STATE OF MICHIGAN

COURT OF APPEALS

WELLS VENTURE CORPORATION,

Plaintiff/Counter-Defendant-Appellant,

v

GTR GLACIER CLUB LLC, and GTR GLACIER GOLF HOLDINGS LLC,

Defendants/Counter-Plaintiffs-Appellees,

and

VILLAS CONDOMINIUM ASSOCIATION,

Defendant-Appellee,

and

TOWNSHIP OF WASHINGTON,

Defendant.

UNPUBLISHED
September 23, 2014

No. 316339
Macomb Circuit Court
LC No. 2011-004205

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Plaintiff, Wells Venture Corporation (Wells Venture), appeals as of right the trial court's order granting summary disposition in favor of defendants GTR Glacier Club, LLC (Glacier Club), GTR Glacier Golf Holdings, LLC (Golf Holdings), and the Villas Condominium Association (the Villas). We reverse the trial court's order granting summary disposition to defendants and remand for further proceedings.

In 2002, Wells Venture owned real property in Washington Township, Michigan, consisting of a developed golf course and adjacent undeveloped property. In September of 2002, Wells Venture sold the undeveloped property to Glacier Club. Then, in 2005, Wells Venture

sold the golf course portion of the property to Golf Holdings on land contract. Sometime in 2007, a detention pond and drainage system were installed on part of the Golf Holdings property for the benefit of Glacier Club. Golf Holdings also purported to grant Glacier Club an easement for the existence of the detention pond and drainage system. The parties dispute whether Wells Venture had any knowledge of the detention pond construction and the creation of the easement, and Wells Venture contended that if it had known about either, it would have objected. Golf Holdings eventually defaulted on its obligations under the land contract and, in 2009, a judgment for possession after forfeiture was entered in Wells Venture's favor. When Wells Venture regained possession of the land it discovered the existence of the detention pond and the related easement. After its demands for the removal of the pond and the easement were not met, Wells Venture filed a verified complaint asserting several claims, including an action for quiet title and an action for trespass. On November 9, 2011, Glacier Golf and Glacier Club filed a motion for summary disposition. After hearing oral argument, the trial court granted the motion and dismissed all of Wells Venture's claims. The trial court also denied Wells Venture's motion for reconsideration.

Wells Venture argues that the trial court erred by granting summary disposition on its trespass claim because it was time-barred. We agree. We review de novo the trial court's decision on a motion for summary disposition and whether an action is barred by the statute of limitations. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009).

The statute of limitations for a trespass claim is three years. MCL 600.5805; *Froling Trust*, 283 Mich App at 279. Specifically, MCL 600.5805(1) provides that "[a] person shall not bring or maintain an action to recover damages for injuries to . . . property unless, after the claim first accrued to the plaintiff . . ., the action is commenced within the periods of time prescribed by this section." MCL 600.5805(10) further provides that "the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for . . . injury to . . . property." MCL 600.5827, the accrual statute, provides that "the period of limitations runs from the time the claim accrues," which is "the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827; see also *Froling Trust*, 283 Mich App at 289. In other words, the cause of action accrues when the last conduct giving rise to the claim and the first injury corresponding to the last conduct have occurred. *Id*. at 290. Finally, in Michigan the continuing wrongs doctrine[1] and the discovery rule[2] have been abolished. *Id*. at 286-288.

[1] Under the continuing wrongs doctrine, if a trespass was of a "continuing nature," then the limitations period would not begin to run until the "continuing wrong" was abated. *Froling Trust*, 283 Mich App at 280.

[2] Under the discovery rule, the statute of limitations would be tolled if "a plaintiff could not have reasonably discovered the elements of a cause of action within the limitations period." *Id.* at 286.

In this case, the last wrongful conduct appears to have occurred in 2007 when the detention pond and the drainage system were first installed. Nothing on the record indicates that any subsequent wrongful conduct occurred. Thus, for purposes of the limitations argument, the last wrong occurred in 2007. However, the parties disagree on when the first subsequent injury occurred, i.e., the first injury after the last wrongful conduct. Wells Venture asserts that it occurred in 2010, after it discovered the existence of the detention pond and the easement and after the redemption period for the forfeited land contract expired. Defendants asserted that it occurred in 2007 because at that time Wells Venture's legal title interest in the property would have been injured.

"[U]nder a land contract, although the vendor retains legal title until the contractual obligations have been fulfilled, the vendee is given equitable title, and that equitable title is a present interest in realty that may be sold, devised, or encumbered." *Graves v American Acceptance Mtg Corp* (*On Rehearing*), 469 Mich 608, 614; 677 NW2d 829 (2004). "That legal title remains in the vendor until full performance of all contractual obligations . . . does not negate the fact that the vendee has already purchased the property." *Id*. at 616. "The vendor's legal title . . . is only a trust coupled with an interest by way of security for a debt . . . . It represents but an ordinary money debt, secured by the contract." *Id*. at 616-617 (quotation marks and citations omitted). The vendor's interest in the property is personalty. *Graves*, 469 Mich at 615, citing *Bowen v Lansing*, 129 Mich 117, 120; 88 NW2d 384 (1901).[3] If the vendor dies, the security represented by the land contract becomes part of the personal assets of the vendor's estate. *Graves*, 469 Mich at 615-616. In contrast, the vendee's interest is a present interest in realty and upon the death of the vendee, it will descend to the vendee's heirs. *Graves*, 469 Mich at 615.

In this case, Wells Venture held the legal title to the property in trust for Golf Holdings. Thus, at the time the detention pond was constructed and the easement was created, Wells Venture's interest in the property was solely an interest in personalty, not realty. The trespass, on the other hand, was something that allegedly happened to the real estate, i.e., the interest that Golf Holdings retained in the property. Further, as a practical matter, even if someone trespassed on the vendee's property, the vendor would still be entitled to the full purchase price because it was holding the legal title in trust as security for the vendee's monetary debt. Therefore, until Wells Venture regained the equitable title, its interest in the realty could not have been injured because it had no interest in the realty. Accordingly, the first subsequent injury occurred, at the earliest, in 2009, after the judgment of possession after land contract forfeiture was entered against Golf Holdings. Thus, at the time the verified complaint was filed in 2011, the three-year limitations period had yet to expire. Accordingly, the trial court erred in granting summary disposition on the grounds that the trespass claim was time-barred.

[3] The land contract mortgage act, MCL 565.356 *et seq*., governs mortgages of land contract vendor's interests and land contract vendee's interests. Accordingly, even though the vendor's interest is considered personalty, *Bowen*, 129 Mich at 120, it can be mortgaged as realty. MCL 565.357.

The only remaining question, then, is whether there was a trespass on the property. "In Michigan, recovery for trespass to land 'is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession.' " *Terlecki v Stewart*, 278 Mich App 644, 654; 754 NW2d 899 (2008), quoting *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). Accordingly, where there is a valid easement, there can be no trespass. In this case, the trial court declined to address Wells Venture's trespass claim, "[g]iven Wells Venture's tacit if not actual consent to or approval of the detention pond." For this same reason, the trial court also dismissed Wells Venture's action to quiet title and declaratory relief. Thus, to properly address whether the trial court erred by granting summary disposition to defendants on all of Wells Venture's claims, requires us to address whether the easement purportedly granted by Golf Holdings to Glacier Club was valid.

"An easement may be created by express grant, by reservation or exception, or by covenant or agreement." *Heydon v MediaOne*, 275 Mich App 267, 270; 739 NW2d 373 (2007) (quotation marks and citations omitted). An easement may also be acquired by prescription, resulting from the use of another's property that is open, notorious, adverse, and continuous for 15 years. *Id.* at 270-271. However, this Court is unable to find any legal authority that an easement can be created by actually or tacitly consenting. While an easement may be created by an agreement, it is still "an interest in land that is subject to the statute of frauds."[4] *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). In fact, in *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002), our Supreme Court stated, "Although one can grant an express, irrevocable easement, it must be evidenced by a writing manifesting a clear intent to create an interest in the land." The Court stated that a permanent interest in the use of land cannot be based on an alleged oral promise, or estoppel alone. *Id.* at 663-664. Additionally, in order to "transfer an interest in property, all parties possessing an interest in the subject property must sign the document." *Zaher v Miotke*, 300 Mich App 132, 141; 832 NW2d 266 (2013).

We conclude that it was error for the trial court to effectively create an easement based on actual or tacit consent, which is essentially nothing more than an oral promise. Rather, an easement must be evidenced by "a writing manifesting a clear intent to create an interest in land." *Kitchen*, 465 Mich at 661. And based on this record, it appears that a question of fact exists as to whether there was "a writing manifesting a clear intent to create an interest in land." *Id.* Although the record contains a "Declaration of Easements," the declaration does not include

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[4] The statute of frauds provides:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing. [MCL 566.106.]

a date or signatures of the parties. Rather, at first glance, it appears to be nothing more than a proposed easement that was never executed by the parties. A representative of Glacier Club claimed in an affidavit that an easement existed, but he did not indicate whether it was signed or unsigned. In a deposition taken two years later, that same representative stated that he did not know if he had signed the declaration. Because there is a genuine issue of fact whether the easement satisfied the statute of frauds, we conclude that the trial court erred by deciding this issue summarily. Therefore, we reverse the trial court's order granting summary disposition to defendants and remand for further proceedings.[5]

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

[5] Wells Venture argues that pursuant to *Kraushaar v Bunny Run Realty Co*, 298 Mich 233; 298 NW2d 514 (1941) and *Stark v Robar*, 339 Mich 145; 63 NW2d 606 (1954), if a land contract vendee involuntarily forfeits his or her interest in the property, any rights that the vendee granted to third parties automatically vanish. If true the easement that Golf Holdings (the vendee) granted to Glacier Club (a third party) would have vanished after Wells Venture (the vendor) regained possession of the property via an involuntary forfeiture.