STATE OF MICHIGAN

COURT OF APPEALS

THOMAS M. BIALEK,

Plaintiff/Counterdefendant-Appellee,

v

JOSEPH F. PILLARS and CAROL J. PILLARS,

Defendants/Counterplaintiffs/Third-Party Appellants.

and

LAWYERS TITLE INSURANCE COMPANY,

Third-Party Defendant-Appellee.

UNPUBLISHED
April 7, 1998

No. 196263
Oscoda Circuit Court
LC No. 95-002280-CH

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendants/counterplaintiffs/third-party plaintiffs ("defendants") appeal by right an order granting summary disposition to plaintiff/counterdefendant ("plaintiff") pursuant to MCR 2.116(C)(8) and (10), and to their title insurer, third-party defendant, pursuant to MCR 2.116(C)(8). Plaintiff filed a complaint requesting injunctive relief to compel defendants, the adjacent land owners, to remove several encroachments from his property. Defendants filed a counterclaim asserting that plaintiff was not the true owner of the parcel in question and requesting that the court quiet title in the land as a private road. Defendants also filed a third party claim seeking to compel their title insurer to defend them during this litigation and to indemnify them. After reviewing the trial court's decision to grant plaintiff's and third party defendant's motions de novo, *West Bloomfield Twp v Karchon*, 209 Mich App 43, 48; 530 NW2d 99 (1995), we affirm.

I

Defendants first argue that the trial court erred in granting plaintiff's motion for summary disposition because there remained a genuine issue of material fact as to whether the grantor originally intended the disputed property to be dedicated for public use. We disagree.

We will affirm the grant of summary disposition pursuant to MCR 2.116(C)(10) where, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Fitch v State Farm Fire and Casualty Co*, 211 Mich App 468, 470-471; 536 NW2d 273 (1995). We must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the nonmoving party and grant the benefit of any reasonable doubt to the opposing party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4).

The parties agree that in August 1953, the DeWitts, the original plattors of the property, conveyed the disputed property to the Wiltons, who are plaintiff's predecessors in interest. Upon reviewing the record, we agree with the trial court that this deed was the ultimate indicator of the original grantor's intent regarding the disputed property and, as discussed below, that it effectively withdrew any prior offer to dedicate the property to the public. See *Kraus v Michigan Dep't of Commerce*, 451 Mich 420, 427-431; 547 NW2d 870 (1996). Indeed, DeWitts' conveyance to plaintiff's predecessors in interest was inconsistent with public ownership. *Id.* at 431. Moreover, defendants never challenged the validity of this deed. Thus, the trial court was correct in determining that further fact-finding, in light of the 1953 deed, would not be required.

Defendants also argue that the trial court erred in granting summary disposition in favor of plaintiff because the disputed property was dedicated to and accepted by the public in its entirely. We disagree. A valid dedication of land for a public purpose requires two elements: (1) a recorded plat designating the areas for public use that evidences the plat proprietor's clear intent to dedicate those areas to public use, and (2) acceptance by the proper public authority. *Kraus*, *supra* at 424; see also *Marx v Dep't of Commerce*, 220 Mich App 66, 76-79; 558 NW2d 460 (1996) (in light of *Kraus*, *supra*, mere township or other public approval of the plat, without reference to acceptance of the property dedicated in the plat, is insufficient to constitute acceptance of a valid dedication of land to the public). In order for the public acceptance of the dedication to be valid, the acceptance must be: (1) timely, and (2) disclosed through a manifest act by the public authority. *Kraus*, *supra*. The requirement of public acceptance by a manifest act, whether formally by confirmation of the dedication or informally by the exercise of authority over it, was necessary to prevent the public from becoming responsible for land that it did not want or need, and to prevent land from becoming waste property, owned or developed by no one. *Id.* Absent timely acceptance by the public, the offer to dedicate may lapse or be withdrawn. *Id.* at 425, 431. As long as the plat proprietor took no steps to withdraw the offer to dedicate by using the property in a way inconsistent with public ownership, the offer will be treated as continuing. *Id.* at 427. Whether the offer to dedicate lapsed or continued depends on the circumstance in each case. *Id.*

In this case, however, whether the disputed property was indeed offered for dedication becomes immaterial because it was clear that the DeWitts withdrew any offer to dedicate when they made the August 1953 conveyance of the disputed property to plaintiff's predecessors in interest. Before that date, no public authority made a manifest act of acceptance, such as passing a formal resolution, opening the road to the public, or exercising regulatory control over it. *Kraus*, *supra* at 424, 431. Given DeWitts' conveyance to plaintiff's predecessors in interest, which was inconsistent with public ownership, we find no error.

II

Defendants next argue that the trial court erred when it barred their claim under the marketable record title act, MCL 565.101 *et seq*.; MSA 26.1271 *et seq*., which states in part that "[a]ny person . . . who has an unbroken chain of title of record to any interest in land for 40 years shall at the end of such period be deemed to have a marketable title to such interest. . . ." MCL 565.101; MSA 26.1271. The statute also exempts, however, certain claims from being extinguished even after the forty-year period has ended. MCL 565.101; MSA 26.1271; MCL 565.104; MSA 26.1274. Specifically, MCL 565.101; MSA 26.1271 allows exemptions for certain interests created through hostile possession, and MCL 565.104; MSA 26.1274 allows exemptions for certain "clearly observable" easements. Defendants concede that the land in dispute has been in plaintiff's chain of title for the requisite forty years. They claim, however, that these exemptions apply. We believe that defendants' actions failed to constitute "hostile possession" because their activities of walking, driving, and plowing snow were not "hostile" as they could be done without a claim of right. Cf. *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 826; 346 NW2d 881 (1984). Another indicator of defendants' lack of hostility was that they requested the trial court to deem the property a "private road" rather than their property. Possession which is permissive or consistent with the title of another is not considered hostile or adverse. See *Burns v Foster*, 348 Mich 8, 15; 81 NW2d 386 (1957). With regard to the easement exemption, physical manifestations of an easement would have to exist before the expiration of the requisite forty years in order to exempt defendants' interest. MCL 565.104; MSA 26.1274. From the record, we believe that any "clearly observable" manifestations did not occur until after the requisite forty year period elapsed. Accordingly, the statutory exemptions contained in § 1 and § 4 of the marketable record title act do not apply.

III

Finally, defendants argue that the trial court erred when it granted summary disposition in favor of their title insurer. Defendants maintain that the dispute was covered by the policy as evidenced by its definition of "land" to include "together with use of private drive as laid out and dedicated in plat known as Big Creek Terrace." Based on this definition, defendants assert that the insurer had a duty to defend and indemnify. We disagree.

In reviewing the grant of a motion for summary disposition under MCR 2.116(C)(8), we look to the pleadings, accept as true all factual allegations and their reasonable inferences, and uphold the grant where no factual development could possibly justify a right of recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *ETT Ambulance Service Corp v Rockford Ambulance*,

Inc, 204 Mich App 392, 395-396; 516 NW2d 498 (1994). In a dispute regarding a contract, however, the trial court may examine the contract itself in conjunction with the motion for summary disposition for failure to state a claim. *Woody v Tamer*, 158 Mich App 764, 770; 405 NW2d 213 (1987). When the contract dispute concerns an insurer's duty to defend, the court must examine the language of the insurance policy to determine the scope of coverage. *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). An insurer's duty to defend is broader than its duty to indemnify and arises in instances where coverage is arguable, even though the claim may be groundless or frivolous. *Polkow v Citizens Ins Co*, 438 Mich 174, 178; 476 NW2d 382 (1991); *Royce, supra.*

The title insurance policy provided coverage if: (1) the insured title vested in a manner otherwise than as stated in the title insurance policy; (2) it was unmarketable; (3) it was subject to liens or encumbrances; or (4) there was no right of access to and from the land. The policy described its coverage by defining the specific "land" and including the language "together with use of private drive as laid out and dedicated in plat known as Big Creek Terrace." The policy further described "land" in its definition section as *not* including "any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured."

Notably, defendants did not claim title to the disputed property but rather requested that the trial court quiet title to the property as a "private road." Indeed, this property interest was not covered by the policy. Even if defendants argue that the private drive referenced on the original plat map was an easement or a right of access, that interest would not be included in the policy's definition of "land" because the access to defendants' own property was never disputed. The language of the policy unambiguously provided that this type of claim was not covered. Therefore, the insurer had neither the duty to defend nor indemnify for this claim.

We affirm.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ Jane E. Markey