

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

WILMOT V. SNELLING

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. OF PRAC. 2E.

MICHAEL D. WILMOT AND LOUISE A. WILMOT, HUSBAND AND WIFE, APPELLANTS,
V.

STEVEN T. SNELLING AND KATHRYN A. SNELLING, HUSBAND AND WIFE, ET AL.,
THIRD-PARTY PLAINTIFFS AND APPELLEES, AND DOUG SIMONSON
AND DONNA L. SIMONSON, THIRD-PARTY DEFENDANTS.

Filed April 22, 2008. No. A-07-090.

INBODY, Chief Judge, and IRWIN, Judge.

IRWIN, Judge.

I. INTRODUCTION

Michael D. Wilmot and Louise A. Wilmot appeal from an order of the district court dismissing their quiet title action and breach of warranty claim after a bench trial. The Wilmots allege that the district court erred in finding sufficient evidence of permissive use to defeat their claim of adverse possession and in dismissing their breach of warranty claim without providing them with an opportunity to present evidence on the matter. For the reasons stated below, we affirm the trial court's decision to dismiss the Wilmot's quiet title action, but we reverse its decision to dismiss their breach of warranty claim. We remand the case back to the trial court for a trial on the breach of warranty claim.

II. BACKGROUND

This case concerns a property dispute between two lakefront lots at the Woodcliff Lakes development in Saunders County, Nebraska. Sometime between 1975 and 1984, a garage was built that was situated on both lots. While the garage is used by the owners of Lot 1, the Wilmots, the garage sits partly on Lot 2, which is currently owned by Steven T. Snelling and Kathryn A. Snelling. The dispute concerns the land underneath the garage as well as land extending from the road to the house, a "wooded area," and land extending from the garage to the lakefront.

In August 2002, the Wilmots filed a petition to quiet title to the disputed property. In November 2002, the Wilmots filed an amended petition to quiet title. In the amended petition, the Wilmots alleged that they had acquired title to the disputed property through adverse possession. Specifically, they asserted that the Wilmots and their predecessors in title had actual, continuous, exclusive, open, and notorious adverse use of the disputed area for more than 10 years prior to the time of filing their original petition.

In addition, the Wilmots alleged a breach of warranty claim against Woodcliff, Inc., and Cindy R. Rosenquist, both previous owners of the Wilmots' lot. As a part of their breach of warranty claim, the Wilmots alleged that Woodcliff and Rosenquist had explicitly and implicitly represented that the entirety of the garage was located on the Wilmots' lot.

In October 2003, a pretrial hearing was held. At the hearing, the Wilmots requested a bifurcated trial such that the quiet title action would be tried first and the breach of warranty claim would be tried second. There were no objections to the motion to bifurcate, and the court proceeded with a bench trial on the quiet title action on April 22, 2004.

The parties stipulated that the Wilmots' garage was built sometime between April 11, 1975, and October 17, 1984. They also stipulated that prior to 1990, Woodcliff owned both the Wilmots' lot and the Snellings' lot. The Wilmots' lot was sold to Rosenquist in April 1990. The Wilmots purchased the lot in June 1993.

Other evidence adduced at trial revealed that Rosenquist "fully intended" to purchase the entire garage and the land it sat on from Woodcliff in 1990. At the time of her purchase and during her ownership of the lot, she believed that she owned the disputed property. She testified that she had exclusive possession of the garage and used other portions of the disputed property as if she owned them.

When Rosenquist decided to sell the lot, she enlisted Patrick Poehling as her listing agent. Poehling testified that he is a real estate broker for Woodcliff Properties. He testified that prior to the Wilmots' purchase of the lot, he took them to the property to view it. At that time, he remembers discussing with the Wilmots "where we thought [the property lines] might be." He also testified that at that point in time he was not aware that a portion of the garage was actually positioned on the adjacent lot. He testified that he assumed the property line was south of the garage.

The Wilmots purchased their lot in 1993. Michael Wilmot testified that he believed he was purchasing the house, the garage, and all the territory in the disputed area. Michael testified that he was specifically told that the "wooded area" within the disputed property was a part of the purchase and that this area was an important consideration in the Wilmots' decision to purchase the lot because of the privacy the trees offered.

At the time of the Wilmots' purchase, Woodcliff owned the adjacent property and leased it to Dean Harrifeld. Shortly after moving in, the Wilmots had a conversation with Harrifeld. Harrifeld told them that their garage was positioned partially on his lot and that if it burned down they could not rebuild it there. The Wilmots notified Poehling of this conversation in August 1993. Michael Wilmot wrote a letter to Poehling and offered Woodcliff and Harrifeld a "compromise offer." Michael proposed:

(1) A new permanent property line be established between [the two lots]. It should begin at the end of the breakwater of [Woodcliff's lot] and extend to a point 3 feet behind

(east) and 3 feet over (north) from the northeast corner of the garage. It should then extend diagonally behind our propane tank to a point on the survey line defined by the recent county survey and then follow along that line to the roadway.

(2) Those trees on or near (within 2 or 3 feet) this established line shall be left intact for all parties to enjoy. Removal for disease or other good reason would be possible with mutual agreement of the owners of both lots.

(3) The property lines established would be surveyed and legally recorded with the expense of this process divided equally among the three parties involved.

In response to Michael's letter, Poehling sent a letter to the Wilmots on September 14, 1993. In this letter, Poehling informed the Wilmots that the county zoning inspector said that the property line could be changed only with the cooperation of all three of the parties involved. Poehling stated that he would wait to hear from either the Wilmots or Harrifeld before proceeding.

Poehling wrote a subsequent letter to the Wilmots on May 20, 1994. We reproduce this letter in part as follows:

After conferring with Mr. Harrifeld (lessee), [Poehling's father] (owner of the lot) and Jerry Divis (county building inspector) [redrawing the property lines] would not be a viable solution. Neither Mr. Harrifeld nor [Poehling's father] feel that they should have to give up any of their lot space due to a mistake by [a previous owner of your lot] going back over 10 years ago in building the garage.

By altering the lot line it would undoubtedly give your lot size a greater dimension and substantially reduce the potential sale effect of [our lot] due to creating a much smaller lot than normal.

After speaking with Mr. Divis, he doesn't believe this would be a viable solution as it would create an undue hardship on the owner of [our lot] from constructing a garage similar to yours. His solution was the same as both Mr. Harrifeld's and . . . Poehling's [father's] in that all three parties could require you to move the structure over so that it fits within your lot line.

Just as there would be a cost in moving the structure, there would be a cost in redrawing the lot line and [our lot] would lose its lot size. The best alternative would be to leave the structure sit so that it doesn't create any ill feelings on both sides.

Mr. Divis said that the structure could be left where it is and in the event that 50% or more would be destroyed due to some natural event. [sic] That at that time it would need to be placed according to building code on your lot.

This may not be in the best interest of what you wanted, but it obviously still leaves Mr. Harrifeld and [Poehling's father] in a situation which is less desirable than what they want. It obviously puts limitations on what can be built on [our lot] today and in the future. Basically they are already giving up 13 ft. now and are allowing you to keep it that way when they really don't desire to. It is unfortunate that this structure was built this way and surprising that the three previous owners of both homes had not noticed this. But the best solution at this time for yourself would be to either move the garage or accept it the way it is for now.

At trial, Poehling testified that this letter was meant to be a response to the Wilmots' concerns and a notice to the Wilmots that he would be of service if needed. He testified that he did not intend the letter to provide the Wilmots with permission to continue to use the property because "it wasn't his to give." Poehling also testified that he was asked to send the letter at the request of his father, who owned the lot, and that he does not understand the legal concept of "permissive use." Poehling testified that after sending the letter, he did not hear any more from the Wilmots about the property dispute. He testified that he thought that the dispute had been resolved.

Michael Wilmot testified that he did not think Poehling's letter granted him permission to use the disputed property. Rather, he believed that the property was his. He conceded that Harrifeld was not agreeable to the Wilmots claiming ownership of that area and that he was told on numerous occasions that he did not own the disputed property.

In August 2000, the Snellings purchased the adjacent lot from Woodcliff. Steven Snelling testified that he learned about the problem with the Wilmots' garage in September 2000. Steven Snelling testified that he never discussed the situation with the Wilmots or instructed them to get off of his property, but he did use much of the disputed property as his own. He used the area next to the Wilmots' garage as a parking area, he had a bench underneath the trees in the wooded area, and he cleared part of the overgrown area. Steven Snelling testified that it was his position that the garage was on his property and that he allowed the Wilmots to keep it there for "neighborly relations."

Two years after the Snellings purchased the lot, they began to construct a fence along the "real" property line. At this time, the Wilmots initiated their quiet title and breach of warranty actions.

After the close of the evidence, the district court found that the Wilmots had proven their adverse possession claim, but also found that the Snellings had provided sufficient evidence to establish permissive use of the property in question. As such, the court dismissed the Wilmots' quiet title claim. The court also dismissed the Wilmots' breach of warranty claim. The court stated:

The warranty deed is unambiguous and conveys to [the Wilmots] that real estate described as Lot S-1058 as surveyed, platted, and recorded. There is no evidence to suggest that Defendant Rosenquist was not seised of the land so described in the deed. Similarly, there is nothing in the record to suggest that the real estate described in the deed was not free of encumbrances.

The Wilmots appeal the district court's order here.

III. ASSIGNMENTS OF ERROR

On appeal, the Wilmots allege that the district court erred in finding sufficient evidence of permissive use to defeat their claim of adverse possession and in dismissing their breach of warranty claim without providing them with an opportunity to present evidence on the matter.

IV. ANALYSIS

1. STANDARD OF REVIEW

A quiet title action sounds in equity. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Newman v. Rehr*, 263 Neb. 111, 638 N.W.2d 863 (2002). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

2. ADVERSE POSSESSION

The Wilmots first assert that the trial court erred in finding sufficient evidence of permissive use to defeat their claim of adverse possession and in dismissing their quiet title action. Upon our de novo review of the record, we find that the Wilmots failed to show that they adversely possessed the disputed property under a claim of ownership for the statutory period of 10 years. As such, we affirm the trial court's dismissal of their quiet title action.

A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Nye v. Fire Group Partnership*, 265 Neb. 438, 657 N.W.2d 220 (2003). Because we find that the Wilmots failed to prove by a preponderance of the evidence that they adversely possessed the disputed property under a claim of ownership for the statutory period of 10 years, we discuss only that element of their adverse possession claim.

A possession that is adverse is under a claim of ownership. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998) (citing Henry H. Foster, *Nebraska Law of Adverse Possession*, 11 Neb. L. Bull. 378 (1933)). Claim of ownership or claim of right means "hostile," and these terms describe the same element of adverse possession. *Wanha v. Long, supra*. The word "hostile," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that the occupant is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner and therefore against all other claimants of the land. *Id.* The purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitations, take action to protect his interest. *Id.* It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. *Id.*

In the instant case, the evidence clearly indicates that the Wilmots believed the disputed property was theirs and treated it as such, from 1993 until the time they initiated this action in 2002. Michael Wilmot testified that he intended to purchase the house, the garage, and all of the territory within the disputed property. He testified that he never wavered from his position that he was the true owner of the disputed property. Michael also testified that the Wilmots treated

the disputed property as their own. He testified that they built a patio approximately 3 years after purchasing the property and that part of the patio extends into the disputed area. In addition, he testified that he used portions of the disputed property for parking and as a pathway from the lake to the house. He testified that he took care of and maintained the disputed property.

In addition, the evidence showed that Rosenquist believed that the disputed property was hers during the pendency of her ownership of the Wilmots' lot from 1990 to 1993. She testified that she "fully intended" to purchase the entire garage and the land it sat on when she purchased the lot in 1990. She also testified that she had exclusive use of the garage and treated the disputed area like any other part of her property.

However, the Snellings and their predecessors in interest argue that the Wilmots' possession of the disputed property was permissive and, thus, not hostile. Permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of possession brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby. *Wanha v. Long, supra*.

The evidence presented at trial established that in 1993, the Wilmots were informed by the lessee of the adjacent property that their garage encroached over the property line. In response to this conversation, the Wilmots contacted Poehling, who investigated the issue and initiated a discussion with the county building inspector. In his letter dated May 20, 1994, Poehling informed the Wilmots that moving the property line was not "a viable option." In addition, Poehling stated that both his father, who was the owner of the adjacent property, and Harrifeld, who was the lessee of the adjacent property, had the authority to force the Wilmots to tear down the garage. Poehling told the Wilmots that neither his father nor Harrifeld were currently going to exercise their right to do so, but that

[M]r. Harrifeld and [Poehling's father are] in a situation which is less desirable than what they want. It obviously puts limitations on what can be built on [our lot] today and in the future. Basically they are already giving up 13 ft. now and *are allowing you to keep it that way when they really don't desire to*. It is unfortunate that this structure was built this way and surprising that the three previous owners of both homes had not noticed this. But the best solution at this time for yourself would be to either move the garage or accept it the way it is for now.

(Emphasis supplied.)

This letter indicates that both Poehling's father and Harrifeld intended to provide the Wilmots with permission to keep the garage in the present location. While Poehling testified that he did not intend for the letter to provide this permission because "it wasn't his to give," he also testified that he wrote the letter at the request of his father, who was the owner of the adjacent property and who had the authority to grant the Wilmots permission to leave the garage in its present location. This grant of permission defeats the Wilmots' claim that they adversely possessed the disputed property under a claim of ownership. As such, we find that the Wilmots did not prove that the requisite elements of adverse possession existed for the statutory period.

We note that the trial court found that the Wilmots proved that the requisite elements of adverse possession existed and that the burden then shifted to the Snellings and their predecessors in interest to demonstrate that the use was not adverse but that the use was by permission or license. The trial court then found that the Snellings had provided sufficient

evidence of permissive use to defeat the Wilmots' claim of adverse possession. The trial court dismissed the Wilmots' quiet title action. A proper result will not be reversed merely because it was reached for the wrong reason. *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004). We affirm the trial court's decision to dismiss the Wilmot's quiet title action.

3. BREACH OF WARRANTY CLAIM

The Wilmots next assert that the trial court erred in dismissing their claim for breach of warranty without first providing them an opportunity to present evidence or arguments on that claim. The Wilmots argue that the court's dismissal of the claim amounted to a denial of their right to procedural due process. We agree that the Wilmots were denied their right to procedural due process. As such, we reverse the decision of the trial court dismissing this claim and remand the case with instructions that the trial court hold a trial on the breach of warranty claim.

The protections of the procedural due process right attach when there has been a deprivation of a significant property interest. *Newman v. Rehr, supra*. Basic principles of due process require reasonable notice and fair opportunity to be heard at some stage of the proceedings prior to a final determination. *In re Estate of Reed*, 267 Neb. 121, 672 N.W.2d 416 (2003). Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *In re Estate of Reed, supra; Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

In the instant case, the parties agreed to a bifurcated trial, with the quiet title action to be tried first and the breach of warranty claim to be tried second. At the conclusion of the bench trial on the quiet title action, the court ordered that both the quiet title action and breach of warranty claim should be dismissed. In deciding that the breach of warranty claim should be dismissed, the court stated:

The warranty deed is unambiguous and conveys to [the Wilmots] that real estate described as Lot S-1058 as surveyed, platted and recorded. There is no evidence to suggest that Defendant Rosenquist was not seised of the land so described in the deed. Similarly, there is nothing in the record to suggest that the real estate described in the deed was not free of encumbrances.

The trial court did not provide the Wilmots with the opportunity to be heard before it found that there was insufficient evidence to support their breach of warranty claim. While some evidence relevant to the breach of warranty claim was admitted at the bench trial on the quiet title action, there is no indication that the Wilmots presented all of the relevant evidence with respect to this claim because the trials on the two claims had been ordered bifurcated.

In their amended petition, the Wilmots alleged that prior to the purchase of their lot, Rosenquist and Woodcliff represented to them both expressly and implicitly that they would own the disputed property if they purchased the lot. As such, the trial court could not rely solely on the language of the deed in determining the viability of the Wilmots' breach of warranty claim. However, the Wilmots were not provided with a meaningful opportunity to provide any further evidence or arguments on this point. The Wilmots had the right to be heard before the court could dismiss their claims.

We find that the Wilmots were denied their right to procedural due process. Accordingly, we reverse that portion of the court's order which dismissed the Wilmot's breach of warranty claim and remand the case with instructions that the trial court hold a trial on that claim.

V. CONCLUSION

Upon our de novo review of the record, we find that the Wilmots failed to demonstrate the requisite elements of adverse possession because they did not show that their use of the disputed property was "hostile." We affirm the order of the district court dismissing their quiet title action.

We also find that the court erred in dismissing the Wilmots' breach of warranty claim without first giving them a meaningful opportunity to be heard on the matter. As such, we reverse, and remand the case with instructions that the district court hold a trial on the breach of warranty claim.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED.

MOORE, Judge, participating on briefs.