Cause No.02-02384-F

DAWN McCARTHY	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
vs.	§	DALLAS COUNTY, TEXAS
	§	
WILLIAM SMITH and	§	
JEANNIE FEENEY-SMITH	§	
	§	
Defendants.	§	116TH JUDICIAL DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

COMES NOW Dawn McCarthy, Plaintiff herein, and files this her response to the motion for summary judgment of William Smith and Jeannie Feeney-Smith, the Defendants herein, and her cross-motion for summary judgment against Defendants, stating as follows:

Background Facts

This is a dispute regarding the ownership of a strip of property between two houses in Dallas. Mrs. McCarthy's house is at 3837 Waldorf Circle, which she purchased an moved into in 1970. The Defendants' house is at 3838 Vinecrest; they purchase their home in 1996. The houses are adjacent and back-to-back: the McCarthy house faces south and the Defendants' house faces north. Although the Defendants moved their fences in 2002, prior to that, for thirty-two years, each house had a back fence and there was an open area between the back fences.

In that area between the fences, there was until 2002 a driveway which was Mrs. McCarthy's only access to the back alley where she put her garbage and her family drove their cars on an almost

daily basis. Since she purchased her house, Mrs. McCarthy believed that the land on which that driveway was built was hers. The Defendants, shortly before the commencement of this lawsuit, discovered that, despite 31 years of use to the contrary, the McCarthy driveway was apparently on their land. They ripped out her driveway and fenced their land, cutting off an access that she had enjoyed for over 31 years. This lawsuit ensued with Mrs. McCarthy claiming adverse possession of the driveway area and the land to the immediate east of the driveway under the ten-year statute. See attached Affidavit of Dawn McCarthy.

During the whole of that ten-year period, running from 1970 to 1980, the house at 3838 Vinecrest was owned by Sally Moss, whose affidavit is also attached. Mrs. Moss sold her house in 1987, after the ten-year period had expired, but she is still alive and able to testify to what transpired during the only relevant time period, that is, from 1970 to 1980.

This lawsuit is one unique in the annals of adverse possession, as far as the undersigned attorney has been able to find. In the typical lawsuit, the one against whom the adverse claim is asserted will claim, for various reasons, that the possession did not meet the requirements of adverse possession in that it was not open enough or notorious enough or hostile enough or adverse enough or exclusive enough or was somehow lacking some element of adverse possession that would have alerted to the owner of the land against whom the claim is asserted that there was a possession under a claim of right. The opposite of that is true here. Mrs. Moss, the owner of the property during the relevant period of time – the ten years between 1970 and 1980 – agrees to every element of the claim of adverse possession. She knew that the McCarthys were claiming the that the land was their own and agrees that the use was open and notorious. In her affidavit, she says, among other things:

> I saw how the McCarthys were using the Strip. It was plain to me at all times that they were using it as their own property. *I had no doubt at the time that it was their property, and I never had any doubt that the McCarthys were using the property as their own.* Mr. DuBose has explained to me that the term "claim of right" used in cases like these can mean not only a verbal claim, but also an open and visible act, so open and notorious and manifested by such open or visible acts that knowledge on the part of the owner will be presumed. There needs to be no presumption of knowledge on my part. At all times I knew that they were using it as their own property. They bought the driveway with the house and the only conclusion I ever drew was that that driveway had to be on their own property, not on mine.
>
> But even if I had not known that the McCarthys were using the Strip as their own, I would have known from the way they used it. *Their use of Strip was clearly open and notorious and manifested by open or visible acts that would have left no doubt in mind that they were using it as their own*. . . . I knew of no other use of the property between our fences by anyone else for any other purpose. I never saw any trespassers in the area between the fences.
>
> I never asserted any claim to the Strip. I rarely went onto the Strip, but if I had done so and the McCarthys had asked me to leave the Strip, I would have immediately complied. *I never brought suit against the McCarthys to remove their driveway or to stop their use of the Strip*. [Emphasis added.]

Thus, the only person who ever had the claim to assert against the McCarthys thus admits she knew what they were doing and never took any action to remove them.

As an afterthought, the Defendants have pleaded a responsive adverse possession claim against Mrs. McCarthy, claiming that they have regained possession of the Strip by the five-year statute of limitations. That motion is without merit and must be denied.

ALL THE REQUIREMENTS OF MRS. McCARTHY'S ADVERSE POSSESSION CLAIM HAVE BEEN MET IN THIS CASE

The statute states that adverse possession is

> an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.

Texas Civil Practice and Remedies Code § 16.021 (1). In this context, the term "hostile" does not bespeak any actual enmity, but only that it is opposed to the claim of the titleholder.[1] We will examine the facts presented in this case, but we must first deal with two preliminary matters.

First: The Relevant Time Period
Nothing after 1980 makes any difference.

We must recognize at the outset that the relevant facts in this case transpired over 22 years ago. The possession by the McCarthys began in 1970 when they acquired the house at 3837 Waldorf Circle. The ten-year statute expired in 1980. Anything that happened after 1980 is immaterial. Once the limitations period expires, the title fully and completely vests in the adverse claimant as if he had received a deed to the property. *Brohlin v McMinn*, 341 S.W.2d 420, 422 (Tex. 1960). Limitation title, like title to any other real property, can once vested only be conveyed by a deed and cannot be conveyed orally. *Kleckner v. McClure*, 524 S.W.2d 608, 613 (Tex Civ. App –Fort Worth 1975). An offer to purchase the tract after the period has expired does not destroy the limitation title,

[1] *Buford v. Cole*, 135 S.W.2d 145, 148 (Tex. Civ. App.– Texarkana 1939) ("the word 'hostile' means a holding out with intent to claim it as his own to the exclusion of all others"); *Stark v. Brown,* 193 S.W. 716, 717 (Tex. Civ. App. – Beaumont 1917) ("the word 'hostile' . . . means an occupancy of the premises under a holding by the possessor as owner, and therefore against all other claimants of the land.").

Auchterlonie v. McBride, 705 S.W.2d 183, 186 (Tex. App. – Houston [14th District] 1985); an affidavit disclaiming any ownership in the tract after the running of the statute is of no effect, *Butler v. Hanson*, 455 S.W.2d 942, 946 (Tex. 1970); *Republic National Bank of Dallas v. Stetson*, 390 S.W.2d 257, 260 (Tex. 1965); an oral statement after the statute had run that the adverse claimant did not intent to claim by limitations is of no effect on the title obtained by limitations, *Jobe v. Osborne*, 128 Tex. 509, 97 S.W.2d 939, 944 (1936). In short, once the statute had run in 1980, the title was completely in the McCarthys. All of what the Defendants relate about what happened on the property, about what Mrs. McCarthy or her daughter Jodee (who does not own any interest in the property) said or did after 1980 is of any significance in this case. If Mrs. McCarthy gave the Defendants a deed, they'd have title; short of that they don't.

Second: The Relevant State of Mind
Mrs. Moss's knowledge the McCarthys used the land as their own makes a lot of difference.

Recollect that in adverse possession we are talking about the running of the statute of limitations. In such cases, the key question is typically, did the titleholder have sufficient knowledge of the claim that it is fair to allow the statute of limitations to run against him. In the normal adverse possession case the owner denies that he or she had such notice or, more commonly, the titleholder is deceased. Typically the question then is whether the nature of the possession is sufficient to have given the title owner notice of the possessor's claim of right and the argument proceeds in that hypothetical vein – was this possession of such a nature that the titleholder should have known there was a claim of right and that the titleholder had notice that he or she had notice of the need to pursue

an action to remove the claim from the property.[2] The fundamental question the court asks in every adverse possession case is whether it is just to allow the running of the statute against the titleholder.[3]

This case, however, is unique among the legion of cases read by McCarthy's counsel. The titleholder here is alive and testifying and is crystal clear that she was fully aware of the nature and extent of the McCarthys' claim of right. In this case, the question as to whether the facts shown would have put some other hypothetical person on notice of the claim is wholly immaterial.

The law of Texas recognizes this. In *City of Houston v. Church*, 554 S.W.2d 242, 245 (Tex. 1977) the Texas Supreme Court stated that

> *Unless the owner has actual knowledge of the hostile claim*, the possession must be so open, visible, and notorious as to raise the presumption of notice that the rights of the true owner are invaded intentionally and with the purpose of asserting a claim of title adverse to his, so potent that the owner could not be deceived, in order to mature a title by adverse possession. [Emphasis added]

Time and again, in case after case, Texas courts have held that the law is that the limitations statute will run where the titleholder

> had ***either*** actual knowledge that the Defendant . . . was claiming all title to the land as his own ***or*** that such adverse possession by the Defendant, in person or by his tenant, was so open, notorious and unequivocal as would put a person of ordinary care and prudence, in the same or similar circumstances as the Plaintiffs, and under the facts and circumstances in this case, upon notice that he . . . was claiming all title

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[2]E.g., *McDonnold v. Weinacht*, 465 S.W.2d 136, 141 (Tex. 1971) ("the appropriation of the land must be of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.")

[3]Hence the standard against which the requirements of adverse possession are measured is whether the possession was of such a character to give notice to the title holder that there was an adverse claim. *Bywaters v. Gannon,* 686 S.W.2d 593, 595 (Tex. 1985) (adverse possession requires "possession sufficient to *give notice* of an exclusive adverse possession"); *Rhodes v. Cahill,* 802 S.W.2d 643, 645 (Tex. 1990) (possession "must constitute an actual and visible appropriation of the land such that the true owner is *given notice* of a hostile claim).

to the land as his own.

Williams v. Williams, 559 S.W.2d 888, 893 (Tex. Civ. App. 1977, writ ref'd n.r.e).[4] Texas courts have long recognized that such requirements as exclusivity, notoriety and the like, are characteristics not required by the statute, but are added to make sure that, in cases where the titleholder has no actual knowledge, he is clearly put on notice about what is going on. See, e.g., *Garcia v. Palacios*, 667 S.w.2d 225, 230-231 (Tex. App. – San Antonio 1984).

In this context, the fact that Mrs. Moss did not believe that she had a she could have pursued against the McCarthys claim – because she believed that the Strip belonged to the McCarthys – is immaterial. The law in Texas is that "Every owner of land is presumed to know its boundaries and to take notice when they are invaded." *Houston Oil Co of Texas v. Olive Sternenberg & Co.*, 222 S.W. 534, 538 (Tex. Comm'n App, Section B, 1920); *Warren v. Swanzy*, 361 S.W.2d 479, 486 (Tex. Civ. App. – Beaumont 1962); *Shell Oil v. Railroad Comm'n*, 247 S.W.2d 448, 451 (Tex. Civ. App. – Austin 1952). In *Garcia v. Palacios,* 667 S.W.2d 225 Tex. App. -- San Antonio 1984, writ ref'd n.r.e.), the Palacios family, titleholder of the land, had believed during the statutory period that the land being used by Garcia, the claimant in adverse possession, belonged to Garcia. The court held that this did not stop the statute on adverse possession from running. The court stated:

The owner of premises is presumed to know the true location of his boundaries and

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[4]Accord, *Nelson v. Morris*, 227 S.W.2d 586, 588 (Tex. Civ. App. – Fort Worth 1950); *Payne v. Price*, 203 S.W.2d 544, 545 (Tex. Civ. App. – Texarkana 1947); *Churchman v. Rumsey*, 166 S.W.2d 960, 962 (Tex. Civ. App. – Amarillo 1942); *Burton v. Holland*, 278 S.W. 252, 254 (Tex. Civ. App. – Beaumont 1925); *Terry v. Terry*, 228 S.W. 299, 301 (Tex. Civ. App. –El Paso1921); *Bailey v. Kirby Lumber Co.*, 195 S.W. 221, 228 (Tex. Civ. App. – Beaumont 1917); *Houston Oil Co. of Texas v. Stepney*, 187 S.W. 1078, 1084 (Tex. Civ. App. – Beaumont 1916, writ denied); *Village Mills Co. v. Houston Oil Co. of Texas*, 186 S.W. 785, 799 (Tex. Civ. App. – Beaumont 1916); *Buford v. Wasson*, 109 S.W. 275, 279 (Tex. Civ. App. 1908)

> is bound to take notice of the nature and extent of possession by a claimant. . . . The Palacios family knew of appellants' possession of the land. What they did not know was that it was theirs.

667 S.W. 2d at 231-232. The appeals court reversed a jury verdict against Garcia in the trial court and rendered judgment for Garcia. So here, the fact that Mrs. Moss did not believe that the McCarthys were on her property does not prevent the running of the statute.

Statutory Requirements

In light of this discussion, let us examine how the facts in this case satisfy the statutory requirements. Section 16.026 states that for the statute to run, the McCarthys need to have cultivated, used or enjoyed the property and to have held the property in "peaceable and adverse possession." "Peaceable" means only that during the period of limitations, no lawsuit was brought to dispossess the McCarthys. No such action was brought during that period. See McCarthy and Moss Affidavits. Adverse possession means

> an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.

Texas Civil Practice and Remedies Code, §16.021(1). Let us examine how these requirements are met.

Claim of Right

This element is a question of intent; did the claimant have the intent to claim the land as his own. In *Orsborn v. Deep Rock Oil Corp*., 267 S.W.2d 781, 787 (Tex. 1954), the Texas Supreme Court held that

> The "claim of right' to which the statute refers simply means that the entry of the limitation claimant must be with the intent to claim the land as his own, to hold it for himself.

When the McCarthys were occupying the Strip believing it was theirs, then, they were occupying it under a claim of right. The fact that they didn't think they were claiming against someone else is immaterial. In *Calfee v. Duke*, 544 S.W.2d 640 (Tex. 1976), the claimant, Mr. Calfee, stated in his testimony that he was not claiming against anyone, it was his land. The court held that this sufficed: the claimant "never thought of himself as claiming adversely to anyone for the simple reason that he thought that he was the rightful owner and had no competition for that ownership." 544 S.W.2d at 642.

Defendants make much over the fact that the McCarthys never made a verbal claim to the land. When both parties, the McCarthys and the Mosses, believed that the land belonged to the McCarthys, it is obvious why there was no such claim: it was utterly unnecessary. When I stand inside the house I know I own, I am highly unlikely to say to my neighbor, "You know, I am claiming this house as mine." It wouldn't make sense. And, as we might explain to Mr. Bumble, the law is not such an ass as that. The law of Texas does not require that there be a verbal declaration of the claim of right. *Ramirez v. Wood*, 577 S.W.2d 278, 287 (Tex. Civ. App. – Corpus Christi 1978, no writ) ("There is nothing in the "claim of right" definition that suggests that the claimant must verbally claim title to anyone.") The Texas Supreme Court has held that either a declaration or "an open or visible act" suffices. *Orsborn v. Deep Rock Oil Corp.*, 267 S.W.2d at 787. The primary act, use of the driveway on an almost daily basis, was observed by Mrs. Moss, and she knew that it meant that the McCarthys were using the property known as the Strip as their own. The statute makes no further requirement where the titleholder has such knowledge.

Actual and Visible Appropriation of Real Property

During the ten years beginning in 1970, the McCarthys used the Strip on an almost daily

basis driving on and off of their property. They divided the maintenance of the land between their fences according to the boundary line that they both believed to be the boundary line between their properties. There is no contradictory evidence

Exclusivity

This is a non-statutory requirement that has no application in a case where Mrs. Moss had actual knowledge of the extent and the nature of the McCarthys' claim, but it is nonetheless met.

Exclusiveness simply means that the McCarthys are the only ones who used the Strip. That is the case here, as the attached and undisputed affidavits of Dawn McCarthy and Sally Moss make clear

Paying of Taxes

In their motion the Defendants claim that they paid the taxes on the Strip and that Plaintiffs did not. There is no competent evidence before the court regarding who paid the taxes on the Strip. Each party paid the taxes billed to them; neither knows what bill, if any, included the tract called the Strip in the years 1970 to 1980. There is no foundation in the record for the Defendants's statements that they and their predecessors paid the taxes on the Strip. The only evidence before the court on the question of who paid the taxes in the period 1970-1980 comes from Mrs. Moss and Mrs. McCarthy. Mrs. Moss, when questioned in her deposition about whether she paid taxes on the Strip, said:

> I don't know. Just paid the taxes. I don't know what I paid them on.

Moss Deposition, page 22, lines 15-16. In her affidavit, after repeating this, Mrs. Moss says:

> I have no idea what the taxing authority thought I was paying taxes on. I did not believe that I was paying taxes on the Strip because I believed that the Strip belonged to the McCarthys and that they were paying taxes on it.

In her affidavit, Mrs. McCarthy said:

> The Defendants have claimed that I never paid any taxes on the Strip. I always paid the taxes on my property as they came due. I always believed that I owned the Strip and the taxes I was paying included the Strip. I do not in fact know whether the taxes I paid were taxes assessed on the Strip or not. . . . If I did not pay taxes on the Strip it was not done intentionally.

Only the taxing authority or its records can establish that fact and there is no such evidence in the motion before the court. While tax payment may be of some weight where it is clear that the disputed property is what is being taxed – e.g., where the property is a separate tract that is separately taxed – in cases of urban boundary disputes such as this one, tax payment is of no probative value.

THERE ARE BARS TO AND ISSUES OF FACT IN DEFENDANTS' CLAIM FOR ADVERSE POSSESSION

The Defendants claim that they have received the Strip back because they have perfected adverse possession of the property under the five-year statute. That claim is without merit.

The Defendants claim in their motion for summary judgment that they gave notice to Mrs. McCarthy of their claim to the property "By reason of the survey flags placed by the surveyor in 1996 when the Smiths bought 383 Vinecrest Drive." There is no evidence in the record of any such flags being placed, the date of their placement or of Mrs. McCarthy's having seen any such flags. In her affidavit she says that she had no knowledge of any claim by the Defendants until 2001. This raises an issue of fact. Moreover, Defendants have cited no authority for the proposition that survey flags are, by themselves, sufficient to establish the requisite actual and visible appropriation of real property required under the statute. Counsel for Mrs. McCarthy is unaware of any such authority; he has searched for such authority on the Lexis database and been unable to find any. Defendants

do not claim any other activity of their which would start the running of the five-year statute.

Assuming, though, for the sake of argument, that the facts alleged would show that the Defendants did have possession of the property called the Strip, there is nonetheless a fatal flaw in Defendants counterclaim. At all times, until the Defendants fenced off her access to the Strip, Mrs. McCarthy and her family continued to use the Strip on an almost daily basis, as they always had, to drive out to the alleyway and to take their garbage out to the alleyway. The law is that shared use of the property by the claimant and the titleholder is an absolute bar to a claim of adverse possession. *Vrazel v. Skrabanek,* 725 S.W.2d 709, 711 (Tex. 1987); *Rick v. Grubbs,* 214 S.W.2d 925, 927 (Tex. 1948)("the law's requisites are not satisfied if the occupancy is shared with the owner or his agents or tenants").

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON HER ADVERSE POSSESSION CLAIM AND ON DEFENDANTS' COUNTERCLAIM

All the facts of Plaintiff's claim have been proved as set out above.. She and Mrs. Moss are the only witnesses able to give testimony regarding the relevant time period, 1970 to 1980. They agree on all relevant issues. The statute ran in 1980, and Mrs. McCarthy now owns the property referred to as the Strip. There are no disputed factual issues.

The court must grant summary judgment against the Defendants on their counterclaim because of the shared use of the tract in question.

Attorney's fees should be granted as set out in the affidavit of Eugene Zemp DuBose.

Conclusion

The court should deny the motion for summary judgment of the Defendants and grant the motion for summary judgment of Mrs. McCarthy.

Respectfully submitted

_____

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ATTORNEY FOR PLAINTIFF

FIAT

Please take notice that Plaintiff's Cross Motion for Summary Judgment will be heard in the courtroom of the 116th Judicial District Court, George L. Allen, Sr., Courts Building, Sixth Floor, 600 Commerce Street, Dallas Texas at _____ m. on the _____ day of _____, 2003.

_____

JUDGE PRESIDING

Certificate of Service

The undersigned attorney hereby certifies that he served the attached document on counsel for Defendants this _____ day of _____, 2003, by certified mail, return receipt requested.

_____
Eugene Zemp DuBose