

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002234-MR

THIENEMAN MULTIFAMILY PROPERTIES, LLC

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 06-CI-005355

THORNTONS, INC.

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; KNOPF,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Thieneman Multifamily Properties, LLC, (Thieneman)

appeals from an order of the Jefferson Circuit Court dismissing its action against

Thorntons, Inc. In its verified complaint, Thieneman alleged that Thorntons owns

property (tracts 7 and 8) subject to a thirty-foot easement intended to benefit an adjacent

parcel (tract 9). Tract 9 was ultimately conveyed to Thieneman. Thieneman alleged that

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Thorntons's rights and responsibilities with respect to the easement were set forth in detail in an instrument entitled as the “shared entrance agreement.”

Thorntons proposed to construct a new store with an entranceway outside the thirty-foot easement. Thieneman brought an action for injunctive relief seeking to restrain Thorntons from violating the provisions of the shared entrance agreement. After our review of the applicable law and the arguments of counsel, we vacate and remand the trial court's judgment for Thorntons.

Thorntons owns a parcel of land (tracts 7 and 8) at the corner of Dixie Highway and Moorman Road in Louisville. The Thieneman property (tract 9) adjoins the Thorntons tracts at Moorman Road. In 1992, John and Mary Bloyd, who then owned both parcels, leased the land to Thorntons. On September 31, 1992, they recorded a plat indicating a private access easement over tracts 7 and 8 for the benefit of tract 9 at the location where the Thorntons tracts and the Thieneman property adjoin. On that same date, the Bloyds executed and recorded an instrument entitled “Shared Entrance Agreement.” This agreement provided that expenses incidental to the maintenance, repair, or rebuilding of the shared driveway as shown in the plat be borne by the owner of tract 7. The agreement further provided that the owners of tracts 7, 8, and 9

shall have the power to make all decisions relating to the implementation of the purposes and provisions [of the shared driveway agreement] and such decisions shall be made by a unanimous vote of those persons representing the owner of said lots who are present and voting at a regularly called meeting. . . .

Thorntons and Thieneman acquired fee simple title to their respective tracts subject to the easement and the recorded agreement.

In April 2006, Thorntons received approval from the Louisville Metro Department of Planning and Design Services for its preliminary development plan for a new store at the corner of Moorman Road and Dixie Highway. The development plan showed direct access to the new store from Moorman Road and also noted the existence of a private access easement that was intended to serve the adjacent commercial property owned by Thieneman. Thorntons's proposed new entrance provided indirect access to Thieneman's property.

Thieneman filed this action in June 2006. It claimed that by undertaking to build its proposed new entranceway, Thorntons had failed to comply with the provisions of the shared entrance agreement. In August, Thorntons filed a motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(b). Thorntons argued that Thieneman could not show that its proposed entranceway interfered with Thieneman's right of ingress and egress or that its proposed entranceway implicated the provisions of the shared entrance agreement. Consequently, Thorntons contended that Thieneman could not state a claim upon which relief could be granted. In its memorandum in support of the motion, Thorntons attached the affidavit of Steve H. Scott, an engineer, who attested that Thorntons's entranceway for the new store was located wholly outside the physical boundaries of the shared access easement.

Thieneman objected to the motion to dismiss and filed a memorandum in support of its opposition. Thieneman argued that the shared access contemplated by the terms of both the recorded easement and the written agreement was to be located within the area clearly described by the Bloyds – and **not outside** the easement on Thorntons's unburdened property. Thieneman also attached the affidavit of Paula Wahl, Engineer Supervisor of the Louisville Metro Department of Planning and Design Services. According to Wahl, engineering standards would not typically permit two separate entrances within such proximity to one another. “In this case, two entrances from Moorman Road to the Thorntons property and the [Thieneman] property would not be appropriate where shared access can be and is provided.” Wahl affidavit at 1. Consequently, Thieneman argued that Thorntons's proposed entranceway **did** interfere with its use and enjoyment of the recorded easement.

In addition, the location of the proposed entranceway was never made the subject of a properly convened meeting of the property owners as required under the provisions of the shared entrance agreement. According to Thieneman, Thornton's noncompliance with its responsibilities under the shared entrance agreement would result in construction of a single entranceway off Moorman Road – outside and beyond the easement originally established for the sole purpose of providing acceptable, shared access to tracts 7, 8, and 9. In reply, Thorntons countered that Thieneman continues to have direct access to Moorman Road across tracts 7 and 8 as granted by the easement and

that Thieneman has no legal right to dictate Thorntons's use of the unencumbered portion of its property.

On October 4, 2006, the Jefferson Circuit Court concluded that Thorntons's proposed entrance located outside the dimensions of the recorded easement did not interfere with Thieneman's use and enjoyment of that easement. The court granted Thorntons motion to dismiss, and this appeal followed.

We begin our review by reiterating that exhibits and affidavits were filed in the record by the parties and were apparently considered by the trial court along with the pleadings. There is nothing in the record to indicate that the court formally converted Thorntons's motion to dismiss into one for summary judgment. However, Kentucky Rule of Civil Procedure (CR) 12.02 provides as follows:

If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Summary judgment may be granted only if the record shows that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. CR 56.03.

Thieneman contends that the trial court erred by concluding that the proposed entranceway did not interfere with Thieneman's use and enjoyment of its

recorded easement or that Thorntons's proposed entranceway did not implicate the shared entrance agreement. We agree.

The terms of both the recorded easement and the shared access agreement, along with the plat, guaranteed to the owners of tracts 7, 8, and 9 equal access to and from Moorman Road. These recorded instruments required the owners of the tracts to work together to maintain a commercially suitable entranceway that fairly and reasonably provided access to the tracts.

As owner of the servient estate, Thorntons is entitled to use its property for any purpose which does not interfere with Thieneman's proper use of its easement. However, Thorntons's proposed construction renders ingress and egress along the recorded easement inherently dangerous. Thieneman demonstrated that the continued use of the original easement after Thorntons's construction of the proposed new entranceway would fail to comply with standard engineering practices and would not likely satisfy municipal planning requirements.

By obtaining approval for its proposed entranceway, Thorntons made an end-run around the purposes of the recorded shared entrance agreement. It wholly disregarded the procedural requirement calling for a meeting and consensus between the property owners. Thorntons's proposed entranceway patently interferes with Thieneman's use of the recorded easement and is in violation of the provision of the shared entrance agreement requiring the parties “to make all decisions relating to the

implementation of the purposes and provisions [of the agreement.]” Thorntons has not shown that it is entitled to judgment as a matter of law.

Consequently, the judgment of the Jefferson Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kyle T. Hubbard
Louisville, Kentucky

BRIEF FOR APPELLEE:

Donald J. Kelly
Frank F. Chuppe
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