

IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF LOM THOMPSON;
CECILIA THOMPSON; AND
RAYMOND THOMPSON,
Appellants,

vs.

HENRY BRACKENBURY AND JOI
BRACKENBURY,
Respondents.

No. 49680

FILED

MAY 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a quiet title action. Seventh Judicial District Court, Lincoln County; Steve L. Dobrescu, Judge.

This appeal arises from a district court order granting summary judgment in a quiet title action concerning a 100-acre parcel of real property. The district court granted summary judgment in favor of respondents Henry Brackenbury and Joi Brackenbury after it determined that the Brackenburys' possession of the disputed property was adverse. Appellants Estate of Lom Thompson, Cecilia Thompson, and Raymond Thompson (collectively, the Thompsons), argue that the district court erred by granting summary judgment because the Brackenburys failed to satisfy the elements of adverse possession under NRS 11.150. The Thompsons claim that there were "genuine issues of material fact," as to whether the property "ha[d] been protected by a substantial enclosure." See NRCP 56; NRS 11.120(2); NRS 11.140(1); see also NRS 11.150. For the following reasons, we reverse the district court's summary judgment and remand this matter to the district court. The parties are familiar with

the facts and we do not recount them here except as necessary to our disposition.

Standard of review

We review a district court's grant of summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when the court has examined the record and has found "no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." Id. at 731, 121 P.3d at 1031. Although this court will review the evidence in the light most favorable to the nonmoving party, that party nonetheless bears the burden to set forth specific facts, based on affidavits or otherwise, to demonstrate that no genuine issue of material fact remains. Id. at 730-31, 121 P.3d at 1030-31. In addition, this court will strictly follow and construe statutory provisions that govern the acquisition of title by adverse possession. Brundy v. Bramlet, 101 Nev. 3, 5, 692 P.2d 493, 495 (1985).

Elements of adverse possession

The general adverse possession statute, NRS 11.150, allows a party to assert possession of real property where that party has continuously occupied and claimed the property and paid all taxes associated with the property for at least five years, and has satisfied the requirements of NRS 11.120 or 11.140. We conclude that, for the purpose of summary judgment, the Thompsons conceded that the Brackenburys fulfilled NRS 11.150's tax requirements, even if, in their opposition to summary judgment, the Thompsons presumptively "reserve[d]" the right to challenge the claim. See Toigo v. Toigo, 109 Nev. 350, 350, 849 P.2d 259, 259 (1993) ("[S]tatements made by counsel in their briefs, alleging facts or their arguments made in open court, portraying what might have

occurred, will not be considered on appeal.” (quoting Lindauer v. Allen, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969)).

Therefore, the principal question left on appeal is whether the Brackenburys satisfied the requirements of NRS 11.120 or 11.140. See NRS 11.150. Both NRS 11.120 and 11.140 allow a party to assert his or her possession over disputed property by fulfilling certain requisites. Determining which statute applies is contingent upon whether or not the asserting party is claiming title “founded upon a written instrument.” NRS 11.120; NRS 11.140.

NRS 11.120 provides, in part, that “[f]or the purpose of constituting adverse possession by any person claiming a title, founded upon a written instrument or judgment or decree, land shall be deemed to have been possessed and occupied in [certain instances.]” In comparison, NRS 11.140 provides:

For the purpose of constituting an adverse possession, by a person claiming title, not founded upon a written instrument, judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial enclosure.
2. Where it has been usually cultivated or improved.

The Brackenburys argue that their claim of possession is “founded upon a written instrument”; namely, the 1996-1997 Land Purchase Agreement between the Brackenburys and the Thompsons (the Agreement). The Agreement, however, did not include a legal description of the disputed property. The Brackenburys claim that, although the Agreement did not include the disputed property, the parties to the Agreement intended to transfer the 100-acre parcel as part of the

Agreement. Meanwhile, the Thompsons contest the disputed property's boundary lines and claim that the disputed property was not intended to be transferred as part of the Agreement. We determine that NRS 11.120's requirement that a claim be "founded upon a written instrument" is not satisfied where one party claims that the disputed property was unintentionally omitted from the deed, while the opposing party argues that the property was intentionally omitted. We therefore conclude that, in this case, NRS 11.140 is the applicable statute.

The parties do not dispute that the Thompsons have not cultivated or improved the property. See NRS 11.140(2). Thus, the remaining question on appeal is whether the disputed property "has been protected by a substantial enclosure." NRS 11.140(1). For the following reasons, we conclude that there are genuine issues of material fact as to whether the disputed property was protected by a substantial enclosure.

First, the evidence in the record related to the location of the disputed property is vague and inconclusive. It is problematic that the district court based its grant of summary judgment on the purported fact that a fence, which surrounded the entire property, enclosed the disputed land. The only evidence supporting the district court's finding is conflicting, and oftentimes self-serving, testimony from the parties. For example, Joi Brackenbury testified that the disputed property was located within the larger ranch property, and thus enclosed by the perimeter fencing and not accessible by the highway. On the other hand, Henry Brackenbury testified that the disputed property was adjacent to the highway, and the Thompsons assert that an individual could freely access the highway from the disputed land. Further, Henry Brackenbury testified that the eastern boundary of the Brackenburys' property abutted

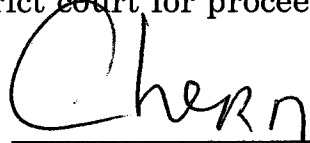
land owned by the Bureau of Land Management (B.L.M.), which itself was adjacent to the highway and would theoretically separate the Brackenburys' property from the highway.


In addition, the plat and survey maps submitted as exhibits to the parties' motions for summary judgment do not conclusively establish the location of the disputed property in relation to the Brackenburys' entire property. It appears, as the Thompsons assert, that an unknown party drew darkened lines on the submitted plat map that were presumably intended to represent the boundary lines of the entire property and the boundary lines of the disputed property. But, at least one area represented on the plat map, which was allegedly included as part of the Brackenburys' entire property, appears to be owned by the B.L.M. In addition, the plat and survey maps do not clearly and competently identify the location of the Brackenburys' entire property, the location of the Brackenburys' purported fence surrounding the property, or the location of the disputed land, which may or may not be enclosed within the perimeter of the Brackenburys' property.

Thus, we conclude that the district court relied on inconclusive and oftentimes conflicting evidence when it considered the disputed property's boundaries. Without conclusive evidence regarding the location of the disputed property, it is factually impossible to determine whether the disputed property was within the greater property owned by the Brackenburys, and thus, within the perimeter fencing that enclosed the Brackenburys' property. For these reasons, we conclude that there are genuine issues of material fact as to whether the Brackenburys satisfied NRS 11.140(2); namely, whether the disputed property "ha[d] been

protected by a substantial enclosure,"¹ and thus, whether the Brackenburys adversely possessed the disputed property. We therefore,

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Steve L. Dobrescu, District Judge
Carolyn Worrell, Settlement Judge
Hutchison & Steffen, LLC
Sterling Law, LLC
Lincoln County Clerk

¹We note that the existence of a highway may possibly act as a "substantial enclosure." However, as explained previously, we are unable to make a determination, without clear and competent evidence establishing actual property location and boundaries, whether the Brackenburys satisfied the requirements of NRS 11.140(2).