COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1388-FT **Cir. Ct. No. 2004CV140**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RICHARD A. MUELLER AND SHARON M. MUELLER,

PLAINTIFFS-RESPONDENTS,

V.

PARSRAM S. THAKUR AND JEAN M. THAKUR,

DEFENDANTS-APPELLANTS,

GENOA STATE BANK,

DEFENDANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Parsram and Jean Thakur appeal[1] from a judgment granting Richard and Sharon Mueller title to a disputed area of property and ordering the Thakurs to remove encroachments they had placed on the property. We affirm for the reasons discussed below.

BACKGROUND

¶2 According to the factual findings made by the trial court, the Thakurs and Muellers own adjacent parcels of land which were once commonly owned by the Elliots. The Elliots sold one tract of land to the Muellers in 1989, and another tract of land to the Thakurs' predecessor in interest, Gilbert Fagen, in 1990. In both instances, the legal descriptions were created based upon the parties' own measurements, rather than by any professional survey.

¶3 Fagen sold his parcel to the Thakurs in 2003. The Thakurs installed a mobile home which they used as a second residence, dug a well and built a garage on what they believed to be their property. The Muellers made no contemporaneous objection to the improvements because they shared the Thakurs' belief as to the property line. In 2004, however, a survey revealed that the actual recorded property line was not where the parties had thought it was, and that some of the improvements installed by the Thakurs were actually on land described in the Muellers' deed.

¶4 The Muellers sued to establish their legal title and terminate any encroachments. The Thakurs claimed the Muellers should be equitably estopped

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

from having the improvements removed and further asserted right to title by adverse possession. After negotiation attempts failed, the trial court found in the Muellers' favor and the Thakurs appeal.

STANDARD OF REVIEW

¶5 An adverse possession determination presents a mixed question of fact and law, requiring findings concerning the sequence of events and a conclusion as to the legal significance of those events. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 728, 408 N.W.2d 1 (1987). We will sustain the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Becker v. Zoschke***, 76 Wis. 2d 336, 346, 251 N.W.2d 431 (1977). Furthermore, although we do not ordinarily defer to the trial court's conclusions of law, we will give weight to a legal determination that is intertwined with the factual findings in support of that determination. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983).

¶6 We have explained our review of an equitable estoppel claim as follows:

> Where the circuit court's findings of fact are not clearly erroneous, it is a question of law whether estoppel has been established. Once the elements of equitable estoppel have been established as a matter of law, the decision to actually apply the doctrine to provide relief is a matter of discretion.

Affordable Erecting, Inc. v. Neosho Trompler, Inc., 2005 WI App 189, ¶10, 286 Wis. 2d 403, 703 N.W.2d 737 (citations omitted).

DISCUSSION

Adverse Possession

¶7 The Thakurs first claim that the trial court made clearly erroneous factual findings that the Thakur parcel is located to the west of land owned by the Elliots (while the Thakurs contend their land is actually to the west of land owned by Howard Maxwell), and that the Fagens made no improvements to the parcel when they owned it (while the Thakurs contend the Fagens installed a septic system and volleyball court). They argue that these findings affected the trial court's conclusion that they had not adversely possessed the disputed land for a period of ten years. We need not address these alleged factual errors, however, because we conclude that the Thakurs needed to show adverse possession for a period of twenty, not ten, years.

¶8 WISCONSIN STAT. § 893.25 permits a person to acquire title to real property by adverse possession for an uninterrupted period of twenty years. The statute requires the land to be actually occupied and either protected by a substantial enclosure or usually cultivated and improved. Section 893.25(2). A person claiming adverse possession must show that the disputed property was used for the requisite period of time in an "open, notorious, visible, exclusive, hostile and continuous" manner that would apprise a reasonably diligent landowner and the public that the possessor claimed the land as his or her own. ***Pierz v. Gorski***, 88 Wis. 2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979). Section 893.26 shortens the requisite period of adverse possession to ten years when the claimant "originally entered into possession of the real estate under a good faith claim of title, exclusive of any other right, founded upon a written instrument as a conveyance of the real estate or upon a judgment of a competent court" and the

instrument or judgment is duly recorded with the register of deeds within thirty days.

¶9 The Thakurs do not claim, or point to any facts in the record to show, that the language of their recorded deed actually encompassed the disputed portion of land. In other words, this is not a "color of title" situation where the legal descriptions overlap, and the party possessing the property also claims title based on a recorded written instrument whose validity might be questionable. Rather, the Thakurs' adverse possession arguments focus on post and fence lines which vary from the legal description, and the parties' actions and mutual beliefs about where the boundary was located. Since the Thakurs do not challenge the trial court's factual finding that the surveys showed that the disputed land fell within the legal description in the Muellers' deed, it is the twenty-year period, rather than the ten-year period, which applies here. *See* ***Beasley v. Konczal***, 87 Wis. 2d 233, 241-42, 275 N.W.2d 634 (1979). The Thakurs cannot establish adverse possession for a period of twenty years because the Muellers' and Thakurs' parcels were both split off from the Elliot land less than twenty years before the present action was commenced.

Estoppel

¶10 The doctrine of equitable estoppel may be invoked to bar the assertion of an otherwise valid legal right where there has been "(1) action or inaction, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." ***Murray v. City of Milwaukee***, 2002 WI App 62, ¶15 & n.9, 252 Wis. 2d 613, 642 N.W.2d 541.

> Courts will not construe ignorance or misapprehension of the true nature or existence of a right into a forfeiture of the power to enforce it. It must appear that the party to be estopped was acquainted with his title and wilfully concealed or misstated it, or that he was guilty of such gross negligence and indifference to the rights of others as, under the circumstances, to be equivalent to actual and premeditated fraud.

Crane v. Esmond, 214 Wis. 571, 577-78, 253 N.W. 780 (1934) (citation omitted).

¶11 The Thakurs contend that the Muellers should be estopped from asserting title to the disputed land, or even if they have a valid title, from exercising their right to demand removal of the improvements the Thakurs placed on the land because: (1) the Muellers did not object for over fourteen years to the boundary markers which had been staked out by Willard Elliot, Gilbert Fagen, and Howard Maxwell at the time of the land sale; (2) Richard Mueller participated in the installation of the garage foundation; and (3) Richard Mueller staked out the same boundary as the Thakurs believed applied when the Muellers were planning to sell a portion of their parcel. The Thakurs assert that they expended money to place their mobile home, build a garage and drill a well in reliance upon these actions and inaction by the Muellers.

¶12 The problem with the Mueller's estoppel argument is that it was really the action of the grantor, Willard Elliot, in staking out a boundary that differed from the legal description of the land he was selling[2] that caused both the

[2] We recognize that staked boundaries made by a common grantor may take precedence over the boundaries shown by a recorded plat when a deed refers to the plat by lot numbers, regardless of the length of time which has passed. *See* ***Thiel v. Damrau***, 268 Wis. 76, 81, 66 N.W.2d 747 (1954). Here, however, the legal descriptions in the deeds are by metes and bounds, not by platted lots as in ***Thiel***. Therefore, we do not believe the same assumptions about the parties' intent can be made.

Thakurs and Muellers to believe the staked line was the true boundary. The fact that the Muellers knew what the Thakurs were doing in the disputed area, and made no objection due to their shared mistaken belief about the true boundary, does not show that the Muellers induced the Thakurs to expend money making the improvements they made, or to place the improvements where they placed them. To the contrary, the fact that the Muellers shared the same mistaken belief as the Thakurs completely undermines the contention that the Muellers engaged in any knowing misstatement or concealment of the true boundary. Therefore, the trial court properly refused to apply estoppel.

Remedy

¶13 Finally, the Thakurs contend that the trial court erroneously exercised its discretion by ordering them to remove the encroachments because: (1) the Muellers had not requested that relief; (2) the court failed to consider the cost and hardship to the Thakurs of complying with the court's order; and (3) the court abandoned a more equitable solution it had previously suggested to punish the Thakurs for not settling the case.

¶14 As the Muellers point out, however, termination of the encroachment was one of the remedies requested in the complaint itself. It is true that counsel for the Muellers subsequently proposed alternate remedies of drawing a new boundary line that went around the garage or paying the Thakurs for the improvements if the line were drawn in accordance with deeds. It is also true that the court commented that if this case had come to it as an arbitration matter, it would consider a fair result to be to award Mrs. Thakur the land and have her pay the Muellers for the extra acreage. However, the court went on to note that this was not an arbitration case, and it would need to decide the case based on the law

and authorities provided by the parties, rather than its view of the equities. It did so. Termination of the encroachments was plainly an available remedy under WIS. STAT. § 840.03(1)(L), and the court did not erroneously exercise its discretion by ordering it.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.