

STATE OF MICHIGAN
COURT OF APPEALS

CONSUMERS ENERGY COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

EUGENE A. ACEY, ELEANORE ACEY,
FREDERICK WILLIAM DROUILLARD,
SHIRLEY ANN DROUILLARD, JOHN
EGLITIS, LAURA EGLITIS, DEL S. FISHMAN,
KATHY FISHMAN, ROBERT J. HOFFMAN,
TROY A. KNIGHT, FAWN Y. KNIGHT,
RICHARD M. VAUGHN, BRENDA S.
VAUGHN, DOUGLAS A. HYMAN, and
MARGO KING HYMAN,,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED

July 17, 2008

No. 277039

Oakland Circuit Court

LC No. 2006-072541-CHss

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant landowners appeal as of right, and plaintiff Consumers Energy Company cross-appeals, the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff in this declaratory judgment action in which Consumers sought a declaration that it had the right to build a second pipeline across defendants' properties. We affirm in part and reverse in part.

In 1951, defendants' predecessors in title entered into a series of gas transmission pipeline easements. Shortly after the easements were entered into, Consumers' predecessor, Michigan Gas Storage Company, constructed a pipeline through the easements. Each of the affected properties involved in this case has one pipeline crossing it that was constructed pursuant to the 1951 easements.

In 2004, Consumers applied to the Michigan Public Service Commission (PSC) for a certificate of public convenience and necessity pursuant to MCL 483.101 *et seq.*, seeking authorization to build a 24.4-mile long gas transmission pipeline known as the West Oakland Pipeline. By order dated December 2, 2004, the PSC granted Consumers a certificate of public convenience and necessity for the West Oakland Pipeline. Consumers thereafter notified

defendants of its intention to construct a second pipeline within the easement and tendered to them the consideration specified in the easements. Defendants refused to cash the checks tendered to them, and notified Consumers of their intention to challenge Consumers' right to build a second pipeline across their properties.

On February 17, 2006, Consumers filed this action for declaratory relief, asking the court to declare that the language of the easements is unambiguous and expressly grants to Consumers the right to build a second pipeline across defendants' properties. On September 13, 2006, Consumers filed a motion for summary disposition, arguing that the case presents a narrow issue of law that could be answered from a review of the language used in the easements.

Before the hearing on the motion, defendants scheduled a motion to compel discovery on September 27, 2006. Consumers opposed the motion to compel on the grounds that it had a pending motion for summary disposition, and because no amount of discovery would change the unambiguous easement language upon which the limited issue presented by the case could be decided. The trial court agreed with Consumers and entered an order denying the motion to compel.¹

At a November 8, 2006, hearing on Consumers' motion for summary disposition, the trial court stated in relevant part:

Plaintiff's complaint merely seeks a declaration that plaintiff has a right to construct a second pipeline across the defendant's property, not more than 30 feet from the existing pipeline.

* * *

I'm going to, obviously, I'm going to grant the motion. I think, I would like to tailor it so that we are clear that in so granting, it must stay within the 66 feet, not to exceed the 30 feet that you are talking about.

The court granted Consumers' motion for summary disposition, finding that the language of the 1951 easement created a right in Consumers to construct a second pipeline. Following the

¹ Defendants suggest that the trial court erred by granting summary disposition before discovery was complete. However, defendants did not raise this issue in their statement of questions presented. "An issue not contained in the statement of questions presented is waived on appeal." *English v Blue Cross*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Nonetheless, with regard to discovery, summary disposition is generally premature if granted before discovery on a disputed issue is complete. *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich app 440, 446; 443 NW2d 420 (1989). Summary disposition may nonetheless be appropriate if further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Newmann v State Farm Mutual Automobile Ins Co*, 180 Mich App 479, 485; 447 NW2d 786 (1989).

hearing, Consumers submitted a proposed order under MCR 2.602(B)(3). Defendants objected to the order. Ultimately, the trial court entered an order on February 23, 2007, that stated in pertinent part:

NOW THEREFORE, IT IS ORDERED, for the reasons stated on the record, that Plaintiff's motion for summary disposition is hereby GRANTED; and

IT IS FURTHER ORDERED, that Plaintiff shall be limited to placing a second pipeline no more than 30 feet from the existing pipeline on all of Defendants' properties; and

IT IS FURTHER ORDERED, that the total available working area during construction of the second pipeline shall be limited to 66 feet in width, measured from a point ten feet North of the existing pipeline across all of Defendants' properties and then South 66 feet; and

IT IS FURTHER ORDERED, that Plaintiff's total available area for the permanent use of its easement shall be limited to sixty-six feet in width, measured from a point ten feet North of the existing pipeline across all of Defendants' properties and then South 66 feet; . . .

Defendants appeal that order, and Consumers cross-appeals. Defendants assert that the trial court erred with regard to the proposed location of the second pipeline, and also assert that the statute of frauds precludes enforcement of the easements. Consumers' cross-appeal is limited to the issue of the allowed work area for the construction of a second pipeline.

This Court reviews de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The extent of a party's rights under an easement is a question of fact that this Court reviews for clear error. *Blackhawk Dev Corp v Dexter Village*, 473 Mich 33, 40; 700 NW2d 364 (2005); *Little v Kin*, 249 Mich App 502, 507; 644 NW2d 375 (2002).

Easements may be created by express grant, by reservation or exception, by covenant or agreement, or be acquired by prescription. *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 270; 739 NW2d 373 (2007). An easement is "a right to use the land burdened by the easement rather than a right to occupy and use the land as an owner." *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005). An "easement holder is said to enjoy all rights reasonably necessary and proper to fully use the easement." *Id.* at 403. Consumers' rights in defendants' properties are determined by examining the language of the easements because an easement holder's rights are defined by the easement agreement. *Panhandle Eastern Pipe Line Co v Musselman*, 257 Mich App 477, 484; 668 NW2d 418 (2003).

This case involves express easements, the language of which states in relevant part:

The route to be taken by said gas mains across said land being more specifically described as follows:

Generally in an Easterly and Westerly direction in, under, through and across said above described land.

With full rights and authority unto the party of the second part, its successors and assigns, and its and their agents and employees, to enter at all times upon said premises for the purpose of constructing, repairing, removing, replacing, and maintaining said gas mains, connections and accessories. Not more than two lines of gas mains may be laid and constructed hereunder. Said lines will not be constructed concurrently, and the second line may be commenced and completed at any time subsequent to the completion of the initial line. Party of the second part shall pay said parties of the first part at the rate of One Hundred Sixty Dollars (\$160.00) per mile for each line of mains laid on said premises, payable, as to each of said lines, on or before the date on which construction of such line commences. Party of the second part shall also pay for damage to crops or fences in laying or maintaining said gas mains. Soil drainage systems, if any, upon said premises, shall be left in as good condition as found.

The easement covering the Hyman property contains the following additional language regarding the pipeline route:

The surface of the property shall be left, as nearly as practicable, in as good condition as found. The working strip for the purposes of construction and maintenance shall be sixty-six (66) feet.

The plain and unambiguous language of the easements expressly authorizes Consumers to build a second pipeline across defendants' properties. The trial court properly determined that Consumers has a right under the easements to construct a second pipeline.

Defendants maintain that the easements are ambiguous with regard to the location of the pipeline. However, the express language of the easements contemplates the construction of a second pipeline "in an easterly and westerly direction" and does not restrict the area available for construction. The language is not ambiguous, and the construction of a pipeline in an easterly and westerly direction is contemplated by the express language of the easements and, therefore, does not materially increase the burden upon the servient estates beyond the originally intended scope of the 1951 easements. *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 577-578; 485 NW2d 129 (1992).

Defendants also assert that Consumers' position is that it can enter defendants' properties for "purposes of placing the second gas transmission pipeline anywhere it determines." However, in its complaint, Consumers asserted that it "intends to locate the West Oakland Pipeline on Defendants' Parcels not more than 30 feet from the existing pipeline."² Consumers

² Consumers asserted in its reply brief in support of its motion for summary disposition that "Defendants are fully aware that Plaintiff has been and remains willing to release its right in any other part of their property than a strip of width sufficient for the construction, repair, removal, (continued...)"

also asserted that it “will limit the work area during construction of the West Oakland Pipeline to an area that is 30 feet on the outside of the existing pipeline (for the piling of soil) and 45 feet on the outside scope of the proposed pipeline, except on the parcel owned by Defendants Hyman, where the construction will be limited to a 66-foot-wide strip parallel to the existing pipeline.” Apparently in reliance on Consumers’ representations, the trial court included the following pertinent restrictions in its order:

IT IS FURTHER ORDERED, that the total available working area during construction of the second pipeline shall be limited to 66 feet in width, measured from a point ten feet North of the existing pipeline across all of Defendants’ properties and then South 66 feet; and

IT IS FURTHER ORDERED, that Plaintiff’s total available area for the permanent use of its easement shall be limited to sixty-six feet in width, measured from a point ten feet North of the existing pipeline across all of Defendants’ properties and then South 66 feet; . . .

Defendants concede that a “blanket easement” existed at the inception of the easements, but maintain that the placement of the first pipeline placed limitations on the easement with respect to the location of, and working strip for, the second pipeline. Defendants cite no authority in support of their argument that the construction of the first pipeline in some fashion modified the language of the easement with respect to the location of the second pipeline. As noted above, the easements are all silent with respect to a precise location for pipeline construction.³

Consumers argues on cross-appeal that the trial court’s finding with respect to the placement of the second pipeline is erroneous, albeit for different reasons. Although Consumers concedes that it consented on the record to the *permanent* use of only 66 feet for each of the properties upon completion of the second pipeline,⁴ Consumers argues that the trial court erred in including a 66-foot working strip for properties other than the Hyman property, and in “arbitrarily defining the 66-foot working strip as beginning at a point ten feet north of the existing pipeline, creating a de facto working strip of only about 56 feet.”

With regard to the working strip for construction of the pipeline, only the Hyman easement contains any restrictions on the size of the working strip. Thus, the trial court erred by limiting Consumers to a 66-foot wide working strip for properties other than the Hyman property.

Consumers concedes that it is limited by the language of the Hyman easement to a 66-

(...continued)

replacement, and maintenance of its pipelines.”

³ Nonetheless, Consumers agreed to that the second pipeline would be constructed 30 feet from the first pipeline.

⁴ Consumers asserts that “the two pipelines, 30 feet apart, will ‘occupy’ not more than 66 feet in total width including parallel access rights.”

foot working strip on the Hyman property, but contends that the trial court erred in arbitrarily defining the starting point of that strip as ten feet north of the existing pipeline and by applying the restriction in the Hyman easement to the other properties. It contends that the 66-foot working strip across the Hyman property should be south of and parallel to the existing pipeline “because heavy earth moving equipment cannot be operated above the existing pipeline without the risk of disturbing it,” and “a 56-foot working strip makes it extremely difficult to install the second pipeline.” Again, because the language of the Hyman easement contains neither a precise location for construction of the pipeline, nor a precise location for the working strip, the trial court erred by arbitrarily defining the starting point of the working strip as ten feet north of the existing pipeline. The Hyman easement plainly states that “the working strip for the purposes of construction and maintenance shall be sixty-six (66) feet,” but does not identify the starting point for the working strip.⁵

Defendants also argue that the easement agreement violates the statute of frauds because it did not include an adequate description of the encumbered land. The statute of frauds is an affirmative defense that must be raised as required by MCR 2.111(F). Because defendants did not raise the statute of frauds as an affirmative defense, the defense is waived. *Travelers Ins Co v Detroit Edison Co*, 237 Mich App 485, 494-495; 603 NW2d 317 (1999).

Affirmed in part and reversed in part.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot

/s/ Pat M. Donofrio

⁵ Consumers’ position is that it agreed that the second pipeline will be placed not more than 30 feet from the existing pipeline, and that there would be a 66-foot work area measured from the existing pipeline and 66-feet south. It contends that the easement does not limit the working strip to “an area of land 66 feet from the North property line,” as defendants contend.