

STATE OF MICHIGAN
COURT OF APPEALS

KENITH CHADWELL and JUDITH
CHADWELL,

UNPUBLISHED
May 4, 2004

Plaintiffs/Counter-Defendants-
Appellees,

v

No. 247303
Oakland Circuit Court
LC No. 2001-033448-CH

HENRY J. WOJTASZEK III,

Defendant/Cross-Plaintiff-
Appellant.

Before: Wilder, P.J. and Hoekstra and Kelly, JJ.

PER CURIAM.

In this dispute over an easement, defendant appeals as of right the trial court's order of dismissal and its underlying ruling of summary disposition in plaintiffs' favor in their action to quiet title. We reverse.

I. Facts

Plaintiffs filed an action to quiet title¹ on an easement over defendant's land that permitted plaintiffs ingress and egress to and from Tipsico Lake. Plaintiffs identified their property as "1005 Williams Street, Fenton" (hereinafter Parcel B) and defendant's property as "7862 Tipsico Lake Road, Holly" (hereinafter Parcel A).

Plaintiffs alleged the following facts. Parcels A and B were once owned by Fred and Martha Rabe. On May 13, 1967, the Rabes sold Parcel B to Donald and Patricia McLean by land contract reserving the right of ingress and egress over parcel A. On July 31, 1973, the Rabes sold parcel A to Theodore and Joyce Sulik by land contract not including the right of ingress and egress for parcel B. But on July 25, 1974, the Rabes recorded a signed affidavit (signed on July 22, 1974) referencing the right of ingress and egress over parcel A. On October 1, 1976, the McLeans sold parcel B to plaintiffs by warranty deed. On July 30, 1999, the Suliks

¹ Plaintiffs' other claim and defendant's counterclaim are not at issue on appeal.

sold parcel A to defendant by warranty deed. Relying on the easement referenced in the Rabes' affidavit, plaintiffs planned to make improvements to parcel B. But defendant refused plaintiffs access to his property.

Answering plaintiffs' complaint, defendant admitted most of the alleged facts, but denied that the land contract between the Rabes to the McLeans reserved the right of ingress and egress over parcel A. Defendant also denied that the Rabes' affidavit granted any rights because, at the time it was signed and recorded, the Rabes had no ownership interest in either parcel A or B.

Defendant filed a motion for summary disposition of plaintiffs' quiet title action under MCR 2.116(C)(10) arguing that he was entitled to summary disposition because the affidavit was executed by the Rabes when they had no ownership interest in either parcel. Plaintiffs filed a response to defendant's motion denying that the affidavit was executed by the Rabes when they no longer had an ownership interest.

On May 10, 2002, the trial court entered an order denying defendant's motion for summary disposition for the reason that the Rabes' affidavit gave notice of the easement to defendant. Defendant filed a claim of appeal on this ruling, but his Court dismissed the appeal because the order appealed was not a final order appealable as of right (Docket Number 242080). The trial court subsequently entered an order resolving all the claims in plaintiffs' favor and closing the case.

II. Analysis

A. Standard of Review

The trial court denied defendant's motion for summary disposition brought under MCR 2.116(C)(10). We review *de novo* a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In evaluating a motion under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions and other documentary evidence in a light most favorable to the nonmoving party and determines whether the moving party was entitled to judgment as a matter of law. *Id.* at 120.

B. No Recorded Conveyance of the Easement

Defendant argues that the trial court erred in granting summary disposition because the Rabes did not have an ownership interest in the property when they executed and recorded the affidavit. We agree that the trial court erred in granting summary disposition, but for the reason that there is no genuine issue of fact as to whether the easement conveyance was recorded.

Defendant appears to believe that the Rabes attempted to convey the easement by way of the affidavit while the trial court determined that the affidavit provided notice of the easement conveyance. Neither of these conclusions is correct.

The affidavit does not purport to convey an interest in land. The affidavit clearly purports only to clarify the parties' intent in the land contract between the Rabes and the Suliks. Nor do the affidavit or the land contract operate to convey the easement. "An easement is an interest in land that is subject to the statute of frauds. In order to create an express easement,

there must be language in the writing manifesting a clear intent to create a servitude. Any ambiguities are resolved in favor of use of the land free of easements.” *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). The land contract between the Rabes and the Suliks did not expressly manifest a clear intent to create the easement over parcel A. Therefore, that document did not convey parcel A subject to an easement. The affidavit cannot clarify the intent of the parties at the time the contract was entered because both parties do not attest to this intent. "Clear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties or consider extrinsic evidence to determine the parties' intent." *Wausau Underwriters Ins Co v Ajax Paving Industries, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). Therefore, neither the affidavit nor the land contract conveyed an easement over parcel A.

Nonetheless, the trial court ruled that defendant had “notice of the easement rights” based on MCL 565.451a(e) which reads in relevant part:

An affidavit stating facts relating to any of the following matters which may affect the title to real property in this state made by any person having knowledge of the facts or by any person competent to testify concerning such facts in open court, may be recorded in the office of the register of deeds of the count where the real property is situated:

* * *

(e) Knowledge of facts incident to possession

The trial court concluded that, on the basis of this statute, the affidavit “acted as notice of the easement rights over Parcel A.”

But any conveyance that is not recorded as provided by statute, “shall be void as against any subsequent purchaser in good faith and for valuable consideration.” *Christensen v Christensen*, 126 Mich App 640, 646; 337 NW2d 611 (1983). Here, no easement conveyance was ever recorded. As discussed above, the land contract between the Rabes and the Suliks did not convey parcel A subject to the easement. Nor does any other recorded document convey parcel A subject to the easement or parcel B with the easement. The only recorded document that refers to an easement (aside from boilerplate language), other than the affidavit, is the land contract between the Rabes to the McLeans conveying parcel B in 1967. That document provides a legal description of parcel B and further states: “together with the right of ingress and egress over the present driveway located on the property of the Sellers.” Before this conveyance of parcel B, parcels A and B were one parcel owned by the Rabes. Thus, when the Rabes conveyed parcel B to the McLeans the quoted description of the easement could have referred to parcel A. But the contract does not provide a legal description of parcel A. As such, a title search would not uncover an easement over parcel A. The term “property of the Sellers” could have referred to yet another parcel owned by the Rabes. Accordingly, the description of the easement in the land contract conveying parcel B to the McLeans did not provide record notice to defendant of the easement over parcel A.

Therefore, the trial court erred in granting summary disposition of plaintiffs’ quiet title action in their favor. It should have granted summary disposition in defendant’s favor because

there was no genuine issue of fact as to whether a conveyance of an easement over parcel A was recorded.²

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Kirsten Frank Kelly

² Because of our resolution of this issue, we need not address the other issue on appeal concerning adverse possession.