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IN THE
COURT OF APPEALS OF INDIANA

TERRACE GARDEN ASOCIATION, INC.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 76A05-1004-MI-258
	)	
LEN C. LANTZ, D. BLANCHE LANTZ, RAY LANTZ, JAKE LANTZ, NELLIE SIMPSON, OR THEIR DEVISEES, HEIRS, AND NEXT OF KIN, OF DECEASED, OR ASSIGNS, AND ALL OTHER PARTIES CLAIMING AN INTEREST IN THE REAL ESTATE DESCRIBED HEREIN,	)	
	)	
Appellees-Respondents.	)	

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0710-MI-381

January 27, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Terrace Garden Association, Inc., (Terrace Garden) appeals the trial court's judgment for appellees-intervenors Pamela Reith, et al. (collectively, the Reiths) in its action to quiet title and for adverse possession regarding a thirty-foot parcel of real estate that was originally filed against Len C. Lantz, et. al (the Lantzes). Specifically, Terrace Garden argues that the trial court should have quieted title to the property in its favor in light of a default judgment that the trial court had entered against the Lantzes. And because of that default judgment, Terrace Garden contends that the trial court erroneously determined that it was required to "re-prove" the elements of adverse possession as to the disputed parcel. Appellant's Br. p. 8.

Concluding that the trial court properly entered judgment for the Reiths, we affirm.

FACTS

Terrace Garden is a not-for-profit corporation that was incorporated under the laws of Indiana in October 2007. The corporation consisted of eleven members, each of whom own a backlot with a cottage in Terrace Garden's subdivision at Clear Lake in Steuben County.

Prior to the incorporation, Len Lantz recorded the Terrace Garden plat in 1926. The plat consisted of fifty-one lots. Between lots forty-seven and forty-eight, there was a

thirty-foot-wide vacant parcel of real estate that is the subject of this litigation. The parcel has never been assessed for tax purposes and, therefore, real estate taxes have never been paid.

Various members of the Reith family have owned lot forty-seven since 1944. Beginning in 1950, the Reiths used the vacant parcel for customary recreational purposes. Those activities included socializing, walking, picnicking, boating, and fishing from a pier. At no time did any Terrace Garden member prevent the Reiths from using the parcel.

Sometime in March 2009, each Terrace Garden member executed a conveyance and assignment of whatever interest he or she had in the disputed thirty-foot-wide parcel of real estate to Terrace Garden. During the summer of 2007, a representative from the Department of Natural Resources (DNR) approached one of the members and indicated that eleven backlot cottage owners would have to remove their docks from the parcel unless they could demonstrate their right of ownership in the property.

Thereafter, a title examiner in Steuben County determined that the sole true owner of the legal fee simple record title to the disputed parcel was Len Lantz. Lantz died in 1952, and no one else had any record, legal right, or title to the disputed parcel as the true legal owner of the property.

On October 11, 2007, Terrace Garden filed its complaint against the Lantzes to acquire title to the property through adverse possession. The complaint also sought to quiet title to the land "against any and all persons whomsoever." Appellee's App. p. 2.

Terrace Garden alleged that between 1997 and 2007, one or more of its members acquired title to the disputed parcel of real estate by adverse possession and, thereafter, conveyed title to that property.

On December 6, 2007, the Reiths intervened in the action, filed an answer to the complaint, and denied Terrace Garden's contentions. The Lantzes did not answer or otherwise respond to Terrace Garden's complaint. As a result, Terrace Garden moved for a default judgment. Thereafter, the Town of Clear Lake and the Reiths appeared for a hearing on the motion. On February 19, 2008, the trial court granted Terrace Garden's motion for default judgment against the Lantzes "and against all other individuals or entities of any nature whatsoever who have failed to appear in this case." Appellant's App. p. 28.

In February 2010, the Reiths filed a counterclaim for adverse possession and quiet title in the parcel naming Terrace Garden as the sole defendant. The Reiths alleged that the predecessors in title had adversely possessed the disputed parcel between 1950 and 1970, thus acquiring vested title that was subsequently passed or conveyed, absent any written instrument of conveyance or devise. In effect, the Reiths alleged that they had a title that was superior to the adverse possession title acquired by Terrace Garden on February 19, 2008, from the Lantzes.

On March 17, 2010, the Reiths and Terrace Garden appeared for a bench trial. After taking the matter under advisement, the trial court determined that the Reiths had failed to prove their adverse possession claim against Terrace Garden. Specifically, there

was no evidence that any of the Reiths intended to claim full ownership of the disputed thirty-foot parcel of real estate. Thus, the trial court concluded that "they all had considered the disputed 30 foot parcel of real estate as a common area available for their mutual enjoyment." Appellant's App. p. 18. As a result, the Reiths had no ownership rights or title to the disputed parcel.

Also, in the findings of fact and conclusions of law that the trial court entered on April 2, 2010, it was determined that Terrace Garden failed to prove by clear and convincing evidence that any of its members intended to claim full ownership of the disputed parcel superior to the rights of any other individual. To the contrary, the trial court noted that Terrace Garden's members and the Reiths believed that they had a co-equal right to use the disputed parcel.

The trial court also observed that the uses of the property were not exclusive, hostile, or adverse to each other, in that the evidence showed that all of Terrace Garden's members and nonmembers had harmoniously used the disputed thirty-foot parcel of real estate for customary recreational purposes until this litigation commenced. Also, notwithstanding Terrace Garden's argument that it should prevail on the adverse possession claim because a default judgment had been entered against the Lantzes, the trial court noted that the Reiths were not affected by those proceedings because that judgment was specifically directed toward the other defendants. Accordingly, the trial court determined that

> The evidence proves that all back lot owners (Reith defendants and Members of Terrace Garden) thought they had the co-equal right to make use of the disputed 30 foot parcel of real estate for recreational purposes. The uses made of the disputed 30 foot parcel of real estate by the Reith defendants were not exclusive, adverse or hostile to the uses being made of the disputed 30 foot parcel of real estate by the Members of Terrace Garden, or their predecessors in title. All back lot owners, until recently, had managed to use the disputed 30 foot parcel of real estate harmoniously for all customary recreational purposes. In essence, they all had considered the disputed 30 foot parcel of real estate as a common area available for their mutual enjoyment.

Appellant's App. p. 18 (emphases added).

Finally, the trial court determined that Terrace Garden failed to demonstrate that it acquired the right to make exclusive use of the disputed parcel by prescriptive easement. More particularly, the trial court observed that the record contained no evidence as to what twenty-year period that any member of Terrace Garden—or any predecessor in title—used the vacant parcel. Moreover, the trial court pointed out that Terrace Garden's use of the property was not hostile, exclusive, or adverse to the Reiths.

Terrace Garden now appeals, claiming that the trial court should have quieted title to the vacant parcel in its favor.

I. Standard of Review

The trial court issued findings of fact and conclusions of law pursuant to Indiana Trial Rule 52. On appeal of claims tried to the bench, we will "not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." T.R. 52(A).

We apply a two-tiered standard of review: we first determine whether the evidence supports the findings and then determine whether the findings support the judgment. Atterholt v. Robinson, 872 N.E.2d 633, 638-39 (Ind. Ct. App. 2007). Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them and the judgment is clearly erroneous if it is unsupported by the findings and conclusions thereon. Id. at 639. In assessing whether findings are clearly erroneous, we will not reweigh the evidence. Id. Instead, we consider the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. Id. A finding or conclusion is clearly erroneous when our review of the record leaves us with a firm conviction that a mistake has been made. Id. We defer to the trial court's findings of fact, but do not defer to its conclusions as to the applicable law. Id.

We also note that Terrace Garden is appealing from a negative judgment. When the party who had the burden of proof at trial appeals, the party appeals from a negative judgment and will prevail only if he establishes that the judgment is contrary to law. Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion. Id.

II. Terrace Garden's Claims

Terrace Garden argues that the trial court erred in failing to declare fee simple title of the disputed parcel in its favor. More specifically, Terrace Garden maintains that it acquired title to the property by adverse possession in light of the trial court's entry of the default judgment against the Lantzes. In other words, Terrace Garden contends that it automatically became the legal title holder of record when the Lantzes were defaulted, and it was not required to establish the elements of adverse possession.

In resolving this issue, we note that for a party to acquire property by adverse possession, the following elements must be established: (1) control, (2) intent, (3) notice, and (4) duration. Bass v. Salyer, 923 N.E.2d 961, 965 (Ind. Ct. App. 2010).[1] Moreover, these elements must be satisfied for a period of ten years. Roberts v. Feitz, 933 N.E.2d 466, 479 (Ind. Ct. App. 2010).

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[1] Our Supreme Court articulated the test for establishing an adverse possession claim in Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005):

> (1) Control—The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of "actual," and in some ways "exclusive," possession);
>
> (2) Intent—The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of "claim of right," "exclusive," "hostile," and "adverse");
>
> (3) Notice—The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former "visible," "open," "notorious," and in some ways the "hostile," elements); and,
>
> (4) Duration—the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former "continuous" element).

In an effort to bypass the adverse possession requirements, Terrace Garden maintains that the default judgment entered against Lantz eliminated the need to offer any additional proof of adverse possession. Other than this assertion, Terrace Garden offered no evidence that it had adversely possessed the vacant parcel from 1997 to 2007. And the only testimony regarding the use of the property during that time period was from the Reiths. That evidence established that they had used the parcel from 1950 to the present. Tr. p. 23-24, 73. Moreover, none of Terrace Garden's members attempted to stop or limit that use between 1997 and 2007. Id. at 25-27, 34-35, 56, 73-74. The only testimony presented to the trial court established that the Reiths and members of Terrace Garden had jointly used the vacant parcel for many years, and nothing changed between 1997 and 2007. Appellant's App. p. 11. Thus, the trial court reasonably concluded that the parties' use of the parcel were not "exclusive, hostile or adverse to each other." Appellant's App. p. 14.

Terrace Garden directs us to a number of cases in support of its claim that the default judgment in the Lantzes' favor in some way excused it from presenting any evidence on its adverse possession claim. However, those cases do not support a conclusion that the default of the owner of record is binding on others who challenged the adverse possession claim.

For instance, in Marengo Cave Co. v. Ross, 212 Ind. 624, 633, 10 N.E.2d 917, 921 (1937), it was recognized that "two or more persons cannot hold one tract of land adversely to each other at the same time." Also, in Snowball Corp. v. Pope, 580 N.E.2d

733, 734-35 (Ind. Ct. App. 1991), we held that where the real owner of record may not know that it owns the property in question, possession must be exclusive as against persons other than the legal owner. More specifically, "where the claimant occupies the land in common with third persons or the public generally, the possession is not exclusive." Id.

Additionally, in Hoose v. Doody, 886 N.E.2d 83 (Ind. Ct. App. 2008), trans. denied, we upheld a trial court's determination that denied the plaintiff's adverse possession claim for failure to satisfy the requirement to pay taxes on the allegedly adversely possessed lot. The circumstances in Hoose demonstrated that the appellants sought to establish the adverse possession of "lot 7," which was near their "Lot 8." Id. at 86. The record owner was not a factor in the decision.

In response to the Doodys' argument that they had failed to pay the real estate taxes for Lot 7, the Hooses—like Terrace Garden—asserted that the county auditor did not include Lot 7 on the tax rolls and, therefore, "no tax payments fell due on Lot 7 requiring payment by any person." Id. at 92. In those circumstances, it was determined that the Hooses—who admittedly only paid taxes on Lot 8

> could not reasonably have believed in good faith that they both owned Lot 7 and did not have to pay taxes on it. Indeed, [the Hooses] offer no evidence that it would have been reasonable to believe that a lot privately owned by them would be exempt from the property taxes and assessments.

Id. at 93.

As set forth above, Terrace Garden did not pay taxes on the vacant parcel. Thus, like the circumstances in Hoose, Terrace Garden has not offered any evidence demonstrating that the parcel would have been exempt from property taxes and assessments.

Additionally, we note that in a pre-trial order that was executed by the parties and approved by the trial court, Terrace Garden represented that the remaining issues of fact to be litigated included whether the plaintiff has acquired ownership of the access property by adverse possession. However, despite this acknowledgment, Terrace Garden presented no evidence as to the elements of adverse possession. Moreover, one of the witnesses admitted that he had not paid any taxes on the parcel and made no effort to even determine whether any taxes were due. Tr. p. 87. In other words, Terrace Garden offered no evidence that it had complied with the provisions of Indiana Code section 32-21-7-1, which provides that:

> In any suit to establish title to land or real estate, possession of the land or real estate is not adverse to the owner in a manner as to establish title or rights in and to the land or real estate unless the adverse possessor or claimant pays and discharges all taxes and special assessments that the adverse possessor or claimant reasonably believes in good faith to be due on the land or real estate during the period the adverse possessor or claimant claims to have possessed the land or real estate adversely. However, this section does not relieve any adverse possessor or claimant from proving all the elements of title by adverse possession required by law.

In light of the above, we can only conclude that Garden Terrace has failed to establish that it was entitled to ownership of the property on its adverse possession claim.

Moreover, Terrace Garden did not become the legal title holder of record to the parcel upon the trial court's entry of the default judgment against the Lantzes.

The judgment of the trial court is affirmed.[2]

VAIDIK, J., and BARNES, J., concur.

[2] On October 28, 2010, Terrace Garden filed a motion to strike the Reiths' appellate brief, which we today deny by a separate Order.