IN THE COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO

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| BARBARA LEIRVIK, | ) | CASE NO. 629204 |
| | ) | |
| Plaintiff, | ) | JUDGE DAVID T. MATIA |
| | ) | |
| v. | ) | **OPINION AND JOURNAL ENTRY** |
| | ) | |
| DAVID SELMAN, ET AL., | ) | |
| | ) | |
| Defendants. | ) | |

## I. Procedural History

Plaintiff Barbara Leirvik (formerly Barbara Podwoski) filed this action on 7/6/07. Her one count complaint seeks equitable relief under the theory of adverse possession. The dispute centers around a strip of land measuring approximately 25 foot by 100 foot (hereafter the disputed property) along the property border between plaintiff and defendants David and Caroline Selman in Gates Mills, Ohio. AmTrust Bank (formerly Ohio Savings Bank) and James Rokakis, Cuyahoga County Treasurer were also named as defendants because Plaintiff believed that they may have claims to the disputed property.

Plaintiff was granted leave to file an amended complaint to include a preliminary judicial report. Defendant AmTrust answered. Defendants David and Caroline Selman (hereafter the Selmans) answered and filed a single counterclaim seeking quiet title. The Selmans contend that they are entitled to a judicial declaration quieting title to the disputed property in favor of the Selmans and against any adverse interest asserted by Plaintiff. Defendant Rokakis has not answered or otherwise appeared.

AmTrust and the Selmans filed a motion for summary judgment on 2/20/08. Plaintiff filed her motion for summary judgment on 2/26/08. The issue for the Court's consideration in this case has been extensively briefed.

## II. Applicable Legal Standard

The Supreme Court of Ohio clearly spelled out in *Grace v. Koch* (1998), 81 Ohio St. 3d 557 the legal standard by which a non-titleholder may acquire titled by adverse possession. The Court explained that to acquire title by adverse possession, a party must prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of 21 years. In *Grace v. Koch*, the Court stated,

> [t]he court of appeals spoke at length about adverse possession being disfavored. We agree. A successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation. Such a doctrine should be disfavored, and that is why the elements of adverse possession are stringent.

In *Grace v. Koch*, the Court stated that "we consider the case a close one," but concluded that the record did not contain clear and convincing evidence to satisfy the requisite adverse element of the action because Grace or his parents were not "on notice that their domains had been invaded in 1971." The holding in *Grace* is distinguished from the case at bar because, unlike the instant case, the Court in *Grace* found that evidence that the titleholder had given permission to the adverse possession claimant to cut the grass in the disputed area ultimately negated the adverse possession claim.

Adverse possession protects one who has honestly entered and held possession in the belief that the land was his own, as well as one who knowingly appropriates the land of others for the purpose of acquiring title.[1]

More recently, in *Evanich v. Bridge* (2008) Ohio 3820**;** 2008 Ohio LEXIS 1982, the Supreme Court of Ohio unanimously held the following:

> We now determine whether adverse possession requires a showing of subjective intent, meaning that the party in possession intended to deprive the owner of the property in question. We hold that it does not.
>
> . . .
>
> In a claim for adverse possession, intent is objective rather than subjective in determining whether the adversity element of adverse possession has been established, and the legal requirement that possession be adverse is satisfied by clear and convincing evidence that for 21 years the claimant possessed property and treated it as the claimant's own. *Yetzer,* 17 Ohio St. 130, followed. This has been the law in Ohio for over 140 years, and we are unwilling to alter a rule that has successfully directed the application of the doctrine of adverse possession for so long.
>
> We are similarly unwilling to accept the Bridges' invitation to eliminate the doctrine of adverse possession entirely. To do so would drastically upset settled law, for the doctrine has its venerable place in the regulation of the use and ownership of real property in Ohio.
>
> The court of appeals concluded that the Evaniches had acted in a way consistent with true ownership by installing landscaping that included railroad ties, stone blocks, fencing, bushes, flowers, and at least one tree. It held that the Evaniches possessed the necessary intent based on their exclusive control over the property for 35 years. Seeing no error in the court of appeals' conclusion that the Evaniches took possession of the disputed property via adverse possession, we therefore affirm the judgment of the court of appeals.

## III. Statement of Facts

In the instant case, Plaintiff argues that she acquired title to the disputed property under the doctrine of adverse possession in 1990. In 1969, Plaintiff obtained titled to the property at 7649 Glen Echo Lane, Gates Mills, Ohio. Leirvik testified at deposition or affirmed in an affidavit that the previous owner, the real estate agent, and William

[1] Plaintiff's M.S.J. at 7, citing *Vanasdal v. Brinker* (Ohio App. 9th Dist. 1985), 27 Ohio App. 3d 298, 299.

Henderson, who was the Service Director of Gates Mills from 1928 to 1970, all told her that her property extended beyond a gravel driveway used to access the garage located on the 7649 Glen Echo Lane Parcel.[2] The Selmans purchased the adjacent parcel at 7629 Glen Echo Lane in October of 2006.

From 1969 to 1972 Leirvik used the gravel driveway, across the property currently titled in the Selmans' name, to access her garage. In 1972, Plaintiff remodeled her home and built a new garage on the opposite side of her house. As a result, she dug up the existing driveway, on what is now the disputed property, and planted grass. She also installed railroad ties and planted shrubs on the disputed property. In May of 1985, Plaintiff planted a flowering crab apple tree on the disputed property.[3]

It has been testified to in deposition or affirmed in affidavits that Plaintiff "exclusively maintained the disputed property as part of her front yard; she cut the grass, took care of rotten trees and shrubs, and kept the area clear. Mrs. Leirvik also used the disputed property as her own. Indeed, her four children played on the disputed property and they took family portraits on it. Mrs. Leirvik and her family also buried the remains of dead pets on the disputed property."[4]

Plaintiff argues that "[a]t no time before 2007 did any of the former owners of the Selman Property even attempt to claim title to the disputed property."[5] Bentley K. Thomas owned what is now the Selman Property at 7629 Glen Echo Lane from 1988 to 2000. He affirmed that "[d]uring this time period, it was my belief that the Leirviks owned the yard area, which they solely maintained, extending from their residence in a

[2] Plaintiff's M.S.J. at 3.
[3] Id. at 3-4.
[4] Id. at 4.
[5] Id.

westerly direction into the wooded area, which is located east of the driveway to 7629 Glen Echo Lane, the area in question being shown on Exhibit A [attached to the Thomas Affidavit and colored in red ink]."[6]

A dispute arose between Plaintiff and the Selmans in 2006 which resulted in the Selmans erecting a split-rail fence on the disputed property, which is effectively in Mrs. Leirvik's front yard.

## IV. Analysis of the Facts

In applying the facts in *Leivik v. Selman* to the applicable legal standard, the Court is extremely mindful that the doctrine of adverse possession is "disfavored" in our modern world of sophisticated real property transactions. Likewise, the Court understands why the heightened "clear and convincing evidence" standard must be applied to adverse possession claims.

The Eighth District Court of Appeals has held that "planting trees, mowing grass and generally maintaining an area of land containing the trees to keep it attractive are acts sufficient to satisfy the notorious and hostile elements of an adverse possession of property."[7] Here, Plaintiff satisfied the notorious and hostile elements. She planted a crab apple tree, placed railroad ties, mowed the grass, planted various vegetation, and generally treated the disputed property as if it were her own front yard. Indeed, the record before the Court reflects that she believed it was her own front yard. Most importantly, when she purchased the property she used a driveway located on the

[6] Thomas Affidavit at Para. 4; attached to Plaintiff's M.S.J. as Exhibit 3.
[7] Plaintiff's M.S.J. at 8, citing *Flask v. Kurinsky* (Ohio App. 8th Dist. April 20, 1989), No. 55270, 1989 WL 43580 at 2.

disputed property to access her garage. When she remodeled her house and moved the garage, she then removed the driveway, a notorious and hostile act.

The record reflects that "there were no interruptions to Mrs. Leivik's use of the disputed property. She began using the disputed property in 1969, and continued to do so without interruption, until 2007. None of the previous owners of the Selman property ever made use of the disputed property, instructed Mrs. Leirvik to stop using the disputed property or otherwise interfered with Mrs. Leirvik's use of the disputed property" until 2006.[8] The Court finds that Plaintiff continuously possessed or used the disputed property without interruption for approximately 38 years.

There is no evidence that any of the former owners of the Selman Property gave Plaintiff permission to use the disputed property. Plaintiff "used the gravel driveway on the disputed property from 1969 to 1972, and removed it when she no longer had a use for it."[9] After the driveway was removed, she planted grass, pachysandra, a tree, and installed railroad ties on the disputed property.[10] She then planted the remains of family pets on the disputed property and generally treated it as if it was her own. It is clear to this Court that Plaintiff engaged in activities and uses which are of the type that a true owner would conduct on his or her land. Therefore, they were sufficient to put the true owner on notice of Plaintiff's adverse/hostile claim to the property in question.

[8] Plaintiff's M.S.J. at 9-10.
[9] Id. at 10.
[10] Id.

Defendants argue that Mrs. Leivik did not unfurl her "flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest."[11] This Court disagrees with that contention.

## V. Conclusion

This Court finds that Plaintiff has clearly and convincingly met and surpassed all of the elements to prove her claim for adverse possession of the disputed property as outlined in her Amended Complaint. The Court finds that Plaintiff objectively intended to and did exclusively possess or use the disputed property in an open, notorious, continuous, and adverse manner for a period of time exceeding 21 years.

The Court, having considered all the evidence and having construed the evidence most strongly in favor of the non-moving parties, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact and that Plaintiff Barbara Leirvik is entitled to judgment as a matter of law. Plaintiff's Motion For Summary Judgment, filed 2/26/08, is granted. Defendants David Selman, Caroline Selman, and AmTrust Bank's Joint Motion For Summary Judgment, filed 2/20/08, is denied.

Defendants' counterclaim for quiet title goes hand in glove with Plaintiff's cause of action. As this Court has entered judgment in favor of Plaintiff, it logically follows that Defendants' polar opposite counterclaim for quiet title is dismissed with prejudice as a result.

In entering judgment in favor of Plaintiff, the Court orders that title to the disputed property, as detailed in the Legal Description dated 6/29/07 and attached to

[11] Defendants' M.S.J. at 4, citing Grace, supra (quoting Darling v. Ennis [1990], 138 Vt. 311, 313, 415 A. 2s 228, 230).

Plaintiff's amended complaint as Exhibit A, is granted to Plaintiff Barbara Leirvik. Barbara Leirvik's title to the disputed property is quieted as to defendants David and Caroline Selman, and to all others claiming through or under them. David and Caroline Selman are ordered to remove the aforementioned split rail fence on the disputed property at their sole cost within 14 days of this order. Plaintiff is ordered to immediately assume all property tax responsibilities for the plot formerly referred to as the disputed property.

This is a final appealable order. There is no just cause for delay.

IT IS SO ORDERED.

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Judge David T. Matia Date

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