Estate of Asanuma v. Blailes, 13 ROP 84 (2006)

ESTATE OF MASAMI ASANUMA,[1]
Appellant,

v.

THEODOSIA BLAILES,
Appellee.

CIVIL APPEAL NO. 04-035
Civil Action No. 01-10

Supreme Court, Appellate Division
Republic of Palau

Decided: March 8, 2006[2]
⊥85
Counsel for Appellant: Raynold B. Oilouch

Counsel for Appellee: Johnson Toribiong

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice; JANET HEALY WEEKS, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable R. BARRIE MICHELSEN, Associate Justice, presiding.

PER CURIAM:

Appellant appeals the Trial Division's judgment finding the existence of an easement for noncommercial use of land in favor of the appellant. It argues that the trial court should have only ruled on the existence of the easement and not on any limitations of an easement. For the following reasons, we will affirm the judgment below.

BACKGROUND

The parties do not dispute the general facts of this case. Prior to 1954, Mikel Ngirmeriil owned land in Ikelau in Koror State. In 1954 or 1955, Masami Asanuma and his wife purchased taro patches[3] from Ngirmeriil, but this land was not directly accessible from Ikelau Road. As a

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[1] Counsel has the obligation to inform the Court of the death of a client, but Appellant's counsel failed to do so. Nevertheless, the Court has changed the style of the case, *sua sponte*, to reflect the passing of Masami Asanuma.

[2] The court has concluded that oral argument would not materially assist in the resolution of this appeal. ROP R. App. P. 34(a).

[3] These taro patches are now identified as Cadastral Lots 051B13, 051B14, 051B15, 051B16, 051B18, 051B19, and 051B23.

part of the sale, Ngirmeriil permitted Asanuma to use part of his property adjacent to the road as an access route to the taro patches. Apparently, this access road even existed during Japanese occupation of Palau and was used to travel to residences. This access road bisects land identified as Tochi Daicho Lot 1064, and the Asanumas have been using it since they purchased the taro patches from Ngirmeriil.

In 1957, Ngirmeriil sold the eastern portion of Tochi Daicho Lot 1064 to Masami Asanuma and his wife. Ngirmeriil retained the western portion of that lot. The access road, however, crossed both properties. As a result of that conveyance, the access road started entirely on Ngirmeriil's western portion of the lot and drifted to Asanuma's eastern lot as it continued south and away from Ikelau Road. The access road was completely on Asanuma's lot when it reached the boundary of the taro patches. In 1958, Ngirmeriil sold the western lot to Dr. Faustino, who was the brother of Appellee Theodosia Blailes.

Blailes moved onto the land in 1984. At that time, there was some use of the access road by both foot and vehicular traffic, which Blailes tolerated. In 1996, construction began to build a two story warehouse in the back of ⊥86 Asanuma's Lot 1064-east. Additionally, two of Asanuma's relatives began building residences on two of the taro patches. As a result, heavy equipment used the access road. Because of the increased construction traffic, Blailes complained. During 1999, Blailes accepted $75 in monthly payments for the use of the access road, but when she requested $100 per month, Asanuma stopped paying her. Shortly thereafter, Blailes built a fence on the boundary line, and the fence prevented the Asanumas from using the access road. Asanuma, then, filed a complaint in the Trial Division, seeking the court to declare that he has an easement over Blailes's land, to enjoin Blailes from blocking the access road, and to award damages to him. In her answer, Blailes denied the existence of an easement.

The court ultimately found that there was an easement over the property. It stated that "[e]ven if Mikel [Ngirmeriil] had said nothing, an implied easement would have been created. . . . Here, the 1954-1955 conveyance of taro patch lots not reasonably accessible except through the retained land must impliedly include an easement over that retained land." It further found that the easement was on the access road and "was to be wide enough for one car to utilize and it begins where the dirt road turns off Ikelau Road into Lot 1064, and proceeds south to a point where it crosses over to the Asanuma's [sic] later-acquired property." Finally, the court considered the extent of the easement. It found that "the contemplated use of the access road is to allow tenants, employees, and commercial delivery trucks to drive to the planned commercial building on Lot 1064-east. . . . Plaintiff's contemplated use is far afield from the intended use of the easement created to reach the taro patches to the south." The court concluded that the easement was limited to noncommercial traffic.

Asanuma challenges this decision, arguing that Blailes did not raise a limited easement as an affirmative defense, and therefore, the court exceeded its authority by considering the nature or extent of the easement, which "was not directly before the Court."

ANALYSIS

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Asanuma makes two subtle arguments on appeal. First, he contends that Blailes never raised a commercial-noncommercial distinction as an affirmative defense, and since affirmative defenses must be raised in pleading, Blailes waived the right to a limited easement. Second, he maintains that the trial court overstepped its authority in ruling on the extent of the easement because it was not properly before the court. Because these are challenges to the trial court's legal conclusions and its authority, the Court reviews this case on a *de novo* basis. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

Appellant's argument that the limited nature of an easement is an affirmative defense is meritless. An affirmative defense is an "assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Black's Law Dictionary* 450 (8th ed. 2004). The Rules of Civil Procedure require that a defendant "set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." ROP R. Civ. P. 8(c). Failure to ⊥87 raise an affirmative defense may constitute waiver of that defense. *Mesubed v. ROP* , 10 ROP 62, 65 (2003); *Remasch v. Ngiramos*, 8 ROP Intrm. 280, 281 (2001).

The nature or extent of an easement does not fall into any one of the specific, enumerated defenses in Rule 8(c). Therefore, in order for it to be considered an affirmative defense, it would have to fall under the catchall phrase "any other matter constituting an avoidance or affirmative defense." Courts have considered several factors in determining whether a defense must be pled under this provision. 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1271 (3rd ed. 2004). One consideration is whether a particular issue follows by logical inference from the plaintiff's claim. *Id.* An easement by definition is "[a]n interest in land owned by another person . . . for a specific limited purpose." *Black's Law Dictionary* 548 (8th ed. 2004). Moreover, an easement is a type of servitude, which "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." Restatement (Third) of Property: *Servitudes* § 4.1 (2000). It follows that a court would necessarily look into the purpose of the easement, and it would not be necessary for a defendant to raise the limited purpose of an easement as an affirmative defense when the defendant denied the existence of an easement.

This same reasoning applies to a second factor: "whether the plaintiff would be taken by surprise by the assertion of a defense not pleaded affirmatively by the defendant." 5 Wright & Miller, *supra*, § 1271. Because Appellant's complaint focuses on the existence of an easement, it should come as no surprise that the court would look into the purpose of the easement.

A third factor courts consider is fairness. This basically requires the court to determine whether "all or most of the relevant information on a particular element of a claim is within the control of one party or that one party has a unique nexus with the issue in question and therefore that party should bear the burden of affirmatively raising the matter." *Id.* Because both parties

had information related to the original purpose of the easement, the fairness factor does not bolster Appellant's argument that Blailes should have raised this issue in her affirmative defenses.

Courts may also place the burden of pleading "on the party who will be benefitted by establishing a departure from the supposed legal or behavioral norm." *Id.* The norm is established at the accrual of the plaintiff's right, and any matters occurring after that time "are almost always placed in the category of affirmative defenses." *Id.* at n.75 (citing Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5, 13-14 (1959)). In the present case, the trial court found that an implied easement was created when Asanuma purchased the taro patches. At that time, the purpose of the easement was set as the norm, and this factor would require Blailes to plead any defenses that originated after the easement was created. Because the purpose (ultimately, the commercial-noncommercial distinction) did not originate after the creation of Asanuma's right to the easement, it is less likely to be a defense that must be plead affirmatively.

Using these factors, the limited purpose of the easement is not an affirmative defense that must be plead by the defendant. We find that it was sufficient that Blailes ⊥88 denied the existence of the easement without also pleading that if there was an easement, it should be limited to noncommercial traffic.

Appellant also argues that the trial court overstepped its authority in ruling on the extent of the easement. We disagree. The Restatement of Property addresses this issue:

> A servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens. Factors that may be considered in determining the availability and appropriate choice of remedy include *the nature and purpose of the servitude* , the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties, and to the public.

Restatement (Third) of Property: *Servitudes* § 8.3(1) (2000) (emphasis added). This clearly states that the nature and purpose of an easement can be considered in crafting a remedy to enforce the easement. Appellate courts have extended this principle by noting that trial courts have flexibility in designing remedies to enforce easements. *See, e.g.*, *Oceanside Cmty. Ass'n v. Oceanside Land Co.* , 195 Cal. Rptr. 14 (Cal. Ct. App. 1983); *Exit 1 Properties Ltd. P'ship v. Mobil Oil Corp.* , 692 N.E.2d 115 (Mass. App. Ct. 1998). Moreover, an easement is a type of servitude, which "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." Restatement (Third) of Property: *Servitudes* § 4.1. Therefore, we find that the trial court did not err in limiting Asanuma's usage of the access road on Blailes's property to noncommercial traffic.

CONCLUSION

For the reasons discussed above, the trial court's judgment is affirmed.