VERMONT SUPERIOR COURT
Chittenden Unit
175 Main Street, PO Box 187
Burlington VT 05402
802-863-3467
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 21-CV-00325

Gail Haupt, et al v. Daniel Triggs, et al

DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Gail Haupt and Thomas Raftery engaged Defendant Daniel Triggs to take action to prevent their neighbors from exercising dominion over a portion of their property. Mr. Triggs agreed to initiate suit against the neighbors, but failed to do so. Ms. Haupt and Mr. Raftery have alleged malpractice in this failure. They now move for partial summary judgment, seeking a determination that as a matter of law, actions they took, through Mr. Triggs and otherwise, were insufficient to interrupt the neighbors' claim of continuous hostile use of that portion of their property. The court grants the motion in part.

The facts material to this motion are undisputed. Ms. Haupt and Mr. Raftery and their neighbors both acquired their properties in 2003. Immediately, the neighbors started using a strip of land belonging to Ms. Haupt and Mr. Raftery as their own—occupying the strip and excluding Ms. Haupt and Mr. Raftery from using the area. In 2014, Ms. Haupt and Mr. Raftery took several steps to persuade the neighbors to relinquish their claims and cease their dominion over the area: they posted a "No Trespass" notice, called the police department on multiple occasions, and ultimately retained Mr. Triggs, who sent a letter demanding that the neighbors cease their activities on the strip or face a lawsuit.[1] None of these steps, either singly or in combination, was successful; the neighbors continued throughout to occupy the strip and exclude Ms. Haupt and Mr. Raftery from using it. Ms. Haupt and Mr. Raftery therefore asked Mr. Triggs to follow through on the threat to initiate legal proceedings. He did not. Instead, over a year and a half later and more than 15 years after the neighbors had begun their use and occupancy of the strip, the neighbors filed suit, seeking a declaration that they had acquired

[1] Mr. Triggs's Opposition suggests also that Ms. Haupt and Mr. Raftery hung a string along the property line, prefatory to planting trees; it suggests also that at some point in either 2014 or 2016 Ms. Haupt and Mr. Raftery engaged a surveyor who placed monuments and stakes. These facts, however, are not properly supported as required by V.R.C.P. 56(c)(2) and so are not included in the narrative above.

title to the strip by adverse possession. Through different counsel, Ms. Haupt and Mr. Raftery eventually resolved that dispute. They then brought this action to recover their expenses in doing so.

These facts present a novel twist on a familiar question: short of filing suit to quiet title and enjoin trespass, what action on a landowner's part will interrupt an adverse possessor's continuity of use, so as to toll the statute of limitation on such a suit? Mr. Triggs focuses on the character of the act, while Ms. Haupt and Mr. Raftery, in their papers and at oral argument, focus on the impact. The distinction is critical; it is undisputed here that none of Ms. Haupt and Mr. Raftery's actions had any impact on the neighbors' uninterrupted use of the strip or their exclusion of Ms. Haupt and Mr. Raftery from the strip. Instead, Mr. Triggs argues that regardless of physical impact, his letter and the earlier notices effected a legal "ouster."

Vermont law does not support this argument. Rather, as far back as 1852, it has been the law of Vermont that to interrupt a period of adverse possession, one of two things is required: "forcible ouster" or "legal proceedings for that purpose." *Pope v. Henry*, 24 Vt. 560, 565 (1852). The more recent teachings of *Brown v. Whitcomb* make clear that this is still good law. 150 Vt. 106 (1988). There, the Court observed, in words that could as easily have been written for this case, "there is no evidence that the actual occupation of the land was ever stopped. Mere verbal protestations without action to reassert control or dominion over the disputed land does not interrupt the adverse possessor's interest in the property, [citation omitted], but only confirms that the occupation is hostile." *Id.* at 110. And again: "There is no evidence that actual occupation of the land in question by defendants and their predecessors was ever interrupted after it began." *Id.*

In his opposition, Mr. Triggs relies principally on a statement from a legal encyclopedia: "Generally, an interference constituting an interruption [of continuity] must be physical, or by suit, or by unequivocal acts of ownership . . . . " 2 C.J.S. Adverse Possession § 175, cited in *Mahoney v. Tara*, 2014 VT 90, ¶ 12, 197 Vt. 412. The problem with this reliance is that the Vermont Supreme Court's citation of this statement is pure dicta; the Court has never held that anything other than "forcible ouster"—meaning physical interruption of actual occupation—or legal proceedings is sufficient, as a matter of law, to toll the limitations period and so defeat a claim of adverse possession. Thus, at most, Mr. Triggs's failure to initiate suit within 15 years of the neighbors' first hostile use of the strip left Ms. Haupt and Mr. Raftery with an argument for expansion of Vermont law in their favor.

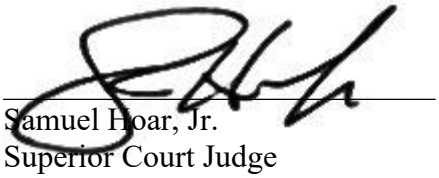
On this motion, the facts are not sufficiently developed to allow this court to predict whether the Vermont Supreme Court would now hold that "unequivocal acts of ownership" short of physical ouster are sufficient to interrupt continuity of hostile use and so defeat a claim of adverse possession or

whether a trial court, applying such teachings, would have found Ms. Haupt and Mr. Raftery's actions to have met that threshold. Those, in all likelihood, are matters that could have been determined only after lengthy discovery proceedings and a trial, and even then, the outcome would have been uncertain. What is certain, however, is that had Mr. Triggs filed suit when he said he would, the neighbors' hostile use would have been interrupted as a matter of law; the litigation would have short and sweet, and the result certain. In contrast, at the very least, Mr. Triggs's inaction exposed Ms. Haupt and Mr. Raftery to great uncertainty and the prospect of substantial expense to achieve, at the end of a very long metaphorical day, what he could have accomplished in a metaphorical flash. In short, that they might ultimately have succeeded is no defense to the claim that he failed in his obligation to them. *See Albright v. Fish,* 138 Vt. 585, 591, 422 A.2d 250, 254 (1980) ("[W]here the wrongful act of one person has involved another in litigation with a third person or has made it necessary for that other person to incur expenses to protect his interests, litigation expenses, including attorney's fees, are recoverable.").

ORDER

The court grants the motion in part. That a court might ultimately have concluded that Ms. Haupt and Mr. Raftery's actions, while failing to effect a physical ouster, were sufficient to defeat their neighbors' adverse possession claim is a defense to neither liability nor causation in this case. As discussed in the status conference held on June 6, 2022, the court acknowledges that this is a slight recasting of the issues as framed by the parties in their motion papers. Thus, also as discussed at that conference and to afford the parties the opportunity contemplated by V.R.C.P. 56(f), the court invites either party to file a motion for reconsideration on or before June 30, 2022, with subsequent briefing per rule.

Electronically signed pursuant to V.R.E.F. 9(d): 6/6/2022 10:02 AM



Samuel Hoar, Jr.
Superior Court Judge