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ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-345

JULY TERM, 2006

Jeffrey Glosser and Tina Glosser	}	APPEALED FROM:
	}	
v.	}	Washington Superior Court
	}	
Thomas Cihocki and Eileen Cihocki	}	
	}	DOCKET NO. 551-9-02 Wncv
v.	}	
	}	
Robert Harrington and Leeann Martin	}	

Trial Judge: Matthew J. Katz

In the above-entitled cause, the Clerk will enter:

Thomas Cihocki and Eileen Cihocki, defendants in this property dispute, appeal a decision of the superior court concluding that they failed to establish adverse possession of certain lands titled to plaintiffs Jeffrey and Tina Glosser, and Robert Harrington and Leeann Martin. We affirm.

The Glossers brought this action for a declaration of the disputed property boundaries and to enjoin

defendants from continuing to encroach on their land. Defendants claimed they were entitled to the disputed land through operation of adverse possession, and filed a counterclaim against Harrington and Martin. In support of their claims, defendants presented evidence that they had mowed, landscaped, maintained a garden, and planted a row of pine trees in the disputed areas and that these activities had been continuous since they purchased the property in 1986.

The superior court concluded that defendants had not met their burden of proving Aan ouster of the owner that is open, notorious, hostile and continuous through the statutory period of fifteen years,@ citing Montgomery v. Branon, 129 Vt. 379, 387 (1971), and 12 V.S.A. ' 501 (quotation and alteration omitted). In support of this conclusion, the superior court found that defendants= acts of mowing and landscaping the disputed portions of the property were neither Anotorious@ nor Ahostile.@ It found those activities were also not continuous for the fifteen years prior to the filing date of the instant action. The court further found that the garden, while sizable, had not been maintained at a consistent size over the years. Finally, the court determined that evidence of when the pine trees were planted was inconclusive and that, at any rate, the seedlings were very small and not necessarily visible for a number of years. After the court entered judgment for plaintiffs, defendants filed a motion for a new trial based on their discovery of new evidence, namely, photographs allegedly documenting defendants= adverse use of the land as early as 1987. This was significant because most of the photographs offered at trial were taken in 1990 or 1991. The superior court denied the motion, concluding that the new evidence could have been found before or during the trial, and that the photos in any case only added to the contradictory evidence on the issue of the timing and scope of defendants= adverse use of the land.

On appeal, defendants allege several errors in the superior court=s decision, which can be addressed in two broad categories: (1) the duration and continuity of defendants= adverse use of the disputed property, and (2) the nature of that useCthat is, whether it was Anotorious@ and Ahostile.@ Defendants also argue that the superior court erred in denying their motion for new trial and in calculating plaintiffs= costs.

AAdverse possession is a mixed question of law and fact.@ MacDonough-Webster Lodge No. 26 v. Wells, 2003 VT 70, & 17, 175 Vt. 382. As such, we view the factual findings in the light most favorable to the

prevailing party and will not set them aside unless they are clearly erroneous. Id. We review conclusions of law de novo. Id.

As noted above, to succeed in their claim, defendants would have to prove both that their activities were Anotorious@Ci.e., sufficiently observable to place plaintiffs on notice of defendants= assertion of a right to the propertyCand Ahostile@Ci.e., incompatible with plaintiffs= ownership rights. Montgomery, 129 Vt. at 387. Defendants would also have prove that these activities commenced sometime prior to September 3, 1987, fifteen years before the lawsuit was filed, and were continuous for that period. Id. Based on testimonial and photographic evidence, the superior court was Anot persuaded that [the pine] trees were planted by September 3, 1987 (fifteen years before this lawsuit began).@ Further, while the court noted that there was currently a fence surrounding the vegetable garden, the garden was not surrounded by a fence in 1990, and the evidence did not establish that the garden had been of a substantial size for the entire statutory period. Although defendants had landscaping work done that might have encroached on the property of Harrington and Martin, this occurred only for a Abrief and discrete period.@ Finally, the court determined that the testimony regarding the mowing was inconsistent both with regard to the date it started, its duration, and whether it was carried out with permission.

Thus, the superior court concluded that the testimonial and photographic evidence regarding the duration and continuity of defendants= use of the land was inconclusive. Under these circumstances, we cannot find clear error in the superior court=s conclusion that defendants failed to carry their burden of proof. If defendants cannot establish the elements of duration and continuity, their claim to adverse possession fails regardless of whether they met the elements of notoriety and hostility. Accordingly, we express no view on the latter two elements and the related arguments.

Defendants also argue that the superior court erred in not granting a new trialCor at least a hearing on the issue of a new trialCin light of defendants= newly discovered evidence. Defendants moved under Vermont Rule of Civil Procedure 59(a)&(e), although a motion for new trial based on newly discovered evidence is properly brought under Rule 60. In either case, the decision whether to grant a new trial is within the discretion of the

trial court. See Bruekner v. Norwich Univ., 169 Vt. 118, 132-33 (1999) (reviewing Rule 59(a) motion for new trial for abuse of discretion); Pirdair v. Med. Ctr. Hosp. of Vt., 173 Vt. 411, 413-14 (2002) (reviewing Rule 60(b) motion for new trial for abuse of discretion). Here, the court concluded that the newly discovered photographic evidence was inconclusive and was contradicted by testimonial evidence presented at trial. Defendants have not demonstrated that this was an abuse of discretion.

Finally, defendants argue that the superior court erred in awarding plaintiffs the costs of copying deposition transcripts and certain costs for postage. V.R.C.P. 54(g). The applicable rule provides a non-exclusive list of costs related to depositions that may be taxed at the discretion of the court. The award was not error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

_____

John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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