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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-488

Filed 21 May 2025

Alamance County, No. 22CVS000432-000

LISA LOVE HAZEN, as Attorney-in-Fact for Brenda Stuckey under a Durable Power of Attorney dated November 21, 2013, Plaintiff,

v.

BRENDA WRIGHT PETERS, Defendant.

Appeal by Defendant from order entered 3 February 2023 by Judge Andrew Hanford in Alamance County Superior Court. Heard in the Court of Appeals 1 November 2023.

Kennon Craver, PLLC, by Julia S. Meister and Henry W. Sappenfield, for Plaintiff-Appellee.

Pittman & Steele, PLLC, by Timothy W. Gray, for Defendant-Appellant.

CARPENTER, Judge.

Brenda Wright Peters (“Defendant”) appeals from the trial court’s grant of summary judgment in favor of Lisa Love Hazen (“Plaintiff”), acting as attorney-in-fact for Brenda Stuckey (“Ms. Stuckey”). On appeal, Defendant argues the trial court erred by denying her motion for summary judgment concerning Defendant’s

counterclaim of adverse possession and by granting Plaintiff's motion for summary judgment on the issue of trespass. After careful review, we disagree with Defendant. Accordingly, we affirm the trial court's order.

I. Factual & Procedural Background

Ms. Stuckey and her husband purchased a single-family home at 123 Carolina Avenue, Burlington, North Carolina ("123 Carolina Avenue") on 4 August 1994. When Ms. Stuckey's husband passed away in 2013, Ms. Stuckey named her daughter, Plaintiff, as her attorney-in-fact.

Defendant purchased the lot next door, 119 Carolina Avenue, Burlington, North Carolina ("119 Carolina Avenue") on 14 June 2021. Defendant's predecessor in title purchased 119 Carolina Avenue on 19 June 2001 from the Barham family, who held title since 1936.

Two abutting concrete driveways adjoin 123 Carolina Avenue and 119 Carolina Avenue. The abutting driveways run parallel (e.g. " || ") before splitting at the top of the driveways (e.g. " Y "). The property line between 123 Carolina Avenue and 119 Carolina Avenue, however, sits at an angle (e.g. " / "). Because the property line sits at an angle, the 119 Carolina Avenue driveway crosses over the property line onto 123 Carolina Avenue (the "Encroachment"). The 119 Carolina Avenue driveway crosses back over the property line where the driveways split at the top. Based on an affidavit from a former neighbor, the placement of the driveways has remained the same since at least the late 1950s.

The Stuckeys were aware of the Encroachment when they acquired 123 Carolina Avenue in 1994. Ms. Stuckey testified that she never told any previous residents of 119 Carolina Avenue they must cease using the Encroachment.

Defendant was similarly aware of the Encroachment when she acquired 119 Carolina Avenue on 14 June 2021. Shortly thereafter, Defendant hired a contractor to replace a cracked portion of her driveway. On 23 October 2021, Defendant approached Ms. Stuckey at her house with an “Encroachment and Easement Agreement,” whereby the “express purpose . . . [was] that [Ms. Stuckey] [would] not lose possession, ownership or title to the encroached [p]roperty through adverse possession as a result of the Encroachment onto the [p]roperty.” Ms. Stuckey refused to sign. The following day Ms. Stuckey learned that Defendant was replacing the cracked concrete. Plaintiff alleged Defendant added to the Encroachment when Defendant replaced the concrete on the driveway. The expansion is reflected in a survey conducted after Defendant acquired 119 Carolina Avenue.

In letters sent to Defendant on 25 October 2021, 15 November 2021, and 17 December 2021, Plaintiff asked Defendant to remove the Encroachment and informed Defendant she did not have the right to remain on Ms. Stuckey’s property. On 7 March 2022, after Defendant refused to remove the Encroachment, Plaintiff filed a trespass action in Alamance County Superior Court. In her complaint, Plaintiff alleged Defendant trespassed on her property, and asked the trial court to (1) eject Defendant from the Encroachment, (2) enjoin Defendant from using the

Encroachment, and (3) award damages. On 17 May 2022, Defendant filed an answer, moved to dismiss Plaintiff's complaint for failure to state a claim, and asserted a counterclaim that she adversely possessed the Encroachment. On 19 and 29 December 2022, the parties filed cross motions for summary judgment.

On 23 January 2023, the trial court held a summary-judgment hearing. On 3 February 2023, the trial court entered an order granting Plaintiff's motion for summary judgment and dismissing Defendant's counterclaim with prejudice. On 2 March 2023, Plaintiff voluntarily dismissed her remaining claim for damages. On 29 March 2023, Defendant filed notice of appeal.

On 17 August 2023, after both parties filed their briefs with this Court, Plaintiff filed a motion for sanctions pursuant to Rule 34, arguing Defendant's appeal was frivolous and requesting attorney's fees. *See* N.C. R. App. P. 34.

II. Jurisdiction

"Ordinarily, an appeal from an order granting summary judgment to fewer than all of a plaintiff's claim[s] is premature and subject to dismissal." *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001). A party's voluntary dismissal of all its claims that survive summary judgment "has the effect of making the trial court's grant of partial summary judgment a final order." *Id.* at 367, 555 S.E.2d at 638 (citation omitted).

Here, Plaintiff voluntarily dismissed her claim for damages after the trial court granted partial summary judgment. Because no claims remain, the trial court's grant

of partial summary judgment is a final order. *See id.* at 367, 555 S.E.2d at 638. Therefore, jurisdiction is proper under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

The issues are whether: (1) the trial court erred by denying Defendant’s motion for summary judgment concerning her adverse-possession claim; (2) the trial court erred by granting Plaintiff’s motion for summary judgment concerning her trespass claim; and (3) this Court should impose sanctions on Defendant pursuant to Rule 34.

IV. Analysis

A. Standard of Review

We “review appeals from trial court summary judgment orders using a de novo standard of review.” *New Hanover Cty. Bd. of Educ.*, 374 N.C. 102, 115, 840 S.E.2d 194, 203 (2020) (citations omitted). “When reviewing de novo, ‘[this Court] considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.’” *Asher v. Huneycutt*, 284 N.C. App. 583, 588, 876 S.E.2d 660, 666 (2022) (quoting *Blackmon v. Tri-Arc Food Sys., Inc.*, 246 N.C. App. 38, 41, 782 S.E.2d 741, 743 (2016) (citation omitted)).

Summary judgment is appropriate where “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) (2023). “When considering a motion for summary judgment, the trial judge must view the presented

evidence in a light most favorable to the nonmoving party.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted)).

“The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact.” *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)). “If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.” *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (citations omitted).

B. Adverse Possession

Defendant argues the trial court improperly granted Plaintiff’s motion for summary judgment and improperly denied Defendant’s motion for summary judgment concerning Defendant’s counterclaim for adverse possession. We disagree.

The party claiming title through adverse possession has the burden “to establish [her] title to the land.” *Dockery v. Hocutt*, 357 N.C. 210, 218, 581 S.E.2d 431, 436 (2003) (quoting *Wallin v. Rice*, 232 N.C. 371, 373, 61 S.E.2d 82, 83 (1950)). To acquire title to land by adverse possession, the claimant must show actual, open, notorious, continuous, and hostile possession for a period of at least twenty years. N.C. Gen. Stat. § 1-40 (2023); see *Newkirk v. Porter*, 237 N.C. 115, 119, 74 S.E.2d 235, 238 (1953).

A party may also adversely possess a true owner's real property under color of title if she claims to possess and actually possesses the property under known and visible boundaries for a period of seven years. N.C. Gen. Stat. § 1-38 (2023). "Color of title' is a writing which purports to convey the land described therein, but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance." *Kennedy v. Whaley*, 55 N.C. App. 321, 326, 285 S.E.2d 621, 625 (1982) (quoting *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E.2d 1 (1973)).

Here, Defendant did not claim color of title as the Encroachment is not evidenced by a purported conveyance. Therefore, we consider whether Defendant adversely possessed the Encroachment for a period of twenty years.

1. Hostile Possession

Hostile possession "does not import ill will or animosity but only that the one in possession of the [property] claims the exclusive right thereto." *State v. Brooks*, 275 N.C. 175, 180, 166 S.E.2d 70, 73 (1969) (citing *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1965)) ("A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right."). It is unnecessary for the adverse possessor to have a conscious intent to claim the land of another if the evidence shows that "[the] landowner, acting under a mistake as to the true boundary between [her] property and that of another, takes possession of the land believing it to be [her] own and claims title thereto" *Walls v. Grohman*, 315 N.C. 239, 249, 337 S.E.2d 556, 562

(1985).

“However, the hostility requirement is not met if the possessor’s use of the disputed land is permissive.” *Jones v. Miles*, 189 N.C. App. 289, 292–93, 658 S.E.2d 23, 26 (2008) (citations omitted). Because adverse possession is disfavored in the law, *Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981), North Carolina courts “presume[] permissive use,” *Minor v. Minor*, 224 N.C. App. 471, 474–75, 737 S.E.2d 116, 119 (2012) (citing *Amos v. Bateman*, 68 N.C. App. 46, 50, 314 S.E.2d 129, 131 (1984)).

The party asserting adverse possession may rebut this presumption by presenting evidence tending “to repel the inference that [the use] is permissive and with the owner’s consent.” *Dickinson v. Pake*, 284 N.C. 576, 581, 201 S.E.2d 897, 900 (1974); *see, e.g., Potts*, 301 N.C. at 668, 273 S.E.2d at 289 (holding that the hostility requirement was satisfied because although “[n]o permission [was] ever . . . asked or given,” there was “abundant evidence that the plaintiffs considered their use of the road to be a right and not a privilege”). In a recent case, our Supreme Court held that the presumption of permissive use was rebutted where defendants mistakenly believed they owned the disputed land, erected permanent fixtures upon it, and plaintiffs failed to object or demand permission. *Hinman v. Cornett*, 386 N.C. 62, 66, 900 S.E.2d 872, 875 (2024).

Moreover, “a possessor’s intent to claim title cannot support a claim of adverse possession where the true owner is never put on actual or constructive notice of the

possessor's hostile intent." *Jones*, 189 N.C. App. at 293, 658 S.E.2d at 26 (citations omitted). "In the absence of positive evidence evincing an adverse, hostile use or claim of right over another's land sufficient to put the owner on notice, the presumption of permissive use is not rebutted" *Johnson v. Stanley*, 96 N.C. App. 72, 75, 384 S.E.2d 577, 580 (1989).

Initially, we note the instant case is distinguishable from *Hinman* as Defendant was aware she did not own the Encroachment, as evidenced by the easement agreement requesting the privilege of using the driveway, and Plaintiff immediately and repeatedly objecting. *See Hinman*, 386 N.C. at 66, 900 S.E.2d at 875. As a result, Defendant cannot claim she acted "under a mistake as to the true boundary," because she learned about the Encroachment during her closing on 14 June 2021. Thus, to prove her possession was hostile, Defendant must show that Plaintiff was put on actual or constructive notice of Defendant's hostile intent. *See Jones*, 189 N.C. App. at 293, 658 S.E.2d at 26.

Defendant's evidence, however, does not create a genuine dispute of material fact concerning whether her use of the Encroachment placed Plaintiff on actual or constructive notice of Defendant's hostile use prior to 2021. Defendant contends her use was hostile because "there is no evidence before the Court that Ms. Stuckey or anyone else ever gave Defendant or any of Defendant's predecessors in title permission for the existing driveway to encroach upon Plaintiff's [p]roperty." Defendant further argues that the "question about whether Ms. Stuckey ever gave

anyone permission to have the driveway on her property . . . would be a question of material fact for the jury to decide.”

Defendant’s arguments misconstrue the permissive use presumption. While there is testimony showing no one asked Ms. Stuckey for permission to use the Encroachment, lack of permission alone is not sufficient to show hostile use. *See Orange Grocery Co. v. CPHC Investors*, 63 N.C. App. 136, 139, 304 S.E.2d 259, 261 (1983) (holding that the plaintiff showed no evidence of any claim of right and hostile or adverse use although no permission had ever been requested or given); *see also Johnson*, 96 N.C. App. at 74, 384 S.E.2d at 579 (reasoning that “mere use alone is presumed to be permissive,” and is insufficient to establish hostility).

Our review of the record reveals no evidence that creates a genuine dispute of material fact concerning whether Defendant’s use of the Encroachment was hostile. Conversely, the evidence shows the presumption of permissive use was not rebutted as a matter of law. Ms. Stuckey stated in her deposition that no one asked for her permission to use the Encroachment, and she “presumed” it was okay for their driveway to be on her property. Moreover, based on a conversation with a former resident of 119 Carolina Avenue at the time the Stuckeys purchased 123 Carolina Avenue in 1994, Defendant testified she thought “that Ms. Stuckey said she gave a man permission to use” the Encroachment. This speculative statement falls short of rebutting the presumption of permissive use.

Ms. Stuckey received notice of a claim of right after Defendant asked Ms.

Stuckey to sign the Encroachment and Easement Agreement in October 2021. When Ms. Stuckey refused to sign the agreement and Plaintiff sent letters asking Defendant to remove the Encroachment, Ms. Stuckey revoked Defendant's permission to use the Encroachment. Therefore, at the earliest, Defendant's use of the Encroachment was hostile after October 2021. Consequently, Defendant's brief hostile use of the Encroachment falls well short of the twenty-year statutory period.

For her claim to succeed, Defendant must defeat the permissive use presumption *and* show that her predecessor in title was in hostile possession of the property to meet the twenty-year period. Defendant's claim fails on both grounds. Without any "positive evidence" showing hostile use or claim of right over the Encroachment sufficient to put Ms. Stuckey on notice for the prescriptive period, Defendant, as a matter of law, cannot rebut the presumption of permissive use. *See Minor*, 224 N.C. App. at 474–75, 737 S.E.2d at 119.

Accordingly, because there is no genuine issue of material fact concerning whether Defendant's use of the Encroachment was hostile, the trial court properly granted summary judgment for Plaintiff on Defendant's adverse possession claim. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

2. Continuous Possession

Defendant next argues that use of the Encroachment was continuous for the required statutory period. Defendant relies on her assertion that she should be permitted to "tack" her alleged possession to the possession of the Barham family.

“Tacking is the [process] whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years.” *Dickinson*, 284 N.C. at 585, 201 S.E.2d at 903. North Carolina follows the minority position that “a party may only tack their possession on to that of a prior owner where the prior owner actually conveys their interest in the allegedly adversely possessed property.” *Lackey v. City of Burlington*, 287 N.C. App. 151, 157, 882 S.E.2d 582, 588 (2022). Unless privity exists between the parties, “[a] grantee in a deed is not entitled to tack the adverse possession of [her] predecessors in title as to a parcel of land not contained within the description in [her] deed” *Burns v. Crump*, 245 N.C. 360, 363, 95 S.E.2d 906, 909 (1957). As such, “[i]t must clearly appear in the deed that the particular premises were embraced in the deed or transfer in whatever form it may have been made.” *Jennings v. White*, 139 N.C. 23, 26, 51 S.E. 799, 800 (1905).

Defendant correctly admits that “she is not allowed to tack onto her grantor’s possession to reach the required twenty (20) years.” As such, her adverse possession claim fails as a matter of law. Nevertheless, relying on *Bell v. Adams*, 81 N.C. 118 (1879), Defendant argues that because at least one of her predecessors in title adversely possessed the Encroachment, perfect title vested in the adverse possessor, and proper title was conveyed to the subsequent owners.

Even assuming Defendant could take title to the Encroachment in this manner when the Encroachment is not reflected on Defendant’s deed, Defendant’s argument

fails. As Defendant notes, at least one of Defendant's predecessors in title from the late 1950's—the earliest evidence of the Encroachment, to 2001, when Defendant's direct predecessor acquired 119 Carolina Avenue—would have held title in 119 Carolina Avenue for at least twenty years. But Defendant presents no evidence that Defendant's predecessors in title used the Encroachment in a hostile manner. Absent evidence of continuous, hostile use for the statutory period, Defendant cannot overcome North Carolina's presumption of permissive use. *See Minor*, 224 N.C. App. at 474–75, 737 S.E.2d at 119. The related contention that Defendant's predecessors *could have* adversely possessed the Encroachment, without supporting evidence, is not enough to survive summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

In sum, viewing the evidence in the light most favorable to Defendant, there is no genuine issue of material fact concerning whether Defendant's possession of the Encroachment was continuous. Accordingly, the trial court did not err by granting summary judgment for Plaintiff.

C. Trespass

Defendant next argues the trial court erred by granting Plaintiff's motion for summary judgment concerning Plaintiff's trespass claim based on Defendant's addition to the Encroachment. We disagree.

As to Plaintiff's claims for trespass and ejectment, it is immaterial whether Defendant extended the Encroachment when she acquired 119 Carolina Avenue in 2021. Once it is established that Defendant's use of the Encroachment constitutes

trespass, any expansion of the Encroachment would necessarily retain the same character.

To prevail on a claim of trespass, a party must show: (1) “the [party] was either actually or constructively in possession of the land at the time the alleged trespass was committed”; (2) “the [opposing party] made an unauthorized, and therefore an unlawful, entry on the land”; and (3) “the [party] suffered damage by reason of the matter alleged as an invasion of [her] rights of possession.” *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 556 (1952) (citations omitted). “Every unauthorized, and therefore unlawful, entry into the close of another, is a trespass entitling the aggrieved party at least to nominal damages.” *Whitley v. Jones*, 238 N.C. 332, 336, 78 S.E.2d 147, 150 (1953) (citing *Lee v. Stewart*, 218 N.C. 287, 288, 10 S.E. 2d 804, 805 (1940)); *see also Dougherty v. Stepp*, 18 N.C. 371 (1835) (explaining that “if there be no adverse possession, the title makes the land the owner’s *close*”).

Here, as previously discussed, the trial court correctly determined Defendant did not adversely possess Plaintiff’s property; thus, Plaintiff maintains title to the Encroachment. *See Matthews*, 235 N.C. at 283, 69 S.E.2d at 556. Further, once Plaintiff revoked Defendant’s permission to use the Encroachment, any subsequent use of the Encroachment was unlawful. *See id.* at 283, 69 S.E.2d at 556. Any unlawful use of the Encroachment by Defendant would entitle Plaintiff to at least nominal damages. *See id.* at 283, 69 S.E.2d at 556; *Whitley*, 238 N.C. at 336, 78 S.E.2d at 150. Plaintiff met her burden of establishing that no triable issue of fact

persisted, and Defendant failed to present evidence rebutting any element of Plaintiff's trespass claim. *See New Hanover Cty. Bd. of Educ.*, 374 N.C. at 116, 840 S.E.2d at 204; *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576. Thus, the trial court did not err by granting summary judgment for Plaintiff's trespass claim.

D. Rule 34 Sanctions

Finally, Plaintiff requests that we sanction Defendant pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure. Plaintiff asserts that Defendant's appeal was not "well-grounded in fact or warranted by existing law" because Defendant (1) knew, or should have known, that she could not prevail on her claim of adverse possession, and (2) misrepresented the law of "tacking" to this Court.

Rule 34(a) allows us to impose sanctions if an appeal "was not well-grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," or if the appeal "was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." N.C. R. App. P. 34(a)(1)–(2).

In evaluating a Rule 34 motion, we focus on whether the appeal is frivolous. *See Yeager v. Yeager*, 232 N.C. App. 173, 183, 753 S.E.2d 497, 504 (2014). Generally, we impose sanctions under Rule 34 when parties repeatedly advance frivolous arguments. *See, e.g., ACC Constr. v. SunTrust Mortg., Inc.*, 239 N.C. App. 252, 272, 769 S.E.2d 200 (2015) (imposing sanctions in the form of costs and attorney's fees when a plaintiff asked the trial court to set aside an order from a different trial court,

and the plaintiff received numerous sanctions at the trial-court level for raising frivolous arguments); *Shebalin v. Shebalin*, 284 N.C. App. 86, 91, 874 S.E.2d 913, 916 (2022) (imposing sanctions when a party “insiste[d] to pursue [a] frivolous appeal” and “repeatedly and baselessly asserted” that an interlocutory order was “a final order, despite the order’s interlocutory nature being apparent on its face [and] multiple admonitions from opposing counsel”); *Ritter v. Ritter*, 176 N.C. App. 181, 184–85, 625 S.E.2d 886, 888–89 (2006) (imposing sanctions pursuant to Rule 34 when a party appealed from an interlocutory order, “fil[ed] numerous non-meritorious motions in the trial court and this Court,” and “was cautioned several times by the trial court for ignoring its previous orders, ignoring court rules and procedural requirements, and harassing court personnel”).

Here, in our discretion, we conclude that sanctions should not be imposed. *See State v. Hudgins*, 195 N.C. App. 430, 436, 672 S.E.2d 717, 721 (2009). Defendant raised at least colorable arguments on appeal supported by some legal authority. Moreover, Plaintiff seemingly misunderstands Defendant’s tacking argument. Plaintiff asserts that Defendant “failed to cite the complete rule, which requires privity for tacking to occur.” In her brief, however, Defendant admits that under North Carolina law, she cannot tack onto her grantor’s possession. As previously discussed, Defendant asserted that when one of the previous owners acquired title through adverse possession, subsequent owners were entitled to the same benefit. Though Defendant’s argument lacks the requisite facts to overcome summary

judgment, in our discretion, her argument on appeal does not rise to the level of frivolousness contained in the cases previously cited whereby sanctions were imposed. Accordingly, we deny Plaintiff's Rule 34 motion for sanctions.

V. Conclusion

For the reasons stated above, we hold the trial court did not err by denying Defendant's motion for summary judgment concerning her claim of adverse possession or by granting Plaintiff's motion for summary judgment concerning her claim of trespass. Accordingly, we affirm.

AFFIRMED.

Judges ARROWOOD and FLOOD concur.

Report per Rule 30(e).