IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

MATTHEW FINK, DIANE WILKE, DAVID & JACQUELYN WILDER, and ANNALESA ANDERSON THOMAS,

Plaintiffs,

v.

THE MUNICIPALITY OF ANCHORAGE, and any Person or Entity claiming any interest in or lien upon the strip of land herein described or any part of it generally running between the Tidelands of the Pacific Ocean and Lots 2A, 3A, 4A, 5A, and 6A, Block K, Turnagain Heights Subdivision,

Defendants.

Case No. 3 AN-07-12346 CI

ORDER GRANTING MOA'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ALL CLAIMS TO QUIET TITLE.

This matter is before the court on Defendant Municipality of Anchorage's (MOA) Motion for Partial Summary Judgment on Plaintiffs' claims to quiet title against the MOA. For the reasons discussed below, the MOA's Motion for Partial Summary Judgment is GRANTED.

FACTS AND PROCEDURAL HISTORY

This case involves a property dispute between Plaintiffs and the MOA. The property at issue was originally part of a homestead owned by Lytin Ary in the 1930s. Between the 1930s and the 1964 earthquake, the land was subdivided and sold to

various parties.[1] During the 1964 earthquake, the bluff at the edge of the lots collapsed and the high-tide line moved seaward. Parties agree that the property seaward of the mean high-tide line as it existed before the 1964 earthquake is owned by MOA.[2]

After the quake, development in the area was prohibited until 1978, and limited after that time. Plaintiff Anderson was deeded Lot 6A as heir to an estate in 1979.[3] Plaintiffs David and Jacquelyn Wilder purchased Lot 4A in 1982.[4] Plaintiff Fink purchased lots 2A and 3A in 1991.[5] Plaintiff Wilke purchased Lot 5A in 2000.[6]

In 1986, the MOA began construction of the Coastal Trail. In 1987, Union Bank sued the MOA seeking compensation for the latter's taking of land for the Tony Knowles Coastal Trail.[7] On July 17, 1996, Union Bank provided the MOA with a quitclaim deed as part of the settlement of the above suit.[8] It is unclear

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[1] There are complicated issues surrounding the title history of this property. Counsel for Plaintiffs provided the court with interesting historical information that may be helpful when the court considers the remaining issues in this case.

[2] Plaintiff's Opposition to Partial Summary Judgment, at 6 ("It is undisputed that [MOA] holds title to the lands seaward of the mean high tide line as it existed prior to the earthquake.").

[3] *Id.* exhibit 11.

[4] *Id.* exhibit 9.

[5] Fink Affidavit, para. 3.

[6] Plaintiff's Opposition, exhibit 10.

[7] MOA's Motion for Summary Judgment (hereinafter MOA's Motion), exhibit D, *Union Bank of Anchorage* v. *Municipality of Anchorage*, 3AN-87-11802CI, Complaint.

[8] *See* MOA's Motion, exhibit E.

whether Union Bank had clear title when it quitclaimed the property to the MOA.[9] In 1998, construction began for a park on a portion of the property in question. Since that time, the MOA and community volunteers have maintained the park and made several improvements.[10]

The issue before the court is whether Plaintiffs can bring an action to quiet title.[11] Therefore, the court limits its consideration to the question of whether Plaintiffs had "possession" of the property sufficient to proceed in an action to quiet title.[12]

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[9] While the record suggests that Union Bank may not have had clear title when it quitclaimed the disputed property to the MOA, that matter is not before the court and is irrelevant to MOA's motion. Even assuming Union Bank did not have good title of the property, the MOA still had possession under color of title. *See Ringstad v. Grannis*, 11 Alaska 393, 398 (D. Alaska 1947)(Possession under color of title refers to the boundaries as described in the instrument granting title); *see also Archer v. Beihl*, 136 F. 113 (9th Cir. 1905)(Where a quitclaim deed claimed to have conveyed property to defendant, and defendant takes possession of even a portion of the property, it is sufficient to give color of title even without a showing that grantor claimed interest in the property at the date the quitclaim was executed.). Further, Plaintiffs' are not challenging the construction of the coastal trail.

[10] *See* MOA's Motion, at 2-5.

[11] There may be a dispute over the actual boundaries of the lots in question. Only a part of the lots in question are impacted by the dispute. This dispute over the boundaries of the Plaintiffs' lots is not material to the issue before this court because even if the disputed portions are included in the plats, Plaintiffs failed to adequately possess the property.

[12] While the court recognizes that there may be genuine issue of material fact in this case, those issues are not material to whether Plaintiffs can proceed in an action to quiet title. *See Century Insurance Agency, Inc. v. City Commerce Corp.*, 396 P.2d 80 (Alaska 1964)(Where alleged factual issues were not material to a proper disposition of the controversy under applicable rules of law, summary judgment was properly granted); *see also Palzer v. Serv-U-Meat Co.*, 367 P.2d 419 (Alaska 1966)(In granting summary judgment it is unnecessary for the trial court to make findings of fact in regard to the lack of any genuine issues of material facts);

DISCUSSION

Standard for Summary Judgment

Summary judgment is governed by Civil Rule 56, which provides that "[j]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."[13] The Alaska Supreme Court has held that in order to prevail in a motion for summary judgment, the moving party must prove, through admissible evidence, the absence of genuine factual disputes and its entitlement to judgment.[14] A genuine factual dispute exists when reasonable jurors could disagree on the resolution of a factual issue.[15] The trial court must draw all reasonable inferences in favor of the nonmoving party and against the movant.[16] Once the movant makes a prima facie showing that he or she is entitled to judgment on the established facts as a matter of law, the opposing party must demonstrate that a genuine issue of fact exists to be litigated by showing that it can produce admissible evidence reasonably tending to dispute the movant's evidence.[17]

In deciding whether the opposing party has met this burden, the court will

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[13] AK. R. CIV. P. 56.

[14] *Shade v. CO & Anglo Alaska Service Corporation*, 901 P.2d 434, 437 (Alaska 1995).

[15] *Pederson v. Barnes*, 139 P.3d 552, 556 (Alaska 2006).

[16] *Clabaugh v. Bottcher*, 545 P.2d 172, 175 (Alaska 1976).

[17] *French v. Jadon, Inc.*, 911 P.2d 20, 23 -24 (Alaska 1996).

consider affidavits, depositions, answers to interrogatories, and other similar material to determine whether any genuine issues of material fact exists.[18] Once a party moving for summary judgment has shown that the case presents no material issue of fact and that the law requires judgment in its favor, the opposing party can avoid summary judgment only by producing competent evidence to show that there are genuine issues of material fact to be tried.[19] Mere assertions of fact by the opposing party in pleadings and memoranda are insufficient for denial of a motion for summary judgment.[20] But the Alaska Supreme Court's holding in *Meyer v. State, Department of Revenue, Child Support Enforcement Division, ex rel. N.G.T.* shows that the evidentiary threshold necessary to preclude the entry of summary judgment is low. In *Meyer*, a paternity proceeding, the court held that the alleged father's sworn general denial that he had engaged in sexual intercourse with the mother during the period of conception was sufficient to preclude summary judgment, despite the results of a genetic test that indicated with 99.98% certainty that he was the father.[21]

Action to Quiet Title

Under Alaska law, possession is a required element of an action to quiet title.[22]

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[18] *Id.* at 24.

[19] *Brock v. Rogers & Babler, Inc.*, 536 P.2d 778 (Alaska 1975).

[20] *State, Department of Highways v. Green,* 586 P.2d 595, 606 (Alaska 1978).

[21] *Meyer v. State, Department of Revenue, Child Support Enforcement Division, ex rel. N.G.T.*, 994 P.2d 365, 368 (Alaska 1999).

[22] AS § 09.45.010: "A person in possession of real property, or a tenant of that person, may bring an action against another who claims an adverse estate or interest in the property for the purpose of determining the claim." *See also Miscovich v. Tryck*,

If a plaintiff is not in possession of the property, then the appropriate remedy is a suit in ejectment rather than a suit to quiet title.[23] "Possession" differs from "use" in that the former "implies not only the possessor's use but his exclusion of others, while use involves limited activities that do not imply or require that others be excluded."[24] To show possession, a claimant should "exercise such intent as to exclude the world from the property."[25]

Possession can be actual or constructive.[26] Constructive possession by the government is shown "either by causing damage to the property or by depriving the owner of the full, beneficial use of the land."[27] Only one party may be in constructive possession of a given property.[28]

Plaintiffs claim that there is a factual dispute over which party, if any,

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875 P.2d 1293, 1297 (Alaska 1994) ("To prevail in an action to quiet title to real property, a plaintiff must prove possession of the property; otherwise the proper cause of action is ejectment.")

[23] *Davis v. Tant*, 361 P.2d 763, 766 (Alaska 1961).

[24] *Tenala, Ltd. v. Fowler*, 921 P.2d 1114, 1119 (Alaska 1996), *citing* Roger A. Cunningham, et. al., THE LAW OF PROPERTY § 8.7, at 451-52 (2d ed. 1993).

[25] *Gillespie v Windhurst*, 16 Alaska 393, 405 (D. Alaska 1956).

[26] *Miscovich*, 875 P.2d at 1297.

[27] *City of Kenai v. Burnett*, 860 P.2d 1233, 1240, *citing Stewart v. Grindle, Inc. v. State*, 524 P.2d 1242, 1246 (Alaska 1974).

[28] *Pacific Coal & Transportation Co. v. Pioneer Mining Co.*, 205 F. 577, 590 (9th Cir. 1913)("There cannot be constructive possession in two persons claiming to hold adversely at one and the same time.").

possessed the disputed property.[29] Relying on *Moore v. Duran*, Plaintiffs argue that determining whether a party has possession of property depends on the facts of each case and the character of the property in question.[30] Therefore, according to Plaintiffs, determining possession is a question for the factfinder and summary judgment is not appropriate. However, under *Moore*, actual possession still requires "dominion and control" over the property, and Plaintiffs have not raised a genuine issue of material fact on this issue.[31]

Plaintiffs further argue that they have been precluded from developing the property due to "the initial ban on any development at the earthquake and the later adoption of AO 78-84" and that this has prevented them from engaging in activities that would normally constitute possession.[32] Plaintiffs suggest that given the limitations on development they did everything possible to exercise dominion over the property by walking the property, taking photographs, and cutting trees. Therefore, Plaintiffs argue, it is not clear which party possesses the property and that since there is a factual dispute over possession summary judgment on Plaintiffs' claims to quiet title is not appropriate.[33]

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[29] Plaintiffs' Opposition, at 9-10.

[30] *Moore v. Duran*, 687 A.2d 822, 827 (Pa. Super. Ct. 1996)(Possession of real property is not precisely defined. Determination of possession depends on the facts of each case and the character of the property. Yet, actual possession means dominion and control over the property.).

[31] *Id.*

[32] Plaintiffs' Opposition, at 10.

[33] Plaintiffs' Opposition, at 2.

However, Plaintiffs' identified actions do not constitute possession under the law. Walking the property, taking photographs, and cutting trees[34] are not activities that support a claim of possession because at most they might constitute "use" rather than "possession."[35] Although Plaintiffs were legally precluded from developing the property, this did not preclude them from posting no-trespassing signs, fencing the property, formally objecting to the building of the coastal trail and/or memorial garden, or taking other steps designed to exclude others.[36] In contrast, the MOA has possessed at least a portion of the disputed property since 1986, when work began on the Coastal Trail, and has held title to even more of the property since 1996.[37] The MOA also provides documentation of work and improvements on the property since 1998 in support of possession.[38]

Plaintiffs also argue because the property is undeveloped, they do not need to

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[34] Plaintiffs have not identified the specific areas from which the trees were cut.

[35] *Tenala v. Foster*, 921 P.2d 1119 (The difference between use and possession is "possession implies not only the possessor's use but his exclusion of others, while use involves only limited activities that do not imply or require that others be excluded.").

[36] It is undisputed that Plaintiffs did not post no-trespassing signs or fence the property or take any other steps to prohibit other's use and possession, acts that would evidence their intent to possess.

[37] MOA's Motion, at 2.

[38] *Id.* 2-5 (The MOA began construction on the coastal trail in 1986; a memorial garden was constructed in 1998, which included flower beds and a bench; a water spigot was installed near the memorial garden in 2003; trees and shrubs were planted in 2006; and volunteers spend time each year on the property maintaining the garden, cleaning the property, etc.).

possess the property to proceed in an action to quiet title.[39] However, Plaintiffs' reliance on *Webster v. Hall* is misplaced. In *Webster*, the Illinois legislature added a statutory exception allowing a party to quiet title without possession "if the lands were vacant or unoccupied."[40] Alaska law recognizes no such statutory exception to AS § 09.45.010.

Plaintiffs further allege that MOA's possession has been intermittent.[41] However, Plaintiffs do not provide any evidence that MOA's possession has been intermittent aside from the mere assertion in Mr. Fink's affidavit.[42]

Plaintiffs' argument that it is not clear which party may have had constructive possession must also fail. Plaintiffs cannot have constructive possession because the MOA possesses the disputed property under color of title,[43] and two parties cannot constructively possess property.[44]

Plaintiffs finally argue that MOA's possession of the garden on the northeast end of the property does not necessarily mean that the MOA possessed the other

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[39] Plaintiffs' Opposition, at 10 (citing *Webster v. Hall*, 58 N.E.2d 575, 578-79 (Ill 1944).

[40] *Webster*, 58 N.E.2d 579.

[41] *See* Fink Affidavit, Plaintiffs' exhibit 1.

[42] As the court noted during oral argument, Mr. Fink's initial and second affidavits are conclusory and do not sufficiently allege facts that can be considered by the court under Rule 56(c).

[43] *Pacific Coal*, 205 F. 590; *Ellingstad v. State*, 979 P.2d 1004.

[44] *Pacific Coal*, 205 F. 590.

parcels.[45] Resolution of this issue depends on whether the disputed property constitutes one contiguous parcel or whether each of Plaintiffs' individual lots extend their individual boundaries seaward past the boundaries indicated by the plat.[46] However, under *Ringstad v. Grannis*, possession under color of title is "measured primarily by the boundaries specified in the instrument which confers it."[47] Further, possession of a portion of a property constitutes possession of the whole.[48] Therefore, the MOA's possession extends to the entirety of the parcel, irrespective of the fact that it might cross a portion of a number of lots, because the instrument under which they received title from Union Bank describes the property as a single parcel.[49]

CONCLUSION

After considering the pleadings, affidavits, briefing, evidence, and oral arguments of counsel in the light most favorable to Plaintiffs, the court finds that as a

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[45] Plaintiffs' Opposition, at 10-11.

[46] In order to best understand Plaintiffs' argument it is helpful to refer to MOA's exhibits A, B, & C.

[47] *Ringstad*, 11 Alaska 398. Even assuming Union Bank never had clear title when it executed its quitclaim deed to the MOA, the description of the property in the deed constitutes the property possessed because the MOA possessed the property under color of title.

[48] *See Lott v. Muldoon Rd. Baptist Church, Inc.*, 466 P.2d 815 (Alaska 1970)(When a party adversely possesses land under color of title, the extent of that land is governed by the terms of the purported instrument, not by the actual physical use of the claimant.); *see also Ringstad*, 11 Alaska 398.

[49] The court makes no determination on the validity of Union Bank's title on the property when it quitclaimed the disputed area to the MOA.

matter of law Plaintiffs have not shown that they possessed the property. While the court appreciates the complex history of the disputed property, the sole issue before the court is whether Plaintiffs can bring an action to quiet title. Since possession is a necessary element in a action to quiet title, MOA's Motion is GRANTED and all claims against the MOA to quiet title are dismissed.[50] Plaintiffs may still proceed in an action for ejectment.

DONE this 12th day of May, 2009 at Anchorage, Alaska.

STEPHANIE E. JOANNIDES
Superior Court Judge

I certify that on 5/13/09
a copy of the above was mailed to
each of the following at their
addresses of record:
Lebo
Owens
Skrupa

~~Kadell Moore~~, Judicial Assistant
nplucker

[50] This ruling only dismisses claims to quiet title against the MOA. The court makes no determination as to whether Plaintiffs may proceed in any action to quiet title against yet unknown parties.