COURT OF APPEAL FOR ONTARIO

CITATION: Sipsas v. 1299781 Ontario Inc., 2017 ONCA 265
DATE: 20170331
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2017 ONCA 265 (CanLII)

Hoy A.C.J.O., Benotto and Huscroft JJ.A.

BETWEEN

Ted Sipsas and Leslie Carruthers

Plaintiffs (Appellants)

and

1299781 Ontario Inc.

Defendant (Respondent)

Justin Winch, for the appellants

David Winnitoy, for the respondent

Heard: October 4, 2016

On appeal from the order of Justice Kenneth G. Hood of the Superior Court of Justice, dated February 3, 2016, with reasons reported at 2016 ONSC 212.

By the Court:

[1] This is an appeal of an order denying the appellants' request for a declaration that they own a part of the property that adjoins the property they purchased, as a result of adverse possession.

[2] The appeal is dismissed for the reasons that follow.

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Background

[3] The appellants, Ted Sipsas and Leslie Carruthers, own 173 Gooch Ave. ("173"), which adjoins 171 Gooch Ave. ("171"). Both properties are in Toronto and were converted to Land Titles on October 22, 2001.

[4] The appellants purchased 173 from Delila and Fred Hendricks on September 28, 2007. The Hendricks had purchased the property in 1969 from the builder who built their two-storey brick home on the property.

[5] 171 was purchased by the respondent, 1299781 Ontario Inc., from the City of Toronto on December 18, 2006. It was essentially a vacant piece of land. The City had taken ownership of the property as a result of unpaid taxes owed by the previous owner, Jennie D. Thompson ("Thompson"), who owned the property from 1932 until 2005.

[6] A dispute arose when the respondent listed 171 for sale. The appellants asserted ownership of part of that property as a result of adverse possession and took the position that 171 could not be sold if the sale included the disputed lands. The appellants commenced an application and obtained a certificate of pending litigation that prevented the sale of 171 until ownership of the disputed lands was resolved. The application was converted to an action that was tried pursuant to the simplified procedure, resulting in the order under appeal.

[7] There is no evidence that the disputed lands were used by Thompson at any time between the Hendricks' purchase of 173 in 1969 and the City's assumption of ownership of 171, including the disputed lands, in 2005.

[8] Mr. Hendricks, the prior owner of 173, gave evidence that the builder from whom he purchased it built a retaining wall on 171 and enclosed the disputed lands with a board fence in 1969, prior to his purchase. He said that he always understood from the builder that the disputed lands were part of his property. According to Mr. Hendricks, he completed the fencing of the disputed lands by 1974. In addition, he built concrete steps on the disputed lands by 1970 and two sheds in 1979, one that was used as a tool shed and the other as a dog house and dog run.

The Trial Judge's Decision

[9] The trial judge noted Mr. Hendricks' evidence that he believed the disputed lands were part of 173. The trial judge observed that none of the purchase and sale documentation from the sale of 173 in 1969 was put into evidence. He acknowledged that the Listing Agreement in connection with the Hendricks' 2007 sale of 173 referred to a Garden Shed being included in the sale. However, the agreement of purchase and sale and the statutory declaration that were executed when the appellants purchased the property did not refer to the disputed lands. He gave more weight to those documents than to the Listing Agreement and

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found that they contradicted Mr. Hendricks' evidence that he always believed that the disputed lands were part of 173.

[10] The trial judge found that the evidence as to the current extent and state of the fence was unclear, but that it was irrelevant given that adverse possession could be established by possession for any continuous ten-year period prior to October 22, 2001.

[11] The trial judge found that the disputed lands were used by the Hendricks only seasonally, from approximately November through March. Further, the trial judge accepted Mr. Hendricks' evidence, at para. 28, "that he did not believe, when he was using the Disputed Lands from April to October, that he was excluding someone else's right to them. It did not concern him." The trial judge found that there was no evidence that Thompson was aware of the use of her land by the Hendricks, and no evidence as to her intended use of the land in any event.

[12] The trial judge applied the three-part test from this court's decision in *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563 (C.A.), leave to appeal refused, [1984] S.C.C.A. No. 232. In that case the court held that an adverse possession claimant must have:

(1) had actual possession;

(2) had the intention of excluding the true owner from possession, and

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(3) effectively excluded the true owner from possession.

[13] The trial judge concluded the adverse possession claim failed at the first step: the Hendricks' use of the land was seasonal and intermittent at best, and so did not meet the requirement of constant and continuous usage. Accordingly, there was no actual possession of the disputed lands. This conclusion was sufficient to dismiss the claim, but the trial judge also concluded that the appellants failed to satisfy the second and third steps of the *Masidon* test.

[14] The trial judge noted that enclosure is the strongest evidence of adverse possession, and may also lead to proof of intention to exclude and actual exclusion of the true owner. However, he found that Mr. Hendricks was unable to give evidence as to the state of the fence during the relevant time because he never went out to look at it. He noted that this supported the respondent's argument that the Hendricks had no intention to exclude Thompson.

[15] The trial judge found there was no evidence concerning Thompson's understanding or her intentions as to the disputed lands, and as a result it could not be said that both Hendricks and Thompson mistakenly believed that the Hendricks owned the land.

[16] Consequently, the appellants were required to establish "inconsistent use", following *Masidon Investments* and *Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722 (C.A.). On this point, the trial judge found as follows, at para. 38:

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> There is no evidence put forward by the plaintiffs as to the use or intended use of the land by the defendant's predecessor in title, Ms. Thompson. The plaintiffs have failed to show that what their predecessors in title, the Hendricks, did was inconsistent with the form of use and enjoyment that Ms. Thompson intended to make of the land owned by her. The plaintiffs have not proven that the use of the Disputed Lands was with the intention of excluding the true owner from possession. Nor is there any evidence that what the Hendricks did was even known to Ms. Thompson, so that there could be an argument that she gave permission to the use of her property and the use was adverse to her ownership.

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[17] The trial judge added, at para. 39, that the Hendricks' sale of 173 without mentioning the disputed lands is consistent with this conclusion: "The Hendricks knew that they had no claim to any of 17[1] Gooch. They knew that the property they were selling was only 17[3] Gooch".

Analysis

[18] Although title to lands registered in Land Titles cannot be obtained by adverse possession following the registration of title, title may be obtained by adverse possession that can be established for a continuous period of 10 years prior to registration: s. 51(2) of the *Land Titles Act*, R.S.O. 1990, c. L.5 and s. 4 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15. Thus, as the trial judge found, the appellants were required to establish that the Hendricks adversely possessed the disputed lands for any 10-year period ending October 21, 2001.

[19] The appellants submit that the trial judge erred in concluding that the appellants failed at the first step of the *Masidon* test because the Hendricks' use of the disputed lands was seasonal and intermittent at best.

[20] It is clearly arguable that the Hendricks' use of the disputed lands was sufficient to establish actual possession. The Supreme Court recently reiterated that the requirement that a claimant have actual "possession" does not require continuous occupation: *Nelson v. Mowatt*, 2017 SCC 8, [2017] S.C.J. No. 8, at para. 31. The Hendricks could be said to have used the disputed lands as a backyard, and backyards are necessarily used on a seasonal basis. But even assuming that the actual possession requirement were satisfied, the appellants' claim would fail on the second step of the *Masidon* test.

[21] The appellants were required to establish that the Hendricks intended to use the disputed lands in a manner inconsistent with the rights of Thompson and the use she intended to make of it. There is no question that the "inconsistent use" test makes it more difficult for claimants of adverse possession to establish an intention to exclude, especially where, as in this case, the intentions of the true owner of the disputed lands are unknown.

[22] The appellants sought to avoid this problem by arguing that this was a case of mutual mistake, rendering the inconsistent use test irrelevant: see *Teis v. Ancaster (Town)* (1997), 35 O.R. (3d) 216 (C.A). However, a mutual mistake

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cannot be established on this record. It was not established that Thompson was mistaken about anything at all. The appellants could do no more than suggest it was *possible* that Thompson also believed that the disputed lands were owned by the Hendricks.

[23] At the hearing of the appeal, the appellants sought to characterize this as a case of unilateral mistake, submitting that the Hendricks mistakenly believed that they owned the disputed land.

[24] As noted in *Barbour v. Bailey,* 2016 ONCA 98, 345 O.A.C. 311, at para. 43, this court has not determined whether inconsistent use is necessary in cases of unilateral mistake, although there is Superior Court authority that supports the proposition that it is not: see *Marotta v. Creative Investments Ltd.,* [2008] O.J. No. 1399, 69 R.P.R. (4th) 44 (S.C.).

[25] This argument was not properly raised on appeal, as it had not been argued at trial. But in any event it cannot surmount a factual hurdle.

[26] At para. 35 of his reasons, the trial judge wrote: “Even if I was prepared to accept Mr. Hendricks’ evidence that he was told by the builder that the Disputed Lands were theirs and he actually believed this, there is no evidence as to what Ms. Thompson believed or what use she intended to make of the property.” While this may suggest that the trial judge stopped short of determining whether the Hendricks believed they owned the disputed lands, he clearly found at para.

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39, referenced above, that "The Hendricks knew that they had no claim to any of 17[1] Gooch." It is clear from his reasons as a whole that that he was not persuaded that the Hendricks believed that they owned the disputed lands.

[27] The appellants argue the trial judge was not entitled to give any weight to the agreement of purchase and sale and the statutory declaration that the Hendricks signed because they came after adverse possession had to be established. They say the trial judge made a palpable and overriding error by not finding – in the face of Mr. Hendricks' evidence and the Listing Agreement that referred to the Garden Shed – that the Hendricks believed they owned the disputed lands.

[28] In our view, it was open to the trial judge to consider the agreement of purchase and sale and statutory declaration in rejecting Mr. Hendricks' evidence that he believed that the Hendricks owned the disputed lands. We are not persuaded that the trial judge's conclusion that the Hendricks knew they had no claim to 171 is a palpable and overriding error.

A note on *Mowatt*

[29] After this appeal was heard, the Supreme Court released *Mowatt*, a decision concerning the law of adverse possession in British Columbia. We refer to *Mowatt* in para. 20, above. In *Mowatt,* the Supreme Court also noted, citing *Masidon* and other cases, that the inconsistent use requirement appears in the

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jurisprudence of Ontario. It held that the law of British Columbia governing adverse possession does not require a claimant to demonstrate that his or her use of disputed lands was inconsistent with the intended use of the "true owner". At para. 27, Brown J., for the court, wrote: "Whether the requirement is properly applicable in other provinces remains an open question subject to examination of their respective legislative histories, the wording of their particular limitation statutes, and the treatment of these matters by the courts of those provinces."

[30] In supplemental submissions following the release of *Mowatt*, the appellants effectively urge this panel to overrule *Masidon* and eliminate the inconsistent use requirement in Ontario, without regard to whether there is mutual or unilateral mistake. However, this panel is not in a position to overrule *Masidon.*

The easement claim

[31] The appellants argued in their factum that the trial judge failed to consider their claim for an easement, but did not pursue the argument at the hearing of the appeal. There is no merit to the argument in any event. There was no evidence to support the claim that an easement was reasonably necessary for the enjoyment of the appellants' land. Furthermore, the grant of an easement would all but preclude the respondent's use of the disputed lands.

Disposition

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[32] The appeal is dismissed.

[33] The respondent is entitled to its costs on the appeal fixed at the agreed amount of $17,500, inclusive of taxes and disbursements.

Released: "AH" "MAR 31 2017"

"Alexandra Hoy A.C.J.O."
"M.L. Benotto J.A."
"Grant Huscroft J.A."

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