STATE OF MICHIGAN

COURT OF APPEALS

STEVE GERRISH,

Plaintiff/Counterdefendant-Appellee,

v

EUGENE PERON,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
October 26, 1999

No. 208539
Chippewa Circuit Court
LC No. 96-002133 GC

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

PER CURIAM.

Defendant appeals as of right from an order of summary disposition and a judgment entered after a bench trial in this action arising out of defendant's trespass on plaintiff's property and defendant's countercomplaint for an easement by necessity. We affirm.

The trial court found that defendant's agents intentionally trespassed when they cut a 30-foot wide, 800-foot deep strip of trees and shrubs on acreage belonging to plaintiff and awarded treble damages. Defendant also appeals the trial court's summary disposition of his action for an easement by necessity, arguing that the trial court erred in ruling that this issue was moot since defendant sold his landlocked parcel before filing his countercomplaint.

Defendant first argues that the trial court erred when it granted plaintiff's motion regarding title to the southern portion of plaintiff's parcel. According to defendant, plaintiff did not have record title to the disputed strip of property and hence lacked standing to assert a trespass. The trial court's summary disposition of a party based on standing is reviewed de novo to determine whether a party was entitled to judgment as a matter of law. *Dep't of Social Services v Baayoun*, 204 Mich App 170, 173; 514 NW2d 522 (1994).

In his action, plaintiff alleged that he owned the thirty-foot strip and that defendant trespassed on it. Defendant's answer denied plaintiff's ownership of the strip, and thus plaintiff's ability to recover for trespass. Once defendant raised a question of plaintiff's ownership of the strip, it became an issue in the matter. See *Adams v Hoover*, 196 Mich App 646, 647; 493 NW2d 280 (1992). Thus, the trial court

did not procedurally err when it ruled that plaintiff owned the thirty-foot strip. Such a ruling was necessitated by defendant's challenge to plaintiff's ownership.

Moreover, the trial court did not err in determining that plaintiff held title to the strip. From 1919 until the 1950s, deeds conveying plaintiff's lot included language excepting the southern thirty feet for street purposes. When a grantor retains a right in or on land granted away, that provision is either an exception or a reservation. *Mott v Stanlake*, 63 Mich App 440, 442; 234 NW2d 667 (1975). The terms "excepting" and "reserving" are used interchangeably; therefore, the language of a deed must be interpreted to carry out the intention of the grantor. *Choals v Plummer*, 353 Mich 64, 69; 90 NW2d 851 (1958). The main distinction between a reservation and an exception is that the reservation vests full title in the property to the grantee, while the grantor retains some specific right. *Bolio v Marvin*, 130 Mich 82, 83-84; 89 NW 563 (1902).

The deeds in plaintiff's chain of title except thirty feet which is reserved for street purposes. The legal description includes the thirty feet. In light of the reasoning of *Bolio*, the language regarding the thirty-foot strip in plaintiff's chain of title is a reservation. Had the grantors intended to convey less than the full parcel, the strip could have been easily excluded from the description; it was not. Plaintiff is therefore vested in title to land subject to a reservation in his chain of title. The trial court did not err when it determined that plaintiff had title to the southern thirty feet of property described in plaintiff's deed.

Next, defendant argues that the trial court erred in ruling that defendant did not have standing to raise a claim to an easement by necessity because defendant sold his allegedly landlocked property before filing his action and therefore was not the real party in interest. MCL 600.2041; MSA 27A.2041 and MCR 2.201(B) require that all actions be brought by the real party in interest. Only a real party in interest has standing to enforce a cause of action. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). To have standing, a litigant must demonstrate a legally protected interest that is in jeopardy of being adversely affected and allege a sufficient personal stake in the outcome of the dispute to ensure that the controversy sought to be adjudicated will be presented in an adversarial setting that is capable of judicial resolution. *Donaldson v Alcona Co Bd of Co Rd Comm'rs*, 219 Mich App 718, 722; 558 NW2d 232 (1996); *Wortelboer v Benzie Co*, 212 Mich App 208, 214; 537 NW2d 603 (1995). At the time defendant filed his countercomplaint, he had no legally protected interest since he did not own any property that would be benefited by a finding of an easement by necessity. See *Trout Unlimited, Muskegon White River Chapter v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992). Without an ownership in a landlocked parcel, it is unreasonable, if not impossible, to find that defendant had a strict necessity for an easement.[1]

Finally, defendant argues that the trial court erred in both setting the amount of damages and trebling that amount pursuant to MCL 600.2919; MSA 27A.2919. As with other findings of fact, an award of damages is reviewed on appeal pursuant to the clearly erroneous standard. *Precopio v Detroit*, 415 Mich 457, 465-467; 330 NW2d 802 (1982); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). We find no error here.

Pursuant to statute, a landowner has a cause of action and a right to treble damages when a person intentionally trespasses and harms property. MCL 600.2919(1); MSA 27A.2919(1). The general measure of damages in a trespass action is the land's diminution in value if the injury is permanent or irreparable. *O'Donnell v Oliver Iron Mining Co*, 262 Mich 470, 477; 247 NW 720 (1933). The loss of aesthetic value, the actual monetary value of trees lost and the cost of their replacement can constitute evidence of the diminution in value. *Thiele v Detroit Edison Co*, 184 Mich App 542, 545; 458 NW2d 655 (1990). If the injury is reparable, or temporary, the proper measure of damages is the cost of restoration of the property to its original condition, if less than the value of the property before the injury. *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993); *Schankin v Buskirk*, 354 Mich 490, 494; 93 NW2d 293 (1958); *Strzelecki v Blaser's Lakeside Industries of Rice Lake, Inc*, 133 Mich App 191, 199; 348 NW2d 311 (1984). These rules are flexible in their application, with the ultimate goal being compensation for the harm or damage done. *Schankin*, *supra* at 496. Thus, whatever method is most appropriate to compensate a plaintiff for the loss may be used. *Id*. at 500.

In this matter, plaintiff testified that he purchased the property as an investment. A county tax official testified that in 1995 the assessed value of plaintiff's land was $22,000. Plaintiff's valuation witness testified that the diminution in value of plaintiff's land was $2,500, which took into account the value of the timber removed, the likelihood of litigation or injury posed by the cleared strip, and actual reduction in value. The trial court's finding that plaintiff suffered $2,500 in damages is not clearly erroneous. *Kratze*, *supra* at 149; *Thiele*, *supra* at 545.

Next, defendant challenges the trial court's ruling that the trespass on plaintiff's property was intentional, which permitted an award of treble damages. A trespass that is merely negligent will not suffice for the imposition of treble damages. *Iacobelli Construction Co, Inc v The Western Casualty & Surety Co*, 130 Mich App 255, 262; 343 NW2d 517 (1983); *Stevens v Creek*, 121 Mich App 503, 509; 328 NW2d 672 (1982).

In this case, defendant's awareness that the alleged right-of-way was not on his own property is evidenced by his August 1994 meeting with city officials. In this meeting, defendant was told that an investigation, a report, and a vote would be necessary before the putative right-of-way could be cleared. Defendant's agent, Bob Neal, testified that defendant knew the right-of-way had to be verified by the city, but thought it was a technicality. While it might have been reasonable for defendant to believe that he had an easement over the southern edge of plaintiff's parcel, defendant was aware that the Sault Ste. Marie city commission had to approve the opening of the right-of-way. Defendant's failure to wait for the conclusion of the city's procedures is evidence of a bad intent and justifies an award of treble damages.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski

[1] Further while MCR 2.202(B) permits an original party to remain in a lawsuit despite a transfer of interest, the court rule cannot apply to defendant's countercomplaint which was filed *after* he sold parcel B. See *Fortin v Vitali*, 15 Mich App 657, 660; 167 NW2d 355 (1969) and Martin, Dean & Webster, Michigan Court Rules Practice, Rule 2.202, comment 3, p 226.