

STATE OF MICHIGAN
COURT OF APPEALS

LIGHTHOUSE PLACE DEVELOPMENT, LLC,

Plaintiff/Counter-Defendant-
Appellee,

v

MOORINGS ASSOCIATION, d/b/a MOORINGS
CONDOMINIUM ASSOCIATION,

Defendant/Counter-Plaintiff/Third-
Party-Plaintiff-Appellant.

v

HARBOR GRAND, LLC and LIGHT HARBOR
MOORINGS CONDOMINIUM ASSOCIATION,

Third-Party-Defendants,

and

LIGHT HARBOR MOORINGS CONDOMINIUM
ASSOCIATION,

Cross-Plaintiff,

v

HARBOR GRAND, LLC

Cross-Defendant.

Before: Murray, P.J., and Markey and Wilder, JJ.

WILDER, J., (*concurring in part and dissenting in part*).

I agree with the majority's conclusions regarding standing, unilateral modification, and reformation of the 1997 Agreement Terminating Easements, and join with the majority in affirming the trial court's opinion and orders on those issues. I disagree, however, with the trial court's conclusion that plaintiff proved its slander of title claim. Therefore, with respect to the slander of title claim, I respectfully dissent.

The elements of a common law or statutory claim for slander of title are falsity, malice, and special damages, *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998), with malice being the crucial element, *Gehrke v Janowitz*, 55 Mich App 643, 648; 223 NW2d 107 (1974). Malice may either be express, a “desire or intention to injure,” or implied, “a wrongful act, done intentionally, without just cause or excuse.” *Glieberman v Fine*, 248 Mich 8, 12; 226 NW 669 (1929). In an action to quiet title, the trial court’s findings of fact are reviewed for clear error, while its conclusions of law are subject to de novo review. *Fowler v Doan*, 261 Mich App 595, 598; 683 NW2d 682 (2004). The judgment in an action to quiet title is also subject to de novo review. *Wengel v Wengel*, 270 Mich App 86, 91; 714 NW2d 901 (2008).

There was evidence addressing two time periods of dispute concerning plaintiff’s slander of title claim; the time frame after defendant became aware that its 1985 Easement had been extinguished up to the recording of the First Amendment to Agreement Terminating Easements, and the time frame after the trial court entered its preliminary injunction which, in part, precluded defendant from “asserting to Amtrak [and] The City of New Buffalo, [inter alia,] any alleged claim arising out of ... the First Amendment to Agreement Terminating Easements.” As to the first time frame, the trial court considered the conflicting evidence, and found no more than that defendant knew from the summer of 2004 forward, that the 1985 Easement that is the subject of dispute in this action had been terminated as of the 1997 Agreement Terminating Easements that resolved the litigation between the defendant and Harbor Grand. While this finding establishes the element of falsity, as it concerns the recording of the First Amendment to Agreement Terminating Easements, in my judgment it is insufficient to also establish the necessary element of malice.

Defendant argued at trial and argues on appeal that it had been advised by its attorney, Michael Chojnowski, that defendant had a good faith argument that the termination of the 1985 Easement, in conjunction with the settlement of defendant’s litigation with Grand Harbor, occurred only through the mutual mistake of defendant and Grand Harbor. I disagree with the majority’s conclusion that there was no evidence of this belief of mutual mistake in the record. The majority correctly quotes in part attorney Chojnowski’s direct examination testimony:

Q. All right. Well, I’m not really interested in that. What I’m interested in is, is you know as a real estate lawyer, that once that agreement terminating easements was signed and filed and recorded, then the easement was history? It was over, it was done with, correct?

A. You’re asking me for a legal conclusion that I’m not comfortable answering because it’s - - I’m not capable of determining that.

However, in its brief on appeal, defendant also cited to and relied on this additional and continuing direct examination testimony by attorney Chojnowski:

Q. Well, I guess what I’m asking - - the point of my asking the question is because when this quit claim deed was given, you would agree with me that the easement - - the termination - - the easement termination agreement had already been entered and had already been recorded?

A. That I agree with. Yes.

Q. And so there really was nothing left to quit claim?

A. Well, *the parties to this quit claim deed felt that there was.*

Q. But - -

A. *So therefore there must have been.*

Q. But you know and I know sitting here today there wasn't anything left?

A. *No. I don't know that. Because when somebody does something based on a mistake, that doesn't necessarily mean that it's final.*

Chojnowski continued on cross-examination:

Q. [D]id you believe that the parties intended to terminate that particular easement?

A. No. I did not believe the parties intended to terminate it. And that was verified by the survey that we got in 2003, which wasn't available in '97.

...

Q. *If you had not believed that the 1997 termination of this particular easement was a mistake, would you have amended it in 2005?*

A. *No, there was no reason to amend it other than the fact that a mistake had occurred, a mutual mistake.*

Q. *You put that in the document itself, correct?*

A. *Yes.*

Q. *And conveyed that to the client?*

A. *Yes.*

Chojnowski's testimony was entirely consistent with the testimony of Byron Higgins that, upon the advice of its lawyer (Chojnowski), defendant authorized Chojnowski to record the First Amendment to Agreement Terminating Easements for the purpose of providing notice of its assertion that the 1985 easement was terminated by mutual mistake. This uncontradicted evidence that defendant acted in reliance on the advise of counsel establishes that the document was recorded for a good faith cause, and not for the purpose of injuring or causing damages to the plaintiff, and thus, precludes a finding of malice. See *Rowland v Lepire*, 99 NEV 308, 313; 662 P2d 1332 (1983) ("evidence of a defendant's reliance on the advise of counsel tends to negate evidence of malice").

Significantly, the trial court did not make *any* finding that defendant had no good faith basis to record the First Amendment to Agreement Terminating Easements. Stated differently, the trial court did not make any finding rejecting the authenticity of defendant's assertion that it had Chojnowski record the amendment with the good faith basis to give notice that the parties to the agreement (defendant and Grand Harbor) believed the agreement reflected a mutual mistake. Even though the trial court subsequently rejected this legal position, the trial court did not find that the legal position was asserted in bad faith or without reasonable grounds. The trial court also made *no* factual finding that the amendment was recorded for the purpose of injuring or causing damages to the plaintiff, rather than defendant's stated purpose of providing notice of its claim of mutual mistake in extinguishing the easement at issue. Instead, the trial court reached a legal conclusion, that the recording constituted slander of title, based solely on two factual findings: 1) that the amendment was recorded, and 2) that defendant knew of the 1997 termination agreement, at the time it had the amendment recorded. These factual findings are insufficient as a matter of law to support the determination that the defendant slandered plaintiff's title, because the trial court made no finding, and there is no evidence to support a finding, of malice.

As to the second time frame, plaintiff presented testimony that after the entry of the preliminary injunction, Higgins appeared at a planning commission meeting in January 2006 and asserted that defendant still claimed an easement in the disputed area. Higgins described this assertion as blatantly false, and testified that he only requested clarification about location on which the train platform was being constructed. He also testified that all of his actions on behalf of defendant were undertaken as advised by Chojnowski. This testimony was verified by Chojnowski:

Q. Now you're familiar with Judge Tolen's ruling regarding the quiet title issue in this case, correct?

A. Yes.

Q. And does that change your opinion about the propriety of your actions?

A. No.

The trial court concluded that Higgins asserted the easement claim at the meeting in "either willful disregard or somehow misunderstanding" the trial court's injunction. Again, I disagree that this ruling constitutes a finding that defendant acted with malice. The fact that defendant acted with the advice of counsel, coupled with trial court's acknowledgement that defendant's actions might have represented a misunderstanding of the requirements of her preliminary injunction, establishes the necessary good cause to preclude a finding that defendant acted with malice. See *Rowland, supra* at 313.

For all of the above-stated reasons, I respectfully dissent from the majority opinion insofar as it affirms the trial court's conclusion that defendant's actions constituted slander of title.

/s/ Kurtis T. Wilder