

STATE OF MICHIGAN
COURT OF APPEALS

JOHN CLUGSTON,

Plaintiff/Counter-Defendant-
Appellee,

v

HARRY JOSEPH JOACHIM III,

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

v

JOHN W. JARCHOW,

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

UNPUBLISHED

June 22, 2001

No. 221816

Sanilac Circuit Court

LC No. 98-025801-CH

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant Harry Joseph Joachim III appeals as of right the order granting summary disposition in favor of plaintiff John Clugston and his son, third-party defendant and counter-plaintiff John Jarchow (Jarchow). We affirm.

On December 12, 1992, plaintiff and defendant entered into a lease agreement wherein defendant agreed to lease commercial property for a period of three years with an option to purchase the premises following expiration of the lease. The lease agreement allowed defendant and his customers to use plaintiff's adjoining lots to the east and south of the leased premises for parking.

When the lease agreement expired, defendant exercised his option to purchase the property pursuant to a land contract. The land contract permitted defendant to continue parking on the adjoining property "to the extent that parking is available." Because Jarchow was the owner of the adjoining lots at the time the land contract was executed, Jarchow joined the execution of the land contract.

Defendant made the required payments on the land contract until the final payment was due. Defendant did not make the last payment on the property because plaintiff refused to provide a clause regarding parking in the warranty deed. Plaintiff brought summary proceedings to forfeit defendant's interest under the land contract. Defendant filed a counterclaim against plaintiff and a third-party claim against Jarchow alleging fraud, misrepresentation, and breach of contract. Plaintiff, joined by Jarchow as third-party plaintiff, filed an amended complaint against defendant alleging breach of contract and forfeiture of the land contract.

On April 26, 1999, plaintiff and Jarchow filed a motion for partial summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court, finding that the language on the face of the land contract was insufficient as a matter of law to create an easement or license, granted the motion.¹ An order dismissing all other claims was subsequently entered.

On appeal, defendant argues that summary disposition was improperly granted because the language of the land contract granted him an express easement to use the adjoining lots for parking or, in the alternative, a license coupled with an interest.

The trial court's decision on a motion for summary disposition is reviewed de novo. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). A motion for summary disposition is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

Defendant asserts that plaintiff and Jarchow conveyed an interest in land, an easement, by certain language that was placed in the land contract involving all three parties. Specifically, defendant points to the following language in the land contract:

As further consideration for this Land Contract, JOHN JARCHOW, the adjoining land owner to the South and East of the above described premises, who also is the son of Seller, agrees to provide Purchaser use of his adjoining parking lots located to the East and South of the above premises, to the extent that parking is available, including ingress and egress to said parking lots. Purchaser agrees not to reserve any parking spaces for himself, nor does JOHN JARCHOW guaranty that spaces will be available. It is expressly understood that by JOHN JARCHOW signing this Land Contract that he is only binding himself to this additional clause paragraph 3.(k)2, and is in no fashion bound by any of the other terms of this Land Contract.

An easement is an interest in land that must comply with the statute of frauds. MCL 566.106; MSA 26.906, MCL 566.108; MSA 26.908; *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). In order to create an express easement, there must be language in the writing

¹ Although the order states that summary disposition was granted pursuant to MCR 2.116(C)(8), the record reveals that the trial court considered evidence beyond the pleadings. Where summary disposition is granted under one subpart of the court rule when judgment is appropriate under another subpart, the defect is not fatal. *Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 57; 498 NW2d 5 (1993).

manifesting a clear intent to create a servitude. *Ditmore v Michalik*, 244 Mich App 569, 582; ___ NW2d ___ (2001); *Forge, supra* at 205.

The intent to grant an easement, however, must be so manifest on the face of the instrument that no other construction can be placed on it. Thus, to create an easement by express grant, there must be a writing containing plain and direct language evincing the grantor's intent to create a right in the nature of an easement rather than a license. *Id.*, n 17. A license grants permission to be on the land of the licensor without granting any permanent interest in the realty. Licenses are revocable at the will of the licensor, even if supported by consideration and even if the licensee spends money in reliance upon the license. *McCastle v Scanlon*, 337 Mich 122, 133; 59 NW2d 114 (1953).

Here, the language of the land contract states that Jarchow agreed to provide use of his adjoining parking lots "to the extent that parking is available." The language of the land contract also provides that Jarchow did not "guaranty that spaces will be available." Such language indicates permissive use and negates any intent to create an easement. See *Troff v Boeve*, 354 Mich 593, 597; 93 NW2d 311 (1958) (the language, "driveway on the north to be used as long as available," and "words of similar import" are "commonly employed to negative and prevent development and growth of easements or other prescriptive rights"). Nothing in the land contract indicates that plaintiff or Jarchow intended to convey a permanent interest in realty. Accordingly, we conclude that the land contract did not create an express easement to use the adjoining lots for parking but, at most, a license.

In the alternative, defendant argues that he was given a license coupled with an interest because use of the parking lot is necessary to make the commercial building that he purchased beneficial to him. Generally, licenses are revocable at will, but a license coupled with an interest is not. A license coupled with an interest is a privilege incidental to the ownership of an interest in a chattel personal located on the land with respect to which the license exists. *Forge, supra* at 210-211. However, defendant's argument is misguided because he has not demonstrated an interest in a chattel personal located on the disputed land. *Forge, supra* at 211. Use of the adjoining property is not a necessary incident to defendant's use of the realty that he purchased and, therefore, any license was not a license coupled with an interest.²

Affirmed.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

² Defendant's reliance on *Powers v Harlow*, 53 Mich App 507; 19 NW 257 (1884) is misplaced. In *Powers*, the plaintiff had to cross the defendant's property to reach the land that the plaintiff leased. The Court held that the "leasing, by implication, gave a right of way of necessity in order that he might render his tenement beneficial" and "was therefore a license coupled with an interest, and was not revocable while the lease was in force." *Id.* at 513. While adjacent parking may be convenient, it is not a necessary incident to defendant's use of the realty.