2013 IL App (2d) 120982-U
No. 2-12-0982
Order filed March 27, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RICHARD J. BURMEISTER and CATHERINE A. BURMEISTER, Plaintiffs and Counterdefendants, v. KENNETH L. TURNER and SUSAN TURNER, Defendants,Counterplaintiffs, and Counterdefendants-Appellants (The Village of Warren, Defendant and Counterplaintiff-Appellee).	)	Appeal from the Circuit Court of Jo Daviess County. No. 11-MR-9 Honorable William A. Kelly, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment for the Village of Warren, as there was no genuine issue of material fact that the evidence revealed a common law dedication for the property in question.

¶ 2 Plaintiffs, Richard and Catherine Burmeister, own and reside at property located at 503 Park Avenue in Warren, Illinois. Defendants, Kenneth and Susan Turner, own and reside at property

located next door, at 415 Park Avenue. A portion of York Street is located between the two properties, and the street terminates there. An 85-foot paved extension of York Street continues onto land to which defendants hold title.

¶ 3 Plaintiffs filed suit against defendants, seeking a declaration that they had acquired a portion of property belonging to defendants through adverse possession. Plaintiffs later added the Village of Warren (Village) as a party and sought a declaration that the Village owned the extension of York Street. The Village filed a counterclaim against defendants regarding the extension. The Village later filed a motion for summary judgment on their counterclaim. The trial court granted the motion, ruling that the Village had established rights to the extension through dedication and prescription. We affirm the trial court's grant of summary judgment for the Village.

¶ 4 I. BACKGROUND

¶ 5 Plaintiffs initially filed their suit for adverse possession against defendants on April 7, 2011. Plaintiffs filed an amended complaint on August 4, 2011, which added the Village as a party. The amended complaint additionally requested a declaration that the Village owned the extension of York Street.

¶ 6 On October 4, 2011, the Village filed a counterclaim against defendants, alleging as follows. "Since on or about 1984," the Village improved an approximately 85-foot long westerly extension of York Road by using motor fuel and general revenue tax funds to seal coat the road surface. Since that time, the Village had continuously maintained the extension by filling potholes and cracks and removing snow and ice from it, along with the rest of York Street. The public had open, free, and unrestricted use of the entire length of York Street during this time, including the 85-foot hard

surface extension. The public's use was continuous and uninterrupted. The Village sought a declaration that the extension was a public highway of the Village by prescription.

¶ 7 On November 1, 2011, defendants filed a counterclaim against plaintiffs for trespass and negligence, alleging that a balcony and stairs plaintiffs had added to their barn/garage encroached on defendants' property by about two feet.

¶ 8 The Village filed a motion for summary judgment on February 21, 2012. Plaintiffs joined in the Village's motion for summary judgment on February 24, 2012. Plaintiffs also moved for summary judgment regarding the land for which they were claiming adverse possession.

¶ 9 The trial court denied the Village's motion on May 1, 2012.

¶ 10 The Village filed a second motion for summary judgment on May 24, 2012; the trial court's subsequent grant of the motion forms the basis of this appeal. In the motion, the Village agreed that defendants had deeds indicating that they were the owners of the 85-foot extension of York Street. However, the Village again argued that it had acquired the extension by prescription. The Village argued that it had seal-coated the extension, continuously maintained and improved the surface, and had removed snow and ice from the surface for more than 15 years. The Village argued that the entire length of York Street, including the extension, had been, and continued to be, open for public travel and was considered a street or public way under section 2-202 of the Illinois Highway Code (Highway Code) (605 ILCS 5/2-202 (West 2010)).

¶ 11 The Village attached the affidavit of John McCool, who stated at follows. He was 59 years old and had lived in Warren his entire life. He was familiar with York Street. He had been continuously employed by the Village since 1976, currently as the superintendent of the sewer department. His duties over his entire career included working to maintain the streets and the

removal of snow and ice from all of the Village's streets. He had personal knowledge that "for some time prior to 1984," the Village provided the materials and paid for the labor to improve and maintain York Street, and those funds came from tax dollars. Village trucks, equipment, sand, and salt had been provided to remove snow and ice from the length of York Street, including the 85-foot extension. McCool had been a guest of plaintiffs on numerous occasions and also a guest of Roger Teuscher, the predecessor in title of defendants' property. He used York Street to access the residences and had parked his vehicle on the side of York Street. He had personal knowledge that the public has had and continued to have full and unrestricted pedestrian and vehicular use of the entire length of York Street. He had no knowledge of anyone ever attempting to obstruct the public's use of any portion of York Street.

¶ 12 The Village alternatively argued that it obtained ownership of the extension through dedication. The Village noted that the August 25, 2001, deed that transferred ownership of the property from Roger Teuscher to defendants included the statement: "[A]lso subject to certain conditions for a street mentioned in a certain Warranty Deed to said premises made by Alfred Jones and wife to Julia Platt and dated August 8, 1874, and recorded in Book 38 of Deeds at page 545 of the records of Jo Daviess County."

¶ 13 The Village noted that the August 8, 1874, deed stated in relevant part:

> "Block number Three (3) and a strip of Land five (5) rods wide off the North side of Block One (1) running West as far as the West line of Block Three (3) and *a strip fifty (50) feet wide commencing at the termination of the Street now laid out on the North End* of Block Six (6) between Blocks Three (3) and Six (6) *and running and extending One Hundred and Eighty (180) feet West* on the South line of Block Three (3), *the last mentioned*

strip to be used as a street for the benefit of the property on the North and South sides of said street. All of the above-described land being in A.M. Jones Third (3d) Addition to Warren, Illinois." (Emphases added.)

The Village maintained that the disputed extension of York Street was contained within the boundaries of the strip reserved for street purposes for the benefit of properties to the north and south of the strip. The Village attached to the motion numerous copies of deeds in the chain of title for the property dating back more than 40 years, all of which also contained language referring to a strip of land to be used for street purposes.

¶ 14 In their response to the Village's second motion for summary judgment, defendants argued that the Village had not established a highway by prescription because McCool's affidavit was insufficient, in that it consisted of conclusions rather than facts admissible into evidence. They further argued that his claim that he was a guest when he parked his car on the street was insufficient to constitute a claim of right in the public generally to the disputed extension. Defendants noted that the Village admitted that defendants and the Teuschers had paid all real estate taxes on the property from 1972 to date; defendants argued that evidence of payment of taxes on a roadway was inconsistent with a claim of right in the public.

¶ 15 On the issue of dedication, defendants argued as follows. Nothing in their chain of title showed the land in question to be donated or granted to the public. Further, the judicially-admitted plat of the Village showed York Street to be only 125 feet long, and it did not show that land claimed by the Village as Village property. The deed did not create a covenant running with the land. Even if, *arguendo*, the 1874 deed could be construed to have created an easement, such easement was extinguished through unity of title. The Village's counterclaim was also barred: (1) by section 13-

109 of the Code of Civil Procedure (Code) (735 ILCS 5/13-109 (West 2010)), because defendants were current title holders of the land and had paid taxes on it; and (2) by *laches*, because it would be inequitable to allow the Village to seek title to the land where it had not done so for 138 years.

¶ 16 The trial court granted summary judgment for the Village on July 11, 2012. We summarize its findings. The subject of the controversy, an 85-foot by 50-foot westerly extension of York Street, was a public way of the Village. The 1874 deed, between Alfred M. Jones and Emeline A. Jones as grantors and Julia E. Platt as grantee, provided that a strip of land 50 feet wide and extending 180 feet was reserved or dedicated for use as a street for the benefit of the properties on the north and south sides of the street. The disputed 85-foot westerly extension of York Street was on property included within the 180-foot strip of land reserved in the 1874 deed. Defendants' "predecessors in title referred to the reservation and dedication of the 50 foot by 180 foot strip for street purposes from 1874 until, and including, reference in the deed in which [defendants] took title from Roger Teuscher in 2001." Additionally, under section 2-202 of the Highway Code, "the evidence presented established a public way along the entire length of York Street as improved." The 85-foot extension of York Street was established by way of dedication, and the extension had also been improved, maintained, and freely used by the public for a period exceeding 20 years.

¶ 17 On August 29, 2012, the trial court entered an order stating that given its grant of summary judgment for the Village, defendants' counterclaims against plaintiffs for trespass, negligence, and encroachment were dismissed with prejudice as moot. The order further stated that plaintiffs and defendants had settled the remaining portion of the case, wherein plaintiffs had claimed adverse possession of a portion of defendants' land. The trial court therefore dismissed plaintiffs' first amended complaint with prejudice.

¶ 18 Defendants thereafter timely appealed the grant of summary judgment for the Village and the corresponding dismissal of defendants' counterclaims against plaintiffs.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendants contest the trial court's grant of summary judgment for the Village. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010). A genuine issue of material fact exists where the material facts are disputed or reasonable people could draw different inferences from undisputed facts. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. We review *de novo* a grant of summary judgment. *Lazenby*, 236 Ill. 2d at 93.

¶ 21 Under section 2-202 of the Highway Code, a highway may be created by statute, dedication, or prescription. 602 ILCS 5/2-202 (West 2010); *City of Des Plaines v. Redella*, 365 Ill. App. 3d 68, 73 (2006). Defendants argue that the Village was not entitled to summary judgment on the basis that it had acquired the 85-foot extension by either prescription or dedication. As we find the issue of dedication dispositive, we turn to that issue.

¶ 22 The dedication of a road can occur through either statutory dedication or common law dedication. *Limestone Development Corp. v. Village of Lemont*, 284 Ill. App. 3d 848, 858 (1996). Statutory dedication occurs when: (1) the property owner files or records a plat which has portions of the premises marked or noted as donated or granted to the public, and (2) the public entity accepts the dedication. *Bigelow v. City of Rolling Meadows*, 372 Ill. App. 3d 60, 64 (2007). In this case,

there was no plat marking the parcel in question as donated or granted to the public, so there was no statutory dedication.

¶ 23 Where statutory dedication requirements are not met, the facts may still reveal a common-law dedication. *Bigelow*, 372 Ill. App. 3d at 67. In such cases, the fee remains in the dedicator, subject to an easement for the public's benefit. *Id.* For a common law dedication to be effective, there must be unequivocal evidence of (1) an intent to dedicate the property for public use and (2) acceptance by the public. *Id.*

¶ 24 The intent to dedicate can be evinced from any acts by the dedicator. *Village of Joppa v. Chicago & Eastern Illinois R.R. Co.*, 51 Ill. App. 3d 674, 679 (1977). In *Kemper v. Campbell*, 27 Ill. 2d 376, 379 (1963), our supreme court held that language in a deed stating that certain land was " 'to be used for street' " plainly expressed an intent to dedicate the land to the public. Similarly, in *City of Greenville v. File*, 130 Ill. App. 2d 878, 880 (1970), the deed described 50 feet of land to be " 'for road purposes only' " and prohibited building on that land. The appellate court noted that while the restriction in the deed did not state that the road was to be public, it also did not state that it was to be private. *Id.* at 882. The court reasoned that the restriction of the tract for road purposes and the prohibition of building on it made sense only if the grantor intended that the tract be preserved as a public way.

¶ 25 Here, the 1874 deed transferring ownership of defendants' land from Alfred Jones and his wife to Julia Platt dedicated certain land, which the evidence showed to include the 85-foot extension, "to be used as a street for the benefit of the property on the North and South sides of said street." This deed provision was continuously noted throughout subsequent deeds, including the deed transferring the land from Teuscher to defendants. Under *Kemper*, such language reserving the

land for street purposes presumptively shows an intent to dedicate the land to the public. Otherwise, as the *File* court reasoned, there would be no purpose in restricting the use of the land.

¶ 26 Defendants cite *Reiman v. Kale*, 83 Ill. App. 3d 773 (1980). There, the road in question gave the subdivision lot owners access to a private landing field and runways adjacent to their properties. *Id.* at 775. The court stated that factors in the case which could indicate an intent to donate the land to the public consisted of the nature of the property (because "roads are generally considered public") and evidence of acquiescence of the lot owners to the township's maintenance of the road. *Id.* at 777. The court also listed the factors showing lack of donative intent, which were: lot lines on the plat running to the center of the street; the owners' payment of taxes on the entire lot, including the portions to the center of the street; and covenants and restrictions relating to the use of the airport that implicitly conflicted with an intent to dedicate to the public, as some lot owners had to use the road to access the runways, which would be extremely difficult if the street was dedicated to the public. *Id.* The court concluded, "Because of the specific facts in this case, including the placement of the lot lines, the payment of taxes, and the covenants supporting the use of the airport, we find that there is insufficient evidence of donative intent to effect a common law dedication." *Id.*

¶ 27 *Reiman* is readily distinguishable from this case, as it involved a subdivision, and subdivisions necessarily require the designation of streets so that lot owners may access their properties. In the instant case, in contrast, the deed would not have to designate certain land for a private street, as the property owner could otherwise choose where to place it. Moreover, *Reiman* involved a plat showing lot lines to the center of the street, and covenants and restrictions relating to the use of the subdivision airport showed a conflicting intent. These factors are not present here. Rather, this situation is akin to *Village of Joppa* and *Kemper*, where the courts construed language

in deeds reserving land for street or road purposes as showing a clear intent to donate the land to the public.

¶ 28 We recognize that *Reiman* also cited the payment of taxes on property as a factor in finding a lack of donative intent. Defendants note that the Village admitted that taxes had been paid on their entire parcel of land from at least 1972 on. That a road is assessed and taxed as private property does not compel a finding that a road is not a public highway, but it is a factor to be considered. *Redella*, 365 Ill. App. 3d at 77. This case is distinguishable from *Reiman* because there the payment of taxes was one of many factors showing a lack of intent to dedicate. Where land has been dedicated for a public highway, the payment of taxes on the land is "under most circumstances, a matter of but small probative force; and *** the fact that it has been taxed will not prevent the public from claiming the use of such land for a public road." *City of Ottawa v. Yentzer*, 160 Ill. 509, 522 (1896). Given the clear evidence of intent to dedicate in the 1874 deed, the payment of taxes on the land does not create a genuine issue of material fact on the issue of intent to dedicate.

¶ 29 As stated, for a common law dedication to be effective there must be unequivocal evidence of both an intent to dedicate the property for public use and acceptance by the public. *Bigelow*, 372 Ill. App. 3d at 67. Defendants argue that the judicially-admitted plat of the Village shows York Street to be only 125 feet long, and it does not show the land claimed by the Village as Village property. We infer from this argument that defendants are taking the position that because the Village does not claim the extension on its plat, it failed to present clear evidence of acceptance.

¶ 30 Acceptance of a dedication may be shown by any act with respect to the property at issue that clearly indicates an assumption of jurisdiction and dominion over it by the public authorities. *Township of Jubilee v. State*, 405 Ill. App. 3d 489, 498 (2010). Acceptance may be proved by

evidence of: (1) direct municipal action, like the municipality's filing suit to establish dedication; (2) the municipality's possession or maintenance of the property; or (3) public use of the road for a substantial time. *General Auto Service Station v. Maniatis*, 328 Ill. App. 3d 537, 547 (2002). Where a dedication is very beneficial, very convenient, or necessary to the public, an acceptance of a dedication may be implied from slight circumstances. *Id.* Blind alleys or cul-de-sacs are considered to be of little public benefit, so much stronger evidence of acceptance is usually required in such cases. *Id.* at 548. As the 85-foot extension here similarly terminates in a "dead end," more than slight evidence of acceptance is required.

¶ 31 Here, the Village supplied John McCool's affidavit as evidence of acceptance. McCool stated that: he had been continuously employed by the Village since 1976 and was currently the superintendent of the sewer department; his duties had included working to maintain the streets and the removal of snow and ice from all of the Village's streets; he had personal knowledge that for some time prior to 1984, the Village provided the materials and paid for the labor to improve and maintain York Street, and those funds came from tax dollars; and the Village had removed snow and ice from the length of York Street, including the 85-foot extension.

¶ 32 Defendants argue that McCool's affidavit does not comply with Illinois Supreme Court Rule 191 (eff. July 1, 2002). Rule 191(a) provides the requirements of affidavits in support of or in opposition to a motion for summary judgment. Specifically, such affidavits must be made on the personal knowledge of the affiant; set forth the facts upon which the claim, counterclaim, or defense is based; shall have attached sworn or certified copies of all papers on which the affiant relies; shall consist of facts admissible in evidence rather than conclusions; and shall affirmatively show that the affiant could testify competently thereto. Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

¶ 33 Defendants argue that McCool's affidavit does not set forth with particularity the facts upon which the Village's claim is based; does not have attached sworn or certified copies of all papers on which McCool relied; and consists of conclusions, not facts admissible into evidence. Relevant to the issue before us, defendants argue that the affidavit does not state specific facts showing how McCool knew the above-recited facts regarding Village maintenance on the extension. Defendants further argue that the affidavit fails to state specific facts showing when and by whom the actions were performed. Defendants maintain that McCool's discovery deposition demonstrates McCool could not recall if he was actually on York street when it was sealcoated, nor what year it was, and that the only municipal services performed on the extension were picking up garbage and plowing. Defendants also argue that a judicially-admitted map shows that the entire length of York Street, from the beginning of the street to the end, would be around 900 feet, while a deposition exhibit showing a municipal estimate of maintenance costs for sealcoating lists the length of York Street from beginning to "END" as 750 feet.

¶ 34 Rule 191 is satisfied if, looking at the affidavit as a whole, it appears that the affidavit is based on the affiant's personal knowledge and there is a reasonable inference that the affiant could competently testify to its contents at trial. *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009). Here, McCool stated that he was continuously employed by the Village since 1976 and was currently the superintendent of the sewer department. He also stated that his duties had included maintaining and plowing the streets. McCool's position and duties provided support for knowledge regarding Village plowing and street maintenance. *Cf. F.H. Paschen/S.N. Nielsen, Inc. v. Burnham Station, LLC*, 372 Ill. App. 3d 89, 93 (2007) (where the affiant stated that he was the president of a company, it was a reasonable inference that as president, he had knowledge of his company's

transactions, which supported his statements regarding with which parties the company had contracted).

¶ 35 While defendants argue that McCool did not know when the street was sealcoated, McCool testified that it occurred before defendants purchased the residence. Defendants also point to an inconsistency regarding the length of York Street, but the very document they rely on, which is an "estimate" to begin with, indicates that the street was to be sealcoated from its beginning to "END," which is not inconsistent with the inclusion of the extension. Even otherwise, defendants do not dispute McCool's statement that the Village had removed snow and ice from the length of York Street, including the 85-foot extension. In fact, McCool testified in his deposition that he personally plowed that area for the Village from "at least" 1976 to 1994. Accordingly, the Village provided clear evidence of its maintenance of the extension, demonstrating acceptance of the dedication.

¶ 36 Defendants argue that even if the 1874 deed could be construed to have created an easement, such easement would have been extinguished because the deed conveyed one parcel of land to one grantee. Defendants cite *Village of Lake Bluff v. Dalitsch*, 415 Ill. 476, 484 (1953), where our supreme court stated where there is a unity of title and possession of the dominant and servient estates in the same owner, it extinguishes the servient estate, as no one may have an easement in his own land. This principle is inapplicable here, as the easement was granted to the public, rather than the lot owner.

¶ 37 Defendants additionally contend, in a very brief argument, that the 1874 deed did not create a covenant running with the land. Defendants cite *Nassau Terrace Condominium Ass'n, Inc.*, 182 Ill. App. 3d 221, 224 (1989). There, the court listed three criteria for a covenant to run with the land: (1) the covenantor and covenantee must have intended that the covenant run with the land; (2) the

covenant must touch and concern the land; and (3) there must be privity of estate between the party claiming the benefit of the covenant and the party resting under the burden of the covenant. *Id.*

¶ 38 Defendants argue that the Village has no right, title, interest, or claim upon the land described in the 1874 deed. To the contrary, as discussed, the deed contained a dedication of a street to the public. Defendants also argue that there is no privity of estate between the Village and anyone in defendants' chain of title from 1874 to date. However, covenants creating easements are generally considered to run with the land so as to bind subsequent owners. *Parrish v. City of Carbondale*, 61 Ill. App. 3d 500, 504 (1978). Moreover, where a landowner enters a covenant concerning the use of the land, such as subjecting it to easements, and the land is later conveyed or sold to someone with actual or constructive notice of the covenant, he will be restrained in equity from violating it. *Willoughby v. Lawrence*, 116 Ill. 11, 22 (1886). Here, every deed from 1874 to defendants' deed contained the condition regarding the street, so the condition was never extinguished.

¶ 39 Defendants next argue that the Village's counterclaim is barred by section 13-109 of the Code. That section states that a person in possession of land for seven years, who has color of title in good faith, and who pays all assessed taxes during such time, shall be adjudged to be the legal owner of such lands. 735 ILCS 5/13-109 (West 2010). That section is inapplicable here, as it is undisputed that defendants have legal title to the land in question. As discussed, where there is a common law dedication, the fee remains in the dedicator, subject to an easement for the public's benefit. *Bigelow*, 372 Ill. App. 3d at 67.

¶ 40 Last, defendants argue that the Village's counterclaim is barred by *laches*. Defendants argue that they have paid property taxes on their land since acquiring it in 2001; that they have relied on county maps, records, their deed, property tax bills, and the Village's map to ascertain and verify

their property boundary lines; and that it would be inequitable to allow the Village to proceed to seek title to their land where the Village has not asserted any claim to it for 138 years.

¶ 41 *Laches* is an equitable doctrine that bars a litigant from asserting a claim where the litigant's unreasonable delay in raising that claim has prejudiced the other party. The doctrine is grounded in the notion that courts are reluctant to aid a party who has knowingly "slept" on his rights, to the detriment of the other party. *Wabash County v. Illinois Municipal Retirement Fund*, 408 Ill. App. 3d 924, 933 (2011). The party asserting *laches* must prove a lack of diligence by the party asserting the claim and a resulting prejudice to the party asserting the defense. *IPI Plaza, LLC v. Bean*, 2011 IL App (4th) 110244, ¶ 45.

¶ 42 Defendants do not acknowledge that there are distinct legal principles for *laches* as applied to governmental bodies. "*Laches* will not be applied to government entities absent extraordinary circumstances because the doctrine could impair the functioning of the government, which, in turn, would harm the public." *Wabash County*, 408 Ill. App. 3d at 933. Further, a *laches* defense may not be based on the inaction of government officials. *Id.* Instead, *laches* will apply only if such officials did an affirmative act that induced the other party to act, making it inequitable to allow the government entity to retract what the government officials had done. *Id.* at 934.

¶ 43 Here, defendants cite no affirmative act by the Village that caused them to act in a particular manner. Accordingly, it is clear that a *laches* defense is inapplicable to this situation. *Cf. City of Marengo v. Pollack*, 335 Ill. App. 3d 981, 989 (2002) (city's 13-year delay in enforcing ordinance limiting outdoor storage space was not barred by *laches*, even though city had inspected the property in the interim without complaint).

¶ 44 In sum, there is no genuine issue of material fact regarding an intent to dedicate the land in question to the public for street purposes and the Village's acceptance of the dedication through maintenance, thereby establishing a common law dedication. There is also no genuine issue of material fact regarding any asserted defenses. As such, the trial court properly granted summary judgment for the Village. Based on our conclusion that the evidence shows a common law dedication, we do not address the issue of whether the Village has claim to the street in question through prescription.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgment of the Jo Daviess County circuit court.

¶ 47 Affirmed.