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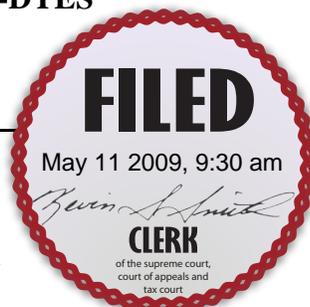
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**IN THE
COURT OF APPEALS OF INDIANA**



THREE LITTLE BIRDS, LLC,)
)
Appellant/Defendant/Counter-Plaintiff,)
)
vs.) No. 71A03-0811-CV-534
)
STONE MANOR INVESTMENT CORP.,)
)
Appellee/Plaintiff/Counter-Defendant.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Michael P. Scopelitis, Judge
Cause No. 71D07-0708-PL-245

May 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant/Counter-Plaintiff Three Little Birds, LLC (“Three Little Birds”) argues on appeal that the trial court’s award of partial summary judgment in favor of Appellee/Plaintiff/Counter-Defendant Stone Manor Investment Corp. (“Stone Manor”) was erroneous because the express non-exclusive easement claimed by Stone Manor has previously been terminated. In response, Stone Manor argues that the express non-exclusive easement has not been terminated, but even if it has previously been terminated, Stone Manor is entitled to an easement by necessity. Concluding that the express non-exclusive easement claimed by Stone Manor has not been terminated, we affirm.

FACTS AND PROCEDURAL HISTORY¹

On April 4, 2005, Irish Crossings Development, LLC (“Irish Crossings”) recorded a document entitled “Declaration of Condominium Property Ownership for Irish Crossings Condominium” in the St. Joseph County Recorder’s Office as Instrument Number 0513899 (“Instrument No. 899”). Appellant’s App. p. 61. Instrument No. 899 contained the rules and regulations for condominium ownership in the Irish Crossings Condominium subdivision (“Condominium Project”). Exhibit C to Instrument No. 899 contained the building envelope diagram and legal description of a parcel referred to as Building Envelope F (“Building Envelope F”).

On April 12, 2005, Irish Crossings recorded a document entitled “1st Amendment to Declaration of Condominium Property Ownership for Irish Crossings Condominium” in the St. Joseph County Recorder’s Office as Instrument Number 0515408 (“Instrument No. 408”).

¹ Three Little Birds has filed a motion for oral argument, which we deny in an order issued simultaneously with this decision.

Instrument No. 408 expressly withdrew Building Envelope F from the Condominium Project and granted Building Envelope F a “temporary easement for ingress and egress in and upon the Common Areas as defined in the Declaration which temporary easement shall automatically terminate when Building Envelope F is resubmitted to the Condominium.” Appellant’s App. pp. 132-33. Also on April 12, 2005, Irish Crossings recorded a “Warranty Deed” in the St. Joseph County Recorder’s Office as Instrument Number 0515409 (“Instrument No. 409”). Instrument No. 409 transferred ownership of Building Envelope F along with the temporary easement described in the preceding paragraph to Weiss Homes, Inc. (“Weiss Homes”).

On January 27, 2006, Weiss Homes recorded Instrument Number 0602720 (“Instrument No. 720”) in which Weiss Homes attempted to resubmit Building Envelope F to the Condominium Project. Approximately seven days later, on February 3, 2006, Irish Crossings recorded Instrument Number 0603683 (“Instrument No. 683”) which stated that “The purported ‘Second Amendment to the Declaration of Condominium Property Ownership for Irish Crossings Condominium’ dated January 26, 2006 which was signed only by Weiss Homes, Inc. and recorded on January 27, 2006 as Instrument No. [720] is hereby deleted in its [sic] entirety and is void since it has been determined to be invalid by the Declarant [Foley].” Appellant’s App. p. 144.

On August 4, 2006, Weiss Homes transferred ownership Building Envelope F along with “a non-exclusive easement, created by a deed recorded as Instrument No. [409], for ingress and egress in and over so much of the Common Areas (as located on April 12, 2005)

of Irish Crossing Condominium, per Declaration recorded as Instrument No. [899], as is reasonably necessary for access to and from, and service to, the subject premises” to Stone Manor. Appellant’s App. p. 27.

On December 4, 2006, Irish Crossings transferred ownership of certain property located in the Condominium Project commonly known as vacant land located adjacent to Burdette Street to Three Little Birds. Irish Crossings subsequently recorded Instrument Number 0653374 (“Instrument No. 374”), which expressly withdrew from the Condominium Project “the portion of the Property referred to as ‘Vacant land located adjacent to Burdette Street.’” Appellant’s App. p. 149.

Stone Manor filed a verified complaint against Three Little Birds on August 29, 2007, seeking a declaratory judgment that:

Stone Manor has a valid non-exclusive, permanent and perpetual easement for ingress and egress in and over so much of the real property formerly known as the Common Areas of the Irish Crossings Condominium, per Declaration recorded as Instrument No. [899], as is reasonably necessary for access to and from, and service to, the fee portion of the Stone Manor Property, or alternatively an easement by implication or necessity.

Appellant’s App. pp. 20-21. On March 19, 2008, Stone Manor filed a motion for partial summary judgment claiming that “the undisputed facts demonstrate that Stone Manor possesses an easement for ingress and egress to the Stone Manor property over the property allegedly owned by Three Little Birds, either by express grant of the easement, or, in the alternative, by necessity, implication, estoppels, or laches.” Appellant’s App. pp. 33-34. Three Little Birds filed its response to Stone Manor’s motion for partial summary judgment on August 14, 2008.

The trial court conducted a hearing on Stone Manor's motion for partial summary judgment on August 22, 2008. On September 22, 2008, the trial court issued an order granting Stone Manor's motion for partial summary judgment. The parties filed a joint motion to amend the trial court's September 22, 2008 order by interlineation pursuant to Trial Rule 54(B) which was granted by the trial court on October 10, 2008. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

Upon review of an order entering summary judgment, this court applies the same standard as the trial court. Summary judgment is appropriate where the evidentiary matter designated to the trial court shows both that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. We will affirm on appeal a trial court's order granting summary judgment if it is sustainable under any theory or basis found in the evidentiary matter designated to the trial court. Additionally, when material facts are not in dispute, our review is limited to the determination of whether the trial court correctly applied the law to the undisputed facts.

Wright v. Am. States Ins. Co., 765 N.E.2d 690, 692 (Ind. Ct. App. 2002) (citations omitted).

When the material facts are undisputed with regard to a motion for summary judgment and the question presented is a pure question of law, we review the matter de novo. *Id.*

II. Whether the express easement claimed by Stone Manor has been terminated.

It is well-settled that the nature, extent, and duration of an easement created by an express agreement or grant must be determined by the provisions of the instrument creating the easement. *Adkins Invs., Inc. v. Jackson County REMC*, 731 N.E.2d 1024, 1033 (Ind. Ct. App. 2000), *trans. denied*; *GTA v. Shell Oil Co.*, 171 Ind. App. 647, 650, 358 N.E.2d 750, 752 (1977); *Erie-Haven, Inc. v. 1st Church of Christ*, 155 Ind. App. 283, 288-89, 292 N.E.2d

837, 841 (1973), *trans. denied*. “It is the duty of the court, in construing an instrument creating an easement, to ascertain and give effect to the intention of the parties, which is determined by a proper construction of the language in the instrument from an examination of all the material parts thereof.” *Adkins Invs.*, 731 N.E.2d at 1003. “If possible, meaning must be given to all parts of the agreement to remain consistent with the rest of the agreement.” *Id.* “The nature of a particular easement should be gleaned by contemplating the purpose to be served by the easement.” *Id.*

An easement is an interest in land and may be held in fee. *Erie-Haven*, 155 Ind. App. at 289, 292 N.E.2d at 841. A fee simple or lesser estate in land may be created so as to be defeasible. *Id.*, 292 N.E.2d at 841. When an easement is normally held in fee, it is well-established that an easement, like another estate in land, may be held as a determinable fee. *Id.*, 292 N.E.2d at 841 (citing *Irvin v. Petitts*, 44 Cal. App. 2d 496, 112 P.2d 688 (1941)). An easement which is held as a determinable fee will terminate upon the happening of the event upon which its existence is conditioned without any action by the grantor of the estate or his successors in interest. *Id.*, 292 N.E.2d at 841.

Three Little Birds contends on appeal that the trial court erred in granting Stone Manor’s motion for partial summary judgment because the express easement created by Instrument Nos. 408 and 409 “was terminated when Irish Crossings transferred the property to Three Little Birds and withdrew the property from the Condominium.” Appellant’s Br. p. 12. In support, Three Little Birds relies upon this court’s determination in *Erie-Haven* that an easement automatically terminated upon the happening of the contingency specified in the

provisions of the instrument that created the easement. 155 Ind. App. at 290, 292 N.E.2d at 842. In *Erie-Haven*, the relevant provision of the instrument creating the easement provided that:

[I]f any business maintained on the said Tract A (the dominant property) shall be abandoned and completely discontinued to the extent that the said railroad switch tracks are no longer being used in connection with the said Tract A, then and in that case, the said rights, privileges and easements as set out in this Agreement shall become void and the said railroad switch track shall become the sole property of Party of the Second Part (Grantors).

Id. at 286, 292 N.E.2d at 839. On appeal, this court determined that the above-stated language created a determinable easement which would terminate automatically upon the happening of the contingency specified in the contract. *Id.* at 290, 292 N.E.2d at 841. The court further determined that for three years there was no business activity on the dominant tract, and it therefore followed that for the said period of time, the switch track was not being used in connection with the dominant tract. *Id.*, 292 N.E.2d at 842. In light of these facts, the court held that the easement terminated pursuant to the terms of the contract. *Id.*, 292 N.E.2d at 842.

Here, it is undisputed that Instrument Nos. 408 and 409 created a determinable fee that would terminate upon the happening of a certain event. However, unlike in *Erie-Haven*, the occurrence triggering the automatic termination of the express easement has yet to occur.²

² Three Little Birds does not argue that the easement was automatically terminated when Weiss Homes recorded Instrument No. 720 in an attempt to resubmit Building Envelope F to the Condominium Project on January 27, 2006. Therefore, Three Little Birds has waived this argument on appeal. *See Chrysler Motor Corp. v. Resheteer*, 637 N.E.2d 837, 839 (Ind. Ct. App. 1994) (providing that failure to raise an argument in the appellant's brief constitutes waiver), *trans. denied*. However, regardless of whether Three Little Birds raised this argument on appeal, this argument would likely be without merit because on February 3, 2006, Foley, on behalf of Irish Crossings, recorded Instrument No. 683 which stated that "Instrument No. [720] is hereby deleted in it [sic] entirety and is void since it has been determined to be invalid by the

The language included in the provisions of Instrument No. 409 creating the express easement for Building Envelope F indicates that the purpose of the express easement in question is to provide for ingress to and egress from Building Envelope F until such time that Building Envelope F is resubmitted to the Condominium Project. Instrument No. 409 expressly provides as follows:

Together with a non-exclusive temporary easement for ingress and egress in and over so much of the Common Areas of Irish Crossings Condominium, per Declaration recorded as Instrument No. [899], as is reasonably necessary for access to and from. And service to, the subject premises, *which temporary easement shall continue until, and automatically terminate upon, the recording of an Amendment to such Declaration submitting the subject premises to such Condominium.*

Appellant's App. p. 29 (emphasis added). Instrument No. 409 further provides:

This deed is subject to the terms of such Declaration providing for the expansion of Irish Crossings Condominium to include the subject premises, and to the rights of the Declarant reserved in the Declaration to withdraw other portions of the Property defined therein from Irish Crossing Condominium, which provisions shall run with the subject and be binding upon all owners and encumbrancers thereof, their heirs, successors and assigns.

Appellant's App. p. 30.

The plain language of Instrument No. 409 suggests that the easement was to run with Building Envelope F. In addition, nothing in Instrument No. 409 suggests that the easement would automatically terminate if Irish Crossings later withdrew additional property from the Condominium Project or transferred ownership of said property to a third party. Three Little

Declarant [Foley].” Appellant's App. p. 144. As a result, Building Envelope F has not been successfully resubmitted to the Condominium Project.

Birds has pointed to no language in Instrument Nos. 408 or 409 or presented any authority suggesting that such an occurrence would result in the automatic termination of the express easement associated with Building Envelope F. Because nothing in the record suggests that Building Envelope F has successfully been resubmitted to the Condominium Project, we conclude that the easement has not been automatically terminated pursuant to the express language of Instrument Nos. 408 or 409, and therefore the trial court did not err in granting partial summary judgment in favor of Stone Manor. In light of our conclusion that the express non-exclusive easement claimed by Stone Manor has not been terminated, we need not consider Stone Manor's alternative claim that it is entitled to an easement by necessity.

The judgment of the trial court is affirmed.

KIRSCH, J., and MAY, J., concur.