

STATE OF MICHIGAN
COURT OF APPEALS

DETROIT EDISON COMPANY,

Plaintiff-Appellee,

v

KATHRYN AUGUSTIN,

Defendant-Appellant.

UNPUBLISHED

February 2, 2006

No. 256728

Oakland Circuit Court

LC No. 2002-039373-CZ

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant Kathryn Augustin appeals as of right from a circuit court order granting plaintiff Detroit Edison Company's motion for summary disposition pursuant to MCR 2.116(C)(10) with respect to Augustin's countercomplaint. We reverse and remand. We decide this appeal without oral argument.¹

I. Basic Facts And Procedural History

This action began with Detroit Edison's complaint for a preliminary injunction to prevent Augustin from interfering with Detroit Edison trimming trees that were allegedly growing into its easement. That action settled. This appeal concerns Augustin's countercomplaint for a temporary restraining order, preliminary injunction, and damages. Specifically, Augustin alleged that, in 1992, Detroit Edison relocated its utility poles and overhead wires outside of its recorded five-foot utility easement, and onto and over Augustin's property. Augustin alleged that the "relocation . . . constitutes both a nuisance, at law or in fact, and a trespass" to her property.

The parties do not dispute that the utility poles are not within the recorded five-foot easement. Initially, Detroit Edison argued that it was not liable to Augustin because Detroit Edison had obtained an easement by prescription, inasmuch as the poles had been present in the same location for more than 50 years. Detroit Edison later presented evidence that the poles were replaced in 1992, but maintained that the new poles were placed right next to the former ones. Detroit Edison ultimately relied on an unrecorded 20-foot easement created by a Joint Pole

¹ MCR 7.214(E).

Line Permit. Augustin claimed that because that easement was not recorded, it was void as to her because she was a subsequent purchaser of the property without notice of the easement. In response, Detroit Edison argued that Augustin had constructive notice of the easement because of the presence of the poles. The trial court recognized that the parties disagreed regarding whether the replacement poles were in the same location as the previous poles but concluded that “even assuming that the new poles are in a different position than the old poles, the evidence still shows that the new poles and wires still fall within [Detroit Edison]’s easement.” The trial court acknowledged that the Joint Pole Line Permit was not recorded but concluded that the poles and wires provided Augustin with constructive notice of Detroit Edison’s easement.

II. Summary Disposition

A. Standard Of Review

We review the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law.²

B. Notice Of Easement

Detroit Edison’s ability to rely on the unrecorded easement depends on whether Augustin was a purchaser in “good faith,” which in turn depends on whether she had notice of the easement at the time of purchase. “Michigan is a race-notice state, . . . and owners of interests in land can protect their interests by properly recording those interests.”³ MCL 565.29 states as follows:

Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

An easement qualifies as an interest in land for purposes of MCL 565.29.⁴ “A person who purchases property without notice of a defect in the vendor’s title is a good-faith purchaser. A person who has notice of a possible defect and fails to make further inquiry into the possible rights of a third party is not a good-faith purchaser and is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed.”⁵

“Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another,

² *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

³ MCL 565.29; *Lakeside Assoc v Toski Sands*, 131 Mich App 292, 298; 346 NW2d 92 (1983).

⁴ *Peaslee v Dietrich*, 365 Mich 338, 344; 112 NW2d 562 (1961).

⁵ *Royce v Duthler*, 209 Mich App 682, 690; 531 NW2d 817 (1995) (citations omitted).

not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries in the possible rights of another in the property.”^{6]}

We conclude that the trial court erred in granting Detroit Edison summary disposition because the issue whether Augustin had constructive notice of the unrecorded easement was dependant, in part, on the location of the utility poles at the time of Augustin’s purchase, which was a disputed question of fact.

The trial court appears to have concluded that Augustin had constructive notice of the unrecorded 20-foot easement because of the presence of utility poles on her property. But, regardless of their location, notice of the existence of an easement does not necessarily charge one with notice of the full scope of an unrecorded easement. In *Allen v Bay Co Drain Comm’r*, a county drain commission obtained an easement but did not record it in the register of deeds office.⁷ Open ditch drains were constructed on part of the easement.⁸ The plaintiffs’ vendor farmed and used the land up to the drainage ditches.⁹ After the plaintiffs purchased the land, the drain commission sought to relocate the drain within the area of the easement.¹⁰ The plaintiffs sought an injunction against the county, the road commission, and the drain commissioner, and to quiet title.¹¹ The trial court found that the plaintiffs did not have “actual or constructive notice of that potion of the easement which supposedly extended beyond the edges of the drains.”¹² On appeal, the defendants argued that the trial court erred in finding that the plaintiffs did not have knowledge of the easement.¹³ This Court held that there was sufficient evidence to support the trial court’s conclusion.¹⁴

The visible open ditch drains in *Allen* are comparable to the utility poles in the present case. The *Allen* plaintiffs were evidently aware of the drains, but they were not charged with notice with respect to portions of the unrecorded easement beyond the edges of the drains. In the present case, Augustin was aware of the utility poles but that does not charge her with notice of the unrecorded easement beyond where the utility poles were located at the time of her purchase.

⁶ *Id.*, quoting *Schepke v Dep’t of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).

⁷ *Allen v Bay Co Drain Comm’r*, 10 Mich App 731, 732; 160 NW2d 346 (1968).

⁸ *Id.* at 733.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 734.

¹³ *Id.* at 733.

¹⁴ *Id.* at 734.

Moreover, the parties disputed the location of the poles at the time of Augustin's purchase. Augustin presented evidence that the poles were within the five-foot recorded easement and then moved in 1992, whereas Detroit Edison presented evidence that the current poles, located approximately 21.5 feet from the lot line, were installed in 1992 "right next to" the original poles installed in 1950.

Detroit Edison argues that the trial court was not required to resolve where the poles or lines were located in order to rule in Detroit Edison's favor. Detroit Edison claims that assertions in Augustin's briefs effectively show that the poles and lines were outside of the recorded five-foot easement at the time of Augustin's purchase. Specifically, Detroit Edison asserts that (1) Augustin acknowledges that the poles are currently 21.5 feet from the rear property line because she did not contest Detroit Edison's assertion of that location in an affidavit of Detroit Edison's employee; and (2) Augustin contends that the northeast pole was moved approximately 12.5 feet. From these points, Detroit Edison reasons that even under Augustin's position, the poles were approximately nine feet from the property line before they were allegedly moved, and such a position would have been four feet outside of the recorded easement. Therefore, according to Detroit Edison, Augustin had constructive notice of an easement that exceeded the scope of the recorded easement, and the unrecorded easement is effective against her because she was not a subsequent purchaser who took without notice.

Contrary to Detroit Edison's argument, Augustin has not made admissions sufficient to conclude that the poles were outside the easement at the time of her purchase. Although Augustin did argue that aerial photographs of the property from 1963 and 2002 showed a difference of approximately ¼-inch, which equated to 12.5 feet, with respect to the location of the northeast pole, that was only an approximation of the distance made in response to Detroit Edison's assertion that the poles had not been moved. Moreover, the approximation only concerned one of the two poles involved. In addition, even if the poles were outside the recorded easement, that alone would not be determinative of Augustin's constructive notice of the scope of the unrecorded easement.

Viewed in the light most favorable to Augustin, there was a genuine issue of material fact concerning Augustin's constructive notice of the unrecorded easement such that the existence of the easement does not provide a basis for dismissing Augustin's trespass and nuisance claims.

C. Timeliness Of Countercomplaint

Detroit Edison argues as an alternative basis for affirmance that Augustin untimely filed her countercomplaint. Detroit Edison did not raise this issue below, and we are not persuaded that it provides an alternative basis for affirming the trial court's order.

The period of limitations for claims for injury to property is three years.¹⁵ However, "[w]here a trespass or nuisance is alleged to have continued during the limitation period,

¹⁵ MCL 600.5805(10).

recovery is not barred.”¹⁶ Citing *Blazer Foods, Inc v Restaurant Properties, Inc*,¹⁷ Detroit Edison argues that the continuing wrong theory requires one to show continuing tortious acts, whereas the present case involves allegations of continuing harm from the completed act of moving the poles and lines in 1992. However, the trespass and nuisance claims involve the ongoing presence and use of the electrical poles and wires. This is comparable to the continuing trespass of an active sewer in *Defnet v Detroit*,¹⁸ and continuing nuisance of the operation of a landfill in *Moore v Pontiac*.¹⁹ Because the alleged trespass and nuisance was ongoing, the continuing wrong theory is applicable.

Moreover, a defense based on a statute of limitation must be raised in a party’s first responsive pleading either as originally filed or amended.²⁰ Generally, an affirmative defense that is not properly pleaded is waived.²¹ In this case, Detroit Edison did not raise this defense in answer to Augustin’s countercomplaint and did not seek leave to amend. Because it appears that the defense may have been waived, and because the continuing wrong theory would be applicable here, we decline to rely on the statute of limitations as an alternative basis for affirmance.

We reverse and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette

¹⁶ *Traver Lakes Community Maintenance Ass’n v Douglas Co*, 224 Mich App 335, 347; 568 NW2d 847 (1997) (citations omitted).

¹⁷ *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241; 673 NW2d 805 (2003).

¹⁸ *Defnet v Detroit*, 327 Mich 254; 41 NW2d 539 (1950).

¹⁹ *Moore v Pontiac*, 143 Mich App 610, 614; 372 NW2d 627 (1985).

²⁰ MCR 2.111(F)(3)(a).

²¹ MCR 2.111(F).