8-4-2009

Flying Elk Investment, LLC v. Cornwall Appellant's Reply Brief Dckt. 35853

APPELLANT REPLY BRIEF
FLYING ELK INVESTMENT, LLC

Appeal from the District Court of the Sixth Judicial District of
The State of Idaho, in and for the County of Bannock

HONORABLE RONALD E. BUSH
District Judge

HONORABLE STEPHEN A. DUNN
District Judge

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FILED THIS _____ DAY OF _____, 2009

STEPHEN W. KENYON, Clerk

BY: _____
Deputy Clerk

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STANDARD OF REVIEW

In matters regarding Summary Judgment, in ruling on an appeal from summary judgment the supreme court will only determine: (1) whether there is a genuine issue as to any material fact; and (2) whether the moving party is entitled to judgment as a matter of law; and the determination is to be based on the "pleadings, depositions, and admissions on file, together with the affidavits, if any;" however, the court should liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences from the evidence. *Mitchell v. Siqueiros,* 99 Idaho 396, 582 P.2d 1074 (1978).

The Supreme Court, upon review, is to liberally construe the facts in the existing record in favor of the nonmoving party and to draw all reasonable inferences from the record in favor of the nonmoving party; in this process, the Court must look to the totality of the motions, affidavits, depositions, pleadings, and attached exhibits, not merely to portions of the record in isolation. *Anderson v. City of Pocatello,* 112 Idaho 176, 731 P.2d 171 (1986).

Standards applicable to summary judgment require the district court and Supreme Court upon review, to liberally construe facts in the existing record in favor of the party opposing the motion, and to draw all reasonable inferences from the record in favor of the nonmoving party. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Loomis v. City of Hailey,* 119 Idaho 434, 807 P.2d 1272 (1991).

When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence

property before it and grant the summary judgment despite the possibility of conflicting inferences. *Id.* (citing *Brown v. Perkins,* 129 Idaho 189, 191, 923 P.2d 434, 436 (1996)); *Loomis v. Hailey,* 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991) The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences. *Id.* (citing *Walker v. Hollinger;* 132 Idaho 172, 176, 968 P.2d 661, 665 (1998); *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 518-19, 650 P.2d 657, 660-61 (1982).

Regarding undisputed facts, Cornwall acknowledges there were no express agreements with either Pat Whitworth or Flying Elk to fix the boundary of the properties on the fence line. David Cornwall deposition pg 17. See also TR pg 44. As a matter of fact there is absolutely nothing in the record to indicate there was any agreement at any time that the fence line would in fact, be the boundary line. A fact that is highly disputed is that the fence in its location prior to 1972 is the same location that the fence existed after 1972. In Pat Whitworth's deposition, the questions was asked,

> "Now, I understand that there are little sections of the fence that got moved here and there, but as far as the big picture, the bulk of the fence, was it pretty much in the same place through those years, when Cornwall's predecessors owned it and when he owned it?"

Whitworth answered,

> "Well, it moved as much as a couple hundred feet back one way or the other, yeah, it was moved."

While it is agreed that the fence line stood unchanged for the last thirty years it remains disputed fact that the fence line prior to that time was in its current location. Irrespective of that disputed fact and contrary to the unrefuted evidence, (1) there was never an agreement to fix the

line as a boundary (2) evidence was presented that once a survey was done that the boundary would then be fixed as per the description of the legal description of the property and (3) the fence had been set as a matter of convenience and moved from time to time as a matter of convenience. Therefore, contrary to the testimony of Pat Whitworth, the trial court simply divined its common sense assessment to create a mythical agreement in some unknown history. However, Pat Whitworth testified affirmatively that there was never an agreement to set the fence as the boundary. Therefore, the case falls squarely within the case law as established in *Brown v. Brown.* There being no agreement, and there being evidence regarding the history of the fence that refutes any agreement ever having been reached. The doctrine of boundary by agreement, of which boundary by acquiescence is a subpart, must fail.

REMEDY AT LAW OR IN EQUITY

The initial presumption is that a person owns land as described. There are however, doctrines in equity such as adverse possession and boundary by agreement that may modify that initial presumption. In the *Bayhouse v. Urquides* 17 Idaho 286, 105 P. 1066 (1909), the equitable doctrine made abundant sense because of the boundary significantly impacting a residential improvement. This case, as in *Brown v. Brown* 18 Idaho 345, 110 P. 269 (1910), concerns agricultural lands, in this case the only "improvement" being a scooped out pond. Cornwall deposition pg. 7, 23. The balance is Ag Land. Cornwall deposition pg. 21. The court acknowledges that there is "no clear and direct evidence of the nature and purpose of the original location of the fence". TR pg. 59. However, that statement is not consistent with the evidence presented by Pat Whitworth going back more than 70 years. The court then bootstraps the

subsequent treatment into an agreement. However, the court also acknowledges more than 70 years there was never an agreement that the fence line was the boundary. This court has recognized that acquiesces alone is not enough. In this particular case there is affirmative testimony that remains unrefuted, that there was never an agreement. And certainly no agreement since 1972.

Boundary by agreement consists of two elements; the boundary is disputed or uncertain, and there was a subsequent agreement fixing the boundary. *Cox v. Clanton,* 137 Idaho 492, 494-95, 50 P.3d 987, 989-90 (2002). The "agreement" element of "boundary by agreement" can be implied by the surrounding circumstances and the landowners' conduct. *Id.* at 495, 50 P.3 at 990. The "long existence and recognition of a fence as a boundary, in the absence of any evidence as to the manner of circumstances of its original location, strongly suggests that the fence was located as a boundary by agreement." *Id.* (internal quotations omitted). But, acquiescence is "merely regarded as competent evidence of the agreement," and an agreement therefore "is essential to a claim of boundary by acquiescence." *Id.* (internal quotations omitted).

Irrespective of *Wakamatsu*, 75 Idaho 23, there is evidence that the location of the original fence was dictated by convenience. Whitworth deposition pg 18. As Pat Whitworth testified, it was erected as a barrier for cattle. Whitworth deposition pg. 20, 21, 27 and 32. They had intended to relocate the boundary should the lad be surveyed. Whitworth deposition pg. 24.

Pat Whitworth's testimony in Deposition is key. [pages 33, lines 20 – 34, 35, 36, 37]

Q. Did you have any discussion with Peoples, the folks that used to own the land, did you ever have an agreement with them that the fence line would be the boundary line?

A. No.

Q. Are you aware of any agreements that ever existed that the fence line that's running north and south would be the boundary line between the properties?

A. No.

Q. With any of your family members, with Max Whitworth or any of his kids, was there ever an agreement that the fence line would be the boundary line?

A. No.

Q. As far as you knew, the fence line was no the boundary line; is that correct?

A. It was not the boundary line.

MR. KLINE: I don't think I have any further questions.

RE-EXAMINATION

BY MR. HOLMES:

Q. Mr. Whitworth, what is a boundary, what do you mean when you say boundary?

A. I have this problem, I will explain my problem. I farm all over. A guy runs his horses in my grain, so I called him and told him, I said I will build you a new fence to take care of your horses. He says the survey line is out in your field. I said it's not in my field, it is in your field. I will move the fence over to where it goes and then I will build you a fence. That is my definition of a boundary. Where it is surveyed, it is correct, and it will stand in court, or law. The law do funny things, but that's how I do it.

With McNabb, I survey, Dave's father says you don't have to give him that ground. It was not my ground, I just moved the fence. I am doing that right now for a mile between my neighbors. I surveyed it, I am just moving the fence. I asked them for nothing, I put the fence where it's supposed to go. But then I want their horses out of my grain.

Q. Is that McNabbs you are talking about?

A. No. This is Wayne Taysom, three Neighbors along there, Wayne, and the guy with the horses, I forgot his name, and Dalhke. I have to build a mile of fence, I don't have to, but that's what I do. And then the question is settled, no more to it. That's my definition. Mr. Chandler, on of these guys that fathered these, I had the same problem with their cattle. I went to see Jim, which is really a controversial fellow he was, I said if I survey and build a new fence, will it anger you? No, the damned thing should have been surveyed years ago, that was it. I am not saying that's how it ought to be, that's just how some folks do things, that's how I do things.

Q. So when you talk about a boundary, you are talking about having the surveyed line.

A. That's right.

Q. And then you establish the fence along that line.

A. It fits the legal description that I pay taxes on. Now, we wasted a lot of time because I can tell you what I know in about three minutes, as a rule.

Q. So the reason that wasn't done here while you owned this property, go get the survey and move the fence on a line, was just simply cost?

A. I was not infringing on anybody else, so my concern did not exist. I used it merely as a fence to restrain stuff off the rest of my property. Had I been over on their property, I would have moved the fence.

Q. Over on whose property?

A. Well, had that been the reversal of things, I would have moved that fence.

Q. You mean if you had been over here (indicating) when Joe Whitworth—

A. If that time had been over here, the fence would have been there now (indicating).

Q. But you still would have had to buy a survey?

A. It's about the money. But I would have bought it. Now, the fence I am moving for the mile between these people, not one of them paid one dime on that survey, because the guy told me my line is out in your filed. I said we'll correct that, it's your field. We will move the fence out o where it's supposed to be, and I won't have horses in my grain anymore.

Q. You understand that some people would use boundary a little different?

A. I do; I do understand that. In this country, everybody is entitled to their won opinion, their own opinion of honesty and of ethics and everything else, each person has their own opinion, and I don't want to convey the fact that I am judging anybody because they do things different, because I am not.

MR. HOLMES: I don't have any other questions.

MR. KLINE: Nothing further.

(Witness excused at 10:00a.m.)

(By agreement, the signature of the witness was waived.)

While there is no question under Idaho Law, that parties can reach an agreement to set the boundaries of land if the true location is unknown. See *Idaho Land Co. v. Parsons,* 3 Idaho 450, 31 P. 791 (1892), the challenge, as presented in this case, is where a prior owner of the property states that the fence was placed as a matter of convince, as a barrier and known, at least by him as not being on the boundary described by the seed and that the true boundary would be set once a survey was done. The standard of "in the absence of any evidence as to the manner or circumstances of its original location". *Anderson,* 145 Idaho 743 - 44. *Cox,* 137 Idaho 492 (494-95).

Pat Whitworth testified there was no agreement. The fence had been moved from time to time.

Acquiesce is merely a subpart of boundary by agreement. Here there is no agreement.

All parties agree that it would have been best-practice to survey the land at the time of purchase. It was, for both a matter of money. However, once surveyed, the described (by deed) line was determined. Notice was provided.

As dispute of facts exist as to the original (prior to 1972) fence location. That factual dispute should be resolved in favor of Flying Elk. It is undisputed that there have been no agreements since the fence was lost moved in 1972 or 1979. Acquiescence alone is not enough. While a long time period of fence existence may strongly suggest an agreement, the unrefuted evidence shows no agreement.

The record does not support the courts findings.

The count below, having found no express agreement relies on the conduct of the parties since 1972. However "the conduct of subsequent owners, or their understanding as to the boundaries, would not prove or disprove an implied agreement". *Downey v. Vavold,* 144 Idaho 592, 596, 166 P.3d 382, 386 (2007).

The holder of title to property is the presumed legal owner of that property. *Anderson,* 145 Idaho, 743.

Another person who claims ownership to that property must establish the claim by clear, satisfactory and convincing evidenced. *Anderson,* 145 Idaho, 743.

IDAHO FENCING LAW IS APPLICABLE

Pat Whitworth testified that the fence was placed as a matter of convenience and was known at least by him and his father not to be on the described line. That testimony is undisputed. It is submitted that the State Legislature provides a legal remedy in this case. I.C. §35-110 provides:

> The person building such fence, or the occupant or owner of the land whereon the same is build, may, upon notice to the other party, whenever doubts arise about the location of such fence, procure the services of a professional land surveyor to establish the boundary line between their respective lands, and the line so established is sufficient notice to the party making the mistake, so as to require him to remove such fence within one (1) year thereafter.

The court below states "this statue provides a remedy when a mistake has been made in setting a fence, and allows that a party may demand a survey to determine the actual boundary." TR, pg. 62.

The court goes on to state, "This stature is directed to those persons *building* a fence or for those instances where the doctrines of adverse possession or boundary by agreement have not been raised." TR pg. 61. It is submitted that the above statement is without authority and is incorrect and not a supportable statement of the law. The statute by its plain reading indicates that when doubts arise as to the location of the fence services of a professional land surveyor are to establish the boundary, and the fence is to be reestablished within one year of notice. The statures also by it's plain languages address both the person that builds the fence or the occupant or owner of the land where the fence is built. The statues talks in generic terms about petition fences with by definition is what has been described by Pat Whitworth. It is therefore submitted that I.C. §35-110 provides the legal authority for Flying Elk to have the property surveyed then demand that the fence be placed on the lawful described boundary.

CONCLUSION

There are disputed facts as to the location of the fence as it existed prior to 1972. Pursuant to Rule 56, IRCP, the conflicting inferences or facts should have been resolved in favor of Flying Elk. The party resisting the motion for summary judgment. Pat Whitworth provided substantial credible evidence that there is not any agreement setting the boundary between the properties. The court errored when it relied so heavily on the conduct of the

subsequent owners as such conduct should not prove or disprove an implied agreement. There existed affirmative testimony that was unrefuted that there is not has been any agreement regarding the setting of a boundary since 1972. The holder of title of property is the presumed legal owner of property. Another person that claims ownership of that property must establish a claim by clear, satisfactory, and convincing evidence.

Contrary to *Teton Peaks v. Ohme*, 08.22 ISCR 1084 (2008), there is ample credible evidence regarding the (1) relocation of the fence (2) use of the fence as a barrier and for convenience and (3) that at least Pat Whitworth and his father understood that the fence was not on the boundary and was not intended to be a boundary line setting fence. It is further submitted that the fifteen acres in question have no substantial improvements on them that would create an unreasonable hardship on David Cornwall to not be able to claim that property as his. Unlike *Bayhouse,* the line would not go through a portion of a dwelling. The property remains agricultural land and much of it is wild or unimproved land.

Further, Idaho Statutes 35-110, provides that once doubts arise as to the location of the fence a parry can have the land survey and seek to have the fence established in it's described by deed location. It is therefore submitted that the state statute should be followed.

Because of the conflicts of fact regarding the location of the fence prior to 1972 coupled with the clear and convincing testimony of Pat Whitworth that there was no agreement fixing the fence as a boundary and because the District Court misapplied Idaho Code §35-110, it is submitted that the matter should be remanded back to District Court to have the matter tried

on merits.

RANDALL KLINE
Attorney for the Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3RD day of August, 2009, in accordance with the Idaho Rules of Civil Procedure and Appellant Rules, I mailed two true and correct copies of the foregoing Brief to the following by placing the same in the U.S. Mail, postage prepaid thereon:

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