STATE OF MICHIGAN

COURT OF APPEALS

PROTO-CAM INCORPORATED and TEN NINE CORPORATION, Plaintiffs-Counterdefendants-Appellees,	UNPUBLISHED December 16, 2004
v	No. 251387 Kent Circuit Court
940 MONROE LLC and PIONEER INCORPORATED, Defendants-Counterplaintiffs-Appellants.	LC No. 00-008231-CZ

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendants appeal from the trial court's judgment granting plaintiffs permanent injunctive relief and damages for trespass. This case involves an easement granted to plaintiff Proto-Cam ("plaintiff" herein) by Charlevoix Club III, Inc. The trial court held that this easement was an exclusive easement denying even the grantor and its successors and assigns from using the easement. We affirm.

Proto-Cam was granted an easement over a portion of vacated Walbridge Street in Grand Rapids by Charlevoix Club. Defendants 940 Monroe and Pioneer are successors to Charlevoix Club.

In June 1994, Charlevoix Club sought a rezoning of its property from light industrial to commercial. Proto-Cam feared that the increased traffic on Walbridge Street would interfere with its industrial operations and objected to the re-zoning at three different hearings before the board of zoning appeals. The board ultimately granted Charlevoix Club's request with the condition that Walbridge Street not be used by the Charlevoix Club "for client or employee parking or for any uses connected to their occupancy or their use of the building." To effectuate this condition, Charlevoix Club granted Proto-Cam an easement over Walbridge Street. The easement was drafted by Charlevoix Club's attorney, Robert Wardrop, and signed by the Club's secretary and treasurer, Michael Webb, on January 16, 1995.

After the easement was signed, Charlevoix Club gave William Tingley, president of Proto-Cam, advance notice before using the easement. Walbridge Street was vacated by the City of Grand Rapids in 1998. From that time forward, Proto-Cam maintained Walbridge Street.

Problems arose when defendants' predecessor-in-interest used Walbridge Street for its construction activities. Plaintiff requested that this use of its easement stop. When defendants persisted in using the street, plaintiff filed a complaint for injunctive relief. Plaintiff sought a temporary restraining order and a preliminary injunction to prevent defendants from using Walbridge Street. The trial court denied plaintiff's motion. It permitted defendants to drive on Walbridge Street, but enjoined them from parking on the street.

Defendants first contend that the trial court erred in considering extrinsic evidence in interpreting the grant of easement. The specific language at issue is as follows:

> 1. Grant of Easement. Grantor grants to Grantee an exclusive easement for ingress, egress and parking over Parcel E.
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> 2. Use of Parcel E. Grantor and Grantee intend that the usage of Parcel E shall be exclusively reserved for Grantee for the purposes of ingress, egress and parking. Parcel E shall not be used for any other purpose other than as set forth herein. Neither Grantor nor Grantee shall erect any buildings or other structures on Parcel E and Grantor shall not interfere with Grantee's use of Parcel E for the purposes set forth herein.

We review the trial court's decision to admit and consider extrinsic evidence for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). The trial court did not abuse its discretion in considering extrinsic evidence of the grantor's intent. Extrinsic evidence may be considered when, after examining the text of the easement, a court determines that the easement is ambiguous. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003).

The trial court found the text of the 1995 grant of easement to be ambiguous. The court stated that the word "exclusive," as found in the 1995 easement, could have three possible meanings: (1) that plaintiff can only use the easement for ingress, egress, and parking, (2) that the grantor agrees not to grant an easement to another party for ingress, egress, and parking, or (3) that use for such purposes by anyone other than plaintiff, including use by the grantor, is excluded.

This finding is consistent with the Idaho Supreme Court's holding in *Latham v Garner*, 105 Idaho 854; 673 P2d 1048 (1983), which, though not binding, is instructive. The court found that the use of the phrase "exclusively for their use" in an easement "lends itself, without contortion, to a number of interpretations." *Id*. at 858. We agree with the Idaho Supreme Court and with the trial court in the present case that the easement in question was ambiguous. Therefore, the trial court was correct in considering extrinsic evidence to determine the intent of the original parties to the easement in using the word "exclusive."

We review the trial court's interpretation of the term "exclusive" de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

The trial court examined each of the pertinent passages of the easement to determine which of the three possible interpretations of "exclusive" appeared most likely. The court found that paragraph 2 of the easement quoted above is most consistent with the third possible interpretation – the interpretation advocated by plaintiffs.

The language of that section strongly supports plaintiffs' assertion – that the easement is for the use of plaintiff only – especially when viewed in light of the extrinsic evidence presented by plaintiff and considered by the court.

The court found several pieces of extrinsic evidence particularly compelling. Michael Webb, the signer of the easement, testified that the easement was intended to implement the terms and conditions of the variance and that he always gave plaintiff notice before using the easement. Additionally, Webb testified regarding a plan his company had for the B & G building. His company wanted to renovate the building and use the north lot for parking. To access this lot, visitors would use Walbridge west of the railroad right of way. To ensure that plaintiff's easement was not disturbed, Webb's company planned to block off Walbridge east of the railroad right of way. Thus, Webb's conduct demonstrates an understanding of plaintiff's exclusive rights that is consistent with plaintiff's assertion that its rights excluded the use of the grantor and its successors and assigns.

The trial court also found the circumstances leading to the grant of easement by Charlevoix Club to be demonstrative of the grantor's intent. Charlevoix Club sought rezoning from light industrial to commercial over plaintiff's objections. The City of Grand Rapids ultimately granted Charlevoix Club's variance request, but the variance specifically excluded the Charlevoix Club from using Walbridge Street "for client or employee parking or for any uses connected to their occupancy or their use of the building." At trial, defendants admitted that the easement was granted to comply with the limitations in the city's variance. Moreover, several letters written by Wardrop indicate an intent to comply with the city's limitations. In October 1994, Wardrop wrote a letter to plaintiff's attorney expressing his client's intent to abide by the limitations in the variance. Subsequently, on November 9, 1994, Wardrop wrote the city planning department to say that his client intended to carry out the intent of the variance. Two months later, the grant of easement was presented to plaintiff. In a December 30, 1994, letter to city commissioner George Heartwell, Wardrop wrote: "The owners [Charlevoix Club] have unconditionally granted Proto-Cam an easement for ingress, egress and use over that portion of vacated Walbridge Street adjacent to the fitness center from Ottawa Avenue to 32 feet west of the railroad tracks. This property will become useless to its owners and is dedicated to use by Proto-Cam."

Defendants are correct in asserting, and the trial court noted, that exclusive easements are disfavored by the law. The Idaho Supreme Court noted in *Latham*, *supra* at 856, "Because an exclusive grant in effect strips the servient estate owner of the right to use his land for certain purposes, thus limiting his fee, exclusive easements are not generally favored by the courts." A predisposition against exclusive easements does not, however, prevent courts from finding their existence. Defendants argue that use of the term "exclusive," alone, is insufficient to exclude the fee owner of the servient estate from reasonable use of the easement. This is not, however, an instance in which use of the term "exclusive" is the only evidence of intent. The text of the easement itself specifically restricts the grantor from interfering with the grantee's use and reserves the easement's use to the grantee. Furthermore, as noted, there was extrinsic evidence

of intent to make the easement exclusive. The trial court properly concluded that, despite the law's disfavor of exclusive easements, the 1995 easement was indeed exclusive.

Next, defendants contend that the trial court erred in awarding damages for trespass because the court's interpretation of "exclusive" was erroneous. We review the trial court's determination of damages following a bench trial for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). The trial court did not err in awarding plaintiff damages in the amount of $8,900 for defendants' repeated use of the easement. The court ordered defendants not to park on plaintiff's easement. Defendants repeatedly violated that order. Moreover, the trial court properly concluded that the easement was exclusive and, therefore, deprived the grantor of all rights to use the easement. As a result, defendants' repeated use of the easement was trespass. The trial court did not err in awarding plaintiff damages.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello