



12 of 16 DOCUMENTS

**LAURA WRIGHT, etc., Plaintiff and Respondent, v. BARBARA SIMMONS, etc.,
Defendant and Appellant.**

B180073

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION THREE**

2006 Cal. App. Unpub. LEXIS 752

January 24, 2006, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC305664. Rodney E. Nelson, Judge.

DISPOSITION: Affirmed.

COUNSEL: Sullivan, Workman & Dee, Charles D. Cummings and Joseph S. Dzida, for Plaintiff and Respondent.

Law Offices of Ira N. Katz and Ira N. Katz, for Defendant and Appellant.

JUDGES: ALDRICH, J.; KLEIN, P.J., CROSKEY, J. concurred.

OPINION BY: ALDRICH

OPINION

INTRODUCTION

This quiet title action was resolved by the trial court's entry of judgment declaring that plaintiff Laura Wright had acquired title to the disputed parcel of real property by adverse possession. In her appeal, defendant Barbara Simmons contends that in moving for summary judgment, Wright failed to produce evidence that her possession was hostile, adverse, and under claim of right. We hold Wright carried her burden of proof in moving for summary judgment as to each of the [*2] elements of her adverse possession cause of action and that in opposition, defendants had failed to demonstrate a triable issue of material fact. Accordingly, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The property at issue, approximately 4,400 square feet, consists of a single family residence located on Romaine

Street in Hollywood. Tracing the title, it shows that Anna C. Wright conveyed the property to Wright's husband, Raymond Martin Wright, on November 14, 1963, by grant deed. Raymond Wright encumbered the property with two deeds of trust, one in June 1965 and one in November 1967.

The property was seized by the Internal Revenue Service (the IRS) which sold it in 1971 to William Little. Little encumbered the property with a trust deed in September 1971. On January 10, 1972, Little assigned to Charles Gamble his beneficial right, title, and interest in the IRS's certificate of sale of the property. In turn, the IRS conveyed to Gamble, "all . . . right, title, and interest of Raymond M. Wright and Laura Wright" in the property in January 1972. Gamble received from the IRS the property subject to the outstanding trust deeds granted by Raymond Wright and Little.

[*3] In 1990, Gamble died intestate.

On November 6, 2003, Wright filed her complaint to quiet title to real property based on adverse possession as of that date. Wright sued all those who might claim an interest either by intestate or testate succession or by virtue of the outstanding encumbrances.

Barbara Simmons and Martha Bufalino answered the complaint. They asserted that Gamble left no issue and because he died intestate, his property passed (*Prob. Code*, § 6402) to his first cousins, Simmons and Bufalino. As an affirmative defense, defendants asserted that Wright had failed to plead specific facts about the open, notorious, and exclusive nature of her possession.

Once the case was at issue, Wright moved for summary judgment asserting ownership of the property by claim of right because she satisfied all of the elements of adverse possession. Wright requested judicial notice of Gamble's death certificate, copies of the deeds, trust deeds, and assignment listed above.

In her declaration submitted with her motion, Wright asserted that she has lived on the property since the late 1950's, and has been the only person to live on the property since her husband's [*4] death in 1987. She declared that she has paid all of the taxes and assessments on the property, made all of the necessary repairs, and physically maintained the property. Wright further declared, "I have been in actual, exclusive possession of the Subject Property since my husband's death in 1987. I have lived openly, notoriously, continuously, and uninterrupted and I do claim so by *claim of right* since my husband's death. No one has made any claims against my interest and possession of the Subject Property." (Italics added.)

Attached to Wright's summary judgment motion were the Los Angeles County joint consolidated annual tax bills for the property covering the six-and-a-half tax years from 1997-1998 through 2003-2004, listing Gamble as the property's owner. Also attached were copies of checks for the full amount of the real estate taxes and special assessments, written to the Los Angeles County Tax Collector, and signed by Wright. Each of these checks lists the assessor's identification number for the property on the memo line in the lower left corner. Each of these checks was processed by the tax collector's office.

Defendants opposed the summary judgment motion on two grounds. [*5] First, defendants contended that Wright was a life tenant with the result that her occupation of the property was permissive and not hostile. Based on the IRS deed to Gamble, defendants claimed that Gamble was record owner of the property. They *asserted* that "Gamble was friendly with and, therefore, permitted plaintiff and Mr. Wright to continue residing on the subject property." They also noted that Wright never expressed a hostile claim to Gamble's legal title and never asserted the existence of a deed from Gamble to Wright and her husband before the complaint. Defendants contended that Wright had never produced such a deed and thus could not demonstrate her adversity by *color of title*.

As their second ground, defendants argued that Wright failed to present material evidence of each of the elements of adverse possession. Defendants observed that other than the tax payments, all of Wright's facts were contained in her declaration. They deduced that, because the tax checks included on the memo line, "Charles Gamble # 5537-019-019,"

Wright must have written them as a *life tenant on behalf of Gamble*.

Defendants specifically disputed three of the five facts Wright had presented [*6] in support of her motion. First, Wright claimed to have paid all of the property taxes and all of the expenses on the property since her husband's death in 1987, and that defendants had not made any property tax payments. Defendants disputed this on the grounds that (1) the earliest check is drafted in 1998, (2) payment was made by third parties because they are written on the bank accounts of others, and (3) the payment to the tax collector was made by Wright on behalf of Gamble as a life tenant would be obligated to do.

Defendants also disputed Wright's fact that she had been in actual possession of the property which possession was open, notorious, continuous and uninterrupted under claim of right for the entire statutory period, and that defendants could not present evidence to the contrary. Defendants objected to the form of this fact as compound, and on the ground that the issue stated an ultimate conclusion and defendants had no burden to prove the negative.

Finally, defendants attacked Wright's asserted fact that no rents had been collected and that she has exerted all possessory rights to the property and that defendants could not present any evidence that Gamble permitted [*7] her possession of the property. Defendants responded by raising evidentiary objections and the presumption under *Code of Civil Procedure section 321* that Wright's occupation of the property was permissive and subordinate to the legal title of Gamble and his heirs. Defendants asserted that plaintiff must prove that her possession was hostile.

Wright replied to defendants' opposition with a supplemental declaration. She declared that her husband Raymond had given Gamble the money he paid to acquire Little's interest from the IRS. Shortly thereafter, i.e., around 1972, Gamble deeded the property back to the Wrights. Raymond never recorded the deed. Wright declared she filed the lawsuit because she could not find the 1972 deed from Gamble to her husband. Attached to Wright's supplemental declaration were portions of her deposition testimony to the same effect. With respect to the checks, Wright declared that friends' names were printed on her checks so that another person would be able to write checks on her account if Wright, who is 86 years old, became disabled. All of the money she used to pay the property taxes was her own money. She also submitted copies [*8] of the tax assessments for 1991 through 1996, which she had produced during discovery. These assessments showed that the property was defaulted in 1991 for nonpayment of 1990 real estate taxes. Wright, who had been paying all the taxes during the early 1990s made that default payment in 1995, after which the notation was removed from the 1996 tax bill. Finally, in her reply to defendants' opposition, Wright observed that defendants had produced no actual evidence that her interest in the property was limited to a life estate.

The trial court granted Wright's motion for summary judgment quieting title to the property in her. The court decreed that Wright was the sole owner in fee simple to the property and defendants, Gamble's testate and intestate successors and all persons claiming by, through and under Gamble, including Simmons, Bufalino, among others, have no right or title to, estate or interest in, or lien on, the property. Simmons timely appealed.

CONTENTIONS

Simmons contends that triable issues of fact about whether Wright's possession of the property was adverse, hostile, and under claim of right precluded summary judgment.

DISCUSSION

1. *Standard of review* [*9] .

" 'Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision to grant [defendant's] summary judgment de novo.' [Citation.] [Citation.] An appellate court is not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not the rationale. [Citation.]" (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951.)

"In moving for summary judgment, a 'plaintiff . . . has met' his 'burden of showing that there is no defense to a cause of action if' he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material [*10] fact exists as to that cause of action or a defense thereto.' [Citation.]" (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 849*, quoting from *Code Civ. Proc.*, § 437c, subd. (o)(1).)

2. *Wright carried her burden of persuasion in moving for summary judgment.*

"The elements necessary to establish title by adverse possession are: (1) tax payments, (2) actual possession which is (3) open and notorious, (4) continuous and uninterrupted for five years, (5) hostile and adverse to the true owner's title, and (6) under either color of title or claim of right. The party asserting title by adverse possession has the burden of proving affirmatively each one of these elements. [Citations.]" (*California Maryland Funding, Inc. v. Lowe (1995) 37 Cal.App.4th 1798, 1803*, citing *Code Civ. Proc.*, § 325.)

Wright demonstrated she made the tax payments for six and a half years, notwithstanding the statutory period is only five years. Defendants' attacks on Wright's evidence of those tax payments do not raise a triable issue of material fact. Wright declared that the checks were written against [*11] her own money. Defendants did not dispute that assertion. In any event, the checks also show they were: (1) *signed by Wright*; (2) written to the Los Angeles County Tax Collector, *who cashed them*; (3) written for the total amount of the tax and assessments; and (4) payment for the tax assessed on the property as identified by the assessor identification number stated on the memo line of the checks. These checks and the tax assessment bills are evidence that Wright paid the taxes for at least the five years before her suit was filed with the result she has proved the first element of her cause of action.

As for the subsequent four elements, Wright declared she has been in actual, open, continuous, and uninterrupted possession of the property at least for the five years preceding 2003 when she filed this lawsuit. Wright asserted in her declarations, signed under penalty of perjury, that she lived "notoriously" on the property since her husband's death in 1987. In support of that assertion, she declared she made repairs, maintained the improvements, and paid the real estate taxes as well as a default that occurred in 1991. In her answers to interrogatories, Wright averred that [*12] "only Raymond and Laura Wright asserted any title to the Property . . ." Consequently, Wright proved the second through fifth elements of her cause of action.

Finally, in her supplemental declaration as with her moving papers, Wright explained that she asserts ownership of the property based on a *claim of right*, not by color of title. She believed Gamble had conveyed the property to her husband although she could not locate an unrecorded deed. "A 'claim of right may be established when the occupancy . . . occurred through mistake.' [Citation.]" (*California Maryland Funding, Inc. v. Lowe, supra, 37 Cal.App.4th at p. 1810*.) Thus, Wright proved the sixth and last elements. Wright met her burden in moving for summary judgment to prove each element of her cause of action. (*Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 849*.)

3. *Defendants failed to carry their burden in opposing summary judgment.*

Under the summary judgment procedure, the burden thus shifted to defendants to demonstrate that a triable issue of material fact existed as to the cause of action. (*Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 849*.)

[*13] a. *There is no dispute of fact about Wright's possession.*

Defendants first challenged Wright's assertion that she has been in actual, open, continuous and uninterrupted possession for at least five years. To dispute these facts, defendants merely lodged evidentiary objections. However, these objections are waived as it appears from the record that they were not raised at the hearing and the trial court

never ruled on them. (*Code Civ. Proc.*, § 437c, subd. (b)(5).) Defendants demonstrated no dispute of *fact* as to these second through fourth elements namely, that Wright possessed the property, openly, notoriously, continuously and uninterrupted for nearly a half century.

b. *Defendants have not demonstrated a dispute of fact about Wright's hostility and adversity.*

Simmons argues on appeal that Wright has not carried her burden to prove the hostility and adversity element. "By 'hostility' the courts mean ' . . . ' . . . the claimant's possession must be adverse to the record owner, "unaccompanied by any recognition, express or inferable from the circumstances, of the right in the latter." ' [Citation.]' ' [Citation.]" (*California Maryland Funding, Inc. v. Lowe, supra*, 37 Cal.App.4th at p. 1806, [*14] quoting from *Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1605.) "The question of hostility is resolved by reference to the intention of the *adverse user*, . . ." Wright in this case. (*California Maryland Funding, Inc. v. Lowe, supra*, at p. 1809.)

Simmons argues Wright produced "no evidence" that her possession of the property was hostile, other than "simply *declaring* her conclusion that she has 'lived openly, notoriously, continuously, and uninterrupted" (Italics added.) Wright's declaration is sufficient evidence. The declaration was signed under penalty of perjury and as such is admissible evidence of the facts contained therein. (*Code Civ. Proc.*, § 437c, subd. (b)(1); *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578 ["The only evidence the trial court should have considered and which we may consider here is that contained in the declarations filed in support of and in opposition to the motion."].)

Simmons argues that Wright failed to show she carried out "hostile acts" toward Gamble's title. We disagree.

Lobro v. Watson(1974) 42 Cal. App. 3d 180, 116 Cal. Rptr. 533, [*15] is instructive. One of the issues in that case involved the element of hostility. The record owner argued the hostile element had been negated because the adverse possessor was heard at least twice to state, " I don't *think* this property is ours, belongs to my brother" " the record owner. (*Id. at p. 188.*) *Lobro* held that "such a statement does not interrupt the running of the statute of limitations *in [the] face of the open, notorious, and visible possession of the property.* [Citations.]" (*Ibid., italics added.*) The court continued, "the mere fact that one thinks that the property one is claiming title to belongs to another is irrelevant so long as there is the *claim* to title adverse to all others; to hold otherwise would only permit adverse possession under color of title and not under claim of right." (*Ibid., italics in original.*) In *Lobro*, the adverse possessor resided on the property and during his occupancy, he maintained the improvement, fenced the lot, replaced the roof, planted trees, and paid the taxes. (*Id. at p. 188, fn. 5.*) From these facts, the *Lobro* court concluded it was "clear" that the adverse [*16] possessor "intended to use the land as his own, to the exclusion of all others. [Citation.] There is no evidence that [the adverse possessor] ever doubted his ownership of the property." (*Id. at p. 188.*) Hence, the adverse possessor had satisfied every element of adverse possession. (*Id. at p. 189.*)

Likewise here, as demonstrated, it is undisputed that Wright resided on the property for half a century, and physically maintained the improvements, made all necessary repairs, and not only paid the taxes, but cleared up a tax default, thus inferentially expressing her claim of ownership. From these facts, we conclude as in *Lobro*, that Wright intended to use the land as her own to the exclusion of all others. Nor is there evidence that Wright doubted her ownership: she claims to this day that Gamble had conveyed his interest to her husband. The undisputed evidence of the circumstances leads to the inexorable inference that Wright's occupation of the property was indeed " ' ' ' ' "unaccompanied by any recognition . . . of the right in . . . " ' ' ' ' " Gamble. (*California Maryland Funding, Inc. v. Lowe, supra*, 37 Cal.App.4th at p. 1806.) [*17] Therefore, as in *Lobro*, all of Wright's evidence demonstrates the hostility and adversity element.

Simmons next argues that Wright was a life tenant with the result her occupancy was permissive and not hostile. As evidence of this, defendants presented only their *assertion*, in their brief opposing summary judgment, *unsupported by any documentation, declaration, or testimony*, that "Gamble was friendly with and, therefore, permitted plaintiff and Mr. Wright to continue residing on the subject property." Yet, the party opposing summary judgment is obligated to "set forth the *specific facts* showing that a triable issue of material fact exists;" they may not rely on allegations. (*Lopez v.*

Baca (2002) 98 Cal.App.4th 1008, 1014, italics added.) These mere statements or arguments simply do not constitute evidence of friendliness or permissiveness such as would demonstrate a triable issue of fact to satisfy *Code of Civil Procedure* section 437c, subdivision (b)(3).

Citing *Civil Code* section 840, Simmons argues Wright is a life tenant because she paid the real estate taxes exactly as required of such a tenant. [*18] Apart from the fact that defendants presented no evidence that Wright was a life tenant, as they had asserted in their opposition to the summary judgment motion, section 840 does not advance Simmons' argument. Section 840 sets forth the duties of a life tenant, and specifies, that "The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance." (Italics added.) Yet, Wright declared that she paid all of the assessments, not simply those benefiting the life estate.

Simmons relies on *Code of Civil Procedure* section 321. (*Civ. Code*, § 741.) Observing that Gamble was the record owner of the property based on the IRS deed to him, Simmons contends that *Code of Civil Procedure* section 321 creates a legal presumption that Wright's possession of the property was permissive at the beginning and Wright never gave notice to Gamble of the adverse nature of her possession. (*Johnson v. Ocean Shore Railroad Co.* (1971) 16 Cal. App. 3d 429, 436, 94 Cal. Rptr. 68.) [*19]

Code of Civil Procedure section 321 reads: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action." (Italics added.)

Even if a legal presumption applies here, as stated in *Code of Civil Procedure* section 321, it is rebutted by evidence that "the property has been held and possessed adversely to such legal title, for five years before the commencement of the action." (§ 321, italics added; see *Tobin v. Stevens* (1988) 204 Cal. App. 3d 945, 953, 251 Cal. Rptr. 587 [once legal title is shown under *Code of Civil Procedure* section 321, the burden shifted to opposing party to demonstrate title by adverse possession].) As analyzed, *supra*, Wright acknowledged [*20] the IRS deed to Gamble, and then rebutted the section 321 presumption that would arise by virtue of the IRS deed by demonstrating all of the requisite elements of adverse possession. Indeed, Wright explained in her declaration that her inability to locate a deed from Gamble to Raymond was the reason she filed this lawsuit.¹

¹ *Enos v. Murtaugh* (1941) 47 Cal. App. 2d 269, upon which Simmons relies is unavailing. There, the plaintiff claiming adverse possession lived on the property with his mother, the record owner. His mother had claimed ownership to the property in statements she made to the tax assessor and to the county, and although plaintiff may have paid the real estate taxes, his payments were done by writing a check to his mother. (*Id. at pp.* 272-273.) None of the plaintiff's acts showed that his occupancy was hostile and not in subordination to the legal title of his mother. (*Id. at p.* 273.) Here, however, there is no evidence that Wright's possession was actually permissive and no evidence that Gamble or defendants ever gave Wright permission to occupy the property. Instead, the evidence is that Wright's possession was adverse and hostile.

[*21] Furthermore, *Johnson v. Ocean Shore Railroad Co.*, *supra*, 16 Cal. App. 3d 429, upon which Simmons relies, is distinguished and of no particular help to Simmons. There, the adverse possessor entered the property permissively pursuant to an easement and after his claim of hostility, never used, occupied, or improved the property or posted signs. (*Id. at p.* 436.) Other than the IRS deed to Gamble and the presumption of *Code of Civil Procedure* section 321, which has been rebutted, Simmons presented no evidence that Wright ever entered the property permissively. More important, Wright's actions, under *Lobro* have always demonstrated her lack of recognition that Gamble held an interest in it. In sum, defendants failed to demonstrate a triable issue as to hostility or adversity.

c. *There is no dispute that Wright has proven her ownership by claim of right.*

Turning to the last element, Simmons contends that it is not clear whether Wright asserts adverse possession by "color of title" or by "claim of right." Not so.

"A 'claim of right may be established when the occupancy . . . occurred through mistake.' [Citation. [*22]]" (*California Maryland Funding, Inc. v. Lowe, supra, 37 Cal.App.4th at p. 1810*, quoting from *Gilardi v. Hallam (1981) 30 Cal.3d 317, 322, 178 Cal. Rptr. 624.*) A "claim of right does not require a belief or claim that the use is legally justified. [Citation.] It simply means that the property was used without permission of the owner of the land. [Citation.]" (*Felgenhauer v. Soni (2004) 121 Cal.App.4th 445, 450.*)

By contrast, "[a] possessor has a color of title when his or her possession is under some *written instrument*, deed, or judicial decree that lacks the essentials of an effective monument of title; it appears to transfer good title, but it is defective and is not actually effective to transfer title." (6 Miller & Starr, *Cal. Real Estate* (3d ed. 2000) *Color of Title Defined*, § 16:4, p. 10, fns. omitted, italics omitted.)

Wright made very clear in her deposition testimony and her supplemental declaration, because she could not locate the deed she claims Gamble conveyed to her husband, that she claims adverse possession based on a *claim of right*. Consequently, Simmons' arguments about the inadequacy of her claim [*23] under color of title are irrelevant. There is no "controversy" about the nature of Wright's claim.

On appeal, Simmons argues that Wright failed to produce the unrecorded deed she claims Gamble gave to Wright's husband Raymond, with the result it is impossible to determine the nature of the fee conveyed to him, i.e., whether a full fee simple was conveyed, and whether it was conveyed to Raymond as his separate property or to Raymond and Wright as community property. From this lack of evidence, Simmons assumes that Wright must be a life tenant who occupies the property permissively. However, regardless of whether this is the only assumption one can logically make, it is irrelevant. Wright has made clear in all of her papers that she does not seek to establish her ownership under color of title and so the nature of the right conveyed in the deed is not germane. Wright has demonstrated adverse possession by herself based on her own use, payment of taxes, and *claim of right* over the prescriptive period.

DISCUSSION

The judgment is affirmed. Each party to bear its own costs of appeal.

ALDRICH, J.

We concur:

KLEIN, P.J.

CROSKEY, J.