

STATE OF MICHIGAN
COURT OF APPEALS

TOM J. KOVACH BUILDER, INC.,

Plaintiff/Counter defendant/Fourth-
Party Defendant/Appellee,

v

JERRY E. VOORHIES and PAULETTE
VOORHIES,

Defendants/Counter plaintiffs/Third-
Party Plaintiffs/Appellants,

and

RIAD KATTUAH, d/b/a LASER SURVEY, and
STANDARD FEDERAL BANK,

Third-Party Defendants/Fourth-Party
Defendants,

and

LEE DYAMENT and JENNIFER DYAMENT,

Third-Party Defendants/Fourth-Party
Plaintiffs/Appellees.

TOM J. KOVACH BUILDER, INC.,

Plaintiff/Counter defendant/Fourth-
Party Defendant/Appellee,

v

UNPUBLISHED
June 11, 1999

No. 202708
Livingston Circuit Court
LC No. 95-014073 CK

No. 202709
Livingston Circuit Court

JERRY E. VOORHIES and PAULETTE
VOORHIES,

LC No. 95-014073 CK

Defendants/Counter plaintiffs/Third-
Party Plaintiffs/Appellees,

and

RIAD KATTUAH, d/b/a LASER SURVEY, and
STANDARD FEDERAL BANK,

Third-Party Defendants/Fourth-Party
Defendants,

and

LEE DYAMENT and JENNIFER DYAMENT,

Third-Party Defendants/Fourth-Party
Plaintiffs/Appellants.

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

This is a consolidated appeal. In Docket No. 202708, Jerry and Paulette Voorhies appeal as of right from the trial court's order granting a directed verdict in favor of Tom J. Kovach Builder, Inc. (Kovach) on the Voorhies' claim for breach of contract resulting in loss of marketable title. In Docket No. 202709, Lee and Jennifer Dyament appeal as of right from the trial court's order granting a directed verdict in favor of Kovach on the Dyaments' claims for negligence and trespass. We affirm in part, reverse in part, and remand for further proceedings.

The Voorhies and Dyaments own adjacent parcels of land. The Voorhies contracted with Kovach to build a house on their lot. After completion of the Voorhies' house, the Dyaments conducted a survey of their land, in preparation for the building of their own house, and discovered that the Voorhies' garage sat approximately four feet over the boundary line, encroaching on about eight square feet of the Dyaments' property. It was discovered that Kovach had not done a survey of the Voorhies' property before building the house. The Dyaments informed the Voorhies of the encroachment and this lawsuit ensued. Kovach initially sued the Voorhies for breach of contract, the Voorhies and Dyaments sued each other, and both filed actions against Kovach.¹ The Voorhies' claim against Kovach was for breach of contract resulting in loss of marketable title, and they added a third-party complaint against the Dyaments, requesting an injunction to force a sale of a portion of the

Dyaments' property. In their fourth-party complaint, the Dyaments alleged claims against the Voorhies for trespass and nuisance, and claims against Kovach for trespass and negligence. The Dyaments also requested an injunction against the Voorhies to force them to remove the encroachment and requested damages from both parties. During trial, the trial court ultimately granted a directed verdict in favor of Kovach on the Voorhies' claim of breach of contract and the Dyaments' claims of negligence and trespass for reasons that will be more fully stated below.

Docket No. 202708

We first address the Voorhies' contention that the trial court abused its discretion in denying their motion to amend the complaint to conform to the pleadings to add a claim of negligence. On appeal, the Voorhies contend that Kovach negligently breached his statutory duty as builder of the premises, but the Voorhies cite no statute that they contend Kovach breached. Thus, this issue is not properly presented to this Court, since we will not search for authority to sustain a party's position. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). Moreover, the Voorhies have otherwise failed to establish a claim of negligence by failing to establish a distinct duty owed by Kovach outside of the contractual duty. *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 83-84; 559 NW2d 647 (1997). Accordingly, the trial court did not abuse its discretion in denying the motion to amend the complaint where such would be futile. *Weyemers v Khera*, 454 Mich 639, 654, 658; 563 NW2d 647 (1997).

Next, the Voorhies argue that the trial court erred in granting a directed verdict in favor of Kovach with respect to their claim of breach of contract resulting in loss of marketable title. This Court reviews de novo a trial court's ruling on a motion for a directed verdict. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). When evaluating such a motion, the court must consider the evidence and all reasonable inferences in a light most favorable to the nonmoving party to determine whether the nonmoving party made a prima facie showing of each of the elements of the claim. *Locke v Pachtman*, 446 Mich 216, 222-223; 521 NW2d 786 (1994).

In their second amended counterclaim, the Voorhies alleged in count II that as a result of Kovach's "gross mistake," the Voorhies' house was unmarketable because they could not offer clear title to the house, could not sell the house, and that damages were in an amount of the value of the house. The Voorhies requested \$500,000 in damages. At trial, the trial court indicated to the parties that it was going to require the removal of the garage from the Dyaments' property as a remedy to the encroachment issue. The Voorhies and Dyaments did not want this remedy, so both parties withdrew any equitable claims they had. The Voorhies at trial sought money damages against Kovach for the difference in the value of the property due to Kovach's breach of the building contract.

It perhaps bears emphasizing at this point that this issue concerns the Voorhies' claim against Kovach only. Considering the number of parties involved, and the claims and counterclaims in the case, it needs to be emphasized the parties involved in this issue because the trial court's decision to order the removal of the encroachment does not effectively deal with the Voorhies' claim against Kovach unless Kovach is liable for some type of money damages. This is especially so because there was clear evidence presented at trial that Kovach breached the contract with the Voorhies because he did not

build their house completely on their property as the contract required and the building of the house did not comply with the plot plan submitted to the township. The contract provided that the “Builder shall provide, or cause to be provided, the purchase of the material, labor and supervision for the erection and completion of a single family dwelling on the Owners premises.” In fact, Tom Kovach admitted at trial that the garage encroached onto the Dyaments’ land, but contended that the fault was with the Voorhies’ representation concerning the property boundaries and proper placement of the house. Kovach did not have a survey done before building the house. Other evidence at trial indicated that Kovach breached the building contract by not constructing the house completely on the Voorhies’ property, nor within the ordinance requirement that the building be ten-feet back from the property lines. Kovach filed the land use application and plot plan with the township and, as such, agreed to conform to the local ordinances. Moreover, the contract specifically incorporated the plot plan and ordinance specifications.

The trial court’s reasons for granting the directed verdict were erroneous. First, contrary to the trial court’s ruling, the Voorhies did establish that they suffered damages as a result of the fact that Kovach breached the contract by building the garage on another’s property. The Voorhies presented the testimony of Lora Edwards, a licensed real estate agent, that with the encroachment the property could not be sold, but without the encroachment the property could sell for \$250,000 to \$275,000. She also testified that the house might sell for \$350,000 to \$375,000 if the house had been placed on the property in accord with the ordinances. The Voorhies also presented testimony from Eric Riske and James Davis regarding the cost of moving the house to a proper position on the property.

This evidence was sufficient to establish damages for a claim of breach of contract resulting in loss of marketable title. Marketable title is that of such a character as should assure the buyer the quiet and peaceful enjoyment of the property which must be free from encumbrances. *Madhaven v Sucher*, 105 Mich App 284, 288; 306 NW2d 481 (1981), citing *Barnard v Brown*, 112 Mich 452; 70 NW 1038 (1897). An encumbrance is anything which constitutes a burden on the title. *Madhaven, supra*, p 284, citing *Post v Campau*, 42 Mich 90; 2 NW 272 (1879). A title may be regarded as “unmarketable” where a reasonably prudent person, familiar with the facts, would refuse to accept title in the ordinary course of business, and it is not necessary that the title actually be bad in order to render it unmarketable. *Madhaven, supra*, p 288, citing *Bartos v Czerwinski*, 323 Mich 87; 34 NW2d 566 (1948). In the present case, the Voorhies presented testimony from a licensed real estate agent that the property could not be sold with the encroachment on the Dyaments’ property. This evidence was sufficient to establish damages for a claim of loss of marketable title, therefore, we conclude that the trial court erred in ruling that the Voorhies had not established any damages on the basis that there was no evidence that the Voorhies attempted to or desired to sell their property.

Further, we disagree with the trial court’s conclusion that any ongoing injury was caused by the Voorhies’ own conduct at trial and not by the encroachment. First, the record does not support the conclusion that the Voorhies and the Dyaments entered into a separate agreement to convey the property. In this regard, we initially note that it was counsel for *Kovach* who suggested that the Dyaments and Voorhies had made a separate private agreement. Lee Dyament, Paulette Voorhies, and Jerry Voorhies all denied the existence of any such agreement (Jennifer Dyament was not in the

courtroom at the time). The Dyaments' attorney also denied the existence of an agreement. Counsel for the Voorhies only stated "the full extent of the agreement" had not been established, no price had been effected, but there would be some conveyance to avoid any equitable decision by the trial court.

Further, it bears noting that the trial court clearly made a factual finding in granting Kovach's motion for a directed verdict and denying the Voorhies' motion for new trial when it ruled that a "collusive private agreement" was reached between the Voorhies and the Dyaments. There is no evidence of any such collusive agreement, because there was no written contract evidencing a sale of property. Even if the Voorhies and Dyaments agreed to convey some property, this would not affect the Voorhies' claim against *Kovach*. It was Kovach's initial breach of the building contract that resulted in the encroachment and if there was some conveyance of the property, it was due to Kovach's breach. Removing the garage does not address the damages claim as between the Voorhies and Kovach.

Here, the Voorhies were seeking damages for a legal claim: breach of contract resulting in loss of marketable title against Kovach. Further, the Voorhies' request for legal damages, as opposed to equitable relief, is entirely proper in an encroachment case. This has been recognized by our Supreme Court in *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 142-143; 500 NW2d 115 (1993). "Fashioning an appropriate remedy where a structure encroaches on the land of another poses special problems and has resulted in special solutions." *Id.*, p 142. Further, "if it is apparent that the [injunctive] relief sought is disproportioned to the nature and extent of the injury sustained, or likely will be, the court will not interfere but will leave the parties to seek some other remedy." *Id.*, p 143, quoting *Hall v Rood*, 40 Mich 46, 49 (1879).

The Voorhies in this case sought a remedy of legal damages. The hardship, including the associated cost, in removing the encroachment was clearly set forth at trial. Thus, the Voorhies' request to withdraw any equitable relief was proper and the trial court should not have removed the issue of damages from the jury's consideration. Accordingly, we conclude that the trial court erred in granting a directed verdict in favor of Kovach with respect to the Voorhies' claim for breach of contract and we remand for a new trial on this claim.²

Docket No. 202709

In this appeal, the Dyaments argue that the trial court erred in granting a directed verdict in favor of Kovach with respect to their claims of trespass and negligence.

A trespass is an unauthorized invasion upon the private property of another. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995). The actor must intend to intrude on the property of another without authorization to do so. *Id.* If the intrusion was due to an accident caused by negligence or an abnormally dangerous condition, an action for trespass is not proper. *Id.*, citing Prosser & Keaton, Torts (5th ed), § 13, pp 73-74. Here, there was no evidence that Kovach intentionally trespassed onto the Dyament's property. A directed verdict on the Dyament's claim of trespass was therefore proper.

Next, with respect to the negligence claim against Kovach, the trial court found that the Dyaments did not make a showing of damages, again believing that there was an agreement to convey land between the Dyaments and the Voorhies and indicating that it would require removal of the garage so that there would not be an encroachment. However, the Dyaments specifically withdrew their request for equitable relief (to have the encroachment removed) and sought only money damages. This is entirely reasonable since the Dyaments' negligence claim was against Kovach. The Dyaments could not request removal of the encroachment where Kovach was concerned because he did not own the land. Thus, the trial court erred in attempting to impose any type of equitable remedy on behalf of the Dyaments regarding their claims against Kovach.

Further, the Dyaments established that they suffered damages to their property as a result of the encroachment created by Kovach. Generally, courts will measure damages in an action for injury to land by the difference between the value of the land before the harm and the value after the harm. *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997). Here, the Dyaments' expert witness in residential real estate appraisals testified that the encroachment diminished the value of the Dyaments' property by \$50,000. The Dyaments testified that they changed the design and location of their house because of the encroachment, and eliminated a planned circular driveway, two-car garage with a breezeway, and a walk-out basement. Considering this evidence, we conclude that it was sufficient to allow a jury to determine what damages, if any, the Dyaments are entitled to because of the encroachment caused by Kovach's negligence.³

The Voorhies and Dyaments also request that this case be remanded to a new trial judge. Although, the parties have failed to show bias or any other reason set forth in MCR 2.003(B), counsel indicated at oral argument that the trial court filed a grievance against the Dyaments' attorney in this matter. For that reason, and to preserve the appearance of justice, we remand this matter to be considered by a new trial court.

In Docket No. 202708, we reverse the trial court's grant of a directed verdict in favor of Kovach regarding the Voorhies' claim for breach of contract resulting in loss of marketable title and remand for a new trial on that claim only. We affirm the denial of the Voorhies' motion to amend the pleadings. In Docket No. 202709, we reverse the trial court's grant of a directed verdict in favor of Kovach regarding the Dyaments' claim of negligence and remand for the limited purpose of determining damages. We affirm the trial court's dismissal of the Dyaments' claim of trespass. Jurisdiction is not retained.

/s/ Gary R. McDonald

/s/ Kathleen Jansen

¹ The breach of contract action between Kovach and the Voorhies involved money allegedly owed to Kovach by the Voorhies and the Voorhies counterclaim of poor workmanship. That claim was submitted to binding arbitration and is not the subject of this appeal.

² The Voorhies also argue that the trial court abused its discretion in denying their motion for a new trial, but they raise the same issues as concerning the motion for a directed verdict. Thus, we need not further consider the same argument. In any event, we are ordering a new trial on the claim of breach of contract resulting in loss of marketable title.

³ The Dyaments, like the Voorhies, also argue that the trial court abused its discretion in denying their motion for a new trial, but do not raise any additional arguments. We conclude that the Dyaments are entitled to a new trial concerning what damages, if any, they are entitled to because of Kovach's negligence in building the encroachment.