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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-64

Filed: 5 November 2019

New Hanover County, No. 17 CVS 2128

SEA WATCH AT KURE BEACH HOMEOWNERS' ASSOCIATION, INC., Plaintiff,

v.

THOMAS FIORENTINO and wife, LEAH FIORENTINO, Defendants.

Appeal by defendants from order entered 15 May 2018 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 17 September 2019.

McAngus Goudelock & Courie, PLLC, by Luke A. Dalton, Esq. and Walt Rapp, Esq., and Marshall, Williams & Gorham, LLP, by Charles D. Meier, Esq., for plaintiff-appellee.

Lewis Brisbois Bisgaard & Smith, LLP, by Christopher Derrenbacher, and Ward & Smith, P.A., by Ryal W. Tayloe, Alex C. Dale, Mary V. Cavanagh, and Thomas S. Babel, for defendant-appellants.

YOUNG, Judge.

Where plaintiff, as a landowner, was entitled to the benefit of an easement across defendants' property, and where the scope of that easement was expanded by the developer's actions, the trial court did not err in granting summary judgment

with respect to plaintiff's claims for use of the easement. Where defendants failed to show malice in the execution and filing of a quitclaim deed, the trial court did not err in dismissing defendants' counterclaim and third-party claim for slander of title. We affirm.

I. Factual and Procedural Background

Sea Watch at Kure Beach is an ocean front residential subdivision located in New Hanover County, developed by Sea Watch, LLC (Sea Watch) and managed by the Sea Watch at Kure Beach Homeowners' Association, Inc. (plaintiff). As part of its development, plaintiff and its members enjoy an access easement, owned by Sea Watch, across one of the lots in the subdivision, Lot 6. This access easement was recorded, and a wooden walkway, deck area, bathrooms, and tiki bar (collectively, the improvements) have been constructed on it.

On 26 April 2001, John and Penelope Fongers purchased Lot 6 from Sea Watch. Subsequently, on 6 May 2011, the Fongerses conveyed Lot 6 to Thomas and Leah Fiorentino (defendants). The improvements on the easement were constructed and in use at the time of both conveyances. Defendants' deed clearly references the recorded plat and the Declaration of Restrictive Covenants.

On 24 December 2016, an attorney for defendants sent a letter to plaintiff objecting to contemplated additional improvements to the access easement. Plaintiff responded that the access easement was a common element owned by plaintiff, and

that plaintiff did not require defendants' permission to make additional improvements. Subsequently, on two separate occasions, defendant sent messages to plaintiff's board, threatening to restrict access to the access easement and improvements. Then, on 19 May 2017, defendants disabled the lock on the bathroom door at the tiki bar, wrapped the bar in yellow tape, and erected signs indicating that the tiki bar was closed. Plaintiff removed the yellow tape and sign and repaired the lock, and on 20 May 2017, defendants called 911 to seek police intervention. On 31 May 2017, Sea Watch conveyed ownership of the easement to plaintiff.

On 31 May 2017, plaintiff filed a verified complaint against defendants, seeking declaratory judgment as to ownership of the access easement, temporary, preliminary, and permanent injunction against defendants' interference in the easement, quiet title as to the easement, and damages for trespass and damage to property based on defendants' intrusion into the tiki bar area.

On 19 June 2017, defendants filed their answer and verified counterclaim and third-party claim. Defendants moved to dismiss plaintiff's complaint, alleging that plaintiff had no rights in the easement and therefore no standing, and moved to strike certain attachments to plaintiff's brief. Defendants also raised the defenses of the statute of limitations, the doctrine of laches, equitable estoppel, unclean hands, waiver, offset, and failure to mitigate. Defendants then raised claims seeking declaratory judgment and quiet title against plaintiff and its members, seeking

damages for trespass against plaintiff and its members, and alleging slander of title against plaintiff and Sea Watch. Defendants also sought preliminary and permanent injunction against plaintiff's ongoing and future use of the easement.

On 23 October 2017, plaintiff filed a reply to defendants' counterclaim, including *inter alia* a motion to dismiss for failure to state a claim, and a Rule 19 motion to dismiss defendants' counterclaims against all members of plaintiff, or alternatively to add them as parties. The trial court ultimately denied plaintiff's motion to dismiss for failure to join necessary parties.

On 27 October 2017, defendants filed a partial motion for judgment on the pleadings, specifically seeking to dismiss plaintiff's first (declaratory judgment) and third (quiet title) claims with prejudice. The trial court denied this motion.

On 19 March 2018, defendants filed a motion for summary judgment with respect to plaintiff's claims, seeking dismissal of plaintiff's action with prejudice. On 13 April 2018, plaintiff likewise filed a motion for summary judgment, seeking judgment as a matter of law with respect to all claims and counterclaims.

On 15 May 2018, the trial court entered its order on the parties' motions for summary judgment. The trial court found that the improvements were constructed prior to the Fongerses purchase of Lot 6 in 2001 or any construction on Lot 6, that marketing for the development specifically included and referenced the improvements, that the Fongerses' deed of purchase specifically referenced the

recorded maps, easements, and covenants of record, and that plaintiff has maintained the improvements since their construction. The trial court also noted that, prior to their dispute with plaintiff, defendants had acknowledged the rights of lot owners to use the improvements, had made specific requests to plaintiff for repairs to the improvements, and had acknowledged plaintiff's right to do so. The trial court found that although the term "access easement" was not defined on the recorded map, Sea Watch established the scope of the easement by constructing and marketing the improvements. The court further found that, although plaintiff was not originally the owner of the easement, the easement was reserved for plaintiff's benefit, plaintiff owns property benefited by the easement, and plaintiff is statutorily entitled to maintain its action as a representative of its members.

The trial court concluded that there was no evidence of malice, as required in defendants' counterclaim for slander of title, and that no genuine issues of material fact existed with respect to the remaining claims and counterclaims. However, the trial court noted that the improvements were permanent improvements to the land, and therefore part of the property, owned by defendants. The trial court therefore granted summary judgment in favor of plaintiff with respect to its first (declaratory judgment), second (injunction), and third (quiet title) claims. The court granted summary judgment on defendants' counterclaim regarding ownership of the improvements, as they are part of the land, but upheld plaintiff's obligation to

maintain the improvements. The trial court also held that Sea Watch's transfer of title to the easement was of no legal effect. Finally, the trial court granted summary judgment in favor of plaintiff with respect to defendants' third (trespass) and fourth (slander of title) counterclaims, dismissing them. Defendants subsequently dismissed their third-party claim against Sea Watch without prejudice. Plaintiff likewise dismissed their fourth claim (trespass).

From the trial court's summary judgment order, defendants filed timely notice of appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Summary Judgment

In their first argument, defendants contend that the trial court erred in granting summary judgment in favor of plaintiff. We disagree.

Defendants contend that the access easement was established as an easement appurtenant for the benefit of individual lot owners, not for the benefit of plaintiff, which as a homeowners' association does not personally own a lot in the development.

Defendants further contend that the Declaration, which established the plaintiff association, granted ownership interests to common elements, but not explicitly to the easement at issue. Defendants also contend that the subdivision plat conveyed an unambiguous access easement, further limiting the rights of other lot owners, and that defendants own the improvements over the easement in fee simple.

As a preliminary matter, defendants are correct that the easement is an easement appurtenant. Where lots are sold by reference to a map or plat referencing streets, lots, parks and so forth, a purchaser of a lot acquires the right to reasonable use of those streets, lots, parks and so forth, and this right is "in the nature of an easement appurtenant." *Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964). An easement appurtenant is a right of another piece of property, the dominant estate, to use the land encumbered by the easement, the servient estate. An easement appurtenant cannot exist apart from the dominant estate; it runs with the land, and is not personal to the landowner. *Brown v. Weaver-Rogers Assocs., Inc.*, 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998).

It is clear that the access easement at issue was referenced in the subdivision plat filed by Sea Watch. It is likewise clear that this easement served to benefit the other lots in the development, by offering access across Lot 6. As such, it is clear that this was an easement appurtenant, benefiting the other lots in the development. This

is made explicit in the Declaration, which states that "All easements and rights described herein are perpetual easements appurtenant[.]"

Where defendants err, however, is in their assertion that plaintiff does not own a dominant estate, and therefore lacks an interest in the easement. This is not accurate. The record reveals that, on 1 October 2001, Sea Watch did indeed convey to plaintiff "two tracts of land labeled 'private common area' as shown of maps of Sea Watch at Kure Beach[,]" constituting property within the development. As an owner "tracts of land" within the development, plaintiff was entitled to benefit from the easement. The trial court so found, specifically finding that "[t]he Plaintiff owns property which is benefited by the easement and is therefore the holder of an easement appurtenant over Lot 6[.]" We likewise hold that, because plaintiff owns a dominant estate benefited by the easement, plaintiff possesses an ownership interest in the easement.

Defendants next contend that because the easement conveyed by the plat was unambiguously an access easement, the rights of lot owners are limited solely to ingress and egress, not the construction of improvements. Defendants argue that the trial court erred in concluding that the easement was created by an ambiguous implied grant based on Sea Watch's marketing materials.

Again, there is no question that an easement was granted. At issue is the scope of the easement. It is true that the easement, by its express terms, conveyed a right

of "access," but not limited solely to ingress and egress. However, it is possible for additional conditions or benefits to be imposed upon an easement based upon other conduct. Such conduct may create an implied dedication. Our courts have long held that "[a]n implied dedication is one arising, by operation of law, from the acts of the owners. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, any form of words, oral or written." *Spaugh v. City of Charlotte*, 239 N.C. 149, 159, 79 S.E.2d 748, 756 (1954). This Court has held, for example, that "oral representations made before, during and after the sale of homes" in a development "manifested [the seller's] intent to dedicate" land for an easement. *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 163, 418 S.E.2d 841, 847 (1992). The trial court's interpretation of Sea Watch's marketing materials as creating not only a right of access, ingress and egress, but a right to construct and maintain the improvements thereon, is not inconsistent with the express grant of an "access easement" in the plat and Declaration. As such, the trial court did not err in determining that the rights of lot owners, and by extension plaintiff, included a right to construct and maintain the improvements.

Defendants further contend that they own the improvements in fee simple. Admittedly, the trial court concluded similarly, finding that "[t]here is no genuine issue of material fact [that] Defendant is entitled to judgment as a matter of law on Defendants' counterclaim for declaratory judgment on ownership of the

improvements constructed over Lot 6[,]" and granting summary judgment "in favor of the Defendant on Defendants' counterclaim regarding ownership of the improvements on the easement over Lot 6."

Defendants correctly assert that, as owners of Lot 6, they "enjoy the right to possess, use, enjoy, dispose, and exclude others from their property, including the improvements within the easement, so long as they do so consistent with the Access Easement." Indeed, our Supreme Court has held that the owner of a servient estate "may not obstruct the easement in such manner as to prevent or to interfere with its reasonable enjoyment" by the dominant estate. *Strickland v. Shew*, 261 N.C. 82, 85, 134 S.E.2d 137, 140 (1964).

Where defendants again err, however, is their misinterpretation of the scope of the easement. As we have previously discussed, the "access easement" is not merely one of ingress and egress; public representations made by Sea Watch expanded the easement to one involving use of the improvements. While defendants correctly acknowledge that they enjoy rights of ownership in the improvements, they may exercise those rights so long as they are consistent with the use and enjoyment of the easement – that is, so long as they permit other lot owners not only ingress and egress, but use of the improvements.

Moreover, plaintiff correctly raises the issue of estoppel. Quasi-estoppel arises from "a party's acquiescence or acceptance of payment or benefits, by virtue of which

that party is thereafter prevented from maintaining a position inconsistent with those acts." *Z.A. Sneeden's Sons, Inc. v. ZP No. 116, L.L.C.*, 190 N.C. App. 90, 96, 660 S.E.2d 204, 209 (2008). Defendants had enjoyed the benefit of the improvements for roughly five years, and had purchased Lot 6 when the improvements had already been in existence for roughly a decade prior. The trial court could reasonably have held, as defendants accepted the status quo of lot owners being able to access and use the improvements for a period of five years, that defendants were estopped from thereafter denying the scope of the easement. Although the trial court made no explicit determinations on this point, we recognize that it may well have factored into the court's decision.

In summary, the trial court correctly found and concluded that plaintiff, as an owner of land benefited by the easement, was entitled to rights within the easement; that Sea Watch, through its marketing materials, expanded the definition of the easement to include not only ingress and egress, but also use of the improvements; and that, although defendants owned the improvements as fixtures upon the land, they did so subject to the rights of lot owners to use the improvements. Defendants do not otherwise demonstrate any genuine issues of material fact. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of plaintiff.

IV. Dismissal

In their second argument, defendants contend that the trial court erred in dismissing their counterclaim for slander of title. We disagree.

Slander of title has four elements, those being "(1) the uttering of slanderous words in regard to the title of someone's property; (2) the falsity of the words; (3) malice; and (4) special damages." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 30, 588 S.E.2d 20, 28 (2003). To satisfy the requirement of malice, a plaintiff must show that "there was no probable cause for the defendant's belief; that he could not honestly have entertained such belief." *Cardon v. McConnell*, 120 N.C. 461, 27 S.E. 109, 109 (1897). On appeal, defendants contend that the trial court erred by concluding that they had failed to show malice.

Defendants contend that they did indeed show malice. Specifically, they point to the 31 May 2017 execution of a deed of easement, in which Sea Watch purportedly conveyed deed to the easement to plaintiff. Defendants argued, and the trial court ultimately concluded, that this deed was void, in that "[a]t the time of the execution of the deed of easement from Sea Watch, LLC to Plaintiff on May 31, 2017, Sea Watch, LLC had no further interest or right in Lot 6 or the easement over Lot 6 which could be granted or conveyed." Defendants now contend that, by allowing this false deed to be filed, plaintiff created a cloud over defendants' title, and that this action constituted malice.

Defendants' interpretation of slander of title in this case is, however, erroneous. While defendants correctly recognize that slander of title requires malice, they fail to recognize that this element must be construed in light of the rest of the elements. Specifically, defendants had the burden of showing that plaintiff or Sea Watch uttered "slanderous words" in reference to defendants' property, which were false. Defendants made no contentions with regard to intent, but rather alleged that plaintiff "fully approved of the drafting and filing" of the 31 May 2017 deed by Sea Watch, and that Sea Watch knew that it "had no right, title, or interest" in Lot 6 or the easement.

The deed, present in the record on appeal, is a quitclaim deed, in which Sea Watch makes "no representation or warranty as to title to the property hereinabove described." The deed specifically conveys to plaintiff "all remaining right and interest, if any, that [Sea Watch] may have in the Access Easement referred to herein[.]"

Even assuming *arguendo* that the filing of a deed may constitute "slanderous words," we can find no falsehood present in the deed. Sea Watch does not contend that it in fact possesses rights in the easement or Lot 6, nor does plaintiff make any contentions at all. Nor can the mere assertion of the deed, absent more, show malice. *See Cardon*, 120 N.C. at 461, 27 S.E.2d at 109 (holding that "[i]f the defendant should assert title to the property in question, or to some interest therein, which turned out

to be unfounded, malice will not be presumed from such a fact, because malice must be shown as a substantive fact"). Indeed, our Supreme Court has long held that a quitclaim deed makes no assertion whatsoever. Specifically, "[n]othing in respect to the maker's interest is asserted. The very terms of the deed puts the purchaser upon notice that he is buying a doubtful title." *Beaufort Cty. Lumber Co. v. Price*, 144 N.C. 50, 56 S.E. 684, 685 (1907).

Moreover, among the relatively few cases of slander of title recognized in this state, a common thread can be found: that the slander of title interfered with a sale of the property or otherwise caused specific monetary harm. For example, in the seminal case of *Cardon v. McConnell*, our Supreme Court held that, "unless the plaintiff shows the falsity of the words published, the malicious intent with which they were uttered, and a pecuniary loss or injury to himself, he cannot maintain the action." *Cardon*, 120 N.C. at 461, 27 S.E. at 109. Defendants do not allege that they were in fact harmed by the conveyance of this deed; rather, they merely allege that it was a bad act.

Finally, it bears repeating that defendants' only allegations were that, at the time of the conveyance of the 31 May 2017 deed, Sea Watch did not have rights in Lot 6 or the easement; that it knew it had no rights in the easement; and that Sea Watch and plaintiff nonetheless executed and filed the easement. However, again, a

quitclaim deed does not make any assertion of right; rather, it "implies a doubtful title in the party executing it." *Price*, 144 N.C. at 50, 56 S.E. at 685.

We are reluctant to permit defendants to read a false assertion into a document which, by its definition, expresses no assertion. As such, we hold that defendants cannot show malice by plaintiff or Sea Watch, and could show no genuine issue of material fact on this claim. Accordingly, we further hold that the trial court did not err in dismissing defendants' counterclaim and third-party claim for slander of title.

AFFIRMED.

Judge DIETZ concurs in the judgment with separate opinion.

Judge TYSON concurs in part and dissents in part with separate opinion.

No. COA19-64 – *Sea Watch at Kure Beach Homeowners' Association v. Fiorentino*

DIETZ, Judge, concurring in the judgment.

I concur in the judgment in this case. The plat map created an "access easement" by plat for the benefit of the planned community's residents. *See Town of Carrboro v. Slack*, __ N.C. App. __, __, 820 S.E.2d 527, 533 (2018). In light of the design and aesthetic of that planned community, the existing structures attached to the wooden walkway are an expected part of community residents' reasonable use and enjoyment of this beach access easement. *Ferrell v. Doub*, 160 N.C. App. 373, 377, 585 S.E.2d 456, 459 (2003).

TYSON, Judge, concurring in part and dissenting in part.

I fully concur in the majority's opinion to affirm the trial court's order, including the trial court's award of the ownership of the improvements constructed within the Access Easement area to Defendants, as owners of Lot 6. Unless otherwise provided, improvements affixed to a freehold become a part thereof and passes with the freehold estate. *Pritchard v. Steamboat Co.*, 169 N.C. 457, 461, 86 S.E.2d 171, 173 (1915); *Basnight v. Small*, 163 N.C. 15, 17, 79 S.E.2d 269, 270 (1913).

The trial court failed to fully allocate the parties' rights and responsibilities concerning the improvements in the Access Easement. I vote to remand to the trial court with instructions to fully allocate the responsibilities and liabilities over the present and future use and enjoyment of the Access Easement. The order contains no findings or allocations on: (1) the payment of *ad valorum* taxes, which is normally the obligation of the property owner; (2) the payment for use or extending utilities, garbage and refuse removal, replacement of improvements, if destroyed, expansions or alterations within the Access Easements; (3) the indemnification and insurable interests; (4) whether the HOA and other lot owners have standing to obtain building permits to make repairs or replacements in their names; (5) which parties are responsible for building code compliance; (6) whether guests of the other lot owners or of the HOA can use the Access Easement or if their use would be overburdening

the easement; (7) the responsibility to remove trespassers; and, (8) whether the HOA or other lot owners can lend or lease out the improvements on the Access Easement to others for social occasions. These examples are just a short list of unresolved issues.

Judicial economy requires that after the trial court undertakes to allocate the rights and responsibilities of the parties, it must do so fully to resolve and avoid future disputes and litigation. *Small v. Small*, 107 N.C. App. 474, 477, 420 S.E.2d 678, 681 (1992) ("it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment." (citation omitted)). I foresee continued disputes and litigation, if the responsibilities and rights of all interested parties are not fully resolved and allocated. As such, I respectfully dissent from that portion of the majority's opinion for its failure to remand to complete the trial court's attempted and partial allocation of rights and responsibilities. The trial court must address the remaining and unresolved issues among the parties, particularly the rights of all lot owners. *See id.*

When an estate is subjected to an easement, the owner thereof may continue to use the land burdened by the easement for any manner or purpose that is not inconsistent with the dominant holder's reasonable use and enjoyment of the easement. *Strickland v. Shaw,* 261 N.C. 82, 85, 134 S.E.2d 137, 140 (1964). The

owner of the subservient estate must "refrain from doing, or permitting anything to be done, which results in the impairment of the easement." *Id*.

The trial court correctly determined the HOA members and all of Sea Watch's lot owners possess and enjoy a recorded right to access the land and improvements from the public roadway to the beach through their appurtenant easement. Defendants generally have the right to possess, enjoy, use, dispose, and exclude others from their property, including the improvements thereon, so long as they do so consistent with rights of the other lot owners and the HOA to use and enjoy the Access Easement and its improvements. As the owner of the servient estate, Defendants must "refrain from doing, or permitting anything to be done, which results in the impairment of the easement." *Id*.

In addition to the unresolved issues scheduled above, if the improvements need replacement or expansion, who will undertake the planning and permitting approvals to reconstruct or build new structures? If Defendants refuse to permit the HOA or other lot owners to rebuild the structures on their easement, are they committing actions that result in the impairment of the easement?

If the Defendants, refuse to rebuild, or perform maintenance on the structure, are they interfering with the HOA's or other lot owner's access rights to the easement to gain building permits, secure insurance, extend utilities, or improve or expand the improvements? What if the HOA or the other lot owners allow the improvements to

deteriorate or the building code inspector condemns the condition or use of the improvements?

Sea Watch executed a general warranty deed to the HOA in October 2001, which conveyed ownership of certain common areas of the subdivision to the HOA. The HOA assesses all lot owners to improve and repair common areas as is required in the Declarations. Historically, the HOA has maintained, improved, insured and repaired the structure and Access Easement, like all other common elements.

Also, Sea Watch, LLC, the developer and sub-divider, petitioned for a building permit to construct the walkway, bathrooms, and cabana on 9 June 2000. The structure was completed prior to April 2001. A constructed walkway over the dunes is required by local ordinance. As owner of the common areas and the *de facto* successor-in-interest to Sea Watch, the HOA should be responsible for repair and maintenance of improvements in the common areas. The trial court needs to determine and allocate who pays property taxes, utilities, and insurance for the improvements. Allocation of responsibility for assessments for beach re-nourishment and replacing the walkway, if washed away, as is required by the ordinance.

As the parties agreed at oral argument, Defendants did not pay property taxes on the structures or improvements within the access easement, like the other improvements on their property. The trial court should fully determine the parameters of Defendant's and the HOA's and the other lot owners' ownership

interests and burdens in the structure and all improvements. Specifically, the trial court needs to determine whether the HOA's and all lot owners' interests in the easement burden them with the responsibility to continue to repair, maintain, insure, replace, and expand the structures and all improvements.

This Court should remand for a detailed allocation of the rights and responsibilities of the HOA, other lot owners and residents, and Defendant over the current and future control, use and burdens of the incidents of ownership and use of the Access Easement by all interested parties. If not, the trial court's award of ownership of the improvements within the Access Easement to the Defendants should be reversed and all improvements located within the Access Easement be declared common areas for all lot owners and residents under the Declaration. These issues are raised in the pleadings and were clearly at issue before the trial court. The order, as it stands, is simply incomplete, unworkable, and should be remanded. I concur in part and respectfully dissent in part.