STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY POLCYN, MARY POLCYN, GEORGE HAUKE, JEAN HAUKE, RAY WALLICK, EDWARD KASSUBA, M. FAY KASSUBA, JEFFREY BURKS, ANITA PIATEK, RONALD VOGT, and ELLEN VOGT,

Plaintiffs-Appellees,

V

TIMOTHY L. TURNER, and CATHY A. TURNER,

Defendants-Appellants,

and

PATRICIA ANSPAUGH, IRIS BEEBEE, WESLEY BEEBEE, CHESTER BUDZYNSKI, PATRICIA BUDZYNSKI, JANICE EVANS, LYNN EVANS, BRIAN GENDELMAN, CAROL GENDELMAN, MARCIA HOLCOMB, VICTOR HOLCOMB, ESTHER JOHNSON, HAROLD JOHNSON, C. SCOTT KOON, MAPLE RIDGE HARDWOODS, INC, AUDREY MOORE, LESTER MOORE, SHIRLEY F. SMILEY, deceased, and STEPHAN SMILEY,

Defendants.

UNPUBLISHED
November 26, 2002

No. 230960
Antrim Circuit Court
LC No. 00-007650-CH

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

In this action to quiet title, defendants Timothy and Cathy Turner appeal as of right from an order granting summary disposition to plaintiffs.[1] We affirm.

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[1] The remaining defendants, owners of other parcels east of Dingman School Road not included (continued…)

I. Facts and Proceedings

Plaintiffs are the owners of the nine lots in Echo Six Estates, a platted subdivision across the road from Six Mile Lake in Echo Township. Echo Six Estates was originally platted by William and Julia Yochum in 1972. In 1971, the Yochums purchased lakefront land on the eastern shore of Six Mile Lake that was bordered by Dingman School Road. They also purchased land on the east side of Dingman School Road. They divided a portion of that land into nine lots to create Echo Six Estates. Each of the nine lots has frontage on Dingman School Road, but no lake frontage. The Yochums provided for lake access in the plat, however. Echo Six Estates, according to the language of the plat, includes the "9 lots numbered 1 [through] 9 inclusive, [and] one private park designated as Echo Six Park." The park is bordered by Dingman School Road on the east and Echo Six Lake on the west. According to the plat, "Echo-Six Park is private and for the exclusive use of the lot owners in this plat. Echo Six Park extends to the shore of Six Mile Lake with full riparian rights thereto." At that time, the Yochums' land to the north and south of Echo Six Park was unplatted, and their land east of Echo Six Estates was likewise unplatted.

In 1971, before Echo Six Estates was platted, the Yochums recorded a "declaration of restrictive covenants" and a master drawing that applied to their entire parcel. The drawing shows the lots that became Echo Six Estates, but also shows waterfront lots A through D, which lie to the north and south of Echo Six Park, and lots to the east of Echo Six Estates labeled E through N. Defendants purchased lot N in 1999. They were the first purchasers of any of lots E through N who developed their property. When they purchased their lot, they were under the impression that they, too, had a right to access Six Mile Lake through Echo Six Park. Defendants based this impression, in part, on four affidavits that were recorded concerning the property in 1976. Three of the affidavits were filed on the same day in September 1976: the affidavits of C. Eugene Ostling, the surveyor of the Yochum parcel, and Richard Georgi and William E. DeWitt, real estate brokers who sold lots in the Yochum parcel. Ostling stated in his affidavit that "it was the intent of the developer to allow purchasers of both platted lots and parcels access to Six Mile Lake over and across [Echo Six Park]." DeWitt and Georgi both stated that they had the understanding and had told potential purchasers that all of the lots in the Yochum parcel would have the right to use Echo Six Park. William and Julia Yochum filed an affidavit approximately two weeks later that stated that they had always intended for all of the lots and parcels within their original parcel to have the right to use Echo Six Park and that they never intended to limit the use of the park to lots 1 through 9. In addition to these affidavits, defendants reviewed the survey drawings and the declaration of restrictive covenants and concluded that as owners of parcel N, they would have lake access through the park. During the summer of 1999, defendants used the park several times without objection from plaintiffs. However, when Timothy Turner inquired about docking a boat off of the park, he was told that he would have to discuss the issue with the park administrator.

In February 2000, plaintiffs filed their complaint to quiet title, also alleging ownership of the park through adverse possession, to keep defendants from using the park. Defendants

(…continued)

in Echo Six Estates, either entered into consent judgments or were defaulted. They are not involved in this appeal.

claimed that they had the right to use the park because the affidavits changed the rights granted by the plat. They also claimed that the application of various equitable principles entitled them to use the park. Plaintiffs moved for summary disposition based on MCR 2.116(C)(9) and (10) prior to the close of discovery, which the trial court granted. Defendants now appeal the trial court's decision.

II. Standard of Review

The trial court granted summary disposition to plaintiffs based on MCR 2.116(C)(9) and (10). This Court reviews decisions on motions for summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A trial court may grant summary disposition under MCR 2.116(C)(9) to a plaintiff if the defendant fails to plead a valid defense to a claim. *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). The court must accept all well-pleaded allegations in a defendant's pleadings as true. *Id*. Only the pleadings may be considered when a trial court decides a motion under this rule. *Id.* at 565; MCR 2.116(G)(5). Summary disposition is proper under MCR 2.116(C)(9) only where the defenses are "so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery." *Id.* at 565, quoting *Domako v Rowe*, 184 Mich App 137, 142; 457 NW2d 107 (1990).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's claim. *Veenstra* at 163. The moving party has the initial burden of showing that no genuine issues of material fact exist. *Id.* In order to avoid summary disposition, the opposing party must not rely on mere allegations or denials, but must produce evidence demonstrating that factual issues remain. *Id.* "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." *Veenstra*, *supra* at 163. The court must view all of the evidence in a light most favorable to the non-moving party. *Id.* at 164. Summary disposition is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Generally, it is premature to grant summary disposition under MCR 2.116(C)(10) when discovery on a disputed issue has not been completed. *Colista v Thomas*, 241 Mich App 529, 537; 616 NW2d 249 (2000). However, summary disposition before the close of discovery is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party. *Id*. at 537-538.

III. Analysis

Before beginning our analysis of the issues raised on appeal, we find it necessary to address a matter that neither party has raised.[2] In their respective briefs, both parties have characterized the plat language concerning Echo Six Park as a dedication. However, as this Court recently held in *Martin v Redmond*, 248 Mich App 59; 638 NW2d 142 (2002), a

[2] See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

"dedication" under MCL 560.253 must be for *public* use. *Id.* at 65-69. Clearly, the plat does not dedicate Echo Six Park to public use. Additionally, a valid dedication requires acceptance by a public authority. *Id.* at 66. Here, no evidence of acceptance has been produced. Accordingly, "dedication" is an improper term in this context. We do not need to analyze, however, whether the language constitutes a gift or grant, both of which also convey fee simple under the statute, because we conclude that defendants have not established a genuine issue of material fact regarding their alleged right to use the park.

Defendants contend that MCL 565.451a allows recorded affidavits to modify the rights of owners of parcels within a plat. We disagree. MCL 565.451a reads in relevant part as follows:

> An affidavit stating facts relating to any of the following matters which may affect the title to real property in this state made by any person having knowledge of the facts or by any person competent to testify concerning such facts in open court, may be recorded in the office of the register of deeds of the county where the real property is situated:
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> * * *
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> (b) Knowledge of the happening of any condition or event which may terminate an estate or interest in real property;
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> (c) Knowledge of surveyors duly registered under the laws of this state with respect to the existence and location of monuments and physical boundaries, such as fences, streams, roads and rights of way of real property;
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> * * *
>
> (e) Knowledge of facts incident to possession or the actual, open, notorious and adverse possession of real property. . . .

MCL 565.453 provides:

> The affidavit, whether recorded before or after the passage of this act, may be received in evidence in any civil cause, in any court of this state and by any board or officer of the state in any suit or proceeding affecting the real estate and shall be prima facie evidence of the facts and circumstances therein contained.

Defendants' argument that based on these statutes, the right to use the park extended to them when the four affidavits were recorded, is misplaced Initially, we note that none of the recorded affidavits relates to the matters addressed in MCL 565.451a (a)-(f). The affidavits do not concern an event that may terminate an interest in the property, MCL 565.451a(b), the location of boundaries on the property, MCL 565.451a(c), or facts incident to possession or claims of adverse possession, MCL 565.451a(e).

Moreover, we agree with the trial court's conclusion that the Land Division Act, MCL 560.101 *et seq*, establishes the procedure for modifying a recorded plat and that the affidavits have no effect on the plat as it was recorded. To change a plat, a complaint must "be filed in the

circuit court by the owner of a lot in the subdivision, a person of record claiming under the owner or the governing body of the municipality in which the subdivision covered by the plat is located." MCL 560.222. The complaint must include: "(a) [t]he part or parts, if any, sought to be vacated and any other correction or revision of the plat sought by the plaintiff," and "(b) [t]he plaintiff's reasons for seeking the vacation, correction, or revision." MCL 560.223. "Upon trial and hearing of the action, the court may order a recorded plat or any part of it to be vacated, corrected, or revised . . . ." MCL 560.226.

Accordingly, whether the intent of those who filed affidavits was to grant the owners of properties outside of Echo Six Estates the right to use Echo Six Park is irrelevant because the proper method for changing the plat was not implemented. This being the case, defendants' claims that further discovery would have aided their defense of plaintiffs' suit is meritless.

We also conclude that defendants' remaining arguments lack merit. Defendants claim that the trial court erred by failing to conduct an evidentiary hearing on the issues of laches and the statute of limitations. Neither of these issues requires an evidentiary hearing in every instance, and an evidentiary hearing was not required here.[3] The facts of this case show that in 1999, defendants purchased their property and began using the park to access the lake. In 2000, plaintiffs filed suit to prevent them from doing so. This very brief passage of time does not support a defense of laches, and defendants have not demonstrated that any material condition changed that would make it inequitable to enforce plaintiffs' claims against defendants. *Kuhn v Secretary of State*, 228 Mich App 319, 334; 579 NW2d 101 (1998).

Defendants did not assert the expiration of the statute of limitations as an affirmative defense, and the trial court denied their request to amend their answer to raise this argument as a bar to plaintiffs' claims. The trial court did not err by denying defendants' request because the amendment would have been futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). Defendants claim that because the affidavits were recorded in 1976, plaintiffs had fifteen years from 1976 to file suit. MCL 600.5801. However, plaintiffs' claims did not accrue when the affidavits were filed. On the contrary, their claims against defendants accrued when defendants, the first owners any of lots E through N who developed their land, began using the park in 1999.

We also find that defendants' estoppel and acquiescence defenses did not prohibit summary disposition. Three theories of acquiescence are recognized in Michigan: 1) acquiescence for the statutory period; 2) acquiescence following a dispute and agreement; and 3) acquiescence arising from intention to deed to a marked boundary. *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000). Defendants have not shown that the facts support any of these three theories, but instead attempt to establish a prescriptive easement under the first theory

[3] Defendants claim that every time the statute of limitations is asserted as a defense, a full evidentiary hearing is required. Their reliance on *Moss v Pacquing*, 183 Mich App 574, 455 NW2d 339 (1990), as support for this position is misplaced. *Moss* concerned the application of the "discovery rule" to a plaintiff's claim in a medical malpractice and products liability suit. The broad statement used by the Court in that case should not be read out of the context of that case to imply that in every instance, a statute of limitations question requires a full evidentiary hearing. *Id.* at 579-582.

through the assertion that "facts are likely to be developed after discovery" that prior owners of lots E through N continuously used the park. As stated above, a promise to produce evidence at trial is not sufficient to prevent summary disposition. *Maiden, supra.* Although discovery was not complete in this case, discovery was available from March 2000 (when defendants were served with the complaint) until October 2000 (when the trial court heard plaintiffs' motion). In response to plaintiffs' motion, defendants did not produce evidence regarding the prior use of the park that could even arguably support their claim that a prescriptive easement existed.

Finally, we find that defendants' assertion of an implied easement is meritless. "To establish an implied easement, three things must be shown: (1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits." *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980). "A claim of implied easement arises where two or more tracts of property are created from a single tract, and the use of the servient estate for the benefit of the dominant estate is apparent, continuous, and necessary." *Forge v Smith*, 458 Mich 198, 211 n 38; 580 NW2d 876 (1998). Here, defendants have failed to show continuity. They have presented no evidence that prior to the division of the Yochums' land, the servient estate, Echo Six Park, was used for the benefit of defendants' parcel. This case is therefore distinguishable from *Koller v Jorgensen*, 76 Mich App 623; 257 NW2d 192 (1977), where back lot property owners sought an implied easement through a lake front access lot that had been previously owned by their homeowner's association and the purchaser of the access lot paid a reduced price because the access lot was being used by the back lot owners. *Id.* at 625-627.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder