STATE OF MICHIGAN

COURT OF APPEALS

RONALD SMALTZ and MARLENE SMALTZ,

Plaintiffs/Counterdefendants-Appellees,

v

MERLE LLOYD,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
February 15, 2000

No. 208952
Osceola Circuit Court
LC No. 95-007069 CH

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right from the December 29, 1997, order of judgment entered after a bench trial. We affirm.

The trial court enjoined defendant from using roads within a platted subdivision to access land he owns outside the boundaries of the subdivision. The trial court also dismissed defendant's counter-complaint, which sought to force plaintiffs to remove encroachments from the right-of-way of a subdivision road. On appeal, defendant argues that the trial court erred in awarding plaintiffs equitable relief because they had unclean hands, erred in ruling that a plat dedication entitled plaintiffs and other owners of lots in the subdivision to have exclusive use of the subdivision's roads and parks, and erred in ruling that defendant was not entitled to continue his use of the roads for access to his property located outside the platted subdivision.

Initially defendant argues that the trial court erred in failing to order plaintiffs to remove encroachments in road right-of-way. When property is encroached on, fashioning an appropriate remedy requires the balancing of the relative hardship to the parties and the equities between them. Ultimately, the factors may balance in favor of denying relief to the party seeking the removal of the encroachment. *Kratze v Independent Order of Oddfellows, Garden City Lodge No 11*, 442 Mich 136, 142; 500 NW2d 115 (1993). No balancing of the hardships is required if the encroachment resulted from an intentional or willful act. *Kernen v Homestead Development Co*, 232 Mich App 503, 508; 591 NW2d 369 (1998).

In the instant case, plaintiffs placed a culvert, rocks, a garden, a portion of a septic drainfield and a propane tank in the sixty-foot right-of-way of the road. All parties testified that none of these encroachments interfered with the nine to ten feet that made up the traveled portion of the road. Further, a surveyor hired by defendant testified that the rocks placed in the ditch may actually maintain the stability of the road by preventing erosion. Defendant did not place proofs on the record that tended to show that plaintiffs willfully and intentionally placed encroachments in the right-of-way of the road. Therefore, it was appropriate for the trial court, in balancing the equities, to rule that the encroachments need not be removed.

Next, defendant argues that plaintiffs sought equity without clean hands, citing their encroachments and use of subdivision roads to access their non-subdivision lot. It is a well-established equitable maxim that those who seek equity must do so with "clean hands." *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975). Any willful act that transgresses equitable standards of conduct is sufficient to allow a court to deny a party equitable relief. *Id*. at 386.

While plaintiffs admittedly walk over a subdivision road to mow or play tether ball on their parcel of non-subdivision land, their use of the road does not burden or increase the traffic on the road system. Rather, plaintiffs' use is incidental to the ownership of their subdivision land. Plaintiffs do not engage in the same conduct they sought to enjoin, since they merely walk across a narrow strip of road. This is in no way identical to non-subdivision owners traveling by car or truck through the subdivision. The trial court properly concluded that plaintiffs were not prevented from seeking equitable relief under the doctrine of unclean hands.

Defendant also argues that the trial court erred in holding that the dedication in the subdivision plat map entitled plaintiffs and other owners of subdivision lots to exclusive use of the development's roads and parks. "In equity cases, this Court's review of the record is de novo with due deference being given to the findings of the trial court. This Court will sustain those findings unless its ruling would have been contrary to that of the trial court." *Marconeri v Village of Mancelona*, 124 Mich App 286, 287-288; 335 NW2d 21 (1983). If the trial court's findings of fact are not clearly erroneous, then this Court reviews the record de novo to determine whether the equitable relief granted was appropriate in light of those facts. *Attorney General v John A Biewer Co, Inc*, 140 Mich App 1, 12-13; 363 NW2d 712 (1985). The trial court did not err in ruling that the roads in the subdivision were dedicated to the use of only subdivision owners and that defendant had not acquired a prescriptive easement to use the roads.

Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there is real and imminent danger of irreparable injury. *ETT Ambulance Service Corp. v Rockford Ambulance, Inc*, 204 Mich App 392, 400; 516 NW2d 498 (1994) Michigan courts generally enforce valid restrictions on property use by issuing an injunction. *Webb v Smith*, 224 Mich App 203, 211; 568 NW2d 378 (1997).

Defendant argues that the intent of the plattors governs and that the intent of plattors – defendant and his brother – is best determined by simply asking them what they intended when the subdivision was platted. "The intent of the plattors should be determined with reference to the language

used in connection with the facts and circumstances existing at the time of the grant." *Thies v Howland*, 424 Mich 282, 293; 380 NW2d 463 (1985); *Dobie v Morrison*, 227 Mich App 536, 540; 575 NW2d 817 (1998).

On the plat map, the roads are designated as private and the dedication states that "the streets and parks as shown on said plat are hereby dedicated to the use of the lot owners, except that portion of public county road, contained herein." The only lots noted on the plat map are the twenty-five lots of the Lloyd's Westgate Subdivision. Where the grantor's "intent cannot be determined from the plat, the contemporaneous and subsequent acts of the parties may be considered" in determining the scope of a dedication. *Jacobs v Lyon Twp*, 444 Mich 914, 921; 512 NW2d 834 (1994) (citation omitted). However, the plattors' intent is clear from the dedication here, and no construction of the dedication is necessary. The trial court did not clearly err in finding that the plain language of the plat dedication restricts the use of the subdivision roads to subdivision lot owners.

In addition, the trial court did not clearly err in ruling that defendant had not acquired a prescriptive easement to use subdivision roads to access his non-subdivision property. An easement is a right to use the land of another for a specific purpose. *Mumaugh v Diamond Lake Cable*, 183 Mich App 597, 606; 456 NW2d 425 (1990). An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years. *Thomas v Rex A Wilcox Trust*, 185 Mich App 733, 736-737; 463 NW2d 190 (1990); *Dyer v Thurston*, 32 Mich App 341, 343; 188 NW2d 633 (1971); MCL 600.5801; MSA 27A.5801. A use is "adverse" when it would entitle the landowner to a cause of action against the trespasser. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 245-246; 528 NW2d 221 (1995).

Mutual use or occupation of property with the owner's permission is insufficient to establish adverse possession. *Rozmarek v Plamondon*, 419 Mich 287, 294; 351 NW2d 558 (1984). The permissive use of property, regardless of the length of the use, will not result in an easement by prescription. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995).

In this case, while the trial court found no prescriptive easement, part of the court's reasoning is inconsistent because it found that defendant's pre-1986 use of the roads was permissive while at the same time holding that defendant's current ownership did not allow for such permissive use. Despite this inconsistency, the trial court also ruled that defendant failed to meet the fifteen-year period of adverse use necessary to create a prescriptive easement, a ruling that is supported by the record. In the absence of clear error, therefore, we decline to reverse on the basis of this inconsistency.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald