STATE OF MICHIGAN

COURT OF APPEALS

JOHN M. STEIGER, CAROL A. STEIGER, RONALD MARTELLO, CLAUDIA MARTELLO, and UMIT BILGE

Plaintiff-Appellants,

v

THOMAS W. SASS, WILLIAM WAGANFEALD, JERRY M. NEHR TRUST, SHARON A. NEHR TRUST, DENNIS E. DOUBECK, SANDRA DOUBECK, TAYLOR FAMILY TRUST, JOHN H. TAYLOR TRUSTEE, JOSEPH NOWAK, BEVERLY NOWAK, JIM and VICTORIA DAVIDSON, MARJORIE KAY BURDO, JUDITH K. METYKO, JOHN A. METYKO, COLIN P. FREEL, ESTHER FREEL, DALE POTTER, and WANDA POTTER,

Defendant-Appellees.

UNPUBLISHED
March 13, 2003

No. 238252
Presque Isle Circuit Court
LC No. 00-002406-CH

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants. We affirm in part, reverse in part, and remand the case to the trial court for a determination of the scope of the use of the easement to which the parks are subject.

This case arose when plaintiffs brought this action in an attempt to quiet title to two parcels of land known as Parks "A" and "B" ("the property"). The land at issue is located in the Ottawa Hills Subdivision in Presque Isle County. Plaintiffs are lot owners in the plat and claim title to the property pursuant to a tax deed from the Department of Treasury dated March 2, 1979. Plaintiffs are the successor purchasers to the purchasers at the tax sale. Defendants are also lot owners in the subdivision.

A chronological timeline is useful in determining the property rights of the parties in this case. In June 1970 a plat was prepared for the property and filed with the county register of deeds. The Freel family[1] owned the plat, consisting of almost nineteen acres, and divided it into thirty-four lots and two private parks labeled "A" and "B." The "Proprietor's Certificate" dated June 12, 1970 states as follows:

> We as proprietors certify that we caused the land embraced in this plat to be surveyed, divided, mapped and dedicated to the use of the public. Parks "A" and "B" are dedicated to the use of the lot owners. That the public utility easements are private easements and that all other easements are for the uses shown on the plat. Lots embracing any waters of Lake Nettie are subject to the correlative rights of other riparian owners and to the public trust in these waters. Waterfront lots extend to the waters edge.

Thereafter, the property owners began selling off the lots in the plat. Apparently, the tax assessor, post-dedication of Parks A and B to the lot owners, placed the parks upon the tax roll contrary to the established practice of spreading the assessed value of the dedicated parks pro rata among the lot owners, and held the plat proprietor responsible. Presumably they failed to pay the taxes causing foreclosure and the resultant tax sale.

The tax sale occurred in May 1977. At the sale, Mitchell Kamlay and Stephen Ura purchased the property. Seemingly, on August 31, 1977 the Freels quit claimed their interest in Park A to Mitchell and Mary Ann Kamlay, and Stephen and Estelle Ura. On the same day, the Freels quit claimed their interest in Park B to Robert and Anna Heise. The next relevant event was when the Michigan Department of Treasury issued a tax deed for both Parks A and B to Mitchell Kamlay and Stephen Ura on March 2, 1979. Thereafter there appears to be accommodating transfers between these parties that do not affect the outcome of this case. The tax deed was not recorded until May 20, 1991, and a return of service of notice of the sale has never been filed with the county treasurer.

Plaintiffs now claim that the rights of the lot owners have been extinguished by the tax deed dated March 2, 1979. Defendants counter arguing that plaintiffs cannot prove that the tax title was perfected as required by MCL 211.140(1) and therefore plaintiffs' claims are without merit. The trial court agreed with defendants finding that, "[t]hey then had five years to file a return of service of notice of the sale with the county treasurer. It has never been filed. Under MCL 211.73a as proper notice was not given, they are barred from asserting title or claiming a lien on the land by reason of a tax purchase."

We review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the trial court's order does not specify which subsection of MCR 2.116(C) that the trial court relied upon, it appears to us that the trial court relied on MCR 2.116(C)(10) because it considered factual evidence not in the pleadings. See *Gibbons v Caraway*, 455 Mich 314, 320, n 7; 565 NW2d 663

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[1] Virgil and Judy Freel, John and Gertrude Freel, and Ronald and Bertha Freel.

(1997). Furthermore, "[a]ctions to quiet title are equitable in nature and are reviewed de novo by this Court." *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998).

On appeal, plaintiffs first claim that defendants were not entitled to notice of the tax sale because they were not owners of the parks, or the last grantee or grantees in the chain of title of the property as described by MCL 211.140. We disagree.

MCL 211.140(1) clearly provides that:

> A writ of assistance or other process for the possession of property the title to which was obtained by or through a tax sale, except if title is obtained under section 131, shall not be issued until 6 months after the sheriff of the county where the property is located files a return of service with the county treasurer of that county showing service of the notice prescribed in subsection (2). The return shall indicate that the sheriff made personal or substituted service of the notice on the following persons who were, as of the date the notice was delivered to the sheriff for service:
>
> (a) The last grantee or grantees in the regular chain of title of the property, *or of an interest in the property*, according to the records of the county register of deeds. [Emphasis added.]

It is undisputed that a return of service of notice of the tax sale has never been filed with the county treasurer and thus has not been perfected in accordance with MCL 211.140(1). Contrary to the assertions of plaintiff, application of MCL 211.140(1) provides that anyone having an interest in the party must be noticed. Therefore all persons entitled to notice were not noticed and the tax title upon which plaintiffs rely was not properly perfected and accordingly plaintiffs cannot claim any rights under the 1979 tax deed to defeat defendants' rights. MCL 211.73a.

Plaintiffs next argue that due to the tax sale, the state obtained absolute title extinguishing all easements and encumbrances. In support of their argument, plaintiffs cite MCL 211.67. However, our review of the statute reveals that MCL 211.67 is not applicable to the instant case. MCL 211.67 does not apply to the rights of a private purchaser following a tax sale. Instead, MCL 211.67 only applies when the state is bid in at a tax sale and obtains absolute title after proper perfection of the title. Therefore this argument also fails.

Lastly plaintiffs argue that the trial court erred when it sua sponte ruled that the lot owners within the plat hold title to Parks A and B under the original plat dedication. Specifically, plaintiffs contend that the trial court erred when it stated:

> IT IS HEREBY ORDERED that for the reasons stated in this Court's written Opinion that:
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> 1. The owners of lots within the recorded plat of Ottawa Hills Subdivision (said plat being recorded at Liber 3 of Plats, Pages 64-65 Presque Isle Records) hold title to Parks A and B under the original plat dedication.

Defendants respond that it makes little practical difference if the thirty-four lot owners' individual interests are that of an easement or title because in both cases they would still be able to use the parks.

We recognize that the "intent of the plattors should be determined with reference to the language used in connection with the facts and circumstances existing at the time of the grant." *Dobie, supra*, 227 Mich App 540. The language here from the Proprietor's Certificate states, "Parks 'A' and 'B' are dedicated to the *use* of the lot owners." (Emphasis added.) Undoubtedly, the language does not purport to transfer ownership of the parks to the lot owners, but rather a use. Plaintiffs have title to Parks A and B subject to the easement encumbrance placed upon the land by the Freels in the original "Proprietor's Certificate" dated June 12, 1970, because the right of use was never extinguished by the tax sale. Therefore, plaintiffs' rights stem from the quit claim deeds that were, of course, subject to the right of use dedicated to the lot owners. After thoroughly reviewing the record and the applicable law, we find the language used in the Proprietor's Certificate is more consistent with the grant of an easement than a grant of fee ownership rights. See *Id*. Accordingly, we find that the trial court erred when it ruled that the lot owners within the plat hold title to Parks A and B under the original plat dedication, and remand the case to the trial court for a determination on the scope of the use of the easement and other equitable relief.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens