STATE OF MICHIGAN

COURT OF APPEALS

SUSAN A. O'CONNORS,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v

GERTRUDE L. GOODMAN, Trustee of the GERTRUDE L. GOODMAN TRUST,

Defendant/Counter-Plaintiff-Appellant/Cross-Appellee,

and

JAMES GOODMAN,

Defendant,

and

SUSAN K. DIETERLE, ROGER W. MAYS, JUDY A. MAYS, RON and ALLISON RALL, Trustees for the BODI LAKE ESTATES TRUST, ALDO R. DAVIS, WILLIAM SCHRYER, LINDA KONICKI, ROY SCHRYER, LISA TROST, GARY A. FRALICK, MARY D. FRALICK, RAYMOND E. JOHNSON, BRAD C. FRALICK, RUSSELL H. CROSSMAN, BILLIE JO JOHNSON, JOANNE NIELSON, LONE PROPERTIES, INC., CHESTER NIELSON, BRENT R. CROSSMAN, and JEFFREY SCHRYER,

Third-Party Defendants.

UNPUBLISHED
May 22, 2012

No. 303809
Luce Circuit Court
LC No. 08-4933-CZ

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Appellant appeals the circuit court's order granting appellee an implied easement over appellant's property. Appellee cross-appeals the trial court's denial of her motion for summary disposition which sought the recognition of an easement by necessity. We affirm.

We review de novo both a trial court's decision on a motion for summary disposition, *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010), and its ruling on an equitable matter, *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 130; 737 NW2d 782 (2007).

Appellant first argues that the statute of limitations barred appellee's claim. When determining whether a motion for summary disposition brought pursuant to MCR 2.116(C)(7) was properly decided, we look to all the documentary evidence of record and accept the complaint as factually accurate unless affidavits or other documents presented specifically contradict it. *Kuznar v Raksha Corp*, 481 Mich 169, 175-176; 750 NW2d 121 (2008).

The period of limitations for actions for the recovery or possession of lands is set forth in MCL 600.5801, which provides pertinent to this case that:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
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> (4) In all other cases under this section, the period of limitation is 15 years.

The prescribed period of limitations applies equally to all actions whether equitable or legal relief is sought. MCL 600.5815; *Attorney General v Harkins*, 257 Mich App 564, 571; 669 NW2d 296 (2003). In general, a claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. A claim to a right of entry or to recover possession of land accrues at the time the person is disseised. MCL 600.5829. Here, the trial court correctly applied the 15-year limitations period.

In *Terlecki v Stewart*, 278 Mich App 644, 659; 754 NW2d 899 (2008), the Court commented that because an easement was the right to use, rather than possess, another's property, "[a] claim to enforce or prevent the creation of an easement does not neatly fit into a statute of limitations barring recovery of possession of real property." Ultimately, the Court found that MCL 600.5801(4) applied because the nature of the claim was an action to prevent a prescriptive flowage easement that would arise after 15 years of adverse possession, or be extinguished by nonuse within the 15-year period. *Id.* at 662-663. The Court noted that the 15-year limitations period would apply to an action to remove obstructions to the natural flowage easement because an easement may be enforced at any time up to its extinguishment by adverse possession. *Id*. at 663, citing *Longton v Stedman*, 196 Mich 543, 545; 162 NW 947 (1917).

Here, appellant argues that appellee's cause of action to enforce an easement accrued beginning in 1970 when appellant denied appellee's predecessors in title, the Brown's, access to what would become appellee's property. However, James Goodwin averred that neither appellee

nor her predecessors in interest, the Browns, had attempted to access the landlocked property by using appellant's land, or had asserted a right to do so for 50 years. He further maintained that "from 1970 to 1995, 25 years, we held our property without any request or demand by anyone to cross the property in any fashion to Bodi Lake" and that appellee trespassed for a survey as a part of an application for a private road in 1999. Additionally, appellee stated that access to her property by means of appellant's property was not denied to her or her predecessors until 1999 when a police complaint was filed and the prosecuting attorney warned her that future attempts to enter the property could result in charges.

If the claim first accrues to an ancestor, predecessor, or grantor of the person who brings the action or makes the entry, or to any other person from or under whom he claims, the period of limitations shall be computed from the time when the claim first accrued to the ancestor, predecessor, grantor, or other person, except as otherwise provided by law. MCL 600.5841. Here, the nature of the claim was to establish that an easement was created in 1952 and to enforce this easement. This claim accrued in 1999 when appellant prevented appellee from accessing her property through appellant's property. Appellee timely filed her claim in 2008 before expiration of the 15-year period of limitations. MCL 600.5801(4).

Appellant also argues that appellee's claim should have been barred by the doctrine of laches. Laches is an equitable defense to a claim that may be invoked when the delay in bringing a claim prejudices the other party. *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 577; 485 NW2d 129 (1992). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004).

Laches applies when there is an unexcused or unexplained delay in commencing an action that results in prejudice to a party from a change in material conditions. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005). It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches. *Great Lakes*, 193 Mich App at 578. Here, appellant argues that appellee's predecessor in title did not attempt to enforce the claimed easement from 1970 through 1995 even though appellant resisted attempts to use the property. But as discussed above, the pleadings and affidavits submitted before the trial court's decision on summary disposition established that appellee's claim did not accrue until 1999. Appellant has not demonstrated that appellee's claim for an easement was asserted after an unexcused or unexplained delay.

Appellant has the burden of proving that she was prejudiced by appellee's lack of due diligence. *Yankee Springs Twp*, 264 Mich App at 612. Appellant argues that imposition of an easement would disturb her quiet enjoyment of property that was previously isolated. But appellant does not explain how delay in enforcing the easement has prejudiced her. Where the situation of neither party has changed materially, and the delay of one has not put the other in a worse position, the defense of laches cannot be recognized. *Wayne Co*, 267 Mich App at 252.

There are three elements to establish an implied easement: "(1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair

enjoyment of the property it benefits." *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980). The party asserting the easement has the burden of proving the claim by the preponderance of the evidence. *Id*.

Appellant argues that there was no evidence that a road or path was ever identified that served what would become appellee's property when the properties were severed in 1952, resulting in appellee's landlocked property. The trial court found that roadways and trails had existed for decades in the area and, "for all intents and purposes crossing onto appellee's property, indicate that vehicular access to the area was contemplated." The trial court cited the testimony of Robert Johnson and Clarence Dumas as support for the finding.

Even though the trial court did not identify a specific path that existed in 1952 over what would become appellant's property that allowed access to what would become appellee's property, the evidence supports the trial court's finding. Appellee's surveyor identified what was referred to as an existing road or path that intersected the south portion of appellee's property in two different areas. Appellant's surveyor did not dispute these findings.

Dumas worked as a logger from July 2004 through 2007 on the properties involved here. Dumas widened the existing road, installed a bridge over a creek that intersected the existing road, and installed a culvert near an overgrown road at the southern end of the section. Dumas did not see any trails that accessed appellee's property. Johnson began visiting Bodi Lake when he was six-years old in 1945 and had driven on the existing road many times since age 12; he remembered the road existed before 1952. Johnson did not know who owned the existing road, but noted that nobody protested its use. Johnson hunted animals and gathered clay on the land around the existing road and testified that there was a bridge over the creek that was passable by vehicles in 1952 until 1970.

Further, Tom Brown was six-years old in 1952 when his father sold portions of the property in question, creating what would become appellee's landlocked property. Brown's family, and later Brown, retained the portion of property that would become appellee's property. Brown stated that although there was never an agreement on the property boundaries, he believed he had the right to drive through appellant's property to what is now appellee's property.

The preceding testimony supported the trial court's finding that the existing road on appellant's property was utilized to access what would become appellee's property before 1952, satisfying the first element for an implied easement.

Appellant also argues that the continuity prong was not satisfied because appellee's property had not been utilized. But the testimony of Brown and Johnson demonstrated the existing road was used from the 1950s to 1970. Brown did not believe there was any difficulty accessing the family's property between 1952 and 1970 when appellant acquired the property. Brown stated that he visited the property on occasion between 1970 and 1995, but did not access the property from the existing road.

A continuous easement is one which operates without interference and which may be enjoyed without any act upon the part of the party claiming it. *Waubun Beach Ass'n v Wilson*,

274 Mich 598, 606-607; 265 NW 474 (1936). Brown acknowledged that his family did not make its own road because they did not often visit the property; however, Brown did not consider who the owner of the existing road was because everyone used the road. Johnson did not know who owned the road, but noted that nobody protested its use. While the testimony did not indicate frequent use, it indicated that use was continuous.

Next, appellant argues that the "necessary for reasonable enjoyment" element was not satisfied because the trial court previously found that water-only access to the landlocked property was sufficient for appellee to enjoy their land. The trial court, however, during the motion on summary disposition distinguished its finding that an easement was not strictly necessary to enjoy the property from its finding that an easement was reasonably necessary for appellee to enjoy her property. The trial court explained that in considering an easement by necessity, it applied a "strict necessity" requirement in finding that water-only access was sufficient for appellee to enjoy her land.[1] In its order denying appellee's motion for summary disposition based on an easement by necessity, the trial court found that a land-based access route to appellee's property may be more convenient but was not necessary for her quiet enjoyment of the property. The trial court reasoned that access across frozen waterways was not restrictive and that appellee's purchase price reflected the difficulty accessing the property by land.

Regardless of the trial court's previous finding, land access to the landlocked property was reasonably necessary for the fair enjoyment of the property. To support its finding, the trial court referenced the history of land access as evidence that vehicular access to appellee's property was contemplated. The record contained no testimony describing the benefits of vehicular or water access to the property. Considering the varying ability to travel across water or ice, depending on the season and the weather, and the inconvenience and effort required to access the property only by utilizing the lake, the trial court did not err by ruling that land access was reasonably necessary for appellee's fair enjoyment of the property.

Given our resolution of the above issues, we need not reach the cross-appeal.

We affirm.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly

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[1] Even though older Michigan cases spoke of a requirement of strict or absolute necessity for an easement by necessity, the current law requires only a showing of reasonable necessity. *Tomecek v Bavas*, 276 Mich App 252, 275, n 9; 740 NW2d 323 (2007), affirmed in part and reversed in part on other grounds 484 Mich 484 (2008), citing *Schmidt*, 94 Mich App at 732-735, and *Chapdelaine v Sochocki*, 247 Mich App 167, 173; 635 NW2d 339 (2001).