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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

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THE TRUSTEES OF FAMILY AFFAIR MINISTRIES FELLOWSHIP	)	
Petitioner/Counter-Defendant,	)	
v.	)	**CIVIL ACTION NO.: 15-989-I**
MALLORY MORGAN,	)	
Defendant/Counter-Plaintiff.	)	

Court costs on appeal to the Plaintiff

Final **ORDER**

Before this Court is Defendant/Counter-Plaintiff Mallory Morgan's (hereinafter, "Morgan") Motion for Summary Judgment seeking judgment on her claim for common law adverse possession. This cause came to be heard on Friday, March 10, 2017 before the Honorable Claudia Bonnyman. Because this Court finds Morgan has satisfied her burden of showing by clear and convincing proof that she has, without dispute, demonstrated that her and her predecessors in title have adversely, actually, exclusively, openly and notoriously, and continuously possessed the property at issue for at least twenty years, and because FAM has not demonstrated any genuinely disputed material facts, this Court grants summary judgment in Morgan's favor.

The Trustees of Family Affair Ministries Fellowship (hereinafter, "FAM") filed a Petition for Ejection for a small tract of land in Nashville, Davidson County, Tennessee after Morgan built a wooden fence abutting an ancient[1] chain link fence between Morgan and FAM's

[1] "Ancient" is a term of art in the context of adverse possession indicating a substantial time of existence of a boundary line demarcation. As it concerns the matter before this Court, "ancient" is in reference to the chain link fence dividing the property between Morgan and FAM that was undisputedly erected by FAM's predecessors in title in excess of twenty years prior to the filing of this lawsuit.

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properties. Morgan then filed a Counter-Complaint alleging she and her predecessors in title have exercised dominion and control over this triangular strip of property between Lot 20 (Morgan's Property) and Lot 21 (FAM's Property) in excess of twenty years. Additionally, Morgan's Counter-Complaint included an action for trespass and, in the alternative, Morgan sought repayment for the maintaining of the disputed property if the Court did not find her to be an adverse holder of the property.

More specifically, Morgan sought a judgment from this Court for adverse possession of the approximately 600 square feet of disputed property between Morgan's Property and FAM's Property (hereinafter, the "Disputed Property"). The Disputed Property is 6.21 feet wide at street side and tapers to the east to 2.28 feet at the rear of the Lots 20 and 21. The Disputed Property is further illustrated by the highlighted portion of the attached May 13, 2015 James & Associates, Inc. Survey, provided by FAM in this matter. The Disputed Property is noted as the "Possible Area of Encroachment" nearest to coordinates S83°31'22"E. A true and exact copy of the James & Associates, Inc Survey attached as **Exhibit 1**.

The Court was tasked with analyzing the following issues:

1) Which party has the burden of proving adverse possession and what is the evidentiary standard for a party attempting to prove adverse possession;
2) Is T.C.A. § 28-2-110(a) relevant to the matter before this Court;
3) Are there facts in dispute related to the adverse, actual, exclusive, open and notorious, and continues adverse possession for twenty (20) years of the Disputed Property;
4) Is tacking an appropriate legal theory for Morgan to constitute her claim for twenty (20) years of adverse possession under the facts before this Court;

5) Does a three (3) month hiatus destroy tacking; and

6) Has Morgan carried her burden of proof to establish adverse possession.

In Tennessee, common law adverse possession rests upon the proposition "that where one has remained in uninterrupted and continuous possession of land for 20 years, a grant or deed will be presumed and such possession must be adverse, actual, exclusive, open and notorious and continuous in nature. *Cumulus Broadcasting, Inc. v. Jay W. Shim*, 226 S.W.3d 366, 376-77 (quoting *Ferguson v. Prince*, 190 S.W. 548, 552 (Tenn. 1916)). Color or assurance of title is not required. *Id.* at 377. The doctrine of adverse possession is often described as a limitation on the recovery of real property. *Id.* at 375. The limitation period may operate not only as a bar to the recovery of adversely possessed property but it may also vest the adverse holder with title. *Id.* The burden of proof is on the individual claim ownership by adverse possession, and the evidentiary standard requires that the evidence be clear and convincing. *Id.* at 377. As such, Morgan had the burden of proof to demonstrate her claim for adverse possession and was required to satisfy of such burden.

FAM relied on T.C.A. § 28-2-110(a) in an attempt to bar Morgan's claim for adverse possession. This Court believes the Disputed Property is exempt from application of T.C.A. § 28-2-110(a). T.C.A. § 28-2-110(a) was enacted to facilitate the collection of property taxes by requiring persons claiming an interest in real property to have that interest assessed and to pay the taxes thereon. *Cumulus*, 226 S.W.3d at 379 (citing *Burress v. Woodward*, 665 S.W.2d 707, 709 (Tenn. 1984)). T.C.A. § 28-2-110(a) provides:

> Action barred by non-payment of taxes. – (a) Any person having any claim to real estate or land of any kind, or to any legal or equitable interest therein, the same having been subject to assessment for state and county taxes, who and those through whom such person claims have failed to have the same assessed and to pay any state and county taxes thereon for a period of more

> than twenty (20) years, shall be forever barred from bringing any action in law or in equity to recover the same, or to recover any rents or profits therefrom in an of the courts of this state.

While a tax map is permissible in a boundary dispute to confirm the payment of taxes, it is not particularly helpful for the purpose of establishing a boundary line. *Cumulus*, 226 S.W.3d at 381 (citing *Whitworth v. Hutchison*, 731 S.W.2d 915, 917 (Tenn. Ct. App. 1986)). T.C.A. § 28-2-110(a) applies when a person or his predecessors in interest have not paid property taxes for twenty continuous years. See *id.*; *Burress v. Woodward*, 665 S.W.2d 707, 709 (Tenn. 1984); *Alexander v. Patrick*, 656 S.W.2d 376, 377 (Tenn. Ct. App. 1983). This Court further relies upon the *Cumulus* exception, which has been summarized sufficiently in *Holtzclaw v. Johnson* as follows:

> *Cumulus* stands for the proposition that 28-2-110 is not a complete bar. As the Supreme Court stated in *Cumulus*, Tennessee Code Annotated Section 28-2-110, "should not serve as a bar to a claim of adverse possession when the tracts are contiguous, a relatively small area is at issue, and the adjacent owner that is making claim of ownership has paid his respective real estate taxes. To hold otherwise would effectively eliminate that adverse [possession of any part of an adjoining tract." . . . [T]his one and a half acres, which was the property in dispute, constituted a relatively small area of the undisputed property. Essentially it's somewhere between three and a half to five percent of the overall property between the two adjacent tracts. . . . The Court found that the properties were adjacent. The parties had stipulated they had paid their respective real property taxes.
>
> Therefore [t]he Court ultimately finds that [the] *Cumulus* exception for adverse possession when the properties are two tracts between neighbors involving a relatively small area with competing claims of ownership, and both respective real property taxes have been paid by the competing owners, 28-2-110 does not serve as a bar to eliminate the adverse possession claim of part of the adjoining tract.

Holtzclaw v. Johnson, 2015 Tenn. App. LEXIS 782 at *11-14 (Tenn. Ct. App. Sept. 28, 2015) (citing *Cumulus*, 226 S.W.3d at 381).

As in *Cumulus* and *Holtzclaw*, the Disputed Property in this case is a relatively small portion of contiguous property. Both FAM and Morgan have paid their relative taxes. For these reasons, T.C.A. § 28-2-110(a) has no application to the matter before this Court.

While fencing is typically an indicia of ownership and boundary lines, it is not dispositive. *Holtzclaw,* 2015 Tenn. App. LEXIS 782 at *11-14. Mistake as to the property line does not make possession something other than adverse. *Cumulus*, 226 S.W.3d at 378. The actual intent to adversely possess the property of another need not be shown by fencing or any other demonstration of adverse possession as it is sufficient that the possession was due to ignorance or mistake as to the true location of the boundary line. *Lemm v. Adams*, 955 S.W.2d 70, 72 (Tenn. Ct. App. 1997) (citing *Liberto v. Steele*, 221 S.W.2d 703, 703 (Tenn.1949); *Foster v. Hill*, 510 S.W.2d 520, 522 (Tenn. Ct. App. 1973); *Gibson v. Shular*, 194 S.W.2d 865, 867 (1946)). This Court also relies on *Lemm* for its factual similarities to the case at bar. In *Lemm*, the adverse possessor believed an ancient fence to be the true boundary line of a property that the adverse possessor had purchased. *Lemm*, 955 S.W.2d at 73. The adverse possessor continuously used the land inside of the fence line as the adverse possessor's own land. *Id.* The Court of Appeals affirmed the trial court's summary judgment in favor of the adverse possessor, holding that possession by ignorance or mistake was immaterial. *Id.* Although ignorance and mistake are immaterial, the conduct of both FAM and Morgan appear to be reasonable under the circumstances as both parties treated the ancient fence as the boundary line. Moreover, the deeds to both the FAM and Morgan properties did not establish metes and bounds and therefore could not have provided either party notice that ancient fence was not the boundary line.

Morgan presented clear and convincing evidence that the dominion and control that she and her predecessors in title exercised through tacking has lasted for more than twenty years.

This Court finds that it is undisputed that Morgan and her predecessors in title landscaped, mowed, gardened, and maintained the Disputed Property up to the ancient chain link fence that divided the FAM and Morgan properties. Morgan's Lot 20 shared a common boundary with FAM's Lot 21. See SUF at ¶ 9. The ancient chain link fence was erected by FAM and divides the two lots and was erected by FAM's predecessors in title in excess of twenty years ago. See SUF at ¶¶ 10, 11. Evidence was introduced through Morgan's supporting affidavits that Morgan and her predecessors in tittle have maintained the Disputed Property as their yard. See SUF at ¶ 12. It was also established that FAM has never maintained the Disputed Property. *Id.* There are no other genuinely disputed material facts. The use and occupancy of land leading to adverse possession is susceptible to the nature and character of the property in dispute determining what constitutes adverse possession. *Derryberry v. Ledford*, 506 S.W.2d 152, 157 (Tenn. Ct. App. 1973). This Court focuses on the possession of the Disputed Property itself and the fact remains that the ancient fence acted as the physical and visual boundary for more than twenty years. The use, control, and possession through landscaping, mowing, gardening, and maintaining the Disputed Property by Morgan and her predecessors in title was sufficient to constitute adverse possession in light of the nature and character of the Disputed Property being a residential yard.

Morgan relies upon the legal theory of tacking to reach the twenty year period required for common law adverse possession. Successive possession, or tacking, may be utilized to establish the requisite period of years if there is no break in the continuous adverse holding. *Cumulus*, 226 S.W.3d at 377. Here, Morgan submitted undisputed proof, including affidavits establishing the Disputed Property has been adversely possessed through tacking for the requisite twenty-year period required by Tennessee law.

FAM argues that Morgan's successive possession was broken on April 27, 2006 when the preceding owner of Lot 20 was foreclosed upon and a lending bank took title ownership of Lot 20. Tennessee Courts have previously held that a "brief hiatus" does not constitute a break in the continuous adverse holding. *Phillips v. Shrader*, 2011 Tenn. App. Lexis 667 (Tenn. Ct. App. Dec. 14, 2011) (copy attached). In *Phillips*, it was determined that a continuous adverse holding was not broken when the preceding owner/holder of the adversely held property in dispute passed away and no one lived at the property for five months. *Id.* The *Phillips* Court determined that the current owner could tack back beyond the five month void because it was only a short period of time and did not constitute a hiatus in the continuity of the adverse possession since five months was only a "brief hiatus." *Id.* The court reasoned that the five-month period of non-residency did not cause a break in possession. *Id.* Here, as a result of the 2006 foreclosure, a bank held title to Lot 20 for less than three months. Thus, there was only a "brief hiatus" of less than three months and which did not cause a break in Morgan's continuous adverse holding of the Disputed Property. The brief three-month hiatus period fails to destroy tacking. Such a finding would not be practical or fair under Tennessee law.

Similar to the findings by the *Cumulus* Court, this Court acknowledges that boundary disputes, or claims of adverse possession or prescriptive easements in association with boundary disputes, are rarely appropriate for summary judgment as there are typically genuine factual issues. *Cumulus*, at 381. However, this Court, like the *Cumulus* Court, finds there are no genuinely disputed material facts in existence. This is evidenced, *interalia*, by the fact that FAM filed its own Motion for Summary Judgment preceding the Motion currently before the Court and informed the Court that there were no material facts in dispute. *Id.* Morgan has carried her burden for title and ownership to the Disputed Property as she has demonstrated without dispute

The parties' agreement that there are no facts in dispute is (13) supportive of the Court's independent decision on the same issue.

that she and her predecessors in title have adversely, actually, exclusively, openly and notoriously, and continuously possessed the Disputed Property for the common law twenty year period up to the ancient fence erected by FAM's predecessor's more than twenty years ago. As such, title and ownership vested in Morgan, as Morgan and her predecessors in title have exercised dominion over the Disputed Property for more than twenty years by treating the Disputed Property as their own.

The Court grants Morgan's Motion for Summary Judgment. Title of the Disputed Property has vested in Morgan as adverse possessor and the Disputed Property shall be incorporated into Lot 20. With this holding, FAM's Petition for Ejection is dismissed in its entirety and all other claims of Morgan become moot and are dismissed.

It is hereby ORDERED, ADJUDGED and DECREED that the Morgan's Motion is well taken and should be granted.

~~ENTERED this ____ day of _____, 2017.~~

CHANCELLOR

APPROVED FOR ENTRY:

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RULE 58 CERTIFICATION
A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

Deputy Clerk and Master
Chancery Court

3/21/17
Date

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF ORIGINAL INSTRUMENT FILED IN MY OFFICE.
THIS 21st DAY OF June 2017
MARIA M. SALAS, CLERK & MASTER
BY _____
DEPUTY

MAILED
3/21/17

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded via United States Mail, postage prepaid to the following:

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this the 20th day of March, 2017.