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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0917**

Dean L. Hovey, et al.,
Appellant,

vs.

Terrance M. Rooney, et al.,
Respondents.

**Filed April 8, 2008
Affirmed
Stoneburner, Judge**

Ramsey County District Court
File No. CX064845

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Considered and decided by Stoneburner, Presiding Judge; Lansing, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellants challenge summary judgment dismissing their breach-of-contract
action and claim for an easement by implication or prescription on respondents'

lakeshore property. Appellants also challenge denial of their motion to amend their complaint to add a claim of promissory estoppel. We affirm.

FACTS

In 1983, appellants Dean L. Hovey and Julie A. Hovey (the Hoveys) bought residential property in White Bear Lake from respondents Terrance M. Rooney and Barbara Rooney (Rooney).¹ The property is adjacent to Rooney's residence, and both parcels are across the street from Bald Eagle Lake. The lakeshore across the street from the parties' property was dedicated on the plats of Shady Side Addition and Town of Bald Eagle as a public right of way known as Bald Eagle Boulevard East. At the time of the purchase, Rooney owned and maintained steps to the lakeshore and a dock on the lake.

The parties dispute what was said during negotiations in 1983 about Rooney's ownership of the lakeshore and what rights the Hoveys could acquire from Rooney in the lakeshore. The purchase agreement, prepared by the Hoveys, contains the following supplement:

1. Sale of said property subject to seller extending to the buyer the right to the use of whatever riparian rights the seller has to approx. 25 ft. of lakeshore located immediately across the street from 5440 Bald Eagle Blvd. E.
2. Seller guarantees joint usage of steps leading to lakeshore.

Closing occurred on June 29, 1983. The warranty deed to the Hoveys' property makes no reference at all to access to or use of the lakeshore. The Hoveys contend that Rooney

¹ Barbara Rooney is now deceased.

told them that the terms of the supplemental purchase agreement could not be performed until the public-right-of-way easement was removed, after which an easement would be deeded to the Hoveys.² Rooney denies making such a statement and asserts that he never claimed to own the lakeshore and never promised to convey an easement or any other interest in the lakeshore to the Hoveys. Rooney asserts that the agreement was that the Hoveys could have permissive use of the lakeshore, steps, and dock while the Hoveys lived on the property.

For more than 20 years the Hoveys have enjoyed unrestricted use of the lakeshore. For several years they maintained a boatlift at the dock. The Hoveys claim that Rooney updated them annually about his efforts to have the right of way vacated and continually renewed the promise to convey 25 feet of lakeshore to them. Rooney admits giving the Hoveys permission to use the lakeshore but denies having any conversations about conveying lakeshore property or an easement to them.

At a May 6, 2002 meeting, the town board granted Rooney's petition to vacate the public right of way over the relevant lakeshore, subject to payment of \$700, a prohibition against any permanent structures or changes to the topography in the vacated right of way, and a reserved easement for construction, maintenance, repair, and replacement of drainage facilities and a bicycle/pedestrian pathway.

The Hoveys assert that Rooney subsequently told them that he had discovered that he owned less lakeshore than he thought that he owned and would therefore not honor his

² The Hoveys refer both to an easement and a conveyance of 25 feet of lakeshore as having been promised to them by Rooney.

promises to convey an interest in the lakeshore to them. The Hoveys brought this action, asserting a breach-of-contract claim and that their use of the lakeshore since 1983 has created an easement on Rooney's property by implication or prescription. Rooney counterclaimed for trespass and nuisance for the Hoveys' failure to remove their boatlift from the lakeshore but denies that he has ever otherwise restricted the Hoveys' use of the property. The district court granted summary judgment to the Hoveys, dismissing Rooney's counterclaim and granted summary judgment to Rooney, dismissing the Hoveys' breach-of-contract claim. Rooney then moved for summary judgment on the Hoveys' claim for an easement by implication or prescription, and the Hoveys moved to amend their complaint to add Rooney's daughter and her husband as defendants and to assert a claim of promissory estoppel. The district court granted summary judgment to Rooney, dismissing the easement claim and denied the Hoveys' motion to amend their complaint. This appeal followed.

D E C I S I O N

On appeal from summary judgment, this court examines the record to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). This court will affirm a grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

I. Rooney owned the lakeshore in 1983

In the order granting summary judgment to Rooney on the Hovey's breach-of-contract claim, the district court stated, "It is undisputed that [Rooney] did not own the lakeshore property referenced in the purchase agreement at the time [the Hoveys] purchased the property." The district court felt bound by this "finding" in the second summary-judgment proceeding. Summary judgment in both instances was premised, in part, on the district court's statement that it was undisputed that Rooney did not own the lakeshore in 1983.

The Hoveys argue that, as a matter of law, Rooney owned the lakeshore in 1983. Rooney submitted an affidavit to the district court in which he claimed he did not own the lakeshore property until the town vacated the right of way, but, at oral argument on appeal, counsel for Rooney conceded that Rooney had fee title to the property in 1983.

It is clear from the record in this case that, as a matter of law, Rooney owned fee title to the lakeshore in 1983. The district court's statement that Rooney did not own the lakeshore, although not disputed at the time it was made, is incorrect. The conclusions of law contained in both summary-judgment orders that flow from this erroneous fact are not supported by the evidence and do not support summary judgment. Nonetheless, summary judgment was properly granted on other grounds.

II. The merger doctrine

The language in the purchase agreement concerning the Hoveys' right to use whatever riparian rights Rooney had to 25 feet of lakeshore located across from 5440 Bald Eagle Boulevard East was not repeated in the warranty deed that the Hoveys accepted from Rooney. The deed makes no reference at all to the lakeshore.

“The merger doctrine generally precludes parties from asserting their rights under a purchase agreement after the deed has been executed and delivered.” *Bruggeman v. Jerry's Enters.*, 591 N.W.2d 705, 708 (Minn. 1999). This is because a purchaser, “by accepting a deed, presumably waived his rights under the purchase agreement.” *Id.*; see also *Brown's Estate*, 126 Minn. 359, 363, 148 N.W. 121, 122 (1914) (stating that the merger doctrine “applies to all stipulations and agreements contained in the executory contract by which the performance of specified acts are expressly made conditions precedent to the right to enforce the same”). “The merger doctrine generally works well as a rule that forces parties to respect the sanctity and finality of a deed.” *Bruggeman*, 591 N.W.2d at 710 (quotation omitted). In *Bruggeman*, the supreme court acknowledged an exception to the merger doctrine for conditions subsequent (contractual obligations that cannot be performed until sometime after closing): conditions subsequent are not presumed to merge. *Id.* at 710-11.

The Hoveys assert that the purchase agreement contained a condition subsequent that could not be performed until sometime after the closing. On this basis, they argue that, under *Bruggeman*, the purchase agreement did not merge with the deed, and they are not presumed to have waived their claim under the purchase agreement. We disagree and

note that this position is entirely inconsistent with the Hoveys' correct assertion that Rooney owned the lakeshore at the time of closing. Assuming that the purchase agreement could be construed to promise conveyance of an interest in the lakeshore property, there was no legal or other impediment to the grant of such an interest at closing. The district court correctly construed the purchase agreement as stating conditions precedent to execution of the deed, and the merger doctrine applies. The Hoveys are presumed to have waived their right to assert the terms in the purchase agreement by accepting a deed that did not include those terms.

Language in *Brown's Estate* and subsequent case law suggests that the presumption created by the merger doctrine is conclusive. *Brown's Estate*, 126 Minn. at 363, 148 N.W. at 122; *B-E Constr., Inc. v. Hustad Dev. Corp.*, 415 N.W.2d 330, 331 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988). But the supreme court stated explicitly in *Bruggeman* that "the merger doctrine merely creates a *presumption* of merger, and that presumption can presently be overcome with sufficient evidence to the contrary." 591 N.W.2d at 710. The district court in this case erred by holding that the Hoveys are *conclusively* presumed to have waived their right to assert claims under the purchase agreement due to the merger doctrine, but because the Hoveys received what was promised in the purchase agreement, their breach-of-contract and easement claims nonetheless fail as a matter of law.

III. The statute of frauds

The Hoveys argue that the presumption of merger is rebutted in this case by Rooney's continuing promises to convey some type of interest in the lakeshore to them.

But there is no evidence that any oral representations by Rooney created or could have created a contract to convey an interest in land to the Hoveys. The Minnesota Statute of Frauds provides in relevant part:

Every contract for . . . the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the lease or sale is to be made

Minn. Stat. § 513.05 (2006). The only relevant writing in this case is the supplement to the purchase agreement. Therefore, even if the Hoveys have created a question of fact about whether they have rebutted the presumption created by the merger doctrine, they cannot claim a right to anything more than was promised in the supplement to the purchase agreement, and that agreement cannot be modified by parol evidence or subsequent oral promises. *See Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979) (stating that parol evidence is inadmissible to contradict a term of a contract for the sale of real estate); *Wojahn v. Faul*, 235 Minn. 397, 399, 51 N.W.2d 97, 99 (1952) (stating general rule that a written contract within the statute of frauds cannot be modified by subsequent oral agreement); *Heisley v. Swanstrom*, 40 Minn. 196, 199, 41 N.W. 1029, 1030 (1889) (holding that because a contract for the sale of land is within the statute of frauds, it cannot “rest partly in writing and partly in parol”).

The plain language of the supplement to the purchase agreement makes the sale of Rooney’s property subject to Rooney extending to the Hoveys the right to use whatever riparian rights Rooney has to the 25 feet of lakeshore immediately across the street from Rooney’s property and guaranteeing “joint usage of steps leading to lakeshore.” This

language does not promise an easement or a conveyance of an interest in land, but only promises permissive use of whatever rights Rooney has to use the described lakeshore and steps. This is exactly what the Hoveys were granted. Even if the Hoveys' presumption of merger is not conclusive as a matter of law, there is no evidence in the record that Rooney breached the terms of the purchase agreement. Whether by reason of the doctrine of merger or the statute of frauds, the district court did not err in granting summary judgment to Rooney on the Hoveys' breach-of-contract claim.

IV. Promissory estoppel

The Hoveys assert that the district court abused its discretion by denying their motion to amend the complaint to assert promissory estoppel in an effort to overcome the statute of frauds. The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of discretion. *Fabio*, 504 N.W.2d at 761. "A motion to amend a complaint is properly denied when the additional claim could not have survived summary judgment." *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

"Promissory estoppel will be found where a party makes a promise knowing another party reasonably relies and acts upon that promise, and the promise must be enforced to avoid injustice." *Norwest Bank Minn., N.A. v. Midwestern Mach. Co.*, 481 N.W.2d 875, 880 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). Promissory estoppel functions "to imply a contract in law where none in fact exists." *Id.* It may also function to take an agreement outside of the statute of frauds. *Id.* The doctrine is "wholly inapplicable" to a situation in which an actual contract existed. *Del Hayes &*

Sons, Inc. v. Mitchell, 304 Minn. 275, 283, 230 N.W.2d 588, 593 (1975). Because the purchase agreement is a contract, promissory estoppel is not available to the Hoveys. The district court did not err in concluding that a claim of promissory estoppel in this case could not withstand summary judgment and did not abuse its discretion in denying the Hoveys' motion to amend the complaint.

V. Easement by implication

The district court granted summary judgment to Rooney on the Hoveys' claim that they have an easement by implication over the disputed land based on the erroneous finding that Rooney did not own the lakeshore at the time of severance. Nonetheless, summary judgment on this claim is sustainable on other grounds.

The doctrine of implied grant of easement is based upon the principle that where, during unity of title, the owner imposes apparently permanent and obvious servitude on one tenement in favor of another, which at the time of severance of title, is in use and is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial, then, upon a severance of ownership, a grant of the dominant tenement includes by implication the right to continue such use.

Romanchuk v. Plotkin, 215 Minn. 156, 160, 9 N.W.2d 421, 424 (1943). "An implied easement must be determined at the time of severance. . . ." *Clark v. Galaxy Apartments*, 427 N.W.2d 723, 726 (Minn. App. 1988). "The party asserting the easement has the burden of proving necessity." *Id.*

On appeal, the Hoveys have not asserted any facts or law that would entitle them to an easement by implication. They merely assert that they are entitled to a remand because the district court relied on an erroneous fact to grant summary judgment. But

remand is not necessary because the record in this case is devoid of any evidence that Rooney, during his ownership of both parcels, had imposed a servitude on his lot in favor of the lot purchased by the Hoveys, and there is no evidence in the record that an easement is “reasonably necessary for the fair enjoyment” of the Hoveys’ property. The district court did not err in granting summary judgment dismissing the Hoveys’ claim for easement by implication.

VI. Prescriptive easement

“To establish an easement by prescription, a party must prove use for the prescriptive period of 15 years and that the use was hostile, actual, open, continuous and exclusive.” *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980). The district court granted summary judgment to Rooney on the Hoveys’ claim to an easement by prescription because the Hoveys’ use of the property did not exceed the scope of permission granted by Rooney and therefore was not hostile. We agree. The Hoveys assert that because they used the property as if they had an easement, their use was hostile. But they have failed to present any evidence that anything about their use of the property was inconsistent with permissive use, and their deposition testimony establishes that, at most, they thought they were entitled to an easement in the future but knew that they were using the property permissively because no easement had been granted. Summary judgment on this claim was appropriate.

Affirmed.