

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JACQUELINE M. DEMARCO and :
BRAD DEMARCO, :

Plaintiffs :

v. :

THOMAS ACKER and SABINA ACKER :

Defendants :

No. 15-2312

Robert T. Yurchak, Esquire
Anthony Roberti, Esquire

Counsel for Plaintiffs
Counsel for Defendants

DECISION AND VERDICT

Serfass, J - May 16, 2017

On September 1, 2015 Plaintiffs, Jacqueline and Brad DeMarco (hereinafter "Plaintiffs"), filed a complaint against Defendants, Thomas and Sabina Acker (hereinafter "Defendants") asserting possession over a three (3') feet wide by fifty (50') feet long section of real property abutting the southern border of their property which is situated at and known as 45 West Sixth Street, Jim Thorpe, Pennsylvania.

On September 23, 2016, Defendants filed an answer and new matter which avers that Defendants are the current deed holders of the property situated at 531 North Street, Jim Thorpe, Pennsylvania. They further allege that their predecessor in title, Joseph V. Giglotti, granted Plaintiffs' predecessor in title, Plaintiff Jacqueline DeMarco's mother, Dorothy Farrell, a

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license to install a pool deck and yard fence which partially encroached upon Mr. Giglotti's property. Additionally, Defendants contend that Plaintiffs and their title predecessors were granted a license to build and maintain their pool deck and yard fence with the understanding that both the fence and pool deck would need to be moved at some point in the future. In their answer, Defendants also included a counterclaim in ejectment.

Following a non-jury trial held before this Court on November 15, 2016, proposed Findings of Fact and Conclusions of Law were submitted by counsel for Defendant and counsel for Plaintiff on December 15, 2016 and December 30, 2016, respectively. Upon review of counsels' submissions and careful consideration of the evidence presented at trial, we make the following:

FINDINGS OF FACT

1. Plaintiffs are husband and wife who reside at 45 West Sixth Street, Jim Thorpe, Carbon County, Pennsylvania;
2. Plaintiff, Jacqueline DeMarco, is the current record owner of the properties located at 43 and 45 West Sixth Street, Jim Thorpe, Pennsylvania;
3. Plaintiff, Jacqueline DeMarco, inherited Plaintiffs' property from her mother, Dorothy Farrell, on April 13, 2013;

4. Defendants are the record owners of the real property situated at 531 North Street, Jim Thorpe, Carbon County, Pennsylvania;

5. Defendants purchased their property on April 15, 2005 from Joseph V. Giglotti, pursuant to a bankruptcy action;

6. On January 31, 1975, John and Dorothy Farrell (hereinafter "the Farrells") inherited Plaintiffs' property from Mr. Farrell's mother, Isabel Farrell;

7. At trial, Jacqueline DeMarco testified that her father built a fence on Plaintiffs' property sometime in 1975 along a hedge row which already existed on the property;

8. Jacqueline DeMarco also testified that her father installed a pool on Plaintiffs' property in 1974, and constructed the pool deck in 1984 or 1985;

10. The pool deck that was constructed in the 1980s has not been moved since its original construction;

11. During June of 2015, Defendant, Thomas Acker, cut and removed a section of Plaintiffs' fence and pool deck which he believed was encroaching on his property; and

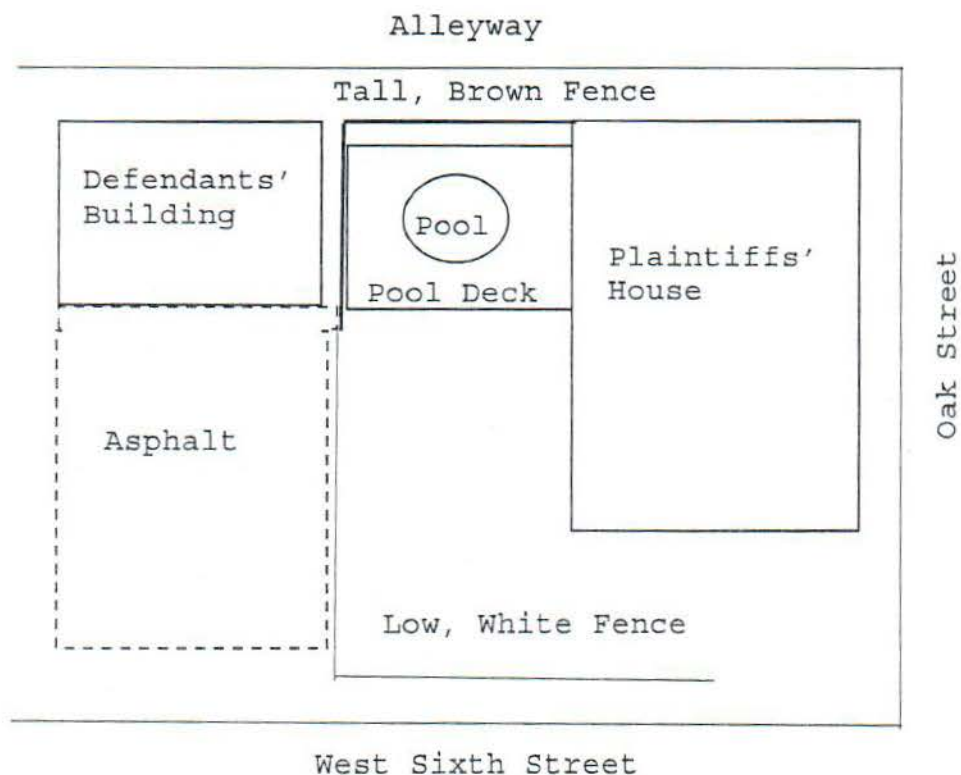
12. The actions of Defendant, Thomas Acker, made the remainder of the pool deck unstable, causing the deck to partially fall into the pool and resulting in the pool becoming unusable.

DISCUSSION

This case concerns a section of land located between the parties' respective properties measuring approximately three (3') feet wide by fifty (50') feet long. Both parties claim to be the rightful owners of this small parcel. Plaintiffs assert that they obtained the land through adverse possession or, in the alternative, via consentable boundary, while Defendants contend that both theories are inapplicable, primarily due to Plaintiffs' alleged inability to tack their possession on to their predecessors' possession.

Currently, a low, white fence and a tall, brown fence delineates the border between Plaintiffs' and Defendants' respective properties. Plaintiffs have proven, through photographs from the 1930s, 1970s, 1990s and the present, that some boundary, whether it be a wrought iron fence, a hedge row, or the current fence configuration, has existed along the same line since the 1930s. The low, white fence travels from West Sixth Street toward the alley behind the parties' properties and ends at a tall post. The post is the beginning of a tall brown fence that stands a few inches closer to Plaintiff's home than the white fence. The tall, brown fence then runs parallel to Defendants' building until it reaches the end of Defendants' building at which point it turns inward towards Plaintiffs' house. The pool deck was built immediately inside the section of

the tall, brown fence that runs parallel to Defendants' building. Primarily at issue is the space created by Defendant, Thomas Acker, when he cleared a portion of the tall, brown fence and pool deck. However, our decision in this matter also applies to any space enclosed in the low, white fence that is not expressly described in Plaintiff, Jacqueline DeMarco's deed. Hereinafter, this space will be referred to collectively as the "disputed parcel." The space that existed between the tall brown fence and Defendants' building prior to June, 2015, is not at issue, and it is undisputed that this space is the sole property of Defendants. A depiction of the relevant area is produced hereinbelow merely for the sake of convenience and has not been drafted to scale.



First, Plaintiffs contend that they are rightful owners of the disputed parcel based upon the theory of adverse possession. To prove adverse possession of land in this Commonwealth, one must prove an actual, visible, notorious, exclusive, distinct, hostile, and continuous use of the land at issue for at least twenty-one (21) years. Dunlap v. Larkin, 493 A.2d 750, 756 (Pa. Super. 1985). It is settled law that a well-kept fence, coupled with continued maintenance of the grounds within the fence, are proof of an actual, visible, notorious, exclusive and distinct possession. Dimura v. Williams, 286 A.2d 370, 371 (Pa. 1972). In the case at bar, Plaintiff, Jacqueline DeMarco, testified at trial and proved through photo exhibits that, since the 1930s, the Farrells and the DeMarcos have used the property within their fence as the family yard; they have planted trees there, removed a tree to install a swing set, mowed the lawn regularly, placed a pool within the fence, and eventually built a deck around the pool. These activities clearly demonstrate that Plaintiffs' use, along with their predecessors' use of the disputed parcel, was actual, visible, notorious, exclusive and distinct.

Plaintiffs must also prove that they have continuously occupied the disputed parcel for the statutory period of twenty-one (21) years. Since Plaintiffs have only been title holders of their property since 2013, they must tack their possession on to the possession of the previous title holders. In an adverse

possession claim, the party asserting the claim must prove privity of estate to tack their possession on to that of another. Inn Le'Daerda, Inc. v. Davis, 360 A.2d 209, 214 (Pa. Super. 1976). Privity of estate requires Plaintiffs' predecessor in title to have claimed title to the disputed parcel and to have alleged to transfer title to plaintiff. Id. Plaintiffs have not contended, and this Court has not found by reviewing the Plaintiffs' and the Farrells' respective deeds, that either deed makes mention of the disputed parcel. As a result, Plaintiffs cannot tack their possession on to the Farrells' possession and cannot maintain a successful adverse possession claim because they have failed to maintain an actual, visible, notorious, exclusive and distinct, hostile, and continuous use of the land at issue for at least twenty-one (21) years.¹

Conversely, a boundary by acquiescence can be established by proving dispute and compromise between the parties, or by recognition and acquiescence of one party to the right and title of the other, for a period of at least twenty-one (21) years. Corbin v. Cowan, 716 A.2d 614, 617 (Pa. Super. 1998); See also Zeglin, 812 A.2d at 561. Since there is no evidence of a dispute between Plaintiffs and Defendants or their predecessors in title, we turn our attention to recognition and acquiescence. This

¹ We have elected not to address the hostility element at this juncture since it is a moot point and the same facts surrounding this element are addressed hereinbelow.

second test falls under the umbrella of consentable boundary. The Pennsylvania Superior Court has continuously held that a well-maintained fence is conclusive evidence of a consentable boundary. Inn Le'Daerda, Inc. v. Davis, 360 A.2d 209 (Pa. Super. 1976). Although the Superior Court determined that a consentable boundary did not exist in the case of Inn Le'Daerda, Inc., the Court nevertheless stated the following in its opinion:

Our courts have long recognized, however, that a boundary line may be proved by a long-standing fence without proof of a dispute and its settlement by a compromise. In Dimura v. Williams, supra, the court noted:

It cannot be disputed that occupation up to a fence on each side by a party or two parties for more than twenty-one years, each party claiming the land on his side as his own, gives to each an incontestable right up to the fence, and equally whether the fence is precisely on the right line or not. Id. 446 Pa. at 319, 286 A.2d at 371.

In such a situation the parties need not have specifically consented to the location of the line. Dimura v. Williams, supra at 319, 286 A.2d at 371. It must nevertheless appear that for the requisite twenty-one years a line was recognized and acquiesced in as a boundary by adjoining landowners. See Miles v. Pennsylvania Coal Co., 245 Pa. 94, 91 A. 211 (1914); Reiter v. McJunkin, 173 Pa. 82, 33 A. 1012 (1896).

In the instant case, there is no evidence that the Farrells or any of Defendants' predecessors in title specifically consented to have the fence and pool deck serve as a boundary between their properties but, as noted in Williams, explicit consent is not required to prove a consentable boundary. Rather, to demonstrate that a consentable boundary exists, the parties

are required to exclusively use the property on their side of the boundary for a period of at least twenty-one (21) years. By 1975, the Farrells and Defendants' predecessor in title at the time, the Browns, treated the low, white fence and tall, brown fence as the boundary line between their two properties. This delineation remained the agreed upon boundary until June of 2015, when Defendant dismantled part of the tall, brown fence and cut away some of the support beams for part of the Plaintiffs' pool deck. Therefore, the fences in question acted as a consentable boundary between the parties' respective properties for approximately forty (40) years.

Since Plaintiff, Jaqueline DeMarco, has only held title to Plaintiffs' property since 2013, Plaintiffs must prove that they may tack their possession on to the possession of their predecessor in title, the Farrells. Tacking in the realm of a consentable boundary carries a lesser standard than that required for adverse possession. Rather than privity of estate, Plaintiffs need only prove privity of possession to tack their ownership on to the Farrells' possession. Zeglin v. Gahagen, 812 A.2d 558, 566 (Pa. 2002). Even where there is no valid, written transfer of a disputed parcel from plaintiff's predecessor in title, as is the case here, a plaintiff may tack their possession on to their predecessor's possession if they maintain the same property as their predecessor. Id. Here, Plaintiffs are able to tack their

possession on to the Farrells' possession because each family exercised exclusive control over the same property, as evidenced by the fence erected in 1975 which has not since been moved. Additionally, neither Defendants nor their predecessors in title ever objected to the placement of the fence or attempted to evict Plaintiffs from property that they believed was rightfully theirs. Since families on both sides of the fence used it as a consentable boundary since 1975 and Plaintiffs are able to tack their possession on to the Farrell's possession, it is clear that Plaintiffs are the rightful owners of any property not specifically described in their deed but nevertheless enclosed by their fence, based upon the theory of boundary by acquiescence.

We now turn our attention to the two license arguments that Defendants raised in their new matter. Defendants initially contend that their predecessor in title, Joseph Giglotti, granted the Farrells a license to install the fence and pool deck. Not only did Jacqueline DeMarco testify that the Browns owned Defendants' property at the time the fence was erected, but Defendants have offered no evidence to suggest that Mr. Giglotti or any other predecessor in Defendants' chain of title ever granted Plaintiffs, or their predecessors in title, a license to use the disputed parcel. Defendants next contend that in 2005, Defendant, Thomas Acker, granted Plaintiffs a license to continue using the disputed parcel until some unknown time in the future.

when the fence would need to be moved. Conversely, Plaintiff, Jacqueline DeMarco, testified that no such conversation with Thomas Acker occurred in 2005. The only evidence Defendants have offered to prove that Thomas Acker granted Plaintiffs a license in 2005 is his own testimony. When faced with the conflicting testimony of two adverse witnesses, it is up to the fact finder to determine what weight to give each testimony. B.G. Balmer & Co. v. Frank Crystal & Co., Inc., 148 A.3d 454, 463 (Pa. Super. 2016). Here, we have only brief testimony, regarding a generic conversation in which Thomas Acker purports to allow Plaintiffs to continue using the disputed parcel until he is ready to perform work in the area. Even though we find Jaqueline DeMarco's testimony to be more credible, if such a conversation had indeed occurred in 2005, Defendants did not have the property rights to convey a license at that time. One of the primary tenets of property law is that one cannot transfer that which he does not own. Much in the same way that a testator cannot bequeath or dispose of property he does not own or to which he does not have a legal right at the time of his death, Defendants could not grant the Farrells a license to use real property that they did not possess.² In re Braman's Estate, 258 A.2d 492, 494 (Pa. 1969).

² Not only did Defendants not have the right to grant Dorothy Farrell a license to continue using the disputed parcel, but Defendants continued to consent to the existing boundary by not ejecting Plaintiffs and the parties continued to occupy the land on their side of the fence, further proving that the fence acted as a consentable boundary.

Because the fence was erected in 1975, we find that the fence became a consentable boundary and that the Farrells became owners of the disputed parcel as of 1996.

Based upon our Findings of Fact and analysis of the relevant legal authority as set forth hereinabove, we reach the following:

CONCLUSIONS OF LAW

1. To find that Plaintiffs have adversely possessed the disputed parcel, they must prove that their occupation of that parcel was actual, visible, notorious, exclusive, distinct, hostile, and continuous for at least twenty-one (21) years. Dunlap, 493 A.2d 750 at 756;

2. Plaintiffs cannot satisfy the continuity element of adverse possession because Jacqueline DeMarco only gained title to her property in 2013 and cannot tack her possession on to her parents' possession due to a lack of privity of estate. Inn Le'Daerda, Inc., 360 A.2d 209, 214 (Pa. Super. 1976);

3. Plaintiffs have not satisfied each element of adverse possession and, therefore, cannot prevail on such a basis. Flannery v. Stump, 786 A.2d 255, 258 (Pa. Super. 2001);

4. A boundary by acquiescence may be established by proving either a dispute and compromise between the parties, or through recognition and acquiescence by one party to the

right and title of the other, for a period of at least twenty-one (21) years. Corbin v. Cowan, 716 A.2d 614, 617 (Pa. Super. 1998);

5. A consentable boundary can be proven based upon a theory of recognition and acquiescence when a well-maintained fence has been maintained for at least twenty-one (21) years. Inn Le'Daerda, Inc. v. Davis, 360 A.2d 209 (Pa. Super. 1976). See also, Dimura v. Williams, 286 A.2d 370, 371 (Pa. 1972);

6. Plaintiffs have shown that they, along with their predecessors in title, have used the disputed parcel as a natural property owner would in excess of twenty-one (21) years, based on the recognition and acquiescence of Defendants and their predecessors in title;

7. In cases concerning boundary by acquiescence rather than adverse possession, Plaintiffs need only prove privity of possession rather than privity of estate to be able to tack their possession on to that of their predecessor in title. Zeglin v. Gahagen, 812 A.2d 558, 566 (Pa. S.Ct. 2002);

8. Plaintiffs successfully proved privity of possession because they are the subsequent title holders to Dorothy Farrell and the fence from 1975 is an obvious presence of an apparent boundary which has not been altered since its installation. Id;

9. By tacking their possession on to Dorothy Farrell's possession, Plaintiffs have satisfied each element necessary to prove that the fence boundary, which encompasses the disputed parcel, is a consentable boundary which controls the parties' property rights;

10. Defendants have proffered no evidence to suggest that, at any time after the Farrells erected their fence in 1975, either said Defendants or their predecessors in title attempted to eject Plaintiffs from the disputed parcel;

11. Plaintiffs possess ownership rights in and to the real property situated inside their fence as erected, existing, and maintained prior to June 2015 when it was dismantled/removed by Defendants;

12. Defendant, Thomas Acker, did not have the right to dismantle or remove any portion of Plaintiffs' fence and pool deck in June of 2015; and

13. Ownership of the disputed three feet by fifty feet (3' X 50') parcel is vested in Plaintiffs.

Upon careful consideration of the above Findings of Fact and Conclusions of Law, we enter the following:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
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JACQUELINE M. DEMARCO and :
BRAD DEMARCO, :
Plaintiffs :
vs. : No. 15-2312
THOMAS ACKER and SABINA ACKER :
Defendants :

Robert T. Yurchak, Esquire Counsel for Plaintiffs
Anthony Roberti, Esquire Counsel for Defendants

VERDICT

AND NOW, to wit, this 16th day of May, 2017, following a Non-Jury Trial held before the undersigned in the above-captioned action and in accordance with our Memorandum Opinion bearing even date herewith, our Verdict is as follows:

1. With regard to Plaintiffs' Complaint, we find **IN FAVOR** of Plaintiffs, Jacqueline M. DeMarco and Brad DeMarco, and **AGAINST** Defendants, Thomas Acker and Sabina Acker, as set forth hereinafter;

2. The boundary line between the parties' properties follows Plaintiffs' fence line which has existed in excess of twenty-one (21) years, including the three feet by fifty feet (3' x 50') disputed parcel referenced in Plaintiffs' Complaint and our Memorandum Opinion bearing even date herewith, ownership of said parcel being hereby vested in Plaintiffs;

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3. Plaintiff's own absolutely and are entitled to the quiet and peaceful possession of the aforescribed parcel as against Defendants and all persons claiming under them;

4. Defendants are hereby permanently enjoined, along with any and all persons claiming under them, from asserting any estate, right, title, lien or interest in or to the disputed parcel or to any other boundary to the aforesaid property or any part thereof adverse to Plaintiffs;

5. With regard to Defendants' Counterclaim in Ejectment, we find **IN FAVOR** of Plaintiffs and **AGAINST** Defendants;

6. With regard to damages, because there was no evidence introduced at trial as to the measure of Plaintiffs' damages, we have not included an award therefor; and

7. Pursuant to Pa.R.C.P. No. 227.4, the Prothonotary shall, upon praecipe, enter judgment on the Verdict if no motion for post-trial relief has been filed under Pa.R.C.P. 227.1 within ten (10) days after the filing of this Verdict.

BY THE COURT:



Steven R. Serfass, J.