STATE OF MICHIGAN

COURT OF APPEALS

JOYCE M. COLUCCI, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED June 25, 2009
v	No. 284723 Wayne Circuit Court
JOSE AND STELLA EVANGELISTA, Defendant/Counter-Plaintiff-Appellee.	LC No. 07-713466-CH

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Plaintiff Joyce M. Colucci appeals as of right a trial court order denying her motion for summary disposition under MCR 2.116(C)(10) and request for an injunction prohibiting defendants Jose and Stella Evangelista from interfering with an express utility easement burdening defendants' property. Rather than granting an injunction, the trial court ordered defendants to pay the cost of relocating plaintiff's utility services from their property to plaintiff's property. We affirm.

I. Facts and Procedural History

Plaintiff owns commercial property at 10811 Farmington Road in Livonia, Michigan. Plaintiff's lot is located adjacent to and south of defendants' commercial property, which is located at 10833 Farmington Road. Plaintiff purchased her property on a land contract and took possession of the property in 1983. The law offices of John N. Colucci have occupied plaintiff's property since that time. Defendants purchased their property in 1987 and operated an office center on the property commonly known as the "Professional Village Office Center."

Plaintiff's and defendants' properties were once owned by a common owner, and that owner located the utilities for both properties on what is now defendants' property and serviced what is now plaintiff's property through utility service lines and meters located on defendants' property. In October 1980, the common owner executed and recorded an express utility easement to protect future owners of 10811 Farmington Road. This "perpetual easement and right of use of natural gas lines, sewer lines and water lines" clearly identifies 10811 Farmington Road (plaintiff's property) as the benefited property and 10833 Farmington Road (defendants' property) as the burdened property and allows plaintiff's property to use and be serviced by gas,

sewer and water lines and meters that are located on defendants' property. The express utility easement provides, in relevant part:

> This easement and rights of use grants the owners of the Benefitted Property, or their heirs, personal representatives, successors or assigns, the right to maintain, use, have the benefit of, make reasonable changes in connection with, and have access to, certain natural gas lines, sewer lines and water lines, and meters for said lines, which lines and meters are located on and run through the Burdened [defendants'] Property, and which lines and meters provide sewer, water and natural gas service to the Benefitted [plaintiff's] Property.
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> This grant of easement and right of use shall run with the land and shall be binding on and shall injure [sic] to the benefit of the parties hereto, their heirs, successors or assigns.

According to defendant Jose Evangelista, the buildings on defendants' property were outdated, dilapidated and abandoned, and the Professional Village Office Center was "no longer a viable business and" was "permanently closed as a result of severe economic downturn in Michigan . . . ." In a letter dated May 8, 2007, defendants stated their intent to demolish the building that housed at least one of the utility meters that served plaintiff's property and requested that plaintiff remove her water meter from the property within 14 days. In response to the letter, plaintiff filed a motion for a temporary restraining order (TRO) on May 18, 2007, seeking to prevent defendants from demolishing any improvements on their property or interfering with plaintiff's utility easement. Plaintiff also sought to prevent defendants from interfering with a prescriptive easement that plaintiff asserted she had acquired for parking on defendants' property for over 15 years. That same date, plaintiff also filed a complaint seeking a permanent injunction to protect her rights under the express utility easement and to establish a prescriptive parking easement based on her use of defendants' property.

The trial court entered a TRO on May 18, 2007, which ordered defendants not to demolish, destroy or alter any utility line or meter serving plaintiff's property and not to interfere with or obstruct the parking of vehicles on defendants' property. The TRO was continued on June 1, 2007, but the language prohibiting defendants from interfering with or obstructing the parking of vehicles on their property was removed. On August 9, 2007, the TRO was amended again. This amended order permitted defendants to destroy two of the remaining three buildings on their property, but ordered defendants to maintain and preserve the utility connections and meters for water, sewer and gas servicing plaintiff's property. The amended order also ordered plaintiff and plaintiff's tenants, employees, guests, invitees and representatives not to park on defendants' property.

On June 14, 2007, defendants filed a counterclaim. In their second amended counterclaim, defendants alleged that Professional Village Office Center was "abandoned, dilapidated, and beyond repair," that five of the eight buildings on the property had already been demolished and that they sought to destroy the remaining three buildings so that they could reduce their property taxes and redevelop and improve their property. Defendants sought a declaratory judgment that the utility easement had terminated because plaintiff had misused or abused it or because the underlying necessity has come to an end and the purpose of the easement had become frustrated, abandoned and impossible. According to defendants, plaintiff's

utility easement was for convenience, not necessity, because plaintiff had an alternative source of utility access. Defendants further sought a declaration that plaintiff did not have a prescriptive parking easement and an order prohibiting plaintiff from parking on their property.[1]

The parties filed cross-motions for summary disposition. Plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that the trial court should reject defendants' claims that plaintiff's utility easement had terminated and that plaintiff had not acquired a prescriptive easement for parking on defendants' property. Plaintiff also sought an order permanently enjoining defendants from interfering with plaintiff's rights under the express utility easement and prescriptive parking easement. According to plaintiff, the purpose of the express easement was not frustrated, abandoned or impossible, and the building on defendants' property was not dilapidated or unrentable. Defendants moved for summary disposition under MCR 2.116(I), arguing, in relevant part, that plaintiff had not established irreparable harm because utilities for plaintiff could be accessed from the road and money damages could therefore remedy any harm to plaintiff.

The trial court denied plaintiff's request for an injunction, stating:

> Here, the easement is one for utilities and is recorded. The easement does not refer to a particular location. In order to re-develop the property, Defendant must move the utility lines and meters. In balancing the equities, there appears to be no irreparable harm to Plaintiff to have the utility lines and meters moved to Plaintiff's property. This is consistent with the desire of the City as testified. It would provide easier access for maintenance for Plaintiff. It would increase the value of Defendant's adjoining property.
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> However, the easement is a property right of Plaintiff and must be compensated. Defendant has agreed to assume the cost of moving the utilities and meters. Therefore, this Court finds that in the balance of factors in issuing an injunction, Plaintiff has not met her burden and the request for injunction is DENIED.
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> In addition, this Court does order that the easement for utilities and meters may be moved from Defendant's property on to Plaintiff's property at the total expense of the Defendant . . . .

The trial court did not rule on plaintiff's claim regarding the establishment of a prescriptive easement for parking. On the record at a June 21, 2007, evidentiary hearing regarding plaintiff's express utility easement and again on the record on March 5, 2008, the trial court stated that it would schedule a hearing to take testimony regarding plaintiff's prescriptive easement claim. However, such a hearing was not held, and the trial court never ruled on plaintiff's prescriptive easement claim.

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[1] Defendants' counterclaim also contained several other counts that are not relevant to this appeal.

II. Analysis

A. Standard of Review

This Court reviews a trial court's decision whether to grant injunctive relief for an abuse of discretion. *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 105; 662 NW2d 387 (2003). The abuse of discretion standard recognizes "'that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

B. Express Utility Easement

Plaintiff argues that the trial court erred in refusing to grant a permanent injunction to protect her utility easement.

Injunctive relief is an extraordinary remedy which issues only when justice requires, there is no adequate remedy at law, and there is a real and imminent danger of irreparable injury. *Higgins Lake Property Owners Ass'n*, *supra* at 106. In deciding whether injunctive relief is appropriate, the trial court generally must balance the benefit to the plaintiff of an injunction against the inconvenience and damage to the defendant, and make a decision in accordance with justice and equity under all the circumstances of the case. *Kernen v Homestead Dev Co*, 232

Mich App 503, 514; 591 NW2d 369 (1998). The following factors are taken into account in determining the propriety of issuing an injunction: (1) the nature of the interest to be protected, (2) the relative adequacy to the plaintiff of injunction and of other remedies, (3) any unreasonable delay by the plaintiff in bringing suit, (4) any related misconduct on the part of the plaintiff, (5) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (6) the interests of third persons and of the public, and (7) the practicability of framing and enforcing the order or judgment. *Id.* at 514-515.

In this case, it was proper for the trial court to deny injunctive relief. The nature of the interest protected, plaintiff's utility easement, is not an interest that can only be protected by the issuance of an injunction. For harm to be irreparable, it must be "a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998). "Economic injuries are not irreparable because they can be remedied by damages at law." *Id.* In this case, there was a quantifiable measure of damages based on the cost of relocating the utilities to plaintiff's property. Thus, there was an adequate remedy at law and no irreparable harm to plaintiff. Plaintiff's need for utility services was adequately protected by the trial court's order requiring defendants to relocate plaintiff's utility lines and meters onto plaintiff's property at defendants' expense. According to the testimony of a building and planning inspector for the City of Livonia, plaintiff's utility easement was an unusual arrangement. Arguably, the value of plaintiff's property would be increased by relocating the utilities from defendants' property onto her property. And she would not bear the economic burden of relocating the utilities. In short, this is simply not the sort of property interest that could only be preserved by the granting of an injunction.

Furthermore, the trial court also properly denied plaintiff's request for injunctive relief because of the hardship to defendants if an injunction were issued. Defendants sought to demolish the building that housed the utility lines and meters that serviced plaintiff's property because the buildings on their property were dilapidated and abandoned and they desired to improve and redevelop the property. Five out of eight of the buildings had already been demolished, and the trial court's amended TRO of August 9, 2007, permitted defendants to destroy two of the remaining three buildings on their property. Although plaintiff presented evidence regarding the soundness of the remaining building, whether or not the building is sound is not dispositive. The Professional Village Office Center has been closed, most of the buildings on defendants' property have been demolished, and the remaining buildings are abandoned. Even if plaintiff's utility easement was not technically terminated based on the purpose for which it was granted ceasing to exist, or based on abandonment or impossibility, see *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 381-382; 699 NW2d 272 (2005), the trial court's ruling, which essentially terminated the easement, was proper in light of the equities of the case. The granting of an injunction would have prevented defendants from improving and redeveloping their commercial property during a difficult economic time in the State of Michigan. Thus, the hardship to defendants if the trial court had granted plaintiff an injunction would have been much greater than hardship to plaintiff if the injunction were denied.

In sum, we hold that the trial court's balancing of the equities in this case was reasonable. Balancing the benefit to plaintiff of an injunction against the inconvenience to defendants, we find that the trial court's solution in this case, which was to deny plaintiff an injunction but

require defendants, at their own expense, to transfer plaintiff's utilities to her property, was just and equitable under all the circumstances of the case.

C. Prescriptive Easement

Plaintiff next argues that the trial court erred in denying her motion for summary disposition regarding her request for a permanent injunction to park vehicles on defendants' property. According to plaintiff, she acquired a prescriptive parking easement because either she or her tenants and their employees and customers have used the parking area on defendants' property in a continuous, open, adverse and hostile manner for over 25 years.

The trial court twice stated on the record that it intended to hold an evidentiary hearing to take testimony regarding this issue. However, the trial court never held such a hearing and never ruled on the prescriptive parking easement issue, although it did order in its amended TRO of August 9, 2007, that plaintiff and plaintiff's tenants, employees, guests, invitees and representatives were not to park on defendants' property. Generally, an issue not decided by the trial court is not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, we may address an issue not addressed by the trial court if it concerns a legal issue and the facts necessary for its resolution have been presented. *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002). Despite the trial court's failure to hold an evidentiary hearing on the prescriptive parking easement issue,[2] we find that the record is sufficient to permit this Court's review of the issue. The record contains plaintiff's motion for summary disposition and all the documents she attached to her motion, as well as defendants' briefs opposing plaintiff's motion and the documentary evidence attached to their briefs. The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5). The record contains these documents, and we will review them to determine whether plaintiff established a genuine issue of material fact regarding the existence of a prescriptive parking easement.

"An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000); see MCL 600.5801(4). The party claiming a prescriptive easement has the burden of showing by satisfactory proof that the use of the defendant's property was of such a character and continued for such a length of time that it ripened into a prescriptive easement. *Prose, supra* at 679.

The party moving for summary disposition based on the lack of a material factual dispute must specifically identify the undisputed factual issues and supports its position with documentary evidence, such as affidavits, depositions, admissions or other documentary

[2] We observe that "[t]he purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003).

evidence. MCR 2.116(G)(3)(b), (G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In this case, plaintiff attached to her motion for summary disposition the affidavit of David F. Giandiletti and to her reply to defendants' amended brief in opposition to plaintiff's motion for summary disposition the affidavit of John N. Colucci. In his affidavit, Giandiletti stated that he and his employees and customers had parked on defendants' parking lot since 1993 and that he had no recollection of any other people other than people associated with plaintifff's property using the property. In Colucci's affidavit, Colucci stated that his law firm, people associated with the law firm, and tenants have continuously used defendants' property for parking since 1983. Plaintiff also attached to her motion for summary disposition a certification of defendants' failure to respond to requests to admit. She argues that because defendants failed to timely respond to her requests for admissions, they have admitted the existence of the elements of a prescriptive easement under MCR 2.312.[3] Although we note that defendants did file a response to plaintiff's discovery requests on November 14, 2007, we need not resolve whether defendants admitted the elements of a prescriptive easement under MCR 2.312 because defendants attached to their amended brief opposing plaintiff's motion for summary disposition the affidavit of defendant Jose Evangelista.[4] In his affidavit, defendant stated that plaintiffs "and their agents have not parked openly, notoriously, continuously, []or adversely at the Professional Village for a 15 year period." Viewing the evidence in the light most favorable to defendants, as the nonmoving party, it cannot be said that plaintiff is entitled to summary disposition as a matter of law. *Clerc*, *supra* at 601. Defendant Jose Evangelista's affidavit explicitly negates the establishment of the elements of a prescriptive easement. Therefore, contrary to plaintiff's argument, she did not establish that there were no issues of material fact regarding the existence of a prescriptive parking easement such that summary disposition in her favor and an injunction to enforce such an easement was warranted.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia Diane Stephens

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[3] MCR 2.312(B) provides, in relevant part:

> (1) Each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request, or within a shorter or longer time as the court may allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter. Unless the court orders a shorter time a defendant may serve an answer or objection within 42 days after being served with the summons and complaint.

[4] Defendants actually provided this affidavit after filing the brief opposing plaintiff's motion for summary disposition, stating that the affidavit was not attached to the brief due to an oversight.