

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KENNETH L. HESS and LEON C. RIDER and	:	
RICHARD D. ELINE,	:	DOCKET NO. 08-02809
Plaintiffs	:	CIVIL ACTION – LAW
	:	
vs.	:	
	:	
DANIEL J. JORDAN, II and JAMES B. REED and	:	
MARY L. REED, his wife,	:	
Defendants	:	

**OPINION AND ORDER**

AND NOW, this 18<sup>th</sup> day of January, 2012, upon consideration of the parties’ briefs, supplemental briefs, and trial transcripts, Defendants’ Motion for Post Trial Relief is GRANTED in part and DENIED in part. This Court improperly granted judgment both in quiet title and in ejectment in favor of Plaintiffs and against Defendants.

In the above-captioned matter, Plaintiffs improperly commenced an action in both ejectment and an action to quiet title. *See Plauchak v. Boling*, 653 A.2d 671, 674 (Pa. Super. Ct. 1995). Our Superior Court has held that:

[i]t is procedurally improper to simultaneously commence both an action in ejectment and an action to quiet title regarding the same parcel or real estate. Ordinarily, the plaintiff in an action to quiet title must be in possession of the land in controversy; if he is out of possession, his sole remedy is an action in ejectment. An action to quiet title may be brought only where an action in ejectment will not lie. Ejectment, being a possessory action, can be maintained if the plaintiff has a right to immediate possession with the concomitant right to demand that the defendant vacate the land.

Permitting an out-of-possession plaintiff to maintain an action to quiet title is impermissible because it constitutes an enlargement of the plaintiff’s substantive rights as defined by statute, and thus exceeds the court’s jurisdiction to proceed.

*Id.* at 674 (citations omitted). However, in this case, Plaintiffs’ “use of an incorrect form of action is not fatal to the relief granted by the trial court.” *Id.*

This Court properly granted judgment ejectment in favor of Plaintiffs because Plaintiffs established their right to immediate exclusive possession. The Superior Court has held that:

[t]he plaintiffs' burden in an action in ejectment at law is clear: they must establish the right to immediate exclusive possession. Recovery can be had only on the strength of their own title, not the weakness of [the] defendant's title. The crux of an ejectment action, therefore, rests with the plaintiffs' ability to identify, by a preponderance of the evidence[,] the boundaries of a parcel of land to which they are out of possession but for which they maintain paramount title.

653 A.2d at 675 (citations omitted).

In this instance, after a non-jury trial on the matter, this Court held that Plaintiffs identified by a preponderance of the evidence the boundaries of the HER Parcel to which Plaintiffs currently lack possession.<sup>1</sup> In making this decision, this Court reviewed the deeds and surveys introduced into evidence, considered the testimony presented at trial, and went on a site view to visit the property at issue. This Court found that the testimony of Mr. Joshua Gavitt to be credible and concluded that Mr. Gavitt's survey of April 14, 2006 correctly identified the location of the eastern boundary of the HER Parcel. Additionally, this Court held that the methodology used by Mr. Gravitt to establish the eastern boundary line of the HER Parcel was consistent with the law set forth in *Merlino v. Eannotti*, 110 A.2d 783 (Pa. 1955).

Furthermore, this Court did not err when it held that Defendants failed to prove the elements necessary to establish a binding consentable line. Pursuant to the doctrine of consentable line,

if adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for the period of time prescribed by the statute of

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<sup>1</sup> The Superior Court has held that:

[w]here, as here, the trial court sits as the sole finder of fact, an appellate court will not reverse on appeal unless the trial judge's findings are unsupported by competent evidence. The question of what constitutes a boundary line is a matter of law while the *location* of that boundary line is a matter for the trier of fact. In a boundary dispute case, as in a general action in ejectment, we will not reverse the trial judge's factual findings if they are supported in the certified record.

653 A.2d at 675 (emphasis in original).

limitations, they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one.

653 A.2d at 675. Through the doctrine of consentable lines, a boundary may be established in two ways: “(1) by dispute and compromise, or (2) by recognition and acquiescence.” *Id.* In order to establish a binding consentable line by recognition and acquiescence, the trial court must make: “(1) a finding that each party has claimed the land on his side of the line as his own; and (2) a finding that this occupation has occurred for the statutory period of twenty-one years.” *Id.*

This Court held that Plaintiffs did not, and have not, consented to the establishment of a line that compromises the location of the boundary line dispute. Upon purchase of the property, Plaintiffs were informed that the boundary line for their property was on the eastern side of the stone fence. This Court found that testimony to mean that the Plaintiffs owned land on the eastern side of this fence, not that the fence was the eastern boundary line of the HER Parcel. Defendants started to occupy the disputed land on the eastern side of the fence when they erected the deer fence; however, evidence established that the fence was not in place for the requisite twenty-one (21) years. Therefore, Defendants failed to prove to this Court that the stone fence constituted a consentable boundary line.

In short, this Court based its findings upon Plaintiffs’ evidence which established their action in ejectment and Defendants failure to establish the requirements of a binding consentable line. This Court noted for the record that the stone fence at issue exhibited two breaks of approximately 450 feet and that the fence is inconsistent because it is thicker at the base and thinner at the top. This Court wanted to preserve for the record that on its site view the Court determined that it would be practically impossible to utilize the fence as a boundary.

**ORDER**

AND NOW, this 18<sup>th</sup> day of January, 2012, it is hereby ORDERED and DIRECTED that this Court's order of July 26, 2011 is hereby AMENDED as follows: judgment in quiet title in favor of the Plaintiffs and against the Defendants pursuant Count I of the Plaintiffs' Complaint is STRICKEN. Count I of Plaintiffs' Complaint is DISMISSED.

In all other respects, this Court's order of July 26, 2011 is REAFFIRMED. Judgment in ejectment is entered in favor of Plaintiffs and against Defendants on Count II of Plaintiffs' Complaint. This Court finds that the eastern boundary of Plaintiffs' real property, as it adjoins the property of Defendants, is correctly identified in the retracement survey prepared by Mr. Gavitt and dated April 14, 2006. This Court adopts the description of that boundary more fully set forth in the survey (Pl. Exhibit 2) and in the metes and bounds description introduced into evidence (Pl. Exhibit 3). Defendants are DIRECTED to remove the encroaching portion of their fence within ninety (90) days of the date of this Order. Defendants shall repair any excavation to Plaintiffs' real property to a condition prior to the installation of the fence. Primarily, Defendants shall smooth the area; no landscaping or planting is required. Defendants shall bear the cost of removal of the fence.

BY THE COURT,

\_\_\_\_\_  
Date

\_\_\_\_\_  
Richard A. Gray, J.

RAG/abn

cc: William P. Carlucci, Esquire  
Benjamin E. Landon, Esquire  
Gary L. Weber, Esquire, Lycoming County Reporter