STATE OF MICHIGAN

COURT OF APPEALS

COLLEEN KILEY, Plaintiff-Appellant,	UNPUBLISHED July 15, 2008
v	No. 277783 Kalamazoo Circuit Court
CHASE MANHATTAN MORTGAGE COMPANY, Defendant-Appellee.	LC No. 05-000246-NZ

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). This case arises from defendant's alleged actions[1] in entering plaintiff's property, a farmhouse which was subject to a mortgage held by defendant, and locking outer doors or otherwise preventing access to the farmhouse on the basis that the home had been abandoned and was in a deteriorated state of repair. Defendant relied on language in the mortgage that permits it to take, if a default has occurred, any action necessary to protect the value of the property and its security interest. On plaintiff's claim of trespass, which was the sole cause of action alleged by plaintiff, the trial court found that there was no genuine issue of fact that defendant was authorized by the mortgage clause to make the intrusion, thereby defeating the trespass action that includes the required element of an unauthorized entry. We affirm in part and reverse in part.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The proper interpretation of a contract, such as a mortgage, is a question of law subject to de novo review on appeal. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

[1] Our reference to defendant's actions of course pertain to the actions of agents acting on behalf of defendant. Defendant does not deny or dispute the existence of agency relationships relevant to this appeal.

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "[A] trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition." *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005).

Plaintiff's sole cause of action sounded in common-law trespass. "Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). Every unauthorized entry upon the private lands or property of another constitutes a trespass. *Id.* at 60, quoting *Giddings v Rogalewski*, 192 Mich 319, 326; 158 NW 951 (1916). The plaintiff must hold title to or actual possession of real property on which the alleged trespass occurred in order to maintain a trespass action. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 508; 686 NW2d 770 (2004). For purposes of trespass, a direct or immediate invasion is one that is accomplished by any means that the defendant knew or reasonably should have known would cause a physical invasion of the land owned by the plaintiff. *Adams, supra* at 71. The defendant must intend to enter or intrude upon the property, and where "the intrusion was due to an accident caused by negligence or an abnormally dangerous condition, an action for trespass is not proper." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186,195; 540 NW2d 297 (1995). But the intent to cause a trespass is generally irrelevant. *Traver Lakes Comm Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 345; 568 NW2d 847 (1997). Because a cause of action for trespass requires an unauthorized entry, consent to enter upon the private property of another is an affirmative and absolute defense to a trespass claim. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705-706; 609 NW2d 607 (2000).

We choose to begin our analysis by first rejecting, in fairly cursory fashion, some arguments presented by defendant as an alternative basis to affirm the trial court's summary dismissal of plaintiff's trespass action. Defendant contends that, although not addressed by the trial court, it is entitled to summary disposition because plaintiff did not sustain any damages for which recovery is allowed. In support, defendant claims that plaintiff does not own the farmhouse property in light of the foreclosure, that plaintiff never used the farmhouse and cannot recover lost rent, that damages are not recoverable for the cost of wintering in Florida, and that the alleged rental losses relative to the caretaker (ranch) house are not recoverable. Defendant's arguments lack merit.

Recovery in trespass is proper for any appreciable intrusion onto the plaintiff's land that violates his or her right to exclude others, and the plaintiff "is presumptively entitled to recover at least nominal damages even absent any proof of actual injury and may recover additional damages for any injuries actually proved." *Adams, supra* at 72-73; see also *Giddings, supra* at 326. Accordingly, even if we assumed that plaintiff did not suffer any actual damages, this would not defeat her claim for trespass and warrant summary dismissal.

Further, plaintiff did own the farmhouse at the time of the alleged trespass. While the record is somewhat muddled regarding the foreclosure by advertisement and the resulting sheriff's sale, with documents showing a March 27, 2003, sheriff's sale and others suggesting a sheriff's sale in the spring of 2005, at the absolute earliest that plaintiff no longer had a right of possession was six months after the ostensible sale in March 2003, and this is assuming a six-month redemption period as claimed by defendant. See MCL 600.3240 (circumstances can affect length of redemption period in foreclosure by advertisement). "Foreclosure causes equitable title to vest in the purchaser [here defendant], while legal title remains in the mortgagor until the redemption period expires." *Ruby & Assoc, PC v Shore Financial Services*, 276 Mich App 110, 118; 741 NW2d 72 (2007), vacated in part on other grounds 480 Mich 1107 (2008). "During the redemption period, mortgagors retain possession and the benefits of ownership of the property, in addition to the statutory right of redemption." *Id.* Michigan has had a continuous and definite policy to save to mortgagors the possession and benefits of mortgaged premises, as against the interests of mortgagees, until expiration of the redemption period, and a mortgagee can only obtain possession within this timeframe in exchange for consideration made pursuant to an explicit agreement, which did not occur in the case at bar. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660-661; 575 NW2d 745 (1998). Therefore, plaintiff retained legal title and the right to possession until, minimally, September 2003, and this period would encompass the initial trespass and plaintiff's claim of continuing trespass that covered the time during which the padlock remained on the side door despite removal and entry demands. Accordingly, defendant's arguments concerning foreclosure, ownership, and damages do not support dismissal of plaintiff's case.[2]

We now move on to plaintiff's arguments. Plaintiff first argues that the trial court erred in making the legal conclusion that the mortgage allowed for entry onto the property for any purpose other than to make repairs. Plaintiff, citing paragraph 7 of the mortgage, concedes that defendant had "a contractual right to enter plaintiff's premises for certain limited purposes." Plaintiff asserts, however, that this right of entry is only implicated when the purpose of the entry is to make repairs, and defendant did not make any repairs but instead inflicted damage on the property through its actions. Paragraph 7 of the mortgage provides:

> If Borrower fails to perform the covenants and agreements contained in this Security Instrument . . ., then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property.

[2] We take no position on whether plaintiff incurred actual damages.

> Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. . . .

There is no dispute that at the time of entry by Charles Busch on January 20, 2003, plaintiff was in default of the mortgage for failure to make her monthly mortgage payments. Thus, the default prerequisite contained in paragraph 7 was satisfied, allowing defendant, according to the mortgage, to do whatever was necessary to protect the value of the farmhouse and defendant's rights in the farmhouse. While the remaining language in paragraph 7 gives examples of what actions can be taken, there is no indication in the plain language of the mortgage that this is an exclusive or exhaustive list of actions. Plaintiff maintains that if we read paragraph 7 as argued by defendant, MCL 600.5711 is rendered moot. MCL 600.5711, which is part of the summary proceedings act, MCL 600.5701 *et seq.*, provides that "[a] person may not make any entry into or upon premises unless the entry is permitted by law. If entry is permitted by law, he shall not enter with force but only in a peaceable manner." We fail to see the reasoning in plaintiff's argument. If parties have contracted so as to allow entry on property under certain circumstances, the entry would generally be "permitted by law." Plaintiff would appear to concede this point, considering that she sees no problem with entry being made to make repairs. And there is no indication that Busch entered the farmhouse with force or in a non-peaceable manner.[3]

Seizing on the "whatever is necessary" language from paragraph 7 of the mortgage, plaintiff next contends that the trial court erred in finding that there was no genuine issue of material fact that it was necessary to secure and winterize the premises in order to protect the value of the property. Before directly addressing this argument, it is necessary to construct the proper analytical framework. We first keep in mind that plaintiff's sole cause of action is trespass, which requires an unauthorized immediate or direct intrusion or entry of a physical, tangible object onto plaintiff's land. *Adams, supra* at 67. The intrusions here would be the presence of Busch and Mitchell in the farmhouse in January 2003, along with the padlock, other locking devices placed on doors or windows, and any physical materials that were placed on the property to seal doors and windows.[4] The defense presented by defendant is that these intrusions or entries were authorized; therefore, there could be no civil liability for trespass. The authorization, as argued by defendant, comes from paragraph 7 of the mortgage, which, as

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[3] Because plaintiff makes no argument on the matter, we decline to address whether there are any state or federal laws or regulations regarding consumer protection, in the context of mortgages and lending, that might be relevant and limit defendant's ability to invoke the mortgage language to make entry on plaintiff's property in the manner at issue. We also note that plaintiff makes no argument that defendant failed to provide any or adequate notice before taking steps to secure and winterize the farmhouse, nor that there was a legal obligation to first give notice. Thus, we decline to address any notice concerns.

[4] Plaintiff gives little or no attention to Mitchell's intrusion; rather, the focus is on Busch and the locking devices.

indicated above, provides that defendant can "do . . . whatever is necessary to protect the value of the Property." Defendant's position is that it was authorized to make the intrusion and enter the farmhouse in order to secure and winterize it, where these actions were necessary to protect the value of the farmhouse. Accordingly, the question for us becomes whether there is a genuine issue of fact that it was necessary for defendant to secure and winterize the farmhouse to protect its value. If there is no factual issue that it was necessary, there would also be no factual issue that defendant was authorized to make entry, for purposes of analyzing the elements of trespass, thereby appropriately resulting in summary dismissal of the trespass claim.

Viewing the evidence in a light most favorable to plaintiff, we find that the trial court properly determined, as a matter of law, that defendant's actions in securing and winterizing the farmhouse were necessary under paragraph 7 of the mortgage; therefore, the invasions by Busch, Mitchell, and any locking devices were, at least initially, authorized. In our view, if the farmhouse was vacant or unoccupied, showed virtually no signs of current use, and was in a state of considerable disrepair, defendant had a right, under paragraph 7 of the mortgage, to protect its security interest by entering the farmhouse for the purposes of securing and winterizing the property. Initially, because we must view the evidence in a light most favorable to plaintiff, we start with the assumption that every door to the farmhouse had been locked and/or sealed by defendant, resulting in an inability to make entry in typical fashion.[5]

Busch's inspection of the property revealed a vacant farmhouse in disarray and covered by debris. Busch, on the basis of his observations and experience, concluded that the farmhouse was vacant and abandoned; there was no indication that it was presently being occupied. An affidavit by Peter Eldridge, a zoning and codes administrator for the city of Portage, Eldridge's deposition testimony, a letter sent to plaintiff from Eldridge regarding the farmhouse's condition, an administrative warrant, observations relative to city inspections, a civil infraction violation notice, and four civil infraction citations revealed that the farmhouse was in an extremely dilapidated condition and appeared vacant and abandoned in the spring, summer, and fall of 2002. The house did not have a functioning heating system, nor running water. Peter Brownell, plaintiff's handyman, testified in his deposition that plaintiff lived in the caretaker or ranch house located on the seven-acre parcel, not the farmhouse. Brownell also testified that the water shutoff valve for the farmhouse was kept in the closed position. Thomas Kreis, plaintiff's brother, testified that he could not state that plaintiff or anyone was living in the farmhouse in 2002. Tax documents submitted by plaintiff relative to the years 2000 through 2002 expressly reflect that the farmhouse was "vacant." One of three comparable market analyses prepared by Gail Mitchell regarding an external and internal inspection of the farmhouse on January 22, 2003, shows that the farmhouse was in great disrepair, with holes in the walls and ceilings and

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[5] Busch testified that he only padlocked one of four doors to the farmhouse, which had three doorways that led to the inside of the house and one doorway that led to the basement; there was no internal access from the main living area of the house to the basement. Busch denied screwing shut any of the doors and windows. Plaintiff's deposition testimony and affidavit contradicted Busch's testimony. Plaintiff asserted that one door had a padlock and that the other doors had the locks changed or were screwed closed and that normal entry could not be made.

no serviceable plumbing in the bathrooms. Plaintiff testified in her deposition that the farmhouse had no telephone from 2000 forward, that the farmhouse had electricity in January 2003, although there had been times over the years that it lacked electricity, and that she could not recall whether the house had running water. Plaintiff does not point to any deposition testimony indicating that she was actually living in the farmhouse. Rather, plaintiff produced two self-serving affidavits, one of which was submitted on a motion for reconsideration.[6] While plaintiff averred that she at times slept in the farmhouse, depending on whether certain other individuals were staying in the ranch house, she did not make any averments concerning any specific timeframes during which she stayed at or slept in the farmhouse. Plaintiff, in her deposition and affidavit, acknowledged that she and her mother were up in Grand Rapids for at least seven days in January 2003, at which time Busch and Mitchell entered the farmhouse. Plaintiff vaguely averred that the farmhouse was being worked on when she left for Grand Rapids, but no particulars are provided. We hold that there is no genuine issue of material fact that the farmhouse was vacant or unoccupied, showed virtually no signs of current use, and was in a state of considerable disrepair. In such circumstances, reasonable minds would agree that it was necessary for defendant to secure and winterize the farmhouse. Therefore, defendant initially had authority, under the mortgage, to protect the value of the farmhouse, i.e., its security interest, by entering the farmhouse for the purposes of securing and winterizing the property.

Plaintiff contends that the ranch house on the seven-acre parcel was occupied and not abandoned, and thus it was not necessary to make any entry or intrusion. The trespass action, however, entailed the farmhouse, not the ranch house. Having multiple dwellings on property does not allow a defaulting mortgagor to permit the ruin of one dwelling without intervention by the mortgagee merely because the other dwelling is occupied and well cared for by the mortgagor. Therefore, plaintiff's argument is unavailing. Plaintiff also argues that there was no evidence or history of vandalism involving the farmhouse, and thus it was not necessary to make any entry, nor to secure and seal the house. We reject this argument. A key reason in making entry and taking steps to secure the farmhouse was to protect it against vandalism, which could further reduce the value of the farmhouse. And simply because there may have been no history of vandalism did not mean that vandalism was an impossibility or that defendant was precluded from safeguarding the property. Plaintiff additionally argues that it was not necessary to winterize the farmhouse, but given the condition of the house and surrounding circumstances, including the fact that it was the middle of winter, there can be no genuine issue of fact that winterization was necessary.[7] Plaintiff further maintains that the value of the property was going

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[6] We note that parties are not permitted to contrive factual issues merely by making assertions in an affidavit that are contrary to damaging testimony previously given in a deposition. *Mitan v Neiman Marcus*, 240 Mich App 679, 682-683; 613 NW2d 415 (2000). Further, evidence that is presented to the trial court for the first time in support of a motion for reconsideration is not properly before the court. *Maiden, supra* at 126 n 9. There is no reason that plaintiff could not have submitted the information contained in her second affidavit at the time of summary disposition. Some of the information from the second affidavit, however, was consistent with plaintiff's deposition testimony.

[7] Whether Busch was negligent in the steps he took to winterize the farmhouse is of no
(continued…)

up and that the farmhouse was in better condition in January 2003 than in July 2000 when the mortgage was given. Other than a general averment in plaintiff's affidavit that lacks detail, the record does not bear out this claim. Regardless, assuming that plaintiff is correct regarding the farmhouse's condition and value, this would not negate the finding that securing and winterizing the house in January 2003 was necessary to protect the value of the farmhouse given the surrounding circumstances.

Plaintiff next argues that the trial court erred in finding that there was no genuine issue of material fact that it was necessary for defendant to lock plaintiff out of the farmhouse. As acknowledged by plaintiff herself, the trial court never made such an express finding, but plaintiff maintains that it is a necessary implication that arises from the court's ruling. Plaintiff is suggesting that defendant lacked authority to enter the farmhouse for the purpose of securing and sealing the entire house to the exclusion of plaintiff, instead of doing so in a manner that would still allow entry by plaintiff.[8] Defendant fails to address this specific argument in its appellate brief. Again, viewing the evidence in a light most favorable to plaintiff, we must presume that all of the doors had been secured and sealed and that plaintiff could not make entry. As held above, defendant did have the authority, under the circumstances, to enter and secure the farmhouse, i.e., it was necessary to do so to protect the value of the property. That authority entitled defendant to secure the entire house (all of the doors and windows), which only makes sense if vandalism is a fear even though defendant contends that Busch only padlocked one door. We do not find that defendant's act of securing the farmhouse in a manner that also excluded plaintiff from entering the property equates to a lack of authorization or necessity to enter the farmhouse and secure or seal all of doors with the particular locking devices utilized or in the fashion undertaken by defendant. First, plaintiff was nowhere to be found. Also, plaintiff did not allege a cause of action for unlawful interference with a possessory interest. See MCL 600.2918. Moreover, we cannot expect defendant to leave the farmhouse all locked up without defendant having a key to the side door, which is what plaintiff suggests, despite other access doors. Furthermore, there is no dispute that defendant posted a sign on the farmhouse indicating that a key would be made available to any person entitled to a key. However, this leads us to the final argument by plaintiff, which is not directly addressed by defendant, nor expressly by the trial court, that the court erred in ignoring the claim that defendant had a duty to depart and remove all tangible objects it had left on the property after learning, through plaintiff's phone calls to defendant, that the property had not been abandoned and entry was sought.

The failure to remove a thing or object on the expiration of a license or termination of consent or some other privilege constitutes a trespass. *Rogers v Kent Bd of Co Rd Comm'rs*, 319 Mich 661, 666; 30 NW2d 358 (1947). Quoting 1 Restatement Torts, p 368, the *Rogers* Court stated:

(…continued)

relevance, considering that plaintiff stipulated to the dismissal of her negligence claim.

[8] Stated another way, the locking devices, which allegedly constituted physical, tangible objects invading or intruding on plaintiff's property, were not authorized to be placed on the doors if plaintiff could no longer access the house because, while it may have been necessary to keep others out, it was not necessary or permissible to keep plaintiff out of the farmhouse.

> "A trespass . . . may be committed by the continued presence on the land of a structure, chattel or other thing which the actor or his predecessor in legal interest therein has placed thereon
>
> (a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated, or
>
> (b) pursuant to a privilege conferred on the actor irrespective of the possessor's consent, if the actor fails to remove it after the privilege has been terminated, by the accomplishment of its purpose or otherwise." [*Rogers, supra* at 666 (internal quotations omitted).]

In *Defnet v Detroit*, 327 Mich 254, 258; 41 NW2d 539 (1950), our Supreme Court stated that the maintenance of an active sewer beneath property owned by the plaintiffs established a trespass, and the "failure of the city to remove or block off the active sewer created a continuing tort." See also *Schadewald v Brule*, 225 Mich App 26, 40; 570 NW2d 788 (1997) (use of an easement that went beyond the reasonable exercise of the use granted by the easement may constitute a continuing trespass to the servient estate owner).

Here, viewing the evidence in a light most favorable to plaintiff, she contacted defendant numerous times between late January 2003 and August 2003, seeking entry into the farmhouse. There is no dispute that the water supply to the ranch house came from a well in the front yard of the farmhouse and that the well water traveled first to a tank in the basement of the farmhouse and then to the ranch house. Also, a valve in the basement of the farmhouse controlled the delivery of water to the ranch house, and plaintiff presented testimony that the ranch house was without water when she returned from Grand Rapids on January 24, 2003. Plaintiff presented evidence that she could not activate the water supply to the ranch house because the basement door to the farmhouse had its lock replaced. Although plaintiff stayed in Florida during most of the period from late January 2003 until August 2003, her repeated requests for action from defendant were essentially ignored according to the documentary evidence. Plaintiff did aver and testify that defendant sent her a key, but the key did not work. It appears that Mitchell had the key to the padlock during this time. Plaintiff averred and testified that defendant finally told her to break into the farmhouse, which plaintiff did in August 2003.

While defendant was authorized and it was necessary to enter the farmhouse on January 20, 2003, to secure and winterize the house to protect the value of the house, we cannot state as a matter of law that defendant was authorized to leave the locking devices on the farmhouse and keep it secured and sealed from plaintiff herself after she informed defendant of her desire to access the house. Plaintiff still held legal title and had the right of possession. Although it arguably was necessary to keep the farmhouse secured and sealed to protect its value after receiving notice from plaintiff, given plaintiff's comings and goings, the use of locking devices, which would constitute the physical, tangible objects invading plaintiff's right of exclusive possession, that also kept plaintiff from entering the farmhouse may not have been necessary or authorized. Factual issues related to this question require resolution by the trier of fact.

We affirm the trial court's order granting summary disposition in favor of defendant to the extent of any claim of trespass that occurred before plaintiff allegedly notified defendant of

her desire to make entry. We reverse and remand for further proceedings consistent with this opinion on the trespass claim arising out of events that transpired thereafter. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering