Filed
Washington State
Court of Appeals
Division Two

December 1, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SANDY FAMILY FIVE, LLC, a Washington Limited Liability Company, Appellant, v. CRAIG J. BROWN and DEBRA A. BROWN, husband and wife, and their marital community, Respondents,	No. 47222-8-II UNPUBLISHED OPINION

WORSWICK, P.J. — Sandy Family Five, LLC (Sandy) appeals the superior court's summary judgment ruling dismissing Sandy's quiet title action. Sandy sought to quiet title to its property free and clear of Craig and Debra Brown's claim to a drain field easement over Sandy's property. Sandy argues that the superior court erred by dismissing its claim because (1) the easement, purportedly created when all the properties were under the same ownership, was never valid, and (2) alternatively, a deed of trust extinguished any easement. The Browns argue that they have (3) an express easement and (4) an implied easement over the Sandy property. We agree with the Browns that an implied easement exists, and we affirm the summary judgment.[1]

[1] The Browns also argue even if they have no easement as a matter of law, equity demands that this court affirm the summary judgment dismissal. Because we affirm the summary judgment, we do not reach this argument.

FACTS

Sandy is a Washington corporation. Sandy presently owns three parcels of real property (now, collectively, "the Sandy property"). Clerk's Papers (CP) at 3-4. The Browns own a neighboring parcel (now, "the Brown property"). CP at 4. Prior to 2005, Paul and Diane Cokeley owned both the Sandy and the Brown properties. Both properties are vacant, but the Cokeleys had planned to build a residence on the Brown property.

Thurston County informed the Cokeleys that if they wanted to build a residence on the Brown property, they would need to use the Sandy property for their drain field. Accordingly, on December 30 and 31, 2005, the Cokeleys recorded two purported drain field easements with the Thurston County Auditor. These documents showed the Cokeleys as both grantor and grantee of the easements. The easements benefited what is now the Brown property and burdened what is now the Sandy property.

In October 2006, Sandy lent the Cokeleys money in exchange for which the Cokeleys granted Sandy a deed of trust over a portion of the Sandy property. This deed of trust included all of the Cokeleys' interest in the Sandy property as security for the loan. The deed of trust did not mention the drain field easements, but instead described the property conveyed as if no easement burdened it. Sandy did not know about the easement when it accepted the deed of trust, although the 2005 drainage easements were recorded with the Thurston County Auditor.

In 2011, the Cokeleys began to construct septic system improvements on the Brown property and a drain field on the Sandy property. In June 2012, the Cokeleys again recorded a drain field easement that was identical to one of the 2005 drainage easements: it burdened a portion of the Sandy property for the benefit of the Brown property.

The Cokeleys conveyed the Brown property to the Browns by statutory warranty deed on December 26, 2012. The Cokeleys represented to the Browns that the property was served by a "drain[ ]field & transport line on property across rd. (w/ easements)." CP at 112. The Cokeleys told the Browns that the on-site sewage system was not entirely on the property, but instead included a "drain[ ]field on lot across the road (easements recorded)." CP at 113. The Browns cannot develop the Brown property without completing the septic system, which requires connecting to the drain field over the Sandy property. The Brown property's septic system is approved by the Thurston County Health Department, and the drain field is installed and hooked up to the Brown property. The Browns' plans to build a house hinge on the ability to utilize the previously issued drain field easements, and without the use of the Sandy drain field, there is no feasible way to develop the property.

In January 2013, Sandy purchased the Sandy property at a trustee's sale. Sandy contacted the Browns and informed them that it knew about the purported drain field easements. It informed the Browns that it believed Sandy's deed of trust from 2006 was superior to the easement from 2012.

Sandy filed a quiet title action, alleging that the Cokeleys could not create an easement over their own property, and therefore, Sandy took the Sandy property free and clear of any easements. The Browns moved for summary judgment dismissal of Sandy's action. For the first time in their motion for summary judgment, the Browns argued that they also had an implied easement. Sandy did not argue that the Browns had waived this implied easement issue by failing to raise it earlier. Sandy also moved for summary judgment in its favor.

The superior court heard the opposing summary judgment motions together. Without explaining its ruling on the record, the superior court orally denied Sandy's motion for summary judgment and granted the Browns' motion for summary judgment.

Before the superior court entered a written ruling, Sandy moved for reconsideration. For the first time in its motion for reconsideration, Sandy argued that the implied easement theory was "not pled and not proved." CP at 168. The superior court orally denied the motion for reconsideration. The superior court did not specify which of the two express easements it believed was in force, but it clarified that it did not base its decision on an implied easement.

The written order states: "Craig and Debra Brown's Motion for Summary Judgment is GRANTED, except that the Court did not address, and does not grant summary judgment with respect to the Brown's [sic] claim of an implied easement, which claim the Browns had not pled." CP at 178. The superior court entered final judgment for the Browns, dismissing Sandy's lawsuit. Sandy appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review a superior court's order for summary judgment de novo, performing the same inquiry as the superior court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c).

The moving party bears the initial burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Then the burden shifts to the nonmoving party to show

that there is a genuine issue of material fact. *Visser v. Craig*, 139 Wn. App. 152, 158, 159 P.3d 453 (2007). If the nonmoving party fails to carry this burden, summary judgment is proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

We consider all evidence submitted and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *McPhaden v. Scott*, 95 Wn. App. 431, 434, 975 P.2d 1033 (1999). But a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. *Visser*, 139 Wn. App. at 158. We may affirm a summary judgment order on any grounds supported by the record. *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011).

II. EXPRESS EASEMENT

Sandy argues that the Cokeleys never created an express easement over the Sandy property because the Cokeleys owned both the Brown and Sandy properties when they purported to create the easement. Sandy argues in the alternative that even if the Cokeleys created an easement, they extinguished it by conveying the entire Sandy property to Sandy in the deed of trust. We agree with Sandy that the Cokeleys could not create a valid express easement over their own property. Thus, we do not consider the effect the deed of trust had on any purported express easements.

An easement is a right in the property of another, not in one's own land. An easement is the right to use land, and the easement must serve a beneficial use. *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853, 351 P.2d 520 (1960). Therefore, "[o]ne cannot have an easement in his own property." *Coast Storage*, 55 Wn.2d at 853. More specifically, a property owner cannot have and does not need an easement in land he owns. *Butler v. Craft Eng Constr., Inc.*,

67 Wn. App. 684, 698, 843 P.2d 1071 (1992). An easement requires both a dominant and a servient estate. *Roggow v. Hagerty*, 27 Wn. App. 908, 911, 621 P.2d 195 (1980). When one person owns both the dominant and servient estates, an easement is terminated. *Coast Storage*, 55 Wn.2d at 853.

Here, the 2005 drain field easements purported to grant easements encumbering one of the Cokeleys' parcels in favor of another. As owner of both parcels, however, the Cokeleys had no need for an easement, and could not create such an interest in their own favor on their own property. No express easement was created by the drain field easements, so the Brown property does not have an express easement over the Sandy property.

III. IMPLIED EASEMENT

The Browns argue that even if they do not have an express easement over the Sandy property, they have an implied easement. Sandy argues that the Browns may not assert an implied easement because they did not plead it as an affirmative defense, and the superior court did not grant their motion for summary judgment on this basis. Sandy also argues that no implied easement existed because the Cokeleys did not use the drain field enough to establish such an easement. We consider this issue on its merits and agree with the Browns.

A. *Failure To Plead Implied Easement*

Sandy argues that the superior court properly excluded the issue of implied easement from the summary judgment ruling because the Browns did not plead the affirmative defense of having an implied easement. We disagree.

We can affirm a summary judgment on any ground supported by the record. *Blue Diamond Grp.*, 163 Wn. App. at 453. The fact that the superior court's stated reasons were not

based on an implied easement theory does not preclude this court from affirming a summary judgment on that ground.

Under CR 8(c) a party must plead its affirmative defenses. Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a CR 12(b) motion, or (3) tried by the parties' express or implied consent. *Bickford v. City of Seattle*, 104 Wn. App. 809, 813, 17 P.3d 1240 (2001).

But a party does not waive its affirmative defense merely because it fails to plead it. Where the party fulfills the policy goal animating the rule—to avoid surprise—we will permit the affirmative defense. *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522 (1996). Thus, a party's failure to plead a defense affirmatively is harmless where the failure to plead does not affect the substantial rights of the parties. *Henderson*, 80 Wn. App. at 624. Also, when there is written and oral argument to the court without objection on the legal issues raised in connection with the defense, objection to a failure to comply with CR 8(c) is waived. *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975).

Here, the Browns did not plead the existence of an implied easement as an affirmative defense to Sandy's quiet title action. The Browns first made this claim in their motion for summary judgment. Sandy did not argue that the Browns had waived this defense until after the trial court granted the Browns' summary judgment motion: Sandy argued for the first time in its motion for reconsideration of summary judgment that the Browns had failed to timely raise the implied easement issue.

Moreover, because Sandy responded to the Browns' summary judgment motion without arguing surprise or prejudice from the Browns' failure to plead the existence of an implied

easement, we consider the Browns' arguable noncompliance with CR 8(c) harmless. *See Henderson*, 80 Wn. App. at 624. Sandy waived its objection to the Browns' failure to comply with CR 8(c) by providing written and oral argument to the trial court in opposition to the Browns' motion for summary judgment without arguing that the Browns waived this issue. *Mahoney*, 85 Wn.2d at 100. Sandy does not argue now, nor did it argue below, that the Browns' failure to plead their implied easement theory prejudiced it. Because Sandy waived its objection to the Brown's failure to comply with CR 8(c) and because the Browns' failure to plead implied waiver was harmless, we reject the argument that the Browns waived this issue.

B. *Implied Easement Exists*

The Browns argue that they have an implied easement. We agree. Implied easements arise by intent of the parties, which intent we find from the facts and circumstances surrounding the conveyance of land. *Roberts v. Smith*, 41 Wn. App. 861, 864, 707 P.2d 143 (1985). We look to three factors when considering whether an implied easement exists: (1) former unity of title and subsequent separation, (2) prior apparent and continuous use of a quasi-easement benefiting one part of the estate to the detriment of another, and (3) some degree of necessity that the easement exist. *McPhaden*, 95 Wn. App. at 437. The first factor—former unity of title and subsequent separation—is an absolute requirement for an implied easement. *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770 (1965); *Roberts*, 41 Wn. App. at 865. But presence or absence of the second and third factors is not conclusive. *Hellberg*, 66 Wn.2d at 668; *Roberts*, 41 Wn. App. at 865. Instead, those factors help us to determine the parties' intent by demonstrating the nature of the property, the extent and character of the use of the property, and how the parts of the property relate to each other. *McPhaden*, 95 Wn. App. at 437.

Absolute necessity is not required to establish an implied easement. *Evich v. Kovacevich*, 33 Wn.2d 151, 157-58, 204 P.2d 839 (1949). Sufficient necessity exists when the party claiming the easement cannot create a substitute to the easement at reasonable cost on his own property without trespassing on his neighbors. *Bays v. Haven*, 55 Wn. App. 324, 329, 777 P.2d 562 (1989). Prior use is circumstantial evidence of an implied easement, but we can find an implied easement based on necessity alone if the land cannot be used without disproportionate expense without the easement. *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995).

Here, we hold that an implied easement exists. There is no dispute that the required first element is met: the Sandy and Brown parcels had unity of title, and were subsequently separated. Thus, the unity of title and subsequent separation element is met. *Hellberg*, 66 Wn.2d at 668.

Sandy's primary argument against an implied easement relates to the second element: use of the property amounting to a quasi-easement. Sandy argues that no quasi-easement existed because the separation of title occurred in 2006 when the Cokeleys granted the deed of trust to Sandy, and the Cokeleys did not begin to construct any septic improvements on the Brown property until 2011. Sandy, therefore, argues that the Cokeleys did not use any quasi-easement during the unity of title. We disagree, because the deed of trust did not separate title in 2006.

Deeds of trust and mortgages do not convey title; they merely create liens. *Mahalko v. Arctic Trading Co.*, 99 Wn.2d 30, 38, 659 P.2d 502 (1983), *overruled on other grounds by Felton v. Citizens Fed. Savings & Loan Ass'n of Seattle*, 101 Wn.2d 416, 424, 679 P.2d 928 (1984). Thus, as a matter of law, title did not separate until December 2012, when the Cokeleys conveyed the Brown property to the Browns. Even construing all material facts in Sandy's favor

and assuming that the Cokeleys did not begin construction on septic improvements until 2011, there is no genuine issue of material fact that the Cokeleys began apparent and continuous work benefiting the Brown property and burdening the Sandy property during unity of title between 2011 and late 2012. *See McPhaden*, 95 Wn. App. at 437.

Moreover, even if there were no quasi-easement during unity of title, that fact is not dispositive. Presence or absence of a quasi-easement is not conclusive of the existence of an implied easement; instead, courts use these factors to evaluate the ultimate issue: whether the parties intended that an easement exist. *Hellberg*, 66 Wn.2d at 668; *McPhaden*, 95 Wn. App. at 437; *Roberts*, 41 Wn. App. at 865. Here, that intent was clear from the repeated attempts the Cokeleys made to establish an express easement over the Sandy property, from the work they did to improve the Brown property by installing septic improvements burdening the Sandy property, and from the representations the Cokeleys made to the Browns about the existence of a drain field easement.

Additionally, there is no dispute that a certain degree of necessity exists: the Browns cannot develop their property without accessing the drain field over the Sandy property. Absolute necessity is not required: instead, we look only for *reasonable* necessity. *Evich*, 33 Wn.2d at 157-58. Reasonable necessity exists when the party claiming the implied easement cannot create a substitute at reasonable cost without trespassing on his neighbors. *Bays*, 55 Wn. App. at 329. This reasonable necessity alone can establish an implied easement beginning during unity of title. *Fossum Orchards*, 77 Wn. App. at 451. Here, there is no dispute that the Browns cannot develop their property without access to the drain field; thus, reasonable necessity exists. There are no facts to suggest that an alternative way to develop the property

exists. Thus, there are no genuine issues of material fact precluding summary judgment dismissal, because the Browns established an implied easement.

ATTORNEY FEES

The Browns request reasonable attorney fees and costs on appeal, but they fail to cite authority for their entitlement to such fees and costs. Thus, we deny their request. RAP 18.1; *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d (2012).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Lee, J.

Sutton, J.