STATE OF MICHIGAN

COURT OF APPEALS

MANJU, INC.,

Plaintiff-Appellant,

v

FATHER & SONS, INC.,

Defendant-Appellee.

UNPUBLISHED
August 20, 2009

No. 286075
Oakland Circuit Court
LC No. 2006-078657-CK

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Plaintiff appeals by right the grant of summary disposition in favor of defendant in this action to enforce purported prescriptive easement rights. We reverse and remand for further proceedings.

On November 7, 2006, plaintiff filed a complaint alleging that, when plaintiff purchased a parcel of property in 2004, the purchase included use of a certain 20-foot wide strip of defendant's property ("Lot 190").[1] Plaintiff averred that the previous owner of the property acquired a prescriptive easement to use Lot 190, that interest was conveyed to plaintiff, and plaintiff had been using it for years. Thus, the building being constructed on Lot 190 by defendant constituted an interference with plaintiff's prescriptive easement.

On December 3, 2007, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). Defendant argued that summary dismissal was proper because the claim was barred by the equitable doctrines of laches and estoppel for three reasons. First, plaintiff was claiming that its predecessor's use of Lot 190 satisfied the elements of prescriptive easement but that claim would have accrued, if at all, 14 years before plaintiff's attempt to assert any such right. Second, plaintiff did not claim any such right when it was renovating its own property and, in fact, acknowledged in its site plans that defendant owned Lot 190. Third, plaintiff did not raise this claim until defendant had already received municipal approval for the project, construction of the building was well underway, and defendant had already spent over $100,000 on this project. In fact, notice was given to nearby property owners, including

[1] It appears that a Dairy Queen had been and is being operated on plaintiff's property and a gas station had been and is being operated on defendant's property.

plaintiff, that public hearings on defendant's application for special use would be held and plaintiff did not attend or object to the application.

On January 16, 2008, plaintiff filed its response in opposition to defendant's motion for summary disposition and requested partial summary disposition under MCR 2.116(I)(2). Plaintiff argued that because the prescriptive easement existed for over 25 years, and no rebuttal evidence contesting its existence was adduced by defendant, its existence must be accepted as a matter of law. See *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985). Lot 190 was consistently used for ingress, egress, and parking for the Dairy Queen, as attested to by the affidavits of the prior owner of the Dairy Queen, Lee Merrill, and the present owner, Walid Manju. Thus, plaintiff was entitled to summary disposition. Further, plaintiff's claim was not barred by laches because within 60 days of when plaintiff's legal claim accrued through the loss of its qualified possessory interest, it requested that defendant stop the construction and then filed this lawsuit. See MCL 600.2918; MCL 600.5829(1); *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). And the doctrine of equitable estoppel cannot effect a surrender or termination of the easement. See *Kitchen v Kitchen*, 465 Mich 654, 660; 641 NW2d 245 (2002).

On February 4, 2008, defendant filed its reply brief in support of summary disposition. First, defendant argued that plaintiff did not acquire a prescriptive easement with regard to Lot 190 from its predecessor because no such rights were included in the deed and there was no privity of estate. Second, defendant argued that plaintiff's claim was barred by laches because it delayed any assertion of right to Lot 190 until after defendant began construction.

On March 19, 2008, plaintiff filed its response to defendant's reply brief. Plaintiff argued that defendant raised several entirely new arguments which primarily challenged plaintiff's claim of prescriptive easement. Plaintiff first argued that it did, indeed, acquire a prescriptive easement with regard to Lot 190 when it purchased the property and there was no legal requirement that such easement be expressly mentioned in the deed. See *Haab v Moorman*, 332 Mich 126; 50 NW2d 856 (1952). Second, plaintiff argued, because it and its predecessor openly used Lot 190 for ingress, egress, and parking with defendant's knowledge and without its permission, defendant's assertion of laches and estoppel had no merit. On April 21, 2008, defendant filed a reply to plaintiff's responsive brief, denying plaintiff's claim to a prescriptive easement but arguing that, prescriptive easement or not, the doctrine of laches barred legal relief.

On May 7, 2008, after oral arguments were heard on the motions, the trial court agreed with defendant, holding:

> After purchasing its property, plaintiff sought approval from the city to make certain renovations. During the presentation to the city of its plans, plaintiff acknowledged the ownership of the disputed parcel rested with defendant. At no time until after defendant had begun construction of its renovations did plaintiff attempt to assert a prescriptive easement. Defendant has presented an affidavit that (sic) had spent in excess of $100,000.00 and actually begun physical construction of the building prior to plaintiff filing the action. The claim for prescriptive easement is barred by the doctrine of laches and equitable estoppel and summary disposition is granted to defendant on C-7. For the same reason is [sic] plaintiff's counter motion is denied.

This appeal followed.

Plaintiff first argues that the trial court erred in finding that laches and estoppel barred its claim because, under MCL 600.2918, plaintiff had 90 days from the time his possessory claim accrued, as defined by MCL 600.5829(1), to commence an action and this lawsuit was filed within 62 days after disseisin of its easement rights. We agree that the trial court erred in concluding that laches and estoppel barred the claim, but for different reasons. We review de novo a trial court's equitable decisions, but its findings of fact in support of the decision are reviewed for clear error. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). The trial court's grant of summary disposition is also reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff has consistently claimed that it held a prescriptive easement to use Lot 190. It appears that the trial court did not decide the issue whether plaintiff held a prescriptive easement but rather held that, even if plaintiff did, plaintiff's delay in asserting its claim barred the action. The trial court's rationale included (1) that when plaintiff was renovating its property, it acknowledged that defendant owned Lot 190, (2) that "at no time until after defendant had begun construction of its renovations did plaintiff attempt to assert a prescriptive easement," and (3) defendant spent over $100,000 and had begun physical construction of the new building before plaintiff filed the lawsuit. We address each justification in turn.

First, the fact that plaintiff acknowledged that defendant owned Lot 190 when plaintiff was renovating its property is irrelevant to the issue whether plaintiff should be charged with laches. Defendant *did* own Lot 190 and that fact was never contested and still is not contested. If plaintiff held a prescriptive easement, such easement "is generally limited in scope by the manner in which it was acquired and the previous enjoyment." *Heydon v MediaOne of Southeast Michigan, Inc*, 275 Mich App 267, 271; 739 NW2d 373 (2007). "The owner of an easement cannot materially increase the burden of the easement or impose a new and additional burden on the servient estate." *Id*. at 275. Thus, when plaintiff renovated its property, consideration of or reference to the prescriptive easement in its renovation plans so as to change or increase the burden on the servient estate would not have been appropriate and defendant's argument to the contrary is without merit.

Second, the trial court's holding that "at no time until after defendant had begun construction of its renovations did plaintiff attempt to assert a prescriptive easement," is similarly unpersuasive. Until plaintiff became aware that defendant intended to interfere with the purported prescriptive easement, plaintiff had no reason to assert its legal claim. While it appears to be true that plaintiff did not attend the public hearings on defendant's application for municipal approval of its renovation project, defendant did not set forth any evidence that plaintiff should have been aware that defendant intended to interfere with plaintiff's purported prescriptive easement.

The record evidence includes that plaintiff's owner, Walid Manju, was assured by defendant's president, Kamal Sharrak, who is Manju's wife's cousin, that any renovation of defendant's property would not involve Lot 190. Sharrak also testified that he never advised Manju that the renovation would involve Lot 190. It also appears that, on the day construction began and it became apparent that Lot 190 was involved, Manju demanded that the construction on Lot 190 stop. The construction did not stop and plaintiff retained counsel. After counsel had

time to investigate the matter, on October 16, 2006, defendant was notified by certified letter that the construction directly interfered with plaintiff's claimed prescriptive easement and such interference must be terminated. Construction continued and this lawsuit was filed on November 7, 2006. Despite this lawsuit, defendant continued construction at significant expense.

Laches is a tool of equity that may remedy "the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." *Public Health Dep't v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996) (citation omitted). "It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Id*. The justifications relied upon by the trial court for concluding that plaintiff was guilty of laches are not persuasive.

Plaintiff argues that it did not delay in asserting its legal right because under MCL 600.2918 it had 90 days from the time its possessory claim accrued, as defined by MCL 600.5829(1), to commence this action and it was filed within 62 days. But MCL 600.2918, known as the anti-lockout law, governs claims of eviction or ejection as is typically found in landlord-tenant disputes. See *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003). And plaintiff's claim that it was disseised, as provided by MCL 600.5829, from the easement misconstrues both easement rights and "disseisin." To "disseise" is "[t]o wrongfully deprive (a person) of the freehold possession of property." Black's Law Dictionary (7th ed). A prescriptive easement holder does not have "the freehold possession of property." An easement is merely the limited right to use the land of another for a specific purpose. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). Thus, a prescriptive easement holder acquires or becomes the owner of a "servitude," which is "a right to the limited use of a piece of land without possession of it." Black's Law Dictionary (7th ed). The holder of a prescriptive easement has a property interest, but not a possessory interest within the contemplation of either MCL 600.2918 or MCL 600.5829. Accordingly, if a prescriptive easement existed, defendant could not eject plaintiff in an attempt to recover the easement. See *McMorran Milling Co v Pere Marquette R Co*, 210 Mich 381, 393; 178 NW 274 (1920).

Nevertheless, we conclude that plaintiff did not unreasonably delay in seeking enforcement of its purported prescriptive easement. In *McMorran*, *supra* at 395, quoting 14 Ruling Case Law, Title, Injunctions, § 64, our Supreme Court explained:

> There is no hard and fast rule as to what constitutes laches, which has been defined as an inexcusable delay in asserting a right. Generally if there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked.

It appears from the record evidence here that plaintiff and its predecessor had used the purported prescriptive easement for years until the day that defendant began construction on its property and interfered with plaintiff's use. There is no evidence of record that plaintiff knew or should

have known of defendant's plan to interfere with plaintiff's use of Lot 190 until the day construction began on an unspecified date in September of 2006. After plaintiff's demand that the construction stop was refused by defendant, plaintiff retained counsel. After a reasonable time of investigation, a certified letter was sent on October 16, 2006, advising defendant of plaintiff's claimed right to a prescriptive easement. Defendant apparently ignored the letter and construction continued. This lawsuit was filed shortly thereafter, yet construction continued.

Under the circumstances of this case, we cannot conclude that permitting plaintiff's claim of a prescriptive easement to be judicially determined would be unfair and unjust. See *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). Plaintiff asserted its claim of a valuable property right with regard to Lot 190 within an acceptable and reasonable time. Thus, defendant failed to prove that plaintiff's lack of due diligence prejudiced it. See *Shelby Twp v Papesh*, 267 Mich App 92, 108; 704 NW2d 92 (2005). Any prejudice to defendant resulted from defendant's own actions. Further, estoppel does not apply because plaintiff's actions cannot be construed as inducing defendant to believe that such construction was permissible. See *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).

Accordingly, the trial court's dismissal of plaintiff's case on the ground that the equitable doctrines of laches and estoppel barred the action is reversed. We decline to address plaintiff's argument on appeal that it was entitled to summary disposition on its claim of prescriptive easement. We express no opinion as to the issue whether plaintiff, in fact, held a prescriptive easement and remand the matter for further proceedings.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Alton T. Davis