

STATE OF MICHIGAN
COURT OF APPEALS

AUGUST ORVIS, VAUGHAN A. ORVIS, and
MARY IRENE HALL,

UNPUBLISHED
October 16, 2012

Plaintiffs-Appellees,

v

No. 306431
Charlevoix Circuit Court
LC No. 088-021-13-CH

JOHN D DeGROOT and CAROL DeGROOT,
THOMAS ARMSTRONG AND MARY ALICE
ARMSTRONG,

Defendants,

and

DEVLON PROPERTIES, INC.,

Intervening Defendant/Appellant

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Intervening defendant (hereinafter “Devlon”) appeals by right from the order of the trial court ordering that a nunc pro tunc judgment be entered for plaintiffs to enforce the terms of the 1989 settlement agreement between plaintiffs and defendants (the DeGroots and the Armstrongs). We affirm.

I. BASIC FACTS AND PROCEDURE

This case arises out of a lawsuit filed in 1988 by plaintiffs against the DeGroots and Armstrongs for adverse possession and easement by prescription. The Orvis family was the owner of Lot 73 of a subdivision known as Schoffen’s Addition to Ironton; the DeGroots and Armstrongs were owners of lots 71 and 72. Plaintiffs alleged that they and their predecessors had used portions of lots 71 and 72 for more than 40 years. Plaintiffs had constructed a dock and boat house on the portion of Lot 71, had periodically constructed ice shanties on that portion, and

used that portion to access Lake Charlevoix. Plaintiffs used the portion of Lot 72 for ingress and egress to their lot and had constructed a driveway and artesian well on that portion.

The parties to the 1988 lawsuit negotiated a settlement of that case. The terms of the settlement were memorialized in a document, labeled simply "Agreement," dated July 19, 1989. The Agreement contains nine numbered subsections describing the rights and duties of the parties under the agreement. Because these terms form the basis for the current dispute, they are produced in full below.

THE PARTIES AGREE AS FOLLOWS:

1. DeGROOT will grant an easement to ORVIS which will permit ingress, egress, access, right to boating, docking or mooring, bathing, fishing, access to navigable water, recreational swimming, and repair, maintenance and improvement of existing dockage but not the right to construct additional structures, over and to the following described property and water:

Over the water from a point 20 feet to the left of the center of the existing ORVIS dock to a point 20 feet to the right of the existing ORVIS dock as you are facing Lake Charlevoix, parallel back to the water's edge and then over the following parcel of land beginning from a point at the water's edge 20 feet to the left of the center of the existing ORVIS dock back in a straight line to the left front corner of lot 73, across the front line of lot 73 to the right front corner of lot 73 and then to a point at the water's edge approximately 63 feet from the right edge of the existing ORVIS dock and then across the water's edge to the point of beginning. (Sketch attached with yellow lines outlining the easement).

The easement will terminate if ORVIS sells lot 73 of Schoffen's Addition to the Village of Ironton in Eveline Township, Charlevoix County, Michigan, to a non-Orvis family member within 25 years of the granting of the easement, other, the easement is permanent and runs with the land.

2. Further, DeGROOT agrees to locate any spring pilings a minimum of 55 feet from the right edge of the existing ORVIS dock; the access dock a minimum of 63 feet from the right edge of the existing ORVIS dock and the finger pier a minimum of 75 feet from the right edge of the existing ORVIS dock.

3. The parties agree to refrain from any permanent or temporary mooring of watercraft or construction or placement of any permanent structure in the area 35 feet from the right edge of the ORVIS dock easement, to the edge of the spring pilings; and both parties shall in this space, enjoy the rights of ingress, egress, access, bathing, recreational swimming, fishing and access to navigable water.

4. The parties agree that DeGROOT will grant to ORVIS a 20 foot wide easement for the existing ORVIS driveway on Lot 72 and an easement for the water well on Lot #72.

5. The parties further agree that if River Street is vacated the easement will extend across River Street and the land would be left in its same condition.

6. The parties will jointly make application to vacate River Street and share the costs of the application and any legal proceedings.

7. It is agreed that ORVIS will be responsible for liability for their existing dock and its use.

8. This proposal is subject to approval of the Corp. of Engineers, Department of Natural Resources and Eveline Township.

9. ORVIS agrees to dismiss the present lawsuit in Charlevoix County without prejudice.

The Agreement was signed by all of its parties and was notarized. The Agreement later was recorded with the Charlevoix County Register of Deeds. Plaintiffs entered a voluntary dismissal of claims in the 1988 lawsuit, without prejudice, in 1989.

In 2004, Devlon purchased Lots 71 and 72, subject to easements, restrictions, and reservations of record. In 2009, plaintiffs filed a lawsuit against Devlon, alleging that in 2009 Devlon had “trespassed on” and “plowed under” plaintiffs’ artesian water well and pump house on Lot 72. That lawsuit also was settled by agreement; the agreement provided that Devlon would pay \$5,000 towards a replacement well (to be constructed on Lot 73) and that plaintiffs would move an encroaching shed onto their own property.

In 2010, plaintiffs again filed suit against Devlon, alleging that Devlon had “erected or attempted to erect a gate at the entrance of Plaintiffs’ existing dock on Lake Charlevoix, made efforts to disassemble Plaintiffs’ dock, and threatened to erect a fence to block Plaintiffs [sic] access over and across their easement to Lake Charlevoix and their dock.” Plaintiffs requested, and the trial court issued, a temporary restraining order (TRO) against Devlon, enjoining Devlon from interfering with plaintiffs’ use of the easement and dock and ordering Devlon to remove existing gates and blockades from plaintiffs’ dock.

While that case proceeded to trial, plaintiffs also moved the trial court to reopen the 1988 lawsuit, alleging that Devlon¹ had denied the existence of the easement granted by the Agreement. Devlon moved to intervene in the 1988 lawsuit. In a motion hearing on September 9, 2011, the trial court granted Devlon’s motion to intervene, and ordered that a nunc pro tunc judgment be entered to enforce the terms of the Agreement. This appeal followed.

¹ Although Devlon was not originally a party to the 1988 lawsuit, and was not added as a party by plaintiffs, the motion to re-open the case was premised on Devlon’s actions, not the actions of the DeGroots or Armstrongs (who no longer owned Lots 71 and 72).

II. STANDARD OF REVIEW

The interpretation of clear contractual language is an issue of law that we review de novo on appeal. *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich 359, 366-367; ___ NW2d ___ (2012). The determination of whether contractual language is ambiguous is also a question of law subject to de novo review. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). We review a trial court's rulings on equitable issues de novo but review the trial court's factual findings for clear error. *McFerren v B&B Inv Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002). We review the trial court's decision to reopen a case for abuse of discretion. *Kogowski v Kogowski*, 319 Mich 511, 516; 29 NW2d 851 (1947).

III. STATUTE OF LIMITATIONS

Devlon first argues that plaintiffs' claim for enforcement of the Agreement is barred by the applicable statute of limitations. We disagree. Devlon claims that most of the material terms contained in the Agreement were not performed. For example, Devlon claims that paragraph 1 of the Agreement was not performed, because, although the paragraph states that "DeGroot *will* grant an easement to Orvis *which will* permit ingress, egress . . ." (emphasis added), no such easement was ever granted. Devlon makes a similar claim concerning paragraph 4 and the grant of an easement on Lot 72. Devlon also claims that the parties never made a joint application to vacate River Street. Lastly, Devlon claims that Paragraph 8, which provides that "[t]his proposal is subject to approval of the Corp. [sic] of Engineers, Department of Natural Resources, and Eveline Township" was never satisfied.

Devlon is correct that the relevant statute of limitations for breach of contract actions is six years. MCL 600.5807(8). Devlon also is correct that a settlement agreement is a contract and is governed by the principles of contract construction and interpretation. *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484; 637 NW2d 232 (2001). However, from these principles Devlon attempts to fashion a rule of law that simply does not exist, i.e., that a contract that is not fully performed, or is breached, within six years is somehow invalid and unenforceable. That is not the law of Michigan.

MCL 600.5807 provides that "[n]o person may bring or maintain any action . . . for breach of contract, or to enforce the specific performance of any contract unless, *after the claim first accrued to himself or to someone through whom he claims*, he commences the action within the periods of time prescribed by this section." (Emphasis added). Thus, "a cause of action accrues when a breach of contract occurs, namely, when the promisor fails to perform under the contract." *Vandenries v General Motors Corp*, 130 Mich App 195, 201; 343 NW2d 4 (1983). Devlon's alleged breaches of the settlement agreement occurred in 2009 and 2010 when it interfered with plaintiffs' use of the property at issue. Even if Devlon's factual allegations were true, the fact that Devlon's predecessors also may have breached or failed to fully perform the Agreement does not render the Agreement somehow invalid or unenforceable.

Further, Devlon's claims regarding the performance of terms of the Agreement were rejected by the trial court. The trial court found that all contractual terms had been completed apart from the joint application to vacate River Street. This factual finding was not clearly erroneous. As to Devlon's claim that no easements were actually granted, we disagree. There

are no “magic words” necessary to create an express easement; rather an instrument creating an express easement must show “a clear intent to create a servitude.” *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). The Agreement clearly states that DeGroot “will grant” two easements to plaintiffs. The word “will” is “an auxiliary verb commonly having the mandatory sense of ‘shall’ or ‘must.’” Black’s Law Dictionary (5th ed), p 1433. Unless defined otherwise, terms of a contract are given their commonly used meanings. *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). Thus the Agreement mandates that DeGroot grant these easements as specified rather than exercise any sort of discretion.

We conclude that the Agreement is an instrument that expresses the necessary intent to create an easement. The fact that the Agreement was recorded with the Register of Deeds so that future prospective titleholders would be made aware of it is further evidence that the easements were successfully created. Lastly, the record indicates that the parties to the Agreement acted as though the easements had been granted as specified. The primary goal in the interpretation of a contract is to honor the intent of the parties. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003). We find that the trial court did not err in concluding that the parties intended to, and did, create valid express easements on Lots 71 and 72.

As for Devlon’s contention that the necessary approval of government agencies was never given, that contention is flatly contradicted by the record. Plaintiffs presented evidence that DeGroot applied for, and received, permits from the Army Corps of Engineers and the Department of Natural Resources in 1991 to place stone along the shoreline to prevent erosion. DeGroot’s affidavit, submitted to the trial court, states that all approval necessary for shoreline work was sought and obtained. Devlon has presented no evidence to rebut plaintiffs’ evidence. The trial court did not clearly err in finding that the parties to the Agreement fully complied with its paragraph 8.

It is true that the parties to the Agreement did not make a joint application to vacate River Street. At the September 9, 2011 motion hearing, plaintiffs’ attorney made reference to a current case pending before the trial court to vacate River Street. Whatever the status of that application, it is clear that at the time of the motion hearing, this term of the Agreement had not been fulfilled. As stated above, we reject Devlon’s argument that the Agreement is somehow invalidated because it was not fully performed in six years. Additionally, parties may modify a contract by mutual agreement. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). Such a mutual agreement can be shown “when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms.” *Id.* Here, the affidavit of DeGroot states that the DeGroots complied with all contractual provisions apart from the joint application. Plaintiffs also fully complied with the contract apart from this provision by dismissing their lawsuit against the original defendants and remaining liable for their original dock. The parties each received the full benefit of their bargain for almost 20 years. The trial court concluded that “there was some mutuality between the parties not to take action to formally have the street vacated.” The trial court committed no clear error of fact or error of law in reaching this conclusion.

In sum, neither the law nor the facts support Devlon's contention that plaintiffs' claims under the Agreement are barred by the applicable statute of limitations, and the trial court did not err in rejecting this argument.

IV. CONDITION PRECEDENT

Devlon next argues that the Agreement is void because a condition precedent, i.e., approval by certain government entities, never occurred. A condition precedent is a "fact or event that the parties intend must take place before there is a right to performance." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007) (citations and quotation marks omitted). Such an event may be the approval of a third party. *Id.* If the condition is not satisfied, there is no cause of action for a party's failure to perform under the contract. *Id.*

Here, as noted above, it appears that the condition precedent was satisfied, as the trial court found: "There were instructions [sic] imposed against plaintiffs and the DeGroots to receive their benefit of having the pier, the pilings, the dock and so forth, following the approval of the Corps of Engineers and the DNR. And so the contingencies in the agreement were fulfilled by the Corps and DNR approval and that work was subsequently completed." To the extent that Devlon argues that additional approvals or actions by the parties were needed, such requirements are not present in the plain language of the document, nor can they be inferred from the conduct of the parties to the Agreement, who both performed under the contract as though the condition had been satisfied. We find no factual error or error of law in the trial court's conclusion that the condition precedent was satisfied.

V. AMBIGUITY

Devlon also argues that the trial court erred by entering a judgment without first resolving ambiguities contained in the agreement. Specifically, Devlon argues that the references to "the water's edge" in the description of the easement render the Agreement ambiguous because the location of the water's edge has changed significantly since 1989, and that the Agreement does not specify whether the dock referenced in the Agreement was for the exclusive use of plaintiffs or whether plaintiffs shared the right of use with the owner of Lot 72. We disagree that there was ambiguity in the Agreement.

When the language of an easement is unambiguous, it should be enforced as written. *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2003). A trial court errs when it considers circumstances outside the granting instrument in determining the intent of the grantor. *Id.* In *Dyball*, this Court determined that the language granting an easement "to the water's edge of Lake Fenton" was unambiguous in showing an intent to grant "access or ingress and egress to the lake." *Id.* at 709. Here, the easement language is even clearer, because it grants an easement on Lot 71 for the purpose of "ingress, egress, access, right to boating, docking or mooring, bathing, fishing, access to navigable water, recreational swimming, and repair, maintenance and improvement of existing dockage but not the right to construct additional structures." Although Devlon is correct that the exact area granted by the easement would change depending upon the water level of Lake Charlevoix, that does not render the Agreement ambiguous. The language of the easement plainly grants plaintiffs an easement for the use and enjoyment of Lake Charlevoix;

it strains credulity to read the Agreement as providing for an easement that may, depending on the water level, terminate on dry land. Such a reading is not supported by the language of the Agreement. The language of the Agreement thus “fairly admits of but one interpretation,” i.e., that the parties intended to grant plaintiffs the right to access the lake regardless of the water level at any given time. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). The trial court did not err in finding that the Agreement contained no ambiguity concerning the Lot 71 easement.

As for Devlon’s contention that the Agreement is ambiguous because it is silent about whether plaintiffs have exclusive use of a dock,² we note that the Agreement provides that “ORVIS desires an easement for their existing dock area . . . and the right to use the land referred to as the COMMON AREA between the ORVIS dock and the DEGROOT dock, and DeGROOT desires to grant the easement and to preserve their usage of the COMMON AREA.” The Agreement refers to the existing dock several times as “the ORVIS dock” and provides that plaintiffs are solely liable for the dock and its use, while granting DeGroot the ability to build a new dock anywhere he likes, provided it is a minimum of 63 feet from plaintiff’s dock.

Nothing in the agreement supports the inference that shared ownership or right of use of any dock was contemplated. To the extent that the Agreement addresses dock ownership, it supports an inference that plaintiffs have exclusive rights to their existing dock and defendants have exclusive rights to the (unconstructed at the time of the Agreement) access dock. This is not to say that we hold that the Agreement unambiguously provides for such a usage scheme; merely that the Agreement itself does not contain an ambiguity concerning dock usage. Perhaps the parties intended to say nothing at all in this Agreement about the usage of various docks; after all, there is no indication in the Agreement that either party desired the use of the other’s dock. In any event, the trial court did not err in finding the Agreement unambiguous on this, or any, point, or in entering the resulting judgment.

VI. PUBLIC POLICY

Devlon’s final argument is that the Agreement is against public policy because it purports to encumber a platted street. Specifically, Devlon argues that paragraph 5 is against public policy and/or in violation of Michigan law. Paragraph 5 states that “[t]he parties further agree that if River Street is vacated the easement will extend across River Street and the land would be left in its same condition.” As stated above, the parties to the Agreement mutually waived the requirement that they pursue vacation of the undeveloped River Street. Additionally, while Devlon claims that paragraph 5 represents an “attempted reservation for the benefit of a stranger

² The Agreement refers both to an existing dock and a dock that is yet to be built. It is unclear to which dock Devlon refers in arguing ambiguity. We thus find ambiguity in Devlon’s argument on appeal. A party may not leave it to this Court to search for the factual basis to sustain his position, but must support his argument with reference to the record. *Begin v Mich Bell Telephone Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). However, we find that the record before this Court does not support Devlon’s argument regardless of the dock to which it refers.

to the conveyance” and is therefore ineffective, *Choals v Plummer*, 353 Mich 64, 71; 90 NW2d 851, 855 (1958), it is clear that the paragraph attempts to reserve an easement for the benefit of *plaintiffs*, not third parties. In any event, as River Street has not been vacated and the parties appear to have abandoned this term of the Agreement, the trial court was not required to address whether paragraph 5 should be given effect. This Court generally does not address issues which are not yet ripe.³ See *Dep’t of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380, 390; 455 NW2d 1 (1990).

VII. NUNC PRO TUNC JUDGMENT

A nunc pro tunc order generally is used “to supply an [o]mission in the record of an action previously taken by the court but not properly recorded.” *Sieboede v Sieboede*, 384 Mich 555, 559; 184 NW2d 923 (1971). Here, plaintiffs originally sought enforcement of a settlement agreement against the original defendants. Devlon then intervened. However, because *enforcement* of the settlement agreement was not an action that the trial court previously ordered but failed to record, but a new action by the trial court, the nunc pro tunc nature of the order is not required or appropriate. See *id.* (“An order Nunc pro tunc may not be utilized to supply previously omitted action.”). Additionally, the enforcement of the settlement agreement against the intervening defendant (Devlon) was not an action previously taken by the trial court which was inadvertently omitted from the record. The trial court thus erred in labeling the judgment a “nunc pro tunc” judgment; it was in fact merely a judgment. The trial court had the power to enter such a judgment enforcing the agreement against the original defendants. Because Devlon took the property from the original defendants subject to easements, restrictions, and reservations of record, and because Devlon was permitted to intervene in the action, thus becoming a party to the action, the trial court could properly enter a judgment against it as well. *Blue Cross and Blue Shield of Michigan v Eaton Rapids Community Hospital*, 221 Mich App 301, 307; 561 NW2d 488 (1997). We therefore modify the trial court’s judgment by striking the words “nunc pro tunc” from the judgment. MCR 7.216(A)(7).

Affirmed as modified. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra

³ We note that should River Street be vacated in the future, and a party attempt to enforce paragraph 5, and it is determined that paragraph 5 is illegal, it is likely that this paragraph could be severed from the legal portions of the Agreement. See *Eastern Distributing Corp v Lightstone*, 257 Mich 184, 186; 241 NW 189 (1932).