

This matter came to be heard before me via WebEx in the Beaufort County Court of Common Pleas on May 31, 2023 for the purpose of hearing the Motion for Reconsideration filed on behalf of the Plaintiffs on May 13, 2022, requesting that I reconsider my Order filed on May 6, 2022.

After careful consideration of the Motion to Reconsider, the record in this matter, and the arguments of counsel, I am unable to discover any material fact or principle of law that has been either overlooked or disregarded, and the Motion for Reconsideration is accordingly denied.

In their Motion for Reconsideration, the Plaintiffs put forth two (2) grounds for reconsideration. Each of these grounds is addressed in turn below.

First, the Plaintiffs note that “it is not disputed by any of the parties that the Plaintiffs owned the portion of the 4.31 acres located north to the fence encroachment.” The Plaintiffs complain that the foregoing “is not the finding of the court and is not included in the Order.” Motion for Reconsideration, pg. 2.

This assertion by the Plaintiffs is incorrect. The foregoing language is an express finding of the Court and is explicitly set forth in the Order in Finding of Fact Number 4 on page 5 of the Order.

The second “ground” advanced by the Plaintiffs is based upon the fact that a portion of the premises was mortgaged and subsequently foreclosed upon in 2005. The Plaintiffs argue that the Defendant Rivers, by issuing the mortgage, “gave up all claim of any sort to the premises to the bank.” This is clearly not the law. Motion for Reconsideration, pg. 2. It’s elementary that a landowner, by obtaining a mortgage, does not “give up all claim of any sort to the premises to the bank.” The landowner is simply giving the bank a security interest in the event that the underlying loan is not paid.

The Plaintiffs also argue that the 2005 mortgage resulted in the “surrender of any accrued (*sic.* title) by adverse possession.” *Id.*

Taking a mortgage out on property, however, does not magically erase vested title, whether that title was obtained by adverse possession or by deed.

Title vesting by adverse possession is the same as if title vested by an express grant or deed. “A title by adverse possession, being ordinarily regarded as equivalent to that derived by a grant or conveyance, may be lost or divested only in the same matter.” 2 C.J.S. Adverse Possession §276.

“Because the completion of a period of adverse possession, accompanied by the other essentials imposed by statute, is ordinarily regarded as vesting a perfect legal title in the adverse claimant equivalent in legal effect to one acquired by a formal grant or conveyance, after title by adverse possession has been perfected, it cannot be divested by acts other than those which would be required in a case where title was by deed. In other words, a title acquired by adverse possession can be divested in the manner, and only in the manner that a title acquired by formal conveyance made be divested, such as, by a conveyance, or by another adverse possession.”

Id. Accord, *Taylor v. Bell*, 87 So. 3d 1134 (Miss. Ct. App. 2012); *Schultz v. Dew*, 1997 SD 72, 564 N.W.2d 320 (S.D. 1997); *Gorman v. City of Woodinville*, 175 Wash. 2d 68, 283 P.3d 1082 (2012); *Beard v. Henn*, 28 Ill. 2d 11, 190 N.E.2d 345 (1963); *Barry v. Thomas*, 273 Ala. 527, 142 So. 2d 918 (1962); *Porter v. Posey*, 592 S.W.2d 844 (Mo. Ct. App. E.D. 1979); *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965); *Carlson v. C & C Coal Co.*, 115 F. Supp. 666 (E.D. Ky. 1953), judgment aff’d, 218 F.2d 384 (6th Cir. 1954); *Noble v. Cooke*, 253 S.W.2d 911 (Tex. Civ. App. Texarkana 1952, writ refused n.r.e.

In this case, Defendant Rivers’ predecessors in title acquired good title to the disputed premises in 1953 (at the latest) and that title was just as good as if they had been granted a general warranty deed. A subsequent mortgage and foreclosure several years later does not negate that title.

Accordingly, once title vested in Defendant Rivers' family in 1953 the chain of title continued thereafter uninterrupted the same as if a deed has been issued to the disputed property on that date.

Additionally, even if title by adverse possession had not already vested many years earlier, the mortgage and foreclosure does not prevent the continued accrual of adverse possession. This is because tacking of adverse possessors is permitted as long as there is privity between the adverse possessors. Privity exists where there has been a transfer of possession by some act or by operation of law. Privity for purposes of adverse possession exists between a mortgagor and a mortgagee. 2 C.J.S. Adverse Possession, §164. See also, *Lively v. Wick*, 122 Colo. 156, 221 P2d 374 (1950) ("Acquisition of title by mortgagee through foreclosure did not break chain of privity of possession between defendants and their earlier predecessors in interest for purpose of determining whether period of adverse use by defendants and their predecessors was sufficient to establish title in the defendants." Headnote 4); *Durden v. Groce*, 159 S.W.2d 941 (Tex. Ct App. 1941).

In summary, the subject Order correctly notes that it is not disputed by any of parties that the Plaintiffs own the portion of the 4.31 acres located to the north of the fence encroachment and this is expressly included in the Order as an explicit finding of fact. Additionally, the subsequent mortgage and foreclosure of the subject premises did not act to erase title to the disputed premises which had vested in the Defendant Rivers' predecessors in title decades earlier.

IT IS, THEREFORE, ORDERED that the Plaintiff's Motion for Reconsideration shall be and is hereby denied.

AND IT IS SO ORDERED.

The Honorable Maite Murphy
Beaufort County Court of Common Pleas



Beaufort Common Pleas

Case Caption: Benjamin Jenkins , plaintiff, et al VS Michael F Rivers , defendant, et al
Case Number: 2020CP0700829
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So Ordered

s/ Maite Murphy 2166

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