District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-1776	E-FILED
Plaintiffs: RICHARD MCLEAN and EDITH STEVENS v. Defendant: DK TRUST and DON KIRLIN	▲ COURT USE ONLY ▲
Attorney for Plaintiff: Kimberly Hult, Esq. *Attorney for Defendant:* William J. Kowalski, Esq. Andrew M. Low, Esq.	Case Number: 06 CV 982 Division 6 Courtroom Q
CORRECTED ORDER	

This matter is before the Court on Plaintiffs' Motion for Amendment of Judgment Pursuant to Rule 59(a)(4). The Court, having reviewed the Motion, Defendants' Response, and Plaintiffs' Reply, hereby issues the following Order.

This matter involves a claim for adverse possession of a strip of land that lies between lot 51, which is owned by Plaintiffs, and lot 50, which is owned by Defendant Kirlin and the DK Trust. A three day trial to the Court was held, and judgment was entered in favor of the Plaintiffs based upon the description of the boundary of the disputed land which was described in Exhibit 1.

In their Motion Plaintiffs now assert that they are entitled to more property than that which was awarded by the Court. Plaintiffs now claim that the specific description of land that they requested in Plaintiffs' Exhibit 1 does not include all of the property to which they are entitled. Plaintiffs now argue, contrary to the representations made at trial, that Exhibit 1 represents the "midline" rather than the outside line of the path referenced by the parties as "Edie's path." Plaintiffs request that the Court speculate that the boundary description that they provided throughout this case omitted 9 inches of property, and they request the Court to award them additional property.

The Court has thoroughly reviewed the briefs and, once again, the evidence admitted by both parties at trial. The Court makes the following findings of fact and law and denies Plaintiffs motion.

The law of adverse possession in Colorado was enacted into law by the Colorado legislature and set forth in Colorado statute at 38-41-101, et seq., C.R.S. (2006). This body of the law acts to preclude a record title holder to real property who has failed to use reasonable diligence for eighteen (18) years to make future claims to the property where the property has been used by another in an open and notorious fashion and in a manner contrary to the record title holder's interest. It has been extensively interpreted by our appellate courts. Colorado trial Courts are bound by the laws enacted by the legislature and the decisions of the higher Courts.

To prevail on a claim for adverse possession, the Plaintiffs must prove five elements:

(1) actual and exclusive use or possession of the real property;

(2) in an open and notorious manner;

(3) adverse and hostile to the record title holder's interest;

(4) under a claim of right; and

(5) continuously for eighteen years

See, *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989).

> [W]here the claimant has been in possession for the required period, the record owner must show an interruption of some aspect of the possession to defeat the claim; mere assertion of a claim of record ownership is not sufficient. Indeed, the claimant's recognition of the owner's record title while the claimant remains in possession strengthens the adverse possession claim. *Schoenherr v. Campbell*, 172 Colo. 306, 472 P.2d 139 (1970).

The clear language of the statute as drafted by the Colorado Legislature and the appellate decisions mandate that even trespassers in bad faith shall be awarded property if the claimant is able to prove the five elements. The law makes no distinction between rural or urban property; the law makes no distinction between good faith and bad faith possession. This Court *cannot* carve out exceptions to the law; that is the duty of the legislature. This Court is bound to apply *all* statutes and cannot choose which, if any, it does not like.

Moreover, the appellate decisions that this Court *must* follow hold that the payment of taxes or home owner association dues is not sufficient to defeat a claim for adverse possession. The appellate courts have been very clear that . . .

> . . . acts of the record owner that did not include re-entry upon the land with intent to possess it and did not constitute legal action to retake possession of it were insufficient to interrupt the period of adverse possession of plaintiff who continued in actual, hostile possession of the property.

Ocmulgee Properties, Inc. v. Jeffrey, 53 P.2d 665, 667-668 (Colo. App. 2002). The legislature has not enacted any statutory exemption that makes payment of taxes and homeowner association dues a defense to an action for adverse possession of real property as has been done in many other states. Indeed, Defendants had the right to request compensation for back taxes and homeowners association dues and other compensation under a claim of *quantum meruit*, but elected not to do so.

The Court has considered all evidence offered and admitted at trial,[1] including its own observations at two site reviews, the first of which was conducted at the request of both parties.[2] The Court can only consider evidence that was presented at trial, and it was the burden of the parties to bring evidence to the Court in accordance with the mandate of the rules of evidence and civil procedure. This Court will not consider evidence that was not presented at the time of trial.

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[1] See, Court's Minute Order Re: Bench Trial dated July 30, 2007, for a complete itemization of all exhibits offered and admitted at the time of trial.

[2] The Court's first site review was conducted on June 7, 2007, at the request of the parties. Because of the extended period of time between the first day of trial and its conclusion, the Court conducted a second site review on July 26, 2007, in order to review and confirm the findings that it had made on June 7, 2007.

With the exception of Lee Stadelle, the land surveyor hired by Defendants whose testimony was inconsistent with every other witness in this case including his own survey crew, this Court found that all of the witnesses presented by both sides at trial were credible.[3] The Court held that

[3] Defendant Mr. Kirlin was asked whether he recalled walking the lot line between the Plaintiff's lot and the property at issue. He responded "not really, we always walked up and around" on the *other side* of the property. Mr. Kirlin testified that he had never had plans drawn to build a home on lot 50. He stated: "We knew our residence would be on lot 49. We considered selling lot 50." When asked whether he inspected the lot line in dispute, he responded that he had not. He stated that "I relied on the plat." Mr. Kirlin testified that he was unaware of any markers delineating the lot line between lots 50 and 51 prior to 2006. He testified that prior to the current litigation, he had never had any contact with Plaintiffs, he never gave Plaintiffs permission to use his property, and, he never told Plaintiffs to stop using his property. Finally, Mr. Kirlin testified that his wife took care of the maintenance of his property over the twenty-three (23) years that he has owned lots 49 and 50. Mr. Kirlin testified that during that period of time, the weeds have been sprayed once and the perimeter fences have been repaired five or six times.

Mrs. Kirlin, who is not an owner of the disputed property or a defendant in this matter, testified that she had never personally worked on the property. Somewhere between six (6) to ten (10) years earlier, she and her husband had a crew spray for weeds, but she did not know if the spraying was done on the property at issue (lot 50) or on the other adjacent lot (lot 49) that is owned by Don Kirlin and the DK Trust. When asked whether she ever specifically went to the lot at issue here (lot 50) to observe anything, she responded "No, we were always drawn to lot 49," a property not at issue in this case, "where we were always going to build." Ms. Kirlin testified that she and her husband had planned to sell lot 50 to finance the construction of their home on lot 49. She testified that fence repairs were 90% related to the fence along the south side of lot 49, adjacent to the fire road, due to the number of people who used the fire road for hiking. When specifically asked whether she "did anything prior to October of 2006 to stop Plaintiffs from possessing the property," she responded, "no I did not."

Rick Burman, a property manager who managed Shanahan Ridge between February of 2002 until March of 2007, testified that when property management inspections were conducted by himself and the homeowners association, they were only allowed to conduct such inspections from the street, the firelane or open space On cross examination, Mr. Burman admitted that he did not know where the lot line between lots 51 and 50 was, nor did he know where the disputed property on lot 50 was. Finally, Mr. Burman testified that the purpose of these inspections was to observe the condition of subdivision fences.

Bob Hunsinger, a retired builder who has resided in the Shanahan Ridge subdivision since 1985, testified that he participates in bi-annual homeowners association walkthroughs. Mr. Hunsinger also testified that these walkthroughs are conducted from the street. Although Mr. Hunsinger testified that he did not "notice" any paths or stepping stones on lot 50, and that he had no evidence that Plaintiffs were using lot 50, on cross examination, Mr. Hunsinger testified that he has never actually inspected the property, and agreed that there may be things that can not be seen from the street. Mr. Hunsinger also testified that he was familiar with lots 49 and 50, but offered no testimony that he was familiar with the lot line between lots 50 and 51. Finally, like Mr. Burman, Mr. Hunsinger testified that what is being looked for in these walkthroughs is whether there has been some deterioration of the perimeter fences in the subdivision. Mr. Hunsinger agreed that prior to 2006, no fences existed that separated lots 49 from 50 and lot 50 from 51.

The Defendants did not offer any exhibits showing that they performed maintenance on the property at issue. They offered no photographic or satellite imaging that "Edie's path" did not exist. Defendant Kirlin offered a photograph showing a small patch of earth. Defendant Kirlin did not offer photographs showing the absence of the two paths asserted by Plaintiffs. The Defendants offered no evidence whatsoever that the Defendants either told the Plaintiffs to stop trespassing or that they gave them permission to use the land.

Because of Defendants' lack of knowledge about their own land, the Court was left with the testimony of Plaintiffs and their witnesses who consistently said that Plaintiffs had openly used the property for twenty-four (24) years, and the testimony of Defendant Don Kirlin and his wife who admitted that for twenty-two (22) years: (1) they were not aware of the property line between lots 50 and 51; (2) they had not spent any time on the property; (3) they had not "noticed" Plaintiffs' use of their property including a rock retaining wall (that is very obvious), a wood pile, landscaping including a sprinkler system installed in 1996, and two distinct paths; and, (4) they had not met the Plaintiffs nor had they either given Plaintiffs permission to use their property or instructed Plaintiffs to not use the their property. Finally, the Court was left with the testimony of Defendants' witnesses who testified that they had

the witnesses offered by the defense did not *dissuade* the Court from concluding that Plaintiffs had in fact met their burden of proof on their claim for adverse possession. This does not mean that the Court determined that the Defendants' witnesses (with the exception of Mr. Stadelle) were not credible or that their testimony was disregarded. It simply means that the testimony that the Defense offered tended to prove the Plaintiffs' claims rather than the defense.

In ruling on this Motion, the Court continues to weigh this testimony in the same fashion, and finds that none of it supports Plaintiffs' Motion. At trial Defendants conceded that the rock retaining wall was built in 1982, and the testimony concerning the rock retaining wall was that it openly and obviously encroached on the Defendant's property. However, this testimony does not support a claim for the additional land. With respect to the garden, Ms. Braun testified that she helped plant the garden and it was there in 1982. Ms. Mitchell and Mr. Winchester testified that the garden has existed since 1982. Mr. Brett[4] testified that Plaintiffs' use of the property was consistent with their representation. But not one of these witnesses, Plaintiffs' or Defendants', offered any testimony to support Plaintiffs' motion for an additional award. With respect to "Edie's path," Mr. Brett, Tad Kline, Ms. Braun, Mr. Winchester, and Plaintiffs all testified that they utilized the "Edie's path" to access the rear of Plaintiffs' property. Although each of these witnesses testified that they had used both paths for decades, no witness offered testimony about the width of the path.

Further, the Motion is not supported by the exhibits offered and admitted at trial. Plaintiffs' Exhibit 1, was admitted into evidence at trial for the purpose of showing the boundary of the disputed property. Although this path is referenced on Plaintiff's Exhibit 1 as the "approximate centerline of footpath," Plaintiffs represented to the Court through the entire trial that this was the boundary of the disputed property. No evidence was presented at trial that the line delineated on Exhibit 1 was anything other than the boundary of the disputed property. Further, Plaintiffs failed to provide any evidence about the width of "Edie's path."[5] The Court has no information that nine (9) inches is one-half of the width of the path. Plaintiffs proved the elements of adverse possession to a

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not "noticed" Plaintiffs' use of the property during the prescribed period for many of the same reasons as those testified to by Defendant Don Kirlin and his wife.

[4] Steve Brett was Plaintiffs' neighbor from 1983 until almost 2003. Mr. Brett's home was located on the lot immediately adjacent to Lot 49 across the fire road from lot 49. Mr. Brett's home has a clear view of Plaintiffs' home across both of Defendants' lots.

[5] Notably, this path was the subject of a temporary restraining order issued pursuant to Rule 65 of the Colorado Rules of Procedure on October 5, 2006. The purpose of such protective orders is to preserve the evidence relevant to pending litigation, to prevent hostilities between parties, and to preserve the status quo. Such orders are routinely entered at the request of one party at the outset of litigation. The entry of this order did not adversely impact any substantive defense that could have been raised. The adverse possession against these Defendants began in 1984, and the Defendants had until 2002 to take action. Any action by the Defendants in 2006 was four years beyond the statutory deadline and futile.

Subsequent to entry of the temporary restraining order, the parties agreed that neither party would be allowed to utilize the disputed property, including "Edie's Path," pending a final determination of the merits of the case. By doing this, the parties, including Defendants, agreed that the temporary restraining order was appropriate in this case. Specifically, Plaintiffs "agreed not to alter the condition or appearance of the Disputed Tract, although they reserved the right to continue to utilize the Disputed Tract to water and tidy the garden and to access the Disputed Tract." See, Plaintiffs' Trial Brief, page 4, May 18, 2007.

Therefore, by the time this Court conducted its first site review on June 7, 2007, "Edie's Path" had been sitting fallow to the elements for approximately eight months. Yet, it was very distinctive to the Court at that time, and remained so seven weeks later when the Court did a second site inspection on July 30, 2007. It was the Court's conclusion that if "Edie's Path" was a recent creation as suggested by Defendants, it would have been over grown by that time with native vegetation. That was not the case.

preponderance of the evidence and that Exhibit 1 was the boundary, and the Court will not consider new evidence or argument at this time. This evidence, even if true, was certainly available to be presented to the Court, and it was not.

ORDER

1. Plaintiffs' Motion to Amend Judgment is hereby denied because it is not supported by the testimony of the witnesses or evidence at trial.

2. Because the Court was not asked at the time of trial to address the maintenance easement referenced in Defendants response, for the same reasons set forth above, the Court declines to address that issue at this time.

3. Paragraph 1 of the Court's Order dated October 17, 2007, is amended to read:

> The disputed property in this matter is delineated on Plaintiff's Exhibit 1 as a footpath beginning from a point on Hardscrabble Drive approximately three feet south**west** of the **south**eastern most corner of lot 50 in the Shanahan Ridge Six Subdivision, Boulder, Colorado, and continuing in a north westerly semi-circle direction to a point approximately twelve and one tenths (12.1) feet to the south**west** of the north**eastern** corner of lot 50. This footpath was commonly referred to throughout these proceedings as "Edie's Path."

BY THE COURT

November 28, 2007, *nunc pro tunc*, November 27, 2007

James C. Klein,
District Court Judge