

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL LASECKI, MARY ANN LASECKI, and
WILLARD LAWRENCE GIBSON,

UNPUBLISHED
February 12, 2009

Plaintiffs-Appellees/Cross-
Appellants,

v

LAKE LEANN PROPERTY OWNERS
ASSOCIATION,

No. 276053
Hillsdale Circuit Court
LC No. 05-000422-CK

Defendant-Appellant/Cross-
Appellee.

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the August 11, 2006 decision of the Hillsdale Circuit Court, which granted plaintiffs' motion for summary disposition for their breach of contract and promissory estoppel claims. Additionally, the trial court awarded plaintiffs an easement over defendant's property. Plaintiffs cross-appealed. For the reasons set forth in this opinion, we reverse and remand this matter to the trial court for further proceedings consistent with this opinion.

At issue is whether plaintiffs are allowed to place shoreline improvements, including docks, on outlot B, which is owned by defendant. Plaintiffs Daniel and Mary Ann Lasecki own lots 97 and 98 and plaintiff W. Lawrence Gibson owns lot 99. A channel runs in front of the lots that connect to Lake LeAnn. Plaintiffs' land does not directly abut the channel. Rather, a small strip of land, known as outlot B, runs between the water and plaintiffs' property. In 1997, the Laseckis received permission from defendant to dredge the channel to allow boat access from their property to the lake. The project was completed in 1998 and the Laseckis created a beach area and placed docks into the water. In October 1998, Gibson bought his property after the dredging was completed. This dispute began when defendant sent plaintiffs letters demanding that they "remove all of the items which you have placed (or caused to be placed) on any portion of Outlot B (including at the shoreline and beach of the Channel, as that shoreline and beach is located on Outlot B) within fifteen (15) days of the date of this letter." Plaintiffs commenced legal proceedings to assert their rights to use outlot B.

The trial court determined that plaintiffs were entitled to an easement over outlot B because 1) there was a meeting of the minds that in exchange for plaintiffs dredging the channel, defendant would treat plaintiffs as lakefront property owners, and 2) based on the doctrine of promissory estoppel, it would be an injustice to rule plaintiffs were not lakefront owners with all the rights inherent in that designation. According to the trial court, this easement entitled plaintiffs to “the same rights as any other lakefront property owner,” which included the right of ingress and egress as well as the right to construct a dock. The trial court also noted that the statute of frauds does not apply to this case because “this is not a situation in which we are conveying an interest in property,” as defendant retained a fee simple interest in Outlot B. Later in the hearing, the trial court was asked:

Defense Counsel[:] Just a clarification, your Honor. If I understand your ruling correctly, you have held that they [plaintiffs] have an easement for ingress and egress, to put up a dock and moor a boat, but they do not have exclusive use and control of that portion of Outlot B.

The Court[:] That is correct.

As regards the promissory estoppel claim, the trial court ruled:

In this case, it would be an injustice to Laseckis and, as a consequence, the Gibsons, to indicate or to rule that they are not lakefront property owners and that their some 70-thousand-dollar investment is for naught. Promises were made, unplotted, understood between all parties. The Court would grant plaintiff’s motion for summary disposition on that particular count.

Defendant brings this appeal, asserting, in part, that the trial court erred when it declared the statute of frauds did not apply to this particular easement and when it decided plaintiffs were entitled to an easement by estoppel. “This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether [] [a party] was entitled to summary disposition.” *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether the statute of frauds bars an action is a question of law that is reviewed de novo by this Court. *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005); *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

The statute of frauds is found in MCL 566.106, which provides:

No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

“An easement is an interest in land that is subject to the statute of frauds.” *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). When asked if the trial court was granting an easement, the court responded, “That is correct.” It is therefore undisputed that the trial court

granted an easement. It is furthermore undisputed that no written agreement exists.¹ Because an easement is considered an interest of land and because the statute of frauds requires any interest in land to be conveyed in writing, the trial court's conclusion that the statute of frauds did not govern the easement granted in this case was incorrect. *Smith, supra* at 205; MCL 566.106. Thus, the trial court's grant of plaintiffs' motion for summary judgment was improper as a matter of law.

Plaintiffs' maintain that the statute of frauds does not bar their claims because their claim falls into the part performance exception to the statute of frauds. The doctrine of part performance provides:

If one party to an oral contract, in reliance upon the contract, has performed his obligation thereunder so that it would be fraud upon him to allow the other party to repudiate the contract, by imposing the statute, equity will regard the contract as removed from the operation of the statute. [*Brummel v Brummel*, 363 Mich 447, 452; 109 NW2d 782 (1961).]

To satisfy this doctrine, "the contract to be enforced must be established by clear and convincing evidence." *Id.* "Before a party may assert that its actions constitute sufficient part performance to remove an oral agreement from the statute of frauds, that party must first show the existence of the oral contract. If the party fails to establish the existence of the oral contract, any performance prior to the making of the alleged oral contract will not be regarded as performance under it." *Empire Shoe Service, Inc v Gershenson*, 62 Mich App 221, 225; 233 NW2d 237 (1975).

The trial court concluded that a contract existed between the parties to allow exclusive and perpetual use of Outlot B between the channel and the lots in exchange for dredging. Defendant contends that the trial court mistakenly concluded that plaintiffs were entitled to an easement based on the doctrine of promissory estoppel. Despite the trial court's finding and plaintiffs' declaration that an oral agreement existed, our review of the record indicates that the record is less than clear about whether any such agreement existed between the two parties. As neither party can prove that they are entitled to a judgment as a matter of law because a genuine issue of material fact exists regarding whether the parties orally agreed that if the Laseckis dredged the channel, then defendant would allow plaintiffs to use outlot B, summary disposition was inappropriate.

Plaintiffs' argument that they are entitled to the permanent use of defendant's land because an easement can be created by promissory estoppel was expressly rejected by our Supreme Court in *Kitchen v Kitchen*, 465 Mich 654, 660, 641; NW2d 245 (2002), when the Supreme Court concluded: "an interest in land cannot be established on the basis of estoppel."

¹ The lower court record is devoid of any written agreement between the parties and neither party has argued that a written agreement exists. However, we note that a question of fact remains as to whether the parties had an oral agreement, and the legal ramifications of any oral agreement are remanded to the trial court for its consideration.

In *Kitchen*, the plaintiffs contended that the defendant’s “oral promise gave rise to an irrevocable license by estoppel for the use of the land in question.” The Court rejected that claim, holding that “plaintiffs’ claim for an irrevocable license based simply on an alleged oral promise must fail because it is barred by Michigan’s statute of frauds....” *Id.* at 658. The Court ultimately concluded:

Neither a written “license” that evidences a promise duration nor the oral conveyance of an intended permanent interest in land is an “irrevocable license.” Instead, the grantor of such an intended interest, in effect, orally conveys an *easement*. Although one can grant an express, irrevocable easement, it must be evidenced by a writing manifesting a clear intent to create an interest in the land. *Id.* at 661 (emphasis in original).

Similar to the plaintiffs in *Kitchen*, plaintiffs in this case are arguing that based on the theory of promissory estoppel, they are entitled to the permanent use of defendant’s land. However, because an easement is an interest in land, plaintiffs must provide written documentation to establish that they have a permanent interest in outlot B. *Kitchen, supra* at 661; *Smith, supra* at 205. Thus, even if plaintiffs established all of the elements of promissory estoppel, they cannot succeed as a matter of law. *Kitchen, supra* at 660. In this case because plaintiffs have failed to establish a written agreement, the trial court erred when it granted plaintiffs’ motion for summary disposition on the issue of promissory estoppel.

As to Gibson’s individual claims, the record demonstrates that the trial court failed to consider the facts specific to Gibson’s claim. Specifically, the trial court failed to consider that Gibson did not participate in the dredging as he bought his land after the dredging was completed. This Court reverses the trial court’s decision granting Gibson an easement and remands for further consideration of Gibson’s claims. On remand we note that the trial court must consider the remedies available to each individual plaintiff, as Gibson may not be entitled to the same relief as the Laseckis.

In view of our disposition of this case, we need not address the parties’ remaining issues.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello