SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0077-15T3

PPG INDUSTRIES, INC.,
NARULA REAL ESTATE ASSOCIATES, LLC,
and ALFRED SMITH,

Plaintiffs-Respondents,

v.

J. GOLDENBERG INC.,

Defendant-Appellant,

and

STATE OF NEW JERSEY and
THE CENTRAL RAILROAD COMPANY n/k/a
CONSOLIDATED RAIL CORPORATION,

Defendants.

Argued September 20, 2016 – Decided May 8, 2017

Before Judges Fisher, Ostrer and Leone.

On appeal from Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. C-13-14.

John L. Pritchard argued the cause for appellant.

Keith A. Bonchi argued the cause for respondent Alfred Smith (Goldenberg, Mackler,

Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys; Mr. Bonchi, of counsel and on the brief; Elliott J. Almanza, on the brief).

Robert A. Wayne argued the cause for respondents PPG Industries, Inc. and Narula Real Estate Associates, LLC (LeClairRyan, attorneys; Mr. Wayne, of counsel and on the brief; Adam G. Husik, on the brief).

PER CURIAM

Plaintiffs PPG Industries, Inc. (PPG), Narula Real Estate Associates, LLC (Narula), and Alfred Smith own three lots in Jersey City that their predecessors purchased from defendant J. Goldenberg Inc. (Goldenberg). Goldenberg appeals from a July 27, 2015 order granting plaintiffs title through adverse possession to their respective portions of an alley at the rear of the lots. We affirm.

I.

We briefly summarize the facts set forth in detail in Judge Hector R. Velasquez's July 2, 2015 opinion. In 1921, Goldenberg purchased all the lots in a block in Jersey City. Goldenberg entered into a railroad siding agreement and supplemental agreements (Siding Agreement) with defendant Central Railroad Company to operate a railroad siding running down a twenty-eight-foot-wide alley in the center of the block.[1] Goldenberg retained

[1] In the 1970s, the Central Railroad Company was absorbed into the Consolidated Rail Corporation. We will refer to both as Conrail.

ownership of the alley, sold the lots on either side, and gave railway access easements to the purchasers to service their commercial buildings.

By 1962, Goldenberg ceased conducting business. The railroad siding in the alley ceased being used by 1965 at the latest.

On one side of the alley were two lots. The first lot was acquired by Smith in 1984, and the second lot was acquired by Narula in 2013. The lot on the other side of the alley was acquired in 2007 by former plaintiff Halladay 2-68 LLC (Halladay). In 2013, Halladay negotiated to sell its lot to PPG, and a title search revealed the alley was still titled in Goldenberg's name.

In 2014, Smith, Narula, and Halladay brought this quiet title action. PPG then bought the Halladay lot and was substituted as a plaintiff. Also in 2014, Conrail entered into a Termination Agreement stating the Siding Agreement was terminated, and noting it effectively had been terminated fifty years earlier when the siding stopped being used.[2]

After a bench trial, Judge Velasquez found as follows. Since at least 1981, the owners of the lots adjacent to the alley exclusively used and maintained the alley, paved it with cement, gravel, and asphalt, and erected fences at both ends to limit

[2] Defendants Conrail and the State of New Jersey defaulted in the quiet title action, and claim no interest in the alley.

access to it. They also used it to park vehicles and store dumpsters, pallets, equipment, and other objects. During that period, Goldenberg never asserted title or control over access to the alley. When Smith, Narula and Halladay took title to their lots, each believed its title included the respective fourteen-foot-wide portion of the alley at the rear of the lot. The judge ruled that Smith, Narula, and PPG were the title owners of the alley as the result of adverse possession, and that Goldenberg's title was extinguished. Goldenberg appeals.

II.

We must hew to our standard of review. "To the extent that the trial court's ruling . . . was premised upon factual findings, those findings are entitled to substantial deference on appellate review, and are not overturned if they are supported by 'adequate, substantial, and credible evidence.'" Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (citation omitted). "The 'trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Ibid. (citation omitted). "We review questions of law de novo." Yellen v. Kassin, 416 N.J. Super. 113, 119 (App. Div. 2010).

III.

Goldenberg principally claims the trial court erred by applying the "preponderance of the evidence" standard to this

adverse possession claim. Goldenberg cites older Appellate Division decisions stating: "It is familiar law that one who claims title by adverse possession has the burden of proving [the requisite possession] by clear and convincing evidence[.]" Meyers v. Pavalkis, 73 N.J. Super. 208, 214 (App. Div. 1962) (citing Mulford v. Abott, 42 N.J. Super. 509, 512-13 (App. Div. 1956), and DeBow v. Hatfield, 35 N.J. Super. 291, 297 (App. Div.), certif. denied, 19 N.J. 327 (1955)); see Monesson v. Alsofrom, 82 N.J. Super. 587, 592 (App. Div.), certif. denied, 42 N.J. 500 (1964). However, that proposition of law has never been adopted by our Supreme Court or its predecessor, the Court of Errors and Appeals.[3]

Before those Appellate Division decisions, our State's highest court had adopted the preponderance standard for adverse possession, and for the similar concept of prescriptive easement.[4] Plaza v. Flak, 7 N.J. 215, 222 (1951) ("The burden of proof remains upon the plaintiff to establish the prescription by the preponderance of the evidence."); Redmond v. N.J. Historical Soc'y, 132 N.J. Eq. 464, 473-74 (E. & A. 1942) (ruling adverse

[3] Those decisions, while citing lower court cases, cite only one high court decision, Foulke v. Bond, 41 N.J.L. 527, 545 (E. & A. 1879), but it does not support that proposition.

[4] See Restatement (Third) of Property: Servitudes [Restatement], § 2.17 comment a (2000) (explaining that "prescription is applied to servitudes while adverse possession is applied to possessory estates").

possession "must be made out 'clearly and positively, by a preponderance of evidence'"); Licari v. Carr, 84 N.J.L. 345, 350 (E. & A. 1913) (ruling a defendant claiming adverse possession "is bound to make out this defence by a preponderance of evidence").

In any event, after those Appellate Division decisions, our Supreme Court again endorsed the preponderance standard, clearly stating: "The burden of proof always remains on the party claiming title by adverse possession to establish [its] aforementioned elements by a preponderance of the evidence." Patton v. N. Jersey Dist. Water Supply Comm'n, 93 N.J. 180, 187 (1983). While the Court cited no authority to support this statement, it cited Plaza regarding "[t]he burden of proof," only just before. Ibid. (citing Plaza, supra, 7 N.J. at 222).

We have subsequently cited and followed Patton. "Those who seek to establish adverse possession bear the burden of proof by a preponderance." Stump v. Whibco, 314 N.J. Super. 560, 576 (App. Div. 1998). "The proponent of the [prescriptive] easement must establish the elements by the preponderance of the evidence." Yellen, supra, 416 N.J. Super. at 120. In Yellen, we recognized "[t]here is authority that the proponent of a prescriptive easement must prove each element by clear and convincing evidence." Id. at 120 n.4 (citing Meyers, Mulford, DeBow, and Vagnoni v. Gibbons, 251 N.J. Super. 402, 409 (Ch. Div. 1991)). However, we concluded,

"[i]n light of Patton, it appears that Meyers has been overruled." Ibid. Today, we hold Patton overruled Meyers, Mulford, DeBow, Monesson, and Vagnoni to the extent they required clear and convincing evidence.

Goldenberg argues the Supreme Court's endorsement of the preponderance standard in Patton, supra, was dictum because Patton failed to meet the preponderance standard, 93 N.J. at 187, and thus also failed to meet the clear and convincing standard.[5] However, "the legal findings and determinations of a high court's considered analysis must be accorded conclusive weight by lower courts," even if they are arguably dicta. State v. Rose, 206 N.J. 141, 182-84 (2011). "Appellate and trial courts consider themselves bound by [the] Court's pronouncements, whether classified as dicta or not." State v. Dabas, 215 N.J. 114, 136-37 (2013). "'[A]s an intermediate appellate court, we consider ourselves bound by carefully considered dictum from the Supreme Court.'" State v. Sorensen, 439 N.J. Super. 471, 488 (App. Div. 2015) (citation omitted).

The Court's statement in Patton was not merely "a passing comment." In re A.D., 441 N.J. Super. 403, 423 (App. Div. 2015),

[5] Similarly, the claimant in Yellen, supra, "failed to satisfy either burden of proof." 416 N.J. Super. at 120 n.4; see Stump, supra, 314 N.J. Super. at 582. Here, by contrast, the trial court correctly found plaintiffs satisfied the preponderance standard.

aff'd o.b., 227 N.J. 626 (2017). Rather, after stating "[t]he burden of proof" was "a preponderance of the evidence," the Court applied that standard, "find[ing] on our review of this record that the plaintiffs did not meet their burden." Patton, supra, 93 N.J. at 187. We have no reason to believe the Supreme Court's endorsement of the preponderance standard was not well-considered.

Goldenberg notes "the view adopted by a majority of jurisdictions is that adverse possession must be shown by clear and convincing evidence." Brown v. Gobble, 474 S.E.2d 489, 493 (W. Va. 1996). However, more than a dozen jurisdictions have adopted the preponderance standard. Ibid.; see Grace v. Koch, 692 N.E.2d 1009, 1012 & n.2 (Ohio 1998); see, e.g., Gerner v. Sullivan, 768 P.2d 701, 704 (Colo. 1989); Phillips v. State, 449 A.2d 250, 255 (Del. 1982); Urban Site Venture II Ltd. P'ship v. Levering Assocs. Ltd. P'ship, 665 A.2d 1062, 1065 (Md. 1995); Cohasset v. Moors, 90 N.E. 978, 979 (Mass. 1910); Rhodes v. Cahill, 802 S.W.2d 643, 645 (Tex. 1990); Kruse v. Horlamus Indus., Inc., 387 N.W.2d 64, 65-68 (Wis. 1986).

Further, New Jersey has not adopted the position of some majority jurisdictions that adverse possession "should be disfavored." Grace, supra, 692 N.E.2d at 1011-12. Rather, our Supreme Court has recognized that "adverse possession promotes certainty of title, and protects the possessor's reasonable

expectations. [Moreover,] allowing adverse possession promotes active and efficient use of land, and 'tends to serve the public interest by stimulating the expeditious assertion of . . . claims'" before they become stale. Devins v. Borough of Bogota, 124 N.J. 570, 577 (1991) (citations omitted). Adverse possession "rewards the person who has made productive use of the land, it fulfills expectations fostered by long use, and it conforms titles to actual use of the property." Randolph Town Ctr., L.P. v. Cty. of Morris, 374 N.J. Super. 448, 458 (App. Div. 2005) (quoting Restatement, supra, § 2.17 comment c), aff'd in part, vacated in part on other grounds, 186 N.J. 78 (2006).

In any event, the position taken by other States is irrelevant given our high court's rulings. "'Because we are an intermediate appellate court, we are bound to follow the law as it has been expressed by . . . our Supreme Court.'" Scannavino v. Walsh, 445 N.J. Super. 162, 172 (App. Div. 2016) (citation omitted). Accordingly, we reject Goldenberg's arguments asserting the clear and convincing evidence standard.

IV.

Goldenberg claims the trial court mistakenly applied the thirty-year period for adverse possession. N.J.S.A. 2A:14-30 provides:

> Thirty years' actual possession of any real estate excepting woodlands or uncultivated tracts, and 60 years' actual possession of woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance or otherwise, shall, in whatever way or manner such possession might have commended or have been continued, vest a full and complete right and title in every actual possessor or occupier of such real estate, woodlands or uncultivated tracts[.]

The sixty-year period applies only to "woodlands or uncultivated tracts." Ibid. "The words of the statute must have the same meaning usually accorded to such words." Conaway v. Daly, 106 N.J.L. 207, 208, 210 (E. & A. 1930) (ruling a tract of land in Atlantic City was not "woodlands or uncultivated tracts"). This alley in Jersey City is not "woodlands or uncultivated tracts" in common parlance. Indeed, Goldenberg admits the property has been a city block in an industrial section of Jersey City since at least 1921.

Nonetheless, Goldenberg argues the sixty-year period applies because it never improved the alley, and subsequent development by claimants should not be considered. Neither reason is supported by the sole case Goldenberg cites. In that case, the property was "open marshland that has never been cultivated and apparently is not suitable for any form of cultivation or development," and was "covered by water at high tide." J & M Land Co. v. First Union Nat'l Bank, 326 N.J. Super. 591, 597 (App. Div. 1999), aff'd in

part, rev'd in part on other grounds, 166 N.J. 493 (2001). We held the claimant's "two billboards along one boundary are only limited improvements that do not alter the basic character of this large open tract of uncultivated land." Ibid. The Supreme Court agreed "[s]ince the land on which the billboards have been erected is uncultivated, the sixty-year statute of limitations has to be satisfied." J & M Land Co. v. First Union Nat'l Bank, 166 N.J. 493, 518-19 (2001).

Rather than focusing on who made the improvements, J & M examined the basic character of the property. Whether we examine the property on the date Goldenberg acquired title, the date Smith, Narula, and Halladay filed suit seeking title, or the date thirty or sixty years before the suit, the alley was not "woodlands or uncultivated tracts." N.J.S.A. 2A:14-30.[6] Therefore, the trial court properly applied the statute's thirty-year period.

V.

Goldenberg argues that because the Siding Agreement provided Conrail with a right of way over the alley, the period for adverse

[6] The most appropriate of those dates is arguably the date thirty years before a claimant filed suit. Using the date the title holder acquired title or the date sixty years before the claimant filed suit would insulate property that had been both developed and adversely possessed for over thirty years. Using the date the claimant filed suit would allow a claimant to develop woodlands or uncultivated tracts in the thirtieth year of its possession and defeat the protection of the sixty-year period.

possession did not begin to run until the Termination Agreement in 2014. Goldenberg relies on Hazek v. Greene, 51 N.J. Super. 545 (App. Div.), certif. denied, 28 N.J. 58 (1958).

The plaintiff in Hazek, a stable owner, claimed horse riding without permission since 1929 gave her a prescriptive easement. Id. at 547-48. A traction company acquired the right-of-way by condemnation from a landowner, and later abandoned and deeded back to the landowner's heirs. Ibid. We rejected Hazek's claim for several reasons, including that "upon the cessation of use for railroad purposes, the title reverted to the heirs," so

> any rights that were in the process of vesting against the traction company were necessarily cut off by the reverter, and the prescriptive period had to start running from the time title reverted. Since the railroad was abandoned in 1940 and this action instituted in 1956, plaintiff did not have the 20-year adverse period needed to make a case against the property.
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> [Id. at 558.[7]]

Hazek is distinguishable because condemnation gave the traction company fee simple ownership. Thus, "the condemning railroad acquired 'the land, itself' and not merely an easement.

[7] We have since held "the thirty- and sixty-year periods that are applicable in the context of adverse possession also to be applicable" to prescriptive easements. Randolph Town Ctr., supra, 374 N.J. Super. at 455.

Consequently the person from whom the land was condemned had no standing to enjoin an unauthorized use." Ibid. (citation omitted).

By contrast, Goldenberg did not give up its ownership of the alley. Rather, the Siding Agreement provided that Conrail

> shall not acquire any easement, use, ownership or other right in the lands of [Goldenberg] upon which such siding or trestle shall be constructed, except such right or interest as must necessarily exist as an incident to the reciprocal relation of common carrier and shipper or receiver of freight or coal, and to carrying out the terms of this agreement while it is in force.

Because Goldenberg remained the owner of the alley, it retained the right to object to any unauthorized use by the lot owners, even while the Siding Agreement remained in force.

Goldenberg contends it should not be faulted for failing to assert its rights as the title holder. However, "the foundation of so-called 'title by adverse possession' is the failure of the true owner to commence an action for the recovery of the land involved, within the period designated by the statute of limitations." Mannillo v. Gorski, 54 N.J. 378, 387 (1969). "'The moral justification of the policy'" is "'that one who has reason to know that land belonging to him is in the possession of another, and neglects, for a considerable period of time, to assert his right thereto, may properly be penalized by his preclusion from thereafter asserting such right.'" Ibid. (citation omitted).

Here, Goldenberg failed to assert its rights for at least fifty years.

In addition, the Siding Agreement ceased to be in force more than thirty years before this suit. The agreement provided:

> This agreement shall continue in force as long as [Goldenberg] shall continue to receive at or ship from said siding or trestle reasonable quantities of freight or coal, and when in the opinion of [Conrail] such reasonable quantities of freight or coal are not received at or shipped from said siding or trestle as to justify it in the expense of maintaining its portion of the same, then [Conrail], at its option, may declare this agreement at an end and may remove . . . any of its track material from the land of [Goldenberg] without being liable for damages. This agreement may also be terminated by either party in case of breach . . . . This agreement may also be terminated by [Conrail], on thirty (30) days' written notice [under specified conditions].

Goldenberg no longer "continue[d] to receive at or ship from said siding . . . reasonable quantities of freight or coal" no later than 1965 when use of the siding ended. Thus, the Siding Agreement ceased to be "in force" a reasonable time thereafter. "[A] servitude terminates when it expires by its terms," such as when "it is no longer used for [the specified] purposes." Restatement, supra, § 7.2 & illustration 1; see id. at § 7.4 comment f (explaining a railroad easement expires under § 7.2 "[i]f the duration of the easement was conditioned on its continued use for railroad purposes," and such use has ended).

Goldenberg notes the Siding Agreement states Conrail, "at its option, may declare this agreement at an end." Goldenberg argues Conrail could have resumed running trains onto Goldenberg's siding at any time until the 2014 Termination Agreement. Despite the absence of an earlier written declaration, the trial court properly found "there can be no doubt that the parties effectively terminated the siding agreement 50 years ago when they both ceased maintaining and using the rail siding for delivery of coal and freight." Indeed, in the Termination Agreement, Conrail agreed that "over 50 years ago, the use of the railroad tracks . . . ceased and the Conrail stopped maintaining or using the railroad tracks on the Property, thereby effectively terminating the Siding Agreements." Goldenberg cannot rely on Conrail's rights when Conrail agreed those rights terminated fifty years ago.

Furthermore, since at least 1981, the lot owners took actions which were inconsistent with running trains on the siding. The lot owners fenced each end of the alley, installed locked gates to which only they had keys, covered the tracks with pavement or gravel, and obstructed the alley by parking vehicles and storing dumpsters and other large, immobile objects. Covering the tracks obviously obstructed use by trains, as did the fencing and storage, two traditional indicia of adverse possession. Stump, supra, 314

N.J. Super. at 569, 577-78.[8] Thus, the lot owners' actions constituted adverse possession both to Conrail's right to run trains on the siding, and to Goldenberg's continuing rights as owner of the alley.

VI.

Goldenberg argues the current lot owners cannot adversely possess the alley because it gave railway access easements to their predecessors when they purchased the lots. "[W]hen a use of property is permissive, by definition it is not adverse." Mandia v. Applegate, 310 N.J. Super. 435, 444 (App. Div. 1998). "Thus, uses made pursuant to licenses are not adverse, nor are uses made pursuant to servitudes[.]" Restatement, supra, § 2.16 comment f & illustration 9.

Here, the railway access easements were incorporated in the deeds for the lots issued by Goldenberg in 1922 and 1923 and were mentioned in two subsequent deeds in 1925 and 1946. The deeds essentially provided that the easement was "for the purpose of operating freight or railway cars" on the siding, and that the easement was in common with all the other owners in the block. The deeds after 1922 also provided the grantee shall not use the

[8] This case bears no resemblance to Hazek, supra, where horse riders were rarely on the tracks and would get out of the way if a trolley came. 51 N.J. Super. at 558-59.

easement "so as to unduly or unreasonably obstruct or interfere with the use of said right of way by other owners."

The trial court properly found these railway access easements effectively terminated in 1965 when Goldenberg's Siding Agreement with Conrail effectively terminated. Several of the easements explicitly referenced Goldenberg's Siding Agreement, and all were implicitly dependent upon it as the sole basis for Goldenberg to grant the lot owners railway access.

"When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created," and "modification is not practicable, or would not be effective, a court may terminate the servitude." Restatement, supra, § 7.10(1); see Am. Dream at Marlboro, L.L.C. v. Planning Bd. of the Twp. of Marlboro, 209 N.J. 161, 169 (2012) (following § 7.10). Where property "is subject to an easement for a railroad right of way," and the railroad abandons rail operations on the right of way, "termination of the easement would be justified because its purpose can no longer be accomplished." Restatement, supra, § 7.10 illustration 4; see also Leach v. Anderl, 218 N.J. Super. 18, 26 (App. Div. 1987).

Further, the lot owners themselves caused the abandonment of the siding by failing "to receive at or ship from said siding

. . . reasonable quantities of freight or coal" under the Siding Agreement. "A servitude benefit is extinguished by abandonment when the beneficiary relinquishes the rights created by the servitude." Restatement, supra, § 7.4. "Evidence of failure to take advantage of the benefits of a [servitude] even for a lengthy period is seldom sufficient to persuade a court that abandonment has occurred." Citizens Voices Ass'n v. Collings Lakes Civic Ass'n, 396 N.J. Super. 432, 443 (App. Div. 2007) (citing Restatement, supra, § 7.4 comment c).

> Some additional action on the part of the beneficiary inconsistent with continued existence of the servitude is normally required, although the amount of additional evidence required tends to diminish as the period of nonuse grows longer. In cases where a very long period of time has passed, abandonment may be found even without other evidence of intent.
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> [Restatement, supra, § 7.4 comment c.]

Here, the lot owners abandoned use of the siding for a very long time after 1965. They also took additional actions inconsistent with the continued existence of the railway access easements by fencing and locking the alley, covering the tracks with pavement and gravel, and obstructing the alley with stored items. This provided ample evidence of their abandonment of the railway access easements. See id. at § 7.4 illustration 2 (stating where the owner of an easement to use a private road "built a

concrete block wall . . . effectively blocking any access from the private road," "the conclusion that the owner . . . had abandoned the easement would be justified"); see also Leasehold Estates, Inc. v. Fulbro Holding Co., 47 N.J. Super. 534, 563 (App. Div. 1957).

Additionally, the lot owners' actions exceeded and violated the railway access easements. "Even though a person may be authorized to make some uses of property, the person may become an adverse user with respect to uses that go beyond the authorized use if the excessive use gives rise to a cause of action for . . . interference with a property interest." Restatement, supra, at § 2.16 comment f. Moreover, "[u]se that is prohibited by a lease or beyond the scope of a license or servitude may be adverse." Ibid. The easements specifically forbade the lot owners from unreasonably obstructing or interfering with the use of the siding, which they did by paving the tracks, fencing the alley, and using it for storage. Thus, the lot owners' possession was adverse despite their predecessors' easements.

VII.

Goldenberg similarly argues plaintiffs' positions cannot be "hostile" due to the railway access easements. However, our Supreme Court in Mannillo "discard[ed] the requirement that the entry and continued possession must be accompanied by a knowing

intentional hostility." Mannillo, supra, 54 N.J. at 386.[9] The Court "h[e]ld that any entry and possession for the required time which is exclusive, continuous, uninterrupted, visible and notorious, even though under mistaken claim of title, is sufficient to support a claim of title by adverse possession." Id. at 386-87; see Patton, supra, 93 N.J. at 187.

Our opinions have differed on whether our "Supreme Court did away with hostility as an essential element of adverse possession," Stump, supra, 314 N.J. Super. at 576, 580 (footnote omitted), or whether the Court has since reaffirmed "the continuing vitality of this element of the test," Yellen, supra, 416 N.J. Super. at 120-21. The better view is that the Court in Mannillo redefined the element of "hostility" by deciding that "an entry and continuance of possession under the mistaken belief that the possessor has title to the lands involved, exhibits the requisite hostile possession to sustain the obtaining of title by adverse possession." Mannillo, supra, 54 N.J. at 382 (1969); see J & M, supra, 166 N.J. at 519 (finding J & M's possession was not "'adverse and hostile'").

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[9] The Court diverged from prior case law, including Predham v. Holfester, 32 N.J. Super. 419 (App. Div. 1954), which, though "acknowledging that [the requirement] had been severely criticized[,] felt obliged because of stare decisis to adhere thereto." Mannillo, supra, 54 N.J. at 386.

Under the modern definition, "'the term "hostile" does not mean that there has to be ill will or malevolence, but the term means only that one in possession of land claims the exclusive right thereto.'" Stump, supra, 314 N.J. Super. at 576 n.* (citation omitted). Thus, "if a person uses the property of another under a claim of right," whether based on a mistaken belief the person owns the property or on an intent to claim property the person knows belongs to another, the person shows the requisite hostility. Yellen, supra, 416 N.J. Super. at 120-21.[10]

There was no evidence that when Smith, Halladay, and Narula acquired their lots in 1984, 2007, and 2013 respectively, they had any knowledge the prior lot owners received a railroad access easement over the alley from Goldenberg in 1922-23. The trial court properly found they took title to their lots believing their title included their respective portion of the alley. Moreover,

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[10] We note Patton, Yellen, and Randolph Town Ctr. quoted pre-Mannillo language: "A possession is adverse if the claimant's use is 'under a claim of right, pursued with an intent to claim as against the true owner[.]'" Patton, supra, 93 N.J. at 186-87 (quoting Predham, supra, 32 N.J. Super. at 424); see Yellen, supra, 416 N.J. Super. at 120 (quoting A.J. and O.J. Pilar, Inc. v. Lister Corp., 22 N.J. 75, 80 (1956) (quoting Predham, supra, 32 N.J. Super. at 424)); Randolph Town Ctr., supra, 374 N.J. Super. at 457 (same). After Mannillo, this language must be read to require only that the claimant use the property under an intentional claim of right, regardless of whether the claimant mistakenly believes the claimant owns the property or knowingly claims against the true owner.

their uses of the alley — paving it, fencing it, and obstructing it — confirmed they intended to possess it under claim of right. Therefore, their possession was hostile.

VIII.

Relatedly, Goldenberg notes the 1920s deeds granting the railway access easements required the lot owners to pay "all" or their "proportionate share" of the taxes on their respective portions of the alley. Thus, Goldenberg argues, the trial court erred by considering that plaintiffs and their predecessors paid the property taxes on their portions of the alley.

However, the obligation under the easements to pay taxes effectively ceased when the railway access easements were terminated and abandoned after 1965. Accordingly, the trial court could properly consider the subsequent payment of property taxes.

"[P]ayment of taxes alone is insufficient to give rise to adverse possession." Patton, supra, 93 N.J. at 189. Nonetheless, "[p]aying taxes on the property" and fencing it are "'the two most significant activities'" by which an adverse claimant can "prove that he or she 'has acted towards the land in question as would an average owner.'" Stump, supra, 314 N.J. Super. at 569 (citation omitted). Plaintiffs and their predecessors did both.

IX.

To establish adverse possession for the required thirty years prior to suit, Narula and Halladay must rely on the possession of their lots by their predecessors. Our courts "permit tacking, the accumulation of consecutive periods of possession by parties in privity with each other." O'Keeffe v. Snyder, 83 N.J. 478, 503 (1980); Stump, supra, 314 N.J. Super. at 568. Goldenberg argues that, because Halladay's predecessor, Bizifish, L.L.C., acquired its lot in 2001 by final judgment after a tax sale certificate foreclosure, and Narula acquired its lot in 2012 by sheriff's deed after a mortgage foreclosure, Halladay and Narula lacked privity with their predecessors.

Goldenberg misapprehends privity. "Privity is simply mutual or successive relationship to the same rights of property." Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704, 706 (E. & A. 1948). "[I]n adverse possession claims," the issue is "privity of possession," that is, "[p]rivity between parties in successive possession of real property." Black's Law Dictionary 1320 (9th ed. 2004). The privity "requirement is satisfied if the later user succeeded to the interest of the earlier user by voluntary or involuntary transfer or by succession at death." Restatement, supra, § 2.17 comment l. A foreclosure "deed, aided by . . . the actual transference of possession . . . , is sufficient evidence

of a transference of possession to raise the required privity between them." See O'Brien v. Bilow, 121 N.J.L. 576, 579 (E. & A. 1939) (quoting Davock v. Nealon, 58 N.J.L. 21, 25 (Sup. Ct. 1895)).

Goldenberg's argument that only transfer by voluntary conveyance can tack is also contrary to the language of N.J.S.A. 2A:14-30. That statute provides that possession "continued by occupancy, descent, conveyance or otherwise, shall, in whatever way or manner such possession might have commenced or have been continued," constitute adverse possession if continued over the statutory period. N.J.S.A. 2A:14-30 (emphasis added).

Goldenberg claims an intent to transfer is required, citing our statement that "[t]acking is generally permitted 'unless it is shown that the claimant's predecessor in title did not intend to convey the disputed parcel.'" Stump, supra, 314 N.J. Super. at 568 (citation omitted). However, Stump did not address or preclude tacking where the property was conveyed by foreclosure. Indeed, in Stump we cited with approval Doyle v. Ellis, 549 S.W.2d 62, 64-65 (Tex. Civ. App. 1977), where an "adverse possessor sold property . . . , then later foreclosed on buyer for failure to pay," and the court held "this privity of possession permitted tacking." Stump, supra, 314 N.J. Super. at 570. Additionally, we held it did "not interrupt continuity of occupancy for the

purposes of an adverse possession claim in respect of land owned privately at the time of the claim on the ground that title was once briefly held by a federal agency," because the property was no longer in government hands. Id. at 572, 575 (distinguishing a case relying on Annotation, Tax Sales or Forfeitures by or to Governmental Units as Interrupting Adverse Possession, 50 A.L.R.2d 600, 604 (1956)).

In reaching that holding, we relied on "the policies enunciated by the New Jersey Supreme Court in Devins, especially as regards the most efficient use of land." Stump, supra, 314 N.J. Super. at 575. Devins's policies, quoted above, all support allowing tacking where a property is transferred by foreclosure.

So do the policies allowing tacking. See O'Keeffe, supra, 83 N.J. at 502-04. "Treating subsequent transfers [by foreclosure] as separate acts of conversion could lead to absurd results." See id. at 504 (citation omitted). "'[A]n innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself [would have been had there been no transfer], — a conclusion as shocking in point of justice as it would be anomalous in law.'" Id. at 504 (citation omitted). "Adoption of that alternative would tend to undermine the purpose of the statute in quieting titles and protecting against stale claims." Id. at 503. "It is more sensible to recognize that on expiration of the period of

limitations, title passes from the former owner by operation of the statute. Needless uncertainty would result from starting the statute running anew merely because of a subsequent transfer." Id. at 504. "The important point is not that there has been a substitution of possessors, but that there has been a continuous dispossession of the former owner." Id. at 502.

Goldenberg's view would defeat those policies and would lead to the absurd result that the innocent purchaser at a foreclosure sale would be worse off than the defaulting adverse possessor had been because the thirty-year period for adverse possession would restart. Thus, the "foreclosure did not interrupt the adverse possession as a matter of law." Parker v. Potter, 109 A.3d 406, 410 (Vt. 2014) (citing cases).

X.

Goldenberg challenges the trial court's finding that the adverse possession by plaintiffs and their predecessors was "exclusive, continuous, uninterrupted, visible and notorious." Patton, supra, 93 N.J. at 187. However, Alfred Smith and James Smith testified that, since 1981, the lot owners adversely possessed the alley by fencing and paving it and using it for storage and parking. The court permissibly credited their unrebutted testimony, which was corroborated by managing members of Narula and Halladay.

Goldenberg argues the lot owners allowed each other to use their respective portions of the alley so their possession was not exclusive. However, "[t]he requirement of exclusivity means only that the user have acted independently of the rights claimed by others, such as the general public." Randolph Town Ctr., supra, 374 N.J. Super. at 454 n.4. This is not a situation where the lot owners were using the alley "as a member of the public, in common with all others." Poulos v. Dover Boiler & Plate Fabricators, 5 N.J. 580, 588 (1950). Rather, each lot owner claimed possession of its portion of the alley "as an adjunct of a private commercial enterprise." Hazek, supra, 51 N.J. Super. at 556-57. Indeed, by fencing and locking the entrances to the alley, the lot owners excluded members of the public. See Kruvant v. 12-22 Woodland Ave. Corp., 138 N.J. Super. 1, 19 (Law Div. 1975), aff'd o.b., 150 N.J. Super. 503 (App. Div. 1977). The lot owners could permit each other to make transitory use of their respective portion of the alley without sacrificing their claim to possession. See Bioletti v. Sindoni, 135 N.J. Eq. 609, 616 (Ch. 1944) ("the requirement of 'exclusive' as regards acquirement of an easement of way by prescription does not mean that the complainants shall have been the sole users").

Goldenberg contends the possession by the predecessors of Narula and PPG was not continuous because portions of their

subdivided buildings were occasionally vacant for several months. However, these short-term vacancies never left an entire building vacant. Moreover, "periods of vacancy occasioned by changes of ownership or substitution of tenants and uses which are consistent with the character of the property do not destroy the continuity of use." E.g., Sufficool v. Duncan, 9 Cal. Rptr. 763, 767 (Cal. App. 1960); McNeil v. Ketchens, 931 N.E.2d 224, 241 (Ill. App. Ct.), appeal denied, 932 N.E.2d 1031 (Ill. 2010).

Goldenberg's remaining arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.