Circuit Court for Montgomery County
Case No. 443778-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 88

September Term, 2019

BRIAN C. GIVENS, *et al.*

v.

EURO MOTORCARS COLLISION CENTER, INC., *et al.*

Fader,
Nazarian,
Wilner, Alan M. (Senior Judge),
Specially Assigned,

JJ.

Opinion by Wilner, J.

Filed: June 26, 2020

This is a dispute between the owners of adjoining commercial property over whether appellant[1] has a surviving prescriptive easement to use what appellant refers to as a "right-of-way" that consists of a 56-foot wide driveway, a paved area at the end of that driveway that includes an adjacent parking lot, and part of a concrete block that appellant refers to as a loading dock, all of which (1) are part of appellee's property, (2) abut appellant's property, and (3) appellant claims to have used for 20 years prior to appellee's purchase of its property. Appellant's property consists of three connected warehouses that, since 1973, have been leased to Capital Carpets, which uses them for the delivery, storage, and distribution of their flooring products and as a business office.

The adjoining property – the alleged servient property – was previously owned by a company known as Post Community Media, LLC and was occupied by the Gazette Newspapers.[2] In December 2016, the property was sold to appellee Country Realty for use by its affiliate, Euro Motorcars Collision Center, Inc. (Euro), as an auto repair service center. We shall henceforth refer to that property as the Euro property.

Shortly after appellee purchased the property, Euro erected a fence designed to protect its customers' vehicles awaiting servicing or repair but that effectively precluded appellant from using the alleged easement. In two rulings, one on partial summary

[1] The alleged dominant property is owned by a trust, of which Mr. Givens is a trustee. The appellants in the case are the trust and the tenant of the property, Capital Carpets. Because their interests are aligned, we shall refer to appellants in the singular.

[2] Gazette had previously owned the building but sold it to Post in 2013.

judgment and one after an evidentiary trial, the Circuit Court for Montgomery County, through an Order denying appellants' request for declaratory and injunctive relief, concluded that the Euro property was not subject to any prescriptive easement that appellant may once have had. This appeal is from that Order.

BACKGROUND

The two properties are part of Comprint Court in Gaithersburg. They are most clearly shown on Plaintiff's Exhibit 6 (reproduced at E 1011). The paper exhibit shows that the entrance to the properties from the public road ends in a circle located near the top of the page. The circle has two openings separated by a grass median and concrete curb. One opening provides access to a driveway that is 23 yards wide and leads to appellant's property. For convenience, we shall refer to that driveway as appellant's driveway, even though it also services the property of another owner not involved in this case. The other opening provides access to and from the 56-foot wide driveway that is part of the Euro property and runs more or less parallel to appellant's driveway.

Along the left side of appellant's driveway (as shown on the document) are six warehouses, the last three of which (9093, 9095, and 9097 Comprint Court) are owned by appellant and, since 1973, have been leased to Capital Carpets. Products are delivered to and distributed from the Capital Carpet warehouses by large trucks. The entrances to those warehouses face appellant's driveway. That driveway dead-ends just past the last

warehouse at 9097 Comprint Court, which requires the delivery trucks, in order to return to the public road, either to back up on appellant's driveway or proceed to the end of it, traverse part of the paved area at that point to make a U-turn on to the parallel 56-foot driveway on the Euro property, and use that driveway to return to the circle.

At some point across from the row of warehouses is what appellant refers to as a loading dock, which was described as a concrete structure 48 inches high that appellant claims is on its property but extends two feet on to the Euro property and that appellant has accessed from the Euro property. There was disputed evidence as to the precise nature of that structure. Appellant claimed that, for more than 20 years, Capital Carpets had used it to unload arriving product, either by accessing it directly from the circle through Euro's driveway or from the other direction by means of the U-turn.[3] That became a separate issue with respect to the scope of the alleged prescriptive easement – an easement to use Euro's paved area and driveway to return to the circle and an easement to use it to access and use the loading dock.

The dispute reached the court in March 2018 in the form of a Complaint for declaratory and injunctive relief. Specifically, appellant averred the use of the "right of way" for more than 20 years but made no averment as to whether that use had been

[3] It seems clear that the actual use of Euro's property, including the alleged loading dock, was by the tenant, Capital Carpets. Because we are dealing with a property interest, we shall regard that as appellant's use.

permissive or hostile and adverse. Appellant requested an order adjudicating and declaring appellant's right to a prescriptive easement and an injunction requiring appellee to remove the fence and cease interfering with appellant's right to use the prescriptive easement through the servient estate. Appellee's answer objected to the use of the terms "servient" and "dominant" estate but professed an inability, due to a lack of knowledge, to respond to the allegation of a prescriptive easement.

Both parties moved for summary judgment. The principal focus of both motions and the affidavits and deposition testimony in support of them was on whether appellee had actual or constructive knowledge of the alleged use that had been made of the Euro property by appellant prior to appellee's purchase of the property, but they both addressed as well whether the alleged use of the Euro property by appellant prior to appellee's purchase had been permissive.[4]

In an affidavit in support of appellant's motion, Mr. Givens, one of appellant's trustee/owners, averred that, to his knowledge, at least since 1993, no one on appellant's behalf had ever sought permission to use the Euro property and that the property had been used for more than 20 years without any agreement. He added that no objection had

[4] The law is clear, and undisputed in this case, that for an easement by prescription to arise, the use of the servient estate by the owner of the dominant estate must be continuous *and adverse* for 20 years. As stated in *Phillips v. Phillips*, 215 Md. 28, 33 (1957) and followed in *Turner v. Bouchard*, 202 Md. App. 428, 441 (2011), "[i]t is generally held that a permissive use can never ripen into an easement by prescription, at least during the period within which permission is granted."

ever been made by the prior owner of the Euro property to appellants' use of the loading dock, and that appellant "used the right of way on the Servient Estate as they see fit."

That averment was contested. As part of appellee's response and cross-motion for summary judgment, appellee alleged that Capital Carpets was given permission by the former owner to use the Euro property for a limited purpose and, in support of that assertion, attached an affidavit of Kenneth Harley, who had worked for the former owner, Gazette Newspapers. Mr. Harley acknowledged that delivery trucks for Capital Carpets would occasionally use the Euro property to exit appellant's property and that Capital Carpets employees occasionally would park their cars on the property. He added that "Capital Carpets asked the Gazette for permission to allow its delivery trucks to drive on the Property to exit the Capital Carpets Property" and "for permission to allow its employees to park on the Property," and that the Gazette "allowed the delivery trucks for Capital Carpet to utilize the Property on certain occasions to exit the Capital Carpets Property" and "allowed employees of Capital Carpets to park on the Property on certain occasions." That assertion was supported in an answer by Charles Harmel, Euro's general manager, to an interrogatory propounded by appellant.

Notwithstanding this factual dispute as to whether the use of the Euro property by Capital Carpets had been permissive, and thus whether appellant *ever* had a prescriptive easement, the principal issue presented to the court was whether appellee was bound by any prescriptive easement that had arisen from such use. Appellee relied on the

proposition that it was a bona fide purchaser for value without any notice, actual or constructive, of appellant's use of the paved area, including the parking area, and, under Maryland law, mostly as explicated in *Kiler v. Beam*, 74 Md. App. 636 (1988), it was not bound by any unrecorded prescriptive easement that may have been created earlier.

The claimed easement to use Euro's paved area for the movement of trucks or parking cars was resolved, in part, on the cross-motions for summary judgment. Deposition evidence was offered to show that, prior to its purchase of the Euro property, which had remained vacant for two years after The Gazette closed its operation there, agents of the seller and of appellee had made numerous visits to the property and never saw any trucks or other vehicles exiting from appellant's property on to the Euro property. In all, 11 representatives of the seller or buyer made 10 visits to the property during business hours. Some of them had copies of the sales packet prepared by the broker that described the property and made no mention of any easement or use of the property by appellant. Some of them noticed cars parked on the paved area but did not know whose cars they were, and some noticed the concrete block but didn't know what it was used for. They averred that they had no reason to suspect that there was any easement to use any part of the property.

Appellant countered that, having noticed the concrete block and cars parked on the property, and able to observe that that there was no physical barrier between the two properties, appellee had a duty to inquire, and, had it inquired of appellant, the immediate

neighbor, it would have learned of the claimed easement. Indeed, that is how appellee did learn of it, but not until after appellee had purchased and settled on the property and Euro erected the fence.

On this evidence, the court, through Judge Rubin, saw a distinction between appellant's using the paved area to access its warehouses generally, which he characterized as the "parking area claim," and to use the part of the concrete block/loading dock on the Euro property in particular, which he characterized as the "loading dock claim." As to the latter, Judge Rubin concluded that whether appellee was on notice that someone had been or was using the structure as a loading dock was a factual issue that could not be resolved on summary judgment but would require an evidentiary hearing.

As to the "parking lot claim," Judge Rubin treated the notice issue as hinging solely on an inference from the cut in the curb that allowed access to the warehouses and concluded, as a matter of law, that the cut in the curb "does not put a prospective purchaser on actual or constructive notice that other people are parking on your land."

That seemed to be the basis for his ultimate holding, but he added, almost as a postscript, that he agreed with appellee's counsel's argument that parking is a possessory use, whereas an easement is a non-possessory use, indicating that parking on another's land without permission does not give rise to a prescriptive easement. For either or both of those reasons, Judge Rubin denied both motions for summary judgment with respect to

the alleged loading dock but granted summary judgment that no easement existed with respect to the paved area generally.[5]

That led to an evidentiary non-jury trial in February 2019 before Judge Cho, limited to whether appellant had a prescriptive easement to use the Euro property to access and use the loading dock; *i.e.*, (1) to make a U-turn on to the 56-foot paved area to load or unload material on to or from the loading dock and then continue on that paved area to get back to the circle and the public road, or (2) to access that paved area directly from the circle, back the truck down to the loading dock to deposit or pick up material, and then exit by proceeding back to the circle.

After considering evidence that, prior to appellee's purchase of the Euro property, Capital Carpets used the loading dock on an average of "one to two times a week" since 1993, the court found that its use was adverse, exclusive, and continuous and that appellant had satisfied its burden of showing that a prescriptive easement had been created. Crediting the evidence by appellee's witnesses, some of whom had been to the property several times during ordinary business hours and either never noticed the loading dock or observed it but did not know what it was and never saw anyone using it. Judge Cho said that she could not find that "there was something so concrete that

[5] The Order granted appellee's cross-motion for summary judgment as to all of appellant's claims for a prescriptive easement on appellees' property except for their claim for a prescriptive easement to use appellees' property at 9030 Comprint Court to access and use the loading dock.

everybody would have intuitively understood or a reasonable person would have understood . . . that what they were looking at there was a loading dock." Accordingly, the court found that appellee was a bona fide purchaser and did not have the requisite notice, either actual or constructive, of the easement. Upon that finding, the court entered an Order denying the Complaint, and this appeal ensued.

DISCUSSION

In this appeal, appellant complains that both Judge Rubin and Judge Cho failed to apply the proper standards in determining (1) that appellee was a bona fide purchaser without notice of any prescriptive easement possessed by appellant, and (2) that any such easement therefore ended with the transfer of title. Appellant also takes issue with Judge Rubin's conclusion that no easement exists for parking on someone else's property. In the absence of any argument to the contrary by appellee, we may accept the trial court's conclusion that, prior to appellee's purchase of the Euro property, appellant did have a prescriptive easement to use the 56-foot paved area to access the Capital Carpets warehouses and to use the concrete block as a loading dock, notwithstanding the evidentiary dispute as to whether that use was permissive. Judge Cho had a right to accept appellant's testimony that the pre-2016 use of the structure had been adverse and legally hostile. The issues before us, as presented in the parties' briefs, concern only whether any such easement survived appellee's taking title to that property.

This Court established the analytical framework for the issues before us in *Kiler v. Beam, supra*, 74 Md. App. 636. The case involved a dirt road that crossed both the appellant's lot and the appellees' contiguous lot. The appellant had been using the road for 24 years prior to the time appellees purchased their lot. When the appellees blocked the appellant's access, a lawsuit was filed. A master (now called a magistrate) found that the appellant's use of the road had ripened into a prescriptive easement prior to the appellees' acquisition of their lot. The trial court did not disagree with that conclusion but found that the appellant's use of the road *after* the appellees took title was not sufficiently continuous for the appellees to be aware that the appellant's use was under a claim of right. That, we held, was not the right approach. The court needed to determine whether a prescriptive easement was established *before* the appellees took title and, if so, whether the easement survived the transfer of title, and we remanded for that purpose.

In that latter regard, we observed, based on treatises and "the overwhelming majority of case law in other jurisdictions," that "an easement is not binding on a subsequent bona fide purchaser of the servient estate if he purchases without notice, either actual or constructive, of the easement." *Id.*, at 641. We iterated the standard for determining actual or constructive notice enunciated in *Fertitta v. Bay Shore Dev. Corp.*, 266 Md. 59, 72-73 (1972):

> "[T]he rule is that if [the subsequent purchaser] had knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry, he will be presumed to have made such inquiry and will be charged with notice of all facts

> which such an investigation would in all probability have disclosed if it had been properly pursued. A purchaser cannot fail to investigate when the propriety of the investigation is naturally suggested by circumstances known to him. If he neglects to make such inquiry, he will be guilty of bad faith and must suffer from his neglect. That which is sufficient to excite inquiry is notice of such facts as would lead an ordinarily prudent [person] to make an examination."

We accepted as well the articulation of that rule by the Supreme Court of West Virginia in *Fanti v. Welsh*, 161 S.E.2d 501, 505 (W. Va. 1968):

> "The grantee is bound where a reasonably careful inspection of the premises would disclose the existence of the easement, or where the grantee has knowledge of facts sufficient to put a prudent buyer on inquiry. It is not necessary that the easement be in constant and uninterrupted use. The purchaser of property may assume that no easements are attached to the property purchased which are not of record except those which are open and visible."

See also *Zissler v. Saville*, 29 Cal. App. 5th 630, 642 (2018)

These principles are clear enough and were applied by the trial court in this case. As in this case, the issue nearly always is a factual one. *See Colbert v. Baltimore City*, 235 Md. App. 581, 588 (2018): "Constructive notice is notice that the law imputes based on the circumstances of the case."

In granting summary judgment with respect to everything but use of the loading dock, Judge Rubin relied on the consistent deposition testimony and affidavits of both the seller's agents and agents of appellee who were familiar with the marketing material and personally visited the property on multiple occasions during business hours prior to appellee's purchase of it. They all stated that they had no indication of any easement across the property and never saw any trucks using any part of the Euro property after

servicing appellant's warehouses.[6] Some noticed a few cars parked on the parking area but had no idea whose cars they were. Some said they did not even notice the loading dock. No one saw it being used as a loading dock. John Alexander, a broker retained by Euro, said that he probably did notice it but had no discussion with anyone as to its purpose. As we have observed, Judge Cho relied on the same evidence in concluding, as a matter of fact and law, that appellees had no actual or constructive knowledge that appellant had been using the concrete block as a loading dock adversely and continuously for 20 years.

Appellant's claim of error rests on the combination of three facts or circumstances – the mere existence of the paved area connecting the two properties without any obstruction; the mere existence of the concrete block; and the fact that cars of unknown owners were parked on an otherwise vacant paved area. Any of those circumstances, appellant claims, "would put a person of ordinary prudence on notice to inquire further," not just to inquire generally but to inquire of appellant. Such an inquiry, appellant insists,

[6] *See* (1) deposition testimony of Guy Copperthite, the seller's agent, to that effect at E 260 and also that, after his company got the listing to sell the property, he spoke with Mr. Givens about the possibility of appellant buying the property and Givens never mentioned the easement; (2) deposition testimony of John Alexander, a broker retained by Euro, who visited the property several times and also was unaware of any easements, never saw any trucks parked on the Euro property, and noticed cars parked on the lot area but did not know who they belonged to (E 299); and (3) deposition testimony of Charles Harmel, the general manager of Euro, who visited the property and saw no trucks or cars and did not recall seeing the loading dock (E 287).

would have disclosed the easement, and appellee is therefore charged with knowledge thereof.

That, in our view, is far too great a leap. None of those circumstances, individually or in combination, suggests even the possibility that appellant might have a prescriptive easement to run its trucks across the Euro property, especially when appellant was aware from the conversation with Mr. Copperthite that the Euro property was being actively marketed and said nothing about any easement. No one saw any vehicles using the Euro property after coming from or proceeding to appellant's property or anywhere near the concrete block. Nor does the fact that unidentified cars occasionally were parked on the paved area suggest that appellant had an easement to park its vehicles there or to run trucks on either the Euro driveway or the other paved area, whether to access the loading deck, if that is what is was, or simply to exit the area back to the circle.

We shall affirm the legal conclusions reached by the trial court but must remand for the entry of a proper judgment. As noted, the Complaint in this case sought a declaratory judgment that appellant was entitled to a prescriptive easement across appellee's property. The request for injunctive relief was ancillary to that primary request. The Court of Appeals and this Court have made clear many times that, when a declaratory judgment is sought and the controversy is appropriate for resolution by declaratory judgment, the court must enter a declaratory judgment defining the rights of

the parties, even if it is not the kind of judgment the plaintiff requested, and not simply dismiss the Complaint. *Lovell Land v. SHA*, 408 Md. 242, 255-56 (2009); *Montgomery County v. Shropshire*, 420 Md. 362, 371, n.7 (2011); *Donnelly Adv. Corp. v. City of Balto.*, 279 Md. 660, 672 (1977). As noted, the judgment in this case simply denied the Complaint for Declaratory Judgment. That does not suffice.

JUDGMENT OF CIRCUIT COURT VACATED;
CASE REMANDED FOR ENTRY OF DECLARATORY
JUDGMENT DECLARING THAT APPELLANT
DOES NOT HAVE A PRESCRIPTIVE EASEMENT OVER
APPELLEE'S PROPERTY AND IS NOT ENTITLED TO INJUNCTIVE
RELIEF; APPELLANT TO PAY THE COSTS.