COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FIRST DIVISION
CASE NO. 18-CI-1603

MARC TISCHBEIN, et. al. **PLAINTIFFS**

vs.

SCOTT HILL, et. al. **DEFENDANTS/THIRD-PARTY PLAINTIFFS**

vs.

DAVID A. KLINGSHIRN, et. al. **THIRD-PARTY DEFENDANTS**

ORDER GRANTING SUMMARY JUDGMENT

Procedural Posture:

This matter is before the court pursuant to motion of Plaintiffs, Marc Tischbein and Peggy Rankin ("Tischbein and Rankin"), for partial summary judgment filed April 4, 2020. Defendants/Third-Party Plaintiffs, the Hills, responded on April 16, 2020. Tischbein and Rankin filed a Reply on April 27, 2020.

There are also other motions pending before the court which will be addressed herein.

In early 2019 cross motions for summary judgment/partial summary judgment were filed by the parties. By order entered April 6, 2020 this court granted partial summary judgment to Plaintiffs finding that they, at a minimum, had an irrevocable license to use the property at the center of this controversy. This court also did a full adverse possession analysis pursuant to Defendants' motion for summary judgment which sought to have Plaintiffs' adverse possession claim dismissed. This court found that Plaintiffs' adverse possession claim was compelling and overruled Defendants' motion for summary judgment.

Now Plaintiffs have filed this motion for partial summary judgment on their adverse possession and easement claims. The record is extensive and the relevant facts extend over a thirty (30) year period of time.

Facts:

This action involves a property dispute. Plaintiffs, Tischbein and Rankin, own 422 Riverside Drive (technically 420-422 Riverside Drive), referred to herein as the Main House. Defendants, the Hills, own 109 Shelby Street, referred to herein as the Coach House. They are adjoining properties.

In 1986 David A. Klingshirn ("Klingshirn"), Third Party Defendant, purchased the Main House. He partnered with Tischbein in the purchase and renovation of the Main House. They lived together in the Main House through 1993. Klingshirn paid approximately two-thirds of the expenses during that period and Tischbein paid approximately one-third.

On April 30, 1993, Klingshirn, Tischbein and Tischbein's then-fiancé, Rankin, jointly purchased the Coach House. In 1993-94 Klingshirn, Tischbein and Rankin, remodeled and updated the Coach and Main Houses, and constructed two garages, a driveway, gate and walkways between them. At that time Tischbein and Rankin contributed additional funds to "settle up" the difference in the amount Klingshirn had previously paid for the Main House over what Tischbein paid. Tischbein and Rankin then paid approximately two-thirds of the remodels and new construction. Klingshirn paid approximately one-third. After the construction and remodels were complete, Klingshirn moved into the Coach House and Tischbein and Rankin resided in the Main House. Klingshirn was still the only person on the Main House deed.

As part of the Coach House remodel a new Coach House "front door" that faced Riverside Drive on the north side of the property was constructed, as well as a walkway from

that front door to Riverside Drive. Klingshirn located his mailbox on that walkway and used 420 Riverside Drive as his address. Technically, the Coach House address was 109 Shelby Street, but it was important to Klingshirn to maintain the prestigious Riverside Drive address (when he lived with Tischbein in the Main House the address for the two units were 420 and 422 Riverside Drive.). The walkway was located on the Main House lot and ran along the west side of the Main House through its side yard.

Originally, only one new garage was constructed on the property and it was for the Coach House. It had an exit directly into the Coach House basement. After the Coach House garage was built the parties explored building a Main House garage on the west side of the Main House in its side yard. They ran into some difficulties with that placement so Klingshirn, Tischbein and Rankin built it next to the Coach House garage between the two houses. The outside windows of the then existing Coach House garage were removed and the new Main House garage connected to the Coach House garage with a common wall. The driveway was constructed so as to service both garages. The only access to the garages and driveway parking was through a shared gate. The electricity for the Main House garage was connected directly to the Main House. There was no way to access one garage from the other. The construction of the two garages, the driveway and the gate were paid approximately two-thirds by Tischbein and Rankin, and approximately one-third by Klingshirn. Klingshirn, Tischbein and Rankin agreed in their depositions that the Main House garage was built for use by the Main House occupant(s) and the Coach House garage was built for use by the Coach House occupant(s).

From 1993 to 2001, the parties shared some ownership of the property and shared the use of the common driveway, gate and paved walkways among the properties in a manner consistent with their verbal agreement at the time they designed and renovated the properties. They treated

them as one property shared by the three of them. The Coach House and the Coach House garage were used and paid for entirely by Klingshirn (exclusive of any mortgage payments), and the Main House and the Main House garage were used and paid for entirely by Tischbein and Rankin (exclusive of any mortgage payments until later in 1990's). The additional driveway parking, which might be considered a walkway, was used exclusively by Tischbein and Rankin.

From the beginning, the relationship between Tischbein and Klingshirn was one of complete trust and friendship. Tischbein paid approximately one-third of the Main House mortgage(s) in the early years and was on at least one loan, yet he was not on the deed. Some of the financing was secured with Klingshirn's pharmacies. When Klingshirn, Tischbein and Rankin purchased the Coach House in 1993 and renovated the properties, no written agreement was executed between the three of them. The financial contributions, living arrangements and use of the properties were discussed and agreed to by all three. As the parties testified in their depositions, they were like family to each other. All financial contributions were made into an account named "Tischbein Properties" and Klingshirn made the payments from that account.

Rankin testified that sometime in the late 1990's she and Tischbein took over one hundred percent of the Main House mortgage payments to which Klingshirn had been contributing (it appears at the rate of approximately 50%). There was no mortgage on the Coach House. In 1998, Klingshirn deeded one-half interest of the Main House to Tischbein (then married to Rankin). Then, according to Klingshirn, in 2001 he felt growing concern that his pharmacies were leveraged by the Main House mortgage. Rankin testified that since she and Tischbein were making all the mortgage payments for the Main House, they wanted to refinance with a lower interest rate. So, in 2001 Rankin, Tischbein and Klingshirn decided that Tischbein and Rankin would refinance the Main House mortgage in their names and the three of them

would legally realign their ownership interests in the two properties. Tischbein and Rankin became the sole owners of the Main House, and Klingshirn became the sole owner of the Coach House. From what the court can discern, the Main House was then mortgaged in Tischbein and Rankin's names, and the Coach House was mortgage-free.

The deeds depicted the boundaries of the two lots as they were before Klingshirn, Tischbein and Rankin purchased the Coach House. Most of the gate, driveway and Main House garage that were built after the 1993 purchase were located within the Coach House property line. Most of the walkway from the Coach House door to Riverside Drive was located within the Main House property line. The driveway parking spots/walkway were located within the Main House property line, and the Coach House garage was located within the Coach House property line. Other paved walkways ran between the boundary lines of the two properties. From the deposition testimony of Klingshirn, Tischbein and Rankin, it appears that none of them gave a second thought to the property lines. After the 2001 property exchange, their living arrangements and use of the properties continued for the next seventeen (17) years as they had for the previous eight (8) years.

The Main House garage continued to be used and paid for exclusively by the Main House occupants, Tischbein and Rankin, and the Coach House garage continued to be used and paid for exclusively by the Coach House occupant, Klingshirn. They continued to share the driveway and gate. During this period, Tischbein and Rankin expended significant funds to replace the Main House garage door, install a new outside light, purchase garage door openers, paint the garage and install shelving. The electricity to the gate was assessed to the Coach House. After 2012 Tischbein and Rankin took over all maintenance costs, including $2,290.00 for a new gate motor. They further paid over $8,000.00 to repair the driveway. All expenses and repairs related

solely to the Coach House garage were paid exclusively by Klingshirn and all expenses related solely to the Main House garage were paid exclusively by Tischbein and Rankin (there is some controversy concerning whether Klingshirn paid property taxes and insurance associated with the Main House garage).

According to Klingshirn's deposition testimony, upon division of the property and during the entire seventeen (17) years that followed, there was never any discussion or commentary regarding ownership or permissive use of the Main House garage, driveway, gate and walkways. When asked in deposition if Tischbein ever told Klingshirn that he owned the garage, Klingshirn responded "I think [Marc] thought that he owned that garage because he parked there...."[1]

Klingshirn, Tischbein and Rankin testified that there was an agreement in 1993-94, when they built the Main House garage, that it would be for the Main House. Klingshirn testified in his deposition that at the time of realignment of the properties in 2001, he assumed that Tischbein and Rankin would keep using the Main House garage and he, Klingshirn, would keep using the paved walkway from the Coach House north entrance through the Main House side yard and maintain his 420 Riverside Drive address. Klingshirn testified that the "gentlemen's agreement" was created in 1993-94 so that Tischbein would have a garage and Klingshirn would keep a Riverside Drive address. He further testified that after they split the properties, they continued to treat them as one property and he assumed they would sell the properties together. Tischbein and Rankin testified that they believed when they split the properties in 2001, they got full ownership of the Main House garage. In fact, Rankin testified that when they discussed splitting the properties in 2001, the three of them verbally agreed that she and Tischbein would continue to own the garage.

[1] Klingshirn deposition, June 17, 2019, page 106.

At some point prior to Klingshirn's sale of the Coach House, Klingshirn expressed to Tischbein an interest to sell. He wanted to sell the properties together to maximize the profit. If not sold together he had hoped that Tischbein and Rankin would buy the Coach House from him. Tischbein and Rankin entertained selling the properties together. They had prospective buyers view the Main House. They were disappointed that the value of the two properties together were assessed by a real estate professional below their expectations. They didn't have any serious buyers express an interest to pay the amount they desired.

Klingshirn blamed Rankin for the failure to sell the properties together. He was upset that Tischbein and Rankin did not offer to purchase the Coach House from him. In 2017 he decided to list the Coach House. He informed Tischbein of his decision.

In light of the Klingshirn's decision to sell, Tischbein and Klingshirn had discussions about getting easements before the Coach House was sold. Klingshirn testified that he wanted the "gentlemen's agreement" to pass to the new owners. Tischbein that he "just wanted to get clarity of a document that confirms our ownership."[2] He said, "all we know is that we were owners of that garage and access to that garage."[3]

On the original MLS listing of the Coach House property, based upon the property plat maps filed of record, two garages were listed. Sometime in 2017, Klingshirn's realtor, Michael Hinckley ("Hinckley"), had brochures made to market the Coach House. The brochures listed the property as having two garages. Tischbein and Rankin were upset when they saw the brochures and told Klingshirn he needed to change them to reflect that the Coach House had only one garage. Klingshirn agreed and had Hinckley redo the brochures. The MLS listing was also changed to reflect that the property had only one garage. Klingshirn did an interview with a

[2] Tischbein deposition, page 85.
[3] Tischbein deposition, page 86.

reporter who was writing an article for the Enquirer about the new unique property going on the market. The published article described the property as having one garage. The reporter executed an affidavit stating that Klingshirn told him the property had one garage.

On October 23, 2017, Klingshirn executed a Seller's Disclosure of Property Condition. In it Klingshirn acknowledged that he did not know the property boundaries, and that he was not aware of any encroachments or unrecorded easements related to the property. He further disclosed that there were features of the property shared in common with adjoining landowners without explanation.

Hinckley discussed with potential buyers that most of the neighbors' garage was on the Coach House property without an easement. He also discussed that the walkway from the Coach House door leading to Riverside Drive was on the Main House property without an easement. At least one potential buyer expressed an interest in getting easements for both before making an offer to purchase. In the end, no offer was made by that potential buyer.

On February 16, 2018, Lorrie Hill, Defendant/Third Party Plaintiff went through the Coach House with her realtor, Sharon Hilinski ("Hilinski"). She emailed Hilinski afterward that she was surprised that it was listed as a two-car garage when it seemed the garage was only one space. She had seen the original MLS listing stating the property had two garages. She questioned whether the Main House garage was owned by the Main House or if there was an easement. Hilinsky responded to Lorrie stating that Hinkley told her the neighbor's garage is on Klingshirn's property, and that there is no easement, just a "gentlemen's agreement." Hinkley told Klingshirn to put the arrangement in in writing in legal terms and Klingshirn said he would when he found a buyer.

Klingshirn reached out to a city official on March 26, 2018 via email stating, "I need direction and advice to have a document [regarding] easement for 422 Riverside Drive [and] 109 Shelby. We share a common drive and walkway;"[4] Klingshirn was not happy that he might have to pay a professional to obtain the easements. Tischbein testified that he assumed Klingshirn was handling the matter. Rankin testified that she assumed Tischbein and Klingshirn were handling the matter. Klingshirn testified that he looked into it but chose not to follow through because he thought Tischbein and Rankin should have to pay for it since they earned more money than him. He admitted he was "perturbed" with Tischbein and Rankin for not offering to pay for it.

On March 17, 2018, the Hills made an offer to purchase the Coach House for $575,000.00. The asking price was $725,000.00. The Hills expressed that the rationale for the low offer included the fact that there was actually one garage, not two. They had Hilinski convey that rationale to Klingshirn.

On March 19, 2018, the Hills signed the Seller's Disclosure of Property Condition.

Klingshirn countered the Hills' offer for $625,000.00. The Counter-Offer stated that as an integral part of the contract, "[t]he adjoining property (422 Riverside Dr.) garage is partially on the subject property." On March 23, 2018, the Hills executed the Contract to Purchase for $625,000.00. Both Lorrie and Scott Hill testified that at that point in time, ownership of the Main House garage was questionable in their minds. They were, however, aware of the past and ongoing Main House garage usage by Tischbein and Rankin.

The Coach House was then appraised for $650,000.00 based upon one one-car garage. Prior to the June 4, 2018 closing, the Hills had the property surveyed. The May 31, 2018 survey report revealed that most of the Main House garage was located on the Coach House property.

[4] Defense exhibit 8.

In an email to Hilinski on June 3, 2018, Lorrie Hill said she was pleasantly surprised that the survey revealed that most of the Main House garage was on the Coach House property. She wanted assurance that no new easements or agreements had been filed regarding the Coach House property since they signed the Contract to Purchase. Klingshirn and the Hills closed on the sale on June 4, 2018.

On June 29, 2018, a meeting took place between the Hills and Tischbein and Rankin regarding use of the Main House garage. A written license agreement was offered by the Hills. There was disagreement between them.

In July of 2018 the Hills, and Tischbein and Rankin, hired attorneys who conveyed to each other their positions regarding the property dispute. The Hills physically blocked Tischbein and Rankin from using the garage, gate and driveway.

Some time at the end of August, 2018, Klingshirn met with the Hills at Notre Dame Academy ("NDA") in Park Hills, Kentucky. The Hills' daughter was to attend NDA and Klingshirn wanted to introduce the Hills to the Notre Dame sisters. During their time at NDA, Klingshirn and the Hills discussed the property situation between the Hills and Tischbein and Rankin. Lorrie Hill, unbeknownst to Klingshirn, recorded the conversation between Klingshirn, Scott Hill and herself. A transcript of that recording has been entered into the record.

During that conversation, Lorrie Hill conveyed to Klingshirn that if he did not say that he gave permission to Tischbein to use that garage, then Tischbein would own it. She then suggested that their attorney would, in turn, sue Klingshirn. She went on to say that there was no need for that because Klingshirn just needed to sign an affidavit saying he gave Tischbein and Rankin permission to use the garage and that would put a stop to the lawsuit. Scott Hill told Klingshirn that Lorrie could type up an affidavit and send it on to Klingshirn's attorney.

Klingshirn responded "here's the deal, whatever, you write it up."[5] Lorrie Hill prepared the August 27, 2018 affidavit and Klingshirn signed it.

That affidavit stated that Klingshirn specifically allowed and permitted Tischbein and Rankin to use the Main House garage and that Tischbein and Rankin paid no expenses relating to its use except for a periodic service call on the electric gate and driveway maintenance. He stated that Tischbein and Rankin never made any claim or assertion or act that they had any ownership interest in it. He further attested that Tischbein and Rankin knew or should have known that use of the Main House garage was allowed by Klingshirn as an ongoing gesture of goodwill and friendship and nothing more.

This action was filed on August 31, 2018 by Tischbein and Rankin.

On May 2, 2019, Klingshirn executed another affidavit incorporating the previous affidavit. He further stated that he inquired about an easement for the Main House garage but nothing came of it. He stated that he has always maintained that he owned the Main House garage, and between the time he accepted the Hills' offer on the Coach House and the time they closed on the sale, he informed the Hills that he allowed Tischbein and Rankin to use it pursuant to a "gentlemen's agreement."

Klingshirn was deposed on June 17, 2019 and July 2, 2019. In his depositions he stated that the only verbal discussion regarding the use of the Main House garage was the gentlemen's agreement between he and Tischbein in 1993-94 when Klingshirn, Tishbein and Rankin purchased the Coach House and designed the renovation of the Coach House property and Main House property for their shared use as one property, with the common goal that Tischbein would have a garage and Klingshirn would have a Riverside Drive address.[6] He further testified that

[5] Klingshirn June 17, 2019 deposition, page 147.
[6] Klingshirn June 17, 2019 deposition, p. 73.

they never discussed ownership or permissive use of the Main House garage after that. He stated that the permissive nature of the use of the Main House garage wa assumed.

Findings and Conclusions:

Summary Judgment

The standard for summary judgment requires the court to view the record in the light most favorable to the non-movant; and for the movant to show the non-existence of any issue of material fact, and make that showing with such clarity that there is no room left for controversy. CR 56.03. The failure of the non-moving party to present evidence in contradiction to the evidence in support of the motion for summary judgment does not in itself justify a granting of the motion; however, the party opposing "…a properly supported summary judgment motion" cannot defeat such a motion without presenting "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." See Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 475 (1991). The inquiry is whether, from the evidence in the record, facts exist which would make it possible for the non-moving party to prevail.

Adverse Possession

In order to establish title through adverse possession all of the following must be met at all time throughout a fifteen-year statutory period:

> (1) Possession must be hostile and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive, and (5) it must be continuous.[7]

The minimum fifteen-year period of time at issue here begins in 2001.

[7] *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky.1955).

Starting with the fifth requirement and moving backward, the deposition and affidavit testimony of Klingshirn, Tischbein and Rankin is undisputed. During the period of 2001 through 2017 only Tischbein and Rankin used the Main House garage. The use was continuous.

The fourth requirement, that possession be exclusive is also undisputed. The Main House garage could not be accessed from the Coach House garage. Klingshirn never used or even attempted to use the Main House garage. Klingshirn, Tischbein and Rankin all testified that the Main House garage was used exclusively by Tischbein and Rankin for the entire time. Klingshirn admitted that he always thought of it as "Marc's garage" or "Marc's mancave."

In order to satisfy the third element, that possession be open and notorious, possession must be conspicuous and not secret, so that the legal title holder has notice of the adverse use.[8] After 2001, Klingshirn was the title holder of most of the property upon which the Main House garage was built. Klingshirn was aware that Tischbein and Rankin exercised control over the Main House garage in a manner that would appear to the world that they owned it.

Not only did Tischbein openly used the Main House garage, all maintenance for it was paid for by Tischbein and Rankin. A new garage door was chosen and paid for by Tischbein and Rankin, as well as new openers, outside lighting and painting. Tischbein and Rankin had storage shelves constructed in that garage. Klingshirn was aware of all of this. By their use and action Tischbein and Rankin showed that they intended to possess the Main House garage to the exclusion of all others. Tischbein and Rankin testified that they believed they owned the garage after the property was realigned. They believed that the Main House garage went with the Main House. Klingshirn, Tischbein and Rankin all testified that they believed that when they built the Main House garage in 1993-94, it was built and intended for that purpose.

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[8] *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co.*, 824 S.W.2d 878,880 (Ky.1992), citing *Sweeten v. Sartin*, 256 S.W.2d 524, 526 (Ky.1953).

Defendants argue that Klingshirn paid additional real estate tax and insurance because of his ownership of the garages. That claim is questionable, but that alone would not destroy Tischein's and Rankin's claim of adverse possession.

The second requirement is that Tischbein and Rankin actually possessed the Main House garage. The testimony on this point is not in dispute. The uncontroverted testimony reflects that Tischbein cleaned his car in the driveway almost every day and parked it in the garage every night. The testimony further shows that Tischbein spent a lot of time in his garage and stored his and Rankin's personal property in there. According to Klingshirn, Tischbein hung out in that garage all the time with his dog and his radio.

The first requirement, that possession be hostile and under a claim of right is where the Hills contend that Tischbein and Rankin's adverse possession claim fails.

"In order to make an adverse claim definite, the adverse possessor must have *either* some color of title that will show the extent of the claim *or* there must be a definite boundary."[9] If someone is in actual adverse possession of property without color of title, he must have well-defined boundaries of his possession.[10]

The only color of title that Tischbein and Rankin have is that a portion of the north wall (closest to the Main House) is located within the Main House property line. Otherwise, the boundary of the Main House garage which Tischbein and Rankin are asserting ownership of, is obviously well-marked and adjacent to the Main House. It is separated from the Coach House garage by a wall. It is inaccessible from the Coach House garage. It adjoins and is partially on the Main House property. The electricity line to the Main House garage connects to the Main House. Tischbein and Rankin have clearly defined their claim of right.

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[9] *Appalachian Regional Healthcare*, at 880, citing *Coulton v. Simpson*, 96 S.W.2d 856 (Ky.1936).
[10] *Shepherd v. Morgan*, 246 S.W.2d 131 (Ky.1951).

In order for possession to be adverse, a possessor must "openly evince a purpose to hold dominion over the property with such hostility that will give the non-possessory owner notice of the adverse claim."[11] "[T]he character of the property, its physical nature and the use to which it has been put, determines the character of acts necessary to put the true owner on notice that a hostile claim is being asserted."[12] These factual assertions of hostility by Tischbein and Rankin are discussed in this opinion analyzing the third element of an adverse claim, that possession be open and notorious. Tischbein and Rankin used the Main House garage in a manner consistent with the size and character of the property and its intended purpose upon construction by them and Klingshirn. In full sight of Klingshirn, they treated it as their property, with all the benefit and responsibility that accompanies ownership. Klingshirn testified that Tischbein thought he owned it.

When an occupant obtains possession of land under the mistaken belief that the property is his, and he conveys no intention of surrendering the disputed property, he is, in fact, holding the property adversely[13]. Furthermore, physical improvement to the property demonstrates the possessor's intent to adversely hold the property.[14]

Klingshirn maintains that Tischbein and Rankin's possession of the property was permissive rather than hostile. This is the real crux of this controversy. Where an owner of property has granted someone permission to use [that] property, a claim of adverse possession cannot be deemed hostile.[15] "[P]ossession by permission cannot ripen into title no matter how long it continues."[16]

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[11] *Appalachian Regional Healthcare,* at 880.
[12] *Ely v. Fuson,* 180 S.W.2d 90 (Ky.App.1944).
[13] *Tartar,* at 153.
[14] *Appalachian Regional Healthcare,* at 880.
[15] *United Hebrew Congregation of Newport v. Bolser,* 50 S.W.2d 45 (Ky.1932).
[16] *Phillips v. Akers,* 103 S.W.3d 705, 708 (Ky.App.2002).

Klingshirn asserts that Tischbein and Rankin's permitted use of the Main House garage was pursuant to a "gentlemen's agreement" but he admits that this verbal agreement was entered into in 1993-94 when Klingshirn, Tischbein and Rankin jointly owned the Coach House and they made plans together for renovations. According to Klingshirn, Tischbein and Rankin, the agreement encompassed building the Coach House garage for use by the Coach House occupant, building a Main House garage for use by the Main House occupant, building a walkway from a newly constructed Coach House front door to Riverside Drive for usage by the Coach House occupant to retain the Riverside Drive address, and building a gate, driveway and other walkways for the shared use by the occupants of both houses. Klingshirn testified that this "gentlemen's agreement" was never discussed between himself and Tischbein and/or Rankin any time after the design and construction of the property renovations which took place prior to 2001 and which included the construction of the Main House garage. He simply testified that the permissive nature of Tischbein and Rankin's use of the Main House garage after the property realignment was assumed. Tischbein and Rankin testified that they believed they owned it, and openly behaved consistent with that belief.

Furthermore, rather than discuss his ownership of the Main House garage and Tischbein's use thereof as permissive after the property split, Klingshirn openly treated it as Tischbein's garage and was aware of and expected Tischbein and Rankin's incurrence of expenses to upgrade and maintain it. When asked in deposition if he paid for any of the maintenance, upkeep or improvement of the Main House garage, he answered that there would have been no reason for him to do so.

Klingshirn, Tischbein and Rankin had an unusual relationship over the thirty years or so. They did not routinely reduce to writing their business dealings amongst themselves. For

example, Klingshirn and Tischbein bought the Main House together with Tischbein initially paying approximately one-third of the mortgage payments. He was on at least one loan agreement with Klingshirn. After approximately seven years Tischbein evened up his investment in the Main House with Klingshirn's. Still, it wasn't until 1998, that Tischbein was put on the deed with Klingshirn as a co-owner. Large sums were spent on the purchase of the Coach House and the improvements of the two properties in 1993-94, yet nothing was put into writing specifying the percentage of ownership or expense obligations of Klingshirn, Tischbein and Rankin.

The deeds to the Coach House and the Main House were never combined to reflect one property, but they all treated them as one. When they split the property they simply conveyed the original deeds to each other. The failure to specify in the deeds that the Main House garage was part of the Main House property would appear typical of the manner in which Klingshirn, Tischbein and Rankin did business together.

Tischbein and Rankin testified that they believed that they got exclusive ownership of the Main House garage upon realignment of the properties in 2001. Rankin testified that in 2001, when the properties were conveyed to each other, they had a verbal agreement that she and Tischbein would retain exclusive ownership of the Main House garage.

In every way Tischbein and Rankin openly treated the Main House garage as their property. When Klingshirn put the Coach House on the market and the realtor printed flyers showing the property had two garages, Tischbein and Rankin immediately objected by expressing that the Coach House had only one garage. Klingshirn acted consistent with that belief by changing the sales literature.

When Tischbein and Rankin refused to purchase the Coach House from Klingshirn, and pulled out of selling the two properties together, Klingshirn admitted he was hurt and upset. It wasn't until he had potential buyers show interest that he expressly claimed ownership. That expression, however, was to the potential buyers, not Tischbein and Rankin, and it was seventeen years after he obtained exclusive ownership of the Coach House.

Even if Tischbein and Rankin exercised ownership of the garage knowing the title was with Klingshirn the hostility element of adverse possession is not destroyed. The fact that Klingshirn did not object to Tischbein and Rankin's continued use of the garage after the deeds were executed does not constitute permission. "The owner's mere knowledge of the possession [by a third party] … [does] not destroy hostility."[17]

Without some act by Klingshirn conveying his assent to Tischbein and Rankins's use of his property, permission cannot be implied. Otherwise, there would essentially be no claim for adverse possession in the Commonwealth of Kentucky.

The only people who can testify as to whether, at any time during the fifteen years beginning in 2001, Klingshirn made any assertion that Tischbein's and Rankin's use of the garage was permissive are Klingshirn, Tischbein and Rankin. Tischbein and Rankin testified that he did not. Klingshirn testified that it was never discussed after the 1993-94 renovation plans when all three parties owned the Coach House.

There were two affidavits executed by Klingshirn after the onset of this legal controversy. One was on August 27, 2018, after his discussion with Lorrie Hill, wherein he made the conclusory statement that from 2001 through 2018 Tischbein's and Rankin's use was permissive

[17] *Herringer v. Brewster*, 357 S.W.3d 920, 930 (Ky.App.2012), citing 3 Robert W. Keats, et. al., *Kentucky Practice: Methods of Practice* ¶5.3 (3d ed. 1989).

and that they knew or should have known that the use was an ongoing gesture of goodwill and friendship. He made no claim that he made any act or gesture to convey that to them.

The second affidavit was executed on May 2, 2019 well after this action was underway. In that one he states that he "allowed and permitted the Tischbeins to continue to use the second garage at 109 Shelby, even though they no longer had an ownership interest in the property." When specifically asked about that permission in deposition, he testified that they never discussed it during the period of time that he owned the Coach House exclusively. He further states in his affidavit that he informed the Hills that he allowed the Tischbeins to use the Main House garage pursuant to a gentlemen's agreement. All Klingshirn testimony regarding verbal agreement of the use of the Main House garage referenced the "gentlemen's agreement" entered into around 1993 when he and Tischbein both owned the Coach House and discussed plans for the building of the garage, the walkway to Riverside Drive and other renovations.

Following both affidavits Klingshirn was deposed. Once on June 17, 2019 and once on July 2, 2019. When asked directly whether he specifically gave permission to Tischbein and Rankin to use the Main House garage upon and since realignment of the property in 2001, he simply said it was assumed. Again, he pointed to no positive act conveying his assent to their use of the garage.

In deposition, Klingshirn testified that he assumed either the two properties would be sold together, or that Tischbein and Rankin would buy the Coach House from him when he was ready, so there was no need to discuss who owned the Main House garage. Klingshirn's internal thought process, however, is not equivalent to an act of assent. He has shown no act inferring or expressing permission.

Klingshirn's testimony of the facts surrounding the division of the property in 2001, the timing of the "gentleman's agreement" around 1993 when they bought the Coach House together and planned renovations, his testimony that Tischbein believed he owned the garage and he that never made an expression to the contrary to Tischbein, and his own behavior toward Tischbein's use of the garage for the seventeen (17) years beginning in 2001 make it clear that no expression of permission to use or act of assertion of ownership of the garage was ever conveyed to Tischbein and Rankin during the period that he was the sole owner of the Coach House. The 1993 gentlemen's agreement was simply an oral agreement establishing shared use of jointly owned property.

Plaintiffs have established title through adverse possession by establishing the existence of all five elements of their claim for a fifteen-year period. Defendants, in turn, have failed to show any act by Klingshirn asserting his ownership or conveying his consent to Tischbein's and Rankins's use of the property which would bar their claim.

Finally, the Hills argue that because Tischbein and Rankin were part owners of the Coach House when it was deeded to Klingshirn, the long-established rule that a vendor of land that remains in possession of the land after the conveyance is deemed to hold under the vendee, not against the vendee applies. The Hills rely on *Dishman v. Marsh*[18]. In *Dishman*, the property in question was land adjoining a home that had been in the grantor's family for many years. Mrs. Dishman conveyed the property to her son-in-law in 1911 in return for their care of her in her later years. Five years later, though, her daughter and son-in-law left town. The son-in-law continued to pay property tax on the property in his name. The property was eventually purchased to satisfy his tax debt.

[18] 128 S.W.2d 235 (Ky.App.1939).

The court found that there was no change of the character of Mrs. Dishman's possession for the twenty years after her son-in-law left town, so there is a presumption that her possession was peaceable. That presumption could only be challenged by a showing of her open, notorious, continuous and adverse possession.[19] The court found that there was no such showing. The court further found and considered that an innocent buyer was involved.

That brings us right back to where we started. There is a *presumption* that the title holder retains ownership of property unless the elements of adverse possession have been proven by clear and convincing evidence.

In this case, the situation is a little more complicated because Klingshirn is also the grantor of the Main House garage. He, along with Tischbein and Rankin, conveyed legal title to himself.

Furthermore, the Hills were not innocent buyers. They purchased the property knowing that Tischbein and Rankin's right to the Main House garage was questionable. The court is not convinced that simply because Tischbein and Rankin did not move out of the garage, then move back in after the 2001 conveyance, they are barred from asserting an adverse possession claim under the vendor/vendee rule.

Easement

Plaintiffs also seek prescriptive and/or quasi easements for the use of the Main House driveway and entrance gate.

"As with adverse possession of a fee simple estate, a prescriptive easement can be acquired by actual, hostile, open and notorious, exclusive and continuous possession of the

[19] *Id.*, at 237.

property for the statutory period of fifteen years."[20] Once those elements are met, the burden shifts to the landowner to offer evidence, either direct or circumstantial, that the claimant's use was permissive only.[21]

For all the reasons stated above finding Plaintiff's adverse possession of the Main House garage, this court finds a prescriptive easement for the use of the driveway and gate to access the Main House garage.

The material facts relied upon by this court to determine the outcome herein are not controverted. The real controversy, as argued by Defendants in the memorandums following the April 6, 2020 order, is the court's characterization of those facts and their application to the law. That makes this matter appropriate for summary judgment. All relevant parties have been deposed. The resolution of this matter lies with their testimony. It is not possible for Defendants to prevail from the facts that exist in the record. The only way they could prevail is if Klingshirn were to change his testimony at trial. If that possibility could preclude summary judgment, there would never be cause for a court to entertain the motion.

Based upon the herein discussion and the court being in all ways advised,

IT IS HEREBY ORDERED AND ADJUDGED by the court as follows:

1. Motion of Plaintiffs, Marc Tischbein and Peggy Rankin, for Summary Judgement on their adverse possession claim regarding the Main House garage and prescriptive easement claim regarding the entry gate and driveway is **SUSTAINED**.

2. Tischbein and Rankin, at their expense, shall have a Kentucky licensed surveyor/engineer prepare a legal description of the adversely possessed property and submit it to the court and Defendants, the Hills, and/or their attorney for any objections. Upon approval

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[20] *Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.*, 15 S.W.3d 727, 730 (Ky.2000).
[21] *Melton v. Cross*, 580 S.W.3d 510 (Ky.2019).

by the court, Tischbein and Rankin shall further submit the description and a corresponding identification plat to the Kenton County and Municipal Planning and Zoning Commission for approval.

4. Tischbein and Rankin, at their expense, shall secure a legal description of the prescriptive easement through the entry gate and over the driveway for access to the Main House garage and submit it to the Defendants, the Hills, and/or their attorney for any objections before submission to the court for approval.

3. Defendants', Hills, Motion to Dismiss Plaintiffs' Claims for Want of Prosecution Pursuant to CR 77.02 is **OVERRULED.**

4. Defendants', Hills, Motion Requesting that the Court Rule on All Pending Motions is **OVERRULED** as now MOOT.

5. Defendants', Hills, Motion to Require Plaintiffs to Post Bond is **OVERRULED** as MOOT.

6. In light of the granting of Plaintiffs' Motion for Summary Judgment on their claims for adverse possession and prescriptive easement, Plaintiffs' Motion to Dismiss Defendants' Second Amended Counterclaim is **SUSTAINED** and those claims are **DISMISSED.**

There being no just cause for delay this is a final and appealable order.

Done this 1st day of February, 2022.

KATHLEEN S. LAPE, J.
Kenton Circuit Judge

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