

2005

LPM Corporation v. Paul C. Smith and Sandra A. Smith: Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *LPM Corporation v. Smith*, No. 20050950 (Utah Court of Appeals, 2005).

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IN THE UTAH COURT OF APPEALS

LPM CORPORATION,

Plaintiff and Appellant,

vs.

PAUL C. SMITH and SANDRA A.
SMITH,

Defendant and Appellees.

Appellate Case No. 20050950-CA

Priority No. 15

BRIEF OF APPELLEES

APPEAL FROM FINAL ORDER BY THE HONORABLE GLEN R. DAWSON,
SECOND DISTRICT COURT, DAVIS COUNTY, BOUNTIFUL DEPT.

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UTAH APPELLATE COURTS
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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear and decide this appeal pursuant to sections 78-2-2(3)(j) and 78-2-2(4) of the Utah Code.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Issue 1: Did the district court err by dismissing LPM Corporation's ("LPM") complaint under Rule 12(b)(6) of the Utah Rule of Civil Procedure for failure to state a claim upon which relief could be granted, where LPM sought to use the doctrine of boundary by acquiescence to obtain an entire, separately platted parcel of land instead of merely to adjust the boundaries between two adjoining parcels?¹

Standard of Review: This Court reviews a district court's decision to grant a motion to dismiss for correctness. See Prows v. State, 822 P.2d 764, 766 (Utah 1991).

Issue 2: Did the district court err by failing to convert the Smith's Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment where dismissal as a matter of law is justified without reference to materials outside the pleadings?

Standard of Review: While a district court's decision to consider matters outside the pleadings is reviewed for abuse of discretion, see Strand v. Associated Students of Univ. of Utah, 561 P.2d 191, 193 (Utah 1977), there is no standard of review for a district court's refusal to base its ruling on materials outside the pleadings and convert a motion into a motion for summary judgment. Ho v. Jim's Enters. Inc., 29 P.3d 633, 635 n.5 (Utah 2001) (denying appellant's request to "convert a rule 12 motion to dismiss to a rule 56 motion for summary judgment," where the trial court had not). Instead, this Court affirms as long as "dismissal can be justified without considering the outside documents." Oakwood Village LLC v. Albertsons, Inc., 104 P.3d 1226, 1231 (Utah 2004).

¹ This issue combines LPM's first two issues.

DETERMINATIVE LAW

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Utah R. Civ. P. 12(b).

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

On March 14, 2005, Paul and Sandra Smith (the “Smiths”) purchased a parcel of land in a subdivision in Kaysville, Utah, on which they hoped to build their home. On April 29, 2005, LPM filed this case in the Second Judicial District Court for Davis County seeking to quiet the Smiths’ title to the parcel in the name of LPM. In its complaint, LPM described two parcels, its own parcel (the “LPM Parcel”) and the adjacent parcel owned by the Smiths (the “Smith Parcel”). It then asked the district court to quiet the Smiths’ title to the entire Smith Parcel via the doctrine of boundary by acquiescence.

On September 15, 2005, the Honorable Glen R. Dawson granted the Smiths’ motion to dismiss. In his ruling, Judge Dawson noted that LPM was attempting to acquire an entire parcel of land rather than simply asking the court to adjust disputed boundaries between two adjoining parcels, and then ruled that LPM needed to satisfy the requirements under the doctrine of adverse possession to take an entire parcel of land. Judge Dawson also noted that LPM could not satisfy those requirements as a matter of

law because, as LPM acknowledged at oral argument, it had not made any tax payments on the Smith Parcel, which would be required to show adverse possession. A copy of Judge Dawson's Order is attached as Exhibit A. LPM timely appealed to the Utah Supreme Court, and the case was then transferred to this Court.

STATEMENT OF FACTS

Unlike LPM's opening brief, which attempts to assert facts which were never properly presented to the district court, the following brief statement of facts draws exclusively from the factual allegations in LPM's complaint. The complaint sets forth the universe of facts relevant to the district court's decision to grant the Smiths' Rule 12(b)(6) motion to dismiss. A copy of LPM's complaint is attached as Exhibit B. While LPM attached materials outside the pleadings in its memorandum in opposition to the Smiths' motion to dismiss, (R. 27-28), and the Smiths then pointed out in their reply memorandum that the district court could convert the motion to dismiss into a motion for summary judgment, (R. 56), the district court did not convert the motion, relying instead only upon the allegations of the complaint for its ruling.² (R. 78-79.) In any event, and as demonstrated below, the district court did not need to rely upon any materials outside the pleadings to grant the Smiths' motion to dismiss, and thus, this Court can—and should—affirm the district court's judgment without reference to such materials.

The Allegations in LPM's Complaint³

LPM owns a parcel of real property in Kaysville City, Utah. (R. 2.) The Smiths own a parcel of real property ("Smith Parcel"), which is adjacent to, and immediately to

² Whether the district court did rely upon materials outside the pleadings is irrelevant as long as "dismissal can be justified without considering the outside documents." Oakwood Village LLC v. Albertsons, Inc., 104 P.3d 1226, 1231 (Utah 2004). This is consistent with this Court's general rules that it may affirm on alternative grounds. See Okelberry v. West Daniels Land Ass'n, 120 P.3d 34, 38 (Utah Ct. App. 2005).

³ While the allegations of LPM's complaint are obviously disputed, they were assumed to be true for purposes of the Smiths' motion to dismiss and they are likewise assumed to be true here.

the north of, the LPM Parcel. (R. 2.) LPM asserts that it and its predecessors have occupied and used the Smith Parcel for over sixty years for farming, livestock grazing, and ingress and egress to and from the LPM Parcel. (R. 2-3.)

LPM's alleged use of the Smith Parcel extends to a fence running along the northern boundary of the Smith Parcel. (R. 3.) This fence has existed since at least 1960. (R. 3.) Both LPM (and predecessors in interest) and the Smiths (and predecessors in interest) allegedly acquiesced to the fence "serving as the boundary between their respective parcels" for more than twenty years. (R. 3.) LPM filed its complaint seeking to quiet title to the entire Smith Parcel under the doctrine of boundary by acquiescence, not the doctrine of adverse possession. (R. 3-4.) LPM had not alleged that it paid taxes on the Smith Parcel. (R. 1-4.)

SUMMARY OF THE ARGUMENT

Despite LPM's attempts to confuse the issues in this appeal, ultimately this Court must answer only one question: Assuming the allegations of LPM's complaint are true, are they legally sufficient to support a claim under the doctrine of boundary by acquiescence? The district court dismissed LPM's complaint because it did not, as a matter of law, state a claim for boundary by acquiescence under Rule 12(b)(6). It is from this order that LPM appealed.

LPM's complaint describes two separate parcels of land, its own parcel, the LPM Parcel, and the parcel directly to the north, the Smith Parcel. LPM then alleges that a fence along the northern boundary of the Smith Parcel should serve as the "boundary between [the] respective parcels" because the parties owning these parcels allegedly have acquiesced to the fence serving as the boundary for more than twenty years.

There is, however, a fundamental problem in how LPM is employing the doctrine of boundary by acquiescence: If, as LPM contends, the fence along the northern boundary of the Smith Parcel were to serve as the boundary between the Smith Parcel and the LPM Parcel, then there would be no Smith Parcel at all, and thus, no Smith Parcel

to which the fence could serve as a boundary. This is because the fence serves as the northern boundary of the Smith Parcel, which lies entirely to the south of the fence.

What LPM seeks in this action is to acquire title to an entire, separately platted parcel of land using a doctrine—boundary by acquiescence—that was created solely to adjust disputed boundaries between two adjoining parcels. Boundary by acquiescence was never intended, and has never been extended, to allow a party to extinguish an entire parcel of land. A related doctrine—adverse possession—does permit a party to acquire an entire parcel of land, but LPM did not plead and cannot prove adverse possession because, as it acknowledges, it has never paid taxes on the Smith Parcel.

Because LPM does not seek to adjust a boundary, but instead to acquire an entire parcel, its boundary-by-acquiescence claim fails as a matter of law and its complaint fails to state a claim upon which relief could be granted. As the district court correctly recognized, LPM cannot bypass the more stringent requirements of adverse possession by employing a doctrine designed only to resolve disputes between adjoining owners over the location of their common property line. LPM’s claims fail as a matter of law. This Court should affirm.

ARGUMENT

1. LPM’S COMPLAINT FAILS TO STATE A CLAIM BECAUSE BOUNDARY BY ACQUIESCENCE IS NOT A DOCTRINE BY WHICH ONE CAN OBTAIN AN ENTIRE PARCEL OF LAND.

LPM’s boundary by acquiescence claim⁴ fails, as a matter of law, because the doctrine of boundary by acquiescence does not entitle LPM to the relief it seeks: to quiet title in the name of LPM to the entire Smith Parcel, and thereby deprive the Smiths of any interest whatsoever in that parcel. LPM does not seek merely to adjust the boundary line between its parcel and the Smith Parcel—which is what the doctrine of boundary by acquiescence is designed to permit. Rather, it seeks to wrestle title to an entire parcel of

⁴ While LPM also advances a quiet title claim, it is wholly predicated on its boundary by acquiescence claim. (R. 3.)

land away from the Smiths. To obtain an entire parcel of land, however, LPM must satisfy the doctrine of adverse possession, a doctrine LPM admits it cannot satisfy because it has not paid any taxes on the Smith Parcel. Therefore, as demonstrated in more detail below, the district court did not err by dismissing LPM's boundary by acquiescence claims under Rule 12(b)(6), and this Court should affirm.

The LPM Parcel is adjacent to the southern border of the Smith Parcel. LPM claims that it (and its predecessors) has used the Smith Parcel for over sixty years up to a fence along the northern boundary of the Smith Parcel. LPM alleges that this fence running along the northern boundary of the Smith Parcel (which also happens to run along the recorded northern property line of the Smith Parcel) somehow has been understood by the various owners of the two parcels also to form the southern boundary of the Smith Parcel. In other words, LPM claims that the owners of the Smith Parcel have acquiesced to the fence forming both the northern and southern boundaries of the Smith Parcel, which means they have acquiesced to having no parcel at all. Not only does such a claim defy logic and common sense, it also, unsurprisingly, is not permitted under the doctrine of boundary by acquiescence.

The doctrine of boundary by acquiescence "has always been restrictively applied in Utah," and merely "fills an important gap in the law left unaddressed by other doctrines" to "settle boundary disputes." Staker v. Ainsworth, 785 P.2d 417, 423 (Utah 1990). The doctrine "grew out of the related doctrine of boundary by agreement." Hales v. Frakes, 600 P.2d 556, 558 (Utah 1979). And the elements of boundary by acquiescence reveal its link to boundary by agreement: (1) occupation to a visible line; (2) mutual acquiescence in the line as a boundary; (3) for at least 20 years; (4) by adjoining landowners. See RHN Corp. v. Veibell, 96 P.3d 935, 941 (Utah 2004). The acquiescence element serves as a substitute for actual agreement, requiring "that both parties recognize the specific line, and that both parties acknowledge the line as the demarcation between the properties." Wilkinson Family Farm, L.L.C. v. Babcock, 993

P.2d 229, 231 (Utah Ct. App. 1999). In essence, boundary by acquiescence is designed to allow a legal boundary line to be adjusted to align with a visible boundary line such as a fence, when adjacent landowners have considered the fence as the boundary line for more than twenty years. In other words, it applies only in those narrow types of cases where the legal boundary line between adjoining landowners differs from a visible boundary line, and the adjoining landowners have treated the visible line as the boundary between their separate parcels.

Adverse possession, on the other hand, is not a doctrine designed merely to adjust a boundary in accordance with the parties' agreement or acquiescence, but instead permits one to obtain title to a neighbor's entire parcel. Unsurprisingly, because adverse possession permits greater relief by divesting a property owner of his entire estate, it also requires more to get that relief: One must establish not only occupation for at least seven years, but also, and most important, that one "paid all taxes which have been levied and assessed upon such land according to law." Utah Code Ann. § 78-12-12 (2005). As this Court has stated, "because of the gravity of adverse possession claims—wresting title from otherwise rightful owners—claimants must strictly comply with all requirements." Martin v. Kearl, 917 P.2d 91, 93 n.5 (Utah Ct. App. 1996). This explains why the tax payment element of adverse possession is so important: "the tax payment requirement should not reward 'one who claims the benefits of ownership without fulfilling his obligation to the community of [timely] paying taxes.'" Id. (quoting 7 Richard R. Powell & Patrick J. Rohan, *Powell on Real Property*, ¶1013[2], at 91-68 (1996) (alteration in original)).

Because adverse possession and boundary by acquiescence serve different purposes, Justice Callister warned long ago that the "doctrine of boundary by acquiescence cannot be utilized as a subterfuge to avoid compliance with the statutory provisions for adverse possession." Davis v. Riley, 437 P.2d 453, 456 (Utah 1968) (Callister, J. concurring). Yet this is precisely what LPM seeks to do in this case. LPM is not seeking to have the fence along the northern boundary of the Smith Parcel serve "as

the line of demarcation between the properties,” but instead is seeking to “wrestle title from otherwise rightful owners.” Under the relief LPM seeks, there is no line of demarcation between the LPM Parcel and the Smith Parcel. There is no Smith Parcel at all. It disappears. In such circumstances, boundary by acquiescence cannot apply, as a matter of law, because the Court must assume that the Smiths and their predecessors acquiesced to the fence serving as the boundary between the Smith Parcel and the LPM Parcel, while it also served as the boundary between the Smith Parcel and the parcel to the north. In other words, on LPM’s theory, the Smiths and their predecessors had to acquiesce to having no parcel at all while somehow also recognizing the fence as the boundary of that parcel. LPM’s claim makes no sense.

Adverse possession and boundary by acquiescence are different doctrines that serve entirely different purposes. LPM should not be permitted to make an end-run around the essential tax requirement of adverse possession by employing the doctrine of boundary by acquiescence. Unsurprisingly, LPM cites no Utah case law where a court has permitted a party to take an entire parcel using the doctrine of boundary by acquiescence. There are none. If a party, such as LPM, wants to obtain title to a neighbor’s entire parcel, it must pay the taxes on that property for at least seven years. See Utah Code Ann. § 78-12-12. Because LPM did not allege that it paid taxes on the Smith Parcel (and later acknowledged that in fact it had not paid any such taxes) it cannot quiet title to the entire Smith Parcel in its name. Therefore, this Court should affirm the district court’s decision to grant the Smith’s Rule 12(b)(6) motion to dismiss.

2. ALL OF LPM’S ARGUMENTS RELY UPON FACTS WHICH DO NOT APPEAR IN ITS COMPLAINT, AND THUS, THESE FACTS ARE NOT RELEVANT ON APPEAL.

While LPM acknowledges that there is no case law to support its attempt to use boundary by acquiescence to take an entire parcel of land, (see Applt. Brief at 14), it nonetheless argues that this Court should allow it in this particular case. All of LPM’s

arguments, however, rely upon factual assumptions and assertions that do not appear in LPM's complaint. While LPM may wish that it had filed a motion to amend under Rule 15, it did not, and thus, these new and unpleaded factual allegations cannot be used to evaluate whether the district court properly dismissed LPM's complaint under Rule 12(b)(6).

LPM makes two arguments suggesting that this Court should consider facts outside the pleadings when evaluating the district court's dismissal pursuant to Rule 12(b)(6). First, LPM argues that the district court erred by failing to convert the Smiths' Rule 12(b)(6) motion into a motion for summary judgment. (Aplt. Brief at 17-18.) This argument fails, however, because even assuming the district court should have converted a motion to dismiss into a motion for summary judgment—which it should not have—this Court will affirm as long as “dismissal can be justified without considering the outside documents.” Oakwood Village LLC v. Albertsons, Inc., 104 P.3d 1226, 1231 (Utah 2004). As demonstrated above, the dismissal in this case is justified when the Court considers only the factual allegations in LPM's complaint.

Second, LPM argues that it made “an oral motion at the hearing requesting leave to amend its Complaint.” (Aplt. Brief at 17.) Initially, it is worth noting—and indeed dispositive—that LPM has not appealed the district court's denial of any motion for leave to amend, and thus the issue is not even properly before the Court. See Holmes Dev., LLC v. Cook, 48 P.3d 895, 902 (Utah 2002). Even if it had appealed the denial of such a motion, however, this Court would review that denial for abuse of discretion. See Neztosie v. Meyer, 883 P.2d 920, 922 (Utah 1994) (“We will not disturb a trial court's ruling on a motion to amend a complaint absent a clear abuse of discretion.”). And as a matter of law, it is not an abuse of discretion to deny leave to amend where a party does not “file a motion that ‘shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought,’” which also is “accompanied by a memorandum of points and authorities in support.” Holmes Dev., LLC, 48 P.3d at 909

(affirming trial court's denial of leave to amend where a party asked to amend in its opposition papers and "never filed an actual motion for leave to amend") (citation omitted); see also Coroles v. Sabey, 79 P.3d 974, 986 n.24 (Utah Ct. App. 2003) (upholding dismissal where plaintiff did not formally move to amend and instead chose to "stand on [their] complaint") (alteration in original)).

LPM had notice of the Smith's arguments when the Smith's motion to dismiss was filed and served. LPM did not, however, file a motion for leave to amend accompanied with a memorandum in support, and thus, the district court did not abuse its discretion when it did not grant LPM's oral request to amend its complaint at the end of the hearing. (R. 79.) Therefore, the only facts relevant to reviewing the district court's ruling on the Smiths' motion to dismiss are those contained in LPM's complaint.

LPM's arguments all rely upon materials external to the pleadings. For instance, LPM argues that if boundary by acquiescence cannot be used to take an entire parcel, then "an adjoining property owner could always avoid boundary by acquiescence by simply deeding the disputed parcel to someone else, or by otherwise creating a new separate parcel, as was done here." (Aplt. Brief at 14.)

This policy concern is not relevant in this case. First, there is nothing to prevent a court from allowing a boundary by acquiescence claim to proceed under such circumstances, when that case is actually brought before a court. But that case is not this case, and there is no assertion, either in the complaint or otherwise, that the Smith Parcel was created as a ruse to defeat a boundary by acquiescence claim. Here, whether the Smith Parcel was once part of a larger parcel is not alleged in the complaint, nor did LPM file a motion to amend its complaint to add this allegation. Second, for reasons outlined by LPM, if an adjoining landowner did attempt to avoid an already vested boundary-by-acquiescence claim by dividing his land such that the disputed portion forms a separate parcel, the attempt likely would fail because a vested boundary-by-acquiescence claim is not destroyed merely by such a division. (Aplt. Brief at 11-12.) Again, however, these

facts are not part of this appeal. The Court need not announce a per se rule to affirm the district court and thus, LPM's policy arguments do not apply. Rather, it is enough for this Court to find, based upon the allegations of the complaint on file, that LPM could not as a matter of law acquire the entirety of the Smith Parcel under the doctrine of boundary by acquiescence. The district court should be affirmed.

Similarly, LPM argues that it is not unreasonable to assume the Smiths' predecessors in interest acquiesced to the fence serving as the boundary between the LPM Parcel and the Smith parcel because "[w]hen the fence was erected, prior to 1940, the property to the north of the fence had not yet been subdivided and was comparable in size to LPM's 88-acre farm on the south side of the fence." (Aplt. Brief at 9.) LPM then explains that such acquiescence was reasonable at that time because the Smith Parcel was but a small portion of a larger parcel. (See id.) These facts also appear nowhere in LPM's complaint, and LPM did not file a motion for leave to amend to allege them. Therefore, these facts also are not relevant in this appeal, and they should be ignored by this Court as it reviews the propriety of the district court's ruling.

In short, the allegations in LPM's complaint are insufficient as a matter of law to support a claim of boundary by acquiescence, and this alone is sufficient grounds for this Court to uphold the district court's order dismissing LPM's complaint under Rule 12(b)(6). Oakwood Village, 104 P.3d at 1231 (affirming dismissal under Rule 12(b)(6) despite the introduction of materials outside the pleadings because "dismissal can be justified without considering the outside documents"). Such relief is particularly appropriate here because LPM had every opportunity to file a written motion to amend.

This Court should affirm.

CONCLUSION

When reviewing a dismissal under Rule 12(b)(6), this Court affirms as long as the dismissal is justified considering only the facts alleged in the complaint. In its complaint, LPM seeks to take an entire parcel of land employing the doctrine of boundary by

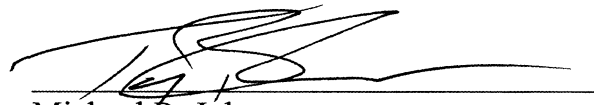
acquiescence, a doctrine designed to resolve boundary disputes, not to allow a party to acquire an entire parcel of land. To acquire an entire parcel of land, LPM must satisfy the elements for adverse possession, which LPM admits it cannot do. Therefore, the Court should affirm the district court's granting of the Smiths' Rule 12(b)(6) motion to dismiss.

ADDENDUM

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, Appellees' appendix of important documents is bound as part of this brief.

DATED this 1st day of February, 2006.

SNELL & WILMER, LLP



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Tab A

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**IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH**

LPM CORPORATION, a Nevada
corporation,

Plaintiff,

vs.

PAUL C. SMITH, and individual, and
SANDRA A. SMITH, an individual,

Defendants.

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

Civil No. 050800569

Honorable Glen R. Dawson

This matter came before the Court on August 15, 2005, for a hearing on Defendants' *Motion to Dismiss* (the "**Motion**"). At the hearing, David E. Kingston appeared on behalf of Plaintiff, and Michael R. Johnson and Troy L. Booher appeared on behalf of Defendants. Prior to the hearing, the Court carefully considered the pleadings and papers submitted by the parties concerning the Motion. At the hearing, the Court carefully considered the arguments of counsel. At the conclusion of the hearing, the Court made its ruling on the record, and the same are incorporated herein.

Based upon the foregoing, this Court rules that Plaintiff's Complaint fails to state a claim against Defendants upon which relief can be granted and that Plaintiff's Complaint should be

Order granting defendants motion to dismiss

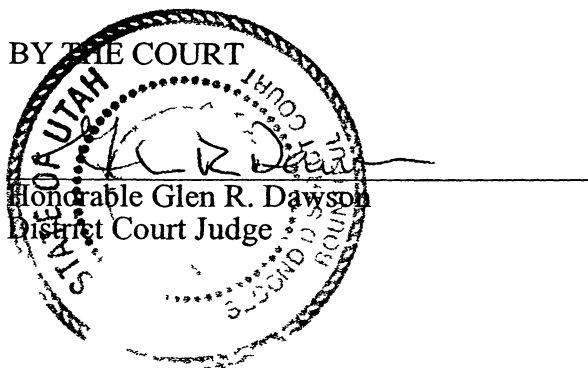


dismissed with prejudice. Plaintiff's Complaint asserts claims for quiet title and boundary by acquiescence. Plaintiff's quiet title claim, however, is wholly predicated on its boundary by acquiescence claim. Plaintiff's boundary by acquiescence claim fails as a matter of law.

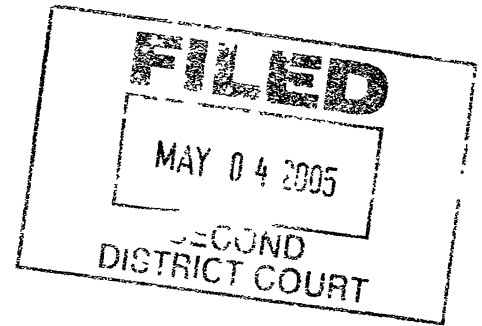
It is undisputed that Plaintiff is attempting in this action to acquire an entire, separately platted parcel of land, that the parcel of land at issue had been separately platted for decades prior to the filing of this action, and that this parcel of land is over 50 fifty feet wide and several hundred feet long. The doctrine of boundary by acquiescence cannot, as a matter of law, be used to acquire an entire, separately platted parcel of land in such circumstances. Rather, in order for Plaintiff to obtain title to the parcel of land at issue, Plaintiff must satisfy the elements of adverse possession. Plaintiff acknowledged at the hearing that it cannot satisfy the elements of adverse possession, because it has not paid the real property taxes on the parcel of land at issue, at least since it was created as a separate parcel in 1967. Therefore, Plaintiff's attempt to acquire the entire parcel of land fails as a matter of law, and any amendment by Plaintiff to amend its Complaint to assert an adverse possession claim would be futile. Based upon the foregoing,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss shall be, and it hereby is, granted, and that Plaintiff's Complaint shall be, and it hereby is, dismissed with prejudice and on the merits, with each party to bear its own attorneys' fees and costs of suit.

DATED this 15th day of September, 2005.



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Attorney for LPM Corporation

**IN THE SECOND DISTRICT COURT IN AND FOR DAVIS COUNTY,
FARMINGTON DEPARTMENT, STATE OF UTAH**

LPM CORPORATION,
a Nevada corporation,

Plaintiff,

vs.

PAUL C. SMITH AND
SANDRA A. SMITH,

Defendants.

COMPLAINT

Civil No. 050800569
ES0700232
Judge: Dawson

Comes now Plaintiff LPM Corporation (hereinafter "LPM"), by and through its counsel, David E. Kingston, and now alleges and complains against Defendants Paul A. Smith and Sandra A. Smith as follows:

BACKGROUND

1. LPM is a Nevada corporation in good standing and is authorized to do business in Utah.

Complaint



VD18437412
050800569 SMITH, PAUL C

2. LPM is the record fee owner of a certain parcel of real property ("LPM's parcel") situated in Kaysville City, Davis County, State of Utah, identified and more particularly described as follows:

BEG AT A PT ON S LINE OF MUTTON HOLLOW IMP DIST S 16.80 CHS & S 31°07'E .94 CHS & N 54° E 1.88 CHS & S 32°47' E 3.78 CHS, M/L, FROM NW COR OF SW ¼ OF SEC 26 T4N-R1W, SLM; TH S 12°E .40 CHS TH E 15.94 CHS; TH S 4.0 CHS; TH N 67°15' E 2.90 CHS; TH S 34°E 6.80 CHS; TH NE'LY TO E LINE OF SW ¼ SD SEC 26; TH N 5.0 CHS; TH W .62 CHS; TH N 1°W 16.80 CHS; TH N 89°15' W TO A PT 100 FT N, M/L, FROM CENTER OF NORTH FORK OF HOLMES CR, TH S 100 FT TO SD CEN LINE & S LINE SD IMP DIST, TH W'LY ALG SD CEN LINE & S LINE OF SD IMP DIST TO POB. ALSO BEG 20 CHS W & 16 CHS N OF SE COR OF SW ¼ OF SEC 26 T4N-R1W, SLM, RUN S 67°15' W 4.72 CHS; S 82°15' W 2.93 CHS, N 89°25' W 7.95 CHS; N 21°30' E 4.06 CHS; N 12°0' W 2.40 CHS; E 14.20 CHS; S 4.00 CHS TO BEG. LESS TO BD OF ED IN 752-940 & LESS TO 1677-206 LESS TO 1699-626. CONT 25.375 ACRES.

LAND SERIAL NO. 11-041-0026

3. Defendants are married and reside together in Davis County, Utah. Defendants are the record fee owners as joint tenants of that certain parcel of real property ("the disputed parcel") that is adjacent, contiguous and neighboring to the north of LPM's parcel, also situated in Kaysville City, Davis County, State of Utah, and is identified and more particularly described as follows:

Beginning at a point North 2494.81 feet and West 2790.30 feet from the Southeast Corner of Section 26; Township 4 North, Range 1 West, Salt Lake Base and Meridian; thence South 0°19'30" East 56.75 feet; thence North 89° 15' West 311.91 feet; thence North 3°25' East 53.83 feet, more or less to the Southwest Corner of Lot 522, King Clarion Hills Subdivision no. 5; thence South 89°48' East 308.35 feet to the point of beginning. Containing .39 acres, more or less.

LAND SERIAL NO. 11-041-0006

4. LPM and its predecessors have occupied and used the disputed parcel for over sixty (60) years for farming, livestock grazing, and for ingress and egress to and from LPM's

parcel and its other adjoining property. Said use extends from LPM's parcel northward to an existing old wire fence ("the fence") that runs along the north boundary of the disputed parcel. Said fence was erected prior to 1960.

JURISDICTION AND VENUE

5. The Court has jurisdiction of this action pursuant to UTAH CODE ANN. § 78-3-4(1), 1953 (as amended).
6. Venue is proper in this Court pursuant to UTAH CODE ANN. § 78-13-1(1), 1953 (as amended).

FIRST CAUSE OF ACTION – BOUNDARY BY ACQUIESCENCE

7. In this first cause of action, LPM realleges and incorporates herein paragraphs 1 through 6 above as though set forth in full herein, and claim and allege as follows:
 8. LPM and its predecessors have occupied the disputed parcel openly, notoriously, exclusively and adversely, up to the fence running along the northern boundary of the disputed parcel, for farming, grazing and as a path of ingress and egress to and from LPM's parcel and its other adjoining real property.
 9. LPM, its predecessors in interest and Defendant's predecessors in interest all acquiesced in the fence serving as the boundary between their respective properties.
 10. Said occupation and mutual acquiescence has been continuous for more than twenty (20) years.

11. LPM found it necessary to retain counsel to represent it in this action and has hired attorney David E. Kingston to do so. LPM has agreed to pay a reasonable attorney's fee for these services plus court costs.

SECOND CAUSE OF ACTION – QUIET TITLE

12. In this second cause of action, LPM realleges and incorporates herein paragraphs 1 through 11 above as though set forth in full herein, and claims and alleges as follows:

13. LPM claims title to the disputed parcel under the theory of boundary by acquiescence, as alleged above, and is entitled to continued possession of the same thereby.

14. Upon information and belief, Defendants claim or may claim some right, title, estate, lien or interest in the disputed parcel, which claims are adverse to LPM's title and constitute a cloud thereon.

15. This action is brought pursuant to UTAH CODE ANN. § 78-40-1, 1953 (as amended) to determine the nature and extent of Defendants' existing or potential claims and/or interests, if any.

16. Defendants have no right, title, estate, lien or interest in or to the disputed parcel or any part thereof.

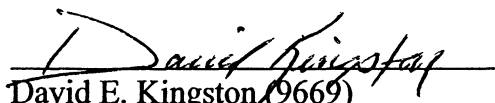
17. LPM found it necessary to retain counsel to represent it in this action and has hired attorney David E. Kingston to do so. LPM has agreed to pay a reasonable attorney's fee for these services plus court costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff LPM hereby prays that the Court

1. Enter a decree, judgment and order
 - a. declaring and adjudging that the legal boundary between LPM's and Defendants' adjoining property be the existing old wire fence running along the northern boundary of the disputed parcel; and
 - b. quieting title to the disputed parcel in LPM; and
2. Enjoin Defendants and/or any hired contractors from removing or disturbing the fence and/or any portion of the disputed parcel.
3. Award LPM its cost and reasonable attorney's fees, and such other and further relief as to the Court seems just.

DATED this 29 ^{April}~~May~~, 2005.


David E. Kingston (9669)
3212 South State Street
Salt Lake City, Utah 84115
Attorney for Plaintiff