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19-P-893

Appeals Court

APRIL A. NANNUCCI & another¹ vs. JOYCE M. HYNDS & another.²

No. 19-P-893.

December 7, 2020.

Land Court. Real Property, Adverse possession, Fences.
Limitations, Statute of. Practice, Civil, Statute of
limitations.

The defendants appeal from a Land Court judgment, entered after a trial, concluding that the plaintiffs had established title by adverse possession to a narrow strip of property under the defendants' record ownership. The defendants argue (1) that the evidence did not support the elements required for adverse possession and (2) that the action was time barred by G. L. c. 260, § 28. We conclude that the judge's findings were not clearly erroneous and that, on these facts, § 28 did not bar the plaintiffs' claim. We therefore affirm the judgment.

1. Evidence supporting adverse possession. The parties own neighboring lots on a residential street in the city of Newton. The boundary line of record was a straight line running from the rear lines of both properties out to the street. The judge found that the plaintiffs had established title by adverse possession to a five-foot-wide strip of land, beyond the record boundary line, that was demarcated by a wooden fence and a visual line extending from the end of that fence to the street. The judge found that the wooden fence had been erected, without

¹ Peter R. Nannucci.

² Steven Hynds.

permission of the defendants,³ more than twenty years prior to the time the defendants removed it (which occurred two years before the plaintiffs brought this suit). The judge found that the part of the strip not bounded by the fence, although accessible to the defendants, had been regularly and exclusively raked and mowed by the plaintiffs, creating a "visible and readily apparent line of demarcation alongside the adjacent [part of the defendants' property]." See Sea Pines Condominium III Ass'n v. Steffens, 61 Mass. App. Ct. 838, 849 (2004). See also Mancini v. Spagtaclular, LLC, 95 Mass. App. Ct. 836, 843-844 (2019).

The defendants challenge certain of the judge's findings as clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (citation omitted). Barboza v. McLeod, 447 Mass. 468, 469 (2006). "Title by adverse possession can be acquired only by proof of nonpermissive use [that] is actual, open, notorious, exclusive and adverse for twenty years" (citation omitted).⁴ Kendall v. Selvaggio, 413 Mass. 619, 621-622 (1992). The inquiry requires finding that the adverse possessor made "'changes upon the land' that constitute 'such a control and dominion over the premises as to be readily considered acts similar to those which are usually and ordinarily associated with ownership'" (citation omitted). Peck v. Bigelow, 34 Mass. App. Ct. 551, 556 (1993). "The burden of proving adverse possession is on the person claiming title thereby and 'extends to all of the necessary elements of such possession'" (citation omitted). Lawrence v. Concord, 439 Mass. 416, 421 (2003).

³ Our references to the actions of the parties are intended to encompass the actions of their respective predecessors in title.

⁴ "An action seeking a declaration of title by adverse possession," such as the plaintiffs brought here, "simply effectuates the statute of limitations applicable to an action for recovery of land under G. L. c. 260, § 21. See Lawrence v. Concord, 439 Mass. 416, 423 (2003), quoting . . . Humbert v. Rector, Churchwardens & Vestrymen of Trinity Church in the City of N.Y., 24 Wend. 587, 604 (N.Y. 1840) ('It is of the nature of the statute of limitations when applied to civil actions, in effect, to mature a wrong into a right, by cutting off the remedy')." Sea Pines Condominium III Ass'n, 61 Mass. App. Ct. at 844 n.14.

The defendants assert clear error in the judge's finding that the wooden fence was erected more than twenty years before the defendants removed it. They note that the testimony supporting that finding was contradicted by other testimony that the fence had been erected less than twenty years earlier. However, as the trier of fact, the judge was entitled to credit the testimony of some witnesses over others. Lebel v. Nelson, 29 Mass. App. Ct. 300, 302 (1990). That he did so does not make the resulting findings clearly erroneous.

The defendants next assert error in the judge's finding that the wooden fence was erected without permission. The defendants point to testimony suggesting that the plaintiffs had earlier erected a wire fence in the same or nearly the same place with the permission of the defendants. From this the defendants argue that the plaintiffs were required to show that their use of the property changed from permissive to adverse and remained so for twenty years. The short answer to this contention is that the judge was not required to credit the evidence that the installation of the wire fence was permissive.

2. General Laws c. 260, § 28. The defendants argue that the plaintiffs' adverse possession claim was time barred by the second clause of § 28. That statute provides:

"No person shall be held to have been in possession of land within the meaning of this chapter merely by reason of having made an entry thereon, [1] unless he has continued in open and peaceable possession thereof for one year next after such entry or [2] unless an action has been commenced upon such entry and seisin within one year after he was ousted or dispossessed" (emphasis added).

The defendants assert that, because the plaintiffs did not commence this action until more than one year after the defendants "ousted or dispossessed" the plaintiffs by tearing down the wooden fence, the plaintiffs' action was filed too late. The judge correctly rejected this argument.

Section 28 dates back at least to R.S. (1836), c. 119, § 8, and, as the judge observed, presents "odd language, difficult for contemporary eyes to parse." Whatever the full extent of the effect of § 28 today,⁵ for present purposes it suffices to

⁵ The judge suggested that it might apply to causes of action that require the claimant, in order to bring them, to

observe that the plaintiffs entered onto the land of the defendants and continued in open and peaceable possession thereof not just for one year, which would bring them within the first clause of § 28, but for more than twenty years, in a manner that was actual, notorious, exclusive and adverse, thereby obtaining title by adverse possession. See Kendall, 413 Mass. at 621-622. See also G. L. c. 260, § 21 (twenty-year limitations period for actions for recovery of land).⁶ Because the two clauses of § 28 are separated by the disjunctive "or," and because the plaintiffs satisfied the first clause, it is immaterial whether they satisfied the second clause. To the extent that § 28 applied here at all, it did not bar the plaintiffs' suit.

Judgment affirmed.

Michael J. Lombardi for the defendants.

Hugh V.A. Starkey for the plaintiffs.

have possession of the land. See, e.g., G. L. c. 240, § 1 (actions to try title); G. L. c. 240, § 6 (actions to quiet title).

⁶ Because adverse possession requires use not just for one, but for twenty years -- a rule at least as old as that of § 28, see R.S. (1836), c. 119, § 1 -- the judge here persuasively reasoned that § 28 does not limit the time for asserting adverse possession claims at all. Although we need not decide the point here, the Supreme Court of Michigan has reached the same conclusion regarding a statute very similar to § 28. See Taggart v. Tiska, 465 Mich. 665, 669-674 (2002). The few Massachusetts cases discussing § 28 and its predecessors do not suggest a contrary conclusion. See Ryan v. Stavros, 348 Mass. 251, 262 (1964); Tyler v. Smith, 49 Mass. 599, 604 (1844); Putney v. Dresser, 43 Mass. 583, 586-587 (1841).