STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF NATURAL RESOURCES

Plaintiff-Appellee,

v

ERIC L. LEUKUMA, NAOMI LEUKUMA, MATT E. KIILUNEN, and MARY KIILUNEN,

Defendants-Appellants.

UNPUBLISHED
December 17, 2009

No. 287802
Houghton Circuit Court
LC No. 2006-013237-CZ

DEPARTMENT OF NATURAL RESOURCES,

Plaintiff-Appellee,

v

ROSWELL MILLER,

Defendant-Appellant.

No. 287803
Houghton Circuit Court
LC No. 2006-013443-CZ

ATTORNEY GENERAL EX REL
DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

v

ERIC L. LEUKUMA, NAOMI LEUKUMA, MATT E. KIILUNEN, MARY KIILUNEN, ROSWELL MILLER, and RUTH MILLER,

Defendants-Appellants.

No. 287804
Houghton Circuit Court
LC No. 2007-013751-CZ

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Defendants appeal by right the trial court's denial of defendants' motion for summary disposition, and grant of summary disposition and injunctive relief in plaintiff's favor. Because the easement had not been abandoned, was not subject to an extinguishment clause in an applicable deed, and thus remained intact and transferable by Michigan Bell, or its successors, to plaintiffs, we affirm.

These cases concern an approximately 60 foot wide strip of land, formerly used as a railroad right-of-way by the Soo Line Railroad, that crosses all of defendants' properties. The right-of way changed hands several times and was ultimately acquired by plaintiff in 2003. Plaintiffs held the strip of land open for public recreational use as a walking/snowmobile trail from the time it acquired the property until sometime in 2005, when defendants erected barriers across the portions of the strip of land that traversed their properties. Plaintiffs thereafter initiated actions (later consolidated) against defendants, claiming that they held fee title to the strip of land, and asserting a claim of public nuisance against defendants. Plaintiffs also sought a declaration concerning its title to the property at issue.

During the course of the proceedings, the trial court found, as matter of law, that plaintiffs' predecessors in title granted an easement, not a conveyance of fee title, and issued an order setting forth the same. The parties thereafter filed cross-motions for summary disposition, with defendants claiming that the easement was abandoned by the railroad and had lapsed, by virtue of an extinguishment clause contained in a contract for the sale of the same between the Soo Line and Michigan Bell. Defendants contended that as a result, plaintiffs had no property rights in the now-lapsed easement and could not maintain their nuisance cause of action. Plaintiffs denied that the easement was abandoned or had extinguished, and further asserted that because the deeds conveying defendants' respective properties excluded the easement from conveyance, defendants had no interest in the easement and thus no standing to request or challenge a determination of interest in the land at issue. The trial court found in favor of plaintiffs, adopting all of their submitted findings of fact and conclusions of law, and entered a final judgment in the consolidated matters noting that it granted plaintiffs' motion for summary disposition and denied defendants' counter-motion for summary disposition. The judgment further provided defendants were enjoined from trespassing, obstructing, or encroaching upon the right-of-way or interfering with the public's use of the same. These appeals followed.

Plaintiffs did not specify in their motion the court rule relied upon in requesting summary disposition. Their request was actually in their response to defendants' motion for summary disposition. Because the parties both submitted documentary evidence to support their respective positions and the trial court apparently considered the evidence in rendering its decision, we will assume the motion and the ruling were based on MCR 2.116(C)(10).

We review the trial court's grant or denial of summary disposition de novo. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 566-567; 702 NW2d 539 (2005). A motion under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under subrule (C)(10), a court considers all the evidence,

affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31.

On appeal, defendants first contend that the trial court erred when it found that defendants lacked standing. We agree.

The first conveyance of the strip of land at issue appears in a July 30, 1883 warranty deed. The hand-written deed purports to sell "Forever", from Mr. and Mrs. Vadenais to the Marquette Houghton and Ontonagon Railroad Company:

> as and for right of way a certain strip of land situated and being in the County of Houghton and State of Michigan, and described as follows, to wit:
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> A strip of land in Lot Number Two (2) in Section Number Twenty (20) in Township Fifty-Four (54) North of Range Thirty-Three West, Sixty feet wide, being Thirty (30) feet wide on each side of its center line of the Marquette Houghton and Ontonagon Railroad as now located and marked upon the ground.
>
> Excepting and reserving therefrom, nevertheless, to parties of the first part that part thereof on which their barn now in part stands.

The Marquette Houghton and Ontonagon Railroad appears to have been succeeded by the Duluth South Shore and Atlantic Railway Company, which was, in turn, succeeded by the Soo Line Railroad.

The trial court, in a January 3, 2007 opinion, ruled as matter of law that the right-of-way conveyed in the 1883 deed was an easement rather than a fee interest. This ruling was neither appealed nor otherwise contested by either party.

Mr. and Mrs. Vadenais' property was split into smaller parcels and changed hands several times over the years. Relevant to the instant matter, the Millers purchased (by warranty deed) a portion of land in 1991 "less the 60 foot right of way of the Duluth, South Shore and Atlantic Railroad." The Kiilunens similarly purchased a portion of the land (by warranty deed) in 1997 "LESS the 60-foot right-of-way of the D.S.S. & A Railroad." In 1999, the Kiilunens sold (by warranty deed) a portion of their land, over which the easement crossed, to the Leukumas. The deed transfers a certain property "LESS the 60-foot right-of-way of the D.S.S. & A Railroad." Plaintiffs argued before the trial court, and the trial court agreed, that the language "less the sixty-foot right-of-way of the D.D.S. & A Railroad" in defendants' deeds meant that defendants were conveyed their property except that portion of land over which the easement crossed, i.e., that defendants did not take subject to the right-of-way, but rather that the strip of property encumbered by the right-of-way was specifically excluded from the transfer. We disagree with the trial court's reading of the deeds.

The following principles guide our interpretation of deeds:

> (1) In construing a deed of conveyance, the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the

> whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable. *Michigan Dept of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005).

The language of the conveyance determines the character of the interest acquired. Thus, the instrument's granting clauses are the starting point for discerning the parties' intent. *Id*. If the grant is for the use of the right-of-way, rather than of the land, an easement is conveyed. See *Quinn v Pere Marquette Ry Co*, 256 Mich 143; 239 NW 376 (1931)(when use for right-of-way is granted, only easement is created; when land itself is conveyed, although for railroad purposes only, without specific designation of a right-of-way, the conveyance is in fee).

An "exception" withdraws a portion of the real property from the description conveyed, or excludes from the grant something that is not intended to be granted. See Black's Law Dictionary (8th ed); see also *Peck v McClelland*, 247 Mich 369, 370-371; 225 NW 514 (1929). "Whatever is excluded from the grant by exception remains in the grantor as of his former title or right." *Peck, supra* at 371.[1]

Defendants were undeniably granted land in fee. At question is the meaning of the language ". . .less the sixty (60) foot right-of-way." "Less" is defined in American Heritage Dictionary (4th ed.) as "without." Taking into consideration the definition of less, we believe the conveyance language to mean that defendants were conveyed a parcel of a parcel of land, but did not get title to the right-of-way, which still belonged to the railroad. In this way, it was expressed that the right-of-way still existed and did not terminate, but ran with defendants' land. The specific mention of the right-of-way convinces us this meaning must have been intended. Again, a right-of-way is essentially an easement. *Michigan Dept of Natural Resources v Carmody-Lahti Real Estate, Inc*, *supra*, at 375; *Warden v Linebarger*, *supra*. The deed can only reasonably be read, then, that defendants received title to their lands, "without" *the easement* at issue.

We must keep in mind that an easement is markedly different from a fee. An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement. *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). Conveying a property less an easement (i.e. a qualified possession), then, does not displace an

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[1] Thus, if, as plaintiffs claim, the strip of land containing the easement was not conveyed to defendants, title to this narrow strip would remain with the grantors, which would be a nonsensical result. There is no indication by either party that the former owners of defendants' properties intended or acted in a manner consistent with retained ownership over this narrow strip of land.

owner of the fee simple of the land over which the easement is granted. An easement does not grant unqualified title as a fee does; it merely encumbers another's fee title. Had the grantors meant to except from transference the land over which the easement ran, it could have specified that defendants took title to the properties "less a sixty foot wide strip of land on which a right-of-way now exists." The deed does not except a strip of land, however—it explicitly excepts the right-of-way, as distinguishable from a fee.

The trial court's ruling that defendants have no standing, as they did not receive title to the strip of land encumbered by the easement was therefore erroneous.

Defendants next assert that the trial court erred in holding that plaintiffs held title to the easement, because the easement was expressly limited to railroad usage and railroad usage had long ceased; because the Soo Line had abandoned the easement thus causing the easement to lapse, and/or; because the easement was subject to an extinguishment clause in an applicable deed. We disagree.

According to defendants, the easement was limited to railroad purposes, and when the railroad ceased using the easement for such purposes, the easement lapsed. This assertion is incorrect.

The extent of a party's rights under an easement is a question of fact, and a trial court's determination of the facts is reviewed for clear error. *Tomecek v Bavas*, 482 Mich 484, 490; 759 NW2d 178 (2008). As previously indicated, the original deed conveying the easement reads:

> as and for right of way a certain strip of land situated and being in the County of Houghton and State of Michigan, and described as follows, to wit:
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> A strip of land in Lot Number Two (2) in Section Number Twenty (20) in Township Fifty-Four (54) North of Range Thirty-Three West, Sixty feet wide, being Thirty (30) feet wide on each side of its center line of the Marquette Houghton and Ontonagon Railroad as now located and marked upon the ground.
>
> Excepting and reserving therefrom, nevertheless, to parties of the first part that part thereof on which their barn now in part stands.

As with the interpretation of deeds in general, in order to determine whether the easement at issue is limited to a specific purpose, "we must discern the parties' intent as shown by the plain language of the deed." *Michigan Dept of Natural Resources v Carmody-Lahti Real Estate, Inc, supra*, at 379-380. The plain language of the deed reads simply that a right of way—not limited to railroad purposes--was being conveyed. Though a railroad was located on the strip of land at the time of conveyance, and the conveyance was to a railroad, there is no *express* requirement that the right of way be used for railroad purposes. Rather, where the railroad tracks were currently located appears to have served as the means of determining where the easement would begin and end.

The language employed in the 1883 deed contrasts with that found in *Michigan Dept of Natural Resources v Carmody-Lahti Real Estate, Inc, supra,* where the Court found the deed to have conveyed a right of way expressly limited to railroad purposes:

> Here, the parties conveyed a right-of-way "for the railroad" of the original grantee. This language shows quite clearly that the parties intended to convey an easement *for a railroad.* Even the paragraph reserving the grantor's rights to extract minerals from the strip of land at issue states that such extraction must be performed "in such manner as not to interfere *with the construction or operation of said railroad.*" Finally, the deed's habendum clause expressly states that the right-of-way is the grantee's "to have and to hold ... *for the purpose and uses above stated and subject to the reservations aforesaid* ...." The only purpose and use mentioned in the instrument is the construction and operation of a railroad. We conclude, therefore, that the easement conveyed by the 1873 deed is limited to railroad purposes.

There is no similar language in the present conveyance expressing that the right-of-way was to be conveyed for the specific limited purpose of railroad business. Nor is there any other language (e.g., "as now used;" "for railroad purposes") that could be construed as limiting the easement strictly to railroad usage.

Next at issue is whether the Soo Line abandoned and thus extinguished the easement. Where an easement is created by grant, and there is no defeasance clause or restriction that it be used for a particular purpose only, it may be terminated by either adverse possession or abandonment. See *Strong v Detroit & Mackinac R Co,* 167 Mich App 562, 568; 423 NW2d 266 (1988). Defendants assert that the Soo Line both abandoned the easement and that a defeasance clause caused the easement to extinguish. We disagree with both claims.

It is undisputed that the Soo Line has not used the right-of-way for railroad purposes since the mid to late 1980's, and that the tracks have long been removed. It is also undisputed that on September 29, 1982, the Interstate Commerce Commission approved the abandonment of Soo Line Railroad Company's lines in the area at issue. The ICC decision notes that abandonment of the line is permitted, but that Soo Line shall keep intact "all of the right-of-way underling (sic) the track. . . for a period of 120 days from the decided date of this certificate. After the 120-day period, then, the Soo Line could abandon the right-of-way. As noted in *Michigan Dept of Natural Resources v Carmody-Lahti Real Estate, Inc, supra*, at 384, however, "[t]hat is not to say [] that the easement, a creature of state law distinct from the rail that physically occupied the right-of-way, was necessarily abandoned at the end of the 120-day period prescribed by the ICC."

According to *Ludington & Northern Railway v Epworth Assembly,* 188 Mich App 25, 33; 468 NW2d 884 (1991):

> To prove abandonment, both an intent to relinquish the property and external acts putting that intention into effect must be shown. Nonuse, by itself, is insufficient to show abandonment. Rather, nonuse must be accompanied by some act showing a clear intent to abandon.

Here, both parties' admission that the public has used the right-of-way for many years as walking/snowmobile/biking path works against a finding that the Soo Line abandoned the easement. Though not used for railroad purposes after the tracks were removed, the easement was undisputedly kept in use for travel. Defendants have directed us to no other actions by the

Soo Line suggesting the manifestation of an intent to abandon the easement itself, and the Soo Line's deed to Michigan Bell also points to an intent *not* to abandon.

The Soo Line Railroad conveyed its right-of-way across defendants' properties to Michigan Bell telephone on July 15, 1985. The Soo Line conveyed "a strip of land one hundred feet (more or less) in width being the right of way of the Soo Line Railroad Company[], said strip being fifty feet (more or less) on each side of the center line of the main track of said Soo Line Railroad Company as the same is now constructed over and across the following. ." The deed then references defendants' parcels of lands and further includes the following language:

> Reserving unto party of the first part (Soo Line), its successors and assigns, a perpetual easement over the premises herein conveyed to maintain and operate over the railroad track(s) as now located on said premises and further reserves the right to maintain, replace, renew, repair, remove or install any railroad facilities on said premises including, but not limited to, spur tracks, bridges, culverts, street and highway crossings, communication lines for the railroad's exclusive use, signals, signs and buildings, provided, that nothing in this indenture shall in any way limit the right of the party of the first part to assign or otherwise convey its interest in such easement for the maintenance and operation of the railroad tracks and railroad facilities. . .

The Soo Line reserved a perpetual easement over the "premises herein conveyed" in the first sentence. The "premises herein conveyed" is the easement. It was the only interest in the land that the Soo Line owned and thus the only interest it could convey ("It is axiomatic that a person cannot convey greater title than he possesses," *Pellerito v Weber*, 22 Mich App 242, 244-245, 177 NW2d 236 (1970)). What the above language appears to accomplish is essentially a limited apportionment of the easement. Soo Line sold the entire easement to Michigan Bell but reserved a right to operate a railroad over the "premises herein conveyed" for a specific period of time. The fact that the Soo Line elected to actually sell the easement, only reserving unto itself the option of operating a railroad over the easement indicates that it did not intend to abandon the easement.

More importantly, a careful reading of the very specific language in the conveyance defeats defendants' argument that the easement over their properties was extinguished by the express terms of the conveyance (defeasance). Defendants argue that because the Soo Line reserved a right to operate a railroad over the easement with the specification that if they did not do so for a period of ten successive years, and did not, in fact, operate a railroad in that area for the 10 year period, the easement extinguished by its own terms. The express language, however, provides that only the Soo Line's *reservation* is self-extinguishing---not the entire easement.

The Soo Line sold the entire easement to Michigan Bell. As previously indicated, it unequivocally conveyed its right-of-way over defendants' property. The Soo Line did reserve "unto party of the first part (Soo Line), its successors and assigns, a *perpetual easement over the premises herein conveyed*." The premises herein conveyed being the actual easement; the Soo Line reserved only a portion of the easement---essentially an easement-within-the-easement, for itself. It is this easement-within-the-easement that is self-extinguishing. The deed specifies that:

> in the event party of the first part or its successors or assigns cease railroad operations upon any portion of the said premises for a period of ten (10) successive years or should party of the first part or its successor or assigns abandon railroad operations on any portion of said premises and remove its railroad tracks, then the aforesaid perpetual easement shall be extinguished with respect to the portion of said premises affected by such cessation or abandonment of railroad operations.

According to the above, nonuse by the Soo Line would thus extinguish only the Soo Line's reserved apportionment ("the aforesaid perpetual easement"). The entire easement would not be extinguished: instead, Michigan Bell would simply own the entire easement, subject to no more restriction, apportionment, or interest by the Soo Line. The easement, then, as distinct from the railroad line, remained intact and thus transferable by Michigan Bell, or its successors, to plaintiffs. There being no other issues raised by defendants concerning the validity of the conveyances to plaintiffs, we need not address the applicability or effect of the State Transportation Preservation Act or address plaintiffs' assertion that if the easement extinguished because the railroad right-of-way was abandoned, the extinguishment clause was void *ab initio* as it violated public policy.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto