STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MANCIU,

Plaintiff-Appellant,

v

JOHN E. RESSEGUIE, JR., and NATALIE A. RESSEGUIE,

Defendants-Appellees.

UNPUBLISHED
July 14, 2005

No. 261393
Newaygo Circuit Court
LC No. 04-187985-CH

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. Plaintiff brought suit seeking declaration of an easement implied by necessity or an easement implied from a quasi-easement. Plaintiff brought a motion for summary disposition under MCR 2.116(C)(10), but the trial court granted summary disposition to defendants under MCR 2.116(I)(2). We reverse and remand.

In December 1999, plaintiff attempted to purchase a twenty-acre parcel of improved real property. Plaintiff borrowed the majority of the money needed to purchase the property and the debt was secured by a mortgage. However, an error in the drafting of the deed resulted in the transfer to plaintiff of only the easternmost ten acres of the property. As a result, only this portion of the twenty-acre parcel was encumbered by the mortgage. In September 2000, after the error in the deed was discovered, plaintiff was deeded the remainder of the original twenty-acre parcel. Only the easternmost portion of the twenty acres has access to a public road. In December 2002, plaintiff applied to Croton Township for a division of the property indicating that a recorded easement would provide access to the landlocked ten-acre parcel created by severance. Plaintiff asserted that from June 2003 to December 2003, he cleared a path through the trees on the property along the intended easement. The intended easement was not recorded. The holder of the mortgage on the easternmost ten acres foreclosed on the easternmost ten acres in December 2003. Defendants purchased the easternmost ten acres and have denied plaintiff access to his retained land across the alleged easement.

Plaintiff asserts that the trial court erred in concluding that plaintiff failed to establish the existence of a genuine issue of material fact regarding whether an easement implied by necessity existed over defendants' property. We agree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151

(2003). Summary disposition may be granted when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

An easement implied by necessity is created by the operation of law. *Chapdelaine v Sochocki*, 247 Mich App 167, 172; 635 NW2d 339 (2001). An easement by necessity may be implied when a piece of property is severed such that "one of the resulting parcels is landlocked except for access across the other parcel." *Id.* "An easement by necessity is based on the presumed intent of the parties and is supported by the public policy that favors the productive and beneficial use of property." *Id.* at 173.

In this case, the severance of the property was effectuated by foreclosure on a mortgage. The trial court determined that this manner of severance could not result in an implied easement by necessity because there was no conduct on the part of the mortgagee indicating assent to the burden imposed. See *Tolksdorf v Griffith*, 464 Mich 1, 9-10; 626 NW2d 163 (2001). We disagree. "The rule that an easement or way by necessity will pass by implication, as well where the severance of the dominant and servient estates is effected by legal proceedings, as where the grant is voluntary, is generally recognized." *Bean v Bean*, 163 Mich 379, 397; 128 NW 413 (1910). Accordingly, we conclude that the fact that the severance was effected by foreclosure is not controlling of the outcome of this case. See also *Myers v LaCasse*, 176 Vt 29; 838 A2d 50 (2003); *Ghen v Piasecki*, 172 NJ Super 35; 410 A2d 708 (1980); *Hickam v Golladay*, 83 Ind App 569; 149 NE 375, 376 (1925).

We further conclude that the assent of the mortgagee, defendants' predecessor in interest, to the easement can be implied from the facts of this case. A record inspection conducted at the time that the mortgage interest was given would have revealed that plaintiff's predecessor in interest had conveyed only the easternmost ten acres of their property to plaintiff, leaving the westernmost ten acres, to which they remained record titleholders, landlocked. Thus, at the time that the mortgage was given, plaintiff's predecessors in interest could have claimed an easement implied by necessity over the easternmost ten acres that secured the loan. By accepting a mortgage interest so encumbered, the mortgagee assented to this burden. The fact that plaintiff subsequently unified title to the twenty acres before the parcels were again severed does not alter our conclusion. See *Myers*, *supra* at 39 (concluding that a mortgagee can be charged with the foresight that a foreclosure would result in the severance of a landlocked parcel that would have a right of access over the foreclosed property).

The trial court attempted to support its determination that plaintiff was not entitled to an easement implied by necessity by noting that plaintiff could have attempted to purchase an easement from one of several other surrounding landowners. This fact, however, is immaterial to the analysis of whether plaintiff was entitled to an easement implied by necessity. *Chapdelaine*, *supra* at 173.

The trial court also reasoned that because defendants were good-faith purchasers of the easternmost ten acres, plaintiff had no more of a right to an easement across those ten acres than to an easement across any other property abutting plaintiff's retained property. This conclusion disregards the fact that plaintiff held unified title in both parcels until the foreclosure and that defendants' predecessor in interest, the mortgage company, had impliedly assented to using encumbered property as a surety. Moreover, while an easement conveyed in a written instrument

is a conveyance within the meaning of MCL 565.29 and MCL 565.35, *Peaslee v Dietrich*, 365 Mich 338; 112 NW2d 562 (1961), an unwritten easement implied by necessity is not a conveyance subject to MCL 565.29 as the term conveyance is defined by the statute as embracing only written instruments. MCL 565.35.

Accordingly, we conclude that the trial court erred by denying plaintiff's motion for summary disposition and granting summary disposition in favor of defendants.

Plaintiff also asserts that the trial court erred by granting summary disposition in favor of defendants as to his claim of an easement implied from a quasi-easement. Because of our resolution of the easement by necessity issue, this claim of error is rendered moot. However, we note that we concur with the result reached by the trial court on this issue, but base our holding on different reasons. An easement may be implied from a quasi-easement when three things are shown: "(1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits." *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980). Plaintiff asserts that from June 2003 to December 2003, he cut down trees to create a path across the easternmost ten acres of the property in order to create a way of access to the westernmost ten acres from a public road. Again, the foreclosure was completed in December 2003. Accordingly, any use of the way prior to severance was not continuous prior to severance. *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 606-607; 265 NW 474 (1936); 1 Cameron, Michigan Real Property Law (2d ed), Easements, § 6.9, p 201 (opining that Michigan's appellate judiciary has "interpreted *continuous* to have its generally understood meaning: 'without a break in regular usage.' This is the meaning that courts in other states have ascribed in similar circumstances").

Reversed and remanded for entry of an order granting summary disposition in favor of plaintiff on his claim of implied easement by necessity. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio