Court of Appeals, State of Michigan

ORDER

City of Novi v Al Evers

Docket No. 290079

LC No. 2007-086155 CH

Deborah A. Servitto
Presiding Judge

Richard A. Bandstra

Karen M. Fort Hood
Judges

On the Court's own motion, the March 30, 2010, unpublished per curiam opinion in this case is hereby VACATED, and a new opinion is attached on which the caption has been modified to include all parties. In all other respects, the content of the opinion is unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 06 2010
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

CITY OF NOVI,

Plaintiff/Counter-Defendant/Appellee,

v

AL EVERS and DORIS EVERS,

Defendants/Counter-Plaintiffs/Appellants,

and

MARION VANOVER, PEGGY SUE VANOVER, and BARBARA MAXWELL,

Defendants.

UNPUBLISHED
March 30, 2010

No. 290079
Oakland Circuit Court
LC No. 2007-086155-CH

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendants appeal by right the trial court's order granting plaintiff's motion for summary disposition. We affirm in part, reverse in part, and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises out of an easement purporting to grant certain rights to backlot holders on Walled Lake. The language provides:

> Lot 12 of Bentley Subdivision adjoining this Subdivision is to be used for pedestrians' right of way to the lake for all purchasers of lots on Poplar Street and Pine Street, each purchaser to pay his proportion for dock improvements and taxes [a few deeds add, "if not paid with in one year this easement ceases."]

In the trial court, there was some litigation over the various chains of title, but the only issue before this Court is what rights, if any, were conveyed by the easement.

The Bentley Subdivision consists of a series of lakefront lots. Lot 12 was burdened by the original grantor with the easement language quoted above, benefiting purchasers of lots in

the Blomfield Subdivision, which is not lakefront property, and which also was developed by the original grantor. At some point in the mid-1970s, a storm drain was installed on Lot 12, decreasing the desirability of the beach and the accessibility of the water. Defendants and plaintiff apparently had been in disagreement for several years over ownership and use of the property, and defendants placed a dock in the water for mooring boats. Eventually, plaintiff filed this three-count suit: quiet title (Count I); adverse possession/prescription interest (Count II); and declaratory relief identifying the scope of use (Count III). Plaintiff asked the trial court to declare it the sole fee owner, either through chain of title or adverse possession, and to declare that defendants had at most an easement for pedestrian use only, with no right to install a dock or moor boats without plaintiff's permission.

Defendants filed a counter-complaint, asking the court to declare that they had the right to use Lot 12 for access to Walled Lake, swimming, fishing, boating, maintenance of a dock for fishing and boating, picnicking, and "all other purposes for which lake access lots are used for [sic]"; and to declare that construction of the storm drain wrongly interfered with the easement on Lot 12, transferring defendants' easement to Lot 11 (also owned by plaintiff).

There is some evidence that historically, a dock had been periodically installed in the water for the benefit of the backlot owners, and that Lot 12 was used for swimming, sunbathing, and similar beach activities. Since 1999, plaintiff's attorneys have periodically issued letters opining on the rights of the parties, and taking the position that the Blomfield Subdivision residents had the right to maintain a dock and to use the waters for swimming, wading, fishing, boating, and temporary anchorage, but not for overnight anchorage or the construction of boat hoists. Although the language of these letters, and the language of the easement itself, leads to the inference that a dock was in place at the time the easement was conveyed, there is no actual evidence of this. The record does include the affidavit of Sarah Woodgate Jackson, a resident since 1952, stating that over 20 different docks had been installed on Lot 12 over the years and that, before the storm drain was installed, she and her husband would periodically dump a load of sand to create a swimming beach, and that she or other residents would mow the lawn.

Both sides moved for summary disposition. The trial court issued a written opinion in which it determined that the plain language of the deed conveyed only a pedestrian right-of-way across Lot 12 to the lake. It did not extend to the right to maintain a dock. Further, the additional language in the conveyance imposing conditions for payment of dock improvements and taxes did not grant a property right.

"The extent of a party's rights under an easement is a question of fact, and a trial court's determination of those facts is reviewed for clear error. A trial court's dispositional ruling on equitable matters, however, is subject to review de novo. The decision to grant or deny summary disposition is also reviewed de novo." *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

We find the trial court correctly read the plain language of the conveyance as granting only a pedestrian right-of-way and nothing more. "The use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). Specific "magic words" are not required on a plat to create an easement. *Chapdelaine v Sochocki*, 247 Mich App 167, 170; 635 NW2d 339 (2001). When

interpreting deeds and plats, Michigan courts seek to effectuate the intent of those who created them. *Curran v Maple Island Resort Ass'n*, 308 Mich 672, 679-681; 14 NW2d 655 (1944).

The trial court correctly read the conveyance's last words as imposing a limitation on the easement; *if* there are any taxes or dock improvement fees, the easement holders must contribute their share of these expenses or lose their right to the easement. The easement conveys only a right-of-way. A right-of-way does not convey riparian rights. *Dyball v Lenox*, 260 Mich App 698, 706; 680 NW2d 522 (2003). There is no language in the easement conveying riparian rights or dock rights. The language defendants point to does not set forth the permissible *use* of the property and does not grant defendants the right to make their own improvements on Lot 12. The language of the conveyance need not include the terms "only" or "limited to" because by its own words all that is being conveyed is a pedestrian right-of-way. The fact that the easement has the single purpose of granting a pedestrian right-of-way is obvious if one removes that language from the clause, leaving a provision that essentially says Lot 12 is to be used for each purchaser to pay his proportion of dock improvements and taxes. This clearly does not grant any right to use the easement for docking or other riparian uses.

Defendants argue that *Tomacek v Bavas*, 482 Mich 484, 490-491; 759 NW2d 178 (2008), compels a different analysis. We disagree. In *Tomacek*, our Supreme Court stated that courts can construe together contemporaneous documents relating to the same transaction when attempting to discern the parties' intent. *Id*. at 493. However, in this case there are no "contemporaneous documents" other than the deeds bearing the language quoted above. In fact, defendants present *no* contemporaneous evidence from the time the original grants were made back in the 1920s. There is simply no credible, extrinsic evidence that the grantor intended to convey the riparian right to install and maintain a dock or any other right beyond pedestrian access to the lake. The trial court correctly interpreted the deed language.

However, both parties sought broad, equitable relief, including a declaration of the parties' property rights both granted expressly by the deed and, in the alternative, those acquired by prescription. The trial court erred in not addressing all claims.

"An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). The Restatement of Property, 3d, Servitudes, [§ 2.16, pp 221-222] provides as follows:

> A prescriptive use of land . . . creates a servitude. A prescriptive use is either
>
> (1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or
>
> (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude. [See *Mulcahy v Verhines*, 276 Mich App 693, 700; 742 NW2d 393 (2007).]

Defendants presented some evidence that at least some of the uses they claim to have acquired may have been acquired by prescription. Thus, although we find the deed language did not

convey these rights and affirm the trial court's conclusion on that issue, we reverse the trial court's grant of summary disposition and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood