



ORIGINAL

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See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

SEP - 5 2024

JOHN D. HADDEN
CLERK

FREEDOM CENTER, INC., a non-)
profit Corporation,)

Plaintiff/Appellee,)

vs.)

PHILLIP O. GATES, an individual,)



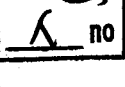
Defendant/Appellant,)

and)

CAROLYN GATES, an individual and)
Heir of Robert Lee Gates, deceased;)
and any and all known and unknown)
heirs, spouses, legatees and devisees)
of Robert Gates, deceased; or any)
known or unknown entities or)
individuals who may or could claim)
an interest,)

Defendants.)

Case No. 121,618

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APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, DISTRICT JUDGE

AFFIRMED

Cynthia Rowe D'Antonio
GREEN JOHNSON
MUMINA & D'ANTONIO
Oklahoma City, Oklahoma

For Plaintiff/Appellee

Phillip O. Gates
Oklahoma City, Oklahoma

Pro se

OPINION BY JAMES R. HUBER, PRESIDING JUDGE:

Phillip O. Gates (Gates) appeals the trial court's August 11, 2023 order granting Freedom Center, Inc. (Center) summary adjudication in this ejectment and quiet title action. The case stands for review under Oklahoma Supreme Court Rule 1.36 without additional briefing by the parties. Based on our review of the record and applicable law, we affirm the trial court's order finding Gates had no right, title, claim or interest in the real property; the Center was the owner of good and perfect title; and ejecting Gates from the property. Based on our review of the record and applicable law, we affirm the order under review.

BACKGROUND

The record on appeal provides the Center acquired real property in Oklahoma City, Oklahoma in 1979, which houses a building owned by the Center.¹ After acquiring the property, Clara Luper, as President of the Center, permitted Robert L. Gates, Gates's uncle (Uncle), to open a barbershop on a portion of the

¹ The real property is located at 2609 N. Martin Luther King Ave., Oklahoma City, OK 73111.

real property in exchange for utility payments and land upkeep. It appears the barbershop business was housed in an “outbuilding” that Uncle either created or moved onto the Center’s real property. In 1990, the Center and Uncle entered a ten-year lease of the real property for \$180.00 per month. The lease expired on November 2, 2000. After the lease expired, Uncle continued to operate the barbershop on the Center’s property.

The record further provides that Gates worked as an apprentice at Uncle’s barbershop and later as a manager. On May 23, 2005, Gates purchased Uncle’s interest in the barbershop business, including the building, equipment, personal property, and goodwill. Uncle died on September 15, 2016, and Gates continued operating the barbershop on the Center’s real property. In January 2020, the Center and Gates entered negotiations regarding a commercial lease for the real property on which the barbershop was located, but the parties were unable to reach an agreement.

In June 2022, the Center filed a petition for ejectment and to quiet title against Gates. The petition stated Uncle held no estate or interest in the Center’s real property prior to his death, and that Gates was a “squatter [] wrongfully in possession of the outbuilding known as the ‘Robert Gates Barber Shop’” located on a portion of the Center’s real property. The petition alleged that Carolyn Gates was the actual owner of the building, but not the real property upon which it was

situated.² The Center alleged neither Gates nor Carolyn Gates had any estate or interest in the real property. Gates filed an answer and counterclaim, alleging he owned the property through adverse possession. Specifically, Gates asserted he owned approximately 1,000 sq. ft of the Center's real property, which included 336 sq. ft where the barbershop building was located and 700 sq. ft of parking (hereinafter, "the Property").

The Center moved for summary adjudication, asserting it was the record title owner of the real property entitled to possession and that Gates's occupation of the Property was permissive, and he could not establish he obtained the Property through adverse possession. Gates disagreed, asserting he openly, adversely, continuously, and exclusively owned the Property since May of 2005. Gates further asserted he mowed and maintained the Center's yard and paid the taxes on the real property for the years 2010 through 2018.

After additional briefing and a hearing, the trial court found Gates did not meet his burden of raising a dispute of material fact on the issue of adverse possession, that Gates had no legal right or ownership of the Property, the Center was the rightful owner of the Property, and the Center was therefore entitled to ejectment and quiet title.

² Carolyn Gates and any and all known or unknown heirs of Uncle were named in the petition, but do not appear to have been served with summons and have never appeared.

Gates appeals.

STANDARD OF REVIEW

“Summary judgment settles only questions of law,” which we review *de novo*. *Toch, LLC v. City of Tulsa*, 2020 OK 81, ¶ 15, 474 P.3d 859. “In a *de novo* review, we have plenary, independent and non-deferential authority to determine whether the trial court erred in its application of the law and whether there is any genuine issue of material fact.” *Payne v. Kerns*, 2020 OK 31, ¶ 10, 467 P.3d 659. “Like the trial court, we examine the pleadings and summary judgment evidentiary materials submitted by the parties to determine if there is a genuine issue of material fact.” *Id.* “We view the facts and all reasonable inferences arising therefrom in the light most favorable to the non-moving party.” *Id.*

ANALYSIS

The issue on appeal is whether the trial court correctly entered summary judgment in the Center’s favor, finding it was entitled to ejectment and quiet title. In an ejectment action, a plaintiff must establish: 1) the plaintiff’s title; 2) the plaintiff’s right of possession; and 3) wrongful possession of the defendant. *Rogers v. Bailey*, 2011 OK 69, ¶ 15, 261 P.3d 1150 (citation omitted).

Here, it is undisputed the Center is the record title owner of the real property. The Center’s quit claim deed is presumed valid under 16 O.S.2021, § 53.

The parties dispute, however, whether Gates adversely possessed a portion of its real property, i.e., the Property.

To establish adverse possession, a party must show his possession of the property was hostile, under a claim of right or color of title, actual, open, notorious, exclusive, and continuous for the full 15-year statutory period. *Akin v. Castleberry*, 2012 OK 79, ¶ 11, 286 P.3d 638 (quoting *Frances v. Rogers*, 2001 OK 111, ¶ 12, 40 P.3d 481); 12 O.S.2021, § 93(4). Acquisition of property by adverse possession is disfavored, “and not to be made out by inference.” *Id.* at ¶ 12. “The party claiming title adversely has the burden of proving every element by clear and positive proof.” *Id.* Moreover, if a party initially possesses real property with the record owner’s permission, that party cannot establish title by adverse possession absent a subsequent “distinct denial or repudiation of the right of the true owner.” *See Indep. Sch. Dist. No. 40, Nowata Cty. v. Allen*, 1968 OK 141, ¶¶ 16-23, 446 P.2d 282; *Winslow v. Watts*, 1968 OK 156, ¶ 4, 446 P.2d 598. Furthermore, “[m]ere naked possession or occupancy of premises, no matter how long, without a claim of right or color of title, cannot ripen into a good title, but must always be regarded as being an occupancy for the use and benefit of the true owner. *Winslow*, ¶ 4.

In the present case, the Center’s motion for summary judgment asserted Gates could not prove one or more of the elements for his claim of adverse

possession, including that his possession of the Property was hostile and continuous for the statutory period. The Center also argued that Gates' initial possession of the Property was permissive.³

In support of these arguments, the Center attached Chairman Leonard Benton's affidavit providing, *inter alia*, that he is the presiding Chairman of the Center; he has personal knowledge of the Center's history; that Clara Luper initially permitted Uncle to house the barbershop building on the land in exchange for utility payments and land upkeep, and subsequently under a lease; Gates was permitted to continue operating the barbershop on the Center's real property after Uncle's death in 2016; that Gates paid the real property taxes in lieu of rent; that the Center requested Gates relocate the barbershop building; that Gates objected; and that Gates was now a squatter.⁴

The Center also attached portions of Gates' deposition, wherein he testified he was "just a manager" of the barbershop business while his Uncle was still alive,

³ The Center also challenges the validity of the 2005 purchase agreement. Based on our resolution of this appeal, we need not address these arguments.

⁴ When an affidavit is submitted in support of a summary judgment motion, it must: (1) be made on personal knowledge, (2) show that the affiant is competent to testify as to the matters stated, and (3) set forth facts that would be admissible in evidence at trial. *See* Rule 13(e), Rules for the District Courts, and 12 O.S.2021, § 2056(E). Chairman Benton's affidavit meets these foundational requirements for admissibility because he testified from personal knowledge, and his statement is sworn.

and it remained Uncle's business until his death in 2016.⁵ Gates also testified that he and the Center attempted to negotiate a lease for the Property in 2020, and he gave the Center a \$600.00 cashier's check during the failed negotiations. The Center attached the cashier's check, as well as an April 6, 2020 letter returning the check to Gates.

The Center's evidentiary materials establish Uncle was initially on the Property with the Center's permission, and that Gates entered the Property with permission as the barbershop's employee and manager. While the unsuccessful lease negotiation may indicate Gates was possessing the Property without permission beginning in 2020, this is insufficient to establish the statutory period for adverse possession. Thus, the Center presented evidence showing the existence of uncontroverted material facts that would preclude Gates' claim of adverse possession and entitle it to judgment as a matter of law. Upon this showing, it became Gates' burden to identify material facts he alleged remain in dispute and

⁵ Gates testified:

Q. Okay. Who was running things in 2005 at the barbershop?

A. As long as my uncle was alive, it was his show.

...

Q. Who was running things at the barbershop before your uncle died? Was it him or was it you? Because you've told me two different things. First you said you was [sic] running the show, then you said he was running it. Who was running the barbershop?

A. The shop—it was my uncle's shop. I was just a manager.

provide evidentiary materials justifying trial on the issue. *Oklahoma Dep't of Sec. ex rel. Faught v. Wilcox*, 2011 OK 82, ¶ 18, 267 P.3d 106.

In response, Gates provided a conclusory argument that the evidence was clear that he “openly and notoriously controlled and occupied Gates Barber Shop for more than fifteen (15) years.” Though Gates attached certain evidentiary materials to his response, detailed below, he provided no case law or argument showing how any of the materials raise a dispute of material fact on any of the elements necessary to prove adverse possession.

First, Gates attaches a “Purchase and Sale Agreement” indicating he purchased the barbershop business from Uncle in 2005. While this agreement contradicts Gates’ own deposition testimony that he was merely a manager of the barbershop until 2016, it is insufficient to raise a dispute of *material* fact. Regardless of Gates’ dealings with Uncle regarding the purchase of the barbershop business, it remains undisputed that Uncle and Gates initially entered the Property with the Center’s permission. For the statutory period for adverse possession to begin running, there must have been a “distinct denial or repudiation of the right of the true owner.” *See Winslow*, 1968 OK 156, ¶ 4 (citation omitted). *See also Tindle v. Linville*, 1973 OK 64, 512 P.2d 176; *Allen*, 1968 OK 141. An internal agreement between Gates and Uncle does nothing to provide the Center with

notice that Gates' presence on the property could be interpreted as a "distinct denial or repudiation" of the Center's rights as the owner.⁶

Gates also attached his own affidavit, wherein he stated he "openly, notoriously, adversely and continuously possessed, owned and operated Gates Barber Shop, the land and surrounding parking lots [] since May, 2005." In support, Gates stated he mowed the lawn, maintained and checked on the Center's building's security, had a key to the Center's building, provided the keys to the Center's representatives when they checked on the building, and paid the real property taxes.⁷

Viewing these statements in the light most favorable to Gates, they still fall short of raising a dispute of material fact. Again, the undisputed facts show Uncle entered the property with permission as a tenant operating a business on the Property, and that Gates entered the Property as an employee and manager of the business. Under these circumstances, the fact Gates performed yard work and maintenance on the real property and had access to the Center's building did not put the Center on notice of a "distinct denial or repudiation" of its rights as a

⁶ We note the 1990 lease agreement between the Center and Uncle expired in 2000, had no hold-over provision, and required possession to be returned to the Center on expiration of the lease. Uncle remained on the Property thereafter. However, Gates has not asserted that Uncle adversely possessed the Property after expiration of the lease. Rather, he contends he adversely possessed the Property since purchasing the barbershop in May of 2005.

⁷ Gates' affidavit includes other various statements not discussed herein as they are immaterial to the issue of adverse possession.

property owner. In fact, Gates' assertion that he had a key to the Center's building and provided it to the Center's representatives when they wanted to access the building, supports the Center's position that Gates was permissibly on their property. Additionally, Gates has not claimed adverse possession of the Center's building or anything other than the Property. Thus, these facts are irrelevant to establishing he adversely possessed the Property.

Furthermore, the payment of taxes is not controlling in determining a claim of ownership "but is one means whereby claim of ownership is asserted." *Akin*, 2012 OK 79, ¶ 13. *See also Mason v. Evans*, 1965 OK 173, ¶ 35, 410 P.2d 534 ("Although the payment of taxes by one who claims land by reason of adverse possession for the required prescriptive period constitutes evidence of claim of ownership, the payment thereof is not necessarily controlling in determining claim of ownership or possession during such period.").

In this case, we need not decide whether the payment of taxes alone is sufficient to raise a dispute of material fact to preclude summary judgment. The evidentiary materials show Gates paid eight years of taxes, and thus, do not show the requisite statutory period had been met for adverse possession.⁸

⁸ We also note Gates' affidavit states he never had an agreement with the Center to pay the taxes in lieu of rent. However, Gates also stated in his affidavit and at his deposition that he paid the property taxes because the county officials told him the Center's entire real property would be sold at a tax sale if the taxes were not paid. Notably, Gates did not state he paid the taxes because he owned the Property.

Even if Gates could successfully negate that he was initially on the Property with the Center's permission, none of his evidentiary materials are sufficient to raise a dispute of material fact as to whether his possession was hostile, under a claim of right or color of title, actual, open, notorious, exclusive, and continuous for the full 15-year statutory period for the same reasons as set forth above. *Akin*, 2012 OK 79, at ¶ 11. Finally, Gates' conclusory statement that he "openly, notoriously, adversely and continuously possessed, owned and operated Gates Barber Shop, the land and surrounding parking lots" for more than 15 years is clearly insufficient to create a material dispute of fact.

For these reasons, we find Gates failed to raise a material dispute of fact justifying trial in this case. The trial court properly granted summary judgment to the Center.

CONCLUSION

The August 11, 2023, order granting the Center summary adjudication is affirmed.⁹

AFFIRMED.

HIXON, J., concurs, and BLACKWELL, J., dissents.

⁹ During the pendency of the appeal, Gates filed an emergency application for stay of enforcement of judgment, and emergency application to assume original jurisdiction and petition for writ of mandamus/prohibition. By order entered on May 1, 2024, the Court, *inter alia*, directed the Center to take no further action in execution of the judgment while the motions were pending. On August 27, 2024, the Center filed a motion to lift the stay. Based on our resolution of this appeal, we deny Gates' emergency applications, and lift the temporary stay entered on May 1, 2024. The Center's request for an attorney's fee is denied.

BLACKWELL, J., dissenting:

As to the issue of permissive use, the trial court effectively flipped the burden on summary judgment to the non-moving party, Phillip Gates. The Center's evidence as to that element was woefully deficient, and, in any event, Gates specifically testified contrary to the Center's contention that he was there with permission after the expiration of his uncle's lease. I would decide the case as follows, and therefore respectfully dissent from the Court's affirmation of summary judgment.

* * *

Phillip Gates appeals the summary judgment of the district court that he could not show adverse possession of a parcel of land that is part of the grounds of the Freedom Center property in Oklahoma City, and on which Gates operates a barbershop. On review, I find the record insufficient to support summary judgment and would therefore vacate the judgment and remand for additional proceedings.

BACKGROUND

The facts presented on summary judgment were these. The exact genesis of the barbershop in question is not clear, but Phillip's uncle, Robert Gates had operated a barbershop on the Freedom Center property since 1989. The property was not in active use that time, and, in 1990 Clara Luper, who was then president

of the Freedom Center, entered into a ten-year lease with Robert Gates. The lease stated that it could not be extended by verbal agreement, but only by “endorsement of both parties on the back hereof.” The lease bears no extension endorsement.

Phillip worked as an apprentice at his uncle’s shop, and then as a manager. Robert appears to have operated the barbershop for at least five years after the expiration of the lease. According to Phillip, in 2005, Robert made an assignment of the business to Phillip. The assignment included all interests of Robert in the Gates Barbershop along with building improvements, equipment, and goodwill. The Center disputes the validity of this assignment. Robert died in September 2016. In sum, Phillip or his uncle continued to operate the barbershop with no lease for over twenty years.

In 2019, Oklahoma City’s “MAPS 4” public investment program made a capital allocation of \$17.1 million, to be supplemented by a \$9.6 million operating fund, for creation of the Clara Luper Civil Rights Center on the site and for the preservation of the Freedom Center.¹ In early 2020, the Freedom Center, concerned about Gates’s unauthorized presence on the property, attempted to negotiate a commercial lease with Gates, but no agreement was reached.

¹ See <https://www.okc.gov/government/maps-4/projects/clara-luper-civil-rights-center> (last accessed June 3, 2024).

In June 2022, the Center filed a petition for ejectment and to quiet title against Gates, describing Gates as an “squatter wrongfully in possession of the outbuilding known as the Robert Gates Barber’s shop.” The petition alleged that Phillip’s daughter, Carolyn Gates, was the actual owner of the building, but not the real property upon which it was situated.

Gates answered, attaching a copy of the notarized, 2005 purchase and sale agreement signed by himself and his uncle, selling the barbershop to himself. He also attached receipts showing that he had paid delinquent property taxes on the Freedom Center property every year between 2010 and 2018. Gates alleged adverse possession in his answer. The Center moved for summary judgment, and district court granted it, finding that the Gates’s occupation of the property was permissive. Gates appeals.

STANDARD OF REVIEW

Summary judgment resolves issues of law, and we review a district court’s grant of summary judgment *de novo*. *U.S. Bank, N.A. ex rel. Credit Suisse First Boston Heat 2005—4 v. Alexander*, 2012 OK 43, ¶ 13, 280 P.3d 936, 939. Using the *de novo* standard, we subject the record to a new and independent examination without regard to the district court’s reasoning or result. *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30*, 2003 OK 30, ¶ 5, 66 P.3d 442, 446. Summary judgment is proper only if the record reveals uncontroverted material facts failing to support

any legitimate inference in favor of the nonmoving party. *N.C. Corff P'ship, Ltd. v. OXY USA, Inc.*, 1996 OK CIV APP 92, ¶ 8, 929 P.2d 288, 292; *Flowers v. Stanley*, 1957 OK 237, 316 P.2d 840. When genuine issues of material fact exist, summary judgment should be denied, and the question becomes one for determination by the trier of fact. *Brown v. Okla. State Bank & Trust Co.*, 1993 OK 117, ¶ 7, 860 P.2d 230, 233. *See Fargo v. Hays-Kuehn*, 2015 OK 56, ¶ 12, 352 P.3d 1223 (“summary judgment should be denied where there are controverted material facts or if reasonable minds could reach different conclusions from the undisputed material facts.”).

ANALYSIS

Phillip Gates argued that he had been occupying the barbershop that resides on part of the Freedom Center property since the lease held by his uncle, Robert Gates, expired in 2000. He argued that his occupancy has been hostile, under a claim of right or color of title, actual, open, notorious, exclusive, and continuous for the statutory period of fifteen years. *Akin v. Castleberry*, 2012 OK 79, ¶ 11, 286 P.3d at 641. On summary judgment, the Center first argued that Gates’ occupancy since 2000 was permissive, and hence no adverse possession claim arose.

The district court signed a journal entry submitted by the Freedom Center that makes some thirty-one findings of fact and law. Of these, I would focus on

the following five findings: (1) that Gates was “permitted” by the Freedom Center to continue operating the barbershop on their property for some twenty years after the lease expired in return for his payment of property taxes (finding five); (2) that Gates had never made a “demand” to the Freedom Center stating that he had any ownership interest in the property (findings sixteen and seventeen); (3) that Gates had been only a “manager” of the of the shop until 2016 (finding six); (4) that Gates had “admitted during the proceedings” that he had no interest in the property (finding fifteen); and, (5) indicating that the January 2020 lease negotiations interrupted the continuous period of adverse possession (findings nine, ten and eleven).

The evidence of adverse use was this. There was no written lease after 2000. The lease had no provision for holdover tenants. In fact, it stated the opposite, that possession must be returned to the Center on expiration. The Gateses kept the barbershop building on the Center’s property where it operated openly as a business for more than twenty years after the lease expired. The only known payments made involving the property were property taxes, paid by Gates directly to the county treasurer.² Gates said he paid these to avoid the property on

² *Mason v. Evans*, 1965 OK 173, ¶ 35, 410 P.2d 534, 539, notes that “[a]lthough the payment of taxes by one who claims land by reason of adverse possession for the required prescriptive period constitutes evidence of claim of ownership, the payment thereof is not necessarily controlling in determining claim of ownership or possession during such period.”

which the business was situated being sold for back taxes. His first reported contact with the Center regarding a new lease was in 2020.

In return, the sole evidence of permissive use for that twenty-year period was an affidavit by the current presiding chairman of the Center, Leonard Benton, which states that Gates was paying the property taxes “in lieu of rent.” Gates disputed this. The Benton affidavit does not state that he, or any other named person, actually made this agreement. It does not identify anyone who might have told Benton of such an agreement.³ It does not even state that Mr. Benton was on the board of the Freedom Center in 2000, when the lease expired, or indeed, when he joined the board. Mr. Benton did not claim to have inspected any business records to ascertain the facts he stated. The affidavit rests entirely on Mr. Benton’s bald claim that he personally knows that Gates’s occupation was not permissive. This is entirely insufficient for summary judgment against the documentary evidence that the lease expired in 2000 and could not have continued by its own terms.

The legal purpose of the court’s findings sixteen and seventeen are not clear, but they appear to be based on a theory that an adverse possessor is required to

³ Or, if this turn out to be the basis of Benton’s knowledge, what hearsay exception the Center would use to covert this hearsay to admissible evidence at trial.

make some form of “demand” on the owner to establish adverse possession. The journal entry states that:

[Gates] testified that he never made demand to Leonard Benton or anyone at the Freedom Center that he owned the barbershop.

[Gates] testified that he never made demand to Leonard Benton or anyone at the Freedom Center that he owned the land in which the barbershop was located.

Journal Entry, ¶¶ 16-17.

These findings appear significant only if an adverse possessor must contact the owner and announce that they are claiming a right in the property before the term of adverse possession begins or can ripen into legal possession. I find no such principle in the Oklahoma law of adverse possession.⁴

Findings six and fifteen go towards a theory that Gates cannot obtain adverse possession of the real property on which the barbershop is located because

⁴ Some states have adopted such a rule, but I do not think Oklahoma is among them. In *Glover v. Glover*, 92 P.3d 387 (Alaska 2004), for example, Alaska adheres to such a rule. Even if that case (which is not universally accepted, *see id.* at 394) represents Oklahoma law, it recognizes a significant exception to its own rule that would preclude the summary judgment entered here. It states:

‘[W]hen the acts of ownership are overt and unambiguous’ and the exclusive possession is long held, a factfinder may infer that the tenant has repudiated his landlord’s claim of ownership and asserted his own. The long occupation, with its unambiguous hallmarks of ownership, serves as the distinct and positive assertion of the claimant’s interest and the repudiation of the true owner’s interest.

Id. (quoting *Adams v. Johnson*, 271 Minn. 439, 136 N.W.2d 78, 82 (1965) (footnotes omitted)). This exception would entirely swallow the rule in many cases, including this one.

he never owned the barbershop itself.⁵ During summary judgment, Gates produced a 2005 notarized “purchase and sale agreement” between Robert and Phillip Gates transferring all “interest” in the barbershop along with “building, other improvements, certain equipment and goodwill” for a record consideration of ten dollars and other valuable consideration. The agreement is signed by Roberts Gates and Phillip Gates.

The Center characterizes this agreement as one improperly signed *twice* by Phillip Gates, one as the grantee, and once using a power of attorney granted to him by Robert Gates as grantor. On this basis, it deems the document invalid. One of the signatures on the actual document appears to be that of *Robert Gates personally*, however. Further, I find no evidence that Robert Gates was under a *conservatorship* at this time, that the power of attorney was exclusive, or triggered upon a finding of incompetence.⁶ Hence, the fact that Phillip Gates held a power of attorney for Robert would not prevent Robert for signing such an agreement

⁵ I express considerable doubt that the ownership of the structure—apparently a mobile home—is significant. The adverse possessor here is clearly the person *running a business from an unauthorized structure on another’s land*, not the owner of the structure. Further, the question of who owns the business of the barbershop appears to be between Phillip and Carolyn Gates. For the purposes of this opinion, however, I assume the question has some significance to the adverse possession case.

⁶ The power of attorney is not in the record. It is referred to in the *Motion for Summary Judgment*, Exhibit 13.

himself.⁷ This 2005 agreement was sufficient to establish a *prima facie* case of an ownership interest, and the Center had the burden of disproving it as a matter of law to be entitled to summary judgment. It did not do so on this record.

The Center also argued that Gates admitted in a deposition that the recited consideration of ten dollars was not actually given for the agreement, and hence it was invalid. The cited deposition pages do not contain such an admission, however. Deposition pages fifty-three and fifty-four contain the following exchange:

Q Okay. So talk about the sales agreement. What was the agreement? What was the Agreement?

A The purchase of the barbershop.

Q Okay. And what were you purchasing the barbershop for?

A My uncle passed -- passed me the torch and my job to keep it lit.

Q Okay. And how much was (sic) you buying it for?

A If I recall, it was -- it was a small amount. Let me see where it says. Yes, ten dollars.

Q So did you give him ten dollars for this?

A I don't recall.

Q Do you have a check showing you gave him ten dollars?

A I don't recall.

⁷ “[I]n the absence of a statute to the contrary, a person of adequate mentality has the right to give away his property to whomsoever he wishes.” *Matter of Conservatorship of Spindle*, 1986 OK 65, ¶ 11, 733 P.2d 388, 390. Only if a party “is not mentally competent concerning the management of the ward’s estate” are such transfers invalid. *Id.* ¶ 10. No evidence of incompetence was presented in these summary proceedings.

Q So if you don't have proof that you gave him a ten-dollar payment, does that mean it did not happen? As we sit here today, do you have a copy of a check or a payment to him for ten dollars? Yes or no.

Mr. Gates, as we sit here today, do you have proof of a ten-dollar payment to Mr. Gates, Mr. Robert Gates? Yes or no.

A Do I have one on me right now?

Q No, not on you right now. Do you have a copy of proof of payment of ten dollars to Robert Gates in your possession anywhere? Yes or no.

A Not that I know of.

Examining this testimony, I find no "admission" by Gates that the consideration stated in the agreement was not actually paid.⁸

The next significant finding was that Gates "admitted during the proceedings" that he had no interest in the property. The Center first cites to pages sixty-two and sixty-three of the same deposition, as follows:

Q Okay. Who was running things in 2005 at the barbershop?

A As long as my uncle was alive, it was his show.

...

Q Who was running things at the barbershop before your uncle died? Was it him or was it you? Because you've told me two different things. First you said you were running the show, then you said he was running it. Who was running the barbershop?

A The shop -- it was my uncle's shop. I was just a manager.

⁸ Furthermore, and perhaps more importantly, the failure to pay the ten dollars does not conclusively prove the agreement lacked consideration. The recited consideration was not just ten dollars, but ten dollars "and other valuable consideration." The motion for summary judgment makes no effort to prove that consideration *other* than the ten dollars was not supplied.

The Center argues that this exchange constitutes a repudiation of the 2005 purchase and sale agreement by Gates. I would find, however, that the law does not compel a conclusion that the property could not have been transferred simply because Robert Gates was still “running the show” after 2005, or because Gates still considered himself a “manger” while his uncle was active in the business. This exchange is insufficient to support any summary judgment that Gates had no interest in the barbershop.

The Center also argued that Gates explicitly admitted that the 2005 transfer of interest was ineffective in the same deposition. The cited testimony is this:

Q Right. But before then, -- you said that you bought it May 23rd, 2005. But before then he owned the barbershop. Is that what you're saying.

A He bought -- he -- he still own it, even though he's passed.

Precisely why Gates believed that Robert Gates still owned the barbershop after his death, or even what question Mr. Gates understood he was answering, was not investigated further. Even if I were to accept the Center's interpretation, that Gates intended to say that his uncle's estate or heirs owned the barbershop, he testified in the same deposition that he had purchased the barbershop and provided documentary evidence that effect. As such, at best, his other testimony raises a question of fact, rather than showing an undisputed fact, as to ownership.

The Center also argued that the 2005 transfer was invalid because, in 2007, Robert's daughter, Carolyn Gates, who by then held Robert Gates's power of attorney, made another "assignment of interest," this time assigning all interest of Robert Gates in the Barbershop to the Robert L. Gates Supplemental Needs Trust. This later transfer does not, in itself, invalidate the earlier transfer, however. Until it is either shown as a matter of law or established by trial of the issue that the 2005 transfer is invalid, it is the 2007 transfer that fails, as Robert Gates assigned all his interests in 2005.

The Center also argued that the fact that Gates entered into lease negotiations with the Center in early 2020 constitutes evidence that he did not have continuous adverse possession of the underlying property for fifteen years. The Center argues that he only acquired ownership through the disputed May 2005 transfer. Hence, the Center argued, Gates had less than fifteen years possession at the beginning of 2020, when the lease was requested, and his possession was therefore not "continuous" for the statutory period.

The lease in question, although negotiated, was not apparently consummated. Gates made a \$600 down payment on a lease on January 6, 2020, but the negotiations failed and the \$600 was returned. No lease agreement was reached, and hence, no lease was entered into. The Center argues, however, that its request that Gates agree to a lease was an "unequivocal act of ownership" by the

Center that breaks the chain of adverse possession. The Center cites *Flagg v. Faudree*, 2012 OK CIV APP 4, ¶ 14, 269 P.3d 45, 50, for this principle. The same paragraph of *Flagg* goes on, however, to state that adverse possession “is not interrupted by giving notice to an occupant that true title is in someone else unless the landowner, or someone in his behalf, acts overtly to oust the adverse claimant.” *Id.* (citing *Macias v. Guymon Industrial Foundation*, 1979 OK 70, 595 P.2d 430, n. 6) (citations omitted). The overt action to “oust the adverse claimant” occurred when the Center filed its petition in ejectment in June 2022, not at the beginning of 2020. Even assuming (without holding) that Robert Gates’ adverse possession from 2000-2005 did not “tack” to Gates later possession, Gates was in adverse possession between the May 23, 2005, purchase and sale agreement and the petition in ejectment filing on June 28, 2022.⁹ Thus, he claims to have been in possession for the required fifteen years.

In conclusion, I note that several questions remain regarding Mr. Gates’ adverse possession claim. The Center claims to have made a permissive agreement

⁹ Adverse possession need not be by the same individual for fifteen continuous years. When privity between successive possessors is present, adverse holdings may be tacked together. Privity of possession rather than privity of title is required. Such privity exists when one holds lands in subordination to the claim of his predecessor and adverse to the true owner under an understanding between the predecessor and himself or by operation of law. Where, however, there is privity between two or more adverse possessions so that they are all referable to the original entry, they may be united, and the holdings regarded as continuous. *Macias v. Guymon Indus. Found.*, 1979 OK 70, 595 P.2d 430, 433, n. 5 (citing *Smith v. Pettijohn*, Okl., 366 P.2d 633 (1961); *Buckner v. Russell*, Okl., 331 P.2d 401 (1958); *Oliphant v. Dalton*, Okl., 304 P.2d 300 (1956); *Ellis v. Williams*, Okl., 297 P.2d 916 (1956)).

allowing Robert Gates, and then Phillip Gates, to remain on the property for total of twenty-two years. However, the Center did not bring evidence sufficient to establish permissive use as a matter of law. If there was a valid agreement, someone associated with the Center, and given the proper authority, made it. The minimum the Center must identify is who made the agreement, whether that person had authority to do so on behalf of the Center and, if they are still living, allowing this witness to be identified and potentially subject to discovery. However, the record here is insufficient to grant summary judgment to the Center on the grounds of permissive occupation. I further reject the argument that the Center's attempts to negotiate a lease with Gates in early 2020, constituted an "overt act to oust the adverse claimant" as required to break continuous possession, and the argument that the current record shows that the May 2005 transfer of the barbershop from Robert to Phillip Gates was invalid as a matter of law. As such, I would find that summary judgment was not appropriate on this record.¹⁰

September 5, 2024

¹⁰ I also respectfully dissent from the Court's decision to immediately dissolve the previously entered stay of the judgment below. That stay should remain in effect at least through the resolution of any petition for rehearing or certiorari, should either be filed. With no discussion of the relevant legal factors, and without affording Mr. Gates an opportunity to respond to the Center's motion to lift the stay, the Court simply removes the stay, thereby inviting the Appellant to remove or destroy the barbershop while post-opinion proceedings are ongoing, which, in my view, would effectively moot the case. I would allow the Supreme Court the opportunity to weigh in before that happens.