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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0913**

Paul Garding,
Respondent,

vs.

Kurt Doughman,
Appellant,

Michael Fox, et al.,
Defendants.

**Filed May 6, 2008
Affirmed in part and reversed in part
Kalitowski, Judge**

Ramsey County District Court
File No. C0-06-4319

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Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Kurt Doughman argues that the district court (1) erred as a matter of law
in granting respondent Paul Garding summary judgment on his adverse-possession claim;

and (2) erred in awarding respondent attorney fees. We affirm the grant of summary judgment and reverse the award of attorney fees.

DECISION

I.

Appellant argues that the district court erred as a matter of law in granting respondent's motion for summary judgment on his adverse-possession claim. We disagree.

On appeal from summary judgment, we review *de novo* whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). The evidence must be viewed in the light most favorable to the party against whom summary judgment was granted. *Id.* Summary judgment is appropriate “when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue for trial exists if there is “*sufficient evidence* to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006).

Adverse possession requires “actual, open, hostile, continuous, and exclusive possession for the statutory 15-year period.” *LeeJoice v. Harris*, 404 N.W.2d 4, 6 (Minn. App. 1987); *see also* Minn. Stat. § 541.02 (2006); *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999). A party seeking to prove adverse possession has the burden of

establishing these elements by clear and convincing evidence. *Denman v. Gans*, 607 N.W.2d 788, 794 (Minn. App. 2000), *review denied* (Minn. June 27, 2000).

Here, appellant challenges the district court's grant of summary judgment for respondent, arguing that the district court erred as a matter of law in finding that the facts before it established adverse possession. But our review of the evidence shows that the district court did not err in determining that respondent's possession of the disputed property was actual, open, continuous, exclusive, and hostile as a matter of law.

Actual and open possession

In order to satisfy the actual and open elements of adverse possession, respondent was required to show that he and his predecessors entered the disputed property in a manner that was sufficient to give appellant notice of his possession. *See Romans v. Nadler*, 217 Minn. 174, 178, 14 N.W.2d 482, 485 (1944); *Skala v. Lindbeck*, 171 Minn. 410, 413, 214 N.W. 271, 272 (1927). Here, uncontroverted evidence of respondent and his predecessors' entry into the disputed property was sufficient to meet that standard. Appellant cites *Nash v. Mahan* for the proposition that mowing the disputed area several times a year was not enough to establish actual and open possession. 377 N.W.2d 56, 58 (Minn. App. 1985). But respondent here presented evidence that over time there were three fences, one metal and two wooden, in place from 1950 until 2006 that incorporated the disputed property into respondent's yard. And we have recognized that enclosing an area is a viable and notorious act of ownership that may satisfy the actual and open elements of adverse possession. *See Romans*, 217 Minn. at 178, 14 N.W.2d at 485;

Gehan v. Morgan, 189 Minn. 250, 252-53, 248 N.W. 820, 821 (1933); *Ganje v. Schuler*, 659 N.W.2d 261, 268 (Minn. App. 2003).

In addition, the affidavits of a previous owner and of a former renter of appellant's property support respondent's assertion that the disputed property was occupied and maintained by the prior residents of respondent's lot and that the prior residents made use of and maintained the narrow strip of land as a modest extension of their own yard. And the record further indicates that the disputed area was utilized by respondent to perform window and siding repairs to the east side of his home. Accordingly, the district court did not err in determining that this evidence collectively established the actual and open elements of adverse possession as a matter of law.

Exclusive possession

In order to establish the exclusivity element of adverse possession, respondent must demonstrate that he possessed the disputed property as his own and intended to exclude others. *Wheeler v. Newman*, 394 N.W.2d 620, 623 (Minn. App. 1986). Here, the fence incorporating the disputed area into respondent's yard since at least 1950 provides sufficient evidence of their objective intent to exercise exclusive control over the land. *See Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972) (explaining that objective rather than subjective manifestations of one's intent to exclude should be considered when determining whether adverse possession has been established). Even though appellant asserts that residents of appellant's lot occasionally crossed the disputed area to access their backyard, and maintained a patch of daylilies that spread into the disputed area there is no evidence that this use of the disputed area was anything but a

trespass. Moreover, because these factual assertions occurred after the 15-year statutory period for respondent's claim of adverse possession had elapsed, they are irrelevant to determining respondent's exclusivity of possession relative to that claim. See *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 110 (Minn. App. 2002). Thus, the district court did not err in determining that the evidence established exclusivity as a matter of law.

Continuous possession

For possession of land to be deemed continuous, it must be used for the statutorily-required time period of 15 years. Minn. Stat. § 541.02. Sporadic or infrequent use is insufficient to establish this element; the land must be used as regularly as is appropriate in light of the nature of the property involved. *Costello v. Edson*, 44 Minn. 135, 138, 46 N.W. 299, 300 (1890).

Here the affidavits of a former owner and former renter of appellant's property and respondent established that, from 1950 to 2001, the disputed area was used, maintained, and incorporated by a fence into the yard of respondent's lot, as well as used and maintained by the occupants of respondent's lot. Although there is no evidence in the record as to the use of the property from 1957 to 1977, the fact that the metal fence incorporating the disputed area into respondent's lot was shown to be continually present throughout this time period was sufficient for the district court to find continuity of use during this time period. Alternatively, even if the statutory period for respondent's adverse possession claim did not begin running until 1981, when the metal fence was replaced with the wooden fences that continued to incorporate the disputed property into respondent's lot, respondent's adverse-possession claim was still established by 1996.

See generally Fredericksen v. Henke, 167 Minn. 356, 361, 209 N.W. 257, 259 (1926) (explaining that possession by successive occupants may be tacked for purposes of establishing the statutory period for adverse possession).

Appellant contends that the district court's reliance on the time period between 1950 and 1977 for purposes of establishing adverse possession was improper because the persons in possession of appellant's lot were tenants, but not the record owners. But Minnesota courts have recognized that possession by a tenant may be treated as possession by the landlord for purposes of establishing the requisite continuity for an adverse-possession claim. *See Kelley v. Green*, 142 Minn. 82, 85, 170 N.W. 922, 923 (1919). Similarly, we reason that it was appropriate for the court to consider the period during the renters' tenancy when determining the continuity of respondent and his predecessors' adverse possession. *Id.*

Appellant also argues that continuity of possession was negated by appellant's occasional trespass, gardening, and planting of daylilies that spread onto the disputed property, as well as respondent's failure to maintain the disputed area free from brush and overgrowth between 2001 and 2005. But even if taken as true, all of these factual allegations took place long after respondent's adverse possession had ripened into ownership. Once title is obtained by adverse possession, no continuity of possession is required to maintain it. *See Fredericksen*, 167 Minn. at 361, 209 N.W. at 259; *Ebenhoh*, 642 N.W.2d at 110. Therefore, the district court did not err in ignoring these factual allegations and deciding that the evidence established continuity of possession as a matter of law.

Hostile possession

To show hostility, an adverse possessor “must intend to exclude the world and treat the disputed property in a manner generally associated with the ownership of a similar type of property in the particular area involved.” *Grubb v. State*, 433 N.W.2d 915, 918 (Minn. App. 1988), *review denied* (Minn. Feb. 22, 1989); *see also Ganje*, 659 N.W.2d at 268. Hostile intent may be inferred from the character of the possession, as shown by the elements of adverse possession discussed hereto. *Frederickson*, 167 Minn. at 359, 209 N.W. at 258; *Dean v. Goddard*, 55 Minn. 290, 297, 56 N.W. 1060, 1062 (1893). Because the record established the actual, open, continuous, and exclusive elements of adverse possession, the district court did not err as a matter of law by inferring respondent’s hostile intent.

In sum, because appellant raised no material issues of fact and the evidence in the record establishes that respondent’s possession of the disputed land was actual, open, continuous, exclusive, and hostile as a matter of law, we conclude that the district court did not err in granting respondent summary judgment on his adverse-possession claim.

II.

Appellant argues that the district court erred by failing to cite authority or make findings supporting its award of attorney fees to respondent. We agree.

We give deference to a district court’s award of attorney fees, reviewing only for an abuse of discretion. *Becker v. Alloy Hardfacing & Eng’g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). But the district court is nonetheless required to indicate the legal basis and rationale behind its ruling. *See Nat’l Union Fire Ins. Co. v. Evenson*, 439 N.W.2d 394,

398 (Minn. App. 1989) (“Findings are necessary to permit meaningful appellate review”), *review denied* (Minn. July 12, 1989).

Respondent contends that appellant waived his right to reconsideration of the attorney-fees issue by not further pursuing his request to the district court to allow a motion to reconsider this issue. But since motions to reconsider do not toll the time period for appeal, respondent was not required to do so. *See* Minn. R. Civ. App. P. 104.01, subd. 2, 1998 advisory comm. cmt.

Here, the district court’s order did not provide a basis for its award of attorney fees to respondent. Because the parties were entitled to findings on the attorney-fees issue specifying the basis of the award, we conclude that the district court’s grant of fees to respondent constituted an abuse of discretion.

Moreover, respondent’s attempts to suggest a possible basis for the district court’s award of attorney fees are unavailing. Respondent attempts to defend his entitlement to attorney fees on the basis of a slander-of-title claim as discussed in *Paidar v. Hughes*, 615 N.W.2d 276, 279-80 (Minn. 2000) (requiring a false statement, maliciously published, causing the claimant pecuniary loss). But there is no authority to support respondent’s assertion that appellant’s acts should be considered false statements for the purpose of establishing this requisite element of a slander claim. Alternatively, respondent claims that the district court’s attorney-fees award was an appropriate sanction under Minn. Stat. § 549.211 (2006) and Minn. R. Civ. P. 11.03 for appellant’s bad faith throughout the pendency of this action. But the record does not indicate that the procedural steps required under Minn. Stat. § 549.211 and Minn. R. Civ. P. 11.03 were

followed here. *See Empire Fire & Marine Ins. Co. v. Carlson*, 476 N.W.2d 666, 669 (Minn. App. 1991) (discussing rule 11's requirement of adherence to at least minimum procedural guidelines so that an attorney has notice and an opportunity to correct his conduct).

Because the district court failed to state its authority for awarding respondent attorney fees, and because the facts in the record fail to support a basis for the award, we reverse.

Affirmed in part and reversed in part.