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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1193

Filed: 7 August 2018

Carteret County, No. 16-CVS-841

DM TRUST, LLC, a North Carolina Limited Liability Company; and MARY ANNE OWEN, Plaintiffs,

v.

MCCABE and COMPANY, Defendant.

Appeal by defendant from order entered 15 May 2017 by Judge Benjamin Alford in Carteret County Superior Court. Heard in the Court of Appeals 21 March 2018.

Wheatly, Wheatly, Weeks, Lupton & Massie, P.A., by C.R. Wheatly III, for plaintiffs-appellees.

Wyatt Early Harris Wheeler LLP, by Stanley F. Hammer, for defendant-appellant.

BERGER, Judge.

McCabe and Company ("Defendant") appeals the May 15, 2017 order granting summary judgment in favor of DM Trust, LLC ("DM Trust") and Mary Anne Owen ("Owen") (collectively, "Plaintiffs"). The order granted Plaintiffs a non-exclusive

easement. Defendant argues there are genuine issues of material fact precluding summary judgment for Plaintiffs. We disagree.

Factual and Procedural Background

On March 30, 1954, Anita Fort Maulick ("Maulick") conveyed two sections of her property in Emerald Isle, North Carolina—identified as "Section 250" and "Section 260"—to separate purchasers. Both deeds from Maulick recognized a fifty-foot proposed street known as Block Drive. The dividing line between Sections 250 and 260 is the center of Block Drive with the northern portion, Section 260, belonging to Defendant and the southern section, Section 250, belonging to Plaintiffs.

Defendant acquired Section 260 from a predecessor in title on April 25, 1968. On September 22, 1982, Dan McCormick, manager of DM Trust, ("McCormick") bought Section 250, and conveyed said parcel to DM Trust on October 24, 2005. Owen acquired an interest in Section 250 on March 3, 1995. The evidence tended to show that since 1982, Plaintiffs, other tenants, and customers used Block Drive for (1) ingress and egress of large trucks, (2) parking spaces adjacent to their commercial property, and (3) access to trash dumpsters.

The parties have disputed the use of Block Drive since at least 1995, when Defendant objected to the installation of Plaintiffs' dumpster. That same year, Defendant notified Plaintiffs that they must maintain an "attractive, well-maintained enclosure on our property around [their] dumpsters serving the businesses adjacent to our property." At the time of this letter, Defendant did not

give permission for Plaintiffs to use Block Drive, but suggested a fence might be installed if Plaintiffs failed to comply with Defendant's demands for an enclosure around the dumpsters. In 1997, Defendant requested Plaintiffs lease a portion of Block Drive where the dumpsters were located because Plaintiffs were encroaching on Defendant's property. Plaintiffs declined to lease the property, and no further action was taken between the parties.

In 2006, the Town of Emerald Isle paved Block Drive. The Public Works director for the Town of Emerald Isle testified that he believed Block Drive was a public street.

In 2015, Defendant informed Plaintiffs that a lease would be required for continued use of Block Drive. Plaintiffs refused, and Defendant erected a fence on the west side of the building, blocking Plaintiffs' access to the rear of the building and parking areas.

Plaintiffs filed suit in Carteret County Superior Court on August 29, 2016, seeking right-of-way access and removal of the fence obstructing Block Drive. The trial court granted Plaintiffs' motion for summary judgment on May 10, 2017, giving Plaintiffs a non-exclusive easement over Block Drive. Defendant was ordered to remove the obstructions on Block Drive within thirty days. Defendant timely appealed.

Standard of Review

"Our standard of review on an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). "An issue is material if the facts alleged would constitute a legal defense or would affect the result of the action." *Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 379 (1976). "In passing upon a motion for summary judgment, all affidavits, depositions, answers to interrogatories and other material filed in support or opposition to the motion must be viewed in the light most favorable to the party opposing the motion, and such party is entitled to the benefit of all inferences in his favor which may be reasonably drawn from such material." *Dickerson, Inc. v. Bd. of Transp.*, 26 N.C. App. 319, 321, 215 S.E.2d 870, 871-72 (1975) (citation omitted). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Wilkins v. Safran,* 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (citation and quotation marks omitted).

Analysis

Defendant argues the trial court erred in granting summary judgment because Plaintiffs failed to demonstrate that the use of Block Drive was adverse, hostile, or under a claim of right as required by a prescriptive easement. Defendant argues that Plaintiffs' use of Block Drive was permissive, thus barring establishment of a prescriptive easement. We disagree and decline to address Defendant's arguments

concerning easement by estoppel and easement by implication because easement by prescription is dispositive.

To establish a prescriptive easement, a plaintiff must

> prove the following elements by the greater weight of the evidence (1) that the use is adverse, hostile or under a claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Barbour v. Pate, 229 N.C. App. 1, 8, 748 S.E.2d 14, 19 (2013) (citation omitted). "An easement by prescription is not favored in the law . . . ." *Deans v. Mansfield*, 210 N.C. App. 222, 226, 707 S.E.2d 658, 662 (2011); *accord Wright v. Town of Matthews*, 177 N.C. App. 1, 15, 627 S.E.2d 650, 660 (2006).

The first element of a prescriptive easement is that the use was adverse, hostile or under a claim of right. "A mere permissive use of a way over another's land . . . can never ripen into an easement by prescription." *Dickinson v. Pake*, 284 N.C. 576, 581, 201 S.E.2d 897, 900 (1974) (citation omitted). "Permissive use is presumed until the contrary is made to appear." *Speight v. Anderson*, 226 N.C. 492, 497, 39 S.E.2d 371, 374 (1946). "To rebut the presumption of permissive use, the party claiming the prescriptive easement must present evidence that establishes a hostile use." *Yadkin Valley Land Co. v. Baker*, 141 N.C. App. 636, 639, 539 S.E.2d 685, 688 (2000), *cert. denied*, 353 N.C. 399, 547 S.E.2d 432 (2001).

"To establish that the use is 'hostile' rather than permissive, it is not necessary to show that there was a heated controversy or a manifestation of ill will . . . ." *Dulin v. Faires*, 266 N.C. 257, 260, 145 S.E.2d 873, 875 (1966) (citation and quotation marks omitted). "[H]owever, there must be some evidence refuting the inference that the use is permissive and with the owner's consent." *Perry v. Williams*, 84 N.C. App. 527, 529, 353 S.E.2d 226, 227 (1987).

Moreover, to establish a claim of right, there must be "an intention to claim and use land as one's own." *Johnson v. Stanley*, 96 N.C. App. 72, 75, 384 S.E.2d 577, 579 (1989). "Notice to the true owner of the existence of the alleged easement is 'crucial to the concept of holding under a claim of right.' " *Id.* (quoting *Taylor v. Brigman*, 52 N.C. App. 536, 541, 279 S.E.2d 82, 85-86 (1981)). "Notice of a claim of right may be given in ways, including . . . open and visible acts such as repairing or maintaining the way over another's land." *Id.*

Plaintiffs' use of Block Drive became hostile to Defendant's interests in 1997, when Plaintiffs refused Defendant's offer to lease a portion of Block Drive from Defendant. Plaintiffs continued to use Block Drive as their own for a right of way to access their commercial property without receiving permission from Defendant. Defendant had notice of Plaintiffs' use as evidenced by the disputes concerning the dumpster, yet Defendant continued to allow Plaintiffs to use Block Drive.

Defendant disputes Plaintiffs' assertion that Plaintiffs are granted use by a claim of right. However, the evidence tended to show Plaintiffs' use was not

permissive because Block Drive was labeled a "proposed street" in their deed, and Plaintiffs believed Block Drive was a public road until 2015 when Defendant erected a fence and notified Plaintiff Block Drive was a private road.

The Town of Emerald Isle paved Block Drive, also believing it to be a public road. Block Drive was marked with a town sign and the general public frequently used the road for over thirty-four years. Plaintiffs further noted that they had directional arrows placed on the pavement to direct traffic to use Block Drive from his parking lot, as well as directing the public to enter Plaintiffs' property from Block Drive, receiving no objection concerning the usage of Block Drive until this current dispute. Because of the actions taken by the Town and the belief Block Drive was a public road, Plaintiffs were using the right of way under a claim of right. Therefore, we hold there was no genuine issue of material fact as to whether the use was adverse, hostile, or under a claim of right.

To establish a prescriptive easement, the second element requires that "the use was open and notorious and with defendant's full knowledge and acquiescence." *Potts v. Burnette*, 301 N.C. 663, 668, 273 S.E.2d 285, 289 (1981) (citation omitted). However, failure of the owner to object to the use, even though they had knowledge of the use, is insufficient to establish a right by prescription. *See Henry v. Farlow*, 238 N.C. 542, 544, 78 S.E.2d 244, 245 (1953). "The use must be open and notorious . . . [so] it is open and of such character that the true owner may have notice of the

claim, and this may be proven by circumstances as well as by direct evidence." *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900 (citation and quotation marks omitted).

In this case, the evidence tended to show that Plaintiffs and the general public used Block Drive "open and notorious[ly] such that the true owner had notice" on a daily basis since 1982 for the ingress and egress of large trucks, use of parking spaces, and access to trash dumpsters. *See Barbour*, 229 N.C. App. at 8, 748 S.E.2d at 19. The dispute between the parties concerning the placement of dumpsters on the right of way demonstrates that Defendant had knowledge of Plaintiffs' use of Block Drive. Defendant also testified Plaintiffs were permitted to use Block Drive at least since the 1997 dispute. Moreover, in 2006 the Town of Emerald Isle paved Block Drive, which further showed use by the public was open and notorious. Defendant concedes they had allowed Plaintiffs and the general public to use Block Drive for over twenty years. Therefore, Plaintiffs used Block Drive openly and notoriously with the full knowledge of Defendant, satisfying the second element. Accordingly, we hold there was no genuine issue of material fact as to whether Plaintiffs' use was open and notorious.

The third element of a prescriptive easement requires that "[t]he adverse use must be continuous and uninterrupted for a period of twenty years." *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900 (citation omitted). "The continuity required is that the use be exercised more or less frequently, according to the purpose and nature of the easement." *Id.* at 581, 201 S.E.2d at 900-01 (citation and quotation marks omitted).

"An interruption to an easement for a right-of-way would be any act, done by the owner of the servient tenement, which would prevent the full and free enjoyment of the easement, by the owner of the dominant tenement . . . ." *Id.* at 581, 201 S.E.2d at 901 (citation and quotation marks omitted).

Defendant argues Plaintiffs' use was not uninterrupted because during 1997 and 2016, Defendant spoke with Plaintiffs about encroachments onto their property. However, despite the disagreements with Defendant, Plaintiffs' continuously used Block Drive uninterrupted for ingress and egress of trucks, access to trash dumpsters, and parking spaces for the commercial property since 1982, as noted in Defendant's testimony. The evidence tended to show that Defendant's conversation with Plaintiffs did not interrupt Plaintiffs' "full and free enjoyment of the easement." *Id.* Plaintiffs and the general public also used Block Drive as a right of way continually and uninterrupted for more than twenty years. Accordingly, there was no genuine issue of material fact that Plaintiffs' use was continuous and uninterrupted.

Finally, the fourth element of a prescriptive easement requires substantial identity of the easement within the twenty-year period. *Barbour*, 229 N.C. App. at 8, 748 S.E.2d at 19. "To establish a private way by prescription, the user for twenty years must be confined to a definite and specific line. While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed." *Deans*, 210 N.C. App. at 228, 707 S.E.2d at 663 (citation omitted). This element was not in dispute between the parties. Both the Plaintiffs and Defendant

clearly identify the "line of travel" known as Block Drive in the same location. Furthermore, all parties agree that Block Drive has not deviated substantially since Maulick subdivided the property and the deeds recognizing a fifty-foot proposed street known as Block Drive were conveyed to separate property owners. Therefore, the fourth element to establish a prescriptive easement is satisfied.

Accordingly, the trial court did not err in granting Plaintiffs' motion for summary judgment because Plaintiffs' presented evidence showing there was no genuine issue of material fact.

Conclusion

Plaintiffs met their burden in proving an easement by prescription by presenting sufficient evidence as to each element. Thus, there were no genuine issue of material fact and the trial court's order is affirmed.

AFFIRMED.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).