

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS HANNAH,

Plaintiff-Appellant,

v

SEMCO ENERGY, INC.,

Defendant-Appellee.

UNPUBLISHED

March 2, 2010

Nos. 286072 & 287335

St. Clair Circuit Court

LC No. 06-001302-CZ

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals by right from that portion of a judgment finding no cause of action in trespass, and from an award to defendant of \$34,768 in case evaluation sanctions. We affirm.

This case arises from defendant's activities in extending a gas main beyond an existing easement on plaintiff's property. Defendant maintained that it rerouted the main across plaintiff's property with his oral permission to do so. Plaintiff, however, maintained that he never gave such permission or that he revoked such permission, and that the rerouting caused damage to his property. Plaintiff thus initiated this action against defendant asserting claims of trespass, negligence, unjust enrichment, and misrepresentation. Plaintiff's negligence claim was dismissed on summary disposition. The parties agreed to bifurcate the remaining issues, with a jury considering plaintiff's misrepresentation claim, and the circuit court hearing the remaining claims of trespass and unjust enrichment.

The jury reached a verdict of no cause of action on plaintiff's misrepresentation claim. In deciding the remaining two claims, the circuit court found that no trespass occurred when the gas main was rerouted because plaintiff gave defendant oral permission to perform the work. The circuit court also found, however, that defendant's presence on plaintiff's land had not yet ripened into an easement and that it thus needed to fashion an equitable remedy. The circuit court also stated its intention to grant an easement to defendant for the relocated gas main. Defendant declined to accept that easement and, instead, indicated its intent to cap the line so that it no longer routed gas across plaintiff's property. As a result of defendant's decision, the circuit court ruled that defendant was to disable the subject portion of the gas main as planned. The circuit court then ordered defendant to pay plaintiff \$2000 for its use of his property to date. The circuit court otherwise dismissed any remaining claims.

I. Trespass

This Court reviews decisions of a circuit court sitting in equity de novo, but reviews the court's findings of fact in support of the equitable decision for clear error. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). To prevail on an action for trespass, the plaintiff must show that the defendant committed an unauthorized intrusion onto land to which the plaintiff was entitled to exclusive possession. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999).

In the present case, the circuit court found that plaintiff gave defendant oral permission to install the gas main extension on his property. Plaintiff does not dispute that finding. However, plaintiff argues that any oral license he granted was, under Michigan law, fully revocable. Plaintiff asserts that he revoked the oral license by repeatedly telling defendant to remove the gas main from his property, and thus defendant's failure to do so constituted a trespass. We disagree.

"[A] license is 'a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it'" *Kitchen v Kitchen*, 465 Mich 654, 658; 641 NW2d 245 (2002), quoting *Sweeny v Hillsdale Co Bd of Road Comm'rs*, 293 Mich 624, 630; 292 NW 506 (1940). Oral licenses cannot ripen into permanent interests in land because they are revocable at will. *Id.* at 658-659.

While plaintiff testified that he told defendant that it could perform work only within the existing easement, Paul Leffler, one of defendant's employees, testified that approximately one week prior to the rerouting he spoke to plaintiff and showed him specifically where on plaintiff's property the rerouting would take place. According to Mr. Leffler, plaintiff told him he could perform the work as described, and that easements were never mentioned. Mr. Leffler further testified that he and plaintiff were both present when the work proceeded, and plaintiff voiced no objection. Whether plaintiff initially gave a verbal license to defendant, then, was an issue of credibility. Whether testimony is credible is a matter for the factfinder, not a reviewing court, to determine. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). This Court must defer to the factfinder's determination in factual matters and must make credibility choices in favor of the verdict rendered. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Moreover, although plaintiff testified that he repeatedly called defendant over the years regarding the gas main extension, he never testified that he did so to ask defendant to remove the gas main extension. Indeed, plaintiff testified that he repeatedly called defendant because he was upset about defendant's failure to properly restore his property after the project, and because he wanted to learn the precise location of the easement defendant had on his property. For these reasons, we conclude that the circuit court did not clearly err in finding that plaintiff did not revoke the oral license he had given defendant.

Next, plaintiff argues that the circuit court erred when it declined to enjoin defendant's trespass. We disagree.

"Injunctive relief is an extraordinary remedy that courts normally grant only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255

Mich App 83, 106; 662 NW2d 387 (2003) (quotation omitted). Pursuant to MCL 600.2919(3), a circuit court must grant an injunction to prevent a threatened trespass if the trespass is of a continuing nature, and if damages as provided by subsection (1) would not constitute a fully adequate remedy.

Because defendant did not trespass onto plaintiff's property, there was no trespass for the circuit court to enjoin. For that reason alone, plaintiff's argument fails. Were we to find, however, that oral permission was revoked or that defendant trespassed at some point, we would nevertheless affirm the circuit court's refusal to issue an injunction.

Our Supreme Court has held that, where a mandatory injunction is sought and the trespass was unintentional, a court must balance the equities before it may issue an injunction. *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 143 n 7, 145; 500 NW2d 115 (1993). "[U]nless the burden to the defendant of removing the encroachment is disproportionate to the hardship to the plaintiff in allowing the encroachment to remain, an injunction will issue." *Id.* at 144. We agree with the circuit court's finding that, because defendant initially had plaintiff's permission to install the gas main extension, any trespass that later came about was unintentional. Accordingly, we agree with the circuit court's conclusion that the relative hardship to plaintiff in allowing the gas main extension to remain was slight. Moreover, at trial, defendant informed the circuit court that it no longer needed the gas main extension to service defendant's neighbors, and thus made a firm commitment to disable it. We conclude that once defendant agreed to disable the gas main extension, equity and justice did not militate in favor of an injunction.

Plaintiff also argues that the circuit court erred when it declined to consider whether he was entitled to noneconomic damages covering mental anguish and diminished use and enjoyment of his property. However, because plaintiff has not proved that a trespass occurred, plaintiff is not entitled to any damages on that theory, economic or otherwise. While plaintiff contends that non-economic damages should also have been considered as a part of his unjust enrichment claim, he offers no real argument or analysis on this point. We thus decline to address this claim. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

II. Case Evaluation Sanctions

Plaintiff argues that the circuit court erred when it granted defendant \$34,768 in case evaluation sanctions. We disagree.

This Court reviews de novo a circuit court's decision whether to grant case evaluation sanctions. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009), quoting *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

MCR 2.403(O) provides in pertinent part as follows:

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation . . .

(2) For the purposes of this rule “verdict” includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

The case evaluation panel awarded plaintiff \$5,000 for all of his claims. However, the jury trial resulted in a finding of no cause of action on plaintiff’s claim of misrepresentation. Following the bench trial on the remaining claims, the circuit court found no cause of action on plaintiff’s trespass claim and dismissed any remaining claims, but did award plaintiff \$2,000 on his equitable claims as compensation for the use of his property. It is undisputed that plaintiff rejected the case evaluation award and defendant accepted it. The verdict was thus more favorable to defendant than was the case evaluation award. Accordingly, unless an exception to MCR 2.403(O)(1) applied, the circuit court was required to award defendant case evaluation sanctions. See *Great Lakes Gas Transmission Limited Partnership v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997).

Plaintiff argues that the exception provided in MCR 2.403(O)(5) is applicable to this case. We disagree. That provision states as follows:

If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and

(b) it is fair to award costs under all of the circumstances.

MCR 2.403(O)(5), then, requires that some form of “equitable relief” be granted. Equitable relief is “a nonmonetary remedy, such as an injunction or specific performance, obtained when monetary damages cannot adequately redress the injury.” Black’s Law Dictionary, (7th ed.) p 1297. See also, *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 79-80; 577 NW2d 150 (1998). The \$2000 awarded to plaintiff was undisputedly a monetary award, rather than an equitable remedy. Plaintiff’s argument that he was, in fact, granted equitable relief

erroneously relies on the following language from the trial court's May 27, 2008 judgment and order:

IT IS FURTHER ORDERED AND ADJUDGED that the remainder of Plaintiff's claims in equity shall be disposed of as follows:

2. SEMCO shall have an easement for the portion of the gas main that was relocated in Plaintiff's yard in August of 2002. However, since SEMCO declined to accept that easement and expressed its intention to disable the portion of the gas main that was relocated in Plaintiff's yard, SEMCO shall disable that portion of the main no later than 45 days from April 17, 2008.

We disagree with plaintiff's argument that, because the circuit court's judgment required defendant to disable the main within forty-five days of the April 17, 2008 order, that it was granting plaintiff equitable relief. The circuit court's statements on the record, and the language quoted above, indicate that the trial court had intended to grant **defendant** equitable relief in the form of an easement. The record shows that defendant, to avoid future conflict, declined the grant of an easement and voluntarily agreed to disable the gas main extension by June 1, 2008. We conclude that the trial court's pronouncement merely memorialized defendant's agreement, it did not order defendant to do so. For these reasons, plaintiff's argument fails.

Because we hold that the circuit court did not award plaintiff equitable relief, we need not further address plaintiff's claims pertaining to MCR 2.403(O)(5). Plaintiff does not argue, nor do we find, that any of the other exceptions to MCR 2.403(O)(1) are applicable to the facts of this case.

Affirmed.

/s/ Alton T. Davis
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto