boundary and not merely a barrier). The attached survey demonstrated that the fence was not located on the legally-described property line. National did not dispute that the fence line did not correspond with the legal property descriptions. We find no merit to National's argument.

National next asserts that its own affidavit created a genuine issue of material fact. This affidavit stated that National had paid property taxes and insured the legally-described property and that National "became aware that the fence was not located on the legally-described boundary" in 2000. Neither of these points, in our view, raises a genuine issue of material fact. Tax and insurance bills are typically based on legal descriptions; if that consideration were dispositive, it would be difficult to conceive of any case where acquiescence could be found. See *Novotny v. Robbins*, 492 N.W.2d 216, 220 (Iowa Ct. App. 1992) (payment of property taxes does not defeat acquiescence). Additionally, National's recognition in 2000 that the fence was not located on the legally-described boundary does not preclude a finding that National acquiesced in such a boundary before 2000. See *Sille*, 297 N.W.2d at 381. Arguably, as the district court concluded, it tends to support such a finding.

National also maintains that according to its affidavit, it lacked "any knowledge that the Plaintiff was claiming the fence as a boundary between the parties' parcels," and "never consented to the treatment of the fence as the true boundary." But these are mere conclusions; they do not set forth "specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5). Here the undisputed facts demonstrate that Georgia-Pacific and its predecessor exclusively occupied and exercised dominion over the land to the north of the

fence and that National was fully aware of this occupancy and exercise of dominion and never objected to it. See also *Liska v. First Nat'l Bank in Sioux City*, 310 N.W.2d 531, 534 (Iowa Ct. App. 1981) (“In order to successfully resist a motion for summary judgment, the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact.”). Summary judgment was properly granted on the question of acquiescence.

B. Statute of Limitations.

Alternatively, National asserts Georgia-Pacific’s claim is barred by the statute of limitations set forth in Iowa Code sections 614.1(5) (providing actions for the recovery of real property must be brought within ten years after their cause accrues) and 614.17A (providing that an action shall not be maintained to recover or establish an interest in or claim to real estate if the action is based upon a claim arising more than ten years earlier). We disagree. An action under chapter 650 is a special action to establish corners or lines (and not the title or right of possession of adverse claimants). Iowa Code § 650.4; *Cuthbertson v. Locke*, 70 Iowa 49, 49, 30 N.W. 13, 13-14 (1886). As the district court found, the statute of limitations does not apply to claims brought under chapter 650. *Cuthbertson*, 70 Iowa at 49, 30 N.W. at 14; see also Marlin M. Volz, Jr., Iowa Practice: Methods of Practice, § 4:1 (2010) (explaining a proceeding under chapter 650 may be used to establish a boundary line established by acquiescence and the statute of limitations does not apply to such proceedings).

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.