STATE OF MICHIGAN

COURT OF APPEALS

THOMAS C. ROSE and KATHLEEN ANN ROSE,

Plaintiffs-Appellees,

v

ROBERT J. GREEN,

Defendant-Appellant,

and

DOREEN K. GREEN,

Defendant.

UNPUBLISHED
May 18, 1999

No. 206524
Oakland Circuit Court
LC No. 96-532056 CH

Before: Markey, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting summary disposition to plaintiffs. We affirm.

This dispute involves two easements across plaintiffs' lakefront property that were created by a subdivision plat in 1925. Defendant owns a parcel across the street, and claims a right to walk across plaintiffs' land to reach Walter's Lake.

I

We review de novo a grant of summary disposition. *Carlyon v Mutual of Omaha*, 220 Mich App 444 , 446; 559 NW2d 407 (1996). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we must consider the pleadings, affidavits, admissions, depositions and any other documentary evidence available in a light most favorable to the nonmoving party in order to determine whether there is a genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). All reasonable inferences must be made in favor of the nonmoving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

II

Defendant first argues that the trial court erred in granting summary disposition to plaintiffs because, as a lot owner in the subdivision, defendant has the right to use the easements at issue. We disagree.

An easement is an interest in land that gives one proprietor some right to use the estate of another. *Young v Thendara*, 328 Mich 42, 50-51; 43 NW2d 58 (1950). Express easements are created only when there is language in the writing that manifests a clear intent to create the easement, such that no other construction can be placed on the face of the instrument that created the easement. *Forge v Smith*, 458 Mich 198, 205, 205 n 17; 580 NW2d 876 (1998). The writing can be in the form of a subdivision plat if it was properly recorded. *Walker v Bennett*, 111 Mich App 40, 43; 315 NW2d 142 (1981). Express easements created by subdivision plat have all the force of any other express grant, and, therefore, are binding on the original owners as well as all persons claiming through them. *Kirchen v Remenga*, 291 Mich 94, 109-110; 288 NW 344 (1939).

Here, the subdivision plat was properly recorded, and the fact that the easements are clearly delineated and labeled indicates an unmistakable intent on the part of the original owners to create the easements in question. Therefore, they are express easements and they are binding on all persons claiming through the original owners, including plaintiffs. However, the existence of binding easements does not lead necessarily to the conclusion that any lot-owner may use the easements on plaintiffs' property, because an easement, like any interest in land, can be enforced only by those to whom it was conveyed. See *Choals v Plummer*, 353 Mich 64, 70-71; 90 NW2d 851 (1958). Therefore, we must determine for whose benefit the easements at issue were created, which is determined by ascertaining the grantors' intent. *Id.*

In order to determine the intent of the grantors, we must construe the language of conveyance in light of the circumstances that existed when the grant was made in order to arrive at a logical interpretation. *Choals, supra* at 71. In this case, the grantors did not express an intent to dedicate the easements to all lot-owners. The language of dedication, which was handwritten on the subdivision plat, dedicated only the streets, intersections, canals, and parkways to the use of all property owners. An examination of the plat leads logically to the conclusion that the easements were not intended for public use. All of the parcels dedicated expressly for public use are indicated by a solid line, and do not run across any lot. This includes the "promenade," a footpath that directly encircles the lake. Defendant argues that the fact that the promenade was not included in the dedication, when plaintiffs admit it was for public use, means that the easements were just as likely overlooked, rather than deliberately left out of the dedication language. We disagree. The promenade, like other public areas, was indicated by solid lines, and did not run across any lot. Further, the nature of the promenade does not allow for any other reasonable explanation. The same cannot be said of the easements.

The easements occur only in the area of the subdivision in which there are two lots, rather than one, between the lake and the road. Further, they were placed directly on the lots involved and are indicated by dashed lines. For these reasons, it is logical to interpret the easements as existing to provide ingress and egress to the landlocked, lakefront lots, and as extending the entire way to the lake

to allow further splitting of these lots. It cannot be said that the grantors showed a clear and unequivocal intent to dedicate these easements to all property owners in the subdivision. See *Att'y Gen'l ex rel Dep't of Natural Resources v Cheboygan Co Bd of Rd Comm'rs*, 217 Mich App 83, 88; 550 NW2d 821 (1996).

Defendant argues further that, even though the easements were not dedicated to the lot-owners, and even if the grantors did not intend the easements to benefit all lot-owners, the easements confer usage rights on the other lot-owners by operation of law. Lot-owners can acquire rights beyond those in their deeds when they purchase land in a platted subdivision. *Pulcifer v Bishop*, 246 Mich 579, 582; 225 NW 3 (1929). See also *Nelson v Roscommon Co Rd Comm*, 117 Mich App 125, 131; 323 NW2d 621 (1982). As originally stated in Michigan, the rule was that, by the act of platting and selling lots, an owner dedicated streets and ways to those who purchased from the owners, even when there was no dedication to the public. *Pulcifer, supra* at 582-583. The Supreme Court subsequently extended the rule to apply to parks. *Petition of Engelhardt*, 368 Mich 399, 402; 118 NW2d 242 (1962). Defendant's argument, in essence, urges this Court to extend this rule to any easement on any plat. We decline to do so. Such a broad application of the rule could contravene intent of owners to establish easements only as between certain lots in the subdivision for much less public purposes than those served by streets and parks. The trial court did not err in holding that the other lot-owners in the subdivision do not have a right to use the easements on plaintiffs' land.

III

Next, defendant argues that summary disposition was erroneously granted to plaintiffs because a question of material fact existed regarding whether defendant's use of the easements over his lifetime has created a prescriptive easement to his benefit. Again, we disagree.

Prescriptive easements arise from the open, notorious, continuous, and adverse use of another's property for a fifteen-year period. *Goodall v Whitefish Hunt Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995). The principle that underlies the doctrine is that, when one person actually uses or possesses the land of another in a way that is openly adverse to another's ownership for such a long time, "the law presumes that the true owner, by his acquiescence, has granted the land, or interest in the land, so held adversely." *Turner v Hart*, 71 Mich 128, 138; 38 NW 890 (1888).

Because of the nature and purpose of the doctrine, the fifteen-year time period does not begin to run until the owner of the servient estate (in this case, plaintiffs) has actual notice of the adverse use. *Menter v First Baptist Church of Eaton Rapids*, 159 Mich 21, 25; 123 NW 585 (1909). While actual notice "may be determined by the character of the use," the use must be "so open, notorious, and hostile as to leave no doubt in the mind of the owner of the land that his rights are invaded." *Id*.

The trial court held that defendant's use of plaintiffs' land to walk to the lake was not continuous enough to give rise to a prescriptive easement. On appeal, defendant makes a reasonable argument that the use was continuous, based on the rule that continuity is determined with reference to "the nature and character of the right claimed." *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971). An easement may be said to be used continuously even when it is only used seasonally if, as in the

present case, the property only lends itself to seasonal use, as was the case with defendant's property. See *id.*

However, we do not believe that it is helpful to discuss one element of prescriptive easement in isolation. The real question is whether defendant's use, in addition to being adverse, was open, notorious, and continuous enough that it put the landowners on notice that their rights had been invaded, followed by a fifteen-year period in which the landowners took no legal action to protect their property rights. See *Menter, supra* at 25.

The party claiming that a prescriptive easement has arisen has the burden of establishing the elements of prescriptive easement. *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985). Defendant presented no evidence that he was using the easement without the permission of the previous owners, and prescriptive easements can never arise from permissive use. *Menter, supra* at 25. Therefore, no prescriptive easement could have existed to bind plaintiffs as successors in interest to previous owners.

The evidence showed that plaintiffs actually knew of the use in 1989, seven years before they filed this cause of action. The circumstances in this case are not such that actual notice can be inferred before 1989. See *Mentor, supra* at 25. Although defendant made no attempt to hide his use of the shortcut, his use was not so continuous as to make it reasonable to assume that plaintiffs must have actually seen him use the shortcut before. He never used the shortcut more than twelve times per year after the age of five, at which time plaintiffs had not yet acquired their property. Nor did defendant's use leave visible marks so that it would be reasonable to expect plaintiffs to have seen evidence of his passing and to have investigated.

After examining the facts in the light most favorable to defendant as the nonmoving party, we find no genuine issue of material fact as to whether a prescriptive easement had arisen. Accordingly, plaintiffs were entitled to judgment as a matter of law.

Affirmed.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff