

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 09-633

DAYLAN HUNT AND JERRI N. &
JAMES L. HUNT, CO-TRUSTEES OF
THE HUNT FAMILY TRUST
APPELLANTS

V.

ENTERGY ARKANSAS, INC.
APPELLEE

Opinion Delivered September 29, 2010

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. CV-2007-144-11]

HONORABLE VICKI S. COOK,
JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

This is a dispute between the Hunt family and Entergy Arkansas, Inc., over property in Garland County. After the Hunts saw Entergy employees surveying the disputed tract, the Hunts filed a petition to quiet title. Entergy filed a motion for summary judgment, which was later granted by the circuit court. The Hunts assert that there remains a genuine issue of material fact on whether they had adversely possessed part of Entergy's property. They also argue that the circuit court erred in refusing to set aside the grant of summary judgment in light of an agreement between the parties to extend the time for filing a response to Entergy's summary-judgment motion. We ordered the Hunts to rebrief the case, as their original brief did not comply with our rules.¹ Now that they have filed a conforming brief, we hold that

¹ See *Hunt v. Entergy Arkansas, Inc.*, 2010 Ark. App. 351.

the Hunts failed to raise a genuine issue of material fact regarding whether they possessed the disputed tract adversely to Entergy's interest. Therefore, we affirm.

The disputed land is below what the parties have referred to as the 324 contour line, where the property is at 324 feet above mean sea level. The property originally belonged to the Storthz family. In 1930, the Storthzes conveyed the property up to the 324 contour line to the Arkansas Power and Light Company ("AP&L"), Entergy's predecessor. The rest of the property was later conveyed to the Toler family. The Tolers' warranty deed specifically excluded the property that was conveyed to AP&L. The Tolers conveyed the property to the International Land Corporation, which in 1976 filed a bill of assurance to create the Lake Catherine Lake View Estates. Deeds from the Tolers to International Land, the bill of assurance, and a 2003 amendment to the bill of assurance reference the 324 contour line.

The Hunts claim ownership of and have paid taxes on Lots 39, 43, 44, 45, and 46 in the subdivision. A plat of the subdivision shows these lots crossing the 324 contour line. The Hunts filed a petition to quiet title after Entergy claimed ownership of the disputed tract. In September 2008, Entergy filed a summary-judgment motion, alleging that the Hunts did not have record title to any property below the 324 contour line and that they had not adversely possessed any property below that line. Entergy attached the deeds showing that the subdivision was not supposed to include property below the 324 contour line. It also presented two plats of the Lake Catherine Lake View Estates, but one of the plats shows Lots 39, 43, 44, 45, and 46 extending across the 324 contour line.

Entergy also relied on deposition testimony from Daylan Hunt and James Hunt. Daylan testified that when he purchased his property in 2001, he thought that his property extended past the 324 line. He acknowledged that his home was not located on what was actually Entergy's deeded property, but he stated that he and his family used property below the 324 line for recreation and crossed it to get to the nearby creek. Daylan also stated that he maintained the property, including mowing, weed-eating, and debugging.

James Hunt also testified that he thought the Trust owned property past the 324 line, though he was informed that he could not build a permanent structure below the 324 line. Thus, he has not constructed any structures in that area. He stated that he cleared a path on the property to allow a vehicle to pass through, but the record does not reveal the specific location of the path. James has a boat dock on the main channel of Lake Catherine, but he received a permit from Entergy for the dock.

On December 15, 2008, the court instructed Entergy to draft an order granting the motion for summary judgment, as the Hunts had not responded to the motion. The Hunts filed a response three days later. The circuit court entered the order granting summary judgment on January 5, 2009. The Hunts filed a motion to set it aside. But the court denied the motion, stating that after reviewing the motion and the Hunts' response to Entergy's original motion, it did not find an issue of material fact that would warrant setting the summary-judgment order aside. This appeal followed.

Though it is their second point on appeal, we address the Hunts' argument that the court should have set aside the summary-judgment order first. In so arguing, the Hunts rely

on portions of the record that show that the parties agreed to an extension of time for the Hunts to respond to the order.

But even assuming that the parties could, without the court's consent, extend the time for responding to a motion for summary judgment,² this does not warrant reversal. In the order denying the motion to set aside, the court stated that it reviewed the Hunts' response to the motion for summary judgment. Assuming that summary judgment was in order here, the record reflects that the circuit court properly reviewed the exhibits and arguments presented before ultimately ruling in favor of Entergy.

All that is left for us to consider are the merits of the motion. The Hunts urge this court to reverse because the record shows that they at least believed that they had title to property below the 324 contour line. Entergy was entitled to summary judgment only if the pleadings, depositions, answers to interrogatories, responses to requests for admission, and affidavits show that there was no genuine issue of material fact to be litigated and that it was entitled to judgment as a matter of law.³ On appellate review, we must determine if summary judgment was proper based on whether the evidence presented by the moving party left a material question of fact unanswered, viewing the proof in a light most favorable to the party

² See Ark. R. Civ. P. 56(c)(1) (allowing twenty-one days to respond to a motion for summary judgment and allowing the court to reduce or enlarge that period for good cause shown).

³ See *Windsong Enters., Inc. v. Upton*, 366 Ark. 23, 233 S.W.3d 145 (2006).

resisting the motion and resolving any doubts and inferences against the moving party, to determine whether the evidence presented left a material question of fact unanswered.⁴

Entergy had record title to the property below the 324 line. The earliest deeds show that its predecessor in interest was granted the property, and subsequent deeds and bills of assurance maintain this ownership. Therefore, the only way the Hunts could defeat Entergy's motion for summary judgment is to present some proof that they adversely possessed the disputed property.

To establish adverse possession, the Hunts had to establish both statutory and common-law requirements.⁵ We only address the common-law requirements, as we hold that they have not been met. To prove the common-law elements of adverse possession, the Hunts had to show that they have been in possession of the property continuously for more than seven years and that their possession has been visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner.⁶

Both Daylan and James believed that their properties extended beyond the 324 contour line. But they cannot acquire land by adverse possession merely by thinking that the land belongs to them; they must do more.⁷ There is some evidence that they maintained the

⁴ *Id.*

⁵ See Ark. Code Ann. § 18-11-106(c) (Repl. 2003) (stating that the statutory requirements are supplemental to the common-law elements of adverse possession).

⁶ See *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005).

⁷ *City of Waldron v. Huston*, 235 Ark. 553, 361 S.W.2d 556 (1962).

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property, but Daylan and James also testified that there were no permanent structures on the disputed tract, that they knew that they had to allow water to travel across the property, and that they asked for Entergy's permission before building a boat dock on the lake. This evidence is insufficient to show that the Hunts possessed the disputed tract, much less did so against Entergy's interest.

The Hunts failed to establish a genuine issue of material fact as to whether they adversely possessed Entergy's property. The circuit court properly granted Entergy's motion for summary judgment. Therefore, we affirm.

Affirmed.

ROBBINS and KINARD, JJ., agree.