STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: JANUARY 18, 2012)

CHRISTOPHER CALUORI and AMANDA CALUORI	:	
v.	:	**C.A. NO. PC-2007-0992**
DONALD NADEAU and GAIL NADEAU	:	
DONALD NADEAU & GAIL NADEAU	:	
v.	:	**C.A. NO. PC-2007-4052 (consolidated)**
CHRISTOPHER CALUORI and AMANDA CALUORI and FEDERICKSON CONSTRUCTION LLC	:	

DECISION

RUBINE, J. These consolidated cases were tried to the Court without a jury. In PC-2007-4052, Donald and Gail Nadeau (collectively, "the Nadeaus") are the Plaintiffs, and seek a determination that they have acquired title to portions of the adjoining Caluori property by way of adverse possession.[1] In the second case, PC-2007-0992, Christopher and Amanda Caluori (collectively, "the Caluoris") are the Plaintiffs and the Nadeaus the Defendants. In that action, the Caluoris seek a declaration to quiet title to the property as identified as belonging to them in a 2006 survey they commissioned and to deny the Nadeaus claim of adverse possession. By way of counterclaim, in PC-2007-0992, the Nadeaus assert the identical claim of adverse possession as they have asserted as

[1] In PC-2007-4052, Federickson Construction LLC ("Federickson") is named as a defendant. That entity has not filed an answer or other responsive pleading; nor did Federickson participate in the trial of these consolidate cases. Accordingly, this decision does not address any issues concerning Federickson.

Plaintiffs' in the PC-2007-4052 action. The following decision shall incorporate the Court's findings of fact and conclusions of law as required Super. R. Civ. P. 52 as to both actions.

I

FACTS

1. Donald and Gail Nadeau purchased approximately seven (7) acres of land known as 153 Westcott Road, Scituate, Rhode Island on May 6, 1993.
2. Christopher and Amanda Caluori own approximately three (3) acres of land at 141 Westcott Road, Scituate, Rhode Island. The Caluoris purchased that property on July 30, 2002. The Caluori property is located north of and adjoining the Nadeau property. The properties share a common boundary on the northern side of the Nadeau property (the southern side of the Caluori property).
3. The Nadeaus have owned their property continuously since they purchased it in 1993. The Caluoris' ownership of the adjoining property has been continuous since July of 2002.
4. The Nadeau property at the time it was purchased was improved with a barn (stable) on the northern portion, contiguous to the adjoining parcel to the north. A stone wall ran perpendicular to Westcott Road in a westerly direction for approximately fifteen (15) to twenty (20) feet, alongside the easterly side of the stable. At the west end of the stone wall, and running in a westerly direction to the rear (western) property line, were a series of fence post holes, which appeared to the Nadeaus to define the location of an earlier fence on the north side of the Nadeau property; and the southern side of the Caluori property, which property at

the time of Nadeaus' purchase was owned by Merle Drew. This area of pasture to the west of the stable was referred to in testimony as the "back" of the Nadeau property or "back pasture". In July or August of 1993, when Mrs. Nadeau and her daughter, Melanie, first brought horses to the property, a temporary fence with electric tape was erected by Mr. Nadeau. That temporary fence was replaced with a more permanent structure in 2005, which replacement used wooden fence posts with electric tape between the posts to keep the horses within the Nadeau property when the horses were using the back pasture for grazing. Either the original temporary fence or the replacement fence erected by Mr. Nadeau remained the de facto dividing line between the Nadeau and Caluori properties from July or August of 1993, until August 7, 2007. The purpose of the fence, however, was not to define the boundary line, but for the more practical purpose of keeping the Nadeau horses on the Nadeau property, and to prevent the horses from entering the Caluori property. That objective was critical both to the Nadeaus and the Caluoris.

5. Because Mr. Caluori became concerned about not knowing the actual southern boundary of his property, and because Mr. Nadeau had erected a fence closely following a line of previous fence post holes, Mr. Caluori commissioned a survey which was completed in May of 2006.

6. After learning the results of the survey, on May 5, 2006, Mr. Caluori sent a letter to inform Mr. Nadeau that the Nadeau fence was erected on the Caluori property without permission, and had to be removed immediately. Mr. Nadeau did not comply with the demand made in the letter of May 5, 2006.

7. Thereafter, in August of 2007, Mr. Caluori took matters into his own hands, and using the survey as his point of reference, removed the fence previously erected by Mr. Nadeau, and erected a new fence along the property line as identified in the survey. At first the new Caluori fence was erected with temporary metal posts and string, but was replaced shortly thereafter with a more sturdy version, having wooden posts, and white tape.
8. From the tape Mr. Caluori attached "no trespassing" signs. The distance between the Nadeau fence and the fence erected by Mr. Caluori was between 13.5 feet at the westernmost end to seven (7) feet on the eastern end. That distance came to define the "disputed strip" separating the Nadeau and Caluori properties, in the rear (western) side of both properties, extending to the west, the full length of the properties, ending at the wooded area that bordered each property on the western-most terminus of both lots. As a result of the Caluori fence, the disputed strip was located to the North of that fence, thus cutting off access to the disputed strip by the Nadeaus or their horses.
9. Mrs. Nadeau and her daughter, Marie, testified credibly as to their use of the "disputed strip", indicating that the strip to the south of the original Nadeau fence (defined by the pre-existing post holes) was the flattest portion of the back pasture, which their horses used for grazing together with the remainder of the pasture area, and that the narrow strip was also used for riding and training the horses using the fence as a straight-edge to teach the horses to ride in a straight

line, and small hurdles or "cavalettis" to establish their proper gait.[2] Because that strip was more flat than other areas of the pasture, it was deemed by the Nadeaus to be an essential feature of their pasture, which they now claim by adverse possession. The "disputed strip" was continuously, but sporadically, used for those purposes from August of 1993 (when the Nadeaus first brought horses to the property and erected a temporary fence to divide their lot's northern perimeter with the southern perimeter of the adjoining property (originally owned by Mrs. Drew and subsequently by the Caluoris). None of the witnesses testified that the Nadeaus erected or replaced the fences to the north of their property to define the boundary, but rather to contain the horses while grazing and training. It was the mutual expectation of the parties that a continuous, unbroken fence line between the two adjoining lots was necessary to contain the Nadeau horses on the Nadeau property.

10. Although Mr. Caluori sent a letter to the Nadeaus, dated July 30, 2007, disputing any claim to adverse possession, wherein it stated that the fence erected by the Nadeaus was not located on the boundary as determined by the surveyor. By the time this letter was sent, the Nadeaus' activities on the disputed strip had continued for a period in excess of ten (10) years.

11. During the period that the events with respect to the "disputed strip" along the north/south border between the properties were developing, another series of events was taking place near the southeast corner of the Caluori lot adjoining

[2] The Court believes that due to the limited width of the disputed strip, the riding and training activities were not carried out exclusively on the disputed strip, but that those activities occurred both on the disputed strip, as well as within the Nadeaus' pasture area to the south of the disputed strip.

Westcott Road, which gives rise to the second disputed claim in this litigation. The facts pertinent to that claim include the following:

(a) The area on the East side of the stable, between the east wall of the stable to the stone wall, along Westcott Road was referred to in testimony as the "front of the property" was described by Mrs. Nadeau as the "paddock area", which area was fully enclosed by a fence at the time the Nadeaus purchased their lot. The continuous enclosure of the paddock area was necessary to keep the Nadeaus' horses on the Nadeau property. The original plank fence was repaired or replaced several times, by both the Nadeaus and the Caluoris. Neither party had a clear understanding of the location of the actual boundary between the paddock area and the Caluori property until the survey of 2006, which survey map described the existing fence in that area to be encroaching in part on the Caluori lot.

(b) Until 2007, after the survey, neither party erected or maintained the fencing for purposes of defining a boundary. Within one or two years after moving in the Nadeaus noticed that the existing plank fence was deteriorating, and replaced it with fence posts to which electrical wire or tape was affixed, as added incentive for the Nadeau horses to stay on the Nadeau lot. Some of these "hot wires" were attached to porcelain connectors. The Caluoris and the Nadeaus were unable to agree as to whether the original plank fence or subsequent hot wire fencing delineated the border of the Nadeau property. This boundary dispute concerning the enclosed "paddock area" continued until 2007. At that time, due in part to

the results of the 2006 survey, Mr. Caluori replaced and re-positioned the fencing and removed the plank and electric fencing erected by Mr. Nadeau around the so-called "paddock area" along boundary lines revealed in the survey. Up until that time, and beginning in the summer of 1993, the "paddock area" was used exclusively by the Nadeaus for warming up horses and tacking the horses before riding because the land in the "paddock area" was flat and somewhat protected from the elements. Somewhere in this area was the location where the Nadeaus established a feeding station, bringing in a covered hay feeder to hold hay especially during the winter months when the pasture could not be used for grazing. It is these activities which allegedly occurred in the "paddock area" which encroached in part on property now claimed by the Caluoris to be a portion of their lot as confirmed by the 2006 survey. Because the new Caluori fencing was only comprised of posts and string, Mr. Nadeau erected a fence in the approximate area of the previous plank fence using electric tape that was designed to keep his horses confined to the "paddock area" which he now claims he owns under the doctrine of adverse possession. However, for the period from 1993 to 2007, the Nadeaus used the "paddock area" enclosed by fencing to tack the horses and warm them up. Other than accessing the area to replace fencing, the Caluoris did not use or maintain any portion of the "paddock area" for their own purposes. Until 2007, when Mr. Caluori removed the fencing erected by Mr. Nadeau, the Caluoris did not dispute or object to the equestrian related

uses of the Nadeaus in the "paddock area". Other than activities related to fencing, those equestrian related uses by the Nadeaus were the only uses of the "paddock area" from 1993 to August of 2007. The evidence produced by the Nadeaus was not clear as to what part of the "paddock area" was on land to which title was recorded in the name of the Caluoris to be theirs, nor the exact dimensions of the "paddock area". Certainly, the Nadeau evidence did not establish with any clarity, where on property titled to the Caluoris the equestrian activities took place and whether any of those activities occurred on land claimed by the Caluoris to be theirs. Although the Nadeaus have emphasized that the feeding of horses at the covered hay feeder was one of the principle activities evidencing their use of property claimed by them, there was no evidence as to where in the "paddock area" the hay feeder was placed, and if its placement was on disputed land. Unlike the disputed strip along the north/south border of the back lot, the disputed area in the front portion of the property was not clearly delineated by any evidence presented by the Nadeaus. The Nadeaus' use of portions of the "paddock area" were exclusive of any use of that area by the Caluoris. What is unclear from the evidence is what activities, if any, were conducted by the Nadeaus on property recorded to the Caluoris. Thus, from the summer of 1993, until May of 2006, fencing in that area was erected or maintained by Mr. Nadeau to contain his horses while they were warming up, tacking, and feeding. Mr. Nadeau never erected fencing in that area to define what he believed formed the

boundaries with the Caluori lot. The fencing was primarily erected to contain the horses using stakes and electrical tape. The tacking and feeding activities were by their nature episodic and sporadic, and in fact the hay feeder located "somewhere" in the "paddock area" was not used during the summer months, when the pasture was available for grazing purposes. Besides the sporadic uses of portions of this area for tacking and feeding horses, there was no evidence that the Nadeaus ever maintained or planted the property enclosed by the fences.

12. The acts of dominion by the Nadeaus along the north/south joinder of the Caluori/Nadeau properties, grazing, riding, and training horses were not uses exclusive to the "disputed strip" (See Fn. 2, supra) and therefore were undistinguishable from similar activities occurring generally in the Nadeau pasture area to the south of the fence erected by the Nadeaus. Accordingly, these activities were not of a sufficient nature to put the Caluoris on notice of the Nadeaus' claim to the "disputed strip". Accordingly, the Nadeaus' have not shown by clear and convincing evidence, activities on the "disputed strip" sufficient to establish that their claim to that strip was sufficiently "hostile" and "notorious" to prove their title thereto by adverse possession.

13. The Nadeaus have failed to present sufficient evidence that defines with any specificity what portion of the Caluori property they claim by adverse possession in the "paddock area". Accordingly, they have failed to establish title to any portion of the "paddock area" by way of adverse possession.

II

STANDARD OF REVIEW

In a non-jury trial, "the justice sits as trier of fact as well as law." Hood v. Hawkins, 478 A.2d 181, 184 (R.I.1984). "Consequently, [s]he weighs and considers the evidence, passes upon credibility of the witnesses, and draws proper inferences." Id. "The task of determining the credibility of witnesses is peculiarly the function of the trial justice when sitting without a jury." Walton v. Baird, 433 A.2d 963, 964 (R.I.1981). "It is also the province of the trial justice to draw inferences from the testimony of witnesses...." Id. See also Rodriques v. Santos, 466 A.2d 306, 312 (R.I.1983) (the question of who is to be believed is one for the trier of fact).

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon...." See Super. Ct. R. Civ. P. Rule 52. The Rhode Island Supreme Court has held that in order to comply with this rule, the trial justice need not engage in extensive analysis and discussion. J.W.A. Realty, Inc. v. City of Cranston, 121 R.I. 374, 399 A.2d 479 (1979); Eagle Elec. Co. v. Raymond Construction Co., 420 A.2d 60 (R.I.1980). Strict compliance with the requirements of Rule 52 is not required if a full understanding of the issues may be reached without the aid of separate findings. 420 A.2d 60 (R.I. 1980). Even brief findings and conclusions are sufficient as long as they address and resolve pertinent, controlling factual and legal issues. White v. LeClerc, 468 A.2d 289 (R.I. 1983).

Furthermore, the Uniform Declaratory Judgment Act § 9-30-1 et seq., grants the Superior Court "power to declare rights, status, and other legal relations whether or not relief is or could be claimed." Section § 9-30-12 provides that the Uniform Declaratory

Judgment Act should be "liberally construed and administered." Moreover, pursuant to § 34-16-1, et seq., the Superior Court has exclusive jurisdiction to quiet title to land.

III

ANAYLSIS

In Rhode Island, title to land may be acquired by adverse possession where one [] ha[s] been [] for ten years in the uninterrupted, quiet, peaceful and actual seisin and possession of any lands . . . for and during the said time, claiming the same as his, her or their proper, sole, and rightful estate in fee simple . . . . G.L. 1956, § 34-7-1. To acquire title to land pursuant to this statute, a claimant must prove actual possession of the property claimed and acts of dominion over that property that will be sufficient in law to vest title thereto in him. Sherman v. Goloskie, 95 R.I. 457, 465, 188 A.2d 79, 83 (R.I. 1963) (citing Dodge v. Lavin, 34 R.I. 514, 84 A.2d 857).

This Court has further clarified this statute by providing specific elements that are necessary to prove adverse possession. It is well-settled under Rhode Island law that in order to establish adverse possession under § 34-7-1, a claimant's possession must be actual, open, notorious, hostile, under claim of right, continuous, and exclusive for at least ten years. Acampora v. Pearson, 899 A.2d 459, 466 (R.I. 2006) (quoting Tavares v. Beck, 814 A.2d 346, 350 (R.I. 2003)). The burden of proof is on the party claiming adverse possession to establish these elements by clear and convincing evidence.[3] Id. See e.g., Samuel Nardone & Co. v. Bianchi, 524 A.2d 1114 (R.I. 1987); Spangler v. Schaus, 106 R.I. 795, 264 A.2d 161 (1970). Failure to prove any one element prevents the ripening of title by adverse possession.

[3] Evidence must be by a preponderance of clear and positive evidence or by evidence that is unambiguous and affirmative in character. Locke v. O'Brien, 610 A.2d 552, 555 (R.I. 1992) (quoting Hilley v. Simmler, 463 A.2d 1302, 1304 (R.I. 1983)).

Some states however, in addition to the above, add an element of "intentionality" to the proof required before an adjoining land owner may claim title to property, as there must be manifest intent to exercise dominion, control or continuous use of the disputed property. See Harris v. Lynch, 940 S.W.2d 42 (1997); see also Cunningham v. Hughes, 889 S.W.2d 864 (Mo. App. 1995); Dodds v. Lagan, 595 P.2d 452, 1979 OK CIV APP 12 (1979). In those jurisdictions requiring such intent, the mere passive act of allowing animals to graze on disputed land is insufficient in the absence of more purposeful use of the disputed property, such as clearing, cultivating, and managing it for pasture or erecting structures thereon to demonstrate the intent to exercise dominion. See Miller v. Warner, 433 S.W.2d 259, 265 (Mo. 1968) (pasturing of cattle or cutting timber do not in themselves establish adverse possession).

Rhode Island case law is consistent with the line of Missouri cases involving grazing cattle. In order to establish the necessary elements of "open, notorious, and hostile" the acts of the party claiming title by adverse possession must be sufficient in nature to provide a reasonable landowner who holds title, with notice of the hostile claim. The acts of the Nadeau horses grazing in the disputed area, even together with uses in common with the remainder of their property, is insufficient to establish title in the Nadeaus by adverse possession. In other words, the manner by which the land being claimed by adverse possession is used must be sufficient to put a reasonable landowner on notice of a hostile claim of title. See McGarry v. Coletti, 2011 WL 6282350 (R.I. 2011). As to the disputed strip dividing the north/south border of the properties, the Nadeaus failed to demonstrate by clear and convincing evidence, their hostile claim of title to that strip. There was nothing clearly and unambiguously unique with respect to

Nadeaus' of the disputed strip that would have put the Caluoris reasonably on notice of the Nadeaus' hostile claim to that strip. See Sherman, 95 R.I. at 467, 188 A.2d at 84 (the act or acts of dominion must be sufficient to manifest an intent to oust the true owner of title).

In the decision of Green v. Russo, 1999 R.I. Super. LEXIS 61, Mr. Justice Clifton, of this Court, has followed the Missouri model set forth in Harris v. Lynch, 940 S.W.2d 42 (Mo. App. 1997). In facts strikingly similar to the instant matter, the Court in Harris determined that maintenance of a non-boundary fence, together with allowing livestock and animals to have access to the disputed land, is not sufficient to establish a claim of adverse possession. 940 S.W.2d at 46; see also Cunningham v. Hughes, 889 S.W.2d 864, 867 (Mo. App. 1995) (allowing cattle to graze on a strip of undeveloped land, repairing a fence constructed by a predecessor, and giving permission to others to hunt and cut wood on the property was insufficient to establish title by adverse possession); Green, 1999 R.I. Super. LEXIS 61.

This Court likewise believes a more equitable application of the doctrine of adverse possession should require some intentionality, as demonstrated by active use, before a party may establish title by adverse possession. In each of the disputed areas at issue in this case, electric fencing, which by its nature was not erected for the purpose of establishing a boundary line but for the purpose of restraining livestock or horses, should not alone give rise to a successful claim of adverse possession. In this case the evidence clearly demonstrates a mutual interest of the two adjoining landowners to erect and maintain fencing to restrain the Nadeau horses from grazing or otherwise entering the Caluori property. The Nadeaus in erecting the original fence following the line of

existing post holes simply allowed their horses an additional narrow area of pasture for grazing. See Dambach v. James, 587 S.W.2d 640, 643 (Mo. App. 1979) (pasturing livestock on rough, uncleared land contained by a non boundary fence built by record title holders' predecessors is insufficient in itself to establish adverse use); Edmonds v. Thurman, 808 S.W.2d 408, 411 (Mo. App. 1991) (plaintiff's maintenance of old fence on defendant's property constructed by defendant's predecessor standing alone is insufficient to establish adverse possession). The fact that, on occasion, the Nadeaus also used at least some portion of the disputed strip together with portions of their own property for training purposes, does not establish the necessary hostile intent to acquire a portion of the Caluori land as their own. See Lee v. Raymond, 456 A.2d 1179, 1184 (R.I. 1983) (something more than mere walking on the land is required either to establish dominion over it or to challenge another's claim of right) (citing Gammons v. Caswell, R.I., 447 A.2d 361, 368 (1982)); see also Riverside Burial Society of Pawtucket v. Chitwood, 2003 WL 136129 at * 6 (R.I. Super. January 10, 2003) (our Supreme Court, like the courts of other jurisdictions, would require proof of maintenance or usage of the trees or an area of the trees or an area around them in addition to their mere planting, for the requisite statutory period, to establish adverse possession).

The evidence in this case falls short of meeting the clear and convincing standard necessary to establish a claim of adverse possession. Strict proof of acts of dominion by the Nadeaus is inconsistent with the [Caluoris'] claims of [title] is clearly necessary. Taffinder v. Thomas, 119 R.I. 545, 551, 381 A.2d 519, 522 (R.I. 1977) (citing Chace v. Anarumo, 104 R.I. 48, 51, 241 A.2d 628, 629 (1968)); see also Sherman, 95 R.I. at 466, 188 A.2d at 83. The Nadeaus actions of erecting a non-boudary fence to restrain their

horses does not show intent[4] to exercise dominion, control, or continuous use of the disputed property.[5] See Daneker v. Olenn, 705 A.2d 988, 989 (R.I. 1997); see also Green, 1999 R.I. Super. LEXIS 61. There is no evidence that the Nadeaus engaged in any acts of possession other than passively allowing their animals to graze on the disputed strip. See Anthony v. Searle, 681 A.2d 892, 897 (R.I. 1996). Furthermore, to succeed in their claim of adverse possession, the erection of the fence by the Nadeaus must have been for the purpose of setting a boundary line, not solely for the purpose of restraining their horses. See Dodds, 595 P.2d at 456 (citing Drury v. Pekar, 224 Or. 37, 355 P.2d 598 (1960)) (the setting of a fence must be for the purpose of setting the boundary line not to restrain cattle); see also Green, 1999 R.I. Super. LEXIS 61. The evidence adduced at trial in the instant matter merely shows the Nadeaus having erected a non-boundary fence to restrain their horses from intruding onto the Caluoris' property while they grazed in the entirety of the pasture which is undisputedly owned by the Nadeaus, together with the intermittent training and riding of the horses within the disputed strip. Thus, the Nadeaus have failed to establish their claim of adverse possession over the disputed strip by clear and convincing evidence of activities that would place the adjoining landowner on notice that such a claim to title was being made.

Likewise, in the second disputed area, the "paddock area", the use of electric fencing again evidenced the intention that the fencing around this area was for purposes of restraint only. In fact, other than erecting and maintaining the fence to restrain their

[4]Although no particular act [is required] to establish an intention to claim ownership, the requisite act must put a reasonable property owner on notice that his property is being claimed. McGarry, 2011 WL 6282350 (R.I., 2011) (citing Acampora, 899 A.2d at 467).

[5] In some cases the courts have recognized that a fence [e]nclosing the land must be a boundary fence in order to establish adverse possession by grazing on [e]nclosed land. 48 A.L.R. 3d 818 § 11(a) and cases cited therein.

horses, the Nadeaus never maintained, cultivated, or otherwise improved or pastured the area to evidence an intention to claim the area within the paddock fencing as their own. The acts of dominion to which the Nadeaus refer were to the effect that they fed, tacked and warmed up the horses within the "paddock area" on occasion. The evidence fails to establish in a clear and convincing manner that these activities consistently took place in the disputed area for the statutory period of ten years. In fact, the Nadeaus have failed to offer sufficient clear and convincing proof even to establish that their equestrian activities took place on land recorded in the name of the Caluoris. Although the evidence in general supports a claim that the Nadeaus exclusively used portions of the "paddock area" for their own purposes, the evidence is unclear as to which portions of the "paddock area" are claimed by the Caluoris, and whether the activities of the Nadeaus took place in that area continuously for the requisite ten year period. Rather, it appears that a majority of these acts occurred sporadically and not continuously throughout the years. Therefore, the evidence adduced at trial fails to establish acts of continuous dominion within the "paddock area" sufficient to satisfy the rule for acquisition of title by adverse possession.

CONCLUSION

Nadeaus' claim of adverse possession both in PC-2007-4052, and by way of counterclaim in PC-2007-0992, of the land in question is DENIED. Caluoris' declaration to quiet title in favor of the Caluoris is GRANTED as to property title to which is recorded in their name, and delineated as theirs on the survey map dated May 18, 2006. Counsel for the prevailing party shall submit an Order and Judgment in accordance with this decision.