STATE OF MICHIGAN

COURT OF APPEALS

CITY OF ST. CLAIR SHORES,

Plaintiff/Counter-Defendant-Appellee,

v

JAMES B. SHOVLIN,

Defendant/Cross-Defendant,

and

MARY E. SHOVLIN,

Defendant/Counter-Defendant/Cross-Plaintiff/Cross-Defendant-Appellee,

and

CHARLES SMITH, LINDA BROCK and RICHARD ANGLEBRANDT,

Defendants/Cross-Defendants-Appellees,

and

ANTHONY J. SCICLUNA and KIMBERLY C. SCICLUNA,

Defendants/Cross-Defendants/Cross-Plaintiffs-Appellants.

UNPUBLISHED
July 1, 2010

No. 290441
Macomb Circuit Court
LC No. 2007-005458-CZ

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ

PER CURIAM.

Defendants, Anthony J. Scicluna and Kimberly C. Scicluna, appeal as of right the trial court's February 17, 2009, stipulated order dismissing all of the parties' claims with prejudice and closing the case. In particular, the Sciclunas challenge the January 26, 2009, order[1] denying their motion for partial summary disposition as to their cross-claim against James B. and Mary E. Shovlin,[2] Charles Smith, Linda Brock, and Richard Anglebrandt, and as to Shovlin's cross-claim against Sciclunas. Because the Scicluas have not shown error on appeal, we affirm.

This case arises out of the parties' dispute over who owns and is responsible for the maintenance of a seawall that borders the Sciclunas' property (Lot 4) and a canal. The bottom of the canal is owned by Shovlin (Lot 2), Smith and Brock (Lot 1), and Anglebrandt (Lot 3), and a common waterway easement runs over their properties for 30 feet to allow for the canal and access to Lake St. Clair.

We review a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(10) de novo. *Universal Underwriters Ins v Kneeland*, 464 Mich 491, 495-496; 628 NW2d 491 (2001). We must view the affidavits, pleadings, and other documentary evidence in the light most favorable to the nonmoving party, and decide whether the moving party has shown the existence of a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996); MCR 2.116(C)(10). Initially, the moving party bears the burden of supporting its claim. *Id*. The burden then shifts to the non-moving party to establish that a genuine issue of material fact exists. *Id*. If no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law. *Id*. A request for declaratory relief is an action in equity, the resolution of which this Court reviews de novo. *Lake Angelus v Oakland Co Rd Comm*, 194 Mich App 220, 223; 486 NW2d 64 (1992).

The Sciclunas' cross-claim against Shovlin, Brock, Smith, and Anglebrandt asserted unjust enrichment and requested relief under MCR 2.605, seeking a declaration that the other defendants owned the seawall and had a duty to maintain it. Shovlin filed a cross-claim against Sciclunas asserting that the seawall encroached into the canal and easement running over the canal, which was granted in the original platting of the Abbott's Subdivision, Assessor's Plat No. 52.

The trial court has the discretion to declare the rights and legal responsibilities of parties to an actual controversy. *Allstate Ins Co v Hayes*, 442 Mich 56, 65; 499 NW2d 743 (1993); MCR 2.605(1)(a). A claim of unjust enrichment requires a showing that the defendant received some benefit from the plaintiff and that plaintiff thereby suffered some inequity. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

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[1] The January 26, 2009, order did not resolve the last pending claims in the case; thus, Sciclunas did not file a claim of appeal until the February 17, 2009, order resolved all the remaining claims.

[2] The record reflects that James B. Shovlin and Mary E. Shovlin were husband and wife, and that James died on December 4, 2006. We therefore refer to Mary E. Shovlin as "Shovlin" throughout this opinion.

We conclude that the trial court correctly denied the Sciclunas' motion for summary disposition as to their cross-claim against Shovlin, Brock, Smith, and Anglebrandt, and correctly denied Sciclunas' motion for summary disposition as to Shovlin's cross-claim against Sciclunas.

The parties do not dispute that the seawall, as reflected in the parties' jointly-obtained 2008 land survey, is presently located on Lots 1, 2, and 3 and encroaches on to the easement over that portion of those lots. The parties also do not dispute the existence of the waterway easement over the canal, which is a "perpetual easement but in common with all the other present and future owners of land in said subdivision, over the water easement as designated on the recorded plat of Assessor's Plat No. 52, St. Clair Shores, for ingress and egress to and from Lake St. Clair." Further, the parties do not dispute that St. Clair Shores Ordinance § 35.014(1) requires the owner or occupant of property that abuts a canal to construct and maintain a seawall to prevent erosion, flood, property damage, and personal injury.

It is undisputed that the Abbott's Subdivision was platted in 1941 according to the assessor's plat number 52. If land at issue is "disposed of by reference to an official plat, the boundary lines shown on the plat control." *Mumaugh v McCarley*, 219 Mich App 641, 649; 558 NW2d 433 (1996). According to the plat, the western boundary line of Lot 4 abuts the canal and the eastern boundary lines of Lots 1, 2, and 3. There is no indication from the plat that a seawall extends out from Lot 4 into the canal and Lots 1, 2, and 3. The deed from Karin Warriner, the previous owner of Lot 4, to the Sciclunas specifically referenced the official plat in giving the legal description of the deeded property as "Lot 4, Assessor's Plat No. 52, as recorded in Liber 21, Page 20, of Plats, Macomb County Records." Thus, the platted boundary lines control. *Mumaugh*, 219 Mich App at 649. The seawall at issue is not on Lot 4.

The evidence presented to the trial court reflects that the 1973 permit to replace the seawall and the 1986 permit to repair the seawall were both obtained by the previous owners of Lot 4, Philip Arbour and Warriner. Arbour's permit application for the seawall contains a letter from plaintiff providing that the seawall permit was approved "[s]ubject to [the] plans and application submitted AND subject to [the] north end lining up with lot line." Regarding the 1986 seawall permit, Warriner's affidavit indicates that, as the previous owner of Lot 4, Warriner believed the seawall was her responsibility, she contracted with a company to have a portion of the seawall replaced in 1986 because it was collapsing into the canal, she was aware that the waterway easement abutted the property line of Lot 4, she understood that she owned the seawall, and she advised the Sciclunas that the seawall was the responsibility of the owners of Lot 4. In addition, St. Clair Shores Building Inspector Dennis Cairns' testimony established that city ordinances require the owner or occupant of property abutting a canal to construct a barrier or wall to prevent erosion or flooding; permits for seawalls contain a provision indicating that construction must be "within legal property lines"; nothing in his files reflected any involvement of the owners of Lots 1, 2, or 3 with respect to the seawall; seawalls may move over time; according to his records, Lot 4 maintained the seawall; the seawall was currently encroaching on the 30-foot water easement; he did not know exactly where the seawall was located 10 to 20 years previous; it was likely that the seawall may actually have been constructed on Lots 1, 2, and 3.

The trial court held that because the location of the seawall before the 2008 survey was unknown and because the Sciclunas claimed that the seawall was not on their property line, no claim would lie for acquiescence to the seawall as a boundary line. See *Kipka v Fountain*, 198

Mich App 435, 439; 499 NW2d 363 (1993). A claim of acquiescence to a boundary line requires a showing that the parties acquiesced to that line as the boundary line for a statutory period of 15 years; the possession need not be hostile or without permission. *Sackett v Atyeo*, 217 Mich App 676, 681-683; 552 NW2d 536 (1996). The trial court in this case correctly found that a claim for acquiescence would not be applicable to these circumstances. The location of the seawall before 2008 was unknown and had shifted over time. There was no evidence of a dispute and agreement or an intention to deed to a marked boundary. Rather, the Sciclunas indicate they did not treat the seawall as their property line. Further, the deed did not specifically define the western Lot 4 property line as the seawall, and the 2008 survey showed that the western property line and the seawall did not coincide. Thus, "[t]he record does not reveal any substantial period of time when the adjoining property owners thought that the retaining wall was the boundary line." *Kipka*, 198 Mich App at 439.

The trial court also concluded that there would be no claim for adverse possession. "A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years." *Kipka*, 198 Mich App at 439. The trial court's ruling was correct because the Sciclunas contended that they had permission to use the seawall and strip of land along the seawall, disclaimed any ownership, and there was no evidence that any seawall was installed with an intent to dispossess the adjacent lot owners of a portion of their properties. Again, the record reflects that the seawall shifted over time and buckled into the canal and was pulled back and repaired by Lot 4 owners. Thus, there was no evidence that the same portion of the land and seawall as depicted in the 2008 survey were continuously occupied for the statutory period.

Moreover, the trial court correctly held that Shovlin, Smith, Brock, and Anglebrandt remained in possession of their lots to the legal property lines, and Sciclunas failed to provide any arguable evidence that the seawall was owned and maintained by the owners of Lots 1, 2, and 3. The trial court thus did not err in denying the Sciclunas' motion for summary disposition on their claims of unjust enrichment and declaratory relief against Shovlin, Smith, Brock and Anglebrandt. There was no evidence that the owners of Lots 1, 2, and 3 ever constructed, repaired, or maintained the seawall or otherwise claimed an ownership interest in the seawall. The evidence reflects that the owners of Lot 4 have always been responsible for fixing the seawall. The original plat for the subdivision shows Lot 4 as abutting the canal. By ordinance, the owners of Lot 4, therefore, had responsibility to construct, maintain, and repair the seawall. The 2008 boundary survey, which is undisputed, shows that the seawall encroaches onto Lots 1, 2, and 3, and into the waterway easement in the canal. Thus, when the Sciclunas repaired the seawall in 2007, Smith, Shovlin, Brock, and Anglebrandt were not unjustly enriched. They did not receive any benefit from the Sciclunas and the Sciclunas suffered no inequity. *Belle Isle Grill Corp*, 256 Mich App at 478. Similarly, the trial court correctly denied Sciclunas' motion for summary disposition against Shovlin's cross-claim.

For similar reasons, we further conclude that the trial court correctly granted Shovlin, Smith, Brock, and Anglebrandt summary disposition pursuant to MCR 2.119(I)(2) as to the Sciclunas' cross-claim because there was no disputed issue of material fact regarding ownership of the property and its encroachment onto the easement and Lots 1, 2, and 3. These parties were entitled to summary disposition pursuant to MCR 2.119(I)(2) as a matter of law. See *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

Further, the trial court properly excluded as hearsay the Sciclunas' statements in their affidavits that the previous owners of Lot 4 told them that they were not responsible for and did not own the seawall. MRE 801(c); MRE 802; MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). We also find no error in the trial court's decision to disregard the Sciclunas' 1999 mortgage survey that stated on its face that it was not to be used to establish legal property lines. Moreover, although the Sciclunas contend that Shovlin's prior threat of litigation in 2005 was evidence that Shovlin claimed ownership of the seawall, we reject this contention after reviewing the proposed complaint and accompanying letter to the Sciclunas. Shovlin's proposed complaint did not allege that she owned the seawall; rather, the complaint alleged that the Sciclunas wrongfully occupied Shovlins' property on the bottomland of the canal by installing a docking platform, mooring watercraft, and a pumping device.

The trial court also properly held that Shovlin was entitled to summary disposition regarding her cross-claim against the Sciclunas. The trial court's opinion and order did not specifically address that Sciclunas' statute of limitations defense. However, a party is not punished for a trial court's failure to decide an issue that was properly raised. *Peterman v Dep't of Natural Resources,* 446 Mich 177, 183; 521 NW2d 499 (1994).

"A trespass is an unauthorized invasion upon the private property of another." *Cloverleaf Car Co v Phillips Petroleum Co,* 213 Mich App 186, 195; 540 NW2d 297 (1995). Additionally, an easement grants the right to use another's land for a specified purpose. *Schadewald v Brule,* 225 Mich App 26, 35; 570 NW2d 788 (1997). An easement may not be misused by materially increasing the burden on the servient estate or by creating a new or additional burden. *Id*. at 36. In the present case, the 2008 survey clearly shows that the seawall encroaches onto the property of Lots 1, 2, and 3, and the waterway easement that was intended to benefit all present and future owners of land in the subdivision by providing ingress and egress to Lake St. Clair. There was no evidence that any of those lot owners authorized such an intrusion. Thus, the seawall was an unauthorized, physical intrusion that trespassed onto their properties and wrongfully encroached onto the easement by obstructing the ingress and egress use granted in the easement.

MCL 600.5805(10) provides that "[t]he period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." The period of limitations for actions to recover possession of land is 15 years. MCL 600.5801(4).

The Sciclunas contend that the statute of limitations period for trespass should have begun to run in 1973 when Arbour repaired the seawall. As noted by the trial court, the location of the seawall before the 2008 survey was unknown, and the record evidence supports this conclusion. Thus, we conclude that the statute of limitations period had not run regarding a claim for trespass. This is not a case where a single trespass occurred in 1973 and no subsequent trespassory actions occurred thereafter. Rather, the record reflects that the seawall was continually repaired over the years and its location shifted over time, and its precise location is unknown before 2008. Warriner performed maintenance to the seawall during the time she owned Lot 4 until 1999, and the Sciclunas used the seawall in 2005 to moor a docking platform,

watercraft, and water pump, and they repaired the seawall in 2007. Thus, the trespass action accrued "at the time the wrong upon which the claim is based was done regardless of the time when damage results," i.e., even as late as when Sciclunas used and repaired the seawall in 2005 and 2007. MCL 600.5827.[3]

In addition, regarding the claim that the seawall interfered with the easement, we conclude that a 15 year statute of limitations would apply under the circumstances because this case involves an action to remove an obstruction to an existing easement. *Terlecki v Stewart*, 278 Mich App 644, 662-663; 754 NW2d 899 (2008), citing *Longton v Stedman*, 196 Mich 543, 545; 162 NW 947 (1917). Thus, the statute of limitations on this claim would begin to run when the 15-year time period for adverse possession by the Sciclunas would commence. As noted, *supra*, and as the trial court held, a claim of adverse possession would not be applicable under the present circumstances; thus, the statute of limitations on the easement interference claim had not yet begin to run.

The Sciclunas also raised the defense of laches. Generally, the party claiming laches must show that he was prejudiced by the opposing party's unexplained or inexcusable delay in that there has been a material change in condition. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005). The Sciclunas have failed to create a genuine issue of material fact regarding the defense of laches. They have provided no evidence that they have been prejudiced by any delay.

The Sciclunas also challenge on appeal the trial court's decision to remedy the situation by ordering replacement of the seawall and movement back to the property line of Lot 4 in five years. The trial court's opinion reflects that it considered the hardships and equities of the situation in determining what relief to provide, and this relief was not disproportionate under the circumstances. *Kratze v Independent Order of Oddfellows, Garden City Lodge No 11*, 442 Mich 136, 142; 500 NW2d 115 (1993). The trial court noted that the five-year time period was reasonable based on the Sciclunas' reference to Cairns' testimony that he believed the existing seawall would last a few more years. The trial court considered the hardships and equities to the parties in reaching a decision regarding how to remedy the situation, and its ordered relief was

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[3] The discovery doctrine and doctrine of continuing wrongs have been abrogated in nuisance and trespass claims. See *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 285, 288; 769 NW2d 234 (2009), *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 382, 389-394; 738 NW2d 664 (2007). Nonetheless, in the present circumstances, there was evidence that the "acts" causing the trespassory injury continued to occur. The record reflects that the seawall was repaired, maintained, and replaced over the years, as recently as 2007, and that its location also shifted over the years.

not disproportionate to the nature and extent of the injury.

Affirmed. Shovlin, Smith, Brock, and Anglebrandt, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio