

STATE OF MICHIGAN
COURT OF APPEALS

JONATHAN L. JONES and JENNIFER S.
JONES,

UNPUBLISHED
September 16, 2004

Plaintiffs-Appellees,

v

ARTHUR C. LIPTOW, SR., and AUDREY J.
LIPTOW,

No. 246409
Oakland Circuit Court
LC No. 02-039032-CH

Defendants-Appellants.

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendants appeal as of right from a circuit court order granting plaintiffs' motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendants owned seven contiguous parcels of property. A house was located on the three center parcels (lots three, four, and five). It was served by a driveway leading to the garage, a walkway leading to the backyard, and a sprinkler system, all of which were installed on the north side of lot three. Defendants sold the three center parcels to plaintiffs, retaining lots one and two to the north and lots six and seven to the south. After the sale, it was discovered that parts of the driveway, walkway, and sprinkler system encroached on lot two. Plaintiffs sought an implied easement appurtenant over a six-foot wide strip running along the southern edge of lot two. The trial court agreed that the walkway and sprinkler system were apparent and that continued use of the walkway was reasonably necessary for access to the backyard and granted the motion.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The motion should only be granted if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law. *O'Donnell v Garasic*, 259 Mich App 569, 572-573; 676 NW2d 213 (2003).

To establish an implied easement, the party claiming the easement must prove three elements by a preponderance of the evidence: “(1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits.” *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980).

There is no dispute regarding unity of title in defendants. There appears to be no dispute that the driveway, walkway, and sprinkler system existed on lot two before the sale. The photographs show that the use of lot two for the driveway and walkway were capable of being seen and defendants acknowledged the existence of the sprinkler system. The evidence thus showed that the easement was apparent. *Bubser v Rangnette*, 269 Mich 388, 392; 257 NW 845 (1934).

Continuity has been defined as a use that “is one which operates without the interference of man,” such as waterspouts, drains, sewers, and overhanging eaves. *Waubun Beach Ass’n v Wilson*, 274 Mich 598, 606-607; 265 NW 474 (1936); *Bubser, supra* at 392-393. Thus, an easement is “continuous” when “it may be enjoyed without any act upon the party claiming it.” *Waubun Beach, supra* at 606. More recent cases have recognized implied easements in cases involving driveways, *Rannels v Marx*, 357 Mich 453; 98 NW2d 583 (1959), vehicular ingress and egress, *Kamm v Bygrave*, 356 Mich 189; 96 NW2d 770 (1959), rights of way, *Myers v Spencer*, 318 Mich 155; 27 NW2d 672 (1947), and lakeshore access, *Koller v Jorgensen*, 76 Mich App 623; 257 NW2d 192 (1977). Because an implied easement requires continuity, and the Courts in these cases found that such an easement existed, “continuous” in this context has evolved to mean “without a break in regular usage” and may also be given its generally understood meaning of uninterrupted use. See 1 Cameron, Michigan Real Property Law, § 6.9, pp 200-201 (2d ed) and cases cited therein. In light of these later cases coupled with the undisputed fact that the driveway, walkway and sprinkler were installed and used by the parties, we conclude that the continuity element has been satisfied as well.

The final element is reasonable necessity. Plaintiffs presented no evidence on this point. They simply asserted that use of the encroaching items was reasonably necessary to their enjoyment of the property. It is true that “[t]he prior use must have been reasonably necessary to the use and enjoyment of the estate retained or conveyed to justify implication of a servitude to continue the use.” 1 Restatement Property, 3d, Servitudes, § 2.12, p 162. However, “[r]easonable necessity usually means that alternative access or utilities cannot be obtained without a substantial expenditure of money or labor. It may also be measured by the amount of waste involved in duplicating facilities or the cost of reestablishing an entitlement to make the prior use.” *Id.* Accord *Schmidt, supra* at 735 (reasonable necessity established by proof that an alternative drain would require considerable effort and expense). Because plaintiffs failed to meet their burden of supporting their claim to summary judgment on the “reasonable necessity” element of their claim, the trial court erred in granting their motion.

Reversed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly