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12/05/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-003497 12/03/2014

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
D. Harding
Deputy

CETOTOR INC

JOEL E SANNES

v.

I N G BANK F S B, et al.

MICHAEL S CATLETT

ROGER W HALL

UNDER ADVISEMENT RULING

The Court has reviewed and considered Plaintiff's Motion for Summary Judgment re: Quiet Title; Doctrine of Merger (Count One) and Trespass (Count Five) (of the Second Amended Complaint), and Separate Statement of Facts in Support, filed March 26, 2014; Defendants' Response and Controverting Statement of Facts, filed July 29, 2014; and Plaintiff's Reply, filed September 12, 2014.

Quiet Title

The following facts are not disputed:

1. On or about April 15, 2008, Dennis Teufel, the owner of Lot 172, recorded a "Landscape Easement Declaration" ("April Declaration") purporting to grant an easement ("Claimed Easement") over a portion of Lot 172 in favor of Lot 171.

2. On or about June 13, 2008, Teufel had notarized a "Restated and Amended Landscape Easement Declaration" ("June Declaration") dated July 1, 2008.

3. On or about the same day, June 13, 2008, Teufel also had notarized a Warranty Deed conveying Lot 171 to Arthur Kruglick dated May 9, 2008.

4. On or about July 1, 2008, the June Declaration was recorded in Teufel's name. The June Declaration stated that Teufel was the owner of both Lot 171 and 172 and reasserted the Claimed Easement over Lot 172.

5. On or about July 2, 2008, the Deed (signed on June 13, 2008) was recorded with the Maricopa County Recorder's Office.

Under the legal doctrine of merger, a person who owns property cannot grant himself/herself an easement over that same property. *Flood Control Dist. of Maricopa County v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, 41, 279 P.3d 1191, 1203 (App. 2012); *Mid Kansas Federal Sav. and Loan Ass'n of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122, 129, 804 P.2d 1310, 1317 (Ariz., 1991). Granting an easement over a piece of property creates a lesser interest in that property. *Restatement of Property* § 450 (1944). When one person has both a greater and a lesser interest in the same property, and no intermediate interest exists in another person, a merger occurs and the lesser interest is extinguished. *Mid Kansas at* 129, 804 P.2d 1310 1317 (1991).

Appletree Mall Associates, LLC v. Ravenna Inv. Associates, 33 A.3d 1097 (2011) and *Gilbert v. Fine*, 653 S.E.2d 775 (Ga. App. 2007) are persuasive. These cases hold that, even though there may be two separate lots with individual parcel numbers, a common owner cannot create an easement in one parcel over the other. "Thus, [the original owner's] attempt to create an easement across one portion of her property for the benefit of another portion while she still owned both was ineffective and the purported easement was invalid." *Gilbert* at 777.

Here, Teufel owned both Lot 171 and 172 when he tried twice to create an easement over Lot 172. Because he owned both properties at the time of both attempts, a valid easement never existed.

Defendants (referred to collectively as "Compass") acknowledge that Teufel owned both parcels when he tried to create an easement the first time, in April, 2008. Compass argues, however, that Teufel did not own both the second time, in June, 2008, because Teufel deeded Lot 171 to Kruglick on the same day that he signed the June Declaration. Alternatively, Compass argues that the June 13, 2008 Deed creates an issue of fact as to whether Teufel owned both lots when he signed the June Declaration.

A deed to real property does not vest legal title in the grantee until it is *delivered and accepted*. *Roosevelt Sav. Bank of N.Y. v. State Farm Fire & Cas. Co.*, 27 Ariz. App. 522, 524,

55 P.2d 823, 825 (App. 1976). "Execution of the deed *without delivery* is legally insufficient to transfer title." *Id (emphasis added).*

Cetotor presents evidence of a delivery date of July 2, 2008, the date that the transaction conveying Lot 171 to Kruglick closed and the Deed was recorded. Compass does not dispute that the Deed was recorded on July 2, 2008. Nor does Compass present evidence to show delivery on an alternate date. There is no evidence of delivery before July 2. The record establishes, at the earliest, a delivery date of July 2, 2008, and the day after Teufel recorded the June Declaration.

The Court finds that Teufel owned both properties on July 1, 2008 when he recorded the June Declaration. Kruglick did not become the owner of Lot 172 until the next day, July 2, 2008. Legally, the easement over Lot 172 did and does not exist, because it was attempted when both lots belonged to a common owner. *Id.* Lot 172 is unencumbered by the Claimed Easement and title in Lot 172 free of the easement is quieted in Cetotor's favor.

Trespass

Count Five seeks monetary damages "In an amount to be proven at trial or, alternatively, there is no adequate remedy at law and Cetotor is entitled to an injunction ordering [Compass] to remove the trespassing structures from Lot 172."

The law provides for money damages for the injury caused by a trespass resulting in an injury to the land unless the trespass is of such a nature that the trespassing structure can and should be removed. As stated in *Kratze v. Independent Order of Oddfellows, Garden City Lodge #11,* 500 N.W.2d 115, 122 (Mich. 1993):

> Where the wrong consists of a trespass to property resulting in an injury to the land, the general measure of damages is the diminution in value of the property if the injury is permanent or irreparable. *O'Donnell v. Oliver Iron Mining Co.,* 262 Mich. 470, 477, 247 N.W. 720 (1933). If the injury is reparable, or temporary, the proper measure of damages is the cost of restoration of the property to its original condition, if less than the value of the property before the injury. *Id.* The rule is, however, flexible in its application. *Schankin v. Buskirk,* 354 Mich. 490, 494, 93 N.W.2d 293 (1958). The ultimate goal is compensation for the harm or damage done. Thus, whatever method is most appropriate to compensate a plaintiff for the loss may be used. *Id.*

Where the trespass "is physically permanent or likely to continue indefinitely," it may be deemed permanent. Dobbs, *supra,* § 5.4, p 338. "Physical permanence alone does not justify classification of a trespass as permanent. The trespass must also be 'legally permanent, in the sense that courts will not require its removal.'" *Id. (internal citation omitted)*

Cetotor is entitled to removal if it can be done. The structures are continually trespassing on the property. However, the Court is not clear as to whether it is possible to remove these structures and restore the property to its former appearance. If that is not possible, then the trespass is likely permanent, and the damage for trespass is the difference in value with and without these structures.

Accordingly,

IT IS HEREBY ORDERED:

Cetotor's Motion for Summary Judgment on Count One for Quiet Title is **granted**. Lot 172 is unencumbered by the Claimed Easement and title in Lot 172 free of the easement is settled in Cetotor's favor.

The Motion for Summary Judgment on Count Five regarding Trespass is **granted,** subject to a stipulation by the parties or Court order that removal is feasible. **No later than December 15, 2014,** Counsel shall meet and confer by phone or in person to discuss removing the structures. If an engineering or other expert's opinion is necessary, the parties shall agree on an impartial professional to evaluate the situation and give them an opinion by **December 31, 2014.** If the parties cannot resolve this issue, either party may request a status conference with the Court for the purpose of setting an evidentiary hearing on damages on the trespass claim.