STATE OF MICHIGAN

COURT OF APPEALS

SOLOMON KATZ,

Plaintiff-Appellant,

v

RONALD J. SPAULDING and ANTOINETTE E. SPAULDING,

Defendants-Appellees.

UNPUBLISHED
July 9, 2002

No. 231318
Wayne Circuit Court
LC No. 99-927179-CH

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Plaintiff, who claimed a prescriptive easement over a portion of defendants' land, appeals by right from a grant of summary disposition to defendants. We reverse the grant of summary disposition and remand the case for further proceedings.

In August 1999, plaintiff filed a complaint alleging that defendants had been parking their vehicles in the driveway located between plaintiff's house at 1023 Wayburn Street and defendants' house at 1025 Wayburn Street in Grosse Pointe Park.[1] Plaintiff contended that the parked vehicles blocked his access to his garage. He claimed a prescriptive easement over the driveway, alleging that he had used the driveway to access his garage for over fifteen years. Documentary evidence submitted by defendants established that the driveway was approximately nine feet wide and that approximately 6.2 feet belonged to defendant's property and 2.8 feet to plaintiff's property. Additionally, plaintiff stated in a brief filed with the trial court that "[a]pproximately one-third of the property belongs to 1023 Wayburn, and the remaining two-thirds belongs to 1025 Wayburn." Accordingly, plaintiff essentially sought an easement over the 6.2 feet of the driveway that did not belong to him.

In September 2000, defendants moved for summary disposition, in essence claiming that plaintiff could not establish the elements of a prescriptive easement because defendants and their predecessors in interest had continually rebuffed plaintiff's attempts to claim the driveway as his own. Defendants attached to their summary disposition brief the deposition of Eva Gast, a prior

[1] A photograph submitted to the trial court demonstrates that the driveway directly abuts the two houses.

owner of defendant's property, who testified that within two years after plaintiff moved to 1023 Wayburn in 1972, plaintiff installed a metal post in the driveway. Gast testified that plaintiff "yelled at my mother and screamed" when asked about the post. When asked whether plaintiff had provided a reason for installing the post, Gast stated, "Just says if he can't use it, nobody's going to use it." Gast testified that after an unspecified time period, her tenant at 1025 Wayburn removed the post.

Gast testified that sometime around 1988, plaintiff installed a fence over part of the driveway, and the fence served to block access to the garage at 1025 Wayburn. Gast filed a lawsuit on May 2, 1988, to have the fence removed and to obtain a prescriptive easement over the part of the driveway located on plaintiff's land. A consent judgment was obtained on September 12, 1989. It stated, in part:

> IT IS FURTHER ORDERED AND ADJUDGED that as to the Defendant, SOLOMON KATZ, that Count II of the Complaint for imposition of an equitable servitude upon the property shall be dismissed with prejudice upon the completion of repairs and renovations to a fence which has obstructed the use of a common drive; that said renovations shall be made to afford reasonable access to a garage on the property situate[d] at 1025 Wayburn, Grosse Pointe Park, Michigan and that Plaintiff shall pay reasonable costs of repair and replacement of existing structures.

Gast testified that plaintiff was an abusive, harassing neighbor who caused her to lose thousands of dollars in rental revenues because he essentially chased tenants away with his obnoxious behavior. Gast also noted that plaintiff's predecessors in interest had accessed the garage at 1023 Wayburn using an alley at the back of the property.

With their motion for summary disposition, defendants alleged that plaintiff had essentially been harassing them through litigation. They stated as follows in their brief:

> . . . the Plaintiff is abusing the "free legal assistance" that he has through his union. His behavior and his use of the union's free legal assistance has created an undue emotional and financial hardship, not only for the Defendants in spending over $5,000.00 so far in legal fees, and possibly much more if this case goes to trial, but also for Eva Gast, who testified she lost almost $8,000.00 in lost rent and attorney fees because of Mr. Katz and his ability to essentially use the courts with no downside. Mr. Katz has unjustly enriched himself by the free use of attorneys in that he has no economic reason to forbear from using the "gift" he gets from the union, all to the economic and financial disadvantage of the Defendants.

Defendants sought an award of attorney fees and costs for the allegedly frivolous nature of the plaintiff's lawsuit.

Plaintiff, in turn, requested that summary disposition be granted to him. He alleged via affidavit that he had used the driveway continuously since December 1972 and that his right to the driveway matured in December 1987. Plaintiff further alleged that using the back alley to access his garage was not feasible because the alley did not face the entrance to the garage.

The summary disposition hearing occurred on October 27, 2000. The parties rested on their briefs, and the trial court granted summary disposition to defendants. The court did not thoroughly explain its reasoning, stating only that "[t]he [c]ourt is satisfied that Mr. Katz cannot show against this Defendant open, notorious and continuous use." The court responded to defendants' motion for attorney fees and costs as follows:

> I'll tell you what, if Mr. Katz wants to bring another lawsuit, you can put it in your order, he has to post a bond if it's under the same grounds. That's probably the best way to do it. Because I think he's entitled to legal representation, I'm not going to deny him that.

The court declined to award defendants attorney fees and costs for the instant case.

Plaintiff moved for reconsideration, arguing that the trial court improperly relied on the outcome of the 1988 litigation in granting summary disposition to defendants.[2] Additionally, plaintiff sought to either (1) rescind the order requiring a cash bond for the commencement of future litigation, or (2) amend his complaint to add a claim of trespass against defendants for driving their vehicles across and parking their vehicles on a portion of his land. The trial court summarily denied plaintiff's motion for reconsideration.

On appeal, plaintiff contends that the trial court erred in granting defendants summary disposition because he established all the elements of a prescriptive easement. Defendants contend that plaintiff did not do so because plaintiff and their predecessors continually asserted their property rights through the years and "disrupt[ed] [plaintiff's] scheme of taking and/or using that which did not belong to him."

We review a trial court's grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). Here, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10), and the trial court did not specifically indicate on which subrule it relied in granting defendants' motion. It appears, however, that the trial court looked outside the pleadings in granting the motion, so we will treat the motion as granted under MCR 2.116(C)(10). See *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1998). In reviewing a motion for summary disposition granted under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to determine if any genuine issue of material fact exists. *Wilcoxon, supra* at 357-358. We resolve all legitimate inferences in favor of the nonmoving party. *Id*. at 358.

As noted in *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001), "[a]n easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years." Contrary to the trial court's conclusion, plaintiff established a genuine issue of material fact regarding whether these elements had been fulfilled. Indeed, plaintiff asserted in an affidavit that he continuously used the driveway from the time he acquired his property in 1972. See *Wilcoxon, supra* at 357 (indicating that this Court considers affidavits in reviewing a grant of summary disposition). Clearly, plaintiff's use of the driveway

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[2] See footnote 5, *infra*.

was open and notorious, because the driveway was located in a public area and directly adjacent to defendants' house. Moreover, his use was arguably "adverse," or, in other words, "hostile." See *Wood v Denton*, 53 Mich App 435, 441; 219 NW2d 798 (1974). As noted in *Killips, supra* at 226, "'hostile' merely means a use that is inconsistent with the rights of an owner." The evidence showed that plaintiff claimed a right to use the driveway and that defendants and their predecessors viewed plaintiff's use of the driveway as being inconsistent with their property rights. There was no evidence of permissive use, which would defeat the element of hostility. See generally *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976). Indeed, defendants explicitly state in their brief that "[p]ermission was never given."

Further, there was a question of fact regarding whether plaintiff's use of the driveway was continuous for a period of fifteen years. Defendants contend that by placing the pole in the driveway, plaintiff "interrupted all use of the driveway." However, even considering the pole and assuming, arguendo, that it interrupted plaintiff's claim of right over the driveway, there may have been enough years of use after the pole's removal to fulfill the fifteen-year requirement. As noted, Gast testified that the pole was installed within two years of plaintiff's acquiring his property in 1972, and there is no clear indication regarding the length of time the pole remained in the driveway. Assuming it was installed in 1974 and remained in place for one year,[3] there would have remained enough time to fulfill the fifteen-year requirement.[4] We again note plaintiff's assertion that he continuously used the driveway from the time he acquired the property in 1972. Given our obligation to resolve all legitimate inferences in favor of plaintiff, *Wilcoxon, supra* at 358, we simply cannot say that summary disposition for defendants was warranted.

Defendants additionally contend that plaintiff's use of the driveway was interrupted by the installation of the fence that was the subject of the 1988 lawsuit. However, while the evidence showed that the fence curtailed defendants' predecessors' ability to access their garage, there was no indication that the fence curtailed *plaintiff's* use of the driveway or the access to *his* garage. A photograph showing the location of the fence indicates that the fence extended so close to the house at 1025 Wayburn that a vehicle on the driveway would not be able to enter the garage at 1025 Wayburn. Nonetheless, the fence was located far enough down the driveway and away from the street that plaintiff would still have been able to drive his vehicle on a good portion of the driveway's surface even with the fence in place. Moreover, Gast specifically testified that plaintiff "had a gate" in the fence. A reasonable inference, in light of the photograph showing the fence's location, is that plaintiff used this gate to access his garage by way of the driveway. See *id.* Accordingly, we conclude that plaintiff demonstrated a genuine issue of material fact regarding whether he openly, notoriously, adversely, and continuously used the driveway for a period of fifteen years. See *Killips, supra* at 258. While plaintiff may not be a likeable person or a desirable neighbor, this is not reason enough to deny him his rights under

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[3] We note that plaintiff contends in his appellate brief that the pole was removed "shortly" after its installation.

[4] Moreover, it is not clear to us that the installation of the pole served to interrupt the running of the fifteen-year period. Indeed, by installing the pole and thereby preventing access to the driveway, plaintiff was essentially exercising dominion over the entire length of the driveway.

the law. The trial court erred in granting summary disposition to defendants.[5] We decline plaintiff's request to order entry of judgment in his favor, however. Indeed, while plaintiff demonstrated a genuine issue of material fact regarding a potential prescriptive easement, we do not believe that he conclusively established such an easement, in light of evidence that interruptions in use might have occurred. Accordingly, we remand this case for further proceedings.

Plaintiff next argues that the trial court should have allowed him to amend his complaint to add a claim of trespass against defendants. However, plaintiff did not properly raise the issue of a potential amendment. Indeed, instead of making a separate request to amend his complaint, plaintiff simply argued for an amendment within the context of his motion for reconsideration. As noted in MCR 2.119(F)(3), to be entitled to relief with respect to a motion for reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." Here, no palpable error occurred, because plaintiff *did not even ask* to amend his complaint until he filed his motion for reconsideration. Appellate relief is unwarranted.[6]

Finally, plaintiff contends that the trial court erred by ordering that plaintiff must file a cash bond for defense costs "if he files a similar action in [the] future." Plaintiff's specific complaint is that this ruling inhibits his ability to bring a separate action for trespass if defendants continue to park their vehicles on a portion of his land. We discern no basis for appellate relief. Indeed, we note that the court's written order incorporates the statements made on the record, and the trial court stated on the record that plaintiff "has to post a bond if it's under the same grounds." An action based on trespass does not involve "the same grounds" as an action to establish a prescriptive easement.[7] Accordingly, plaintiff's argument is unfounded.[8]

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[5] Plaintiff also contends that the trial court erred by relying on the 1988 lawsuit in granting summary disposition to defendants. Plaintiff is correct that the doctrine of res judicata did not serve to bar the instant lawsuit, because the 1988 case involved an issue separate from the one involved here. Indeed, in the 1988 case, the issue was whether defendants' predecessors had a prescriptive easement over plaintiff's land, not whether plaintiff had a prescriptive easement over defendants' predecessors' land. However, contrary to plaintiff's assertion, we do not believe that the trial court erroneously relied on res judicata in granting summary disposition to defendants. Indeed, the court explicitly stated, "The Court is not going to reference [the prior lawsuit] . . . ." Instead, the court relied on its belief that plaintiff simply could not establish the elements of a prescriptive easement.

[6] We express no opinion regarding whether a separate claim for trespass would be appropriate here. We do note, however, that defendants erroneously contend that the 1988 consent judgment negated any claim for trespass by plaintiff. Indeed, the 1988 consent judgment allowed defendants' predecessors reasonable access to their garage but did not address whether defendants' predecessors could park their vehicles in the driveway such that plaintiff's access to his garage was blocked. In fact, the consent judgment specifically referred to the driveway as a "common drive."

[7] Moreover, even if we apply the strict letter of the court's written order, we do not deem a trespass action a "similar action" under the order.

The grant of summary disposition to defendants is reversed, and this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Patrick M. Meter

(…continued)

[8] Plaintiff implies that the trial court might in essence expand its ruling and require an unreasonable bond in future litigation. However, no future litigation has been commenced, and thus this issue is not currently ripe for review.