

STATE OF MICHIGAN
COURT OF APPEALS

YAZAN’S SERVICE PLAZA LLC and YAZAN
A. MUSLEH,

UNPUBLISHED
December 20, 2011

Plaintiffs-Appellants,

v

No. 300237
Wayne Circuit Court
LC No. 08-118368-CH

CITY OF HAMTRAMCK,

Defendant-Appellee.

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Plaintiff Yazan Musleh, sole shareholder of Yazan’s Service Plaza LLC, purchased property from the City of Hamtramck to develop a gas and service station along with a retail strip mall (the “service plaza”). Despite the obvious demarcation of a county “right-of-way” on a March 12, 2002 survey and the clearly irregular shape of the parcel on visual inspection, Musleh claims that he was unaware of Wayne County’s interest in the property until he began construction on the service plaza. The trial court properly dismissed Musleh’s breach of contract and promissory estoppel claims against the City because Musleh purchased the property subject to any easements. Contrary to Musleh’s argument, the County did not own the right-of-way in fee and there is no indication that the City transferred property belonging to another entity.

I. BACKGROUND

The subject land is described as Lots 1 - 37 of the Hudson-Weber Land Company’s Subdivision and abuts Conant Avenue at the intersection of Holbrook Avenue in the City of Hamtramck. In 1935, the private owners of Lots 1 - 37 transferred their ownership interests to the City. In 1943, the city adopted a resolution approving the Wayne County Road Commission’s designation of Conant Avenue as a county road.¹ The County apparently exercised jurisdiction over Lots 1 - 37 at that time; however, the County and City resolutions are silent regarding that fact. The County used a portion of Lots 1 - 37 to reroute Conant Avenue,

¹ Pursuant to 1931 PA 130, § 2, county road commissions had the power to incorporate township highways into their county road systems.

modify a nearby railroad track and to create a service drive. In 1978, 35 years later, the City sought to regain “jurisdiction over a portion of the easement right-of-way of Conant Avenue.” In its request, the City indicated that it owned the fee and wanted to control Lots 1 - 37 free and clear of the County’s interest. The County issued a “disclaimer of any interest in lands acquired but not required for the right-of-way of Conant.” The County then granted the City a quit-claim deed to cede its interest in that portion of Lots 1 - 25 that had not been used for public purposes. The County retained its “easement right-of-way” over the entirety of Lots 26 - 37 and a strip of Lots 1 - 25. It is undisputed that neither the 1943 resolution nor the 1978 quit-claim deed were recorded.

By the time of the 1978 transaction between the City and the County, the face of Lots 1 – 37 had changed. A county service drive, right-hand turn lane, sidewalks and road curbs altered the buildable portion of the lots into an irregular shaped parcel. From 1978 through the early 1980s, the City negotiated with potential developers for the property. At that time, the City attempted to sell only those portions of Lots 1 - 25 that it owned free and clear of the County’s interest. The development negotiations failed, however, and the property remained vacant. On March 21, 2002, Musleh entered into a purchase agreement with the City for “Lots 1 through 37, HUDSON-WEBER LAND CO’S SUBDIVISION, as recorded in Liber 37, Page 84 of Plats, Wayne County Records.” Musleh paid the City \$75,000 for the property and the City later returned \$25,000 of the purchase price at the close of construction. The purchase agreement provided that that the subject property included “[a]ll easements, whether or not recorded, strips and rights-of-way abutting, adjacent, contiguous, or adjoining the Property, but only to the extent of Seller’s interest, if any, therein.” The City transferred the property to Musleh by warranty deed on May 22, 2002, “[s]ubject to easements and building and use restrictions of record.” Although the 2002 purchase agreement required Musleh to obtain an independent survey of the land, he did not personally secure a survey until 2003. Musleh claims that he visually inspected the site to determine the extent of possible construction before deciding to purchase the property.

Musleh immediately began construction on the service plaza. When Musleh’s work spilled over into the County right-of-way, however, the County issued a cease-and-desist order until Musleh applied for and received a County building permit. According to a letter issued by the County on November 1, 2002, Musleh began a “Right-of-Way purchase process” with the County in March 2002, the same time he purchased Lots 1 - 37 from the City. Musleh met with County officials in July 2002 to discuss his duties in the purchase process, but failed to follow the steps necessary to either extinguish the County’s right-of-way or incorporate his construction into the right-of-way.

Several lines of litigation followed. Musleh filed a complaint for superintending control against the County to eliminate the cease-and-desist order. The circuit court ordered the County to allow Musleh to install driveway entrances from Conant Avenue but declined to define the parties’ interests in the property. Musleh filed suit against the City of Detroit, which claimed a sewer easement over the property. The City of Detroit settled with Musleh for \$10,000, again without defining the parties’ property rights. Wayne County filed suit against the City of Hamtramck and Musleh to prevent further interference with its easement right. Musleh and the County entered into a settlement agreement under which Musleh transferred a quit-claim deed to the County that specifically delineated and preserved the County’s right-of-way. In return, the

County transferred a quit-claim deed to Musleh specifically designating a portion of Lots 1 - 25 as belonging to Musleh without encumbrance by the County's easement.

During the pendency of the Wayne County settlement negotiations, Musleh filed the current action against the City, alleging breach of contract and promissory estoppel. Musleh asserted that the County actually owned the "easement right-of-way" in fee through either a statutory dedication or as a "highway-by-user." Musleh accused the City of attempting to transfer fee title to land that it did not actually own. The City later sought summary dismissal of Musleh's claims under MCR 2.116(C)(8) and (10). The trial court dismissed Musleh's equitable claim because the parties had entered into a purchase agreement and warranty deed from which their legal rights could be derived. The court subsequently dismissed Musleh's breach of contract claim, finding that the City owned Lots 1 - 37 in fee and therefore did not breach its promise to convey fee title to the land. Specifically, the court ruled:

[T]here is no evidence that the County took the necessary steps to effectuate a statutory dedication of the property. Absent evidence of this, the Court must conclude that the property was not dedicated and thus the fee remained with [the City] and was never transferred at any relevant time to the County. In fact, there is evidence that [the City] indeed retained title and fee to the property in the letter from [the City's] agent to the County dated March 20, 1978

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition *de novo*. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Where, as here, the trial court reviews evidence beyond the pleadings, summary disposition is granted pursuant to (C)(10), rather than (C)(8).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (internal citations omitted).]

We also review *de novo* underlying issues of statutory and contract interpretation and matters of equity. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

III. NATURE OF COUNTY'S INTEREST IN THE LAND

There are three methods by which land can become a "public road": statutory dedication, common-law dedication or acquisition under the highway-by-user statute, MCL 221.20. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 554; 600 NW2d 698 (1999). Statutory dedications are made under the Land Division Act,

MCL 560.101 *et seq.*, by designating public roads in a recorded subdivision plat map. *Beulah*, 236 Mich App at 554. The developers of the Hudson-Weber Subdivision did not designate Lots 1 – 37 as a public road in the original plat map. Accordingly, no statutory dedication occurred in this case.

To establish a common-law dedication of land for a public purpose, the moving party must show that (1) the landowner intended to offer the land for a public use, (2) public officials accepted the offer and maintained the road as a public road; and (3) the public actually used the road. *Pine Bluffs Area Prop Owners Ass’n, Inc v Roscommon Co Rd Comm*, 287 Mich App 690, 719; 792 NW2d 18 (2010). A common-law dedication is informal and ““may occur without a grant or even without written words.”” *Id.*, quoting *Boone v Antrim Co Bd of Rd Comm’rs*, 177 Mich App 688, 693; 442 NW2d 725 (1989). Here, the Wayne County Road Commission took jurisdiction over Conant Avenue and Lots 1 – 37 in 1943. The Hamtramck city council “consented” to the County’s assumption of jurisdiction as noted in the County resolution. The communications between the City and the County in 1978 reflect the parties’ understanding that the City owned the fee title to Lots 1 – 37 and the County maintained only an easement. This unrefuted evidence establishes an offer and acceptance to make Conant a public road and to use Lots 1 – 37 for ancillary public road purposes. The easement had, in fact, been used for public sidewalks, a service drive, right-hand turn lane, sewers and curbs. This evidence clearly demonstrates a common-law dedication.

We take this opportunity to explain why the County did not take Lots 1 – 37 as a highway-by-user. MCL 221.20 has provided for the creation of public roads since 1909 as follows:

All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

As described in *Beulah*, 236 Mich App at 554-555:

[E]stablishing a public highway pursuant to the highway by user statute, MCL 221.20 . . . , requires (1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use.

In this case, the public’s use of Lots 1 – 37 was not exclusive. The City retained a fee interest in the land and the public never used the back sections of Lots 1 – 25. We question whether there was “a defined line” over Lots 1 – 37. It appears that until 1978, neither the City nor the County was certain where and to what extent the land would be needed for road purposes. In any event,

even if the County took an interest in Lots 1 – 37 as a “highway by user,” the City would still own the fee to the property, only subject to a public easement. See *2000 Baum Family Trust v Babel*, 488 Mich 136, 167 n 19; 793 NW2d 633 (2010).

IV. EFFECT OF COUNTY’S EASEMENT ON THE CITY’S AND MUSLEH’S PROPERTY INTERESTS

The result of the City’s common-law dedication to the County was the creation of “an easement in the public,” not an ownership interest. *Eyde Bros Development Co v Eaton Co Drain Comm’r*, 427 Mich 271, 282; 398 NW2d 297 (1986). See also *2000 Baum Family Trust*, 488 Mich at 167 n 19; *Boone*, 177 Mich App at 693 (“‘Dedication’ is an appropriation of land to some public use made by the owner of the fee and accepted for such use by or on behalf of the public. . . . Dedication may occur by statute or at common law, with common-law dedication creating not fee title but only an easement in the public.”). The City owned Lots 1 – 37 and could transfer title to a purchaser. The purchase agreement provides that Musleh took the property along with all recorded and unrecorded easements. Musleh received the benefit of that bargain and the trial court correctly determined as a matter of law that the County had not breached the purchase agreement.

Musleh also failed to create a genuine issue of material fact that he was entitled to relief based on any breach of the warranty deed. In general, when a landowner transfers title through a warranty deed, it makes six “covenants of title” to the purchaser.

- The covenant of seisin assures the grantee that, at the time of the conveyance, the grantor was seised of the land.
- The covenant of right to convey certifies that the grantor had the right to convey the land at the date of the conveyance.
- The covenant against encumbrances promises the grantee that there were no encumbrances, liens or servitudes against the land as of the date of the conveyance.
- The covenant of warranty assures the grantee that the grantor will forever warrant and defend the title of the land. In other words, if the title should become defective in the future the grantor will cure the breach by paying such damages as might result from the loss. Because of the breadth of this covenant it is considered of prime importance and the name “warranty deed” is derived from it.
- The covenant of quiet enjoyment promises the grantee that no one with better title will interfere with the purchaser’s quiet enjoyment of the premises in the future.
- Finally, the covenant of further assurances guarantees the purchaser that the grantor will perform any further actions which may be necessary to clarify or establish the title. [14 Powell on Real Property, § 81A.03(1)(b).]

The City was seized of the property at the time of the sale to Musleh. The City also had the right to convey its interest in the land. Further, the County's easement was not "better title" to the property than Musleh's ownership in fee.

Viewed in the light most favorable to the non-moving party, Musleh might have been able to establish that the City breached the covenant against encumbrances as the property was subject to a servitude (the County's easement) that was not recorded. However, the City presented undisputed evidence that Musleh was aware of the County's right-of-way at the time of the sale. First, correspondence between the County and Musleh reveals that Musleh entered negotiations to purchase the right-of-way contemporaneous to his purchase of Lots 1 – 37. Second, the City conducted a survey of the property 10 days before the parties entered into the purchase agreement. That survey clearly shows the placement of the County's right-of-way over Lots 1 – 37. Third, Musleh admitted at his deposition that he visually inspected the property before purchase and took notice of the encroaching right-hand turn lane. Finally, although the deed conveyed ownership subject only to recorded easements, the parties' intent to convey the land subject to any unrecorded easements, such as the County's right-of-way, is shown in the purchase agreement.

In any event, Musleh presented no evidence of damage as a result of the City's alleged breach of the contract or warranty deed. Musleh was on notice of the County's right-of-way over the property for roadway purposes based on the 2002 survey and his own visual inspection of the property. Musleh was able to construct a gas station and a six-storefront strip mall on the unencumbered portion of the land. Musleh's plans to expand the development over the remainder of Lots 1 – 37 was completely irrational given the presence of a service drive and a right-hand turn lane over that portion of the land. Moreover, to the extent that the County's easement could render Musleh's title defective, the City met its obligation to "warrant and defend the title of the land" by securing two separate title insurance policies benefitting Musleh.

The trial court also properly dismissed Musleh's promissory estoppel claim. Under this equitable theory, a plaintiff must show that the defendant made an "actual, clear, and definite promise" and should have reasonably expected the promise "to induce action or forbearance on the part of the promisee," and that he actually took the induced action or forbearance. *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 133-134; 506 NW2d 556 (1993). The court may enforce the promise if necessary to prevent injustice. *Id.* Musleh rests this claim on a conspiracy theory. Musleh implies that the City knowingly withheld information about the County's easement during the sale negotiations. As a result of this alleged trickery, Musleh believed he could install additional businesses on Lots 26 – 37 of the property and earn a larger profit. There are several problems with Musleh's theory. As already noted, Musleh was on notice of the County's easement from the 2002 survey and his own visual inspection of the property. Moreover, Musleh's claims ring hollow in light of his admission during his deposition that the City did not engage in wrongdoing during the sale of the property and evidence of Musleh's March 2002 negotiations with the County to purchase the right-of-way.

In summary, Musleh failed to create a genuine issue of material fact that the City breached either the purchase agreement or the warranty deed. The City presented undisputed evidence that Musleh was aware of the County's right-of-way at the time of sale and took the

property subject to that easement. Musleh received the benefit of the bargain he negotiated and his claims fail as a matter of law.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher