STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Avenue
Grand Haven, Michigan 49417
616-846-8320
* * * * *

RANDY ELLEN,
Plaintiff,

v

HIGH GRADE MATERIALS COMPANY and **MERCANTILE BANK MORTGAGE COMPANY, LLC,**
Defendants.
_____/

OPINION AND ORDER ON MOTIONS FOR SUMMARY DISPOSITION

File No. 2021-6646-CB

Hon. Jon Van Allsburg

Plaintiff Randy Ellen alleges fee simple ownership and seeks to quiet title to two parcels of real estate titled to defendant High Grade Materials Company. The court previously granted summary disposition to defendants as to plaintiff's acquiescence claim, but granted Plaintiff the opportunity to amend Count I of his complaint. Plaintiff filed an amended complaint alleging adverse possession, and both defendants again move for summary disposition pursuant to MCR 2.116(C)(7) and (8). For the reasons stated, defendants' motions are granted.

Plaintiff alleges that in 1999 or 2000, he entered into a partnership with Mr. Sturrus (then-president of High Grade Materials Company) to develop real estate subdivisions, with Ellen managing the day-to-day operations of the partnership. (Amended Complaint, ¶¶ 17-19). He did so for the next five years, based upon a verbal promise of one-half of the profits and ownership of Parcel 1. (Amended Complaint, ¶¶ 20-23). Parcel 1 is a 2-acre parcel on which is located a home and outbuilding. Parcel 2, against which plaintiff also asserts a claim of adverse possession, is a 22.84-acre parcel of unimproved real estate which surrounds Parcel 1 on three sides. (Amended Complaint, ¶ 11). Parcel 2 is not alleged to be included in the oral promise pertaining to Parcel 1.

Shortly after their verbal agreement, Ellen moved into the home on Parcel 1. (Amended Complaint, ¶¶ 28, 34). The verbal partnership agreement between Ellen and Sturrus "was dissolved" in 2005, allegedly based on Sturrus' claim that there were still no profits to share. (Amended Complaint, ¶ 29). Plaintiff has remained in exclusive and continuous possession of the home, and he has paid utilities and insurance on the home and performed routine maintenance. (Amended Complaint, ¶¶ 34-36). His use and maintenance of the home have included portions of

Parcel 2 as well, allegedly for such things as lawn mowing and occasionally parking tractor trailers. (Amended Complaint, ¶¶ 36-37).

Standard of Review

Defendants' motions pursuant to MCR 2.116 (C)(7) tests whether the plaintiff's Amended Complaint is barred by the statute of frauds or by the statute of limitations and requires the consideration of all documentary evidence filed or submitted by the parties. *Maskery v Board of Regents of University of Michigan,* 468 Mich 609; 664 NW2d 165 (2003). The court must accept as true the well-pleaded allegations in plaintiff's Amended Complaint and construe them in a light most favorable to the plaintiff, and should deny defendants' motions unless no factual development could provide a basis for recovery. *Huron Potawatomi, Inc. v Stinger,* 227 Mich App 127; 574 NW2d 706 (1997).

MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone, to determine whether the plaintiff has stated a claim on which relief may be granted. *Bailey v Schaaf,* 494 Mich 595, 603; 835 NW2d 413 (2013); *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). Any well-pleaded factual allegations in the complaint, together with any inferences that can reasonably be drawn from them, must be accepted as true and construed in a light most favorable to the non-moving party. *Maiden, supra,* citing *Wade v Dep't of Corrections,* 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden, supra,* citing *Wade* at 163. A mere statement of conclusion, unsupported by allegations of fact, will not suffice to state a cause of action. *Churella v Pioneer State Mut Ins Co,* 258 Mich App 260, 272; 671 NW2d 125 (2003).

Analysis

Recently, the Michigan Court of Appeals discussed the doctrine of adverse possession in *Houston v Mint Group, LLC,* 335 Mich App 545; 968 NW2d 9 (2021):

> The underlying statutory basis that gives rise to the doctrine of adverse possession is found in MCL 600.5801...
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> ***
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> The *Kipka*[1] panel...observed:
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> > A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. These are not arbitrary requirements, but the logical consequence of someone claiming by

[1] *Kipka v Fountain,* 198 Mich App 435, 439; 499 NW2d 363 (1993).

> adverse possession having the burden of proving that the statute of limitations has expired. To claim by adverse possession, one must show that the property owner of record has had a cause of action for recovery of the land for more than the statutory period. A cause of action does not accrue until the property owner of record has been disseised of the land. M.C.L. § 600.5829. Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership.
>
> ***
>
> Other cases additionally indicate that the possession must be hostile and under cover of a claim of right. The term 'hostile' as employed in the law of adverse possession is a term of art and does not imply ill will; rather, hostile use is that which is inconsistent with the right of the owner, without permission asked or given, and which would entitle the owner to a cause of action against the intruder. *Id.* at 558-559 (citations omitted).

It is well-established that permissive use is not adverse and cannot ripen into title by adverse possession. *Warner v Noble*, 286 Mich 654, 660; 282 NW2d 855 (1938); *Hamilton v Weber*, 339 Mich 31, 53; 62 NW2d 646 (1954). The claimant's possession of the property must be "hostile, and under cover of claim of right." *Warner*, 286 Mich at 661.

Plaintiff's Amended Complaint alleges that more than 20 years ago the president of High Grade, Sturrus, agreed that plaintiff take possession of a residence on parcel 1 owned by defendant High Grade "as compensation" for work performed by plaintiff on a partnership between Sturrus and Ellen. Plaintiff alleges that the partnership "was dissolved" five years later as it was not sufficiently profitable, but he continues to reside in, use, and maintain the residence and yard. He alleges that his use and maintenance has extended onto parcel 2, but he provided no factual detail as to such use or maintenance.

The Amended Complaint continues to allege that plaintiff was given High Grade/Sturrus's permission to reside on parcel 1. Permissive use cannot ripen into adverse possession because the use must be hostile to the title of the true owner to be adverse. *Kipka*, 198 Mich App at 438. As stated in *Burns v Foster*, 348 Mich 8, 15; 81 NW2d 386 (1957) (cleaned up):

> To make good a claim of title by adverse possession, the true owner must have actual knowledge of the hostile claim or the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invalid intentionally. A mere permissive possession or one consistent with the title of another can never ripen into a title by adverse possession.

The fact that the alleged Ellens/Sturrus partnership was dissolved in 2005 was not so "open, visible, and notorious" that High Grade and the rest of the world would know or recognize that Ellen's occupancy of Parcel 1 had thereby become "hostile." By the same token, plaintiff's vague and intermittent "use and maintenance" of Parcel 2, is not so open, visible, and notorious as to put High Grade or anyone else on notice of plaintiff's hostile and adverse claim to the property.

Plaintiff cites *Gardner v Gardner,* 257 Mich 172; 241 NW 179 (1932), for the proposition that adverse possession may be shown despite the claimant's use having begun permissively. In *Gardner*, Henry Gardner acquired title to property from his father by inheritance in 1893, but never resided on the property. His brother Leonard resided on the property exclusively for the next thirty years, paid all taxes, remodeled a house on the property, and later built an expensive second house on the property and rented the other, retaining all rents. In affirming the trial court's award of adverse possession, the Supreme Court considered it "incredible" that brother Henry would not have known of brother Leonard's blatant assertion of ownership, concluding that "[i]f possession was permissive in the first instance, it soon changed to repudiation of leave to that of asserted right and hostility and so continued by use and occupation and improvements wholly incompatible with recognition of ownership in Henry." Id., at 175-176.

Gardner is distinguishable on its facts from the present case. There seems to be little room for disputing the fact that remodeling a house and building another without the consent of the deeded owner is sufficiently "open, visible, and notorious" to put the owner on notice that the initial permissive use had become hostile. In this case, the allegations of lawn mowing, the occasional parking of tractor trailers, general "use and maintenance," and the dissolution of a business partnership convey no such notice. Plaintiff has made no allegations that could support a finding of hostility.

Plaintiff relies upon a verbal agreement to convey ownership of Parcel 1 as the underlying basis for his claim. Verbal agreements to convey ownership of land violate MCL 566.106, which states as follows:

> Sec. 6. No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

With respect to plaintiff's claim of partial performance, in *Zaborski v Kutyla*, 29 Mich App 604; 185 NW2d 586 (1971), the Court of Appeals stated:

> The law in Michigan is clear that partial performance of an oral contract to convey an interest in land may remove that contract from the operation of the statute of frauds. ... Possession and improvements in regard to the property may remove it from the statute. ... Payment of money pursuant to the contract is another factor to consider.... (citations omitted). *Id.*, at 607.

Plaintiff asserts in the present case that he at least partially performed – for a period of five years until a 2005 dissolution – an agreement to manage a partnership for the development of real estate. He alleges that he has remained in possession of the property, but does not allege making

improvements, and he does not allege that any payments were to be made under the contract. For partial performance to be established, however, there must be acts which unequivocally refer to, and result from, the agreement. *Groening v McCambridge,* 282 Mich 135, 140; 275 NW 795 (1937). There are none alleged here.

Defendants respond that even if the plaintiff's claim is not barred by the statute of frauds, it remains barred by the statute of limitations. The limitations period to recover damages for breach of contract is six years. MCL 600.5807(9). The limitations period begins to run when the claim accrues, which is on the date of the breach and not the date the breach is discovered. *Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc.*, 196 Mich App 367, 372 n1; 494 NW2d 1 (1992). In this case, plaintiff knew of Sturrus' "hesitancy" to comply with the terms of their alleged agreement, certainly by the time their partnership dissolved in 2005 (Amended Complaint, ¶¶ 26-27). Plaintiff's failure to bring this action within six years of Sturrus' breach bars his claim now.

Defendants' motions for summary disposition pursuant to MCR 2.116(C)(7) and (8) are GRANTED.

IT IS SO ORDERED. This is a final order resolving all claims and closes this case.

Date: March 25, 2022

Hon. Jon Van Allsburg, Circuit Judge