D.A. 11-2-94 097

IN THE SUPREME COURT OF FLORIDA 9/5

CASE NO.: 83,244
5DCA CASE NO.: 93-386
L.T. CASE NO.: CI 92-643

FILED
SID J. WHITE
AUG 12 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

WILLIAM W. SETON, JR., et ux.,

Petitioners,

vs.

EULA M. SWANN,

Respondent.
_____/

ANSWER TO PETITIONERS' BRIEF ON THE MERITS

Respectfully submitted by

Edward Brinson, Esq.
Florida Bar No. 008790
P.O. Box 421549
Kissimmee, Florida 34742-1549
(407) 847-5127

PRELIMINARY STATEMENT

The Respondent, EULA M. SWANN, will use the identical symbols for reference as were used in the Petitioners' Brief on the Merits.

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and of the Facts contained in Petitioners' Brief on the Merits, except that Respondent specifically disagrees "that Mrs. Swann sat back and allowed them to improve, maintain, and possess 'the encroachment area' for ten (10) straight years." T-130, T-136, T-142

The Respondent further disputes that the trial court never reached the question of whether the defenses based on the doctrines of "boundary by acquiescence" or "boundary by agreement" was reached. T-130, T-136, T-142

SUMMARY OF ARGUMENT

The decision of The Fifth District Court of Appeals below establishes a two-step test to be applied before another's land can be acquired by adverse possession. Section 95.16(1) requires that the real property in question be described in a written instrument recorded in the official records of the County. This is the "meat" of Section 95.16. Sub-section (2) merely describes what the legislature defines as possession of the property in question. ***Seddon v. Harpster***, 403 So.2d 409 (Fla. 1981) does not control this case. After ***Seddon, supra***, the current version of Section 95.16(2)(b) was enacted by Chapter 87-194, Section 1, Laws of Florida and provides that if "only a portion of the land protected by the enclosure is included within the description of the property in the written instrument, judgment, or decree, only that portion is deemed possessed." This revision of Section 95.16(2)(b) brings the instant case under the previously established precedent of ***Meyer v. Law***, 287 So.2d 37 (Fla. 1973).

Further, ***Seddon, supra,*** was certified by the Second District Court of Appeal to the Supreme Court as to whether Section 95.16 could be interpreted retroactively. Any decision by the Supreme Court, other than retroactivity, is dicta, and therefore does not establish any precedent.

For the above reasons, the Petitioners cannot prevail relying on ***Seddon***. The Petitioners have no written title to the Respondent's property and the fencing was Mrs. Swann's, not the Seton's.

The Setons argue that since Mrs. Swann is the one who erected the fence, that Sub-section (2)(b) is not applicable. They suggest that since the Setons' used the disputed strip for their ordinary use, Section 95.16(2)(c) applies. The Setons admit that they have no paper title to meet step one, but seem to believe, erroneously, that since the Legislature, in Chapter 74-382.83 11 and 12 Laws of

Florida, reworded Section 95.16(2)(b) and did not reword Section 95.16(c), that the Fifth District court of Appeals is in Conflict with ***Seddon, supra.***

The Setons, saddled with the absence of any paper title, turn to ***Turner v. Valentine***, 570 So.2d 1327 (Fla. 2d. DCA 1990). In that case, Turner had possession under Section 95.16(c), but did not have paper title. The Appellate Court below was not unmindful of ***Turner, supra***, and disagreed with ***Turner***. ***Turner*** created a new type of title, namely, "Colorable Title," which was found to be as sufficient as the paper title found in ***Seddon***.

Although the Respondent agrees with the reasoning in ***Swann*** as it deals with ***Turner v. Valentine***, a strong argument could be made that the legal description set out in ***Turner*** could have included the enlarged backyard caused by the change in the creek's course. This fact would meet the requirements of both step one and step two possession for seven (7) years under Section 95.16(2)(c).

The Petitioners cannot prevail under the theory of "agreement." The testimony of "Bill Seton" himself (T-90) (T-96) and argument of his attorney (T-130) puts this issue to rest. There was no agreement and no finding of agreement.

Likewise, the theory of acquiescence was dealt with and put to rest by the Trial Judge. (T-136) Although the Final Judgment, (R-217-218) prepared by counsel for the Setons, did not address acquiescence, it is clear from the Trial Court's comments that acquiescence was not proved, and that there was no factual basis on which to find acquiescence.

ARGUMENT

The Petitioners have stated the question presented for decision as follows:

ISSUE I. WHETHER THE FIFTH DISTRICT COURT OF APPEALS' INTERPRETATION OF SECTION 95.16 OR THE INTERPRETATION GIVEN SECTION 95.16 BY THE FLORIDA SUPREME COURT IN *SEDDON V. HARPSTER*, 403 SO.2D 409 (FLA. 1981) AND THE OTHER DCA's IS MORE IN LINE WITH ACTUAL WORDING OF THE STATUTE.

The Respondent, EULA M. SWANN prefers to restate the issue presented more concisely as follows:

Issue I. The Fifth District court of Appeals' interpretation of Section 95.16(1) is in line with the actual wording of Section 95.16.

The Respondent agrees with Petitioners, that Sub-section (1) of Section 95.16 is the "meat" of the statute and that Sub-section (2) merely defines three different ways a person may "possess" a piece of property for "adverse possession" purposes under color of title.

The Petitioners reliance on ***Seddon v. Harpster***, 403 So.2d 409 (Fla. 1981) as binding precedent to reverse ***Swann v. Seton,*** 629 So.2d 935 (Fla. 5th DCA 1993), is misplaced. The question certified by the Second District Court of Appeal to the Supreme Court in ***Seddon*** was whether the new law, Chapter 74-382, (now Section 95.16) could be applied retroactively. The Supreme Court held that it could not. The ***Seddon*** Court stated that "the new statute clearly states that one does not have to have paper title correctly describing the disputed property as long as that area is contiguous to the described land and protected by a substantial enclosure." This pronouncement is mere dicta. Under the theory of stare decisis, all pronouncements by the Court other than the issue of retroactivity are dicta, and do not establish binding precedent.

It appears that the Petitioners rely heavily on ***Turner v. Valentine***, 570 So.2d 1327 (Fla. 2d. DCA 1990) taking comfort in the words in Section 95.16(2)(c)

"for the ordinary use of the occupant." A new form of title was coined by the court in ***Turner v. Valentine, supra***, "Colorable Title" (emphasis supplied). It can be argued that in ***Turner v. Valentine***, the claimants had Colorable Title, when you carefully read the legal description in the Valentines' deed.

> The East 151.39 feet of Lot 12, Fair Oaks Subdivision (Also known as that part of Lot 12, lying east of the Centerline of Allen's Creek, Fair Oaks Subdivision) according to the Map or Plat thereof, as recorded in Plat Book 41, Page 37 Public Records of Pinellas County, Florida.

That part of Lot 12 lying East of the Centerline of Allen's Creek, could be determined by a survey, even after the creek bed moved as it did in that case.

The Setons could not have "Colorable Title" to Lot 25, when their deed refers only to Lot 24. There was no stream, creek, or other naturally fluctuating boundary involved. The Setons do not and cannot meet the requirements of Section 95.16(1). Without the "meat" of the statute, i.e., title, whether it be "paper title" or "colorable title," any type of possession under Section 95.16, whether under 95.16(2)(b) or 95.16(2)(c) is immaterial. ***Swann*** requires a two-step analysis, i.e., title and possession. One without the other does not meet the requirements. The Setons cannot demonstrate either type of title. Therefore, possession is immaterial.

In ***Bailey v. Hagler***, 575 So.2d 679 (Fla. 1st DCA 1991), the claimants, although citing ***Seddon***, and unlike ***Swann***, had a quit-claim deed, which accounts for step one in the statutory test for adverse possession.

Bailey also allowed title by acquiescence after finding (1) uncertainty or dispute as to the location of the true boundary, (2) location of a boundary line by the parties and (3) acquiescence in the location of the fence by the parties. There can be no serious claim that Mrs. Swann ever acquiesced in allowing the Setons

to acquire any of Lot 25. Mrs. Swann testified "I was right in his face all the time." (T-54, T-52, T-55, T-51, T-58) She never acquiesced. (T-60)

The sound two-step analysis set forth in ***Swann, supra*** and the decision by this court in ***Meyer v. Law***, 287 So.2d 37 (Fla. 1973) sustains the District Court on the question of adverse possession. The Trial Court at (T-136) addressed the question of acquiescence, and made no such finding. Acquiescence was not an issue appealed by the Setons to the Fifth District in this cause.

ISSUE II. THE 1987 CHANGE IN SECTION 95.16(2)(b) DID NOT CHANGE SECTIONS 95.16(2)(a) AND (c).

The 1987 change in Section 95.16(2)(b) has no effect on Section 95.16(1), which is the "meat" of the statute. The Respondent has Appendixed hereto, the Legislative history of Section 95.16. After comparison of the several proposed versions of Section 95.16, it becomes apparent that Sub-section (1) was not changed, nor intended to be changed. The Court below correctly ruled that a two-step analysis is required in cases where there is indicia of title. The Petitioners' attempt to rewrite Sub-section (1) is improper in this case, and cannot change the decision herein.

ISSUE III. THE FIFTH DISTRICT COURT OF APPEALS CORRECTLY APPLIED SECTION 95.16, IN LINE WITH COMMON LAW PRINCIPLES.

Judge Peterson's opinion, concurred in by Judges Harris and Sharp, is consistent with the realities of ownership of subdivision lots. It is reasonable to assume that there were no subdivisions when the common law was in effect. Common law principles should be applied to modern conditions, only if reasonable. The Respondent submits that it would be unreasonable for an owner of a subdivision Lot to lose ownership of a part of her subdivision Lot based upon a misplaced fence, or because a neighbor made improvements jammed up to her fence (T-49). It is well known that subdivision lots are platted, and that the size of these lots is subject to governmental approval and to governmental set-back requirements. The boundaries are set by plat and mistakes in fencing or improvements, if allowed to give rise to title, could alter the entire plat. That result is not reasonable, and if allowed, could cause non-conforming lot problems.

The Petitioners continue to suggest to this court that if they cannot prevail under Section 95.16, that they should prevail on the doctrines of "boundary by acquiescence" and or "boundary by agreement."

The Petitioners presented evidence contrary to the doctrine of boundary by agreement. Bill Seton's testimony was that there was no agreement, (T-90) and that fact was admitted by Seton's counsel. (T-130) Mrs. Swann said there was no agreement. (T-60). Therefore, no agreement can be now conjured.

The trial court dealt with the Petitioners' affirmative defense of acquiescence at (T-136), when the court stated that the principle of acquiescence is contrary to the theory of Adverse Possession.

The concept of acquiescence is a mutual recognition of a boundary and is the basis of this theory. The elements of a boundary by acquiescence are found in ***McDonald v. Givens***, 509 So.2d 992 (Fla. 1st DCA 1987), as follows:

(a) Dispute from which it can be implied that both parties are in doubt as to the boundary, and

(b) Continued occupation and acquiescence in a line other than the true boundary line for a period of more than the statute of limitations.

The Petitioners won at the trial court level, and the Trial Judge instructed the Petitioners to prepare a proposed Final Judgment in accord with his ruling (T-142). It is conceded that the Final Judgment granted only Petitioners requested relief based upon adverse possession. However, due to the Court's statements (T-142), (T-130), T-136) it is clear that the Trial Court granted relief on the principle of adverse possession, and made no finding of acquiescence or agreement. The failure to find a factual basis for acquiescence or agreement was not appealed by the Setons, but was argued by them at every chance, both at trial and on appeal. This dispute must be ended and this court has the power of finality, especially when the Final Judgment appealed was prepared by the Petitioners.

The Respondent elects not to respond to the Petitioner's interesting discussion of the "interplay" between Justice Boyd, Justice Adkins, and Judge Peterson. There is sufficient legal precedent and good reasoning to uphold the decision in ***Swann, supra***, and this case needs to be ended by holding that the Petitioners should not prevail on any theory, whether it be estoppel, waiver, acquiescence, tacit agreement, adverse possession, or whatever else Petitioner's may raise. This small strip of a platted subdivision lot, purchased by Mrs. Swann so many years ago, should not continue to be repurchased by her through the judicial process. Setons never purchased the land in question, and it

has not been, either in the past or now, for sale to them by Mrs. Swann. Purchasers of platted subdivision lots need the security of knowing that they do not need to erect a fence on the boundary-lines of their lot to prevent loss of any footage to a neighbor who mows over his boundary every week and calls that ordinary use.

CONCLUSION

The below decision by the Fifth District Court of Appeals was correct and has correctly applied Section 95.16. This Court is urged to set at rest the issue of adverse possession under Color of Title and to adopt the two-step analysis set forth in ***Swann***. Further, it is urged that this Court hold that the Setons have not acquired title to Mrs. Swann's Lot 25 by estoppel, waiver, acquiescence, tacit agreement, adverse possession or whatever, and further direct the Trial Court to order the Setons to remove their improvements from her Lot.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Frederic B. O'Neal, Esq., P.O. Box 2288, Orlando, Florida 32802 and William Muntzing, Esq., P.O. Box 421966, Kissimmee, Florida 34742, by U.S. Mail this 11 day of August, 1994.

BRINSON, SMITH, SMITH & STARR, P.A.
1201 West Emmett Street
P.O. Box 421549
Kissimmee, FL 34742-1549
(407) 847-5127

By: Edward Brinson
Edward Brinson
Florida Bar No. 008790
Attorneys for Respondent