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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.

John J. BANACKI, Plaintiff-Appellee,

v.

David W. HOWE and Jamie C. Howe, Defendants-Appellants,
and

Chris Joseph Smit,¹ John W. Kaiser, Jr., Trustee of the Paulette Kaiser Trust, Sharon Gibson, Trustee of the Sharon Gibson Trust, Lambert Greendyke, Thomas Tuitman, John Wegh, Trustee of the John and Josephine Wegh Trust, Carmela Cox, Daniel Cleveland, James J. Kuzel, Nicholas Poulos, John B. Ruiz, Edward Czerwien, Stanley Czerwien, Janet Greendyke, Terry Fritz, Christopher L. Decaigny, Genevieve A. Rohen, David Sypniewski and Geraldine Sypniewski, Trustees Of The Leo M. Schur Trust, Catherine Basham, William Boehnlein, Robert Hodges, Will Munnecke, Jean Fritz, Russell H. Basham, Karen Hodges, Sharon Munnecke, Dennis Doherty, Joanne Doherty, Daniel L. Kuruzar, Beverly Tuitman, Kenneth M. Floody, Lori Cleveland, Mary T. Kuzel, Dena M. Ruiz, Bridgette Czerwien, Lena B. Degrado, Trustee, John E. Martin, Trustee, Jeanette Martin, Trustee, Randall Properties, John D. Benassi, Richard Benassi, Ed Benassi, Ray W. Haack and Esther Haack, Co-Trustees, Jeffrey St. Peters, Margaret St. Peters, Zlatan Stepanovic, and Vesna Stepanovic, Defendants.

Docket No. 302778. March 20, 2012.

Van Buren Circuit Court; LC No. 07-056592-CH.

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

Opinion

PER CURIAM.

*1 Defendants-appellants David W. Howe and Jamie C. Howe (hereinafter referred to as defendants) appeal as of right the order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10) with regard to his claims for trespass and a permanent injunction and denying defendants' motion for summary disposition that was brought pursuant to MCR 2.116(C)(1), (8), and (10). The order also denied plaintiff's motion to quiet title in his favor. We affirm.

The property at issue was platted in 1941 as Gilmore Lake Subdivision. The plat designates a street, a park, two courts (East Court and West Court) and 62 lots, 36 of which have water frontage on Magician Lake. Twenty-six of the lots are back lots and have frontage on Gilbert Street. East Court is a 25-foot wide strip of waterfront land that lies between lots 12 and 13, and West Court is a 24'2" wide strip of waterfront land that lies between lots 29 and 30. The plat dedication states, "The park, street, and courts, as shown on said plat are hereby dedicated to the use of persons owning land adjacent to

said park, street, or courts." Lots 1 to 36 and East and West Courts all extend to the water's edge.

Plaintiff is the owner of Lot 13. Defendants are the owners of back lots 47, 48, 49, and 50. According to plaintiff's third amended complaint, defendants installed a pier, boat lift, wooden dock, and decking upon East Court and into Magician Lake adjacent to East Court. Plaintiff's trespass claim alleged that defendants had no right to use East Court or the lake frontage adjacent to East Court because defendants are not owners of land adjacent to East Court, and that defendants' encroachments "exclude [plaintiff's] right to use and enjoy East Court and the riparian interest adjacent to East Court." Plaintiff also sought an injunction to enjoin defendants from installing piers, boat lifts, wooden docks, and decking. Lastly, plaintiff sought to quiet title to East Court "against all Defendants" and in favor of plaintiff and Smit as owners of property adjacent to East Court.

Defendants responded to the complaint by filing a motion for summary disposition in lieu of an answer. Defendants maintained that no trespass had occurred because the plottors dedicated the park, street, and courts to the use of persons owning land adjacent to said park, street, or courts, and that the dedication intended to give all persons owning land adjacent to any park, street, or court the right to use the parks, street, or courts. Thus, defendants argued that plaintiff could not maintain an action for trespass, injunctive relief, or to quiet title to the property. Defendants also asserted that they had a prescriptive easement for use of East Court for lake access, overnight mooring of boats, and seasonal installation and removal of a wooden pier and boat lift because their use, and the use of their predecessor in interest, had continued without complaint or objection for 65 years.

*2 Plaintiff thereafter filed his own motion for summary disposition. Plaintiff argued that the clear and unambiguous language of the subdivision plat and dedication precluded defendants and others from riparian uses such as overnight mooring of boats and seasonal installation and removal of a pier and boat lift on East Court. Thus, plaintiff maintained that regardless of whether the court interpreted the dedication as limiting use of East Court to the two adjacent lot owners, or whether the court interpreted the dedication as limiting the use of East Court to all lot owners in Gilmore Beach Subdivision, defendants' use of East Court for overnight mooring of boats and installation of a wooden pier and boat lift interfered with all lot owners' right to use East Court. Plaintiff also maintained that such use interfered with the riparian interest area adjacent to East Court.

Following a hearing on the competing motions for summary disposition, the trial court found that defendants' use of East Court to erect items such as a dock and boat lift, as well as overnight mooring of boats, exceeded the scope of the dedication of the plat.² The court granted an injunction enjoining uses that amount to riparian owner uses.³ The trial court also rejected defendants' argument that they had a prescriptive easement to use East Court for such riparian uses. The court granted plaintiff's motion for summary disposition and denied defendants' motion for summary disposition.

II

Defendants argue that the trial court erred by granting summary disposition in favor of plaintiff because material issues of fact existed regarding the permissible uses of East Court as dedicated to all lot owners in the dedication of the subdivision plat. This Court reviews de novo a trial court decision regarding a motion for summary disposition.

Maiden v. Rozwood, 461 Mich. 109, 118; 597 NW2d 817 (1999). The extent of a party's rights under an easement is a question of fact for the trial court, which this Court reviews for clear error. *Dobie v. Morrison*, 227 Mich.App 536, 541-542; 575 NW2d 817 (1998). This Court also reviews de novo a trial court's rulings on equitable issues, including the grant of injunctive relief. *Cipri v. Bellingham Frozen Foods, Inc.*, 235 Mich.App 1, 9; 596 NW2d 620 (1999).

The issue in this case concerns the extent of defendants' right to use East Court, which terminates at the water's edge and is therefore riparian land. *Thies v. Howland*, 424 Mich. 287-288; 380 NW2d 463 (1986). It is well established that a riparian owner enjoys "certain exclusive rights" which include "the right to erect and maintain docks along the owner's shore, and the right to anchor boats permanently off the owner's shore." *Id.* at

288 (citations omitted). A nonriparian owner, on the other hand, has "a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming." *Id.*, as well as "the right to anchor boats temporarily." *Id.*; *Jacobs v. Lyon Twp (After Remand)*, 199 Mich.App 667, 671-672; 502 NW2d 382 (1993). Additionally, the Court stated in *Thies* that rights normally afforded exclusively to riparian lot owners may be conferred by easement. *Little v. Kin*, 249 Mich.App 502, 509; 644 NW2d 375 (2002).⁴ A dedication of land for private use in a recorded plat gives lot owners in the plat an irrevocable easement or right to use such privately dedicated land. *Little v. Hirschman*, 469 Mich. 553, 560-562; 677 NW2d 319 (2004).

*3 Defendants assert that the dedication in this case gives them an easement to use East Court for the activities in dispute and beyond merely accessing the lake, particularly in light of the historical uses of the easement.

The rights of nonriparian owners should be determined by examining the language of the grant. *Dyball v. Lennox*, 260 Mich.App 698, 703; 680 NW2d 522 (2004). "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little v. Kin*, 468 Mich. 699, 700; 664 NW2d 749 (2003). Courts should consider the circumstances existing at the time of the grant to determine the scope of the dedication but only if the language of the grant is ambiguous. *Id.* at 703-704. In this case, while the dedication unambiguously grants use of East Court to the subdivision lot owners, it is silent regarding the parameters of that use. Therefore, it is appropriate to consider the circumstances surrounding the grant of the easement to determine the dedicator's intent. No evidence, however, was presented concerning how the property was used at the time the plat was dedicated or concerning other pertinent circumstances surrounding the dedication of the property in 1941. Rather, the only evidence presented was the affidavit of defendants' predecessor in interest, Jack Szymanski, who averred that he resided on back lots 47 through 50 from 1942 through 1994 and that he used East Court as "lake access" and for the "overnight mooring of boats, and seasonal installation and removal of a wooden pier and shore station." He further averred that his parents "were the original owners of that property⁵ and used the Court in a similar fashion." Szymanski also averred that his neighbor built and installed a small wooden deck in front of the pier in 1942. There is no indication, however, that any of these activities were occurring at the time of the grant of the easement. Activities on the lake at some time after the plat dedication are not sufficient to establish "that the disputed activities are properly within the scope of the plat dedication." *Jacobs (After Remand)*, 199 Mich.App at 672. Therefore, this Court must rely on certain presumptions that arise based on the language of the dedication.

Specifically, language in a plat dedicating certain property for "the use" of lot owners is generally considered to grant an easement to those lot owners to whom the use is dedicated. *Dobie v. Morrison*, 227 Mich.App 536, 540; 575 NW2d 817 (1998). Further, "[t]he use of the terms 'streets' and 'alleys' implies passage, and public roads that terminate at the edge of navigable waters are presumed to provide public access to the water ... [Thus], the burden rests with defendants to establish that anything other than mere access to the lake was intended." *Higgins Lake Prop Owners Ass'n v. Gerrish Twp*, 255 Mich.App 83, 102; 662 NW2d 387 (2003).

*4 In this case, the land at issue is not a street, alley, or public road but, rather, a "court." "Court" is not defined in the dedication; for guidance, this Court may consult a dictionary to afford the term its plain and ordinary meaning. *TMW v. Dept of Treasury*, 285 Mich.App 167, 172; 775 NW2d 342 (2009). *Random House Webster's College Dictionary* (1992) defines a court as "a short street." Although East Court is dedicated to the subdivision lot owners and not to the general public, our Supreme Court, noting that public ways that terminate at the waters' edge are generally deemed to imply passage and to provide public access to the water, has stated, "The fact that only subdivision owners can use the alleys and docks would not require a different result." *Thies*, 424 Mich. at 295-296. There is no sound reason why private courts should be distinguished from public roads relative to this presumption.

Although the lots owners' status as nonriparians did not prevent the plottors from including dock rights within the scope of the easement, see *Cabal v. Kent Co Rd Comm*, 72 Mich.App 532, 536; 250 NW2d 121 (1976) (permitting docking rights to nonriparians

where the easement granted fishing and boating rights), the dedication in the present case merely included the "use" of East Court within the scope of the easement. Defendants have failed to overcome the presumption that the scope of the easement intended nothing more than lake access. The trial court's finding that the grant of land to the "use" of the subdivision lot owners did not confer riparian rights and thus did not include anything more than the right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming, and the right to temporarily moor boats, was not clearly erroneous. There is no indication that the plottors intended, at the time East Court was dedicated, that all lot owners would have essentially unlimited use of East Court or that individual lot owners could monopolize East Court by permanently mooring boats and installing decks and boat lifts, or by storing such items on East Court, because such use would impair the other lot owners' ability to use East Court. Indeed, as the trial court observed, if a few individuals build their own docks and boat lifts or keep such property on the court, they are effectively appropriating East Court for their own private use, which would impede the other lot owners' use of East Court and access to the lake. A review of the photographs of East Court reveals that the terminus of East Court was, in fact, monopolized by defendants. The trial court's findings are not clearly erroneous. The trial court did not err in determining the scope of defendants' rights under the dedication.

Defendants contend that even if the dedication itself did not give them the right to use East Court as if they were riparian owners, they have acquired such rights through a prescriptive easement. A prescriptive easement is typically established where an express easement has failed because of a defect and was treated as though it had been properly established. *Plymouth Canton Comm Crier, Inc v. Prose*, 242 Mich.App 676, 684-685; 619 NW2d 725 (2000). In addition, a prescriptive easement is also found to arise in a manner similar to adverse possession, when there is "use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Higgins Lake Prop Owners Ass'n*, 255 Mich.App at 118. In this case, the trial court properly rejected defendants' claim of a prescriptive easement on the basis that a prescriptive easement cannot arise with respect to property already subject to an easement for the benefit of an entire subdivision that was created through a private dedication simply because a lot owner "overuses" the easement. There is no basis for the establishment of a prescriptive easement because of the absence of the element of adversity. Hostile or adverse use cannot be established if the use is permissive, regardless of the length of the use. *West Michigan Dock & Market Corp v. Lakeland Investments*, 210 Mich.App 505, 511; 534 NW2d 212 (1995). Because defendants and other lot owners used East Court for an extended time period openly and without any dispute arising, this permissive and accepted use of the subject property was not adverse or hostile and, therefore, a prescriptive easement could not arise.

*5 Affirmed.

Footnotes

1 This Court corrects Smit's name to reflect the proper party to this lawsuit. Chris Joseph Smit's name was listed incorrectly throughout the lower court proceedings as "Christopher Smit."

2 The trial court also agreed with defendants that the use of East Court and West Court was dedicated to all lot owners in the subdivision; this finding is not challenged on appeal.

3 Specifically, the court opined:

Future use of East Court and West Court by owners of lots within the Gilmore Beach Subdivision shall not include the installation or construction of piers, boat lifts, wooden docks, decking, floating rafts; nor the permanent mooring of boats within the riparian interest area adjacent to East Court and West Court. Further, use of East Court and West Court by owners of lots in the Gilmore Beach Subdivision shall not include storage of piers, boat lifts, wooden docks, and decking and

floating rafts upon East Court and West Court. Said uses shall be considered a trespass upon East Court and West Court.

- 4 In *Little*, 249 Mich.App at 505, the easement provided that the back lot owners held a non-exclusive, permanent easement ... "for access to and use of the riparian rights to Pine Lake." [Emphasis in original.]
- 5 The affidavit does not state the date on which Szymanski's parents acquired the property even though they were the original owners.

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