

No. 33295 *Bernard J. Folio, an individual; and Grandeotto, Inc., a corporation, Plaintiffs Below, Appellants v. City of Clarksburg, a municipal corporation, Defendant Below, Appellee,*

and

No. 33302 *Grandeotto, Inc., a corporation, Plaintiff Below, Appellant v. City of Clarksburg, a municipal corporation, Defendant Below, Appellee*

FILED

November 15,

2007

Benjamin, Justice., dissenting:

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

The majority holds that summary judgment was improper because of questions of fact concerning whether right-of-ways were created by estoppel as a result of representations by the City of Clarksburg. The majority also holds that summary judgment was improper because questions of fact exist concerning the claim that the City engaged in fraud and negligent representation. I am of the opinion that those conclusions are based upon a mistaken view of the facts and circumstances concerning the parcel in question and a misapplication of the law to the status of these actions. Therefore, I respectfully dissent.

The majority treats the right-of-ways set forth in the two agreements as one and the same and remands the whole to the Circuit Court for further litigation upon the issues of estoppel, fraud and negligent representation. In fact, the invalidity of the agreements notwithstanding, the City does not contest either a pedestrian right-of-way or a sewer line in

a northerly direction from the appellants' other commercial property to Pike Street. In addition, during oral argument before this Court, the City indicated that pedestrians could use an adjoining tract to walk around the building which spans the parcel on its southern border. Under the mandate of the majority, however, the City is under no further obligation to make those accommodations. Instead, the parties will now be litigating the issue of estoppel, as well as alleged fraud and misrepresentation. There is no guarantee that the appellants will prevail before a jury.

It must be remembered that the primary focus of the appellants was to obtain specific performance of the two right-of-way agreements and to require the building to be demolished, not whether they were entitled to right-of-ways, in the first instance, based upon equity. In view of the invalidity of the two agreements, even if the appellants prevail upon remand, the right-of-ways they receive may be very different from the ones the agreements attempted to create. The better approach would have been for this Court to affirm the invalidity of the agreements, based upon lack of sufficient description and merger, and remand the action to the Circuit Court for further proceedings upon the right-of-ways the City is willing to accommodate and whether the accommodation is acceptable to the appellants.

I.

A detailed statement of the facts before this Court is appropriate. The appellants owned two of several parcels on a block in downtown Clarksburg between West Pike Street to the north and Trader's Avenue to the south. One of the parcels owned by the appellants faces South Third Street to the east and, including structures housing various businesses, was known as 110-112 South Third Street. The other parcel owned by the appellants, located immediately behind 110-112 South Third Street, was a rectangular lot extending approximately 182 feet from West Pike Street to Trader's Avenue and was 49 feet wide. On the southern end thereof is a brick building known as the shoe store building which spans the entire 49 feet along Trader's Avenue. The remainder of the parcel was used as a parking lot.

Following the November 12, 2003, letter from the City concerning the construction of an extended parking facility, appellant Grandeotto, Inc., by agreements dated November 25, 2003, and March 26, 2004, conveyed, to itself, pedestrian and sewer right-of-ways across the Trader's Avenue parcel to the back of the 110-112 South Third Street property. Pursuant to the agreements, the sewer line was to extend from the back of the 110-112 South Third Street property to Pike Street, and the pedestrian right-of-way was to extend from the back of the 110-112 South Third Street property to both Pike Street and Trader's

Avenue. Importantly, neither agreement mentioned the shoe store building obstructing the pedestrian right-of-way in the southerly direction toward Trader's Avenue.

Subsequent to an April 2004 contract of sale between the parties, a deed was made on June 8, 2004, whereby the Trader's Avenue parcel was conveyed to the City. Neither the contract of sale nor the deed provided for the demolishing of the shoe store building. Receiving less grant money from the State of West Virginia than expected, the City proceeded with a smaller parking facility for the block between West Pike Street and Trader's Avenue and began collecting rent from the tenant in the shoe store building.

In December 2004, the appellants filed an action in the Circuit Court seeking specific performance of the two right-of-way agreements and the demolition of the shoe store building by the City. The appellants filed a separate action seeking damages resulting from alleged misrepresentations made by the City surrounding its purchase of the Trader's Avenue parcel. The Circuit Court entered summary judgments in favor of the City.

II.

The majority correctly concludes that the two agreements by which appellant Grandeotto, Inc., conveyed to itself pedestrian and sewer right-of-ways across the Trader's Avenue parcel were invalid based upon lack of sufficient description and merger.¹ The majority then states that summary judgment was improper because of questions of fact concerning whether right-of-ways were created by estoppel. As indicated above, however, the appellants originally sought to obtain specific performance of the two agreements and to require the shoe store building to be demolished. Although questioning the validity of the agreements and whether it can be compelled to demolish the building, the City does not contest the allowance of right-of-ways across the parcel.

¹ With regard to the failure of the agreements for lack of sufficient description of the right-of-ways, the record demonstrates that the Circuit Court ruled correctly. There are a number of uncertainties which rendered the November 25, 2003, and the March 26, 2004, agreements invalid. No map or plat was made or referred to showing the specific location of the right-of-ways, and the record is unclear as to whether the agreements contemplated that the right-of-ways would abut the rear of the South Third Street structures or would traverse the middle of the Trader's Avenue parcel. Nor did the agreements indicate whether the pedestrian right-of-way extending in the direction of West Pike Street would overlap the sewer line extending in the same direction. Adding to that uncertainty was the provision in the agreements that the sewer line would be located pursuant to Grandeotto, Inc.'s, discretion.

Moreover, the two agreements were identical with the exception that, in the March 26 agreement, the pedestrian right-of-way was stated to be 10 feet wide rather than 5 feet. As the Circuit Court observed, however, the agreements rendered unclear whether there were two pedestrian right-of-ways and what the ultimate width would be. Thus, the Circuit Court stated in the order of March 1, 2006, that, given the standard 20 foot width for a sewer line, the appellants theoretically could claim a 15 foot pedestrian right-of-way totaling, in the direction of West Pike Street, a 35 foot right-of-way upon a 49 foot wide parcel. Adding to the problem was the suggestion of the appellants during a hearing conducted in February 2006 that the pedestrian right-of-ways could be used for vehicular traffic even though no mention of vehicular traffic was made in the two agreements.

As long recognized, in an action for specific performance, “the court will look into all the circumstances of the case and will not decree specific performance unless it appears from the whole record that justice and equity will be subserved thereby.” Syl. pt. 2, *Heflin v. Heflin*, 63 W. Va. 29, 59 S.E. 745 (1907). In particular, in syllabus point 1 of *Guinn v. Warbutton*, 64 W. Va. 76, 60 S.E. 1100 (1908), this Court observed that “[s]pecific performance will be denied, when the alleged contract, aided by extrinsic evidence of surrounding circumstances, is indefinite and uncertain in description of the land, and refers to nothing by which it may be identified with reasonable certainty.” *See also*, syl. pt. 3, *Belcher v. Powers*, 212 W. Va. 418, 573 S.E.2d 12 (2002) (indicating that, to be valid, a right-of-way must be capable of being identified).

Here, as the majority confirms, the two agreements were invalid. Therefore, they cannot be specifically enforced. Nor can specific performance be ordered requiring the City to demolish the shoe store building. When appellant Grandeotto, Inc., made the two agreements, the pedestrian right-of-way extending in the southernly direction was blocked by the building. Grandeotto, Inc., did not mention the building in either agreement. Nor was the building mentioned in the contract of sale and deed when the parcel was conveyed to the City. The appellants had every opportunity to make sure that provisions for the demolition of the shoe store building were placed in the documents concerning the sale of the parcel. They failed to do so, and they cannot now specifically enforce the building’s demolition upon the City.

With regard to fraud and negligent representation, the majority relies upon the City's letter of November 12, 2003, which stated that, in constructing an expanded parking facility, the appellants' Trader's Avenue parcel would need to be acquired and existing structures thereon demolished. A review of the record, however, does not suggest that the appellants were thereby induced into the sale upon the promise that the City would demolish the shoe store building. Although the building obstructed the pedestrian right-of-way set forth in the two agreements in the direction of Trader's Avenue, the building did not obstruct pedestrian access in the direction of West Pike Street. The appellants made no mention of the building in the two agreements. Moreover, neither the contract of sale nor the deed to the City provided for the demolishing of the building. The destruction of the building was not specified as part of the consideration for the conveyance. The November 12, 2003, letter served to initiate negotiations for the sale of the Trader's Avenue parcel, which was not accomplished until the making of the deed on June 8, 2004. Consequently, the letter could not have constituted a misrepresentation by the City "at the time of the conveyance" as the majority implies. The letter did not evidence fraud or actionable misrepresentation by the City as a matter of law. Given the uncertainties surrounding the planning and completion of municipal construction projects, the City cannot be expected to have had the parking facility, and its financing, absolutely finalized prior to communicating with its commercial property

owners, especially where some owners may, as did the appellants, subsequently obtain counsel.²

III.

The City does not contest the existence of either a pedestrian right-of-way or a sewer line in the northerly direction from the back of the 110-112 South Third Street property to Pike Street. In its memorandum in support of summary judgment, the City indicated that it would not prevent the appellants' enjoyment of either pedestrian access or a sewer line across the parcel in question. Moreover, as stated above, during oral argument before this Court, the City indicated that pedestrians could use an adjoining tract to walk around the building which spans the parcel on the southern border. Consequently, while a remand may be appropriate to work out the specifics of the right-of-ways now accommodated, the sending of this matter back to the Circuit Court for a jury trial upon the

² In addition to the November 12, 2003, letter, an internal memorandum written by Ralph Pedersen, the City's consulting architect, stated that prior to the June 8, 2004, conveyance, the Mayor indicated that the shoe store building would not be demolished. In alleging misrepresentation, the appellants asserted that they were unaware of that information until after the sale. Nevertheless, it is undisputed that the remainder of the Trader's Avenue parcel was included in the City's parking project. The appellants never made sure that the principal documents, i.e., the two right-of-way agreements, the contract of sale and the deed, required the City to demolish the building. In all probability, the City's inconsistency was brought about by the uncertainty of the amount of grant money the City would receive for the project.

issues of equitable estoppel, fraud and misrepresentation is both unnecessary and improper.

Therefore, I dissent.