Case No. A-24-794

IN THE NEBRASKA COURT OF APPEALS

ALAN KORTMEYER and CAROLYN KORTMEYER,

Appellants,

v.

ALYSSA HENDRIX, CAREY HENDRIX, KACH 510, LLC, KACH ROBERTS BLDG., LLC, KACH420M, LLC, C&A COMPLEX MANAGEMENT, LLC, and GLEN HAVEN SUBDIVISION UTILITY SERVICE, LLC

Appellees.

APPEAL FROM THE DISTRICT COURT

OF SEWARD COUNTY, NEBRASKA

Before the Honorable Rachel A. Daugherty

BRIEF OF APPELLEES

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STATEMENT OF JURISDICTION

The Hendrixes accept the Statement of Jurisdiction in Appellants' brief.

STATEMENT OF THE CASE

A. Nature of the Case

This case is a boundary dispute between Appellants Alan Kortmeyer and Carolyn Kortmeyer and Appellees Alyssa Hendrix, *et al.* On July 19, 2023, the Kortmeyers filed a Complaint and Motion for Ex Parte Order against the Hendrixes. (T1) (T6). On September 18, 2023, the Hendrixes filed an Answer and Counterclaim against the Kortmeyers, seeking as relevant to this appeal, an order quieting title to Lot 26 in their favor. (T55).

B. Issues Tried Below

On May 23, 2024, a bench trial was held. As relevant to this appeal, the issues tried below were whether the Kortmeyers had acquired title to a portion of Lot 26 via adverse possession, or whether the Hendrixes were entitled to an order quieting title to Lot 26.

C. How the Issues were Decided and Judgment Entered

The District Court held that the Kortmeyers failed to prove the elements of adverse possession and quieted title to the Hendrixes. (T152).

D. Scope of Review

The Hendrixes accept the Scope of Review set forth in the Kortmeyers' brief.

PROPOSITIONS OF LAW

1. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for a statutory period of 10 years. *Siedlik v. Nissen*, 303 Neb. 784, 791 (2019).

2. A claimant of title by adverse possession must show the extent of his or her possession, the exact property which was the subject of the claim of ownership, that his or her entry covered the land up to the line of his or her claim, and that he or she occupied adversely a definite area sufficiently described to found a verdict upon the description. This standard requires that the claimant provide to the trial court a precise legal description rather than general descriptions based on landmarks. *Siedlik v. Nissen* 303 Neb. 784, 794 (2019).

3. It is an ancient and well settled rule of law that a tenant cannot, while occupying the premises, deny his landlord's title. *Bender v. James*, 212 Neb. 77, 81 (1982) (quoting *Carson v. Broady*, 56 Neb. 648 (1898))

4. Acts of routine yard maintenance, without more, are not sufficiently notorious to warn the titleholder that another is claiming or using the land for his own purpose. Something more than a neighbor watering and mowing over the property line is needed to alert a reasonable owner that his title is in danger and he must take steps to protect his interest. *Poullos v. Pine Crest Homes, LLC*, 293 Neb. 115, 121 (2016). *See also Siedlik v. Nissen*, 303 Neb. 784 (2019).

STATEMENT OF FACTS

This case is about a boundary dispute between the Kortmeyers and the Hendrixes regarding the proper boundary between Lot 27 (owned by the Kortmeyers) and Lot 26 (owned by the Hendrixes). For ease of reference, Appellees will collectively be referred to in this brief as "the Hendrixes" unless otherwise noted.

Initially, Lots 26 and 27 were platted in the Glen Haven Subdivision Replat dated April 20, 1977. (E19). In more recent times, the Glen Haven Subdivision Replat was further replated into the KaroVan Addition owned by the Hendrixes through their entities KACH 510, LLC and Glenhaven Subdivision Utility Service, LLC (E20) and the Kortmeyer Addition Replat, owned by the Kortmeyers. (E16).

The Kortmeyers purchased Lot 27 in 1990. (137:5-8). Lot 26, which is the adjacent lot to the west, was owned by the Carroll family from 1990 to 2018. (137:9-17). In 2018, Lot 26 was purchased along with the other remaining lots in the Glenhaven subdivision by the Hendrixes and their various companies. (157:7-13). In 2021, the parties obtained surveys and discovered that a retaining wall built by the Kortmeyers was located 7.10 feet of the western boundary of Lot 27 and on Lot 26. (74:20-75:18).

At some point after the Kortmeyers moved onto Lot 27 in 1990, someone moved a trailer onto Lot 26. (97:23-98:4). The trailer was eventually owned by Betty Jackson who lived as the Kortmeyers' neighbor. (98:8-99:2). Mr. Kortmeyer testified that he and his wife purchased the trailer from Ms. Jackson for back taxes and began using Lot 26 which was still owned by the Carolls. (Id.). At trial, Mr. Kortmeyer testified that Ms. Jackson lived in the trailer next door until 1998. (Id.). Thereafter, the Kortmeyers purchased it and began using the lot. (Id.).

Mr. Kortmeyer acknowledged that he paid lot rent on Lot 26 from 2009 forward, first to the Carolls and then to the Hendrixes.

(140:15-141:6) (112:22-113:19). This was in recognition of a prior lawsuit between the Kortmeyers and the Carolls which found that the Kortmeyers owed back rent to the Carolls for their use of Lot 26 (known as Lot 29 in the Court of Appeals Opinion). (E44).

The Kortmeyers placed the retaining wall on Lot 26 in 2004 and added a "front garden" area in 2003. (141:7-15). Prior to 2004, the Kortmeyers testified that they maintained the disputed property by weeding and mowing it. (141:16-24). The Kortmeyers adduced no other evidence, other than ordinary lawn maintenance, of their use of any disputed portion of Lot 26 prior to 2003/2004.

SUMMARY OF THE ARGUMENT

The analysis and resolution of the Kortmeyers' adverse possession claim breaks down into two distinct periods: (i) from 1990 when the Kortmeyers purchased Lot 27 until approximately 2004 when they put in their retaining wall and (ii) from approximately 2004 to 2021.

The undisputed facts show that the Kortmeyers rented Lot 26 from the Hendrixes and their predecessors in title from at least 2008/2009, and the evidence further supports a finding that their use of Lot 26 was permissive even before they paid formal rent. Nebraska law is clear that a tenant cannot adversely possess against a landlord because the tenant's use is deemed permissive. *See, e.g. Bender v. James*, 212 Neb. 77, 81 (1982); *Koch v. Dakota Cnty.*, 151 Neb. 506, 508–09 (1949); *Carson v. Broady*, 56 Neb. 648 (1898). In other words, a tenant cannot satisfy the "adverse" element of the five-part test for adverse possession.

Thus, for the Kortmeyers to establish adverse possession, they must show that they satisfied all five elements of adverse possession in a continuous 10-year period prior to when they began leasing Lot 26. The Kortmeyers failed to carry this burden because the only evidence they adduced was ordinary lawn maintenance, which cannot support a

claim of adverse possession. *See, e.g. Poullos v. Pine Crest Homes, LLC*, 293 Neb. 115 (2016).

Finally, although not ruled upon by the District Court, the Kortmeyers' adverse possession claim also fails because they never presented a legal description of the portion of Lot 26 they claim to have "maintained" prior to the 2004 retaining wall installation.

Because the Kortmeyers failed to maintain their burden of proof for adverse possession, the District Court properly dismissed their claims and quieted title in favor of the Hendrixes.

ARGUMENT

I. THE KORTMEYERS FAILED TO ESTABLISH THE ELEMENTS OF ADVERSE POSSESSION.

Simply put, the Kortmeyers failed to carry their burden of proof to establish title to a portion of Lot 26 by adverse possession. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for a statutory period of 10 years. *Siedlik v. Nissen*, 303 Neb. 784, 791 (2019).

A claimant of title by adverse possession must show the extent of his or her possession, the exact property which was the subject of the claim of ownership, that his or her entry covered the land up to the line of his or her claim, and that he or she occupied adversely a definite area sufficiently described to found a verdict upon the description. This standard requires that the claimant provide to the trial court a precise legal description rather than general descriptions based on landmarks. *Id.* at 794 (citations omitted).

II. A TENANT CANNOT ADVERSELY POSSESS AGAINST THEIR LANDLORD.

The Kortmeyers fail the "adverse" element of their claim to a portion of Lot 26 because their use of Lot 26 was permissive. Beginning

in about 2008/2009, the Kortmeyers began leasing Lot 26 from the Hendrixes' predecessors in interest. And, Nebraska law is clear that a tenant cannot adversely possess against a landlord because the tenant's use is deemed permissive. "It is an ancient and well settled rule of law that a tenant cannot, while occupying the premises, deny his landlord's title." *Bender v. James*, 212 Neb. 77, 81 (1982) (quoting *Carson v. Broady*, 56 Neb. 648 (1898)).

Thus, with relation to the Kortmeyers' installation of a retaining wall and garden beds in 2003/2004, they cannot establish the requisite 10-year period for adverse possession.

Moreover, the evidence at trial also tends to show that the installation of the retaining wall and garden beds was itself permissive. The prior resident of Lot 26 was Betty Jackson, who was friends with the Kortmeyers. Mrs. Kortmeyer testified that "Betty and I planted trees together" on Lot 26. (138:11-17). Mrs. Kortmeyer also testified that they bought Ms. Jacksons trailer and evicted "drug dealers" in around 2004-2006. (139:12-24).

Most important, Mrs. Kortmeyer admitted that Richard Caroll "just **allowed us** to take care of [Lot 26] because he was kind of in trouble for letting the squatters be there, so we took care of it. In the course of one lawsuit it was added that they wanted to charge back $85 for that lot **and so we agreed at that point**." (140:3-9) (emphasis added).

Thus, even though the Kortmeyers began paying formal rent for Lot 26 in 2008/2009, their earlier use of Lot 26 was permissive. The Carolls allowed the Kortmeyers to use Lot 26 in exchange for keeping the premises free from squatters.

Because the Kortmeyers' use of Lot 26 was permissive, they cannot establish title by adverse possession based on the installation of a retaining wall in approximately 2004.

III. ORDINARY LAWN MAINTENANCE CANNOT ESTABLISH ADVERSE POSSESSION.

The Kortmeyers also failed to establish the "notorious" element of adverse possession for their pre-2004 uses of Lot 26.

The problem for the Kortmeyers is that "Acts of routine yard maintenance, **without more**, are not sufficiently notorious to warn the titleholder that another is claiming or using the land for his own purpose. Something more than a neighbor watering and mowing over the property line is needed to alert a reasonable owner that his title is in danger and he must take steps to protect his interest." *Poullos v. Pine Crest Homes, LLC*, 293 Neb. 115, 121 (2016) (emphasis added). *See also Siedlik v. Nissen*, 303 Neb. 784 (2019).

In this case, the Kortmeyers failed to adduce evidence of "something more" than ordinary, routine lawn maintenance for their acts of possession prior to the installation of the retaining wall in 2004. The most they did was "maintain" it, as illustrated by Mrs. Kortmeyer's cross-examination:

> Q: The 13 years that you lived there after you purchased Lot 27, you didn't do anything to occupy that 7 feet of Lot 26?
>
> A: Yes, we did. We maintained it.
>
> Q: You maintained it because your friend Betty Jackson was living there?
>
> A: We maintained it all the time. We maintained it from the day we moved in. **We mowed it, took care of it, weeded it**.

(141:16-24) (emphasis added). Mr. Kortmeyer also testified that they "maintained" Lot 26. (77:13-23).

Moreover, even these ordinary acts of lawn maintenance were apparently permissive. As noted above, the Kortmeyers were friends with Betty Jackson, who lived on Lot 26 in the 1990s, and that they "planted trees together." (138:11-17). And, as noted above, Mrs.

Kortmeyer admitted that Richard Caroll "just allowed" the Kortmeyers to take care of Lot 26. (140:3-9).

As a matter of law, these ordinary acts of lawn maintenance are insufficiently "open and notorious" to support a claim of adverse possession.

IV. THE KORTMEYERS FAILED TO PROVIDE A LEGAL DESCRIPTION FOR THE PROPERTY THEY CLAIM TO HAVE "MAINTAINED."

Although the District Court did not make a finding on this point, the Kortmeyers' adverse possession claim also fails because they failed to provide a legal description for the land they claim to have "maintained" prior to 2004.

"A claimant of title by adverse possession must show the extent of his or her possession, the exact property which was the subject of the claim of ownership, that his or her entry covered the land up to the line of his or her claim, and that he or she occupied adversely a definite area sufficiently described to found a verdict upon the description. This standard requires that the claimant provide to the trial court a precise legal description rather than general descriptions based on landmarks." *Siedlik v. Nissen*, 303 Neb. 784, 794 (2019) (citations omitted).

At trial, the Kortmeyers claimed adverse possession based on the location of the retaining wall, but this wall was not in existence until 2004, and thus was not in existence for a continuous 10-year period before the Kortmeyers began leasing Lot 26 or otherwise permissively using the lot. The Kortmeyers provided no legal description for the portion of Lot 26 they claim to have "maintained" prior to 2004. Accordingly, the Kortmeyers claim for adverse possession fails for lack of a legal description.

CONCLUSION

For the foregoing reasons, the Hendrixes respectfully request this Court affirm the Judgement and Order of the District Court.

Dated: March 28, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word count and typeface requirements set forth in NEB. CT. R. § 2–103. This brief was prepared using Microsoft Word version 2502 (Build 18526.20168 Click-to-Run) and contains 2,555 words (2,618 words in total less the 63 words in this Certificate of Compliance).

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Certificate of Service

I hereby certify that on Friday, March 28, 2025 I provided a true and correct copy of this *Brief of Appellees Hendrix et al* to the following:

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