OA 10-9-85
047

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 66,385

TORTOISE ISLAND COMMUNITIES, INC. and TORTOISE ISLAND GROUP, LTD.,

Petitioners,

v

THE MOORINGS ASSOCIATION, INC., individually and THE MOORINGS ASSOCIATION, INC., a Class Representation,

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF

J. Daniel Ennis
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STATEMENT OF THE CASE AND FACTS

Pursuant to Fla.R.App.P 9.210(c) Petitioner's Statement of the Case and Facts are accepted by Respondents.

ARGUMENT I

AN IMPLIED EASEMENT BASED ON PRE-EXISTING USE ARISES FROM THE INTENT OF THE PARTIES; AN IMPLIED EASEMENT OF NECESSITY UNDER FLA. STAT. 704.01 ARISES FROM THE ACTS OF THE PARTIES.

The Fifth District Court of Appeal in The Moorings Association v Tortoise Island Communities, Inc., 460 So.2d 961 (Fla. 5th DCA 1981) held that an easement by implication based on pre-existing use does not require an absolute, but only a reasonable necessity.

Easements by implication are recognized in Florida. Winthrop v Wadsworth, 42 So.2d 541 (Fla. 1949). 5 Restatement, Property Sections 474-476 recognizes easements by implication. 1 R. Boyer, Florida Real Estate Transactions Section 23.03[3][a],[b] recognizes easements by implication and appears to differentiate that from a quasi-easement. The former created by viewing the intent of the parties in light of the circumstances of the conveyance while the latter being primarily concerned with an apparent, visible use prior to conveyance and necessary for the beneficial convenient, comfortable or reasonable enjoyment of such land. In Koller v Jorgensen, 257 N.W.2d 192 (Court of Appeals, Michigan 1977) the court therein reviewed those factors listed in Section 476, Restatement, Property and recognized the creation of an implied easement from an inference of the intent of the parties when the conveyance was made. In Koller an implied easement in lakefront property owned by the defendant arose when a back lot was sold to the plaintiffs. The court emphasized that the intent of the parties was sufficient to show that an implied easement arose.

In Kirma v Norton, 102 So.2d 653 (Fla. 2nd DCA 1958) the court focused on the circumstances existing at the time that purchasers in a subdivision obtained property from the developer. Evidence was taken in that case which established that the intent of the purchaser and the intent of the seller was that an easement would be created in a sewer pipe which ran across property retained by the seller and that the easement arose when the unified title was severed.

In Dinkins v Jenkins, 122 So.2d 620 (Fla. 2nd DCA 1960) the court found that an implied grant had not been sufficiently pled where there was lacking the allegation of unity in title. However, Dinkins recognized the existence of an implied easement citing Thompson on Real Property. The court further stated that the circumstances surrounding a conveyance would be viewed and that whatever is obviously in use as an incident or an appurtenance passed by implication when the land was sold.

Star Island Association v City of St. Petersburg Beach, 433 So.2d 998 (Fla. 2nd DCA 1983) recognized that the doctrine of implied easement when a land owner conveys part of his land he impliedly grants all apparent or visible easements upon the part retained which were at that time used by the grantor for the benefit of the land conveyed and which were reasonably necessary for use of the land conveyed. In Star Island a defect in two of the elements prevented an easement by implication. The grantor therein did not create the circumstances giving rise to the need for an easement and at the time of conveyance there was no access to a public road.

In Williams Island Country Club v San Simeon, 454 So.2d 23 (Fla. 3rd DCA 1984) the court held that a golf course owner had made a prima facie showing for an implied easement in a golf cart path which existed at the time the unity of title was severed. The court focused on the circumstances existing at the time of the conveyance to find an intent to grant or reserve an easement. The elements reviewed were: (1) was the use of the land for an easement apparent or visible or reasonably discoverable at the time of severance of the unity of title; (2) the use was such that a permanent use was intended; and (3) was the easement reasonably necessary for the use and benefit of the dominant tenement. Strict necessity was not required.

In 1 R. Boyer, Florida Real Estate Transactions, Section 23.03[3][b] the commentator in describing "quasi-easements" states:

> "The requirement of importance is highly elastic and frequently confused with or equated to the requirement of necessity. Generally, this requirement is satisfied if the use is necessary for the beneficial, convenient, comfortable or reasonable enjoyment of such land. . . ."

Common law easement of necessity is codified in Fla. Stat. 704.01(1). Fla. Stat. 704.01(2) refers to a statutory way of necessity exclusive of the common law method; the latter being mutually exclusive of the former. See Reyes v Perez, 284 So.2d 403 (Fla. 4th DCA 1973). In Stein v Darby, 126 So.2d 313 (Fla. 1st DCA 1961) the court discussed the evolution of common law way of necessity in relation to the statutory way of necessity. The court in viewing the historic perspective of common law way of necessity found that public policy played a pivotal role in the historic evolution of implying an easement of necessity.

Fla. Stat. 704.01 does not discuss pre-existing uses. Thus, for this type easement to arise, other considerations are important. In Redman v Kidwell, 180 So.2d 682 (Fla. 2nd DCA 1965) the court in reviewing Fla. Stat. 704.01 found an implied grant giving an easement of necessity under common law. In that case necessity was found to have existed where the claimant was land-locked and only had access to his land over the land of the defendants or by water. The court found that access by water was not practicable and since defendants and claimant had obtained title from a common grantor, then a common law way of necessity was created. In Roy v Vastgoed, 404 So.2d 410 (Fla. 4th DCA 1981) the court found a common law way of necessity by going back the chain of title to determine that both the claimant and defendants had obtained title from a common grantor and that this implied grant of way of necessity remained dormant until such time as there was a need for the land. It was further alleged that immediate access was needed to demonstrate necessity. The court found that the necessity to establish common law necessity is not implied if there is other reasonable access to the property which will enable the owner to achieve the beneficial use and enjoyment of his property. It is clear that the Roy and Redman cases define necessity in the context of the common law and the statute. The common law way of necessity and the statutory way of necessity neither require pre-existing use which goes to demonstrate intent and the circumstances of a conveyance. This is in accord with the commentators and the Restatement on Property.

The Fifth District Court of Appeal did not err in finding that the allegations of the complaint sufficiently demonstrated the elements to create an implied easement based on pre-existing use. In 3 H. Tiffany, The Law of Real Property, Section 781 at 256 (3rd Ed. 1939) Professor Tiffany advocates inquiry into the subjective intent of the parties as to the necessary characteristics of a "quasi-easement". He takes the view that even though an easement is not continuous, not apparent and not necessary, it should be implied if it accords with the probable intent of the parties.

The Fifth District Court of Appeal in The Moorings Association, supra found that once the elements of an implied easement were alleged the grantor would be equitably estopped to deny his grant citing Lefler v Smith, 388 So.2d 261 (Fla. 5th DCA 1980) rev. den. 397 So.2d 778 (Fla. 1981).

This court in McCoroquodale v Keyton, 63 So.2d 906 (Fla. 1953) upheld an implied grant stating that:

> "Common honesty should require that [the developer] perform that which at the time of the conveyance he represented he would perform."

It would appear that common honesty should require that a successor in interest not destroy that which an original developer in honesty promised and delivered.

Respondents rely on the dissent in the opinion to argue that the statute of frauds is a complete defense to the allegations of the complaint. In W.B.D., Inc. v Howard Johnson Company, 382 So.2d 1323, 1327 (Fla. 1st DCA 1980) the court stated that an oral contract when fully performed by one party is outside the statute

of frauds. The court went on to state that the statute of frauds could not be employed as a defense in this situation even though the subject matter of the contract was the conveyance of an interest in land.

In Winters v Alanco, 435 So.2d 326 (Fla. 2nd DCA 1983) the appellate court reversed the trial court which held that an oral agreement had been fully performed and the statute of frauds could not be employed as a defense against its enforcement. The court cited Miller v Murray, 68 So.2d 594, 596 (Fla. 1953) to distinguish the inapplicability of the statute of frauds exception of part performance to the case. The court, based on the circumstances surrounding the creation of the supposed easement and in reviewing the evidence adduced found that it was not the intent of the parties to create an easement and that the acts of the parties were inconsistent with the intent to create an easement. In analyzing the Winters case the court reviewed the evidentiary circumstances surrounding the creation of the easement to determine intent to create an easement.

The allegations herein are consistent with Winters and demonstrate that it was the intent of the parties to create an easement and that the acts of the parties complied with that intent.

An easement by implication can be created where the circumstances, the acts and the intent of the parties were to create an easement. Pre-existing use and visibility of the easement are some of the circumstances weighed to determine that

intent. In contrast, where there exists a land-locked piece of property a way of necessity may arise irrespective of prior use or visibility of a way of ingress or egress.

The Fifth District Court of Appeal was correct in weighing the factors of pre-existing use, demonstrated intent and acts of the parties thus requiring a more liberal interpretation of "necessity". In those circumstances where common law way of necessity is sought, a stricter standard of "necessity" is required, especially if the easement is not open, visible or in use.

ARGUMENT II

THE ISSUE OF CLASS REPRESENTATION BEING PRESENTED THE FIRST TIME BEFORE THIS COURT IS NOT RIPE FOR REVIEW; CLASS ACTION IS PROPER WHERE EQUITABLE RELIEF SOUGHT.

Petitioners concede that the Class Representation issue was never presented to the trial court nor to the District Court of Appeal for review. Fla.R.Civ.P. 1.220(c) outlines the pleading requirements for a Class Action. Fla.R.Civ.P. 1.220(d) states the trial court is to make a determination which includes findings of fact and conclusions of law as to whether a Class Action can be maintained. Respondents have initially met the burden of pleading requirements as required by the Rule. The dissent argues that this class action was improper without the benefit of a ruling by the trial court pursuant to the Rule. It would appear that even assuming that such a hearing had been made and the trial court had ruled in favor of allowing a class determination, a ruling on that order would be premature. See American Heritage Institutional Securities v Price, 379 So.2d 420 (Fla. 4th DCA 1980).

This court in Jones v Neibergall, 47 So.2d 605 (Fla. 1950) stated that in a reconsideration of an initial proceeding that issues not presented to the trial court nor presented to this court initially would not be considered on reconsideration. The Florida Rule of Civil Procedure concerning class actions provides for pleading requirements, provides that the trial court is to be given the widest latitude in taking evidence and determining whether a class action is the proper vehicle and further provides that the trial court will enter findings of fact

and conclusions of law, as to whether a class action is proper. Petitioners now seek for the first time a ruling from this Court as to whether a class action can be maintained. This procedure would bypass the precedure set out of this Court to initially make that determination.

The Second Amended Complaint referred to representations from the original developer regarding an access canal to be constructed to enhance a subdivision being developed. True to those representations, the developer fully performed only to be thwarted by the successor Petitioners.

In Davidson v Lely Estates, Inc., 330 So.2d 528 (Fla. 2nd DCA 1976) the court noted that ordinarily a class action would be inappropriate to determine the merits and remedies of those parties seeking redress from an action based on fraud and deceit, because of significant differences in the nature of the fraudulent representations as well as the degrees of reliance thereon. However, the court noted that where a claim is predicated on equitable relief, claimants validly pled a class action and it was error for the trial court to have dismissed that claim with prejudice. In Lance v Wade, 452 So.2d 1008 (Fla. 1984) it was held that a class action based on fraud could not be maintained due to the inherent nature of a fraud action. There is no allegation of fraud herein with respect to the original developer. There are no misrepresentations relied upon by any members of the class. The members of the class rightfully relied upon representations and full performance by the original developer.

The original developer fully performed. The successor Petitoners removed that which had been constructed thereby denying the Respondents the reasonable access to the river to which they were entitled.

There is nothing to affirm or reverse with regard to the Fifth District Court of Appeal's decision on a class action as that issue, not having been raised, was not decided. That issue should not be decided at this time without the benefit of a trial court's determination as to the maintainability of a class. The dissent must of necessity presume the trial court determined that a class was proper which, under the circumstances of this case, requires this court to ". . . divine issues from the ether . . .", Jones, supra at 606.

CONCLUSION

For the reasons stated herein Respondents, THE MOORINGS ASSOCIATION, INC., respectfully request this Court affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier this 12th day of June, 1985 to Kerry I. Evander, Esquire, 1825 South Riverview Drive, Melbourne, FL 32901, Attorney for Petitioners.

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