COURT OF APPEAL FOR ONTARIO

CITATION: Majewsky v. Veveris, 2018 ONCA 848
DATE: 20181024
DOCKET: C62945

Simmons, Miller and Fairburn JJ.A.

BETWEEN

Peter Majewsky

Plaintiff (Respondent)

and

Juris Veveris and Christina Miller-Veveris
and Stewart Title Guaranty Company

Defendants (Appellants)

Marvin J. Huberman, for the appellants

Ryan Breedon, for the respondent

Heard: September 26, 2018

On appeal from the judgment of Justice M.J. Donohue of the Superior Court of Justice, dated October 11, 2016, with reasons reported at 2016 ONSC 5608.

REASONS FOR DECISION

[1] This appeal involves a boundary dispute between neighbours. The parties (for convenience, "parties" shall include Mr. Majewsky's mother), acquired neighbouring acreages of land near Markdale, Ontario, during the 1980's. In 2008, the appellants, the Veverises, observed an aerial photograph that led them to believe their neighbour, the respondent, Mr. Majewsky (who had by then acquired

title from his mother) was encroaching on their land. The encroachments were confirmed through a survey obtained later that year.

[2] The trial judge found that the respondent had acquired possessory title to an area of the appellants' land on which a portion of the respondent's house, outbuildings and yard were situate ("the house lands"). The trial judge also held that the respondent was entitled to prescriptive easements, based on the doctrine of lost modern grant, over a portion of a laneway and a cedar trail that encroached on the appellants' lands.

[3] The appellants raise multiple issues on appeal: five concerning the house lands, five concerning the cedar trail and one concerning the laneway.[1] We address these arguments in turn.[2]

The House Lands

[4] First, the appellants argue that the trial judge erred in finding that the respondent had acquired possessory title to the house lands because, they say, the weight of the evidence demonstrated that the respondent's (or his mother's) possession of such lands was not adverse, but rather was with the permission of the appellants.

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[1] In oral argument, counsel for the appellants confirmed they were not pursuing the twelfth argument as set out in their factum.

[2] No issue was raised on appeal concerning the trial judge's interpretation of s. 5(4) of the *Real Property Limitations Act,* R.S.O. 1990, c. L.15. As such, nothing in these reasons should be taken as commenting on that interpretation.

[5] We reject this argument. The trial judge's conclusion was premised in large measure on a finding that, until 2008, the parties operated under the mutually mistaken belief that the respondent (or his mother) owned the house lands. Nonetheless, to rebut the claim that the respondent's (or his mother's) occupation of the house lands was adverse, the appellants point to permission given to the respondent, his mother or her spouse, to do various things on their (the appellants') land – for example, to cut grass, walk on it, and park vehicles on it. However, nothing the appellants have identified gives rise to an inference that that the appellants gave permission to the respondent or his mother to occupy the house lands as if they owned it and for the purpose of building a permanent residence on it – which the respondent's mother did in 1993. In the result, we see no error in the trial judge's finding that possession of the house lands was adverse.

[6] We will address the appellants' second and third arguments together as they are related. The appellants' second argument is that the trial judge erred in law at para. 76 of her reasons by holding it was unnecessary that the respondent establish effective exclusion of the appellants from possession of the house lands to establish a possessory title. Their third argument is that the trial judge erred in failing to find they were not effectively excluded from the house lands.

[7] We do not accept these arguments.

[8] At paras. 72 and 73 of her reasons, the trial judge correctly noted the three elements of the test for adverse possession (actual possession, intention to exclude the true owner from possession and effective exclusion of the true owner from possession) and correctly observed that it is unnecessary to prove the second element, where, as here, the parties have a mutual misunderstanding of true ownership.

[9] Paragraphs 74 to 77 of the trial judge's reasons, which include the impugned finding, read as follows:

> All of the evidence in this case supports that the Majewskys openly used, maintained, possessed, and occupied the house and yard are including their out-buildings. The Majewskys serviced the trailers and sheds with electricity. They installed a septic tank and septic bed in the yard. They installed a yard overhead light. They acted as the owner and possessors of the land as they thought they were.
>
> The plaintiff and the defendants were under the mistaken belief that it was the Majewskys' land until 2008.
>
> Mr. Veveris argued that it was not completely fenced in on all sides to establish it was exclusive to the Majewskys. I am not satisfied this was necessary or required when all parties operated under the mistaken belief that it was Majewsky property.
>
> I am satisfied that [Mr. Majewsky] has made out a claim for possessory title of the house and yard including the out-buildings. [Emphasis added.]

[10] Read fairly, the trial judge was not saying in para. 76 of her reasons that it was unnecessary to prove effective exclusion of the true owner of land to establish

a possessory title. Rather, she was saying that, in the context of this case, involving mutual mistake as to the ownership of the house lands – on which the Majewskys had established a permanent home – it was unnecessary that those lands be completely fenced to establish effective exclusion of the true owners. The Majewskys had achieved that result through the nature of their occupation and by virtue of the mutual mistake of the parties.

[11] In our view, this finding was well supported by the evidence. The respondent, and before him, his mother, used the house lands as their permanent residence from 1993 onward. As a result of mutual mistake, all parties believed the Majewskys owned the house lands. In our view, it was open to the trial judge to conclude that an inference of effective exclusion arose from the nature of the Majewskys' use which included the erection of a permanent home and related outbuildings, installation of a septic tank system and customary usage of the adjacent yard; and that, further, that inference was not displaced by the fact of occasional neighbourly visits by the appellants.

[12] The appellants' fourth and fifth arguments are also related. The appellants fourth argument is that the trial judge erred in using the period 1997 to 2007 as sufficient for establishing adverse possession instead of focusing on the ten-year period immediately preceding registration of the lands in Land Titles (May 25, 1999 to May 25, 2009). The appellants say this is significant based on their fifth argument: the trial judge misconstrued or ignored the evidence that, in 2008, which

was within the ten-year statutory period they say applies, the appellants objected to the respondent's encroachments on the appellants' lands.

[13] We do not accept these submissions. The appellants' arguments on this issue as set out in their factum misinterpret the provisions of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, under which limitation periods are established for an owner to move to recover possession of land. Contrary to the appellants' submissions, *Sipsas v. 1299781 Ontario Inc.,* 2017 ONCA 265, 85 R.P.R. (5th) 24, at paras. 10 and 18, stands for the proposition that adverse possession can be established with respect to lands registered under *the Land Titles Act*, R.S.O. 1990, c. L.5, by possession meeting the necessary requirements during any continuous ten-year period prior to registration in Land Titles.

[14] In oral argument, the appellants asserted that the trial judge erred by misconstruing the starting date of the adverse possession claim. This was because the requirements for an adverse possession claim were never met due to the various errors they had identified. However, for the reasons we have already explained, we do not accept the appellants' other arguments concerning the adverse possession claim.

[15] Based on the foregoing reasons, we reject the appellants' grounds of appeal concerning the house lands.

The Cedar Trail

[16] As we have said, the appellants raise five issues in relation to the finding of a prescriptive easement over the cedar trail. In our view, two of those issues are dispositive and it is unnecessary that we address the appellants' other issues concerning the cedar trail.

[17] As their ninth argument, the appellants contend that the trial judge erred in finding that the "harvesting and transporting of wood" use on the cedar trail was continuous. As their tenth argument, they submit the trial judge erred in finding that the cedar trail conferred a benefit on the dominant tenement. In our view, the trial judge's reasons concerning accommodation of the dominant tenement and continuous use cannot be sustained.

[18] At para. 49 of her reasons, when addressing the laneway, the trial judge set out the law relating to prescriptive rights of way and correctly recognized, quoting from *Barbour v. Bailey*, 2016 ONCA 98, 66 R.P.R. (5th) 173, leave to appeal refused, [2016] S.C.C.A. No. 139, that one of the essential characteristics of a prescriptive easement is that it must accommodate – that is, be reasonably necessary to the better enjoyment of the dominant tenement.

[19] Further, at paras. 52 and 53 of her reasons, the trial judge correctly relied on *Kaminskas v. Storm*, 2009 ONCA 318, 310 D.L.R. (4th) 549 for the proposition that to acquire a prescriptive easement whether under the doctrine of lost modern

grant or by prescription under the *Real Property Limitations Act*, the claimant must demonstrate use that is continuous, uninterrupted, open, and peaceful for a period of 20 years.

[20] At para. 86 of her reasons, the trial judge turned to the issue of the cedar trail. After reviewing the evidence, she returned to the law and, at para. 108, again quoted from *Barbour v. Bailey*, in which the court said, in relation to the fourth criterion for a prescriptive easement, "what is 'reasonably necessary' [for the better enjoyment of the dominant tenement will] depend on the nature of the property and the purpose of the easement." Further, "[t]here must be a connection between the easement and the normal enjoyment of the dominant tenement, as opposed to a personal right belonging to the dominant tenement owner": *Barbour*, at para. 58 (citation omitted). Parking spaces or driveways are examples of uses that courts have found fulfill the criteria. The *Barbour* court added at para. 59 that "[t]his is reinforced by the fact that in order to be capable of forming the subject matter of a grant (the third criterion listed above) easement rights must not be ones of mere recreation and amusement; the rights in issue must be of utility and benefit to the dominant tenement" (citation omitted, emphasis added).

[21] However, having set out the law correctly, the trial judge erred by failing to properly consider whether the continuous use she found met the criterion of accommodating the dominant tenement.

[22] At para. 109 of the reasons, the trial judge stated:

> The use to which the Cedar Trail was put was for both for recreation in a country property and wood-gathering. It was not just for amusement but also for utility and benefit to the Majewskys.

[23] At para. 111, the trial judge said she was satisfied that the respondent, through his mother and her partner, had "made out factually an entitlement to a prescriptive easement" for the cedar trail and therefore "the use may continue specifically for the purpose of harvesting and transporting wood from the woodlot" (emphasis added). This holding implies that continuous use for the purpose of harvesting wood had been established during the necessary period and that was the right that provided utility and benefit to the dominant tenement. Yet at para. 101 of the reasons, the trial judge noted that the evidence disclosed that the respondent had used the cedar trail to harvest wood on only two occasions in the past and that he planned and hoped to do so in the future. In fact, the record supports the use of the cedar trail for harvesting wood on only one prior occasion along with occasional use to bring firewood to the house. One or even two prior uses of the cedar trail for harvesting wood and occasional use for gathering firewood was not sufficient to support a conclusion of continuous use.

[24] At para. 102 of the reasons, the trial judge also found continuous use based upon recreational uses (hikes, walks and an annual Legion event). However, as

set out in *Barbour v. Bailey*, such uses were personal to the Majewskys rather than of utility and benefit to the dominant tenement.

The Laneway

[25] The appellants' eleventh argument is that the trial judge erred in finding a prescriptive right to maintain the laneway encroachment by clearing brush, plowing snow and cutting grass a distance of three metres onto the appellants' lands as there was no evidence of such maintenance on the appellants' lands during the 20-year period. We reject this argument. The appellants do not contest the trial judge's finding of a prescriptive right for the portion of the laneway that encroaches on their land. Their sole objection is the maintenance rights the trial judge attached to the prescriptive easement. The trial judge accepted the respondent's evidence concerning him, his mother and his stepfather taking out dead trees, cutting grass and plowing snow on either side of the laneway. Although the respondent testified that the grass was trimmed three feet on either side of the laneway he also said their snowblower "shoots the snow a good two to three metres." Based on the evidence she accepted, it was open to the trial judge to make the order permitting maintenance of the laneway.

Disposition

[26] Based on the foregoing reasons, the appeal is allowed in part by setting aside the trial judge's finding of a prescriptive easement over the cedar trail and

dismissing the respondent's claim in that respect. The appeal is otherwise dismissed.

[27] Costs of the appeal are to the respondent on a partial indemnity scale fixed in the amount of $10,000 inclusive of disbursements and applicable taxes. If so advised, the appellants may make written submissions, not to exceed three pages, concerning the costs award below within 10 days of the release of these reasons; the respondent may respond within 7 days thereafter.