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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-251

Filed 05 September 2023

Mecklenburg County, No. 20 CVS 6930

DANIEL J. BURNS III AND WIFE LINDA COAD; AND SRIDHAR NARHARI AND WIFE NAGASRAVANI PARIAPALLIE, Petitioners/Plaintiffs,

v.

ELIZABETH JANINE LUTH; WILLIAM PAUL MULLIS, JR., FAMILY, LLC, CLEMENTI SOUTH LLC, and Respondents/Defendants,

BRENT A. BARTON, UNMARRIED; ERIKA ANGELS STEWART AND HUSBAND ALEX DOGGETT STEWART; ANN E. GRONINGER, UNMARRIED; NICHOLAS ARTHUR LAWSON AND WIFE, MEGAN HERSHBERGER; SANIJAY KIANI AND WIFE, SHEETAL VORA; GEORGE DOUGLAS LYONS, JR., UNMARRIED; GEOFFREY N. OWEN AND WIFE, CAROL M. OWEN, Additional Respondents/Defendants.

Appeal by plaintiffs from order entered 11 January 2023 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2023.

Alexander Ricks PLLC, by Roy H. Michaux, Jr., for plaintiff-appellants.

Cranford, Buckley, Schultze, Tomchin, Allen & Buie, P.A., by R. Gregory Tomchin, for defendant-appellees.

ARROWOOD, Judge.

Daniel J. Burns, III, Linda Coad, Sridhar Narhari and Nagasravani Pariapallie (collectively “plaintiffs”), appeal from an order entering partial summary judgment in favor of defendant Family, LLC. On appeal, plaintiffs argue the trial court erred in granting partial summary judgment in favor of defendant Family, LLC because there was a genuine issue of material fact as to the exclusivity and hostility elements of adverse possession. For the following reasons, we hold the trial court erred in granting summary judgment in favor of defendant Family, LLC and, therefore, reverse and remand the matter.

I. Background

Plaintiffs filed the initial complaint for Declaratory Judgment and Injunctive Relief on 11 May 2020 against Elizabeth Janine Luth, William Paul Mullis, Jr., Family, LLC, and Clementi South, LLC (collectively “defendants”). The complaint was regarding an alleyway which was “an easement appurtenant” to several lots, including those belonging to the parties. The complaint alleged the alleyway remained open until it was partially blocked by “five crepe myrtle trees that were planted in the alley” and a fence. Plaintiffs asserted in their complaint that the fence “preclud[ed]” them “from using [the] alley for ingress and egress from their lots[.]” Although the fence was erected in 2015, the complaint was initiated in 2020 due to changing traffic conditions and plaintiffs wanting to use the alleyway for “vehicular traffic to make it easier, more convenient, and safer to enter and exit the

neighborhood[.]” Therefore, plaintiffs requested defendants remove the fencing and plaintiffs be allowed to remove the crepe myrtle trees.

Defendant Luth responded on 13 July 2020, requesting the complaint be dismissed, asserting fifteen defenses, and asserting several counterclaims. Remaining defendants filed an answer and motion to dismiss on 16 July 2020. One basis for dismissal was plaintiffs’ failure to join necessary parties, specifically the property owners of the other lots surrounding the alleyway. Thereafter, plaintiffs’ claims against defendant Luth were dismissed with prejudice, as defendant Luth “removed [the] fencing and posts from the” alley and agreed to keep the alley free from obstructions, resolving all claims between plaintiffs and defendant Luth.

On 10 February 2022, plaintiffs moved for summary judgment, arguing there was no issue of material fact and plaintiffs were entitled to judgment as a matter of law. Specifically, plaintiffs argued “the record map” of the property “show[ed] the dedicated right of way for the 10-foot-alley” and it was clear “defendants ha[d] wrongfully attempted to include the . . . alley as part of their property[.]” entitling plaintiffs to relief and the alley obstructions be removed.

An affidavit of plaintiff Coad, submitted with the motion, stated the alley “was not open for vehicular traffic due to 5 Crepe Myrtle trees that had been planted within the dedicated right of way by someone prior to [her] purchase of the [home] in 1998,” but “[t]he trees were not objectionable because they did not interfere with [her] use

of the alley[.]” An arborist’s examination of the trees determined they were “roughly 44-55 years old” and had “not been transplanted within the past 5 years[.]”

On 4 April 2022, following a hearing, the trial court entered an order requiring plaintiffs to include the owners of all lots shown on the “Map record” in the action as they were necessary parties. Pursuant to the order, plaintiffs served Brent A. Barton, Erika Angels Stewart, Alex Doggett Stewart, Ann E. Groninger, Nicholas Arthur Lawson, Megan Hershberger, Sanijay Kiani, Sheetal Vora, George Douglas Lyons, Jr., Geoffrey N. Owen, and Carol M. Owen (collectively “additional defendants”) with the complaint. None of the additional defendants responded.

A supplemental affidavit of plaintiff Coad clarified that the crepe myrtle trees did not completely block traffic, as “service vehicles used the alley on a regular basis by driving around the crepe trees[.]” Furthermore, an affidavit by Horace Davis, III (“Mr. Davis”), “a managing member of [defendant] Family, LLC,” stated that the crepe myrtle trees were planted as far back as 1963, and he did not recall a time when the alley was “used for vehicular traffic.”

Plaintiffs’ motions for summary judgment and defendants’ motion to dismiss came on for hearing in Mecklenburg County Superior Court on the 3 October 2022 session, Judge Ervin presiding.¹ On 19 January 2023, the trial court entered an order

¹ A record of the transcript was not submitted with the record.

granting partial summary judgment for plaintiffs and partial summary judgment for defendant Family, LLC.

The order found that defendant Family, LLC was entitled to summary judgment because there was “no genuine issue of material facts regarding” defendant Family, LLC’s “claim that it acquired a portion of the alleyway” by adverse possession when it planted the crepe myrtle trees, and the trees continued to exist “for more than the statutory period.” The order further found that plaintiffs were entitled to summary judgment on their claim that defendant Mullis “had no ownership right to any portion of the . . . alleyway.” The order specifically stated that it was “a final judgment in [the] matter and there [wa]s no just cause for delay.” Thereafter, plaintiffs filed a notice of appeal on 8 February 2023.

II. Discussion

On appeal, plaintiffs argue the trial court erred in granting partial summary judgment for defendant Family, LLC because “there was no indication that [the crepe myrtle trees] were planted with the intent to claim” the alleyway as permanent property and “the trees did not constitute exclusive use of th[e] easement.”

As an initial matter, we note that although summary judgment orders are usually “interlocutory order[s] from which there is no right of appeal[,]” there are limited exceptions to this general rule. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citation and internal quotation marks omitted). “[A]n interlocutory order may be appealed immediately . . . if (i) the trial

court certifies the case for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b), or (ii) the order ‘affects a substantial right of the appellant that would be lost without immediate review.’” *McIntyre v. McIntyre*, 175 N.C. App. 558, 562, 623 S.E.2d 828, 831 (2006) (citation omitted). Here, the order is immediately appealable because, although interlocutory, “the trial court certifie[d] in the judgment that there [wa]s no just reason to delay the appeal[,] and the order was a final judgment as to the claim.” *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253 (citations omitted). Accordingly, we address plaintiffs’ claim on its merits.

A. Standard of Review

“[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.” *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2022). “We review an order allowing summary judgment *de novo*. 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) (citations and internal quotation marks omitted). “[E]vidence presented by the parties must be viewed in the light most favorable to

the non-movant.” *Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577 (citation omitted).

B. Adverse Possession

On appeal, plaintiffs contend summary judgment was inappropriate because there was a genuine issue of material fact as to whether defendant Family, LLC had exclusive use of the easement and whether defendant intended to claim title when it planted the trees.

“To acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period . . . under known and visible lines and boundaries.” *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176 (citations omitted), *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (Mem) (2001). The relevant statutory period in this case is twenty years. N.C. Gen. Stat. § 1-40 (2022).

“For possession of property to be exclusive, ‘other people must not make similar use of the land during the required statutory period.’ ” *Jernigan v. Herring*, 179 N.C. App. 390, 394, 633 S.E.2d 874, 878 (2006) (citation omitted), *disc. review denied*, 361 N.C. 355, 645 S.E.2d 770 (Mem) (2007). Additionally, “[t]he hostility requirement does not import ill will or animosity . . . only that the one in possession of the lands claims the exclusive right thereto” and utilizes the land “under such circumstances as to manifest and give notice that the use is being made under claim of right.” *Jones v. Miles*, 189 N.C. App. 289, 292, 658 S.E.2d 23, 26 (2008) (citation and internal

quotation marks omitted). Furthermore, “for possession to be hostile, the possessor must intend to claim title to the property at issue.” *Id.* at 293, 658 S.E.2d at 26. However, “[t]he hostility element may be satisfied by a showing that ‘a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto[.]’ ” *Id.* at 292, 658 S.E.2d at 26.

Here, the only evidence presented was that five crepe myrtle trees were planted in the alley by defendant Family, LLC’s previous property owners well over the statutory period. There was nothing in the record to show the intent of planting the trees, whether it was a mistake by the previous property owners, nor who maintains the trees, if anyone. Without more information in the record and absent a transcript of the hearing, we are unable to hold there was no genuine issue of material fact as to the hostility element of adverse possession.

Furthermore, this Court has previously found that planting trees alone is not enough to satisfy the elements of adverse possession. For example, in the unpublished case of *Hayes v. Rogers*, this Court held that the defendant planting trees and performing yard maintenance around the trees was not enough to show the defendant’s “actions were actual, open, hostile, or continuous to support his claim for adverse possession.” *Hayes v. Rogers*, 155 N.C. App. 220, *3, 573 S.E.2d 775 (2002) (unpublished). The defendant’s claim in *Hayes* was further discredited by the fact that the plaintiffs performed similar maintenance on the same strip of land. *Id.*

Therefore, summary judgment for the plaintiffs was proper. *Id.*

As *Hayes* demonstrates, cases of adverse possession require more than a mere planting of trees. For example, in *Saddle Club, Inc. v. Gibson*, a case relied upon by defendant Family, LLC, this Court affirmed the trial court's holding that the plaintiff had acquired a tract of land by adverse possession. *Saddle Club, Inc. v. Gibson*, 9 N.C. App. 565, 568, 176 S.E.2d 846, 849 (1970). The plaintiff utilized the land by planting three trees, parking cars, erecting signs, and had landscaped and maintained the land. *Id.* at 566, 176 S.E.2d at 847-48. Therefore, this Court held the plaintiff "had exercised dominion and control over [the land] by using it for the purposes for which it was ordinarily adaptable[.]" *Id.* at 568, 176 S.E.2d at 848.

Furthermore, an affidavit and photos from the record showed the alleyway had been utilized for fences, trees, and a storage building at some point, indicating there is also a genuine issue of material fact as to exclusive use of the alleyway. Therefore, we hold there was a genuine issue of material fact as to some elements of adverse possession. Accordingly, we reverse and remand.

III. Conclusion

For the foregoing reasons, we reverse the trial court's order granting partial summary judgment in favor of defendant Family, LLC and remand the matter to the trial court.

REVERSED AND REMANDED.

Judges COLLINS and CARPENTER concur.

BURNS V. LUTH

Opinion of the Court

Report per Rule 30(e).