

STATE OF MICHIGAN
COURT OF APPEALS

MOLLIE BARRETT,

Plaintiff/Counter-Defendant-
Appellee,

v

JOSEPH M. PREVOST,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellant,

and

CHARTER ONE MORTGAGE CORPORATION,

Third-Party Defendant-Appellee.

UNPUBLISHED

November 16, 2006

No. 269477

Macomb Circuit Court

LC No. 2004-002685-CH

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

The parties are adjoining property owners. Plaintiff filed this action alleging claims for both an implied and prescriptive easement over a driveway on defendant's property to provide access to her garage and backyard. The trial court denied defendant's motion for summary disposition and granted summary disposition for plaintiff, concluding that she established her claims for both types of easements. The court thereafter denied defendant's motion for reconsideration or relief from its decision. Defendant appeals as of right. We reverse and remand for entry of judgment in favor of defendant.

Plaintiff's complaint alleged that a wall existed between the two properties until its removal in 1947. Plaintiff purchased her property in 1977. Plaintiff alleged that the former owner told her that both properties shared the common driveway. Plaintiff also alleged that she has continuously used the driveway on the neighboring property as if it were her own since 1977.

Defendant purchased his property in June 2001. Since that time the parties have quarreled over the use of the driveway. Defendant eventually placed a fence on his property, down the middle of the alleged common driveway. The fence allegedly prohibits plaintiff from using the backyard of her home and from getting her car into her backyard garage.

Plaintiff initially alleged a single count for an implied easement over defendant's driveway based on the use of the area as a common driveway since 1947. Plaintiff also alleged that an easement was necessary to enable her to use her property.

Defendant filed an answer, a counterclaim, and a third-party complaint against Charter One Mortgage Corporation.¹ Defendant moved for summary disposition of plaintiff's complaint and his counterclaim under MCR 2.116(C)(8), (9), and (10). The trial court took the matter under advisement. Before the court issued a decision, plaintiff was allowed to file an amended complaint adding a claim for a prescriptive easement.

Plaintiff originally appeared for her deposition in November 2004, but it was not completed. In November 2005 the court ordered plaintiff to appear to complete her deposition within ten days. The court also ordered plaintiff to execute an authorization to allow defendant to obtain records from the Illinois Secretary of State. Plaintiff's deposition was not concluded until December 6, 2005. In the meantime, the court set a trial date for January 26, 2006.

Shortly after plaintiff's second deposition was completed, defendant filed a second motion for summary disposition. He renewed his original motion with regard to plaintiff's claim for an implied easement, which the trial court had not yet decided, and also requested summary disposition with regard to plaintiff's claim for a prescriptive easement. Because plaintiff's second deposition had only recently been completed and a transcript was not yet available, defendant indicated that he would submit a supplemental brief once the transcript was received. On January 17, 2006, the trial court issued an order in which it agreed to hear oral argument on defendant's second motion for summary disposition on February 13, 2006, and advised the parties that it would issue a written opinion on defendant's first motion for summary disposition. On January 23, 2006, however, the trial court issued a written opinion denying both of defendant's motions, granting summary disposition in favor of plaintiff, and closing the case.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition of plaintiff's claims under MCR 2.116(C)(8) and (10).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Patterson, supra*.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of

¹ Charter One Mortgage Corporation's involvement is not relevant to the issues on appeal.

material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A party faced with a motion for summary disposition under MCR 2.116(C)(10) is required to present evidentiary proofs showing a genuine issue of material fact for trial. If such proofs are not presented, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999).

In her complaint, plaintiff alleged the following facts to support her claim for an implied easement:

17. That both homes were served at all relevant times by this common driveway that ran along the lot lines between the properties.

18. That the use of this common driveway was visible, apparent to the casual observer and that the defendant was aware of this common use at the time of purchase.

19. That the use of this common driveway has been continuous since the removal of the original fence in 1947.

20. That the use of this common driveway is necessary for the use of the property in question.

21. That the Plaintiff requests this honorable court grant her an implied easement in the use of this common driveway so she may continue to use her property as she has always done.

An easement is the right to use the land of another for a specified purpose. *Schadewald v Brulé*, 225 Mich App 26, 35; 570 NW2d 788 (1997). An easement merely grants the holder the right to qualified possession to the extent necessary for enjoyment of the rights conferred on him by the easement. *Id.*

The law may imply an easement where two or more tracts of land are created from a single tract of land. To establish an implied element, the following three elements must be established:

(1) [T]hat 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).]

The rationale behind an implied easement is that after the division of a parcel, any servitude in use that exists on one of the lots for the benefit of the other lot should continue to exist as it was at the time the grant was made. *Rannels v Marx*, 357 Mich 453, 456; 98 NW2d 583 (1959); 1 Cameron, Michigan Real Property Law (3d ed), p 221, § 6.9. All implied easements are based on the presumed intent of the parties. *Schmidt, supra* at 732. The party asserting a right to an implied easement has the burden of proving the claim by a preponderance of the evidence. *Id.* at 731.

In its opinion, the trial court concluded that plaintiff was entitled to an implied easement because a common driveway was created between the two properties in 1947, after a wall was removed. Plaintiff alleged these facts in her complaint. Even if they are sufficient to state a claim for an implied easement, summary disposition for plaintiff was improper because plaintiff failed to demonstrate factual support for them. Although plaintiff alleged in her complaint that she was advised that there was a common driveway when she purchased her home in 1977, she did not submit any documentary evidence to support this allegation. Conversely, in support of his motion for summary disposition, defendant submitted the deposition testimony of Eleanor Berry, a former resident of plaintiff's property. Berry lived at the property in 1947 and sold the property to plaintiff in 1977. Berry testified that there was never a fence or wall dividing the driveways, nor was there ever any intent to create a common driveway between the two homes. Plaintiff testified at her deposition that Berry told her about a wall, but plaintiff failed to produce evidence to support her allegation that the former owners of the properties ever intended to create a common driveway, even if a barrier was removed. Accordingly, plaintiff failed to show a genuine issue of material fact to support the allegations in her complaint regarding a common driveway. The trial court's decision is inconsistent with the undisputed documentary evidence submitted by defendant in his first motion for summary disposition. Accordingly, the trial court erred in granting summary disposition for plaintiff and denying defendant's motion for summary disposition with respect to plaintiff's claim for an implied easement.

We also agree with defendant that the trial court abused its discretion when it proceeded to deny defendant's second motion for summary disposition, without the benefit of oral argument and without allowing defendant the opportunity to supplement his motion.

We recognize that a trial court has discretion to dispense with oral argument on a motion. MCR 2.119(E)(3). This Court reviews a trial court's decision to dispense with oral argument for an abuse of discretion. "An abuse of discretion occurs only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Fisher v Belcher*, 269 Mich App 247, 252; 713 NW2d 6 (2005).

Here, the trial court explained that it decided defendant's second motion without oral argument because it felt that the parties' briefs were sufficient to enable it to decide the matter. A court generally may dispense with oral argument where it is fully apprised of the parties' positions by their briefs. *Fast Air, Inc v Knight*, 235 Mich App 541, 550; 599 NW2d 489 (1999). In this case, however, defendant had explained in his brief in support of his second motion for summary disposition that it would be necessary to file a supplemental brief because a transcript of plaintiff's second deposition was not yet available when the motion was filed. Additionally, the trial court had issued an order advising the parties that it would hear defendant's second summary disposition motion on February 13, 2006. Under these circumstances, the trial court abused its discretion by issuing a decision on January 23, 2006, without notice to the parties. The court had been advised that supplemental briefing was necessary and the court's earlier January 16, 2006, order reasonably led defendant to believe that he would have an opportunity to file a supplemental brief before the scheduled February 13, 2006, hearing date for the motion.

These procedural circumstances, combined with the evidentiary proofs submitted by defendant in support of his motion for reconsideration or relief from judgment, were sufficient to warrant either reconsideration under MCR 2.119(F)(3), *In re Beglinger Trust*, 221 Mich App

273, 279; 561 NW2d 130 (1997), or relief from the trial court's decision under MCR 2.612(C)(1)(a), *Fisher, supra* at 262; *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999), because of mistakes by the court in its analysis of plaintiff's claim for a prescriptive easement.

On the merits, the submitted evidence established that there was no genuine issue of material fact regarding plaintiff's claim for a prescriptive easement.

In her amended complaint, plaintiff alleged that she acquired a prescriptive easement because she had openly used the driveway on defendant's property since 1977, without the permission of the then owner of the property. An easement by prescription results from the use of the property of another that is open, notorious, adverse, and continuous for a period of 15 years. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 645; 528 NW2d 221 (1995); MCL 600.5801. Permissive use of property may not result in an easement by prescription. *Banach v Lawera*, 330 Mich 436, 440-441; 47 NW2d 679 (1951).

In *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995), this Court defined an easement by prescription as having elements similar to adverse possession, except that for an easement by prescription, exclusivity is not required, citing *St Cecilia Society v Universal Car & Service Co*, 213 Mich 569, 576; 182 NW 161 (1921). Stated another way, a prescriptive easement is nothing more than an unopposed, continuous trespass on another's property for 15 years. *McDonald v Sargent*, 308 Mich 341, 344-345; 13 NW2d 843 (1944).

In *Goodall, supra* at 646, this Court, quoting *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976), observed the following with respect to the necessary "hostile" or "adverse" use for a prescriptive easement:

The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder [for trespassing]. See *Rose v Fuller*, 21 Mich App 172; 175 NW2d 344 (1970); also, 25 Am Jur 2d, Easements and Licenses, § 51, pp 460-461.

At her deposition, plaintiff admitted that she used her neighbor's driveway for many years with the consent of defendant's predecessor-in-title. We agree with defendant that plaintiff therefore cannot establish that the use was adverse or hostile. Although plaintiff also submitted an affidavit in which she stated that she did not have anyone's permission to use the driveway, and that her use of the driveway was hostile, this was insufficient to establish a genuine issue of material fact to avoid summary disposition. Plaintiff filed her affidavit after she gave testimony at her first deposition admitting that she had the permission of her neighbor to use the driveway. Plaintiff could not establish a genuine issue of material fact by presenting an affidavit that was contrary to her deposition testimony. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001); *Mitan v Neiman Marcus*, 240 Mich App 679, 682-683; 613 NW2d 415 (2000). Accordingly, the trial court erred in granting summary disposition for plaintiff and

denying defendant's second motion for summary disposition with respect to plaintiff's claim for a prescriptive easement.

In light of the foregoing, we reverse the trial court's decisions and remand for entry of judgment in favor of defendant on plaintiff's various claims for an easement. Given this disposition, we need not address the remaining issues on appeal.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot