STATE OF MICHIGAN

COURT OF APPEALS

JAMES DELGENIO, JACKIE DELGENIO, DICK SCHMIDT, and JEAN SCHMIDT,

Plaintiffs-Appellants,

v

JACK A. MYERS, BETTY J. MYERS, LUIS G. RAMIREZ, MARY L. RAMIREZ, MARK J. WILSON, WILMA WILSON, MARK D. MATHIS, and PEGGY A. MATHIS,

Defendants-Appellees.

UNPUBLISHED
July 31, 1998

No. 202157
Allegan Circuit Court
LC No. 95-018866 CZ

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Plaintiffs James Delgenio, Jackie Delgenio, Dick Schmidt and Jean Schmidt appeal as of right from an order granting judgment in favor of defendants Jack A. Myers, Betty J. Myers, Luis G. Ramirez, Mary L. Ramirez, Mark J. Wilson, Wilma Wilson, Mark D. Mathis and Peggy A. Mathis. We reverse in part, affirm in part and remand.

In the 1960s, the Recreation Subdivision Corporation (hereinafter the corporation), as plattor, established a subdivision abutting Hutchins Lake. The dedication of the plat and the restrictive covenant referenced therein were recorded in August of 1964. The restrictive covenant provided that the owners of lots one through seven and forty-one through fifty-one had a right-of-way over Outlot B for purposes, inter alia, of access to the lake. From 1970 until the commencement of this suit, some back-lotters maintained, for the majority of the time, at least one dock off the outlot. In 1995, plaintiffs, owners of front lots seven and eight, filed the instant action contending that the dedication of the plat and the restrictive covenant referenced therein did not afford the back-lotters the right to erect and maintain a dock off the outlot. After a bench trial, the trial court ruled that the language of the dedication of the plat and ¶ 11 of the recorded restrictive covenant afforded the owners of lots one through seven and forty-one through fifty-one the right to erect and maintain a dock off Outlot B. The court further ordered that such a dock had to be "erected and maintained in a reasonable manner so as to not

interfere with the use and enjoyment of the adjoining front lot owners' property rights in Lot 7 and Lot 8." Having determined that the "right to access" language of the dedication of the plat and ¶ 11 of the restrictive covenant included the right to erect and maintain a dock, the trial court stated that it no longer needed to determine whether the Myers had obtained a license to erect and maintain a dock or a prescriptive easement.

On appeal, plaintiffs claim that the trial court erred in determining that the Schmidts lacked standing to assert that defendants' use of outlot B was in violation of the provisions of the restrictive covenant. We agree. This Court reviews de novo a trial court's decision in an equity action. *City of Holland v Manish Enterprises*, 174 Mich App 509, 511; 436 NW2d 398 (1988). "However, we attach great weight to the findings of the trial court and sustain those findings unless convinced that had we heard the evidence in the first instance we would have been compelled to make findings contrary to those actually made. In other words, we set aside the trial court's findings only where they are clearly erroneous. If the trial court's findings of fact are not clearly erroneous, then we review the record de novo to determine whether the equitable relief granted was appropriate in light of those facts." *West Michigan Park Ass'n, Inc v Fogg*, 158 Mich App 160, 171; 404 NW2d 644 (1987), citing *Attorney General v John A Biewer Co, Inc*, 140 Mich App 1, 12-13; 363 NW2d 712 (1985).

Because ¶ 10 of the restrictive covenant grants subdivision lot owners the right to enforce "the covenants" of the restrictive covenant and because this paragraph does not indicate that enforcement is limited to the preceding paragraphs, i.e., ¶¶ 1-9, the Schmidts, as subdivision lot owners, may enforce ¶ 11 of the restrictive covenant.

Plaintiffs further claim that the trial court clearly erred in finding that the general access easement provided in the dedication of the plat and the restrictive covenant referenced therein included the right of the lot owners referenced in ¶ 11 of the restrictive covenant to erect and maintain a dock off the outlot. We agree.

"[O]wners of land abutting any right of way which is contiguous to the water are presumed to own the fee in the entire way, subject to the easement. . . . Thus, [the] plaintiffs are presumed to own the fee in the walk running the front of their lots unless the plattors intended otherwise." *Thies v Howland*, 424 Mich 282, 293; 380 NW2d 463 (1985). Although the Myers' property abuts the right of way granted to them over Outlot B, which is contiguous to the water, the corporation, as the plattor and grantor, through ¶ 11 of the restrictive covenant, reserved some interest in the fee to Outlot B. Therefore, the Myers may not maintain their claim that they may erect a dock on the basis of riparian ownership. Similarly, because the other defendants' properties do not abut Outlot B, riparian rights do not arise in their ownerships of their individual properties.

However, lot owners who do not enjoy riparian rights may still prevail on their claim to erect a dock if such an activity falls within the scope of the plat's dedication. *Thies*, *supra* at 289. Regardless of the way's course (i.e., parallel or perpendicular to the shoreline), the intent of the plattors in granting the easement must be ascertained. See *id*. at 293 and *Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667, 672; 502 NW2d 382 (1993).

Jack Myers testified that he, upon request, received from the corporation, as owner of the outlot, a written assurance to erect and maintain a dock off the outlot. However, it is not logical to find that the plattors, on the one hand, intended to grant to the grantees the added right of erecting and maintaining a dock off Outlot B through the dedication of the plat and the restrictive covenant referenced therein, but, subsequently, found it necessary to provide the Myers with an additional document purporting to give them the already reserved and granted rights.

In addition, the testimony of Myron Sale, who had been involved in the determination of the terms of the dedication, purporting that he had never told the back-lotters that their right-of-way to the lake included a right to build a dock off Outlot B is also indicative that the plattors had not intended to include a right to erect and maintain a dock off the outlot. Also, Sale's testimony that the back lots initially sold for less than half of the amount of the front lots is also indicative that the plattors did not intend to grant the back-lotters the right to erect and maintain a dock off the outlot. Rather, given that front lots one through seven are considerably smaller than the great majority of back lots forty-one through fifty-one, but nonetheless cost twice as much strongly indicates that the plattors intended to convey exclusive riparian rights to the front-lotters. See *Thies*, *supra*, 424 Mich 294 n 8.

While we acknowledge that the trial court found correctly that Sale, a former officer of the corporation, had, at least, acquiesced to the building and maintenance of the Myers' dock, this acquiescence does not *unequivocally* reflect an intent to include a right to erect and maintain a dock in the language of the dedication of the plat and the restrictive covenant referenced therein. Although such a finding, by itself, would not be clearly erroneous, we note that the trial court did not take into account any of the other surrounding circumstances in ascertaining the intent of the plattors in granting the respective lot owners the general right of access to the lake. Therefore, based on all the surrounding circumstances, we are convinced that if we had heard the evidence in the first instance, we would have been compelled to make findings contrary to those actually made. Thus, the trial court clearly erred in finding that the dedication of the plat and the restrictive covenant referenced therein provided the grantees with a right to erect and maintain a dock off Outlot B.

Although the trial court did not address plaintiffs' claim that those documents, likewise, did not permit the lot owners to permanently moor boats off the submerged land next to the outlot, this Court may properly consider it. See *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996). Because we determine that the plattors had not intended to grant the lot owners the right to erect and maintain a dock off the outlot, it logically follows that they, likewise, did not intend to extend the grantees the right to permanently moor boats off the submerged land next to the outlot.

Plaintiffs next claim that the trial court erred in not including additional orders defining the scope of the easement right as part of its judgment. However, we hold that this issue is unpreserved because plaintiffs failed to move for a clarification of the trial court's order below.

Last, plaintiffs argue that if this Court concludes that the language of the dedication of the plat and the restrictive covenant referenced therein does not evince an intent on the part of the plattors to extend the lot owners the right to erect and maintain a dock off the outlot, we should make a dispositive

decision on the other issues raised by the evidence. We acknowledge that we may properly consider an issue raised before the trial court and pursued on appeal although the trial court failed to rule on the issue. See *id*. Here, in its opinion, the trial court stated that its disposition of the case, i.e., the dismissal of plaintiffs' claim with prejudice on the basis of the dedication of the plat and the restrictive covenant referenced therein, did not require a determination as to defendants' alternative claims that the Myers had obtained a right to place a dock off the outlot through prescription or a license. Therefore, this issue is properly before this Court.

Because the corporation, as grantor and owner of the servient estate, could not unilaterally modify the scope of the easement by giving the Myers a license in direct contravention to the easement rights contained in the dedication of the plat and the restrictive covenant referenced therein, the corporation lacked the authority to give the Myers such a license. See *Mumaugh v Diamond Lake Area Cable TV Co*, 183 Mich App 597, 606; 456 NW2d 425 (1990) ("[a] license is merely authority or permission to do some act . . . upon the licensor's land without having any permanent interest therein").

Defendants, however, also argue that the Myers obtained an easement by prescription. A prescriptive easement arises from a use of the servient estate which is open, notorious, adverse, and continuous for a period of fifteen years. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995). Here, the only issue is whether there was an adverse use spanning fifteen continuous years. Because we have determined that the dedication of the plat and the restrictive covenant referenced therein did not include the right to erect and maintain a dock off Outlot B, the corporation could not unilaterally give permission to modify the scope of the easement. *Schadewald v Brule*, 225 Mich App 26, 36; 570 NW2d 788 (1997). Therefore, the Myers' use could not have been permissive from the onset. Rather, the use was adverse to the interests of the front-lotters because the dedication of the plat and the restrictive covenant referenced therein did not intend for back-lotters to enjoy the riparian right of dock erection and maintenance. See *Whitefish*, *supra* at 645-646.

Because there existed conflicting evidence as to whether the Myers' adverse use of the dock had continued for the statutory period, we hold that this case should be remanded for a determination of whether the Myers showed this by clear evidence. See *Cheslek v Gillette*, 66 Mich App 710, 714; 239 NW2d 721 (1976).

Although plaintiffs do not address the issue of estoppel, defendants do, having pleaded it as an affirmative defense. Defendants again addressed this claim at trial. However, their theory under promissory estoppel is untenable because the evidence adduced at trial did not show that plaintiffs made any inducing promises to them. See *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997).

As to the defense of equitable estoppel, this doctrine arises where "(1) a party by representations, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is allowed to deny the existence of the facts." *In re Beglinger Trust*, 221 Mich App

273, 276; 561 NW2d 130 (1997), citing *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994).

Because the Mathises were aware of potential litigation as to the back-lotters exercise of the disputed right before purchasing their property, they may not now persuasively argue that they had been induced by plaintiffs' intentional or negligent conduct to believe that they would affirmatively possess a right to maintain a dock off the outlot.

Similarly, the Myers may also not avail themselves of this theory because plaintiffs, who purchased their properties more than fifteen years after the Myers' purchase of the lots and erection of the dock, could not have induced the Myers, with their intentional or negligent conduct, to believe in facts which would have been prejudicial to them.

The Wilsons, likewise, may not use this defense because Mark Wilson's reliance upon the belief that he could use a dock off the outlot was not justifiable. Wilson admitted that he had been aware that he could not have erected a third dock off the outlot because of the limited space; instead, he "figured" that he could sufficiently get along with the back-lotters who owned the docks to be able to share it. Because it would not be reasonable to purchase a lot on the presumption that one's personality would ensure dock usage, we conclude that Wilson did not justifiably rely on the belief, induced by plaintiffs, that dock usage would be guaranteed.

Likewise, Ramirez testified that he had merely presumed that he would be permitted to install a dock at the outlot because of the right of access to the lake and existing docks. This reliance was not reasonable or justifiable because the mere existence of the dock did not necessarily signal that the back-lotters owned the existing docks. Indeed, under ¶ 11 of the restrictive covenant, the plattors, i.e., the corporation, could have erected and maintained the docks that Ramirez noticed off Outlot B.

Reversed in part, affirmed in part and remanded. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ Michael R. Smolenski

I concur in the result only.

/s/ Michael J. Kelly