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DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
SEP 10 2008	
By _____	Clerk Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In re: SRBA

Case No. 39576

)
) Subcase No.: 63-7539

)
) **MEMORANDUM IN SUPPORT OF**
) **CROSS-MOTION FOR SUMMARY**
) **JUDGMENT**

COMES NOW Craig Whitted ("Whitted"), by and through his counsel of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman, P.A., and hereby files this memorandum in support of his cross-motion for summary judgment.

I. ISSUES

Whitted has moved the court for summary judgment in favor of Whitted and against Sarah Jane Smith ("Smith") on the grounds and for the reasons there is no genuine issue of material fact, and Whitted is entitled to summary judgment as a matter of law. Whitted seeks the court to enter summary judgment decreeing:

1. That Smith has no right, title, or interest in and to any portion of the Whitted Property, including, but not limited to, the generally described 10 foot by 10 foot area in which a well is located on the Whitted Property; and
2. That Smith has no right, title, or interest in and to any water whose source originates on the Whitted Property.

II. HISTORY AND FACTS

B. Whitted Property Chain of Title

1. Craig and Sheilla Whitted are the fee simple owners of the subject property, which is located on the generally described as the South Half of the Southeast Quarter of Section 14, Township 1 South, Range 2 West, Boise Meridian, Canyon County, Idaho (the "Whitted Property").
2. Attached to the Affidavit of Craig Whitted as Exhibits A-1, A-2, and A-3, are true and correct copies of site plans and photographs properly depicting the location of the Whitted Property.
3. Whitted's grandfather-in-law and grandmother-in-law, namely, Earl L. Cusic, and Doris I. Cusic, husband and wife, acquired the Whitted Property on or about July 17, 1951, pursuant to a quitclaim deed executed by George F. Sanders and Ada L. Sanders, husband and wife, as grantors, in favor of Earl L. Cusic and Doris I Cusic, husband and wife, as grantees, which quitclaim deed was recorded with the Canyon County Recorder's office on February 4, 1952, as instrument no. 385366 (the "Cusic Quitclaim Deed").
4. A true and correct copy of the Cusic Quitclaim Deed is attached to the Affidavit of Craig Whitted as Exhibit B, and by this reference incorporated herein as though set forth in full.

5. The Cusics were the fee simple owners of the Whitted Property continuously from July 17, 1951, through January 4, 1990, when it was conveyed to Sheilla Whitted and your affiant, but Mr. Cusic passed away in 1980, and his interest was transferred to Ms. Cusic.

6. The Whitteds acquired the Whitted Property on or about January 4, 1990, pursuant to a certain warranty deed executed by Doris Irene Cusic, as grantor, in favor of Craig and Sheilla Whitted, which warranty deed was recorded with the Canyon County Recorder's office on June 30, 1990, as instrument no. 9001773 (the "Whitted Warranty Deed").

7. A true and correct copy of the Whitted Warranty Deed is attached to the Affidavit of Craig Whitted as Exhibit C, and incorporated herein by reference.

8. Sheilla Whitted and Whitted have been the owners of the Whitted Property continuously since we acquired it on January 4, 1990.

B. The Smith Property Chain of Title

9. On or about December 31, 1987, David W. Vastine and Marsha Jane Vastine, husband and wife, acquired the Smith Property from Edward Evans, et al., which property is described on Exhibit D attached to the Affidavit of Craig Whitted, and which property is adjacent to the Whitted Property (the "Smith Property").

10. Jesse Peavey and Pearl Peavey, individually and then later as owners of Canyon Cattle Co., Inc., an Idaho corporation, leased all or a portion of the Smith Property from the 1960s up through July 17, 1992, and operated a cattle feedlot on the Smith Property.

11. On or about July 17, 1992, David W. Vastine and Marsh J. Vastine, husband and wife, as grantors, conveyed the Smith Property to Canyon Cattle Co., Inc. pursuant to a certain warranty deed recorded with the Canyon County Recorder's office on July 30, 1992, as instrument no. 9217150 (the "Canyon Cattle Warranty Deed").

12. A true and correct copy of the Canyon Cattle Warranty Deed is attached to the Affidavit of Craig Whitted as Exhibit D, and incorporated herein by reference.

13. On or about June 15, 1999, the Canyon Cattle Co., Inc., as grantor, executed a certain warranty deed on the Smith Property in favor of Casey McKee, an unmarried person, and Cody McKee, a married man, as grantees, which warranty deed was recorded with the Canyon County Recorder's office on June 24, 1999, as instrument no. 9924708 (the "McKee Warranty Deed").

14. A true and correct copy of the McKee Warranty Deed is attached to the Affidavit of Craig Whitted as Exhibit E, and incorporated herein by reference.

15. On or about March 23, 2000, Casey McKee and Cody McKee, as grantors, executed a certain warranty deed on the Smith Property in favor of Joe Donaldson, as grantee, which warranty deed was recorded with the Canyon County Recorder's office on or about March 23, 2000, as instrument no. 200014029 (the "Donaldson Warranty Deed").

16. A true and correct copy of the Donaldson Warranty Deed is attached to the Affidavit of Craig Whitted as Exhibit F, and incorporated herein by reference.

17. On or about September 27, 2002, Joe Donaldson, as grantor, executed a certain quitclaim deed on the Smith Property in favor of the David Joseph Donaldson Revocable Trust dated June 29, 1999, which quitclaim deed was recorded with the Canyon County Recorder's office on or about October 11, 2002, as instrument no. 200248079 (the "Trust Quitclaim Deed").

18. A true and correct copy of the Trust Quitclaim Deed is attached to the Affidavit of Craig Whitted as Exhibit G, and incorporated herein by reference.

19. On or about June 1, 2004, the David Joseph Donaldson Revocable Trust dated June 29, 1999, as grantor, executed on the Smith Property in favor of Sarah Jane Smith, as grantee, a certain warranty deed to the Smith Property, which warranty deed was recorded with the Canyon County Recorder's office on June 2, 2004, as instrument no. 200429614 (the "Smith Warranty Deed").

20. A true and correct copy of the Smith Warranty Deed is attached to the Affidavit of Craig Whitted as Exhibit H, and incorporated herein by reference.

B. Permissive Use of the Well

21. Whitted resided on the Whitted Property in 1982 and 1983, and then commencing in 1985, resided on the Whitted Property continuously to the present date. During such period of time, Whitted raised livestock and raised crops on the Whitted Property.

22. The subject well was drilled in the 1960s and is located on the Whitted Property (the "Well").

23. At the time the Well was drilled, the Cusics, Whitted, and Jesse Peavey and Pearl Peavey, who were the tenants of the Smith Property, all

recognized that the Well was drilled on the Whitted Property and was in the wrong location. Nevertheless, the Cusics gave the Peaveys permission to use the well on a non-exclusive basis.

24. The Peaveys utilized the Well on this permissive basis up until they acquired the Smith Property in 1992.

25. In 1992, Jesse Peavey came to Whitted and inquired about purchasing the Well since he did not acquire it with his land purchase of the Smith Property from the Vastines.

26. Sheilla Whitted and Whitted decided only to give the Peaveys permission to the non-exclusive use of the Well until the Peaveys sold the Smith Property or drilled their own well, which the Peaveys intended to do.

27. Upon Smith commencing to operate the feedlot on the Smith Property, which was before she acquired the Smith Property, Whitted had a conversation with her and agreed to give her permission to use the well on a non-exclusive basis. This is when Smith allegedly found out the Well was on the Whitted Property.

28. At no time was use of the Well by an owner or occupant of the Smith Property adverse or under a claim of right. Rather, all such use was on a permissive basis granted by the owner(s) of the Whitted Property.

29. Attached to the Affidavit of Craig Whitted as Exhibit I is a true and correct copy of a photograph that Whitted took in August, 2008, depicting the Well and the partially buried hoses coming out of the Well that were utilized by Whitted to obtain water from the Well for purposes of watering livestock and other uses.

30. At no time did any owner or occupant of the Smith Property pay any property taxes relating to the Whitted Property or the Well on the Whitted Property.

31. At no time did any owner or occupant of the Smith Property own any right, title or interest in and to the Whitted Property or the Well.

32. Whitted has always been a good neighbor and worked cooperatively with the owners of the Smith Property, but upon Smith learning the Well was not on the Smith Property, and thus, would affect her ability to assert a water right, the mutual cooperation came to an abrupt end through no fault of Whitted, and Smith suddenly asserted an interest in the Whitted Property in an attempt to adjudicate claimed water rights.

33. Smith has no water rights originating from the Whitted Property.

III. ANALYSIS

A. Standard of Review

Summary judgment is proper "if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho Rule of Civil Procedure 56©. The Court construes the record in the light most favorable to the nonmoving party and draws all reasonable inferences in favor of that party. *DBSI/TRI v. Bender*, 130 Idaho 796, 801, 802, 948 P.2d 151, 156, 157 (1997). If reasonable minds might come to different conclusions, summary judgment is inappropriate. *Id.* 130 Idaho at 802, 948 P.2d at 157. (However, "a mere scintilla of evidence or only slight doubt as to facts" is not sufficient to create a genuine issue for purposes of

summary judgment. *Harpole v. State*, 131 Idaho 437, 439, 958 P.2d 594, 496 (1998). The nonmoving party "must respond to the summary judgment motion with specific facts showing that there is a genuine issue for trial." *Tuttle v. Sudena Industries, Inc.*, 125 Idaho 145, 150, 868 P.2d 473, 478 (1994). Summary Judgment is appropriate where the nonmoving party fails to make a showing sufficient to establish that the existence of an element essential to its case when it bears the burden of proof. *Harris v. State Department of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). See, generally, *Samuel v. Hepworth, Nungester and Lezamiz*, 134 Idaho 84, 996 P.2d 303 (2000).

B. Smith has not acquired any interest in the Whitted Property, whether by adverse possession or by prescriptive easement.

In Smith's motion for summary judgment and supporting memorandum, Smith confuses "prescriptive easements" with "adverse possession." Smith does not discuss the elements or requirements of adverse possession, but instead cites only to the elements of a prescriptive easement. See *Sarah Jane Smith's Memorandum in Support of Motion for Summary Judgment*, p. 4 (quoting *Beckstead v. Price*, 2008 Slip Op. No. 84 (June 17, 2008); *Akers v. D.L. White Constr. Inc.*, 142 Idaho 293, 303, 127 P.3d 196, 206 (2005)) (henceforth "*Smith Memorandum*"). Nevertheless, Smith claims "a prescriptive right to ownership" of the land at issue, which Smith asserts is "exclusive" to her, *Smith Memorandum*, p. 4 (emphasis added), even though Smith would not obtain such "ownership" in fee or "exclusive rights" even if she were able to meet the elements of a prescriptive

easement. *E.g., Luce v. Marble*, 142 Idaho 264, 273-74, 127 P.3d 167, 176-77 (2005) (holding that a prescriptive easement provides easement rights only, and that "exclusive" easements do "not exist under Idaho law"). Elsewhere, Smith mentions adverse possession in passing, but does not describe the elements of adverse possession or why she would be entitled to adversely possess the Whitteds' property. *Smith Memorandum*, p. 7, 9.

As it happens, Smith cannot meet the elements for either adverse possession or a prescriptive easement.

1. Smith does not have a prescriptive easement over the Whitted Property

To establish an easement by prescription, the party seeking to establish such an easement "must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period." *Akers*, 142 Idaho at 303, 127 P.3d at 206 (quoting *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003)).

Of particular note in this case is Smith's inability to satisfy the third element, that of use that is "adverse and under a claim of right." "Under a claim of right means that the claimant has used the way without recognition of the rights of the owner of the servient tenement. Consequently, a prescriptive right cannot be obtained if the use of the servient tenement is by permission of its owner, because the use, by definition, was not adverse to the owner." *Hunter v. Shields*, 131 Idaho

148, 151, 953 P.2d 588, 591 (1998). In short, no easement by prescription can arise where the use of the property has been with the permission of the owner. *Id.*

In the present case, it is undisputed that the use of the well by Smith and her predecessors-in-interest was only with the permission of the owners of the Whitted Property, including the Whitteds and their predecessor's in interest. These grants of permissive use going back to when the well was first drilled are established in the Affidavit of Carrie Cusic-Moore, ¶¶ 4, 5, the Affidavit of Alvin H. Race, ¶¶ 4-6, the Affidavit of Ava M. Race, ¶ 4, the Affidavit of Craig Whitted, ¶¶ 24-29, and the Affidavit of Sheilla Whitted, ¶¶ 10-13. The evidence provided in these affidavits is uncontroverted, and Smith cannot rely upon mere unsupported allegations or denials to avoid summary judgment on this issue. I.R.C.P. 56(e).

In response, Smith asserts only that her use of the well, or those of her predecessor's in interest, was adverse and under a claim of right because "[t]he Cusics, Mr. Whitted's predecessors in interest, knew Mr. Jensen drilled the well, believed it was on their property, but acquiesced to the continued use of it." *Smith Memorandum*, p. 5. Interestingly, by stating that the Cusics and Whitted's "acquiesced" to the use of the well, Smith does not claim that the use of the well was anything other than permissive. The Cusics and Whitted's past willingness to grant a neighbor permission to use the well did not, and could not, give rise to a valid prescriptive easement claim. *Hunter*, 131 Idaho at 151, 953 P.2d at 591. It was not necessary (as Smith implies) for the Cusics and Whitteds to deny others permission to use the well in order to retain their own property rights. *See id.* The Whitteds and their predecessors in interest did not merely allow the well to be used

by others – they affirmatively granted permission. Affidavit of Carrie Cusic-Moore, ¶¶ 4, 5, the Affidavit of Alvin H. Race, ¶¶ 4-6, the Affidavit of Ava M. Race, ¶ 4, the Affidavit of Craig Whitted, ¶¶ 24-29, and the Affidavit of Sheilla Whitted, ¶¶ 10-13. In doing so, they retained the right to withhold such permission in the future.

“A use begun under permission or license can be changed into one exercised as a claim of right (i.e., hostile and adverse) only after unequivocal conduct giving the owner of the servient tenement notice of the hostility and adverseness of such claim.” *Id.* at 152, 953 P.2d at 592 (quoting *Webster v. Magleby*, 98 Idaho 326, 327, 563 P.2d 50, 51 (1977)). In the present case, the Whitteds have established by uncontroverted testimony that the use of the well on their property has been permissive only, and that that permissive use existed back to the beginning of the well’s existence. Until the present lawsuit, neither the Smiths nor their predecessors in interest have given, or claim to have given, unequivocal notice of any adverse claim of right to the use of the well. Accordingly, Smith has not and cannot as a matter of law meet the elements needed to establish a prescriptive easement burdening the Whitteds’ property.

2. Smith has not adversely possessed any portion of the Whitted property.

A claim of adverse possession requires “that the possession has been actual, open, visible, notorious, continuous and hostile to the party against whom the claim is made.” *Luce*, 142 Idaho at 272, 127 P.3d at 175. Further, it is necessary for the claimant to establish that she has protected the land to be adversely possessed behind a “substantial enclosure” and has cultivated or improved the property for the statutory period of 20 years. I.C. § 5-210 (prior to

2006 the statutory period was five years). Additionally, the party asserting adverse possession must demonstrate that it has paid all taxes levied and assessed on the land it claims to have adversely possessed. *Luce*, 142 Idaho at 272, 127 P.3d at 175; *DeChambeau v. Estate of Smith*, 132 Idaho 568, 571, 976 P.2d 922, 925 (1999). "The burden of proving all of the essential elements of adverse possession is upon the party seeking title, and every element must be proven with clear and satisfactory evidence." *Wilson v. Gladish*, 140 Idaho 861, 864, 103 P.3d 474, 477 (2004).

Smith has failed to meet these elements as a matter of law. First, as discussed above, the use of the well by Smith and her predecessors was not "hostile to the party against whom the claim is made" because such use was with the permission of the owners of the Whitted property. *Hunter*, 131 Idaho at 151, 953 P.2d at 591.

Second, neither Smith's use nor the use of her predecessors has been "exclusive" since the Whitteds and their predecessors also made use of the well. Affidavit of Carrie Cusic-Moore, ¶¶ 5, 6; Affidavit of Alvin H. Race, ¶ 7; Affidavit of Ava M. Race, ¶ 6; Affidavit of Craig Whitted, ¶ 30; Affidavit of Sheilla Whitted, ¶¶ 9, 11.

Third, Smith has not cultivated or improved the property, nor has Smith protected the property she claims behind a "substantial enclosure" as required by statute. I.C. § 5-210; *Utter v. Gibbins*, 137 Idaho 361, 48 P.3d 1250 (2002) (holding that a party's claim of adverse possession was defeated by that party's failure to

mark off the claimed property within a "substantial enclosure" as required under I.C. § 5-210).

Fourth, Smith has not paid, or even claimed to have paid, any taxes on the subject property. Absent such payment of taxes, Smith's claim fails as a matter of law. I.C. § 5-210; *Wilson*, 140 Idaho 865, 103 P.3d 478.

C. Smith does not have any water rights originating from the source on the Whitted Property.

Idaho case law has long established a general principal that a water right cannot be obtained by trespass. *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168, 1170 (1974); *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722, 723-24 (1931); *Marshall v. Niagara Springs Orchard Co.*, 22 Idaho 144, 125 P. 208, 212 (1912). Smith correctly quotes the Idaho Supreme Court's decision in *Marshall*, 22 Idaho 144, 125 P. at 212:

One may not acquire a water right on the land of another without acquiring an easement in such land. *** And an easement is an interest in land that cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription.

Id., (quoting *Prentice v. McKay*, 98 P. 1081 (Mont. 1909)).

In the present case, Smith is attempting to acquire a water right on the land of another, but her access, and that of her predecessors in interest, has been permissive only. As discussed above, Smith cannot as a matter of law meet the elements of either adverse possession or a prescriptive easement. As a result, Smith does not have title to the land on which the well is located, nor does she possess an easement leading there. Accordingly, Smith is unable to establish a water right on land to which she has neither ownership nor a right of access.

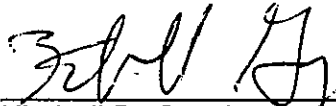
Lemmon, 95 Idaho at 780, 519 P.2d at 1170; *Bassett*, 51 Idaho 256, 5 P.2d at 723-24; *Marshall*, 22 Idaho 144, 125 P. at 212.

IV. CONCLUSION

Smith cannot, as a matter of law, meet the elements necessary to establish either a prescriptive easement or ownership by adverse possession over the well and the surrounding property on the Whitted's land. Accordingly, the Whitteds respectfully request the Court grant their cross-motion for summary judgment.

DATED this 9th day of September, 2008.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.



Kimbell D. Gourley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of September, 2008, a true and correct copy of the foregoing document was served as follows:

John M. Marshall J. Will Varin GIVENS PURSLEY LLP PO Box 2720 Boise, ID 83701-2720	☐ First Class Mail ☒ Hand Delivery ☐ Facsimile ☐ Overnight Delivery
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Kimbell D. Gourley