STATE OF MICHIGAN

COURT OF APPEALS

LEO MUCHA, JR. and BETHANY MUCHA, Plaintiff-Appellees, v RICHARD KALINOWSKI AND JESSICA KALINOWSKI , Defendant-Appellants.	UNPUBLISHED June 17, 2008 No. 276961 Lapeer Circuit Court LC No. 05-036452-NZ

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order granting summary disposition to plaintiffs. We affirm.

I. Basic Facts and Proceedings

Plaintiffs filed the instant case after defendants refused to allow plaintiffs to access their property across an alleged easement over defendants' property. In 1993, Ron and Sue Forys owned 40 acres of property and sold defendants portions of the property identified in their warranty deed as parcels "C-1," "C-3" and "easement," and sold a parcel, labeled the "remainder" in defendants' deed, to Charles and Brenda Cichoracki. The easement abuts each the above-identified parcels.[1] Although the warranty deed conveyed to defendant by the Forys purports to convey an easement to defendants, the warranty deed does not indicate the dominant and serviant tenements. The remainder, the easement and C-3 abut a major road, but access to the remainder from the road without the easement is allegedly problematic because of wetlands. C-1 does not abut the road, but can be accessed through the easement or C-3.

On May 27, 2004, the Cichorackis conveyed the remainder to plaintiffs. The deed from the Cichorackis to plaintiffs makes no mention of the easement, but the Forys, Cichorackis and plaintiffs accessed the remainder exclusively through the alleged easement.

[1] Another parcel C-2 abuts parcels C-1, C-3 but does not abut the easement or the remainder.

In 2005 there was apparently a dispute between Leo Mucha and Richard Kalinowski that culminated in Richard threatening to erect a fence to block Leo's access to the remainder through the alleged easement. Plaintiffs filed the instant complaint on September 30, 2005, asserting that the failure to mention the easement in their deed was clerical error. The complaint alternatively alleged claims of easement by necessity and prescriptive easement.

Defendants subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(8). In response to plaintiffs' claim of clerical error, defendants maintained that the only relevant documents were "[t]he warranty deed of the [p]laintiff[s], the warranty deed of the [d]efendants and the survey," none of which clearly indicate plaintiffs' interest in the easement. Defendants also argued that the remainder abutted a major road and, thus, precluded any claim of easement by necessity, and further that plaintiffs could not establish use of the easement for 15 years as it was created in 1993. Plaintiffs responded and attached an affidavit from Ron Forys averring that the easement was intended to benefit the remainder because a driveway could not be built on wetlands to allow access to the property. Plaintiffs later filed a supplemental response to defendants' motion seeking summary disposition pursuant to MCR 2.116(C)(10).

At the summary disposition hearing, defendants argued that the easement serves C-1, and that there is no evidence that the easement serves the remainder. Plaintiffs responded by arguing that the easement did not serve C-3 because it could be accessed through C-1, and that defendants' deed states, "subject to the easement." Plaintiffs also noted that although the motion was brought pursuant to MCR 2.116(C)(8), MCR 2.116(I)(2) permits courts to grant summary disposition to plaintiffs. The trial court found that "[d]efendants were well aware of the existence of an easement on their property," and granted summary disposition to plaintiffs pursuant to MCR 2.116(I)(2).

II. Whether Plaintiffs May Use the Easement To Access Their Property

A. Standard of Review

Defendants initially claim that the trial court erred in considering documentary evidence to decide defendants' motion for summary disposition, which was filed pursuant to MCR 2.116(C)(8). The trial court expressly granted plaintiffs summary disposition pursuant to MCR 2.116(I)(2), which provides in relevant part:

> (I) Disposition by Court; Immediate Trial.
>
> (1) If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.
>
> (2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

Defendants' claim lacks merit. MCR 2.116(I)(2) expressly provides the trial court discretion to consider "affidavits or other proofs" in determining whether "a party is entitled to judgment as a matter of law." MCR 2.116(I)(2) does not indicate the trial court is precluded

from considering "affidavits or other proofs" simply because the motion was filed pursuant to MCR 2.116(C)(8). Further, plaintiffs filed a supplemental response to defendants' motion seeking summary disposition pursuant to MCR 2.116(C)(10) and defendants responded. Defendants further claim that in deciding the motion pursuant to MCR 2.116(I)(2) the trial court erred by denying them an opportunity to engage in discovery and present evidence. However, as mentioned, defendants' responded to plaintiffs' supplemental response. Also, defendants filed a motion for reconsideration raising this issue, but failed to indicate any discoverable evidence that disputes the evidence relied on by the trial court. Defendant's claim is without merit and review of the trial court's decision pursuant to MCR 2.116(C)(10) is appropriate.

This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10). *Veenstra v Washtenaw Country Club*, 466 Mich 155; 159, 645 NW2d 643 (2002). In deciding the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id*. at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 540; MCR 2.116(C)(10) and (G)(4).

B. Analysis

Defendants argue that because plaintiffs' deed does not mention the easement, the trial court erred in looking the beyond four corners of the deed to conclude that plaintiffs have an interest in the easement.

> "The general rule is that courts will follow the plain language in a deed in which there is no ambiguity. . . ." "[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. The meaning of the words used, and not what the parties may have intended by such language, is controlling." [*Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207, 216; 731 NW2d 472 (2007) (internal citations omitted).]

We agree with defendants that, "easements should be construed according to language within the four corners of the grant." *Dyball v Lennox*, 260 Mich App 698, 680 NW2d 522 (2004). We also agree that, given this tenet of construction, plaintiffs' uncorrected deed does not establish any interest in the easement. However, we reject defendants' contention that defendants' deed similarly cannot identify plaintiffs' interest in the easement. "An easement may be created by an express reservation in another document of conveyance." 1 Cameron, Michigan Real Property Law: Principles and Commentary (3rd ed), § 6.6, p 216; See *Chapdelaine v Sochocki*, 247 Mich App 167, 635 NW2d 339 (2001) (holding access easement claimed by plaintiff to have been created by an express reservation in the document of conveyance, the purchase agreement.) Defendants' deed plainly shows that the easement abuts the remainder, C-1 and C-3. However, defendants' deed fails to mention the purpose of the easement and does not identify the dominant and serviant estates. Thus, in this case, while the general grant of the easement to defendants is clear, the purpose of the easement is unclear and ambiguous. *Little v Kin*, 468 Mich 699, 664 NW2d 749 (2003). "If the language is ambiguous, extrinsic evidence may be considered to determine the scope of the easement." *Schumacher v. Department of Natural Resources*, 275

Mich App 121, 131; 737 NW2d 782 (2007). Accordingly, the trial court properly considered evidence beyond the four corners of the deeds.

We conclude the trial court did not err in relying on record evidence to conclude that plaintiffs possess rights to use the easement to access their property. Ron Forys' unchallenged deposition testimony plainly avers that the easement was intended to be used to access plaintiffs' property. Further, the purchase agreement plaintiffs entered into indicates an intent to convey an interest in the easement to plaintiffs. The trial court did not err in granting plaintiffs' an interest in the easement to access their property.[2]

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[2] Though not raised on appeal, the record reflects that plaintiff has demonstrated an implied easement.

> Where during the unity of title an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which, at the time of the severance, is in use, and is reasonably necessary for the fair enjoyment of the other, then upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage in substantially the same condition in which it appeared and was used when the grant was made. [*Harrison v Heald*, 360 Mich 203, 206-207; 103 NW2d 348 (1960) (citations omitted).]

In order to prevail, the party asserting an easement by implied reservation must show: (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).

Here, there is no dispute that during the unity of title the claimed easement was used for the benefit and enjoyment of what is now plaintiffs' property and that such use was apparent and obvious. Indeed, defendants' deed identifies plaintiffs' property as the remainder, and defendants have not disputed the deposition testimony from Ron Forys that he openly and obviously used the easement to access plaintiffs' property and even he walked the property with defendants to point out the existence of the easement intended to benefit plaintiffs' property. Further, before the instant case, no one had ever attempted to impede the use of the easement to access plaintiffs' property. Also, although defendants' challenge whether the use of the easement is necessary to access plaintiffs' property, there is no real dispute that use of the easement is reasonably necessary for the enjoyment of plaintiffs' property. Defendants do not challenge plaintiffs' claim or support for the claim that wetlands make access to the remainder problematic at best. Thus, even if the trial court improperly determined that plaintiffs possessed an express easement to access their property, the trial court properly allowed plaintiffs such access as an implied easement.

We further agree with plaintiffs that later executed corrective deeds from the Cichorackis and the surviving Forys expressly granting plaintiffs rights to the "easement for ingress or egress," establishes plaintiffs' interest in the easement. An easement necessarily implies that at least two parties share interests in the land, the owner of the serviant estate and the holder of the easement. Typically, the owner of a servient estate may continue to use land encumbered by an easement. *Michigan Dept of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 374; 699 NW2d 272 (2005). If, as defendants claim, they hold the easement, then someone else must own the servient estate. Because the easement was created in 1994, only three other parties possessed an interest the serviant estate; the Forys, the Cichorackis or plaintiffs. In response to defendants' motion for reconsideration, plaintiffs attached as an appendix corrective deeds from the Cichorackis and the surviving Forys granting plaintiffs rights to the "easement for ingress or egress." Under this scenario, plaintiffs currently possess an "easement for ingress or egress." On the other hand, if defendants own the serviant estate, they cannot also hold the easement, because in "situations where the easement claimed is appurtenant, the Michigan Supreme Court has held that an owner of land cannot have an easement in his own land." *Slatterly v Madiol*, 257 Mich App 242, 261; 668 NW2d 154 (2003) citing *Rusk v Grande*, 332 Mich 665, 669; 52 N.W.2d 548 (1952) and *Hasselbring v Koepke*, 263 Mich 466, 478, 248 NW 869 (1933). Besides defendants' property, the only other property appurtenant the easement is plaintiffs. Thus, the easement in defendants' deed can only be interpreted as acknowledging the remainder as the dominant estate. In either case, plaintiffs, at least, possess a right to access their property across the easement.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen