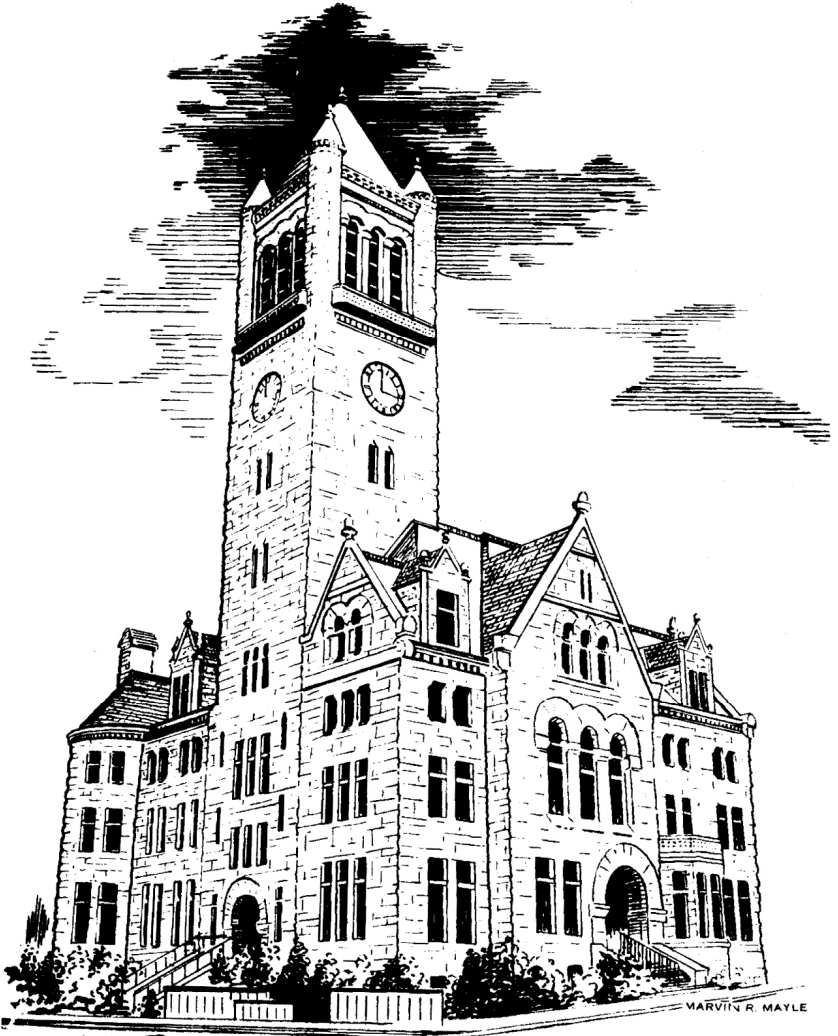


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LEGAL NOTICES

NOTICE

Notice is hereby given that Articles of Incorporation for a Nonprofit Corporation have been approved and filed with the Department of State of the Commonwealth of Pennsylvania on November 3, 2022, for a Nonprofit Corporation known as TEAM IAN CHARITIES, INC.

Said Nonprofit Corporation has been organized under the provisions of the Business Corporation Law of 1988 of the Commonwealth of Pennsylvania.

The purpose or purposes of the Corporation are as follows:

To assist people with special needs and their families by developing and disseminating essential skills, knowledge, assistance and values through research, teaching and service and for any and all other lawful purpose for which a Nonprofit Corporation may be organized under the Nonprofit Corporation Laws of the Commonwealth of Pennsylvania including, but not limited to making distributions to organizations under Section 501 (c)(3) of the Internal Revenue Code (or the corresponding section of any future Federal Tax Code).

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JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY,
PENNSYLVANIA
CIVIL DIVISION

THE BOROUGH OF POINT MARION,	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
DANIEL T. SAVINO,	:	No. 2686 of 2019, G.D.
Defendant.	:	Honorable Nancy D. Vernon

OPINION AND ORDER

VERNON, J.

December 14, 2022

Before the Court is a Complaint in Ejectment and Trespass filed by Plaintiff the Borough of Point Marion against Defendant Daniel T. Savino, involving a twenty-foot alley that bisects property owned by Savino in Point Marion, Fayette County, Pennsylvania. The Borough alleged that on or about November 2017, Savino built and maintained an exterior wall that extended approximately fourteen feet into its alleyway. According to the Borough, Savino has refused to remove the wall from the right-of-way or pay the Borough for the expense of relocating the alley.

By way of Answer and New Matter, Savino admitted that he built a retaining wall on his property and specifically denied that the Borough maintains the twenty-foot alley that bisects his property, alleging to the contrary that the Borough has never maintained the alley since he purchased the property adjacent to both sides of the alley.

In his New Matter, Savino alleged that he purchased a home in Point Marion Borough in or around 1988, and that since that time an unopened, unimproved, never used paper alley was located next to his home. In 2016, a tree in the alley was struck by lightning and for service and safety reasons, Savino removed the dead tree from the alley. As a result of the tree removal, Savino alleged that he began to experience water runoff and to redirect the water, he constructed a retaining wall in the alley. Savino further alleges that he maintained the alley by clearing snow and debris so that he could utilize the alley as a driveway without prior complaint or exception from the Borough. According to Savino, the Borough never used the alley as a roadway and instead instituted legal action to harass and distress him. Savino alleges that his use of the alley has been actual, continuous, exclusive, visible, notorious, distinct and hostile for a period in excess of twenty-one years.

Following bench trial, we make the following:

FINDINGS OF FACT

Joseph O. Elwell, Jr., a registered surveyor for Polestar Engineering, testified for the Borough and was recognized by the Court as an expert in the field of surveying. Elwell performed a survey of the Savino property, including the alleyway in dispute, in November 2017. See, Exhibit 1. Elwell testified that the alley is twenty-foot wide and that the wall built by Savino juts out between fourteen and fifteen feet into the alley. Savino owns the property on both sides of the alley. According to Elwell, the alley is laid out, but not named on the Survey and Plan of Lots for Point Marion, PA prepared by T. J. Keiser, recorded February 8, 1915. See, Exhibit 2. Under cross-examination, Elwell testified that he has no knowledge whether the alleyway was maintained by the Borough for the prior thirty-four years.

Daniel Schmidt, of Gibson Thomas Engineering, was certified as an expert in the field of engineering. Gibson Thomas is the engineering firm employed by the Borough and Schmidt inspected the Savino property. Schmidt testified to a retaining wall on the alleyway near the Savino house. The Borough admitted into evidence pictures of the retaining wall and alley. See, Exhibit 5.

Schmidt testified that the turning radius of a snowplow would not fit through the alleyway and that it would not be cost effective for the Borough to widen the alley. Schmidt admitted that he did not know the measurements between the utility wall and corner to determine if a vehicle could turn. Schmidt did not see any run-off water issues in the area during his one-day visit and testified that a retaining wall would divert the water away from Savino's house.

Mitchell Cottrell, has resided for twenty-eight years in the Borough and is a Councilman. Cottrell explained that the stone wall on Prospect Street, perpendicular to the alley, acts as a guardrail and further impacts the ability to turn into the alley because of Savino's retaining wall. Cottrell testified that "there's no alley left" because of Savino's wall.

The Borough presented a picture at the intersection of Prospect Street and the alley with a handmade sign stating, "NOT A THROUGH STREET." Cottrell testified that the Borough never granted permission to Savino to erect the sign or to block the alley. According to Cottrell the roadway from Prospect to the alley should be open to the public but he does not know whether it is traversable because of Savino's wall. Cottrell testified that "to the best of his knowledge" the Borough maintained the alleyway including snowplowing, graveling, and whatever needed to be done. The Borough receives liquid fuel funds for 0.33 miles including the contested portion of the alleyway.

Carl Ables testified that he has been the Mayor of Point Marion for twelve years. Ables testified that prior to Savino erecting the wall that the Borough maintained the alley. Ables testified that "when the Borough guys weren't there" that he would plow the alley and that he placed gravel in potholes. According to Ables, this was over Christmas day. Ables denies that the alley was a paper alley. Ables also denied that the "Not a Through Street" hand painted sign was sanctioned by the Borough and denied that Savino had Borough permission to build a wall in the alley. Ables testified that rescue vehicles need to be able to traverse but the alley is not passable. Ables also serves as

a firefighter and testified that fire engines could not “get back through there” in case of emergency. Under cross-examination, Ables testified that he plowed the road in the year 2012 or 2013 and the following season deposited gravel on the alleyway.

Savino inquired of Ables if there is a reason to access the alley to which Ables responded “we have to access it ... there was an alley there.” Ables mentioned another residence and a vacant house that would be accessible through the alley but did not testify that the alley is the only means of access to these two houses.

Daniel Savino represented himself at the nonjury trial and testified on his own behalf. He resides parttime at 10 Prospect Street, Point Marion, and parttime in Uniontown, Fayette County. Savino testified that he erected the wall to save his property from stormwater and sewage runoff. According to Savino, the alleyway is a paper alley having never been maintained by the Borough. Savino owns the property on each side of the alley. Savino stated that the only other property accessible by the alley is an abandoned house. Savino testified that he can traverse the alley even with the retaining wall and that it is accessible from either direction. Savino testified that he drives down the alley when his neighbors block access from Prospect Street, which happens frequently.

Savino testified that a sidewalk and wall previously jutted ten feet out into the alley and that he removed them prior to erecting the new retaining wall in dispute. Savino admitted into evidence sixty-nine pictures and described for the Court what each image depicts. See, Exhibit B.

Savino testified that prior to installing the wall, water would gush towards his house. He has put gravel and concrete in the alley, but it did not resolve the issue until he installed the retaining wall. Savino testified that he installed the retaining wall some time in 2016. Savino further testified that he maintained the alley by fixing the gravel when it would wash out and by removing a dead tree that fell onto the alley. Savino denied that the Borough has ever maintained the portion of the alley abutting his parcels.

The Borough called Carl Ables as a rebuttal witness who testified it would cost the Borough a significant amount of money to move the alley. The expenses would include engineering, contracting, and utility costs. Ables testified that the alley had asphalt and it was plowed prior to the erection of Savino’s wall, but no dates were given. Ables testified the alley was maintained “where it was at” and that he personally plowed the alley.

The Borough admitted into evidence the most recent deed depicting Savino’s ownership being recorded, pursuant to his divorce, from Daniel T. Savino and Betty W. Savino, husband and wife, to Daniel T. Savino on September 20, 2006, recorded in Record Book 2006, Page 1991, in the Recorder of Deeds of Fayette County. See, Exhibit 6. In testimony, Savino testified that he has owned this property for thirty-four years. The Court takes judicial notice of prior deeds of record in the Recorder of Deeds of Fayette County detailing Savino’s continuous ownership of this property beginning on October 6, 1989, by way of Deed from Thomas O’Brien to Daniel T. Savino and Jennifer L. Savino, recorded in Record Book 611, Page 166.

DISCUSSION

In its Complaint, the Borough filed counts of ejectment and trespass against Savino for his blocking the alleyway with the retaining wall. “Ejectment is an action filed by a plaintiff who does not possess the land but has a right to possess it, against a defendant who has actual possession.” *Siskos v. Britz*, 790 A.2d 1000, 1006 (Pa. 2002). “Ejectment is a possessory action only, and can succeed only if the plaintiff is out of possession, and [the plaintiff] has a present right to immediate possession.” *Id.* [quoting *Brennan v. Shore Bros.*, 110 A.2d 401, 402 (Pa. 1955)]. An ejectment action differs from a quiet title action in that quiet title serves to determine the relative and respective rights of all potential title holders. *Id.* In contrast, ejectment determines the immediate rights as between the plaintiff and the defendant. *Id.* Therefore, to prevail in an ejectment action, “the plaintiff must show title at the commencement of the action and can recover, if at all, only on the strength of his own title, not because of weakness or deficiency of title in the defendant.” *Hallman v. Turns*, 482 A.2d 1284, 1287 (Pa.Super. 1984). If a plaintiff in ejectment has presented at trial *prima facie* evidence that it has title to the property at issue, the burden then shifts to the defendant, unless the plaintiff’s proof necessarily defeats the plaintiff’s claim of title. *Dunn v. Milanovich*, 152 A. 757, 758 (Pa. 1930). Conversely, if the plaintiff’s claimed chain of title is faulty, the plaintiff has not shown a *prima facie* case, and the plaintiff’s ejectment case fails. *Faux v. Cooke*, 163 A. 384, 385 (Pa.Super. 1932).

By way of evidence presented, the Borough has established record title to a twenty-foot alley that bisects the parcels owned by Savino. This evidence includes the Survey and Plan of Lots for Point Marion, PA prepared by T. J. Keiser, recorded February 8, 1915, and the survey of the properties performed by Polestar Engineering detailing the alley having been laid out for public use. See, Exhibits 1 and 2. The supporting evidence also includes the deeds of record conveying property to Savino which clearly reserved a twenty-foot alley between the two parcels of land.

Similarly, the tort of trespass protects interests in the possession of property. Liability for the common-law tort of trespass arises from the intentional entry upon the land of another without privilege to do so; a trespass occurs, in other words, when a person who is not privileged to do so intrudes upon land in possession of another, whether willfully or by mistake. *Klein v. Madison*, 374 F. Supp. 3d 389 (E.D. Pa. 2019) (applying Pennsylvania law); *Briggs v. Southwestern Energy Production Company*, 224 A.3d 334 (Pa. 2020); *McDonald v. CNX Gas Company, LLC*, 240 A.3d 917 (Pa.Super. 2020).

As record title owner, the Borough has established a *prima facie* case for ejectment and trespass. Despite the Borough establishing these elements, Savino alleges ownership of the alley by adverse possession. Where one party shows good paper and record title, and the other asserts a title by adverse possession, the burden is upon the latter to prove every element of adverse possession. *Camp Chicopee v. Eden*, 154 A. 305 (Pa. 1931); *Hershey v. Poorbaugh*, 21 A.2d 434 (Pa.Super. 1941). Where one of the parties claims title by adverse possession, that party has the burden of proving every element necessary to show adverse possession. *Conneaut Lake Park v. Klingensmith*, 66 A.2d 828 (Pa. 1949).

Adverse possession is an extraordinary doctrine that permits one to achieve owner-

ship of another's property by operation of law; accordingly, the grant of this extraordinary privilege should be based upon clear evidence. *Flannery v. Stump*, 786 A.2d 255 (Pa.Super. 2001). One who claims title by adverse possession must prove that he or she had actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for 21 years. *Recreation Land Corp. v. Hartzfeld*, 947 A.2d 771 (Pa.Super. 2008). Each of the elements of adverse possession must exist in a claim of an ownership interest under the doctrine of adverse possession; otherwise, the possession will not confer title. *Johnson v. Tele-Media Co. of McKean County*, 90 A.3d 736 (Pa.Super. 2014). One who occupies land adversely for the prescriptive period gains an absolute, marketable title with the attendant right of possession, which title may be divested only in the manner in which title acquired by formal grant or conveyance may be divested, and it is not lost by neglecting to keep up possession. *Plauchak v. Boling*, 653 A.2d 671 (Pa.Super. 1995).

Generally, to support a claim or defense based on adverse possession, nothing short of an actual possession, continued permanently, will be sufficient to take away from the owner the possession that the law attaches to legal titles. *Flickinger v. Huston*, 435 A.2d 190 (Pa.Super. 1981). The determination of what constitutes actual possession of the property for the purposes of adverse possession depends on the facts of each case, and to large extent on the character of the premises. *Watkins v. Watkins*, 775 A.2d 841 (Pa.Super. 2001). "Actual possession" of land for the purposes of adverse possession is dominion over the land; it is not equivalent to occupancy. There is no fixed rule by which the "actual possession" of real property by an adverse possession claimant may be determined in all cases. *Id.* The requirements for actual possession of a property for purposes of adverse possession will necessarily vary based on the nature of the property. *Recreation Land Corp.*, *supra*.

Savino properly pled a claim for adverse possession in his New Matter by alleging that he has been in actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the alley for a period in excess of twenty-one years. Here, the testimony adduced at trial establishes that Savino has exercised such dominion and control over the alley to be declared as the legal and equitable owner of this tract.

Savino testified credibly that the Borough has not maintained the portion of the alley that bisects his lands. Savino further testified, and the Court accepts as true, that he removed a prior wall from the same area prior to erecting the retaining wall now in dispute. The Court further finds credible that Savino, and Savino alone, has maintained the alley by placing gravel and concrete and by removing a dead tree that had fallen. Savino's maintenance is supported by the sixty-nine pictures that he placed into evidence.

The Court has taken judicial notice that Savino's ownership of the parcels on either side of the alley began on October 6, 1989. The statutory period for title of the alley to vest in Savino for adverse possession occurred in October 2010, well prior to the instant litigation instituted regarding the retaining wall in December 2019.

As to exclusive use, a claimant's possession need not be absolutely exclusive; rather, it need only be the type of possession which would characterize an owner's use. *Glenn v. Shuey*, 595 A.2d 606 (Pa.Super. 1991). Here, the only testimony presented by

the Borough regarding use of the alley was through Mayor Carl Ables who testified that he plowed the alley in 2012 or 2013 over Christmas when the borough maintenance employees were not working and that the following season, he placed gravel in a pothole. Even if this testimony were credible, the year 2012 or 2013 was well after Savino established adverse possession of the alley. The Borough failed to present any testimony that regular, routine maintenance occurred in the alley. The Borough's plowing by the Mayor once or twice does not overcome the exclusive nature for which Savino utilized the lands. Savino's use of the land is consistent with the type of possession which would characterize an owner's use of an alleyway for ingress and egress and general maintenance.

The elements of visible and notorious are easily met here where a wall was previously in the alley and was replaced with a retaining wall and by Savino's general upkeep of the alley.

The final element of adverse possession – hostility – is one of art and does not mean ill will or hostility, but simply implies an assertion of ownership rights which are adverse to those of the true owner and all others. *Brennan v. Manchester Crossings Inc.*, 708 A.2d 815 (Pa.Super. 1998). Further, if all elements of adverse possession are established, the element of hostility is implied. *Id.*

If an adverse use is rendered permissive simply because the true owner who is aware of the adverse use does not expressly object, we must question when, if ever, an adverse possession claim would be successful. It is the continuation of the hostile use by the adverse possessor in the face of the true owner's knowledge which is the very essence of an adverse possession claim. Simply, the true owner must affirmatively act to interrupt the adverse possessor's use of the property. [...] He cannot sit passively, knowing of the adverse use and, then, claim to have given permission implicitly to the adverse possessor by his failure to object. Permission is an act of commission, not omission.

Id. at 823.

Here, the Borough presented no affirmative actions it took prior to 2010, or even until this litigation in 2019, that would have interrupted the Savino's use of the alley. We conclude Savino has established the element of hostility and has proven that he exercised such dominion and control over the alley, adverse to all others, to now be declared as the legal and equitable owners in fee simple of those portions of the alley which bisect his lands.

The last remaining consideration, which was not raised by either party, is the ability of Savino to adversely possess the Borough's land. Where land is given for the use of the public there must be a dedication to such use and an acceptance thereof before the rights of the public become vested, and such dedication and acceptance must be done in a timely manner. *Pistner Bros., Inc. v. Agheli*, 518 A.2d 838 (Pa.Super. 1986). Title by adverse possession may be acquired in the land dedicated for a public street or highway that never was accepted. *Scott v. Donora Southern R. Co.*, 72 A. 282 (Pa. 1909); *Dulany v. Bishoff*, 67 A.2d 600 (Pa.Super. 1949); *Borough of Edgeworth v. Lilly*, 565 A.2d 852 (Pa.Comm. 1989). The Borough presented no evidence that the twenty-foot alleyway bisecting Savino's property was ever accepted for public use by the Borough.

A “street becomes public when it is (1) dedicated to public use and (2) accepted by the municipality.” *Leininger v. Trapizona*, 645 A.2d 437, 440 n. 1 (Pa.Cmwlt. 1994). If the street is not accepted within twenty-one years, “the land is discharged from such servitude, and the dedicated portion of it has entirely lost its character as a public street.” *Rahn v. Hess*, 106 A.2d 461, 463–64 (Pa. 1954).

We must first determine whether the road and alley in this case were dedicated to public use. “Any act of the owner which clearly indicates an intention to dedicate is sufficient, and the offer may be express or implied by acts, deeds, plots or plans.” *Tobin v. Radnor Tp. Bd. of Comm’rs*, 597 A.2d 1258, 1264 (Pa.Cmwlt. 1991). “Incorporation of streets and alleys into a plan, recorded or unrecorded, constitutes an offer to dedicate the streets and alleys for use by the public.” *Ott v. Reager*, 459 A.2d 1272, 1275 (Pa.Super. 1983). The Survey and Plan of Lots for Point Marion, PA prepared by T. J. Keiser, recorded February 8, 1915, lays out the alley showing that it was dedicated to public use. See, Exhibit 2.

However, the record is devoid of any evidence that the Borough accepted the dedication. “An acceptance of a dedication of a street by a municipality may be implied as well as express, and may be established by showing acts of dominion over or control of the street by proper authorities.” *Wensel v. Twp. of N. Versailles*, 7 A.2d 590 (Pa.Super. 1939). The Borough presented no evidence, implied or express, that the alley was ever accepted by it for public use. The lack of acceptance for public use permits Savino to adversely possess that portion of the alley that bisects his adjoining lands. Although not raised in the pleadings or before the Court, as an alternative disposition, we must note that where a street has been dedicated to public use and the public does not accept the dedication, if the side of the street is a boundary in the deed for abutting land, the owners of this abutting land take title to the center line of the street. *Rahn*, 106 A.2d 461, 463–64.

WHEREFORE, we will enter the following Order.

ORDER

AND NOW, this 14th day of December, 2022, following a non-jury trial on the Borough of Point Marion’s action in ejectment and trespass and Defendant Daniel T. Savino’s claim of adverse possession as to the disputed alley, it is hereby ORDERED and DECREED that judgment is entered in favor of and Defendant Daniel T. Savino and that and Defendant Daniel T. Savino is declared the fee simple owner of that portion of the twenty-foot wide unnamed alley that bisects his lands as described on that certain Deed from Daniel T. Savino and Betty W. Savino, husband and wife, to Daniel T. Savino on September 20, 2006, recorded in Record Book 2006, Page 1991, in the Recorder of Deeds of Fayette County

BY THE COURT,
NANCY D. VERNON, JUDGE

ATTEST:
Prothonotary

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