IN THE COURT OF APPEALS OF IOWA

No. 8-251 / 07-1510
Filed April 30, 2008

DONALD J. STEWART and JUDY STEWART,
Plaintiffs-Appellants,

vs.

CLARENCE JUDY and BETTY JUDY,
Defendants-Appellees.

Appeal from the Iowa District Court for Mills County, Gregory W. Steensland, Judge.

Plaintiff appeals the district court decree denying plaintiff had title to a tract of land by adverse possession. **REVERSED AND REMANDED.**

Steven H. Krohn of Smith Peterson Law Firm, L.L.P., Council Bluffs, for appellants.

William F. McGinn of McGinn, McGinn, Springer & Noethe, Council Bluffs, for appellees.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Plaintiffs Donald J. Stewart and Judy Stewart (Stewart) sought to quiet title to a three-and-one-tenth-acre tract they have farmed since 1986. The district court denied their claim finding title to the tract to be in record title holders Clarence Judy and Betty Judy (Judy). Stewart appeals contending they established title to their claim by adverse possession and acquiescence. We reverse and remand.

I. BACKGROUND AND PROCEEDINGS.

The relevant facts are basically without dispute. In June of 1987 Stewart purchased a tract of land in Mills County, Iowa, from the Conservatorship of Gretchen S. McAlexander. Excepted from the land Stewart purchased was a five-and-a-half-acre tract south of the land Stewart purchased. The excepted tract had been sold to Dawson Oil and Transport Company (Dawson) in 1972 by Gretchen and her husband Mike McAlexander. Dawson continued to own the five-and-a-half-acre tract until Judy purchased that property from Dawson in June of 2006.

In 1972, at the time Dawson purchased the property, the land had been surveyed and staked. However there were no fences or boundary line markers designating where the Dawson land ended and the Stewart land began. Dawson never used the property. Joan Dawson, married to Bill Dawson from 1984 until his death in the spring of 2006, testified. She related that Bill Dawson was the owner of Dawson Oil and Transport Company and that neither Bill nor anyone else from the company ever gave Stewart permission to farm the land. Joan also

testified that she and Bill drove by the land when traveling from their home in Nebraska to Minneapolis.

Stewart purchased his land in 1987 to farm it. He testified that shortly after the purchase he put in steel posts and fencing on the south end of what he believed was his property to separate it from the Dawson land. He testified he was still farming the land when on August 19, 2006, the fence, steel posts, wire, and a portion of his crop that had been north of the posts on the three-and-one-tenth acres at issue here were removed at Judy's direction. Stewart further testified that he objected to the removal but it happened anyway. A new survey had shown Judy that the fence and three-and-one-tenths of the acres Stewart was farming were on land deeded to Judy by Dawson.

In the spring of 1998, nearly twelve years after Stewart bought the land, Bill Dawson contacted Stewart by phone telling him he had learned the previous fall that Stewart was farming some of his property. Bill told Stewart to stop farming it and Stewart said he would not. Bill subsequently had the sheriff service a notice on Stewart relaying the same information. There is no evidence of any further contact between Bill Dawson and Stewart, although Bill's wife said she thought there may have been other phone calls.

On September 27, 2006, Stewart filed this action seeking to quiet title to the three-and-one-tenth acre tract. The district court rejected Stewart's claims of acquiescence and adverse possession.

II. SCOPE OF REVIEW.

This is a quiet title action tried in equity and as such our review is de novo. Iowa R. App. P. 6.4. We have the responsibility to examine the facts as well as

the law and decide anew the issues properly preserved. *Johnson v. Kaster*, 637 N.W.2d 174, 178 (Iowa 2001); *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 811 (Iowa 2000). We give weight to the district court's findings of fact, but we are not bound by these findings. *Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 267 (Iowa 2000). We are especially deferential to the district court's assessment of witness credibility. *Johnson*, 637 N.W.2d at 178.

III. ADVERSE POSSESSION.

The district court denied Stewart's claim based on adverse possession finding:

> [T]he acts of Donald Stewart in placing a line of steel posts and farming the property with nothing more does not meet the significant burden necessary to establish adverse possession . . . . The placing of a few steel posts would not alert someone without more that Stewart intended this to be a boundary. The act of farming the already tillable land without any further improvements in the nature of fences, buildings, clearing of land, or anything of that nature is not sufficient for Stewart to meet their burden of proof in this case.

Stewart contends the district court erred in these findings and conclusions, arguing the evidence clearly establishes the elements of adverse possession and demonstrates that their possession of the disputed property was hostile, actual, open, exclusive, and continuous possession under a claim of right for more than ten years.

Judy argues that on discovery by Bill Dawson that Stewart was encroaching on his land, Stewart was told to cease and desist. Bill did call

Stewart and Stewart advised Dawson he would continue to farm. There were no additional statements of Stewart's intentions and he ignored Dawson's demand.[1]

A party claiming title by adverse possession must establish hostile, actual, open, exclusive and continuous possession, under claim of right or color of title for at least ten years. *Garrett v. Huster*, 684 N.W.2d 250, 253 (Iowa 2004); *C.H. Moore Trust Estate v. City of Storm Lake*, 423 N.W.2d 13, 15 (Iowa 1988); *Marksbury v. State*, 322 N.W.2d 281, 287 (Iowa 1982). Proof of these elements must be "clear and positive." *C.H. Moore*, 423 N.W.2d at 15; *Carpenter v. Ruperto*, 315 N.W.2d 782, 784 (Iowa 1982). Since the law presumes possession is under a regular title, the doctrine of adverse possession is strictly construed. *C.H. Moore*, 423 N.W.2d at 15. A claimant, however, need not establish both color of title and claim of right; either will suffice. *Council Bluffs Sav. Bank v. Simmons*, 243 N.W.2d 634, 636 (Iowa), *cert. denied*, 429 U.S. 1001, 97 S. Ct. 532, 50 L. Ed. 2d 613 (1976). Payment of taxes is not essential to the acquisition of title by adverse possession. *I-80 Assocs., Inc. v. Chicago, Rock Island & Pac. R.R. Co.*, 224 N.W.2d 8, 10 (Iowa 1974); *Moffitt v. Future Assurance Assocs.*, 258 Iowa 1160, 1170-72, 140 N.W.2d 108, 114-15, (1966); *see also Grosvenor v. Olson*, 199 N.W.2d 50, 51 (Iowa 1972); *Shives v. Niewoehner*, 191 N.W.2d 633, 636 (Iowa 1971). This doctrine is strictly construed. *See Garrett*, 684 N.W.2d at 253.

The district court found, and our review of the record confirms, that Stewart farmed the land as his own beginning in 1987 and continuing until Judy

[1] At the time Dawson made the call and served the notice Stewart had been farming the land for more than ten years and probably had already established his claim by adverse possession.

had the crops removed in August of 2006. While recognizing Stewart's period of possession, the district court determined that farming already tillable land was not sufficient; rather, there had to be further improvements such as fences, buildings or clearing of the land. In *Moffitt*, 258 Iowa at 1171, 140 N.W.2d at 114, the Iowa Supreme Court said:

> To constitute adverse possession or to set in operation the statute of limitations does not necessarily require the claimant to live upon the land, or to enclose it with fences, or to stand guard at all times upon its borders to oppose the entry of trespassers or hostile claimants. *It is enough if the person pleading the statute takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition. Whalen v. Smith*, 183 Iowa 949, 953, 167 N.W. 646, 647 (1918) cited in *Clear Lake Amusement Corporation v. Lewis*, 236 Iowa 132, 138, 18 N.W.2d 192, 195 (1945).
>
> Actual possession is the type of possession or control owners ordinarily exercise in holding, managing and caring for property of like nature and condition.

Moffitt, 258 Iowa at 1171, 140 N.W.2d at 114. (Emphasis supplied).

We disagree with the district court that the placing of the steel posts and farming the land alone is insufficient to establish adverse possession.[2] A farmer owning unimproved farmland would ordinarily exercise dominion over it by cultivating it, planting it, and harvesting the crops. Stewart's twenty years of cultivating, planting, and harvesting crops, are the type of possession or control an owner of farmland ordinarily would exercise in holding, managing, and caring for property. *See id*.; *see also Council Bluffs Sav. Bank*, 243 N.W.2d at 636-37.

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[2] Stewart's undisputed testimony was that there was wire on the fence and that he cleaned brush from a portion of the tract in question. The district court's findings indicate that he did not believe Stewart's testimony on these points. Because we do not find the presence of wire or the cleaning up of brush to be relevant to our disposition we make no credibility finding on this evidence.

We disagree with the district court that this evidence is insufficient to show adverse possession if the other elements are present.

Judy also appears to argue that Stewart cannot show adverse possession because he did not sufficiently communicate his position to Dawson, for at no time did he take the necessary steps to put Dawson on notice of his intent, and Stewart did not have ten years of continuous possession.

It is not necessary to establish a claim of right by an express declaration; it is sufficient if the claimant has acted so as to clearly indicate he did claim title. *See C.H. Moore*, 423 N.W.2d at 15. It need not be based on writing. *Id*. The actual occupation, use, and improvement of the premises by the claimant, as if he were in fact the owner thereof without payment of rent or recognition of title in another, or disavowal of title in himself, will be sufficient to raise a presumption of his entry and holding as absolute owner and, unless rebutted, will establish the fact of a claim of right. *See id*.

In *Teabout v. Daniels*, 38 Iowa 158, 160-61 (1874), the court rejected a claim that a jury in an adverse possession claim should be instructed that unless the title holder had knowledge or could justly be presumed to have knowledge of the adverse possession, the jury should find for the title holder. In doing so the court said:

> The true rule is that the possession which raises a presumption of title must be open, visible and notorious, and not clandestine or hidden. When the possession is shown to be of such open character, the person against whom it is maintained, as a matter of law is presumed to know it, or to be negligent in not knowing it, and in either case he is bound by it.

Teabout, 38 Iowa at 161. There is no showing that Stewart's possession of the land was hidden. It was bordered on three sides by improved public roads. Joan

Dawson indicated she and Bill Dawson had driven by it. There is no evidence to refute the presumption that Bill Dawson knew about Stewart's possession or that he was negligent in not knowing of it.

Stewart's possession was hostile. The testimony of Joan Dawson was that Stewart never had a lease.

Our review of all the evidence convinces us that Stewart has proven title to the disputed tract by clear and convincing proof of adverse possession. His possession had spanned nearly twenty years when Judy forcibly removed his posts and crop. We reverse the district court and remand, directing the court to enter judgment consistent with this opinion.

Having determined that Stewart has acquired title to the land by adverse possession, we need not address his claim of acquiescence and elect not to do so.

REVERSED AND REMANDED.