

STATE OF MICHIGAN
COURT OF APPEALS

DAVID J. MICHALIK, Personal Representative of
the Estate of JOHN MICHALIK, Deceased,

UNPUBLISHED
November 9, 1999

Plaintiff-Appellant,

v

No. 209109
St. Clair Circuit Court
LC No. 96-000306 CZ

WILLIAM JUSTICE and MARGARET
KOTHSTEIN,

Defendants-Appellees.

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendants' motion for summary disposition. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

This case involves a dispute over riparian rights. Defendants constructed a dock in front of their home on the St. Clair River. When the dock was complete, plaintiff filed an action for trespass and nuisance. He claimed that the dock was not constructed perpendicular to the thread of the stream and that, as a result, it extended onto subaqueous land owned by him. Plaintiff later amended his complaint to add an ejectment claim. After their expert completed a survey of the property, defendants offered to remove the portion of the dock that, according to the survey, encroached on plaintiff's property. Claiming that the encroachment was greater than that depicted in defendants' survey, plaintiff declined the offer and moved forward with this action.

Plaintiff first argues on appeal that the trial court erred in granting defendants summary disposition with regard to their trespass claim. Although the court did not state under which subsection of MCR 2.116 it was granting summary disposition, because the record shows that the court considered documentary evidence outside the pleadings, we assume that the motion was granted pursuant to MCR 2.11(C)(10). We review a trial court's ruling on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In *Quinto v Cross & Peters*, 451 Mich 358; 362-363; 547 NW2d 314 (1996), our Supreme Court set forth the standard for reviewing motions for summary disposition brought pursuant to MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [Citations omitted.]¹

The trial court dismissed plaintiff's trespass claim on the basis that he did not present evidence to show that defendants' encroachment was not accidental. However, plaintiff was not required to show that defendants' trespass was non-accidental. A trespass is an invasion of the plaintiff's interest in land. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995). Every unauthorized entry upon the private property of another constitutes a trespass. *Gelman Sciences, Inc v Dow Chemical Co*, 202 Mich App 250, 253; 508 NW2d 142 (1993). To sustain a claim of trespass, the plaintiff must show that the actor intended to intrude on the property of another and that he was not authorized to do so. *Cloverleaf, supra*. Therefore, plaintiff was only required to show that defendants had intended to construct the dock in question and that it was a intrusion on his riparian rights. That defendants mistakenly believed that dock to be entirely within their own riparian rights is of no consequence. Therefore, the trial court erred in dismissing plaintiff's trespass claim.

However, we find that plaintiff did not raise a genuine issue of fact concerning the extent to which defendants' dock encroaches on plaintiff's property. The parties agree that the boundaries of their riparian rights must be established by drawing lines perpendicular to the middle, or "thread," of the St. Clair River. See *Campau Realty Co v City of Detroit*, 162 Mich 243, 245; 127 NW 365 (1910). Defendants contend that the middle of the St. Clair River is established by the international boundary line between the United States and Canada. Plaintiff concedes that an international boundary on a river may coincide with the middle or thread of the river in some instances. See *United States v Chandler-Dunbar Co*, 229 US 53; 33 S Ct 667; 57 L Ed 1063 (1912). He argues, however, that an international boundary does not always coincide with the midpoint of the river. Rather, he contends that it follows the navigable channel and, therefore, diverges from the midpoint of the river at times. Plaintiff concludes that because a record *could* be developed that shows that the property lines as depicted on defendants' survey are not accurate and that the dock encroaches to a greater extent than the survey shows, there exists a genuine issue of fact precluding summary disposition.

It is not sufficient, however, for plaintiff to raise the possibility that there exists an issue of fact; plaintiff was required to present evidentiary proofs creating a genuine issue of material fact for trial. See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 n 2; 597 NW2d 28 (1999). In response to defendants' expert's survey, plaintiff offered an aerial photograph showing that defendants' dock is not parallel to some of the other docks along the same shoreline, and affidavits in which plaintiff avers that the dock is wider than is depicted in the survey and that the dock is not perpendicular to the thread of the river. However, whether the dock was constructed perpendicular to the thread of the river is irrelevant. The issue is whether the dock was constructed within defendants' property boundaries. Even defendants' survey shows that the dock is not parallel to the property lines that are drawn perpendicular to the international boundary. Moreover, with regard to plaintiff's assertion that the dock is wider than depicted in the survey, we note that the survey does not indicate the exact width of the dock, but only indicates that the dock extends onto plaintiff's property by eighteen inches at its furthest point. Plaintiff submitted no survey or other competent evidence contradicting the accuracy of the property lines as established on defendants' expert's survey or the extent of the encroachment depicted there, nor did plaintiff submit evidence that the thread of the river at the point relevant to determining defendants' property lines is anything other than the international boundary. Therefore, we find that plaintiff failed to raise a genuine issue of material fact with regard to the extent of defendants' trespass.

Although we conclude that the trial court erred in dismissing plaintiff's trespass claim, because plaintiff failed to present competent evidence to dispute the accuracy of defendants' survey or the extent of encroachment depicted there, we remand only for determination of damages. After establishing an appropriate lump sum in future damages, the trial court must give defendants the option of paying the damages to plaintiff or removing the portion of the dock that encroaches on plaintiff's property. See *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505; 534 NW2d 212 (1995).

Plaintiff also argues on appeal that the trial court erred in granting defendants summary disposition with regard to his nuisance claim. Again, to avoid summary disposition, plaintiff was obligated to set forth specific facts, supported by evidence, showing that there was a genuine issue for trial. *Smith, supra*; *Quinto, supra*. Plaintiff presented no specific facts to show substantial interference with the use and enjoyment of, or significant harm to, plaintiff's land. See *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992); *Kilts v Kent Co Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910). Plaintiff presented no evidence that his property values were diminished by defendants' encroaching dock, nor did he allege or provide evidence of any substantial interference with his use and enjoyment of the property or of potential dangers stemming from the encroaching dock. Indeed, plaintiff acknowledges that there was no evidence before the trial court as to the nature of the defendants' use of the dock or of its effect on plaintiff's property value. Therefore, the trial court did not err in granting defendants summary disposition with regard to plaintiff's nuisance claim.

Finally, given that we have found that defendants' dock does encroach on plaintiff's property and that plaintiff is entitled to damages or removal of the encroaching portion of the dock, we need not address plaintiff's alternative claim of ejectment.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Jeffrey G. Collins

¹ Relying on *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997), plaintiff contends that in considering a motion for summary disposition brought under MCR 2.116(C)(10), after considering the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties, the court must evaluate whether a record *might be developed* through the ensuing litigation that would leave open an issue upon which reasonable minds might differ. However, in *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 n 2; 597 NW2d 28 (1999), our Supreme Court recently clarified that the standard cited by plaintiff is that which applied under the former General Court Rules of 1963, not MCR 2.116(C)(10). The Court stated:

Under MCR 2.116, it is no longer sufficient for plaintiffs to *promise to offer* factual support for their claims at trial. As stated, a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. MCR 2.116(G)(4). [*Id.* at 456.]