

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CLARENDON)
)
 Gina M. Derry and Catherine M. Stone,)
)
 Plaintiffs,)
)
 vs.)
)
 Ray A. Zuber and Ellen R. Zuber,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE THIRD JUDICIAL CIRCUIT
 DOCKET NO.: 2017-CP-14-00113

**ORDER DENYING PLAINTIFFS'
 MOTION TO RECONSIDER AND
 ALTER OR AMEND**

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 SC Court of Appeals

This matter comes before the Court pursuant to the Plaintiff's Notice of Motion and Motion and Memorandum in Support to Reconsider and Alter or Amend Order Pursuant to S.C.R.C.P. Rules 59(e) and 52(b) Despite several enumerated grounds, the motion is based primarily upon the Plaintiff's assertion that the Court, in its order filed May 15, 2023, failed to address the issue of acquiescence on the part of the Defendants by allowing the fence to remain for a period of time. A hearing was held in Manning, South Carolina on August 9, 2023, at which the court received oral arguments on the motion. For the reasons stated herein, this Court holds that application of the theory of estoppel by acquiescence to the facts of this case does not provide relief for the Plaintiffs from the existing order of this court.

FINDINGS OF FACT

1. Reference is made to the findings of fact specified in the previous order of this Court, which are incorporated into this order.
2. Additionally, the Court finds that an award to the disputed strip to the Plaintiffs would result in a lot sized less than the remaining lots in the subdivision.

DISCUSSION

This Court recognizes that a disputed boundary line can be established by acquiescence of the parties. Allen v. Johnson, 27 S.C.L. (2 McMul.) 495, 496 (1836). "It is well established that if adjoining landowners occupy their respective premises up to a certain line which they mutually ... acquiesce in for a long period of time ... they are precluded from claiming that the

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boundary line thus ... acquiesced in is not the true one. " Klapman v. Hook, 206 S.C. 51, 32 S.E.2d 882, 884 (1945)

However, acquiescence is a question of fact determined by the intent of the parties. Croft v. Sanders, 283 S.C. 507, 323 S.E.2d 791, 793 (1984). The Court has reviewed the facts of this case thoroughly. For the reasons that follow, the Court does not find that any acquiescence of the Zubers provides a justification to move the property line established by the plat.

1. The equities of the dispute do not favor the Plaintiffs.

Acquiescence is an equitable doctrine. The term is often intertwined with the term "estoppel." See McClintic v. Davis, 228 S.C. 378, 90 S.E.2d 364 (S.C. 1955) ("His silence is acquiescence, and it estops him."). Accordingly, equitable concepts apply. It is when one views the connection of the Plaintiff's attempt to claim a portion of the Defendants' lot to the results as applied to the entire neighborhood that the conclusion must be reached that equity can not allow the Plaintiff's to gain title to the "disputed strip."

Testimony at the hearing revealed that at least three lot owners in this neighborhood lived their lives for years with a mistaken belief of the location of the lot lines in the neighborhood. The error was discovered when the Defendants ordered a survey to determine if the carport installed by the Plaintiffs was legally placed. As revealed in the record and discussed in the May 15, 2023 Order, the surveyor found that all lines were incorrectly located on the ground. Although the Plaintiffs had at least constructive knowledge of the issue through the plat referenced as the "DuValle Elliott plat," they kept silent and used the portion of the Defendants' lot that did not belong to them. The Jordan's, who lived to the left of the Plaintiffs, had in fact installed a fence that encroached upon the Plaintiffs' property. When they learned of the error, they immediately removed all property from the Plaintiffs' lot and maintained their property within the surveyed lot lines. When the defendants learned of the issue, they immediately moved the storage building that encroached upon the neighbor's lot to the right of them so that it is now totally contained within their platted lot. Plaintiffs. However, refused to withdraw to the lines shown by the plat, and brought this action. If the Plaintiffs are allowed to gain ownership of the "disputed strip," they will end up with a lot larger than the other residents affected by the error. This Court will not use equity to produce such a result.

In addition, if the Plaintiffs were to prevail, the Defendants would be left with a lot described by the Clarendon County Planning Director as "nonconforming." This Court finds no grounds to penalize the Defendants in that manner.

2. The parties did not intend to set the boundary when the fence was placed.

The Supreme Court has held that "[t]he mere existence of a fence between ... properties is not ... sufficient to establish a boundary line by ... acquiescence [absent intent]." Harrison v. Lanoway, 214 S.C. 294, 52 S.E.2d 264, 266 (1949). "[A] fence may be built between adjoining landowners for purposes that have nothing to do with fixing a boundary." Croft v. Sanders, 323 S.E.2d at 793. In Kirkland v. Gross, 332 S.E.2d 546, 286 S.C. 193 (S.C. App. 1985), the Court stated that one party's "testimony he had no intention for his fence to establish the property line is evidence reasonably supporting the trial court's finding of lack of acquiescence. Catherine Stone testified to those facts. Under direct examination, Ms. Stone testified as follows:

Q. Was there any stob or pipe at the front of the property by the roadside?

A. No. In fact, when we put the fence in, we didn't really put it as a marker. Like I said, we used it as a barrier because people were coming up the driveway and then crossing over; you know it was tearing it up.

Hearing Transcript, page 82, Lines 12-18.

3. Estoppel is not to be used offensively.

According to established precedent in South Carolina, estoppel and waiver are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the instruments of gain or profit. See Herring v. Volume Merchandise, Inc., 252 N.C. 450, 113 S.E.2d 814 (1960); 28 Am.Jur.2d Estoppel and Waiver § 33 (1966). See also Ott v. Ott, 182 S.C. 135, 188 S.E. 789 (1936). While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (S.C. 1991). The Plaintiffs here attempt to use

the principle of estoppel by acquiescence to acquire additional property from what they were deeded.

4. The Plaintiffs had at least constructive notice of the correct boundaries.

"Mere silence or acquiescence will not work an estoppel when the party seeking estoppel has constructive notice of the public records that disclose the true facts. Binkley v. Rabon Creek Watershed Conserv., 348 S.C. 58, 74, 558 S.E.2d 902, 909," In this case, the Plaintiffs paid for a survey that disclosed the boundary issue clearly. Although they testified that they had no knowledge of the survey, the record reveals that it was recorded in their name. Accordingly, the doctrine of estoppel will not relieve them from notice of the location of the boundary line.

Having reviewed the application of the principle of estoppel by acquiescence to the facts of this case, the Plaintiffs' Motion to Reconsider and Alter or Amend the Court's previous order is denied.

AND IT IS SO ORDERED.

Date: November 7, 2021

G. Wells Dickson, Jr.
G. Wells Dickson, Jr.
Special Referee, Clarendon County

Kingstree, SC