STATE OF MICHIGAN

COURT OF APPEALS

DEVRIES DEVELOPMENT AND NM LAND DEVELOPMENT COMPANY, LLC, Plaintiffs/Counterdefendants-Appellees,	UNPUBLISHED February 2, 1999
v	No. 205175 Kent Circuit Court
EXTRA ROOM OF KALAMAZOO, Defendant/Counterplaintiff-Appellant.	LC No. 97-003399 CH

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs brought this declaratory judgment action seeking a declaration that plaintiffs have a prescriptive easement over a six-foot-wide common hallway located between the parties' buildings. The hallway contains a staircase leading to the upper levels of both parties' buildings. Defendant appeals as of right the trial court's grant of summary disposition in favor of plaintiff. The trial court determined that both parties have a prescriptive easement over the hallway and that plaintiffs have the right to modify the staircase for use as a fire escape. We affirm the trial court's determination that plaintiffs have a prescriptive easement over the hallway, and remand to the trial court for a determination of (1) the original purpose of the easement, (2) whether plaintiffs' proposed improvements are necessary for plaintiffs to fulfill the purpose of the easement and, if so, (3) whether the proposed improvements pose an unreasonable burden on defendant's estate.

Defendant first argues that plaintiffs failed to show adverse use of the shared hallway and stairs and, consequently, failed to satisfy the requirements for establishing a prescriptive easement. To establish a prescriptive easement, a plaintiff must show:

> [f]irst, a continued and uninterrupted use or enjoyment; second, identity of the thing enjoyed; third, a claim of right adverse to the owner of the soil, known to and acquiesced in by him. The accepted rule is that the user must be exercised by the owner of the dominant tenement, and must be open, peaceable, continuous, and as of right. [*Engleman v Kalamazoo*, 229 Mich 603, 606; 201 NW 880 (1925).]

Defendant argues that mutual use never ended, and therefore adverse use never began. For purposes of this case, all parties agree that use of the stairs and hallway began permissively. However, mutuality ends when the owner of the servient property conveys that property. Cameron, 1 Mich Real Property, 2d, § 6.12, p 205. See also *Sallan Jewelry Co v Bird*, 240 Mich 346, 348; 215 NW 349 (1927). Unless the new owner grants permission to those parties who previously enjoyed a license to use the land, any continued use is adverse. Here, title to both buildings has been conveyed several times, there is no record that permission was given or renewed with each conveyance, and the use is in excess of the statutory period. Therefore a presumption of adverse possession arises and the burden shifts to the servient estate owner to show that use was merely permissive. *Reed v Soltys*, 106 Mich App 341, 346; 308 NW2d 201 (1981).

Defendant directs this Court's attention to cases involving shared driveways, where our Supreme Court and this Court have held that a prescriptive easement does not arise until mutual use ends. At first blush, these cases arguably appear contradictory to the general principle that conveyance of the servient estate rescinds the license to use. However, the tension is more apparent than real. In *Reed*, *supra* at 347, there was substantial evidence that the use had been permissive, not adverse. In *Banach v Lawera*, 330 Mich 436; 47 NW2d 679 (1951), our Supreme Court held that use of a shared driveway did not ripen into an easement because the plaintiffs had not "shown by the requisite degree of certainty" adverse use for the requisite period of time. *Id.* at 443. However, there was no suggestion in *Banach* that the plaintiffs were entitled to the presumption that arises with long term use and multiple conveyances, which are both present in the instant case.

We also distinguish the cases cited by defendant based on their subject matter. Both dealt with shared driveways, not hallways and staircases. While both provide ingress and egress, in many cases the location of a driveway is simply a question of convenience. In cases involving staircases, the use is often necessary, because the stairs provide the only practical access to a building's upper floors. Our Supreme Court has consistently held that in cases like this one, where two buildings have shared a staircase for so many years, there is a presumption of adverse use and prescriptive easement. *Sallan*, *supra* at 348. Therefore, the trial court correctly held that each party holds a reciprocal easement in the hallway and staircase.

Defendant next argues that, even if adverse use did ripen into a prescriptive easement, that easement has lapsed from nonuser. Unlike easements stemming from written grants, prescriptive easements can lapse from mere nonuse. *McDonald v Sargent*, 308 Mich 341, 344; 13 NW2d 843 (1944). However, in this case the staircase itself acted as a sort of adverse use of the common space. It is unnecessary for plaintiffs to show that they actually used the staircase for the prescriptive period; that they simply retained it as their only access to their upper levels until 1997 is sufficient.

Defendant's final argument is that plaintiffs' improvements will impose an unreasonable burden on its building. In *Mumrow v Riddle*, 67 Mich App 693; 242 NW2d 489 (1976), this Court articulated a two-fold test for determining whether particular improvements fall within the dominant estate's privilege to make those improvements necessary for it to effectively enjoy the easement. First we consider whether the improvement is necessary for plaintiffs to effectively enjoy their easement. *Id.*

at 700. Second, even if it is necessary, we consider whether it will unreasonably burden the servient estate. *Id*. "Improvements" receive greater scrutiny than repairs. *Id.*

The record in this case is insufficient to permit meaningful application of the test. First, the purpose of the original easement is not entirely clear, so we cannot determine what is necessary for its enjoyment. Plaintiffs argue that they should be allowed to widen and lengthen the staircase so that it can be used as a fire escape. However, the record is void of any evidence that the staircase has ever been used as a fire escape. Rather, the record suggests that the staircase was simply used as a means of ingress and egress. If the latter is true, use of the staircase as a fire escape is outside the scope of the original easement. Widening the staircase for use as a fire escape, therefore, would not be *necessary* to enable plaintiffs to effectively enjoy the existing easement, but rather may be necessary for them to enjoy the easement for a purpose never before ascribed to it. On remand, the trial court shall make findings with respect to the purpose of the original easement and to whether plaintiffs' proposed improvements are necessary for effective enjoyment of that easement.

Second, the trial court was not entirely correct that "absolutely nothing has been presented which even suggests . . . [a] burden on the servient tenement." The record strongly suggests that, in order to widen the staircase, plaintiffs will need to remove an elevator shaft lying entirely on defendant's property. Defense counsel noted this fact at the hearing on plaintiffs' motion. Such improvements appear to require significant modification of defendant's building.[1] On remand, the trial court shall carefully ascertain the full extent to which plaintiff's proposed modifications will burden defendant's building.

We note, without deciding whether plaintiffs can make their improvements, that plaintiffs are not without options in this case. They can build the fire escape within their building (as defendant had to do when the previous owner of plaintiffs' building refused to allow renovation of the common area). Plaintiffs advance two arguments against this point. First, building the fire escape within their building would increase renovation costs and require that they use otherwise leaseable space. However, under *Mumrow*, the trial court should analyze the burden to the servient estate, not the cost of plaintiffs' alternative renovation plans. Second, they argue that this is the only plan that allows them use of this easement. However, plaintiffs' desire to use this easement is not relevant to whether the proposed use is permissible under the *Mumrow* test.

Remanding for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Michael J. Kelly
/s/ Roman S. Gribbs
/s/ E. Thomas Fitzgerald

[1] Given that the paving of an existing gravel driveway in *Mumrow* is considered an unreasonable burden, it is hard to imagine that the construction apparently required for this staircase is reasonable.