2015 IL App (3d) 130841-U

Order filed February 10, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

WEE-MA-TUK HILLS, INC.,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
Plaintiff-Appellee,	)	Fulton County, Illinois.
	)	
v.	)	
	)	
LARRY A. NELSON and DIANE E. NELSON,	)	
	)	
Defendants-Appellants.	)	
_____	)	Appeal No. 3-13-0841
	)	Circuit No. 12-CH-60
LARRY A. NELSON and DIANE E. NELSON,	)	
	)	
Counterplaintiffs-Appellants,	)	
	)	
v.	)	
	)	
WEE-MA-TUK HILLS, INC.,	)	
	)	Honorable Steven R. Bordner,
Counterdefendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendants alleged sufficient facts in their counterclaim to survive plaintiff's section 2-615 (735 ILCS 5/2-615 (West 2013)) motion to dismiss. Reversed and remanded.

¶ 2 Defendants-counterplaintiffs, Larry and Diane Nelson (the Nelsons), purchased two lots located in a subdivision built and owned by plaintiff, Wee-Ma-Tuk Hills, Inc. (Wee-Ma-Tuk). Wee-Ma-Tuk owned various outlots located within the subdivision, which the Nelsons used to access numerous lakes. Wee-Ma-Tuk sued the Nelsons for trespass and to quiet title. The Nelsons filed a counterclaim, alleging that they held an implied easement over the outlots. The court granted Wee-Ma-Tuk's motion to dismiss the Nelsons' counterclaim, finding that the Nelsons' use of the outlots was permissive and Wee-Ma-Tuk terminated such use.

¶ 3 The Nelsons appeal, claiming that the court erred by: (1) granting the motion to dismiss; and (2) considering facts outside of the complaint.

¶ 4 For the following reasons, we reverse and remand the matter for further proceedings.

¶ 5 BACKGROUND

¶ 6 The Nelsons purchased two lots in a subdivision, which Wee-Ma-Tuk developed and owned. At the time of purchase, Wee-Ma-Tuk provided the Nelsons with documents containing general information for lot owners. The information included a representation that outlots are available on each lake for the purpose of providing access to the lakes for all landowners and members. The Nelsons used the outlots to access the various lakes located within the subdivision and to store personal belongings.

¶ 7 Wee-Ma-Tuk later decided to sell the outlots. Wee-Ma-Tuk filed a quiet title and trespass action against the Nelsons. The Nelsons filed an answer and two counterclaims, alleging promissory estoppel and consumer fraud. The Nelsons alleged that when they purchased their lots, Wee-Ma-Tuk promised them that Wee-Ma-Tuk reserved the outlots to provide lot owners access to the lakes and that such outlots would always remain open.

¶ 8 The Nelsons filed a motion to amend the counterclaims, which the court granted. The Nelsons added a third counterclaim alleging easement by implication. Subsequently, the Nelsons voluntarily dismissed counterclaim one and two, relating to promissory estoppel and consumer fraud; the court dismissed those counterclaims without prejudice. Wee-Ma-Tuk filed a motion to dismiss the Nelsons' third counterclaim regarding the easement by implication. After a hearing, the court dismissed the Nelsons' counterclaim pursuant to section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2013)), finding that the Nelsons failed to allege sufficient facts to state a cause of action. The court found that the claimed easement was a license. The court also found that the Nelsons' use of the license was permissive; Wee-Ma-Tuk terminated such permissive use. The court's order dismissing the counterclaim contained language pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 9 The Nelsons appeal.

¶ 10 ANALYSIS

¶ 11 The Nelsons argue that the trial court erred in granting Wee-Ma-Tuk's motion to dismiss. Specifically, the Nelsons claim that they pled sufficient facts to state a cause of action for an easement by implication.

¶ 12 We review *de novo* an order granting a motion pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2013)). *Majca v. Beekil*, 183 Ill. 2d 407, 416 (1998) (citing *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997)). A reviewing court must determine whether the allegations of the complaint, when viewed in the light most favorable to the nonmoving party, are sufficient to state a cause of action upon which relief can be granted. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 382 (2004). "[W]e assume the truth of all well-pleaded factual allegations in the complaint [citation]." *Majca*, 183 Ill. 2d at 416. Here, we must determine

whether the allegations contained in the Nelsons' counterclaim are sufficient to state a cause of action.

¶ 13 There are two types of implied easements: (1) easement by necessity; and (2) easement implied from preexisting use. *Emanuel v. Hernandez*, 313 Ill. App. 3d 192, 196 (citing *Granite Properties Ltd. Partnership v. Manns*, 117 Ill. 2d 425, 435 (1987)). The record is clear that the Nelsons are not arguing that they are entitled to an easement by necessity. A court will imply an easement from prior existing use if the party establishes the following: (1) common ownership of the dominant and servient estate and a subsequent conveyance or transfer separating that ownership; (2) the common owner used part of the united parcel for the benefit of another part and use was apparent and obvious, continuous and permanent; and (3) the claimed easement is necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor or transferor. *Gacki v. Bartels*, 369 Ill. App. 3d 284, 290 (2006) (citing *Deem v. Cheeseman*, 113 Ill. App. 3d 876, 882 (1983)).

¶ 14 The Nelsons' alleged, *inter alia*, the following facts:

> "3. The counter-defendant, Wee Ma Tuk, Inc., at one time, owned all of the real estate known as Wee Ma Tuk Hills Subdivision, Sections 1, 2 and 3.
>
> 4. Over the course of several years, Wee Ma Tuk Hills developed the subdivisions and sold off lots in the subdivisions.
>
> 5. During the course of the development, the counter-defendants set aside outlots which they intended to be used by the owner of lots to access lakes.

6. The counter-plaintiffs purchased two lots from the counter-defendants over the course of time.

* * *

9. The subdivisions of Wee Ma Tuk Hills Section 1, 2 and 3 contained numerous outlots at the time of the development of the properties.

10. When the counter-plaintiffs purchased their lots, they were specifically told that the outlots in the subdivision were reserved to provide access to the lakes, for people who did not own lots on those lakes and would always remain open.

11. They were given hand-outs in which they were told this.

* * *

16. The counter-plaintiffs will be unable to access the lakes, other than the lake their current home is on, unless outlots are left available, or an easement is provided across outlots, to allow them to access the lakes.

17. In addition, the counter-plaintiffs' second tier lot will be significantly reduced in value because it will have no access to any lakes, of any kind.

18. It was the intent of the original owners of Wee Ma Tuk Hills to allow lake access via the outlots as exhibited on Exhibits B, C, and D.

19. It is convenient for the Nelsons and owners of all lots that the easements across outlots remain to allow access to the various lakes in the Wee Ma Tuk Hills Subdivision.

20. It is convenient to the owners of second tier lots that they have access to the lakes and the easements across the outlots."

¶ 15 Wee-Ma-Tuk does not dispute the presence of the first two requirements for an implied easement from prior existing use. However, Wee-Ma-Tuk argues that the facts alleged do not establish that the use of the outlots is necessary and beneficial to the enjoyment of the Nelsons' lots.

¶ 16 A claimed easement need not arise out of real necessity; it is sufficient if the easement is highly convenient and beneficial. *Cosmopolitan National Bank of Chicago v. Chicago Title & Trust Co.*, 7 Ill. 2d 471, 477 (1955); *Gilbert v. Chicago Title & Trust Co.*, 7 Ill. 2d 496, 499-500 (1955). Moreover, our supreme court held that the more pronounced a continuous and apparent prior use is, the test of necessity becomes one of reasonable necessity; a use is reasonably necessary when it is reasonably convenient to the use of the benefited land. *Granite Properties*, 117 Ill. 2d at 440.

¶ 17 For the following reasons, we find that the Nelsons set forth sufficient facts to survive Wee-Ma-Tuk's section 2-615 motion. As stated above, the Nelsons alleged that it is convenient to use the outlots to access the lakes located within the subdivision. Moreover, the Nelsons alleged that if Wee-Ma-Tuk denied access to the outlots, the Nelsons would not have access to any lake from their second lot; thus, access to the outlots is necessary to use the lakes located within the subdivision. The Nelsons further alleged that the use of the outlots to access the lakes increases the value of their lots.

¶ 18 The Nelsons also alleged that Wee-Ma-Tuk intended for lot owners to use the outlots for recreational use and to access various lakes located within the subdivision. Wee-Ma-Tuk developed the subdivision around many different lakes; restricting access to the outlots would prevent lot owners from using such lakes. Where an owner arranges an entire estate so that one portion derives a benefit or advantage from the other portion, of a permanent, open and visible character and then sells a portion, the purchaser takes the portion sold with all of the benefits and burdens which appear at the time of sale. *Gilbert*, 7 Ill. 2d at 499. Easements and servitudes, corresponding to the benefits and burdens existing at the time of sale, are created at the time of severance. *Id.* An implied easement is the result of the parties' intentions. *Emanuel*, 313 Ill. App. 3d at 196.

¶ 19 The Nelsons also alleged that at the time they purchased their lots, Wee-Ma-Tuk told them that the outlots in the subdivision were reserved for the purpose of providing residents with access to the lakes and would always remain open. Wee-Ma-Tuk agreed that the general information provided to lot owners concerning the lots included a statement that "[o]utlots are provided on each lake for the purpose of providing access to the lake for all land owners and members." However, Wee-Ma-Tuk argues that the language created a revocable license as opposed to an implied easement. Whether the representation constituted an implied easement or a license is a question of fact, which we do not have the power to decide. However, the same is true for the trial court when ruling on a section 2-615 motion to dismiss. We make it clear that we are not deciding whether the Nelsons proved that an implied easement existed, but merely finding that the Nelsons alleged enough facts to survive Wee-Ma-Tuk's motion to dismiss.

¶ 20 We reverse and remand this case for further proceedings.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Fulton County is reversed and the cause is remanded for further proceedings.

¶ 23 Reversed and remanded.