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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-12-1082

Opinion Delivered May 29, 2013

STEVEN L. JONES, DONNA and LINDELL COOPER, and GAYE and JAMES E. SMITH
APPELLANTS

V.

SUZANNE RUNSICK f/k/a SUZANNE COOK BANGS
APPELLEE

APPEAL FROM THE IZARD COUNTY CIRCUIT COURT
[NO. CV-2011-127-2]

HONORABLE ADAM HARKEY, JUDGE

AFFIRMED

BRANDON J. HARRISON, Judge

Steven Jones, Donna and Lindell Cooper, and Gaye and James Smith appeal an order quieting title to certain property in their neighbor, Suzanne Runsick. On appeal, they argue that the circuit court erred in (1) not requiring Runsick to prove possession and (2) finding that boundary by acquiescence was an affirmative defense. We affirm the circuit court's order.

On 6 October 2011, Runsick filed a complaint in the Izard County Circuit Court against her neighbors Steven Jones, Donna and Lindell Cooper, and Gaye and James Smith (collectively referred to as "Jones"). In her complaint, Runsick asserted that she owned a certain tract of land in Izard County and asked the court to quiet title and award her a judgment to pay for moving an encroaching fence line. Jones filed an answer that generally denied Runsick's allegations.

A hearing was held on 26 July 2012, at which Runsick asked that her property lines be established according to a survey that had been filed with the court. Runsick also noted that Jones's answer to the complaint was a general denial and did not affirmatively raise, either as an affirmative defense or as a counterclaim, adverse possession or boundary by acquiescence. So, Runsick objected to any offer of evidence with regard to adverse possession or boundary by acquiescence, citing Ark. R. Civ. P. 8 (2012) and *Stolz v. Franklin*, 258 Ark. 999, 531 S.W.2d 1 (1975). Jones agreed that they had not pled adverse possession as an affirmative defense and claimed that they sought no relief "other than [to] leave things exactly the way they are." Jones argued that this was a case of boundary by acquiescence and that they were not required to affirmatively plead that as a defense or a claim.

After reading the cases that counsel provided, the court ruled that acquiescence was an affirmative defense that was required to be pled under Ark. R. Civ. P. 8. The court invited counsel to file a motion for reconsideration if some correcting law on point could be found. The court then received testimony on Runsick's claim of title.

Michael Pickering, a registered land surveyor, testified that he had surveyed Runsick's property and that the plat showed some encroachments over the legal property line. Roy Runsick, Suzanne's husband, testified that the plat accurately represented the land that his wife owned, that he managed the property and was familiar with it, and that he and Suzanne had paid the property taxes on the land since 2002. On cross-examination, Runsick's counsel raised several objections to questions posed to Roy on whether he had possessed the property on the other side of the alleged encroaching fence line. Runsick's counsel argued that the

questions were geared toward establishing acquiescence or adverse possession, which Jones had failed to plead; Jones's counsel, on the other hand, said the questions challenged Runsick's possession. The court initially allowed the line of questioning, reasoning that it was relevant to the damages for encroachment that Runsick requested. But once Runsick voluntarily withdrew the claim for damages, the court found that any further testimony on the fence line was irrelevant.

Finally, Lindell Cooper testified that he owned the property that was north and east of Runsick's property and acknowledged that the survey showed some encroachment of his fence onto Runsick's property. When Jones's counsel questioned Cooper about whether Runsick possessed the property on the other side of the fence, Runsick objected; the court sustained, again stating that because the encroachment claim had been dropped, the testimony was irrelevant. In the end, the court ruled from the bench that it was quieting title given the survey prepared by Pickering but that Jones could file a written motion for reconsideration.

Jones did so on 9 August 2012, arguing that the court committed reversible error by not allowing the defendants to present proof of the existing fence locations and how long the fence lines had been in place. Jones argued that denying this proof "prevented their defense to the Plaintiff's factual claim of possession." Jones also contended that possession was an express requirement for Runsick to quiet title; that the deed introduced by Runsick, while a prima facie showing of legal title, did not show possession; and that the survey "clearly shows non-possession of the property located on the Defendants[']s side of the fences."

Jones also noted that boundary by acquiescence was not one of the affirmative defenses listed in Ark. R. Civ. P. 8(c), and he further argued that "the proof of the existing fence lines and the evidence as to the length of time the fences have been in place is the denial of a factual allegation and no attempt to avoid the claim by operation of law." Along with the motion for reconsideration, Jones filed a "motion to proffer testimony," asserting that Lindell Cooper and Steven Jones should be allowed to proffer testimony on the existing fence line, improvements made by Cooper on his side of the fence line, and photographs of trees grown into the fence line.

In September 2012, the court entered an order and ruled that Runsick had "met her burden of proof and proved that she was the owner of certain real property located in Izard County." Consequently, the court quieted title in Runsick and enjoined Jones from encroaching on the property. The order also formally dismissed Runsick's encroachment claim, which sought money damages. In a separate order, filed 19 September 2012, the court denied Jones's motion to proffer testimony. Jones then timely appealed to this court.

The standard of review on appeal from a bench trial is whether the circuit court's findings were clearly erroneous or clearly against the preponderance of the evidence. *City of Rockport v. City of Malvern*, 2010 Ark. 449, 374 S.W.3d 660. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that an error has been committed. *Id.* Facts in dispute and determinations of credibility are solely within the province of the fact-finder. *Id.*

Here, Jones first argues that the court made no finding on Runsick's possession; that Runsick has now "waived" any claim of possession; that the court erred in not allowing them to present proof with regard to possession; and that even though they were precluded from presenting evidence of Runsick's nonpossession, the evidence that was presented "made it clear" that Runsick was not in possession of the disputed property. Runsick disputes that Jones was prohibited from inquiring about possession, but was instead only prohibited from soliciting testimony on the boundary-by-acquiescence issue. And she argues that even if there was error in not allowing some questioning, Jones did not proffer any testimony or other evidence at the hearing.

A prima facie case to quiet title requires a showing that the plaintiff has legal title to the property and possesses it. *Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000). In this case, Runsick introduced deeds showing record title to the disputed property (which Jones conceded), and Roy Runsick's testimony showed that he and Suzanne possessed the property. Though the circuit court did not use the word "possession," it found that Runsick had proved that "she is the owner of certain real property" as described in the property description. We also note that, after the order was entered, Jones never asked the court to make additional findings or to clarify its ruling.

We also hold that any alleged evidentiary error regarding any testimony is not properly before us because no proffer was made below. Jones made no request at the hearing to tender any evidence. A tender of proof is required because it advises the circuit court of the nature of the evidence so that the court can intelligently consider it—it also places the excluded

evidence in the record so we may review it. *See W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996). The failure to proffer evidence so we can see if prejudice results from its exclusion precludes review of the evidence on appeal. *Duque v. Oshman's Sporting Goods–Servs., Inc.*, 327 Ark. 224, 937 S.W.2d 179 (1997). We note that Jones's untimely motion to proffer, made after the hearing, also failed to tender any proof for this court's consideration.

Jones also asserts that boundary by acquiescence is not an affirmative defense. They agree that avoiding a claim by operation of law requires the filing of an affirmative defense, but contend that establishing the location of a legal boundary line is merely a factual question. Jones acknowledges *McEntire v. Watkins*, 73 Ark. App. 449, 43 S.W.3d 770 (2001), where this court reversed a lower court's ruling based on acquiescence after finding that "appellee did not plead the issue of acquiescence, and never made a motion to conform the pleadings to the evidence." *Id*. at 450, 43 S.W.3d at 771. According to Jones, however, the *McEntire* court did not analyze whether boundary by acquiescence was, in procedural fact, an affirmative defense. And finally, Jones argues that any holding by this court that boundary by acquiescence is an affirmative defense should only be applied prospectively. Runsick disagrees with Jones's assertions and asks us to hold that boundary by acquiescence is an affirmative defense.

We affirm the circuit court's ruling that boundary by acquiescence is a defense that must be affirmatively pled under Ark. R. Civ. P. 8(c). The rule requires a party, in responding to a complaint, counterclaim, cross-claim, or third-party claim, to affirmatively set forth

defenses such as comparative fault, duress, estoppel, and res judicata, as well as "any other matter constituting an avoidance or affirmative defense." The existence of a boundary by acquiescence could certainly be considered an "avoidance" as the word is used in Ark. R. Civ. P. 8(c). Cooper admitted that the survey showed his fence was encroaching onto Runsick's property; thus, the only way Jones could establish that the fence was the legal boundary line was by pleading adverse possession or boundary by acquiescence. Runsick claimed that she owned this property—a claim supported by deed, by testimony, and by the survey. Jones claims that they were not seeking to avoid a claim by operation of law, but by seeking to establish the fence as the legal boundary line, that is exactly what they were trying to do. We acknowledge, but decline, Jones's request to apply our affirmative-defense holding prospectively.

Affirmed.

WYNNE and WHITEAKER, JJ., agree.

Jeremy B. Lowrey, for appellants.

Murphy, Thompson, Arnold, Skinner & Castleberry, by: *Blair Arnold*, for appellee.