STATE OF MICHIGAN

COURT OF APPEALS

HELEN BURROUGHS,

Plaintiff-Appellee,

v

PAUL G. RAND, III, and BERNADINE M. RAND,

Defendants-Appellants,

and

STERLING BANK AND TRUST, formerly known as STERLING SAVINGS BANK, a federal savings bank,

Defendant.

UNPUBLISHED
November 2, 1999

No. 204279
Calhoun Circuit Court
LC No. 95-003654 CH

Before: Griffin, P.J. and McDonald and White, JJ.

PER CURIAM.

Seventy-three-year-old plaintiff Helen Burroughs owns a mobile home in which she resides that is located on real property for which she possesses no legal ownership interest. In 1970, plaintiff and her late husband were granted a license by the then fee-simple owner Duke Farley to place the mobile home on the premises and to use a common well and driveway. In reliance on her license, plaintiff made construction improvements to her mobile home. It was undisputed that at the time of trial in 1996, plaintiff's mobile home was immovable, for practical purposes, because of alterations and age.

In 1992, following the death of Mr. Farley, the real property was subdivided into ten parcels and sold individually at an auction.[1] As a result of the subdivision, plaintiff's trailer is now primarily located on parcel six but extends approximately seven feet onto parcel seven. The gravel driveway and well are on parcel four. The new owners of parcels six, seven, and four continued plaintiff's license, although by mutual agreement plaintiff began paying the owners of parcel six $75 per month.

In 1994, defendants purchased parcel four. Thereafter, defendants constructed a gate in an attempt to deny plaintiff ingress and egress to her home. In October 1995, defendants attempted to deny plaintiff access to the well by turning off the electricity.

Following defendants' attempts to deny plaintiff access to the driveway and the well, plaintiff brought the present action in the Calhoun Circuit Court seeking equitable relief. At the conclusion of a non-jury trial, the trial court made findings of fact and conclusions of law. After hearing testimony, receiving exhibits, and visiting the premises, the court ruled that plaintiff was entitled to equitable relief in the form of a "personal license" for the use of the driveway and well that "shall be in existence as long as plaintiff is alive and resides in her house trailer." The judgment provides that "plaintiff shall maintain the well and the ten foot [driveway] strip of land." The court's ruling from the bench specifies that "Mrs. Burroughs also has the right to utilize the well at her cost . . . so it's at her cost she maintains the well."

On appeal, defendants do not challenge any of the findings of fact but contest the equitable relief ordered by the circuit court. Although defendants purchased parcel four with full knowledge that their predecessors in title had granted plaintiff a license to use both the driveway and well, defendants now argue that plaintiff possesses no legal ownership interest in any real property and that plaintiff's license to use the driveway and well is revocable at will. We affirm.

Our constitution (Const 1963, art 6, § 5), statutes (MCL 600.223(4); MSA 27A.223(a)), and court rules (MCR 2.101(a)) have eliminated the procedural distinctions between law and equity. MCR 2.101(a) provides as follows: "Form of Action. There is one form of action known as a 'civil action'." Nonetheless, the substantive differences between law and equity remain. MCR 2.101 is identical to its predecessor GCR 1963, 12. The committee comment to GCR 1963, 12 provided in pertinent part:

> These rules are written to abolish, as far as possible, the *procedural* distinctions between law and equity. No attempt has been made to alter the substantive differences between law and equity. However, Professor Pomeroy observed, in the preface to the first edition of Pomeroy's Equity Jurisprudence (1881), that under such unified procedure "The tendency . . . has plainly and steadily been towards the giving an undue prominence and superiority to purely legal rules, and the ignoring, forgetting, or suppression of equitable notions." The adoption of these rules is not to be construed as approving of this tendency. On the contrary, Professor Pomeroy's words are to be taken as a warning so that we may avoid the consequences he describes. Only procedural distinctions are abolished or minimized by this set of rules. (Emphasis in original.)

See also *Blue Water Excavating Co, Inc v State Highway Comm'r*, 4 Mich App 266, 271-272, nn 4 and 5; 144 NW2d 630 (1966).

In the present case which seeks equitable relief, principles of equity apply. In this regard, the Supreme Court has stated:

> Equity looks at the whole situation and grants or withholds relief as good conscience dictates. [*Thill v Danna*, 240 Mich 595, 597; 216 NW 406 (1927).]

Further, although the procedural distinctions between law and equity no longer exist, "it is still true that most of the rules of equity are characterized by a greater flexibility than those of the common law, and that courts possess greater discretion in administering equitable remedies than even the same courts have in administering common-law remedies." McClintock, Equity (2d Ed), p 2.

In this regard, "(e)quity is said to be flexible rather than rigid, its interest justice rather than law. Suppose a tenant is one day late in paying her rent, as the result, say, of a mistake or an accident that put her in the hospital. The landlord seeks to oust her in accord with the terms of the lease. A court may say that equity relieves from a forfeiture, allow the tenant to pay the landlord and keep the tenancy." Dobbs, Law of Remedies (2d ed), § 2.1(3), p 55.

In encroachment cases, the majority approach is to balance the relative hardships and equities. *Id.* at § 5.10(4), pp 540-541. The trial court should consider the parties' course of conduct and intentions and balance considerations such as good faith, laches, and estoppel. *Id.* The relative costs and benefits to the parties must be weighed and economic waste is to be avoided. However, "[t]he defendant who intentionally or recklessly builds his structure partly on the plaintiff's land will be compelled to remove it, even at great cost, to avoid giving him a right of private eminent domain." *Id.*

Had plaintiff possessed an ownership interest in the land on which her mobile home sits, it is most likely that following the division of the dominant parcel, plaintiff would be entitled to an implied easement or easement by necessity or prescription to the well and driveway. See, generally, *Forge v Smith*, 458 Mich 198, 211, n 38; 580 NW2d 876 (1998); *Schmidt v Eger*, 94 Mich App 728; 289 NW2d 851 (1980). Because plaintiff has no legal interest to any real property to which an easement could attach, she possessed a license that is ordinarily revocable at will. However, licenses necessary for a tenant's use of leased land are irrevocable for the necessary term of the lease. *Forge, supra* at 211, n 37; *Powers v Harlow*, 53 Mich 507, 513-514; 19 NW 257 (1884).

The circumstances presented in *Hunter v Slater*, 331 Mich 1; 49 NW2d 33 (1951), most closely resemble the present facts. In *Hunter*, a right-of-way easement granted to the plaintiffs was found to be invalid as violating the statute of frauds. However, the plaintiffs therein reasonably relied on the invalid easement and expended funds for its improvement. In light of these circumstances, the decision of the trial court to grant the plaintiffs an equitable personal license of right-of-way across defendant's property was affirmed by the Supreme Court:

> We are in accord with the conclusion of the trial judge that *plaintiffs have in equity a right-of-way across said quarter section*. The trial judge concluded that the intent of the parties as shown by the correspondence was that the plaintiffs were to have an easement. We find from the written exhibits that the lumber company *intended to give plaintiffs a permanent license to cross its land*, concluding a contract to that effect, in the lumber company's promise in writing, that "whenever it is convenient for us to get into the territory we will get in touch with you then to complete any arrangements

> that may be necessary." *The right promised to plaintiffs for a right-of-way across the lumber company's quarter section was not a mere naked license,* revocable at will by the lumber company, or one to be revoked by the sale of the land. *Stevens v City of Muskegon,* 111 Mich 72 (36 LRA 777); *Greenwood v School District No. 4 of Napoleon Township,* 126 Mich 81. [*Id.* at 6 (emphasis added).]

In the present case, the trial judge looked at the "whole situation" and in the historic tradition of equity, fashioned a remedy that the facts and "good conscience dictates." *Thill, supra* at 597. On appeal, we review equity decisions de novo but will not disturb the findings of fact of the trial court unless they are clearly erroneous. *Sparks v Sparks,* 440 Mich 141, 145-152; 485 NW2d 893 (1992); *LaFond v Rumler,* 226 Mich App 447, 450; 574 NW2d 40 (1997). After our review, we affirm the equitable relief ordered by the circuit court. In view of the overall equities, plaintiff's good-faith intent, reasonable reliance, and the passage of time, and after weighing the costs and benefits to the parties, including the avoidance of economic waste, we hold that the trial judge, sitting in the position of a former chancellor in equity, did not err in granting plaintiff a lifetime equitable license for the use of the well and driveway.

The other issues raised by defendants are also without merit. Although the focus of plaintiff's complaint was on a request in equity for an easement, the circuit court was within its authority to grant other equitable relief. Further, we note that plaintiff's complaint prayed for "such other relief as the court may seem just." Defendants' claim that plaintiff lacks standing to seek equitable relief is likewise without merit. Plaintiff has a real interest in the equitable right she seeks to enforce. *Bowie v Arder,* 441 Mich 23, 42-43; 490 NW2d 568 (1992). See also 28A CJS, Easements, § 195, p 421[2], and cases cited therein.

Affirmed.

/s/ Richard Allen Griffin

[1] After Mr. Farley's death, plaintiff began paying $45 per month in "rent" to Farley's daughter, Carolyn Pederson. Shortly before the auction, Pederson filed and then voluntarily dismissed an ejectment action against plaintiff.

[2] 28A CJS, Easements, § 195, p 421, states:

> Any one rightfully in possession of the premises to which an easement is appurtenant may maintain an action for injury to or disturbance thereof. Accordingly, it has been held that a lessee or a tenant at will or a widow of an intestate with her children continuing in possession of decedent's land without partition, may maintain the action.