COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2827 **Cir. Ct. No. 2013CV908**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

EUGENE H. VANDER HEIDEN, JOAN M. VANDER HEIDEN, DAVID E. VANDER HEIDEN, DANIEL J. VANDER HEIDEN, DUANE M. VANDER HEIDEN AND DEAN P. VANDER HEIDEN,

PLAINTIFFS-RESPONDENTS,

V.

VERHASSELT BROS., LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Outagamie County: GREGORY B. GILL, Judge. *Affirmed*.

Before Stark and Hruz, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Verhasselt Bros., LLC, appeals a grant of summary judgment in favor of Eugene, Joan, David, Daniel, Duane, and Dean

Vander Heiden (collectively, "the Vander Heidens") regarding their adverse possession action. Verhasselt also appeals the circuit court's denial of motions for reconsideration and relief from judgment. We affirm the circuit court's judgment and orders.

BACKGROUND

¶2 The Vander Heidens own a plot of land in the Town of Oneida. Eugene Vander Heiden purchased the property in 1963 and understood the lot extended to a barbed-wire fence boundary on the north side. Grace Hockers owned the adjacent plot to the north of the Vander Heidens from 1967 to 2012. Hockers and the Vander Heidens never met during this timespan, as Hockers leased her land to the Evers family shortly after her purchase until she sold the property in 2012. The Vander Heidens maintained the fence from 1963 until the mid-1980s, when Eugene Vander Heiden and Gerald Evers agreed to remove it and leave in its place a small grass strip to continue serving as the property line. The Vander Heidens cultivated crops up to this line, and Evers installed a driveway adjacent to the line.

¶3 Hockers sold her property to Verhasselt in 2012. After surveying the property, Verhasselt claimed a portion of land on the Vander Heidens' side of the long-standing property line, which prompted the Vander Heidens to file this action. The circuit court granted summary judgment for the Vander Heidens, after which Verhasselt filed motions for reconsideration and relief from judgment. The motions were denied, and Verhasselt now appeals.

STANDARDS OF REVIEW

¶4 We review summary judgment de novo. ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. The burden of proof for adverse possession is on the party asserting the claim, and his or her evidence must be "clear and positive and must be strictly construed against the claimant." ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979).

¶5 We review a circuit court's decision on motions for reconsideration and relief from judgment for an erroneous exercise of discretion. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶¶44, 48, 275 Wis. 2d 397, 685 N.W.2d 853; ***Schauer v. DeNeveu Homeowners Ass'n***, 194 Wis. 2d 62, 70, 533 N.W.2d 470 (1995). A circuit court decision that requires the exercise of discretion will be affirmed on appeal if there appears to be any reasonable basis for the decision. The court of appeals will look for reasons to sustain the circuit court's exercise of discretion. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

DISCUSSION

A. Summary Judgment

¶6 Verhasselt argues there were genuine issues of material fact with respect to the requirements for adverse possession. WISCONSIN STAT. § 893.25[1] codifies the common law elements of adverse possession, which in this case require "hostile, open and notorious, exclusive and continuous" physical

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

possession for a period of twenty years. *See* ***Wilcox v. Estate of Hines***, 2014 WI 60, ¶20, 355 Wis. 2d 1, 849 N.W.2d 280 (citation omitted). Further, under Wisconsin law, the adverse possessor must be in "actual continued occupation under claim of title, exclusive of any other right," and must either "protect[]" the adversely possessed land by a "substantial enclosure" or must cultivate and improve the land "usually." *See* WIS. STAT. § 893.25(2)(a), (b).

¶7 The affidavits of Eugene Vander Heiden and Gerald Evers set forth facts sufficient to establish a prima facie showing of adverse possession. These facts include, inter alia, the existence of a fence on the now-disputed property line for more than twenty years and, following removal of the fence, the existence of a grass strip that was respected as the property line for an additional twenty-plus years. Verhasselt produced no specific evidentiary facts during summary judgment proceedings to rebut the prima facie case and create a *material* issue of fact. It is well established that "evidentiary matters in affidavits accompanying a motion for summary judgment are deemed uncontroverted when competing evidentiary facts are not set forth in counteraffidavits." ***WEPCO v. California Union Ins. Co.***, 142 Wis. 2d 673, 684, 419 N.W.2d 255 (Ct. App. 1987). Moreover, the adverse possession of twenty years or more vested title in the Vander Heidens. *See* ***Harwick v. Black***, 217 Wis. 2d 691, 701, 580 N.W.2d 354 (Ct. App. 1998). Many of Verhasselt's arguments concern the nature and extent of the adverse possession after a twenty-year period had elapsed. Thus, summary judgment was appropriate.

¶8 Verhasselt also argues that summary judgment facially violates both the United States and Wisconsin Constitutions' respective rights to a jury trial. This argument is meritless; the constitutional right to a jury trial does not prevent the grant of summary judgment when there are no genuine issues of material fact

that require a trial. *See* ***Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.***, 2008 WI App 116, ¶39, 313 Wis. 2d 93, 756 N.W.2d 461 (calling such contentions, with respect to the Wisconsin Constitution, "frivolous").

B. Motions for reconsideration and relief from judgment

¶9 Verhasselt next argues its motions for reconsideration and relief from judgment were improperly denied. Courts have broad discretion in granting relief from judgment. *See* WIS. STAT. § 806.07(1). To prevail on a motion for reconsideration, the movant must establish a manifest error—the "wholesale disregard, misapplication, or failure to recognize controlling precedent"—or present newly discovered evidence. ***Koepsell's***, 275 Wis. 2d 397, ¶44.

¶10 Verhasselt produced affidavits in support of the above motions; however, it advanced no legitimate reason as to why the affidavits and evidence therein could not have been presented during the summary judgment proceedings. The affidavits therefore did not constitute new evidence and were properly disregarded by the circuit court. ***Id.***, ¶46 (party may not use motion for reconsideration to introduce evidence that was obtainable at original summary judgment phase); *see also* ***Eichenseer v. Madison-Dane Cnty. Tavern League, Inc.***, 2006 WI App 226, ¶27, 297 Wis. 2d 495, 725 N.W.2d 274 (affidavits failing to comply with civil procedure requirements must be disregarded). Furthermore, the circuit court was not presented with a legitimate reason to believe it manifestly erred with respect to its summary judgment order. The circuit court thus properly exercised its discretion in denying Verhasselt's motions for reconsideration and relief from judgment.

C. Applicability of WIS. STAT. § 893.33

¶11 Finally, Verhasselt contends the thirty-year recording requirement under WIS. STAT. § 893.33(2) is applicable to this case. The circuit court ruled that the statute did not apply because § 893.33(5) exempts "owners in possession." Eugene and Joan Vander Heiden conveyed the property in 2012 to their four sons and retained a life estate. Verhasselt insists that holders of life estates or remainders in fee simple are not "owners" under § 893.33(5), and that the 2012 conveyance "took away [the Vander Heidens'] right to claim the owner-in-possession exception."

¶12 This argument is underdeveloped, conclusory, and unsupported. We shall therefore not further consider the issue. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).[2]

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] We note, however, that by its plain language, WIS. STAT. § 893.33 "does not apply to any action … by any person who is in possession of the real estate involved as owner at the time the action is commenced." Section 893.33(5). The term "owner" as used in the statute means simply the persons who, either themselves or in privity with others, had possession or dominion over the property during the last twenty years, if not under color of title. *See* ***O'Neill v. Reemer***, 2003 WI 13, ¶28, 259 Wis. 2d 544, 657 N.W.2d 403 (citation omitted). We perceive no reason within the statute to conclude the use of the term "owner" in the owner-in-possession exception was intended to exclude holders of life estates and Verhasselt provides no authority for that contention.