Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-480

AUGUST TERM, 2010

Adams Family Properties	}	APPEALED FROM:
	}	
v.	}	Rutland Superior Court
	}	
Shawn Michael Tomasi	}	DOCKET NO. 539-9-06 Rdcv
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Plaintiff Adams Family Properties (AFP) appeals from the trial court's order granting judgment to defendant Shawn Tomasi in this property dispute. We affirm.

The parties are adjoining landowners. In September 2006, AFP filed a declaratory judgment action, asserting that it had acquired the right, through adverse possession or a prescriptive easement, to use certain land between its building and Tomasi's garage. Following a two-day bench trial, the court made the following findings. In May 1969, AFP's predecessor-in-interest, Sallie Adams, purchased a single-family home in Fair Haven, Vermont, as an investment property. Between 1971 and 2005, Adams's son, John, managed the property. In 1986, the property was transferred to AFP. In 2005, Tomasi purchased a lot from Ellen Salvato that adjoined AFP's property. No definitive boundary line between the two properties had been established by the town, nor was a survey introduced at trial.

The court found that between 1971 and 2005, AFP's tenants used the disputed area sporadically. They parked cars there temporarily, engaged in recreation, and performed small maintenance tasks. The court found that these activities did not rise to the level of adverse use. AFP's tenants and members of the Adams family also mowed the disputed area on a limited basis, but they did not plow it during the winter. Tomasi and his predecessors-in-interest did plow the disputed parcel, and the court found that Tomasi and Salvato had used the disputed property for parking and other activities that drew into question AFP's actual use of the land. The court explained that Salvato owned a nursing home across the street from her property, and with her permission, nurses had parked on the disputed area on a regular basis from 1975 to 2002. In sum, the court found no evidence that AFP did anything on the disputed property that had been open, notorious, hostile, and under claim of right. Based on its findings, the court concluded that AFP failed to meet its burden of proof.[*] AFP filed a motion to alter and amend or for a new trial, which was denied. This appeal followed.

AFP challenges the court's findings that: its use of the property was sporadic; that it mowed the lawn "on a limited basis;" and that Tomasi and his predecessors-in-interest used the area in dispute as a parking lot between 1975 and 2002. AFP also maintains that the court erred

[*] AFP stated at the conclusion of trial that it was not pursuing its adverse possession claim, but relying solely on its claim to a prescriptive easement.

in concluding that AFP failed to satisfy its burden of proof. According to AFP, its evidence showed that it used the lawn area on the north side of its dwelling house as a side yard beginning in 1971, and it had acquired the right to continue such use. AFP argues, moreover, that Tomasi's uses were not incompatible or in opposition to its use of the property.

This case presents a mixed question of fact and law, thus, we view the evidence in the light most favorable to the prevailing party, and we will uphold the trial court's findings of fact unless they are clearly erroneous. First Congregational Church of Enosburg v. Manley, 2008 VT 9, ¶ 12, 183 Vt. 574 (mem.). We review the court's legal conclusions de novo. Id.

"To successfully claim an easement through prescription, there must be open, notorious, continuous and hostile use . . . for fifteen years." Wells v. Rouleau, 2008 VT 57, ¶ 8, 184 Vt. 536 (mem.); see also Cmty. Feed Store, Inc. v. Ne. Culvert Corp., 151 Vt. 152, 155-56 (1989) (explaining that elements necessary to establish a prescriptive easement are "essentially the same" as those required for adverse possession; the "term 'prescription' applies to the acquisition of nonfee interests, while 'adverse possession' indicates that the interest claimed is in fee"). As AFP notes, "continuous use is not synonymous with constant use. Continuity of use is merely such use as an average owner would make of the property, taking into account its nature and condition." Darling v. Ennis, 138 Vt. 311, 313-14 (1980). At the same time, "the extent of the acquisition . . . must be determined by the extent of the actual occupation and use. There can be no constructive possession beyond the limits which are defined by the user upon the land, or by other marks or boundaries marking the extent of the claim." Cmty. Feed Store, Inc., 151 Vt. at 156 (quotation omitted). These requirements rest "on the public policy that existing rights in land should not be lost unless the owner has been put on guard sufficiently to enable him or her to take preventative action with reasonable promptness." Manley, 2008 VT 9, ¶ 13 (quotation omitted). In other words, one "must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest." Moran v. Byrne, 149 Vt. 353, 355 (1988) (quotation omitted).

The court did not err in concluding that AFP failed to meet these requirements here. The court found that Tomasi and Salvato had used the disputed property for parking and other activities that drew into question AFP's actual use of the land, and that AFP's use of the land was "sporadic" at best. These findings are supported by the evidence. At trial, an individual who pumped gas on the Tomasi parcel between 1976 and 1978, and also ran a car repair station on the land from 1990 to 2008, stated that he did not see any use of the disputed property by AFP's tenants or the Adams family. He testified that his customers would park in the disputed area on most days, and that cars would be left there while waiting to be repaired. He also stated that there were mostly weeds and gravel in the disputed area. He never saw children playing in the disputed area, nor did he observe any picnicking or barbequing. He testified that snow was plowed and piled onto the disputed area during the winter months, without any complaint. Another witness testified that his mother rented the AFP property between 1971 and 1981. He lived with her for one year and visited her often during her tenancy. He testified that his mother would not let him park in the disputed area, and that his siblings would not park in that area either. He also stated that there were junk cars and other items on the disputed area that belonged to Carl Cram, a tenant of Salvato. He agreed that snow was plowed onto this area during the winter, and that there was no grass or any mowing done by him or his mother during the period she lived there. He also stated that his four children would not play in the disputed area during visits, nor had his mother put up a clothesline on the property. He never saw anyone from the Adams family plow the area or cut the grass.

A neighbor, who lived nearby for thirty years beginning in 1975, also testified that there were always cars from the service station parked in the disputed area and that, following such use, people who worked at the nursing home parked there. She described the parking as occurring to the "left" of a certain tree, which was the area in dispute. Additionally, Cram testified that he operated a service station on the Tomasi property between 1979 and 1985. He parked cars that needed to be fixed in the disputed area. He testified that at one point, Salvato told him to move some of the vehicles so that people at the nursing home could use the disputed area for parking. He did not observe anyone park in that area who went over to the AFP property or who visited tenants living there. He did not cut the grass in disputed area, and he stated that AFP's tenant did not mow the grass between 1979 and 1984. He explained that it would be impossible to do so because there were so many cars and car parts in the area.

While AFP points to its evidence to show that its tenants did use the disputed area, the court was not persuaded that such use satisfied the requirements of a prescriptive easement. Given the evidence that Tomasi's predecessors-in-interest used the property extensively during the prescription period, it was reasonable to find that AFP's use of the property was sporadic and that it was insufficient to meet its burden of proof. See, e.g., Manley, 2008 VT 9, ¶¶ 15-17 (upholding trial court's rejection of adverse possession where trial court found that lawn mowing constituted occasional use that did not show that plaintiff's use of adjoining property was adverse and intended to exclude others); Stanard v. Urban, 453 N.W.2d 733, 735 (Minn. Ct. App. 1990) (concluding that requirements of adverse possession not satisfied where plaintiff mowed and maintained property during the summer, stored lake equipment on property during winter, and allowed children and grandchildren to play on property); Romans v. Nadler, 14 N.W.2d 482, 485 (Minn. 1944) ("Occasional and sporadic trespasses for temporary purposes, because they do not indicate permanent occupation and appropriation of land, do not satisfy the requirements of hostility and continuity, and do not constitute adverse possession, even where they continue throughout the statutory period.").

The question is not, as AFP suggests, whether its use of the land was compatible with Tomasi's ongoing use. To the contrary, when the title owner of record uses the property during the period in question, "such use interrupts the continuity of adverse possession by another." MacDonough-Webster Lodge No. 26 v. Wells, 2003 VT 70, ¶ 24, 175 Vt. 382 (citations omitted); see also Ganje v. Schuler, 659 N.W.2d 261, 267 (Minn. Ct. App. 2003) (element of "exclusivity" requires party to possess the land "as if it were his own with the intention of using it to the exclusion of others" (quotation omitted)). The evidence amply shows that Tomasi and his predecessor-in-interest used the property during the period in question here. Essentially, AFP challenges the court's evaluation of the weight of the evidence and the credibility of witnesses, matters exclusively reserved for the trial court. See Mullin v. Phelps, 162 Vt. 250, 260 (1994). We will not reweigh the evidence on appeal.

AFP's remaining challenges to the court's findings are equally without merit. It is irrelevant to the court's conclusion whether the Tomasi parcel contained a dwelling building and a garage. Additionally, it was not unreasonable for the court to state that the contested area was "part of the parking lot located between" the parties' property given the use of the property for storing cars that needed repair and other forms of parking. We also reject AFP's contention that the court's findings are insufficient to show how it arrived at its decision, or are otherwise inadequate. We have considered all of AFP's claims in this regard, and we find them all without merit.

Finally, AFP asserts that the court erred in denying its motion to alter and its request for a new trial. AFP maintains that the court should have allowed it to present new evidence that

contradicted one of the court's findings. Specifically, it argues that it had a sworn statement from an individual who plowed snow at the request of one of AFP's tenants during the winter of 1997-1998. At the hearing on the motion, it also sought to introduce photographs of the area in question taken in 2001, which it argued directly contradicted the description of Tomasi's witnesses. According to AFP, it is of no moment if it could have prevented these errors during trial by presenting the evidence in question.

We review the court's decision for abuse of discretion, Alden v. Alden, 2010 VT 3, ¶ 7, and we find no abuse of discretion here. AFP was alleging a "mistake" based on evidence that was not before the trial court at the time of trial. It sought to introduce evidence that it could have discovered before trial, as the trial court found. There was no "mistake" by the court and the failure to present the evidence in a timely fashion was the fault of AFP, not the court. As the court found, moreover, it would be unfair to Tomasi to admit the affidavit and alter the record where Tomasi had no opportunity to cross-examine the affiant. Additionally, the evidence did not implicate the fairness of the trial, and it would not have changed the result. See 11 C. Wright et al., Federal Practice and Procedure § 2808, at 86-93 (2d ed. 1995) (explaining that to warrant new trial based on newly discovered evidence moving party "must have been excusably ignorant of the facts despite using due diligence to learn about them," although new trial could be warranted where it "is necessary to prevent a manifest miscarriage of justice;" newly discovered evidence must also be likely "to change the result of the former trial," and "evidence that would merely affect the weight and credibility of the evidence ordinarily is insufficient" (footnotes omitted)). The court identified ample reasonable grounds for its ruling, and we find no error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice