

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS HEATOR, Individually and as Trustee of the THOMAS D. HEATOR and NORMA J. HEATOR REVOCABLE LIVING TRUST DATED JUNE 28, 2018, NORMA HEATOR, Individually and as Trustee of the THOMAS D. HEATOR and NORMA J. HEATOR REVOCABLE LIVING TRUST DATED JUNE 28, 2018, DORI KAY BLACKFORD, and CLIFFORD R. BLACKFORD,

Plaintiffs/Counterdefendants-
Appellees,

v

ROBERT BOWERS, DONNA J. BOWERS, and CHARLOTTE CASEY,

Defendants/Counterplaintiffs-
Appellants.

UNPUBLISHED
August 12, 2021

No. 354416
Lenawee Circuit Court
LC No. 18-006118-CH

Before: SAWYER, P.J., and BOONSTRA and RICK, JJ.

PER CURIAM.

In this real property dispute, defendants/counterplaintiffs appeal as of right the trial court’s order granting summary disposition in favor of plaintiffs/counterdefendants. On appeal, defendants argue that the trial court erred when it granted summary disposition under MCR 2.116(C)(10) in favor of plaintiffs because the trial court improperly extended an easement beyond its legal description. Defendants also argue that the trial court erred when it determined that plaintiffs did not abandon the easement at issue. Lastly, defendants argue that the trial court erred when it determined that the compatibility of plaintiffs’ proposed use—construction of a dock—with the current use of the easement—a boat ramp—was irrelevant. For the reasons set forth below, we affirm the order of the trial court granting summary disposition in plaintiffs’ favor.

I. BACKGROUND

This case arises from a dispute between neighboring property owners over the scope and application of an easement. The easement at issue was created on October 1, 1965, between Milford Wheaton and Marcie Marie Wheaton and Linwood Sanford and Evah Sanford, who each owned adjoining properties in Woodstock Township, Michigan.

On June 30, 1967, the Wheatons and Sanfords entered into an agreement with Ray S. Utterback and Mary C. Utterback, and Veron L. VanNest and Edna L. VanNest, to amend the existing easement, from which a road was built, on their respective properties. The neighbors agreed to amend the easement to terminate the road “at a point 184.78 feet south of the north line of said Easement, and that the North 124.78 feet of said Easement as above described shall remain unimproved.” The parties also agreed that the “North 124.78 feet of said Easement shall be for the use jointly of the respective owners for access to Silver Lake”

In 1989, the neighboring landowners to the easement entered into another agreement with respect to the easement. There, the parties agreed:

[T]he owners of property abutting the Easement may build a boat dock on Silver Lake at the end of the Easement at Silver Lake for the purpose of mooring boats owned by them but not others. That the Road Easement and the North 124.78 feet thereof and the dock thereon shall not be used for picnics. The Easement is to be kept open and unobstructed to allow passage of all abutting owners and their guests to have access to Silver Lake.

It is further agreed that the dock and all boats shall be removed from the Easement from November 1st to April 1st of each year.

In 2018, plaintiffs filed a complaint in the trial court alleging the parties named in the lawsuit were successors in interest to the easement created in 1965, and the ensuing agreements respecting the easement. Plaintiffs claimed that, after they placed their property for sale in 2018, defendants told the potential buyers they could not construct a dock. Plaintiffs sought declaratory and injunctive relief.

After competing motions for summary disposition, the trial court granted summary disposition in plaintiffs’ favor. The trial court rejected defendants’ argument that the easement in question did not extend to the water’s edge, concluding that the 1989 agreement extended the easement. The trial court also rejected defendants’ argument that plaintiffs abandoned their rights, finding that defendants failed to present evidence of plaintiffs’ intent to abandon those rights. The trial court also concluded that the proposed dock’s incompatibility with the existing boat ramp was irrelevant to the claims raised in plaintiffs’ complaint.¹ This appeal followed.

¹ The trial court did not address defendants’ argument that plaintiffs’ proposed dock would violate state and local law.

II. STANDARD OF REVIEW

We review de novo a trial court's decision regarding summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.* This Court also reviews de novo questions of statutory interpretation, including interpretation of local ordinances. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

In addition, "[t]he extent of a party's rights under an easement is a question of fact for the trial court, which [this Court] review[s] for clear error." *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2003) (cleaned up). Findings are clearly erroneous "where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

III. DISCUSSION

Defendants first contend that under the express language of the easement, it does not extend to the edge of Silver Lake. Accordingly, defendants argue that plaintiffs did not have the right to construct a dock on Silver Lake and the trial court erred when it concluded otherwise. We disagree.

"[T]he rights of nonriparian owners should be determined by examining the language of the easement and the circumstances existing at the time of the grant." *Dyball*, 260 Mich App at 703-704. "[W]hen the language of the easement grant is plain and unambiguous, a directive to consider circumstances existing at the time of the grant was inconsistent with well-established principles of legal interpretation." *Id.* at 704. "[W]here the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Id.* (cleaned up). However, if the language is ambiguous, "extrinsic evidence may be considered by the trial court in order to determine the scope of the easement." *Id.* (cleaned up).

The trial court appeared to rely on the language of the 1989 agreement for its ruling that the easement extended to the water's edge. In the 1989 agreement, the parties' predecessors agreed that "the owners of property abutting the Easement may build a boat dock on Silver Lake at the end of the Easement at Silver Lake for the purpose of mooring boats owned by them but not others." Defendants posit, and plaintiffs do not appear to contest, that the legal description of the easement does not extend to the water's edge. As a result, defendants argue that the trial court could not have concluded the easement permitted construction of a boat dock. This argument from defendants, however, ignores the plain language of the 1989 agreement.

We conclude that the language of the 1965 easement, when coupled with the 1989 agreement, unambiguously provided for the construction of a boat dock at the end of the easement

and edge of Silver Lake. Under the 1989 agreement, the parties' predecessors agreed that the "owners of property abutting the Easement may build a boat dock on Silver Lake at the end of the Easement at Silver Lake for the purpose of mooring boats owned by them but not others." Defendants offer no explanation as to how to harmonize this provision of the 1989 agreement with their argument that the easement did not extend to the water's edge. Indeed, defendants' failure to harmonize the 1989 agreement with the original easement language creates ambiguity where none previously existed. See *Haring Charter Twp v Cadillac*, 290 Mich App 728, 739; 811 NW2d 74 (2010) ("Terms are ambiguous *only if* they cannot possibly be read together in harmony."). On the basis of the plain language of the 1989 agreement, the trial court correctly determined that the parties' predecessors amended the easement to extend it to the water's edge to allow them to construct a boat dock.

Defendants also contend that the trial court erred by ignoring the requirement that plaintiffs resolve the dispute through the committee referred to in the easement. In the 1967 agreement, the parties' predecessors agreed that they would form a committee that was empowered to restrict access to Silver Lake via the easement to anyone not authorized by the committee. Contrary to defendants' arguments, however, this provision is not dispositive.

The provision in question permits the committee to restrict access to Silver Lake by using the easement. The provision does not empower the committee to adjudicate disputes between abutting landowners as to how access to the lake is arranged for them. In other words, the provision in question permitted the committee to restrict access to just the landowners, or to allow others to use the easement as well. Therefore, the fact that the trial court did not afford defendants relief on this basis was not error requiring reversal.

Next, defendants claim that plaintiffs abandoned their rights to the easement. In support of this argument, defendants rely on statements from the current landowners indicating that, in 1995, the parties constructed a boat ramp in lieu of constructing a dock. During this time, according to defendants, it was agreed that the parties did not want a dock and wanted a boat ramp instead. The trial court concluded that the evidence presented by defendants did not show plaintiffs intended to abandon the easement.

"To prove abandonment, both an intent to relinquish the property and external acts putting that intention into effect must be shown." *Ludington & Northern R v Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991). "Nonuse, by itself, is insufficient to show abandonment. Rather, nonuse must be accompanied by some act showing a clear intent to abandon." *Id.* (cleaned up). In *Ludington*, for example, this Court concluded that the plaintiff did not abandon its use of the railway in a case where the easement "was created 'for railroad purposes,' and there ha[d] been no showing that this purpose [was] no longer existent or necessary." *Id.* at 35. Further, this Court stated: "[I]t does not follow from mere nonuse that the purpose for which an easement was created no longer exists." *Id.*

The same is true in this case. Defendants are correct that there has been no use of the easement as a dock for the entire time the easement has existed. Thus, defendants can satisfy the "nonuse" prong of abandonment of an easement. However, where defendants falter is in demonstrating that plaintiffs intended to abandon the easement, and did so by an act showing an intent to abandon. See *id.* at 33.

While defendants presented ample evidence that they intended to abandon the idea of a dock, they presented only scant evidence that plaintiffs also demonstrated an intent to abandon, aside from their acquiescence in the use of the ramp and not a dock. This is insufficient under *Ludington* to demonstrate that plaintiffs intended to abandon the easement because it was not a clear act in addition to nonuse. While defendants may be correct that the possibility of future use does not otherwise defeat abandonment, defendants are still required to show that plaintiffs abandoned their rights. Defendants failed to do so. Therefore, the trial court did not err when it determined plaintiffs did not abandon their rights under the easement.

Defendants also argue that plaintiffs abandoned their easement rights because the area of the easement in question had been used as a boat ramp for more than 15 years, likening it to a prescriptive easement. “An easement by prescription results from the use of the property of another that is open, notorious, adverse, and continuous for a period of 15 years.” *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 270-271; 739 NW2d 373 (2007). “Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder.” *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995) (cleaned up). Defendants cannot show, nor have they tried to show, that their use of the boat ramp was adverse to plaintiffs’ rights. The fact that the parties agreed in 1995 to construct a ramp in lieu of a dock does not make defendants’ use of the ramp adverse to plaintiffs’ rights. Therefore, any argument on the basis of a prescriptive easement fails.

Lastly, defendants contend that the trial court erred when it concluded that the issue of whether the dock would be incompatible with the ramp was irrelevant. According to defendants, installation of a dock would necessarily mean that the ramp would be removed, which defendants do not want.

“It is settled that the owner of a fee, subject to an easement, may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement.” *Hasselbring v Koepke*, 263 Mich 466, 476; 248 NW 869 (1933). “What may be considered a proper and reasonable use by the owner of the fee as distinguished from an unreasonable and improper use, and what may be necessary to plaintiff’s beneficial use and enjoyment, are questions of fact to be determined by the trial court or jury.” *Id.* “It is an established principle that the conveyance of an easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement.” *Unverzagt v Miller*, 306 Mich 260, 265; 10 NW2d 849 (1943) (cleaned up).

The easement unambiguously provides the parties with the right to construct a dock for ingress and egress to Silver Lake. There are no conditions expressed in the easement concerning the ability to construct a dock on the easement. Other than their complaint that the dock would destroy the purpose of the ramp, defendants offer no factual basis, let alone a legal one, for this Court to conclude that the construction of a dock would violate the terms of the easement. Therefore, plaintiffs were permitted to construct a dock, notwithstanding the existence of the boat ramp, because plaintiffs were entitled to “all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement.” *Unverzagt*, 306 Mich at 265.

Defendants also argue that the trial court improperly ignored their argument that the dock proposed by plaintiffs would violate state law and a local ordinance. This issue is not ripe and,

even if it were, would not entitle defendants to any relief. “The ripeness doctrine requires that a party has sustained an actual injury to bring a claim. A party may not premise an action on a hypothetical controversy.” *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 554; 904 NW2d 192 (2017). “In land use challenges, the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action.” *Paragon Props Co v Novi*, 452 Mich 568, 579 n 12; 550 NW2d 772 (1996) (cleaned up).

Here, there is no indication in the record what kind or size of dock is proposed, other than defendants’ unsupported assertions that plaintiffs want a multifamily dock. Therefore, without knowing whether a dock would be installed and, if so, the particulars of its construction, the trial court could not presume to rule on hypothetical and contingent claims. See *Van Buren Charter Twp*, 319 Mich App at 554. The trial court’s failure to analyze this issue when entering its order is not cause for reversal because the trial court would have to adjudicate the unripe claims to do so.

Even if the issue were ripe, the trial court was nevertheless correct to grant summary disposition in plaintiffs’ favor. Plaintiffs sought a declaration from the trial court that the language of the easement permitted them to construct a dock. Plaintiffs did not seek an order that a dock be constructed. In other words, the issue before the trial court was what was authorized by the easement, not state or local law.

Affirmed. Plaintiffs may tax their costs as the prevailing party. MCR 7.219(A).

/s/ David H. Sawyer

/s/ Mark T. Boonstra

/s/ Michelle M. Rick