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LEXSEE 2011 MASS. APP. UNPUB. LEXIS 333

KEVIN P. BOIVIN & others ¹ vs. RACHEL M. BECKMAN.

¹ Lorraine Y. Boivin and Debra Campagna.

10-P-426

APPEALS COURT OF MASSACHUSETTS

2011 Mass. App. Unpub. LEXIS 333

March 15, 2011, Entered

NOTICE: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

SUBSEQUENT HISTORY: Reported at *Boivin v. Beckman*, 2011 Mass. App. LEXIS 370 (Mass. App. Ct., Mar. 15, 2011)

PRIOR HISTORY: *Boivin v. Beckman*, 17 LCR 698, 2009 Mass. LCR LEXIS 145 (2009)

DISPOSITION: [*1] Judgment affirmed.

JUDGES: Lenk, Brown & Duffly, ⁵ JJ.

⁵ Justice Duffly participated in the deliberation on this case prior to her appointment to the Supreme Judicial Court.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs (Kevin and Lorraine Boivin and Debra Campagna), and the defendant (Rachel Beckman), own neighboring lots of registered land in Salisbury. The plaintiffs claim to be the owners of an easement burdening the defendant's lot, giving them the legal right to park a total of two cars on her property. In July of 2009, the plaintiffs sought a judgment in the Land Court declaring as much. Then on August 7, 2009, the plaintiffs filed a lis pendens against the property, pursuant to *G. L. c. 184, § 15*. In response, the defendant filed a special motion to dismiss pursuant to *G. L. c. 184, § 15(c)*, which the trial court judge granted. The judge thereafter denied the plaintiffs' subsequent motion for reconsideration, relief from judgment, and to amend the substituted complaint. The plaintiffs now appeal these adverse rulings. We affirm.

Background. On August 10, 1982, Rose Valentino subdivided her beachfront property in Salisbury into four lots, 820, 821, 822, and 823. Plaintiff Campagna [*2] has owned lots 820 and 821 as a trustee since 1997, and in her own name since 2007. The Boivin plaintiffs took ownership of lot 823 in 2000, and the defendant took ownership of lot 822 in 1999. The plaintiffs claim,

without argument to the contrary, that since the 1982 subdivision, the owners of lots 820-821 and 823 have each parked one car on lot 822, for a total of two cars. The parking spots on lot 822 were, at some unknown point, numbered and painted. However, no reference to a parking easement was made in either the plaintiffs' or the defendant's certificates of title or deeds. The only written reference to a parking easement concerning these properties can be found in a 1981 "subdivision plan," which itself is referenced in the defendant's deed and certificate of title.

Discussion. *General Laws chapter 184, § 15*, provides "a mechanism for expedited removal of an unjustified lis pendens, including dismissal of frivolous claims supporting an approved lis pendens." *Galipault v. Wash Rock Invs., LLC*, 65 Mass. App. Ct. 73, 81, 836 N.E.2d 1123 (2005), quoting from *Wolfe v. Gormally*, 440 Mass. 699, 705, 802 N.E.2d 64 (2004). Under *G. L. c. 184, § 15(c)*, as amended through St. 2002, c. 496, § 2, a special motion to [*3] dismiss "shall be granted if the court finds that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds." "The applicable standard of review for the dismissal of the plaintiff[s] action, dissolution of the lis pendens, and awarding of fees and costs is whether the trial court judge 'committed an error of law or abused his discretion in applying the standards of *G. L. c. 184, § 15(c)*.'" *McMann v. McGowan*, 71 Mass. App. Ct. 513, 519, 883 N.E.2d 980 (2008), quoting from *Galipault*, *supra* at 82.

Here, the judge did not err in granting the defendant's special motion to dismiss, as the plaintiffs have failed to bring forth facts sufficient to show that they hold an easement burdening the defendant's registered land. See *Mt. Holyoke Realty Corp. v. Holyoke Realty Corp.*, 284 Mass. 100, 105, 187 N.E. 227 (1933) (the party asserting the existence of an easement has the burden of proving that it exists). As an initial matter, it is well settled that "the holder of a certificate of title taken 'for value and in good faith' holds [*4] 'free from all encumbrances except those noted on the certificate.'" *G. L. c. 185, § 46*, as amended by St. 1981, c. 658, § 26." *Commonwealth Elec. Co. v. MacCardell*, 66 Mass. App. Ct. 646, 648, 849 N.E.2d 910 (2006), S.C., 450 Mass. at 48 (2007), quoting from *Emmons v. White*, 58 Mass. App. Ct. 54, 66, 788 N.E.2d 558 (2003). As no parking easement was declared

in writing on the defendant's certificate of title, the plaintiffs rely on the case of *Jackson v. Knott*, 418 Mass. 704, 640 N.E.2d 109 (1994), which lays out two narrow exceptions to the general principle above: "If an easement is not expressly described on a certificate of title, an owner, in limited situations, might take his property subject to an easement at the time of purchase: (1) if there were facts described on his certificate of title which would prompt a reasonable purchaser to investigate further other certificates of title, documents, or plans in the registration system; or (2) if the purchaser has actual knowledge of a prior unregistered interest." *Id. at 711*. The plaintiffs do not come under either of these limited exceptions.

"In considering the first exception, we ask whether there were facts within the Land Court registration system available to [the defendant], [*5] . . . which would lead [her] to discover that [the] property was subject to an encumbrance, even if that encumbrance was not listed on [her] certificate[] of title." *Ibid.* Here, no amount of investigation on the defendant's part would have led to her discovery of the alleged parking easement, because no document in any relevant chain of title, including the plaintiffs', contains a declaration of any parking easement. See *id. at 712* ("A review of the plaintiffs' certificates of title would disclose to [the defendants] no right to use the Way on any certificate"); *Calci v. Reitano*, 66 Mass. App. Ct. 245, 249, 846 N.E.2d 1164 (2006)("[A]n investigation of certificate of title No. 1247 would not have provided notice of a recorded express easement over lot 134A").

The only written reference to a parking easement appears on the subdivision plan. The defendant likely had an obligation to review the plan because it was referenced in her certificate of title, but this review would have provided her with little pertinent information. See *Jackson v. Knott*, *supra* at 711 ("If a plan is referred to in the certificate of title, the purchaser would be expected to review that plan"). The subdivision plan discloses [*6] a simple drawing of the defendant's lot, which bears the words "parking easement." This would not begin to tell the defendant who owned such an easement or what legal rights it bestowed. ² Furthermore, "where land is conveyed with reference to a plan, an easement . . . is created only if clearly so intended by the parties to the deed." *Id. at 712*, quoting from *Scagel v. Jones*, 355 Mass. 208, 211, 243 N.E.2d 908 (1969). The appearance of the words "parking easement" on the plan, without

more, does not suffice to prove that the original conveyor, Valentino, intended a parking easement to burden lot 822. In point of fact, the defendant did take her property subject to several written easements, including shared access to the beach and utilities, showing that the conveyor knew how to create an easement when she wanted to. See *Boudreau v. Coleman*, 29 Mass. App. Ct. 621, 630, 564 N.E.2d 1 (1990) ("Having expressly reserved some easements, failure to reserve others must be regarded as significant").

2 For instance, beyond the initial question of who had a legal right to park on her land, the defendant could not have known on which part of the general "parking easement" area the easement owner (or owners) had the right to [*7] park cars, or whether the defendant herself also had a right to park a car there.

"In considering the second exception, we ask whether at the time of purchase [the defendant] had actual knowledge of a prior unregistered interest." *Jackson v. Knott*, supra at 713. Here, as in *Jackson v. Knott*, the plaintiffs can point to no "prior unregistered document creating an easement," which might have proved the defendant had actual knowledge of a parking easement. Ibid. The fact that the defendant is aware that others have parked on her property for many years is insufficient to show "actual knowledge" of an easement, as the use could just have easily been permissive. *Id.* at 713-714 ("The record discloses only that [the defendants] have been aware of the use of the Way as a path to the beach as a permissive use").

Even if, as the plaintiffs argue, the defendant could have orally agreed to an easement burdening her land,³ the record is barren of any evidence to suggest that the defendant was either informed orally that the plaintiffs possessed a legal right to park on her land when she purchased lot 822, or that she orally agreed to burden her land with a parking easement at some later date. See [*8] *Commonwealth Elec. Co. v. MacCardell*, 450 Mass. at 54 ("To meet the actual knowledge exception, there must be

some intelligible oral or written information that indicates the existence of an encumbrance or prior unregistered interest"); *Commonwealth Elec. Co. v. MacCardell*, 66 Mass. App. Ct. at 652 (the plaintiff "did not depose or call [the defendant] to testify about any knowledge or notice she may have had at the relevant time, i.e., when she purchased lot 1").⁴

3 Deciding as we do, there is no need to address whether an oral agreement would satisfy the second *Jackson v. Knott* exception.

4 Although the judge denied the plaintiffs' motion to amend their substituted complaint, the proposed additional allegations were made on information and belief when more is necessary to defeat a special motion to dismiss under *G. L. c. 184, § 15(c)*. Indeed, at argument, counsel for the plaintiffs acknowledged that the defendant's predecessors in ownership are still living, and yet the record reflects no affidavit or similar statement on their part that averred they had orally informed the defendant of the parking easement.

Where the plaintiffs failed to make an adequate showing that they fall under [*9] either of the narrow exceptions set out in *Jackson v. Knott*, their claim could permissibly be deemed frivolous under *G. L. c. 184, § 15(c)*, as devoid of any reasonable factual support or arguable basis in law. Accordingly, the Land Court judge did not err or otherwise abuse his discretion in dismissing the case, or in denying the plaintiffs' subsequent motion for reconsideration, relief from judgment, and to amend the substituted complaint.

Judgment affirmed.

By the Court (Lenk, Brown & Duffly, ⁵ JJ.)

5 Justice Duffly participated in the deliberation on this case prior to her appointment to the Supreme Judicial Court.

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