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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190916

Howard Ross and Mary Dunne

v.

Clark Property Management, LLC

**Appeal from Madison Circuit Court
(CV-19-900329)**

THOMPSON, Presiding Judge.

Howard Ross and Mary Dunne appeal a judgment entered by the Madison Circuit Court ("the trial court") quieting title to certain real

2190916

property in Clark Property Management, LLC ("Clark Property"). We dismiss the appeal insofar as it is asserted on behalf of Dunne and affirm the trial court's judgment.

Facts and Procedural History

In 2003, Ross purchased a several-acre parcel of undeveloped land in Huntsville ("the property") at a tax sale and received a tax-sale certificate. In 2007, Ross received a tax deed for the property. In 2008, Dunne purchased the property at a tax sale and received a tax-sale certificate. In 2009, the State acquired the property at a tax sale and Robert Clark, who by profession purchases tax-sale properties, subsequently, purchased the tax-sale certificate for the property. On June 25, 2016, Clark was issued a tax deed for the property, and on June 29, 2016, Clark, the sole member and manager of Clark Property, transferred the property to Clark Property.

On February 14, 2019, Clark Property filed a complaint in the trial court to quiet title to the property. Ross and Dunne, as interested parties, answered, denying that the State had acquired title to the property in 2009, that Clark had acquired title to the property in 2016,

2190916

that Clark Property or its predecessor in title has been in actual peaceable possession of the property since 2009, that Clark Property's title is superior to their claims to the property, and that Clark Property or its predecessor in title has possessed the property against all other claims of right for more than three years. Neither Ross nor Dunn sought to redeem the property.

On May 26, 2020, the trial court conducted a trial. Clark Property appeared with counsel; Ross appeared pro se; Dunne appeared pro se, but because of Dunne's health issues and her fear of catching COVID-19, the trial court did not require her to attend in person. The only issue presented to the trial court for determination was whether Clark Property had adversely possessed the property for the requisite three-year period so as to cut off any redemption rights Ross or Dunne possessed. At trial, Clark testified that he and Clark Property had exercised possession, ownership, and dominion over the property, valued at \$34,100, by mowing or having mowed the property every other week for 9 months of each year since 2011 at a cost of \$4,050 per year; that he and Clark Property had paid the property taxes (\$337.56 per year) on the property every year

2190916

since 2010; that he and Clark Property had removed storm debris from the property in 2011, 2012, and 2019; that he had discussed with entities opportunities for developing the property; that he had discussed the property's zoning with the City of Huntsville; and that he or Clark Property has been in possession of the property since 2009. Clark further testified that he had not received a demand for lawful charges or redemption from Ross, Dunne, or any other person or entity. On cross-examination, Clark admitted that he had not used the property for "personal purposes."

Ross testified that the property appeared to him to be a vacant lot, stating: "There was nothing I saw that would indicate someone was using it or there was any particular ownership of the property." He admitted that since 2008 he had not paid the taxes on the property, had not mowed the grass or removed debris on the property, had not sought to develop the property, and had not done anything to exercise any sort of dominion or control over the property.

The trial court admitted into evidence the relevant deeds to the property as well as a photograph of the property. The property, which

2190916

appears to consist of 2.25 acres, is bordered on two sides by streets, on one side by several homes in a neighboring subdivision, and on one side by another vacant lot. The property is undeveloped and contains three or four clumps of trees surrounded by grass. From a map of the general area submitted by Clark Property and admitted into evidence, there appear to be several vacant lots in the area.

On June 3, 2020, the trial court, after considering the ore tenus testimony of the witnesses and the other evidence, entered a judgment finding that Clark Property had adversely possessed the property and quieting title in Clark Property. In its judgment, the trial court found that, in 2009, the property had been sold to the State pursuant to a tax sale; that Clark Property's interest in the property arises from the State's interest in the property; that, in 2016, Clark Property became the owner of the property via a warranty deed issued by Clark; that Ross's interest in the property is pursuant to a 2007 tax deed; that Dunne's interest in the property is pursuant to a 2008 tax-sale certificate; and that, since 2009, Clark Property or its predecessor in title has adversely possessed the property. In light of its findings, the trial court held that Clark

2190916

Property is vested with all right, title, and interest in the property and that any other party is divested of any right, title, or interest in the property.

On July 2, 2020, Ross and Dunne each filed, pursuant to Rule 59, Ala. R. Civ. P., a "motion to vacate judgment and grant new trial," arguing that Clark Property is not entitled to clear title to the property because it did not present sufficient evidence of adverse possession of the property for at least three years. On July 16, 2020, the trial court denied Ross's motion and issued an amended judgment, clarifying that Dunne had not been "physically" present in the courtroom because of the COVID-19 pandemic. Dunne's motion was denied by operation of law on September 30, 2020. See Rule 59.1, Ala. R. Civ. P.

On August 25, 2020, Ross and Dunne filed a joint notice of appeal to the Alabama Supreme Court,¹ and on November 3, 2020, that court

¹Pursuant to Rule 4(a)(5), Ala. R. App. P., the notice of appeal as to Dunne was held in abeyance pending the trial court's timely ruling on, or the denial by operation of law of, her Rule 59 motion challenging the June 3, 2020, judgment and, thus, became effective on September 30, 2020.

2190916

transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

Standard of Review

" 'Where ore tenus evidence is presented to the trial court, a presumption of correctness exists as to the court's findings of fact. This presumption is especially applicable in cases involving claims of adverse possession, because the evidence in such cases is usually difficult to assess from the vantage point of the appellate court. Unless it is clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence, the trial court's determination of fact will not be disturbed. Gaston v. Ames, 514 So. 2d 877, 878 (Ala. 1987). However, when the trial court improperly applies the law to the facts, no presumption of correctness exists as to the court's judgment. Gaston, supra.'

"Brackin v. King, 585 So. 2d 37, 40 (Ala. 1991) (some citations omitted). Also, as the supreme court stated in Thomas v. Davis, 410 So. 2d 889 (Ala. 1982):

" '[T]he trier of fact, the trial court without a jury, unlike an appellate court later reviewing the matter from a written record, occupies a position of peculiar advantage enabling it to see and hear firsthand the evidence as it is presented. From that vantage point the trier of fact can observe the demeanor of the witnesses, listen to the inflections and intonations of their voices during oral testimony, and study their eyes, facial expressions,

2190916

and gestures -- all of these sensory perceptions which play a critical role in the factfinder's determination of which witnesses are to be afforded credibility when conflicting testimony is given. Consequently, this court will rarely disturb the judgment of the trial court in a boundary line dispute or adverse possession case which turns on issues of disputed facts.'

"Id. at 892."

Kennedy v. Conner, 291 So. 3d 867, 876 (Ala. Civ. App. 2019).

Analysis

A pro se litigant may represent only himself or herself before a trial court or an appellate court. See § 34-3-6(a), Ala. Code 1975. Ross and Dunne appear pro se before this court. Ross and Dunne executed and filed a joint notice of appeal. On May 30, 2020, Ross, acting pro se and in compliance with Rule 31, Ala. R. App. P, filed an appellant's brief with the clerk of this court. Dunne, however, did not file an appellant's brief in compliance with Rule 31. Because Ross cannot represent Dunne and Dunne did not file a brief with this court in compliance with Rule 31, the appeal insofar as it is asserted on behalf of Dunne, is dismissed. See Rule

2190916

2(A), Ala. R. App. P. (providing for dismissal of an appeal if the appellant fails to file a brief in compliance with Rule 31).

Ross contends on appeal that the trial court's finding that Clark Property or its predecessor had adversely possessed the property for more than three years is not supported by clear and convincing evidence. Specifically, he argues that the evidence of adverse possession is insufficient because the evidence indicates that Clark Property and its predecessor mowed the grass only to avoid liens by the City of Huntsville but did not use the property personally. Accordingly, he reasons that, because Clark Property did not present evidence of "the posting of signs, erection of fences, staking or surveying of the boundaries, making of improvements, bailing of hay, cultivation, or pasturing of livestock," the evidence of adverse possession of the property by Clark Property and its predecessor is not clear and convincing.

A party claiming adverse possession must prove by clear and convincing evidence that there was " 'hostile possession of the land under a claim of right that was actual, exclusive, open, notorious and continuous' " for the required period. Kennedy, 291 So. at 876 (quoting

2190916

Cambron v. Kirkland, 287 Ala. 531, 534-35, 253 So. 2d 180, 182 (1971)).

Clear and convincing evidence has been defined as

"[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

§ 6–11–20(b)(4), Ala. Code 1975.

In Williams v. White, 207 So. 3d 59, 64 (Ala. Civ. App. 2016), this court noted that the elements of adverse possession are possession for the requisite period that is exclusive, open, and notorious. In Kennedy, 291 So. 3d at 877, this court noted that a trial court must consider the totality of the possessory acts of one claiming adverse possession of property to determine objectively whether the claimant indicated to the world that he or she claimed ownership of the property. See Chastang v. Chastang, 141 Ala. 451, 37 So. 799 (1904)(holding that acts of a possessory nature committed by the claimant of adverse possession are to be considered collectively rather than independently in determining the sufficiency of the claimant's possession).

2190916

In support of his argument, Ross cites Crowden v. Grantland, 510 So. 2d 238 (Ala. 1987), and Johnson v. Coshatt, 591 So. 2d 483 (Ala. 1991). In Crowden, the only evidence of adverse possession of the disputed property was testimony from the claimant that he had paid taxes on the disputed property and had occasionally mowed the property. Recognizing that sporadically going upon the disputed property does not establish exclusive possession and that the payment of taxes must be accompanied by possession that is actual, open, notorious, hostile, exclusive, and continuous to demonstrate adverse possession, this court affirmed the trial court's judgment determining that the claimant had not presented sufficient evidence of adverse possession.

In Johnson, the Alabama Supreme Court recognized that the elements of "open" and "notorious" possession are established when the claimant's " 'acts of dominion and control over the property were of such character and distinction as would reasonably notify the landowner that an adverse claim [was] being asserted against his land.' " 591 So. 2d at 484 (quoting Strickland v. Markos, 566 So. 2d 229, 232 (Ala. 1990)). The Johnson court held that the claimant's evidence indicating that he had cut

2190916

the grass on the disputed strip of property for almost 40 years was not sufficient to establish adverse possession because the evidence indicated that the claimant had cut the grass out of convenience and for aesthetic purposes. Additionally, evidence was presented indicating that throughout the years the property owner's predecessors had used the disputed property. Therefore, the Johnson court held that

"the single undisputed fact that [the claimant] and the tenants of his predecessor in title had cut the grass on the disputed strip for almost 40 years was insufficient, as a matter of law, to establish that the [property owners] and their predecessors in title had been placed on notice that an adverse claim had been asserted against their property...."

591 So. 2d at 485.

In Hand v. Stanard, 392 So. 2d 1157 (Ala. 1980), our supreme court addressed whether a claimant had acquired through adverse possession title to an undeveloped beachfront lot. At trial, the claimant presented evidence indicating that the lot had been assessed in his name, that he had paid taxes on it for approximately 10 years, that he had had the lot surveyed and the corners marked, that he had visited the lot approximately 4 or more times a year, that he had posted "No

2190916

Trespassing" signs on the lot, that he and his friends had picnicked on the lot, that he had cleared trash off the lot, and that he had asked neighbors not to dump trash on the lot. Other evidence, however, was presented indicating that neighbors who lived near the lot had not seen the claimant on the property. The trial court held, based on the claimant's acts of ownership over the lot, that the claimant owned the lot by adverse possession. Recognizing that "[t]he acts of ownership and dominion necessary for adverse possession of a vacant lot need not and cannot be the same as with respect to a lot covered with valuable improvements or on which there is a residence" and that "[l]and need only be used by an adverse possessor in a manner consistent with its nature and character -- by such acts as would ordinarily be performed by the true owners of such land in such condition," 392 So. 2d at 1160, the supreme court affirmed the trial court's judgment holding that the claimant's acts of possession were those of an owner of an undeveloped beachfront lot.

In this case, although Ross claims that the only evidence of Clark Property's acts of ownership of the property is the evidence indicating that Clark Property and its predecessor mowed or had others mow the grass,

2190916

a review of the record establishes that Clark Property and its predecessor performed several acts of ownership of the property and that their acts of ownership, i.e., their use of the property, are consistent with the nature and character of acts that would be performed by the true owners of a lot in such condition. The property is a vacant lot with a few clumps of trees surrounded by grass. Since 2009, Clark Property or its predecessor has kept the grass cut, cleared debris after storms, and paid the taxes on the property. The testimony indicated that Clark Property and its predecessor have maintained the property as any owner of a vacant lot that has not been developed would. Additionally, Clark Property or its predecessor had explored opportunities to develop the property by approaching the City of Huntsville concerning the property's zoning, and by contacting various entities about its development. All of these acts taken by Clark Property or its predecessor, when considered in their totality, are consistent with the expected use of a vacant lot by its owner and provide clear and convincing evidence of Clark Property's adverse possession of the property. Cf. May v. Campbell, 470 So. 2d 1188, 1190

2190916

(Ala. 1985)(holding that the evidence "collectively" was sufficient to support the claimant's adverse possession of rural timberland).

Ross also contends that Clark Property failed to demonstrate that the acts of possession of the property performed by Clark Property and its predecessor were open and notorious so that a reasonably alert owner would be put on notice of the adverse possession. Specifically, he argues that because he was not notified of the conveyance of the interest of the State to Clark pursuant to § 40-10-132 through 40-10-134, Ala. Code 1975, and because he did not receive any notice or indication that Clark Property and its predecessor, instead of the City of Huntsville or the State, was mowing the grass, Clark Property and its predecessor's possession of the property was not open and notorious.

Contrary to Ross's assertion, Clark Property and its predecessor's acts of possession of the property were in accord with the acts of an owner who has purchased a vacant, undeveloped lot through a tax sale. Ross, who had an interest in the property due to his earlier purchase of the property through a tax sale, knew no later than 2008 that the property was subject to a tax sale and in the possession of the State or another

2190916

individual. It was not incumbent upon Clark Property or its predecessor to post a sign stating that the property had been purchased. Because Clark Property and its predecessor's acts of possession of the property were in accord with the acts of possession of the purchaser of a vacant lot via a tax sale, Clark Property and its predecessor's possession of the property was open and notorious. See Clanahan v. Morgan, 268 Ala. 71, 80, 105 So. 2d 429, 437 (1958)(quoting Goodson v. Brothers, 111 Ala. 589, 595-96, 20 So. 443, 444 (1985))(emphasis omitted)(" 'Openness and notoriety and exclusiveness of possession are shown by such acts in respect of the land in its condition at the time as comport with ownership -- such acts as would ordinarily be performed by the true owner in appropriating the land or its avails to his own use, and in preventing others from the use of it as far as reasonably practicable; and near akin to these are the acts evidencing the element of hostility toward all the world. ...' ").

"[W]hen we review a trial court's finding based on evidence the trial court received ore tenus, we do not reweigh the evidence. Mollohan v. Jelley, 925 So. 2d 207, 210 (Ala. Civ. App. 2005) (' "Where a trial court receives ore tenus evidence, [t]his court is not permitted to reweigh the evidence on appeal and

substitute its judgment for that of the trial court." ' (quoting Amaro v. Amaro, 843 So. 2d 787, 790-91 (Ala. Civ. App. 2002))). If the trial court's finding regarding an adverse-possession issue or a boundary-line issue is based on evidence it received ore tenus, we must affirm that finding if it is supported by credible evidence. See Bohanon v. Edwards, [970 So. 2d 777 (Ala. Civ. App. 2007)]; and Carr v. Rozelle, 521 So. 2d 26, 28 (Ala. 1988)(" 'A judgment of the trial court establishing a boundary line between coterminous landowners need not be supported by a great preponderance of the evidence; the judgment should be affirmed if, under any reasonable aspect of the case, the decree is supported by credible evidence." Graham v. McKinney, 445 So. 2d 892, 894 (Ala. 1984).')."

Holifield v. Smith, 17 So. 3d 1173, 1179 (Ala. Civ. App. 2008).

Accordingly, because credible evidence of Clark Property and its predecessor's acts of ownership of the property for over three years supports the trial court's determinations that Clark Property and its predecessors actions amounted to adverse possession, and that, accordingly, Clark Property owns the property, the trial court's judgment is due to be affirmed.

Clark Property, in its brief, contends that this case is now moot and, therefore, that Ross's appeal constitutes a request for an advisory opinion. According to Clark Property, because Ross did not submit a motion,

2190916

claim, or counterclaim for judicial redemption before trial, his right to judicial redemption expired.

In First Properties, L.L.C. v. Bennett, 959 So. 2d 653, 654 (Ala. Civ. App. 2006), this court summarized Alabama's redemption law, stating:

"Under Alabama law, after a parcel of property has been sold because of its owner's failure to pay ad valorem taxes assessed against that property (see § 40-10-1 et seq., Ala. Code 1975), the owner has two methods of redeeming the property from that sale: 'statutory redemption' (also known as 'administrative redemption'), which requires the payment of specified sums of money to the probate judge of the county in which the parcel is located (see § 40-10-120 et seq., Ala. Code 1975), and 'judicial redemption' under §§ 40-10-82 and 40-10-83, Ala. Code 1975, which involves the filing of an original civil action against a tax-sale purchaser (or the filing of a counterclaim in an ejectment action brought by that purchaser) and the payment of specified sums into the court in which that action or counterclaim is pending. See generally William R. Justice, 'Redemption of Real Property Following Tax Sales in Alabama,' 11 Cumb. L. Rev. 331 (1980–81)."

The limitations period for statutory or administrative redemption is three years, see Henderson v. Seamon, 261 So. 3d 1203, 1206 (Ala. Civ. App. 2018). Because Clark Property's predecessor in interest bought the tax-sale certificate from the State in 2009, Ross's right to statutory or administrative redemption expired in 2012. Therefore, the only remedy

2190916

available to Ross at the time Clark Property filed its complaint to quiet title was judicial redemption under §§ 40-10-82 and -83.

In Hand, our supreme court discussed these two statutes, stating:

"Ala. Code 1975, § 40-10-82, establishes a 'short statute of limitations' for tax deed cases. The 'short period' begins to run when the purchaser is entitled to demand a tax deed and is in adverse possession of the land. ... The invalidity of the tax sale is immaterial if adverse possession is proved for the three-year period. ...

"The purpose of § 40-10-83 is to preserve the right of redemption without a time limit, if the owner of the land seeking to redeem has retained possession. This possession may be constructive or scrambling and, where there is no real occupancy of the land, constructive possession follows the title of the original owner and can only be cut off by the adverse possession of the tax purchaser"

392 So. 2d at 1160 (emphasis added).

In support of its argument that Ross has not presented a justiciable controversy, Clark Property cites to Taylor v. Gray, 90 So. 2d 778 (Ala. 1956). In Taylor, the supreme court held that a complaint to quiet title did not show a justiciable controversy because the respondent did not claim any right, title, or interest in the land and did not deny the complainants' title or their right to possession of the land.

2190916

This case is distinguishable from Taylor because, although Ross has not initiated a redemption action, a determination as to whether Clark Property or its predecessor adversely possessed the property for the requisite three-year period was necessary to extinguish any right to redemption Ross may have had. Ross's inability to seek redemption has been established by the trial court's judgment, which we are affirming, determining that Clark Property and its predecessor adversely possessed the property for the requisite three years so as to cut off Ross's redemption rights. If the trial court or this court had determined that Clark Property had not established adverse possession of the property for the requisite three-year period, then the limitations period for Ross to maintain an action for judicial redemption would not have expired. In other words, Ross was an interested party, i.e., arguably a potential owner of the property who could seek redemption, and his interest in the property could be cut off only by a determination that Clark Property and its predecessor had adversely possessed the property for the requisite period. Consequently, Ross presented a justiciable controversy -- whether Clark

2190916

Property or its predecessor adversely possessed the property for three years -- for the trial court and this court to address.

Conclusion

Based on the foregoing, this appeal is dismissed in part and the trial court's judgment is affirmed.

APPEAL DISMISSED IN PART; AFFIRMED.

Moore, Edwards, Hanson, and Fridy, JJ., concur.