STATE OF MICHIGAN

COURT OF APPEALS

AUCTIONEER DRAIN DRAINAGE DISTRICT, Plaintiff-Appellee,	UNPUBLISHED November 17, 2005
v	No. 256296 Ingham Circuit Court
CONSUMERS ENERGY COMPANY, Defendant-Appellant.	LC No. 04-000285-CZ

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

PER CURIAM.

Defendant appeals as of right an order granting summary disposition in favor of plaintiff. We affirm.

I. Basic Facts and Proceedings

On April 30, 1915, plaintiff acquired a right-of-way across a property located in Leroy Township, Ingham County, and that same year, recorded its interest in the office of the Ingham County Drain Commissioner. Plaintiff installed an eighteen-inch diameter storm drain along its right-of-way approximately four feet below the surface (the Auctioneer Drain). On April 13, 1953, defendant acquired an easement across the same property, and recorded its interest with the Ingham Register of Deeds on August 19, 1953. Defendant installed a gas main along its easement, which, at one point, intersects the Auctioneer Drain approximately one inch above the drain.

In 1956, the Drain Code was amended to require all drain easements acquired afterwards be recorded with the register of deeds. 1956 PA 40. Though plaintiff claims it was not required to do so, plaintiff nonetheless recorded its right-of way with the Ingham County Register of Deeds on June 27, 1955.

On February 7, 2000, a petition was authorized to clean out, widen, deepen, straighten, tile, extend, or relocate the Auctioneer Drain because it was found to be functioning inadequately On November 24, 2003, plaintiff discovered that defendant's gas line crossed the drain pipe, and had to stop the planned activities until the line was moved. Plaintiff requested defendant relocate the line below the drainpipe. Defendant refused to move the gas line asserting that its easement took precedence over plaintiff's right-of-way. The parties entered a standby agreement under which defendant immediately relocated the gas main and plaintiff escrowed $20,000 pending the

outcome of a court judgment. Plaintiff filed suit, and after considering the parties' cross-motions for summary disposition, the trial court granted summary disposition in favor of plaintiff. This appeal ensued.

II. Analysis

A. Standard of Review

This Court reviews the grant or denial of a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Issues of statutory interpretation are likewise reviewed de novo. *Cherry Growers, Inc v Agricultural Marketing and Bargaining Bd*, 240 Mich App 153, 166; 610 NW2d 613 (2000).

B. Priority under MCL 565.29.

Defendant first argues that the court erred in failing to apply MCL 565.29 to conclude that defendant's easement, recorded two years before plaintiff's right-of-way, was superior. We disagree.

MCL 565.29 provides that, "Every conveyance of real estate . . . which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." Before the Drain Code was amended in 1956, there was no requirement to record drain easements and rights-of-way with the register of deeds. See 1923 PA 316; *Hodgeson v Ragnone*, 52 Mich App 411, 415; 217 NW2d 395 (1974). However, 1915 CL 4876 (substantively identical to the present MCL 280.30), the statute in effect at the time plaintiff acquired its right-of-way, did require that drain commissioners keep a record of each drain under their jurisdiction, including surveys and releases of rights-of-way.

In 1956, the Drain Code was amended to require drain commissioners to record easements, rights-of-way, and damage releases with the county register of deeds. 1956 PA 40; MCL 280.11. However, the amendment only addressed property interests acquired by the drain commissioner after the amendment and not unrecorded rights-of-way acquired before the amendment went into effect. *Hodgeson, supra.*

In 1961, our Supreme Court decided *Peaslee v Saginaw Co Drain Comm'r*, 365 Mich 338; 112 NW2d 562 (1961), in which it held "the recording of the release of right of way in the office of the drain commissioner was not constructive notice" to subsequent bona fide purchasers. *Id.* at 346. *Peaslee* was later followed in *Allen v Bay Co Drain Comm'r*, 10 Mich App 731, 732-734; 160 NW2d 346 (1968), in which this Court held that a drain easement that extended beyond the bank of the drain was not enforceable against the current owners who had purchased adjoining property without notice. In *Allen*, as in *Peaslee*, the drain easement at issue had been filed in the drain commissioner's office, but had not been recorded with the register of deeds. *Id*. at 732.

However, shortly after *Allen* was decided, the Legislature enacted MCL 280.6, which provides:

> All established drains regularly located and established in pursuance of law existing at the time of location and establishment and visibly in existence, which were established as drains, and all drains visibly in existence in written drain easements or rights of way on file in the office of the commissioner, shall be deemed public drains located in public easements or rights of way which are valid and binding against any owners of any property interest who became or hereafter become such owners after the location and establishment of the drain or the existence of the drain became visible or the written drain easement or right of way was executed[.]

While "the recording of the release of right of way in the office of the drain commissioner [may not constitute] constructive notice" to subsequent bona fide purchasers under *Peaslee*, MCL 280.6 abrogates the result of *Peaslee* by quieting title in favor of drain easements or rights-of-way, regardless of whether subsequent bona fide purchasers had notice of such easements or rights-of-way. Further, a more specific statutory provision prevails over a more general statutory provision. *Jones v Enertel, Inc*, 467 Mich 266, 270-271; 650 NW2d 334 (2002). Therefore, because MCL 280.6 carves out a specific exception to MCL 565.29, we reject defendant's argument regarding MCL 565.29.

C. Applicability of MCL 280.6

There is no dispute that the first part of MCL 280.6, regarding drains that are physically "visibly in existence," is not implicated here. Plaintiff's drain is a subsurface one, buried approximately four feet below the soil surface since it was established. As this Court stated in *Kiesel Intercounty Drainage Bd v Hooper*, 148 Mich App 381; 384 NW2d 420 (1986):

> [T]his first provision of M.C.L. § 280.6 provides for a public right-of-way based solely on the fact of a regularly located and established drain physically visible at the time a property owner takes title . . . . The physical visibility of the public drain put defendants on notice of plaintiff's interest in the land, and gave them opportunity to inquire into and challenge the extent of plaintiff's interest at the time they acquired title to the land. [*Kiesel, supra* at 386.]

The second part of the statute, however, clearly addresses the circumstances in the case at bar:

> [A]ll drains visibly in existence *in written drain easements or rights of way on file in the office of the commissioner*, shall be deemed public drains located in public easements or rights of way which are valid and binding against any owners of any property interest who *became or hereafter become* such owners after the location and establishment of the drain or the existence of the drain became visible or the written drain easement or right of way was executed[.] [MCL 280.6 (emphasis added).]

Indeed, as this Court noted in *Kiesel*:

> This second provision creates a valid public easement for drains "visibly in existence in written drain easements or rights of way on file in the office of the commissioner." Whether valid or not, the 1905 release of right-of-way involved in this case was on file in the office of the Bay County Drain Commissioner and, thus, under the second cited provision of the statute, is deemed a valid public easement. We agree with the trial judge that this provision of the statute was intended to cure any defects and quiet title in rights-of-way on file with the drain commissioner. [*Kiesel, supra*.]

In accordance with MCL 280.6 and *Kiesel*, we conclude that plaintiff's drain that was "visibly in existence in written drain easements or rights of way on file in the office of the commissioner" and is superior to defendant's later-acquired easement.

D. Plaintiff's Right of Way and Defendant's Easement

Defendant also claims the trial court erred in requiring defendant to move its gas line because plaintiff, in replacing the eighteen-inch drain with a thirty-inch drain, exceeded the description of its right-of-way, and consequently interfered with the gas line. Defendant counters that it may replace the Auctioneer drain with drain that is larger than that described in its right-of way under MCL 280.2, which provides plaintiff with rights to, among other, "maintain," widen," deepen" "extend" and "relocate" drains.

However, we need not address whether plaintiff was entitled to increase the size of the Auctioneer drain under MCL 280.2. Rather, we agree with the trial court that only the rights provided under plaintiff's right-of-way need be considered. As stated, plaintiff's right-of-way is superior to defendant's easement, and specifically provides for opening and maintaining of the Auctioneer drain. Indeed, "[t]he scope of such public easements or rights-of-way can, pragmatically, include a reasonable area for the maintenance of the public drain." *Keisel, supra* at 386. Here, the gas line crosses over the Auctioneer drain, and defendant's gas line would have to be moved even if plaintiff were performing maintenance on the existing eighteen-inch drain. Therefore, the trial court did not err in determining that defendant's gas line interfered with plaintiff's right-of-way.

E. Summary Disposition Before Close of Discovery

Finally, defendant argues that summary disposition was improperly granted before the close of discovery and that at the summary disposition hearing, plaintiff argued facts that were not in the record. We disagree. The court did not err in granting summary disposition to plaintiff before the close of discovery because under the terms of the right-of-way granted to plaintiff, MCL 280.6, and subsequent case law, it is apparent that there were no facts under which defendant could have prevailed. Also, any facts improperly argued by plaintiff were not outcome determinative. Accordingly, the grant of summary disposition to plaintiff was not

premature because there was no reasonable chance that further discovery would provide factual support for defendant's position. *Stringwell v Ann Arbor Pub School Dist*, 262 Mich App 709, 714; 686 NW2d 825 (2004).

Affirmed.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly