

STATE OF MICHIGAN
COURT OF APPEALS

PETER N. HEYDON and HENRIETTA
HEYDON,

UNPUBLISHED
December 22, 2005

Plaintiffs-Appellants,

v

No. 255186
Washtenaw Circuit Court
LC No. 99-005130-NZ

MEDIAONE OF SOUTHEAST MICHIGAN,
INC,

Defendant-Appellee.

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right the orders granting summary disposition in favor of defendant and denying plaintiff's motion to amend the complaint. We affirm in part, reverse in part, and remand.

In 1959 plaintiffs' predecessors in title granted Detroit Edison an easement across their property for overhead electrical lines. Defendant subsequently obtained written permission from Detroit Edison to install a television cable line on the existing utility poles. Plaintiffs filed this action seeking both common-law and statutory damages after defendant attempted to access the easement in January 1999. Plaintiffs also sought injunctive relief against future trespasses pursuant to MCL 600.2919(3). The trial court granted summary disposition in favor of defendant, finding that defendant never actually installed its cable and that plaintiffs' claims failed to present an actual case or controversy. Plaintiffs thereafter moved to amend the original complaint to assert a second, late-discovered trespass claim. Citing the passage of time, the trial court denied the motion to amend.

The grant or denial of leave to amend a complaint is within the sound discretion of the trial court. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Reasons that justify a trial court's denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, and futility. *Id.* at 658.

In addition to being untimely, plaintiffs' proposed amendment would have been prejudicial. Although delay alone will not justify denial of a motion to amend, delay combined with prejudice to the nonmoving party is a sufficient reason. *Ben P Fyke & Sons, Inc v Gunter*

Co, 390 Mich 649, 663-664; 213 NW2d 134 (1973). Prejudice may result when the moving party seeks to amend the complaint after discovery is closed, and the opposing party did not have reasonable notice that the moving party would bring the new claim. *Franchino v Franchino*, 263 Mich App 172, 192; 687 NW2d 620 (2004). Because the trial court had already closed discovery over three years earlier, defendant would not have been able to uncover evidence regarding the alleged late-discovered trespass. Thus, although the trial court cited only plaintiffs' delay in bringing the motion to amend, the proposed amendment would have been prejudicial to defendant's interests.

Plaintiffs argue that any amendment of the complaint was technically unnecessary because the original complaint was broad enough to encompass the alleged late-discovered trespass. We disagree. The complaint exclusively described the alleged trespass of January 1999 on the "real property located in Washtenaw County near Joy Road in Scio Township (the 'Property')." The asserted late-discovered trespass allegedly occurred at a much later date on a separate parcel of land. A complaint must contain "specific allegations necessary reasonably to inform the adverse party of the pleader's claims." *Iron County v Sundberg, Carlson & Associates, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997). Plaintiffs' complaint was based exclusively on the alleged trespass to plaintiffs' Joy Road property in January 1999. The language of the original complaint was not broad enough to encompass the alleged late-discovered trespass to a separate portion of plaintiffs' property.

The court granted summary disposition on the ground that plaintiffs' claims failed to present an actual case or controversy. A trial court's ruling on a motion for summary disposition is reviewed de novo, *Wayne County v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998), as are questions of law. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Regardless of the trial court's reasoning for dismissing the claims, it reached the correct result. This Court will affirm a trial court's decision if it reached the right result, even if it did so for the wrong reason. *Wickings v Artic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

Plaintiffs' complaint asserted two causes of action.¹ Count one was based on the original trespass of January 1999 and sought monetary damages only. Count two was brought pursuant to MCL 600.29129 and sought both monetary damages and injunctive relief. While in many respects MCL 600.2919 mirrors common-law trespass, it provides a right of action for injury or waste by non-trespassers as well.

Defendant was entitled to judgment as a matter of law on plaintiffs' trespass claims because defendant had the right, as a partial assignee, to enter the Detroit Edison easement on

¹ Plaintiffs also asserted a third cause of action, entitled "negligence." The substance of this count alleged that defendant had "negligently and recklessly" entered upon plaintiffs' land. However, at common law there is no separate cause of action for negligent entry to land. Regardless of a defendant's mental state, any non-permissive entry onto the land of another is a common-law trespass, provided the entry itself was intentional. Thus, this count merely reasserted a claim of common-law trespass.

plaintiffs' land. An easement is the right to use the land of another for a specific purpose. *Michigan Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc.*, 472 Mich 359, 378-379; 699 NW2d 272 (2005). The Detroit Edison easement in the present case is a personal right, and therefore an easement in gross. *Smith v Denny*, 224 Mich 378, 381; 194 NW 998 (1923). Contrary to the general rule, easements in gross for utility or railroad purposes are assignable. *Johnston v Michigan Consolidated Gas Co.*, 337 Mich 572, 580; 60 NW2d 464 (1953).

Detroit Edison entered into a written agreement to assign space on its utility poles to defendant. Because Detroit Edison was not transferring the entire easement, the agreement was not a complete assignment. However, the agreement was what has been called a partial assignment, division of benefits, or apportionment agreement. See e.g. *Centel Cable Television Co of Ohio, Inc v Cook*, 58 Ohio St 3d 8, 10; 567 NE2d 1010 (1991). "Transferable benefits in gross may be divided unless contrary to the terms of the servitude, or unless the division unreasonably increases the burden on the servient estate." 2 Restatement Property, Servitudes, 2d, § 5.9, pp 61-65.

The easement granted to Detroit Edison in 1959 did not prohibit the installation of cable within the easement. In fact, the easement was granted to "the Detroit Edison Company its successors and assigns," thereby contemplating possible alterations to the use of the easement in the future. Further, "[a] principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). This Court has specifically held that the attachment of a cable television wire to poles within an electric company's easement does not materially increase the burden on the servient estate. *Mumaugh v Diamond Lake Area Cable TV Co*, 183 Mich App 597, 607; 456 NW2d 425 (1990). Because defendant's intended use of the easement would not have violated the terms of the servitude or unreasonably increased the burden on the servient estate, Detroit Edison was entitled to partially assign an interest in its utility easement to defendant in this case. 2 Restatement Property, Servitudes, 2d, § 5.9. Thus, reasonable access of the easement by defendant did not and would not in the future constitute trespass. Defendant was entitled to judgment as a matter of law on plaintiffs' trespass claims.

However, the trial court improperly dismissed plaintiffs' claim for damages under MCL 600.2919(1). Plaintiffs did not waive their claim for compensation stemming from the January 1999 events. MCL 600.2919(1) applies to "[a]ny person," and not merely to trespassers. Therefore, despite the relatively minimal injury to plaintiffs' property, plaintiffs are still entitled to recover damages under MCL 600.2919(1) as compensation for the harm inflicted to their land.²

² We note that as a partial assignee of Detroit Edison's easement rights, defendant simply stands in the shoes of Detroit Edison when entering the utility pole easement on plaintiffs' property. Because defendant holds an interest in Detroit Edison's easement, there is no taking of private property. In light of our analysis, we decline to address whether defendant has a corresponding federal right under 47 USC 541(a)(2), or whether the interpretation of that statute in *Mumaugh*,
(continued...)

Affirmed in part, reversed in part, and remanded for a determination of statutory damages only. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly

(...continued)

supra, remains viable.