STATE OF MICHIGAN

COURT OF APPEALS

SHUBH HOTELS DETROIT, L.L.C., Plaintiff-Appellant,	UNPUBLISHED June 3, 2008
v	No. 276666 Wayne Circuit Court
WELLS OPERATING PARTNERSHIP, L.P., Defendant-Appellee.	LC No. 05-535718-CK

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Plaintiff, Shubh Hotels Detroit, L.L.C. ("Shubh"), appeals as of right the order of the trial court granting defendant, Wells Operating Partnership, L.P. ("Wells"), summary disposition. We affirm.

This litigation concerns two properties, an office building and parking garage at 150 West Jefferson in Detroit ("the Office Property"), and the Hotel Pontchartrain ("the Hotel Property"), at Two Washington Boulevard in Detroit. Before December 31, 1984, the Hotel Pontchartrain Company owned the Hotel Property and two parcels of vacant land across the street ("the parking parcels"). On December 31, 1984, the Hotel Pontchartrain Company conveyed the Hotel Property to The Crescent Hotel Group of Michigan, Inc. ("Crescent"), and assigned Crescent their vendee's interest in a land contract to purchase the parking parcels. Crescent subsequently sold and conveyed the Hotel Property to the Hotel Pontchartrain Limited Partnership ("the Limited Partnership"), of which Crescent was sole general partner.

In early 1987, the John Madden Company ("Madden") expressed an interest in using the parking parcels as part of the site for the proposed Madden Building, which was to be constructed across the street from the Hotel Property. On July 27, 1987, Crescent and Madden entered into an agreement by which Crescent would convey the parking parcels to Madden in consideration of Madden granting an easement for 175 parking spaces in the not-yet-constructed Madden Building. Crescent conveyed the parking parcels to Madden on July 31, 1987. On August 28, 1987, Madden conveyed the parking parcels to Detroit Development Group, L.L.C. ("DDG"). The same day, DDG granted Crescent an easement "for the exclusive use of 175 parking spaces by the Hotel Pontchartrain Limited Partnership," in a parking structure that DDG agreed to construct and maintain on the parking parcels ("the easement").

In 1990, San Jacinto Savings Association, F.A. ("San Jacinto"), acquired the Hotel Property through a foreclosure of the Limited Partnership's mortgage. San Jacinto claimed that it also acquired the easement. However, Crescent disagreed. Crescent claimed it never conveyed rights to the easement to the Limited Partnership, and therefore, those rights could not have been acquired by San Jacinto through the foreclosure proceedings. This dispute became the subject of litigation ("the Texas Litigation"). The suit was filed in the Wayne Circuit Court, but was removed to the United States District Court for the Southern District of Texas by the Resolution Trust Corporation ("RTC"), which had been appointed San Jacinto's conservator and receiver.

While the Texas Litigation was pending, Jefferson Street Properties, Inc. ("Jefferson"), acquired the Office Property. Jefferson entered into an agreement with San Jacinto, under which San Jacinto agreed to convey all of its "right, title, and interest in, to and under" the easement for $1,500,000. On September 26, 1991, Jefferson and San Jacinto executed a quitclaim deed ("the quitclaim deed") reflecting this agreement. The funds were deposited into an escrow account pending the satisfaction of certain conditions imposed by Jefferson. On September 27, 1991, Jefferson deposited a "Mutual Release" into escrow. This document stated that Jefferson and San Jacinto, along with their successors and assigns, release each other "from any and all claims or liability arising out of, or in connection with, the Premises, the Easement, or the parking structure which is the subject matter thereof." Only Jefferson signed this copy of the mutual release. On October 23, 1991, San Jacinto deposited a signed copy of the same mutual release into escrow.

San Jacinto, Crescent, and Jefferson subsequently negotiated a settlement agreement under which Crescent released any claim to the easement in exchange for $225,000 of the $1,500,000 Jefferson had deposited into the escrow account. The Texas court entered an order on January 15, 1992, granting San Jacinto's/RTC's motion for summary disposition, finding that RTC, as receiver for San Jacinto, was "as against all other Claimants, the owner of all right, title and interest in the subject Easement," and denying Crescent's motion for summary disposition, finding that it had "no right, title or interest in the subject easement." Crescent agreed not to appeal the judgment and waived its right to appeal in consideration of San Jacinto's promise to pay, on the closing of the sale of the easement, $225,000. On February 19, 1992, San Jacinto and Jefferson authorized the escrowee to break escrow and disburse $1,275,000 plus interest to RTC, as receiver for San Jacinto, and $225,000 to Crescent upon further instruction. They also authorized the release of the mutual releases executed by each. The quitclaim deed was recorded on February 28, 1992. Shubh acquired the Hotel Property on February 11, 2005, and Wells acquired the Office Property on March 31, 2003.

We first address Wells's argument that Shubh's claims on appeal are barred by the doctrine of res judicata.

In order to be preserved for appellate review, an issue must generally have been raised by a party and addressed by the trial court. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Wells's res judicata argument is not preserved for appeal because, although Wells argued before the trial court that Shubh's claim was barred by the doctrine of res judicata, the trial court did not address this argument. We review a trial court's decision on a motion for summary disposition de novo. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). Although Shubh brought its motion for summary disposition under both MCR

2.116(C)(9)[1] and (C)(10), we will consider the trial court to have decided the motion under MCR 2.116(C)(10), because it considered documentary evidence submitted by the parties.[2] When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* Summary disposition is appropriate "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

We also review the issue of the applicability of res judicata de novo as a question of law. *PT Today, Inc v Comm'r of Office of Financial and Ins Services*, 270 Mich App 110, 146; 715 NW2d 398 (2006). Although this issue is unpreserved, we may review an issue that has been raised by a party but not addressed by the trial court if it is a question of law and all the necessary facts have been presented. *Detroit Free Press, Inc, v Family Independence Agency*, 258 Mich App 544, 555; 672 NW2d 513 (2003).

"A party's claim is barred by the doctrine of res judicata when (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies." *PT Today, supra* at 146. In this case, the third element is not met.

The issue here is whether the quitclaim deed terminated the easement. The quitclaim deed was being held in escrow during the Texas litigation and was not recorded until after the Texas court entered its order. Moreover, the issue of the validity and effect of the quitclaim deed depends, at least according to Shubh, upon the extent to which the quitclaim deed and the Texas court's order were properly recorded and appear in the relevant chains of title. Therefore, the Texas court did not and could not have addressed this issue and Shubh's claim is not barred by res judicata. "[I]f the facts change, or new facts develop, res judicata [does] not apply." *Labor Council, Michigan Fraternal Order of Police v Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994).

Shubh's primary argument on appeal is that the trial court erred in determining that the quitclaim deed executed by the parties' predecessors in interest terminated the easement. We disagree.

Shubh asserts that the quitclaim deed purported to convey the Office Property, including any interest that property, as the servient estate, held in the easement, rather than conveying San Jacinto's interest in the easement. "The general rule is that courts will follow the plain language in a deed in which there is no ambiguity." *Minerva Partners, Ltd v First Passage, LLC*, 274

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[1]A motion for summary disposition under MCR 2.116(C)(9) alleges that "[t]he opposing party has failed to state a valid defense to the claim asserted against him or her."

[2] "[A] motion for summary disposition under MCR 2.116(C)(9) is tested solely by reference to the parties' pleadings." *Glass v Goeckel*, 473 Mich 667, 677; 703 NW2d 58 (2005).

Mich App 207, 216; 731 NW2d 472 (2007) (internal citation omitted). "[I]t is the duty of the court to construe a deed as it is written, and if a deed is clear and unambiguous, it is to be given effect according to its language, for the intention and understanding of the parties must be deemed to be that which the writing declares." *Id*. (change in *Minerva*; citation omitted.) The relevant language of the quitclaim deed is as follows:

> KNOW ALL MEN BY THESE PRESENTS [SIC]: That SAN JACINTO SAVINGS ASSOCIATION, F.A., [address], quit claims to JEFFERSON STREET PROPERTIES, INC., a Michigan corporation, [address], the following described premises, including but not limited to any right, title, and interest in that certain Grant of Easement dated August 28, 1987, recorded September 15, 1987 in Liber 23426, Page 657, Wayne County Records, situated in the City of Detroit, County of Wayne, and State of Michigan, to-wit:
>
> [Legal description of Office Property][3]
>
> for the sum of One Dollar ($1.00) and other good and valuable consideration.

"A quitclaim deed is, by definition, a deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid." *Michigan Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 377-378; 699 NW2d 272 (2005). The quitclaim deed in this case unambiguously conveys to Jefferson whatever interest San Jacinto had in the Office Property, explicitly including any interest in the August 28, 1987, easement. Because a quitclaim deed does not make any guarantees with respect to the extent or validity of the grantor's interest in or title to the subject property, *id*., a quitclaim deed necessarily requires further inquiry on the part of a subsequent purchaser or anyone examining the chain of title in order to discern the effect of the quitclaim deed.

Both parties to this appeal cite 7 Michigan Legal Forms § 26:40, which provides sample language for a document terminating an easement:

> This Quitclaim Deed is made *[date of quitclaim deed]*, between *[name of grantor]*, of *[address of grantor]*, *[name of city]*, *[name of county]*, State of Michigan, Grantor, and *[name of grantee]*, of *[address of grantee]*, *[name of city]*, *[name of county]*, State of Michigan, Grantee.
>
> Grantor, in consideration of $*[dollar amount of consideration]*, paid by Grantee and the receipt of which Grantor acknowledges, releases, and forever quitclaims to Grantee all the right, title, interest, estate, claim, and demand, both at law and

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[3] The legal description of the property in the quitclaim deed matches the one in the warranty deed, dated March 31, 2003, which conveyed the Office Property from 150 West Jefferson Partners, L.L.C., to Wells.

> in equity, of Grantor, of, in, and to that real property located in the *[name of county]*, State of Michigan and more particularly described as *[legal description of property]*, together with all improvements, easements, rights, privileges, and appurtenances held or owned by or of Grantor in the above-described real property.
>
> Grantor executes this Quitclaim Deed for the purpose of terminating all easement rights created by the *[description of document granting easement rights]* recorded in Liber *[number of liber]*, Page *[number of page]* of *[name of county]* Records.
>
> Grantor has executed this instrument on the date first written above.

The quitclaim deed at issue in this case does not contain an explicit statement that San Jacinto was executing the deed for the purpose of terminating the easement rights created by the August 28, 1987, grant of easement. Although such a statement would have provided clarity, the sample language, *supra*, demonstrates that the quitclaim deed unambiguously conveyed to Jefferson any interest San Jacinto had in the easement. Shubh claims that the quitclaim deed conveys the Office Property, rather than San Jacinto's rights in the easement. This argument is apparently based on the following language in the quitclaim deed: San Jacinto "quitclaims the following described premises, including but not limited to any right, title and interest in [the easement]." The comparable language of the sample form is as follows: "Grantor acknowledges, releases, and forever quitclaims to Grantee all the right, title, interest, estate, claim, and demand . . . of, in, and to that real property . . . more particularly described as [legal description of property], together with all improvements, easements, rights, privileges, and appurtenances held or owned by or of Grantor in the above-described real property."

In order to be more precise, the deed perhaps ought to have quitclaimed San Jacinto's "right, title, interest," etc., in the "the following described premises" including any right, title and interest in the easement, instead of quitclaiming "the following described premises," including any interest in the easement. However, because a quitclaim deed, by definition, conveys a grantor's complete interest in real property, and nothing more, quitclaiming "the premises" is, for all practical purposes, the same thing as quitclaiming "all the right, title, interest," etc., in the premises. It should also be noted that Shubh has failed to support its argument that the quitclaim deed identified "the wrong premises," and that, in order to achieve a transfer of San Jacinto's interest in the easement to Jefferson, the quitclaim deed should have identified the Hotel Property as the dominant tenement, included a description of that property, and identified San Jacinto as its owner. Shubh states in its brief that § 26:40, quoted above, "demonstrates both that the quit claim deed should identify the dominant property easement by legal description and record citation." The quitclaim deed identifies the easement in exactly the way suggested by § 26:40: it describes the document granting the easement rights, and cites the liber and page number. Therefore, the sample document in § 26:40 does not support Shubh's argument that the quitclaim deed should have identified the dominant tenement and San Jacinto as its owner.

The Texas court's order confirmed that the rights to the easement were San Jacinto's to convey, and that the quitclaim deed transferred that interest to Jefferson, which at that time owned the Office Property, the servient estate. "An easement may be extinguished by an express release made by the owner of the dominant tenement in favor of the owner of the servient." 8 Mich Civ Jur, Easements, § 47. Therefore, once San Jacinto's interest in the easement was

transferred to Jefferson, the easement was extinguished. See also 4 Powell, Real Property, § 34.20, p 187 ("The owner of an easement has an interest in the land of another. Therefore, the owner of the easement may end the easement by releasing it to the servient owner."); *von Meding v Strahl*, 319 Mich 598, 605; 30 NW2d 363 (1948), overruled on other grounds *Schmidt v Eger*, 94 Mich App 728; 289 NW2d 851 (1980) ("The union of dominant and servient estates in the same owners extinguishes prior easements. One cannot ahve [sic] an easement in one's own land.").

Shubh's second argument on appeal is that the trial court erred in holding that it had constructive notice of the termination of the easement. We disagree.

Constructive notice "is notice that is imputed to a person concerning all matters properly of record, whether there is actual knowledge of such matters or not." *Richards v Tibaldi*, 272 Mich App 522, 540; 726 NW2d 770 (2006). "When a person has knowledge of such facts that would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed." *Id*. at 539, quoting *Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951). "Since the recording of the various designated instruments or writings is constructive notice to those subsequently dealing with or attempting to acquire interests in the property involved, it is incumbent upon such persons to examine carefully the public records in order to determine the nature of the legal title of the property and the rights or interests of other persons in the premises." 21 Mich Civ Jur, § 20, citing *Piech v Beaty*, 298 Mich 535; 299 NW2d 705 (1941).

On appeal, Shubh asserts that the quitclaim deed provided "wrong notice." It argues that the quitclaim deed "was, if anything, misleading on its face since it appears to be a quit claim conveyance of an interest in property including the servient tenement interest that traveled with the Property." Shubh does not claim that the quitclaim deed was not recorded and admits that it appears in the grantor/grantee index for the Hotel Property. Shubh asserts that the quitclaim deed does not appear in the tract index, but does not explain why this is significant. For the reasons already discussed, the quitclaim deed terminated the easement and, because Shubh admits that the quitclaim deed was recorded and does not even assert that it lacked actual notice of the quitclaim deed, the trial court properly held that Shubh had notice of the termination of the easement.

Moreover, even if Shubh did not have actual or constructive notice of the termination of the easement by virtue of the quitclaim deed, there were circumstances that should have prompted Shubh to inquire about the continued existence of the easement. While the January 2, 1990, deed conveying the Hotel Property to the Hotel Pontchartrain Limited Partnership explicitly refers to the easement by liber and page number, the easement does not appear in the deed by which Shubh acquired the property, or in any of the other three deeds conveying the Hotel Property after the quitclaim deed was recorded. Moreover, basic observations and inquiries would not have suggested that the owners of the Hotel Property had rights to use parking spaces at the Office Property. According to an affidavit filed by Danny Appiah, the site manager of the Office Property since July 1999, during his tenure, "the parking garage has been used solely and exclusively by (1) tenants of The Madden Building, (2) persons who pay for monthly parking permits, and (3) members of the general public who pay by the hour for access to the parking garage." Also according to the affidavit, since at least July 1999, the owners and

managers of the Hotel Property have not paid any of the costs of operation or routine maintenance of any parking spaces in the parking garage or any portion of the real estate taxes of the parking garage, which were requirements under the 1987 Grant of Easement. See 21 Mich Civ Jur, Recording of Instruments and Notice of Rights, § 31 ("One entering into any transaction concerning realty is required to take notice of any possession, use, or occupancy of the realty by another and must make inquiry as to the nature and extent of the rights or interests of such person. . . . Such actual possession, use, or occupancy is notice of the claim or title of that person, whatever it may be, and not merely that which the records may show.")

Shubh's third argument on appeal is that its predecessors in interest did not abandon the easement, and Wells did not acquire it through adverse possession. Because we find that the easement was terminated by the quitclaim deed, we need not address this argument. We also note that this issue is unpreserved with respect to Shubh's adverse possession argument, because the trial court did not address it. *Brown*, *supra* at 599.

Shubh's fourth argument on appeal is that Wells is estopped from asserting that the easement was terminated because the last four deeds in the Office Property's chain of title, all executed and recorded after the quitclaim deed, and including the deed by which Wells acquired the property, refer to the easement. We disagree.

"An estoppel arises where: (1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts." *Minerva*, *supra* at 218. Shubh does not even claim inducement on the part of Wells. Moreover, Shubh cannot claim reasonable reliance on a belief that the easement was still in effect because, as discussed, *supra*, Shubh had actual or constructive notice that the easement had been terminated.

Shubh cites three cases in support of its argument that Wells is estopped from asserting termination of the easement. In *Akers v Baril*, 300 Mich 619; 2 NW2d 791 (1942), the Court held that, because the purchasers of the servient estate "accepted and recorded the deed," which reflected the 25-foot roadway in question, they "estopped themselves and their successors from denying the use of the road to abutting property owners who bought in the belief that they were entitled to an easement which was necessary so as to give an appreciable value" to the dominant owners' lot. *Id*. at 624-625. The Court found that the attempts of the grantor and the new owners of the servient estate, after the dispute arose, to execute new backdated deeds in an effort to terminate the easement by excluding it from the new deeds, did not terminate the easement. *Id*. at 623, 626. In *Odoi v White*, 342 Mich 573; 70 NW2d 709 (1955), the Court rejected the defendants' argument that an easement over a "two rod strip of land" reflected in the plaintiffs' deed ceased to exist because the dominant estate had been converted from a dairy farm to a golf course, where "the expressly granted easement was not limited to one particular purpose or use." *Id*. at 576. Moreover there was, "no showing in the record that there was any conveyance nor any act on the part of any person at the time owning the dominant estate, expressly repudiating, extinguishing or destroying ownership on the part of the owner of the dominant estate of the easement in question." *Id*. at 576-577. Finally, in *Crane v Smith*, 243 Mich 447; 220 NW2d 750 (1928), the Court found that the plaintiffs had failed to establish mutual mistake with respect to the date of expiration of an easement: "[h]aving caused an independent investigation to be made by an attorney of their own selection, to whom the facts were open and known, the plaintiffs are

not in a position to continue to claim that they accepted [the defendant's] statement of the time of expiration, without at least a fair showing that the advice of their attorney did not undeceive them." *Id*. at 450.

Of the cases cited by Shubh, *Akers*, *supra*, is the most closely analogous to the facts of the instant case. Unlike *Akers*, however, the record in this case does not establish that Shubh purchased the property in reliance on the easement. As already discussed, Shubh had, or should have had, notice that the easement was terminated. Therefore, any reliance upon the continued existence of the easement was not reasonable. Moreover, the termination of the easement in this case was achieved by agreement between the parties' predecessors in interest. This was not a situation, as in *Akers*, where the servient owners attempted retroactively and arguably in bad faith, to cut off the dominant owners' access to the easement. *Odoi*, *supra*, simply stands for the proposition that an expressly granted easement that is not limited to any particular purpose or use is not extinguished just because the dominant estate was converted to another use. *Crane*, *supra*, is essentially about notice and, if anything, works against Shubh. As already discussed, Shubh had, or should have had, notice that the easement had been terminated. Thus, Wells is not estopped from arguing that the easement has been terminated.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly