STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. DETTLOFF and JOANNE DETTLOFF, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED October 20, 2009
v JO McCLEESE-ROSOL, Defendant/Counter-Defendant/Cross-Defendant-Appellant,	No. 287019 Oakland Circuit Court LC No. 2004-059341-CH
and HILDA MAY HUNT, Trustee of the HILDA MAY HUNT REVOCABLE LIVING TRUST, Defendant/Cross-Defendant-Appellee.	

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant/counter-defendant/cross-defendant Jo McCleese-Rosol appeals as of right the October 3, 2006, order granting plaintiffs/counter-defendants Robert and Joanne Dettloff a prescriptive easement and dismissing McCleese-Rosol's breach of contract claim against defendant/cross-defendant Hilda May Hunt Revocable Living Trust. McCleese-Rosol also appeals as right the January 30, 2008, order granting summary disposition pursuant to MCR 2.116(C)(10) of McCleese-Rosol's claims of innocent misrepresentation and breach of warranty against the trust.[1]

[1] The remaining issues between plaintiffs and Rosol were resolved pursuant to a consent judgment entered on July 17, 2008.

FACTS AND PROCEDURAL HISTORY

McCleese-Rosol is the land contract vendee of the real property that is the subject of this litigation. The Dettloffs are the owners of property adjacent to the subject parcel. The Hunt Trust is the land contract vendor of the subject parcel.

Hilda May Hunt and her late husband acquired fee title to commercial property at 1550 Union Lake Road in Commerce Township in the 1960s. Hunt originally operated a grocery store on the property, and had a rear parking area that is the subject parcel in this case. The property was conveyed to the Trust on December 13, 1991.

Robert Dettloff has maintained his insurance agency at 8262 Cooley Lake Road since 1975. Initially, he was a tenant of the building. According to Dettloff, when he first started working in the building there was no discussion about parking and he parked wherever he wanted. Dettloff purchased the property containing the building on land contract on December 1, 1977. He did not recall any provisions in the land contract that addressed parking for the businesses. Since 1975, he, his employees, and his customers utilized the portion of the subject parcel located immediately behind his property for ingress, egress, and parking. Dettloff currently has tenants that occupy portions of his buildings, and his lease agreements do not specifically identify a parking area for the tenants. Several of the neighboring business owners also used portions of the subject property adjacent to their own properties for access and parking. According to Dettloff, the owners of the buildings that surround the subject parcel have contributed toward maintenance and snow plowing for the subject parcel, and the record owners of the subject parcel never authorized, nor participated in, these efforts. Dettloff described the subject parcel as "wide open" and stated that he never discussed the parking situation with anyone.

In 1986, McCleese-Rosol acquired commercial property at 1560 Union Lake Road, adjacent to the Hunt property, and operated the "Bela Rose Flower Market" at that location. McCleese-Rosol purchased the Hunt Trust property at 1550 Union Lake Road, including the subject parcel, in 2002. A purchase agreement was signed by McCleese-Rosol on March 28, 2002, and by the Hunt Trust on April 18, 2002. The purchase agreement indicated that the purchase was pursuant to a land contract, and stated that the conveyance was "subject to the existing building and use restrictions, easements, and zoning ordinances, if any."

A land contract between the parties was signed by McCleese-Rosol on April 30, 2002, and by the Hunt Trust on May 8, 2002. The land contact conveys two parcels to McCleese-Rosol, one of which is the subject parcel. Section 1 of the land contract states that the conveyance is "subject to any applicable building and use restrictions and to any easements or zoning affecting the land." Section 3 of the land contract requires that a warranty deed be executed simultaneously with the land contract and that the warranty deed be held in escrow. The land contract references a warranty deed conveying the property "subject to the existing building and use restrictions, easements, and zoning ordinances, if any."

On June 24, 2002, McCleese-Rosol wrote a letter to the surrounding property owners advising them of her ownership of the property and explaining that her "decision to purchase 1550 was predicated on a need for parking for my employees and customers." By way of the letter, McCleese-Rosol announced that

> anyone who is an owner, tenant, or employee of the businesses receiving this letter may have my permission to park in any of the parking space that has been cleared and leveled behind 1550 Union Lake Road. You may also advise your customers that they are also welcome to park there. However, there will be no overnight parking or any unlicensed vehicle allowed. I understand that cohesiveness of all of us will mean more business for all of us. Let's become a team of united business owners for the betterment of our community. Bob Dettloff has shared the expense of clearing the rear lot (Thank you Bob!) In the near future we will gravel and re-grade the lot as well. Anyone wishing to contribute funds toward the purchase of gravel would be appreciated, but not expected. You may also contact me regarding the boundaries for parking.

On March 3, 2003, McCleese-Rosol issued another letter to the owners, tenants, and employees of the surrounding property addressing issues that had arisen with regard to parking since her purchase of the property. McCleese-Rosol offered parking spaces on a rental basis. When this offer failed, McCleese-Rosol erected a spite fence that blocked the Dettloffs' access to that portion of the subject parcel that they were accustomed to use for parking.

On June 24, 2004, the Dettloffs filed a complaint asserting a prescriptive easement over the subject parcel. McCleese-Rosol filed a third-party claim against the Hunt Trust and later amended her complaint to assert claims of breach of contract, innocent misrepresentation, and breach of warranty.

On October 3, 2006, the trial court entered an order granting in part and denying in part cross-motions for summary disposition. The trial court held that the Dettloffs had a prescriptive easement for ingress, egress, and parking on the subject parcel, finding that:

> Plaintiffs have demonstrated the continued use of the disputed parcel for well in excess of the required 15 years. The burden then shifts to Defendants to show the initial use was permissive. Nothing has been presented to indicate the initial use of the disputed parcel was permissive, thus, Plaintiffs have a prescriptive easement for continued parking and access.

The order also granted summary disposition in McCleese-Rosol's favor with regard to the Dettloffs' trespass and nuisance claims against McCleese-Rosol, and further granted the Hunt Trust's motion with regard to McCleese-Rosol's breach of contract claim. The order denied summary disposition regarding McCleese-Rosol's breach of warranty and innocent misrepresentation claims.

On January 30, 2008, the trial court entered an order regarding McCleese-Rosol's and the Hunt Trust's cross-motions for summary disposition. The order granted the Hunt Trust's motion with regard to McCleese-Rosol's breach of warranty and innocent misrepresentation claims.

The remaining issues between the Dettloffs and McCleese-Rosol were resolved pursuant to a July 17, 2008, consent judgment.

I

McCleese-Rosol argues that the trial court erred by finding that the Dettloffs established a prescriptive easement over the subject parcel. Specifically, she first contends that the Dettloffs failed to meet the burden of proving that the use of the subject parcel was not permissive, and that the trial court improperly shifted the burden to McCleese-Rosol to prove that the use was not permissive.

An action for a prescriptive easement is equitable in nature. See *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). This Court reviews de novo the trial court's holdings in equitable actions. *Id.* In addition, this Court reviews the trial court's findings of fact for clear error. *Grand Rapids v Green*, 187 Mich App 131, 135-136; 466 NW2d 388 (1991). Additionally, this Court reviews de novo the lower court's decision regarding a motion for summary disposition brought under MCR 2.116(C)(10). *Houdek v Centerville Twp*, 276 Mich App 568, 572; 741 NW2d 587 (2007).

A prescriptive easement is typically established where an express easement has failed because of a defect and was treated as though it had been properly established. *Plymouth Canton Comm Crier, Inc v Prose*, 242 Mich App 676, 684-685; 619 NW2d 725 (2000). In addition, a prescriptive easement is also found to arise in a manner similar to adverse possession, when there is "use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 93, 118; 662 NW2d 387 (2003).

The burden of proving a prescriptive easement remains at all times with the party seeking to establish the easement. *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985). However, when the party establishes that the use has been "in excess of the prescriptive period by many years," a presumption of a prescriptive easement arises. *Reed v Soltys*, 106 Mich App 341, 246; 308 NW2d 201 (1981). A showing of twenty-five years of use is sufficient to create such a presumption. *Haab v Moorman*, 332 Mich 126, 144-145; 50 NW2d 856 (1952). Once such a presumption arises, "the burden of producing evidence" shifts to the other party to establish that the use was merely permissive. *Widmayer*, *supra* at 290. If the other party fails to rebut the presumption, the trier of fact must find that the use was non-permissive.

Here, the trial court observed that the Dettloffs continually used the subject parcel for "well in excess of the required 15 years." Thus, the court noted that "the burden then shifts to Defendants to show the initial use was permissive." The uncontested evidence showed that the Dettloffs had been using the subject parcel since 1975, more than 30 years before this action was filed. Such a period is clearly in excess of the 15-year prescriptive period by many years, and was sufficient under *Reed*, *Haab*, and *Widmayer*, *supra*, to shift the burden of moving forward with evidence to establish that the use was permissive to McCleese-Rosol.

Permissive use "denotes permission in fact, expressly or by necessary implication," and means "more than acquiescence." 25 Am Jur 2d, Easements and Licenses, § 58. This definition of permissive use stands in contrast to a mere failure to object. In *Mumrow v Riddle*, 67 Mich App 693, 697-698; 242 NW2d 489 (1976), the trial court had concluded that because the plaintiff had "made no objection to the use made by the defendants of the disputed area," the plaintiff's use had been necessarily permissive. *Id.* This Court reversed, declaring that the trial court's conclusion was "not in accord with the law controlling easements by prescription." *Id.* at 698.

This Court observed that the mere failure to object to an adverse claimant's use would not render that use necessarily permissive. *Id*.

Here, the evidence considered by the trial court indicated that McCleese-Rosol's predecessor in title never objected to the Dettloffs' use of the subject parcel. The evidence further indicated that the Dettloffs never requested permission, and that McCleese-Rosol's predecessors in title in fact never gave permission. Indeed, McCleese-Rosol states in her brief on appeal that "such parking by Dettloffs occurred absent a request for permission and the owners [sic] grant or denial of permission." The failure of McCleese-Rosol's predecessors in title to object to the Dettloffs use of the subject parcel was not sufficient to render the Dettloffs' use permissive. The trial court properly determined McCleese-Rosol presented no evidence to rebut the presumption that the Dettloffs' use had been non-permissive.

McCleese-Rosol argues that the Dettloffs' use of the subject parcel was necessarily permissive by virtue of the fact that the use was in common with the use of all of the owners and the tenants operating the businesses around the subject parcel. McCleese-Rosol relies on *Banach v Lawera*, 330 Mich 436; 47 NW2d 679 (1951), in which the court held that a prescriptive easement cannot arise out of a use that is mutual *and* permissive. In that case, the adverse claimant's use was already permissive when the mutuality began. Even assuming that the Dettloffs' use of the subject parcel was mutual with the owner of the subject parcel (no evidence of mutual use with the record owner is presented in this case), McCleese-Rosol presented no proof that the use was permissive at inception. The mutual non-permissive use of the subject parcel would not have prevented the Dettloffs' from acquiring a prescriptive easement over McCleese-Rosol's property.

II

McCleese-Rosol next argues that the trial court erred by granting summary disposition in favor of the Hunt Trust with regard to McCleese-Rosol's claims of breach of contract, innocent misrepresentation, and breach of warranty. We disagree.

A

McCleese-Rosol argues that the existence of a prescriptive easement on the subject parcel constitutes a breach of the land contract and the warranty deed by the Hunt Trust. In support of this argument, McCleese-Rosol first asserts that the parties' purchase agreement merged into the land contract and, therefore, the land contract supercedes the purchase agreement. She asserts that any reliance on the purchase agreement is improper. In support of this argument, she relies on *Godspeed v Nichols*, 231 Mich 308; 204 NW2d 122 (1925). However, McCleese-Rosol does not quote the Court's full statement. In that case, the Court stated:

> As to plaintiff's claim of merger, it may be conceded that a deed made in full execution of a contract for the sale of land is presumed to merge the provisions of a preceding contract pursuant to which it is made, including all prior negotiations and agreements leading up to the execution of the deed, with the long recognized exception that:

> "Where, however, the deed constitutes only a part performance of the preceding contract, other distinct and unperformed provisions of the contract are not merged in it. And where a contract of sale provides for the performance of acts other than the conveyance, it remains in force as to such acts, until full performance." [*Id.* at 316.]

Clearly, *Godspeed* stands for the proposition that when a deed is made in full execution of a contract for the sale of land, it is presumed to merge the provisions of the purchase agreement pursuant to which it is made into the deed. *Godspeed* does not involve the merging of a purchase agreement into a land contract when the land contract is executed.

McCleese-Rosol also maintains that "The Purchase Agreement set forth the framework for the Land Contract that would be entered into by the parties and upon execution of the Land Contract itself, the Purchase Agreement's terms were merged into the terms of the Land Contract." In support of this assertion, McCleese-Rosol relies on the following language in *Omnicom of Michigan v Giannetti Investment Co,* 221 Mich App 341, 347; 561 NW2d 138 (1997):

> If parties to a prior agreement enter into a subsequent contract that completely covers the same subject, but the second agreement contains terms that are inconsistent with those of the prior agreement, and the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement.

Here, however, a review of the purchase agreement and the land contract reveals that the land contract does not completely cover the subject matter of the purchase agreement.

Where there is more than one agreement relating to the same subject matter the intention of the parties must be gleaned from all the agreements. *Culver v Castro,* 126 Mich App 824; 338 NW2d 232 (1983). Although in some circumstances a later agreement may supersede an earlier agreement where the documents cannot stand together, *Joseph v Rottschafter,* 248 Mich 606; 227 NW 784 (1929), McCleese-Rosol does not assert that the documents cannot stand together. The purchase agreement and land contract do not conflict and both may be enforced.

The purchase agreement provides that the purchase purchased the property "subject to the existing building and use restrictions, easements, and zoning ordinances, if any." The purchase agreement also provides that "Purchaser is purchasing the property in an 'as is' condition as that the Seller makes no warranties as to the land and structure purchased or the condition thereof," and that "Failure by Purchaser to terminate this Agreement prior to the expiration of the Feasibility Period will constitute Purchaser's acceptance of the property in its 'as is' condition. This provision will survive the closing." McCleese-Rosol purchased the property "subject to easements . . . if any." Indeed, the land contract also states that "The seller will execute and deliver to the buyer . . . warranty deed conveying title to the property, subject to the existing building and use restrictions, easements, and zoning ordinances, if any . . ." Neither the purchase agreement nor the land contract makes any covenants or promises that another person will not make a claim of a prescriptive easement. Indeed, the purchase agreement clearly states that McCleese-Rosol purchased the property "subject to . . . easements, if any." Thus, the existence of a prescriptive easement on the property does not constitute a breach of contract.

Nonetheless, McCleese-Rosol argues that language in the land contract that "The seller's delivery of possession to the buyer is not subject to the rights of any other persons or entities except as stated in the line of title or title insurance . . ." requires a finding that the Hunt Trust breached the contract. This argument is misplaced, as this provision deals with possession, not conveyance. There is not dispute that the Hunt Trust delivered possession of the property to McCleese-Rosol without the assertion of rights to possession by any third parties.

McCleese-Rosol also argues that the warranty deed has been breached, and she maintains that the warranty deed states that the property is subject only to easements "of record." However, the original warranty deed was withdrawn because it contained language inconsistent with the terms of the land contract. The original warranty deed included a provision that required the Hunt Trust to convey and warranty the subject parcel to McCleese-Rosol subject to "easements of record." The title company acknowledged the error, removed the original warranty deed from escrow, and returned a corrective warranty deed to escrow. The corrective warranty deed purports with the terms of the land contract and states that the Hunt Trust conveys and warrants the premises to McCleese-Rosol "subject to the existing building and use restrictions, easements, and zoning ordinances, if any . . ."

B

McCleese-Rosol argues that the trial court erred by failing to grant summary disposition in her favor on her claim of innocent misrepresentation, which requires a showing that defendant: (1) made a false statement in a transaction with plaintiff, (2) without knowledge of that statement's falsity, (3) which statement actually deceived plaintiffs, and (4) on which plaintiffs detrimentally relied, with the benefit inuring to defendants. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 116; 313 NW2d 77 (1981). This writer disagrees because McCleese-Rosol fails to establish that the Hunt Trust made a false statement in either the land contract or the warranty deed.

McCleese-Rosol asserts first that a false statement was made in the land contract because the Hunt Trust represented that McCleese-Rosol's *possession* of the property "would not be subject to any claims for possession of the property except as set forth in the line of title or title insurance policy." However, as discussed previously, no other claims of possession were made when McCleese-Rosol took delivery of the property. Thus, reliance on this statement is misplaced. Second, McCleese-Rosol asserts that the "warranty deed states that the conveyance is subject to easements 'of record' and there is no record of the prescriptive easement . . ." This statement is misplaced as previously discussed, however, because the original warranty deed contained an error regarding the language "of record" and the deed was withdrawn and corrected.[2] McCleese-Rosol failed to offer evidence that the Hunt Trust made any representations as to the existence or non-existence of a prescriptive easement over the subject

[2] Rosol's reliance on this error in support of the breach of warranty claim is misplaced.

parcel. The trial court properly granted summary disposition in favor of the Hunt Trust.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald