STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2001

KK-Five Corporation,
Appellant,

vs.

Groveland Terrace Condominium Owners' Association,
Respondent.

Filed September 30, 2019
Affirmed in part, reversed in part, and remanded
Smith, John, Judge[*]

Hennepin County District Court
File No. 27-CV-17-18204

Kay Nord Hunt, Michelle K. Kuhl, Lommen Abdo, P.A., Minneapolis, Minnesota; and

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Considered and decided by Larkin, Presiding Judge; Rodenberg, Judge; and Smith, John, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SMITH, JOHN, Judge

On appeal from the district court's grant of summary judgment in favor of respondent condominium association, appellant commercial condominium owner argues that the district court erred by concluding that appellant does not have an exclusive right to the use of 15 parking spaces during business hours as established by an express easement. We affirm in part, reverse in part, and remand.

FACTS

The facts of this case are undisputed. In October 2004, appellant KK-Five Corporation ("KK-Five") sold four buildings located in the Lowry Hill neighborhood to Groveland Terrace Condominiums, LLC ("GTC"). At the time, the buildings existed as an apartment complex, and were located at 311 Kenwood Parkway (Kenwood Building), 48 Groveland Terrace (48 Building), 50 Groveland Terrace (50 Building), and 52 Groveland Terrace (52 Building). Contemporaneous with the sale, and in an agreement dated October 29, 2004 (the "Lease Agreement"), GTC leased back to KK-Five three apartments (the "Commercial Units") in the 50 Building so that KK-Five could continue operating its offices there. And because "[p]arking in Lowry Hill is at a premium, and the area surrounding the offices was mostly residential," KK-Five conditioned the sale on the retention of several parking spots on or near the apartment complex so that KK-Five would have access to "sufficient parking for its employees and clients" during business hours. GTC and KK-Five memorialized their intentions in a closing agreement dated October 29, 2004.

In January 2005, GTC sold the Kenwood Building to another developer, Kenwood Group Partners ("KGP"). At the time of the sale, GTC and KGP entered into a "Reciprocal Easement Agreement," that was recorded on January 13, 2005. This agreement provided that GTC would retain an exclusive parking easement consisting of five stalls located on the roof of the Kenwood Building parking garage. Specifically, the agreement stated that KGP

> hereby grants a 44.4 foot wide permanent, exclusive parking easement for the benefit of [GTC] over and upon the Parking Easement Area on the top of the parking garage on the Kenwood [Building] for the purpose of parking passenger vehicles and a permanent easement for ingress to and egress from such Parking Easement Area, subject to the terms and conditions and limitations set forth herein.

The agreement also provided that the easement ran with the land.

In August 2005, GTC incorporated respondent Groveland Terrace Condominium Owners' Association (the "association"). Several months later, in December 2005, GTC recorded its declaration (the "Declaration"), which converted the 48 Building and the 52 Building, termed the "Subject Property," into the Groveland Terrace Condominium ("condominium"). The Declaration also provided that the 50 Building be deemed "Additional Real Estate" that could be added to the condominium at a later date. And Article III, section H of the Declaration, which is the center of this dispute, provides:

> H. Common Element Parking Easement. Declarant hereby reserves and declares a perpetual easement for parking between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, excluding legal holidays, over up to fifteen (15) common element parking stalls located on the Subject Property or on any portion of the Additional Real Estate that may be added to the Subject Property in favor of Owner of the

> Additional Real Estate. This easement may be assigned to the owner of a portion of the Additional Real Estate and shall run with and benefit the Additional Real Estate or specific portion thereof.

While KK-Five was still leasing the Commercial Units in the 50 Building, GTC executed an Assignment of Parking Easement to KK-Five on November 29, 2007 (the "Assignment"). The Assignment acknowledged that under section H of the Declaration, GTC "has reserved a perpetual, assignable easement for parking between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, excluding legal holidays, up to fifteen (15) parking stalls controlled by the Association." The Assignment also stated that GTC has "designated" 15 parking spaces "to be the fifteen (15) spaces burdened by the Parking Rights." The Assignment then stated that GTC "hereby conveys and assigns to [KK-Five] from and after the date hereof, all of [GTC's] right, title, and interest in and to the [15 parking spaces], as identified and described [in the Assignment]." Finally, the Assignment was signed by George Sherman as principal of GTC.

In addition to signing the Assignment, Sherman signed a "Joinder of Association"(the "Joinder") in connection with the Assignment. The Joinder states that the association

> hereby joins in the attached Assignment for the purpose of acknowledging that it has succeeded to [GTC's] interest under the Parking Agreement, subject to the Parking Rights, is responsible for performing [GTC's] obligations under the Parking Agreement, and has and will assess all costs of complying with such obligations and maintaining the parking stalls that are the subject of the Parking Rights against all Condominium Units as a general Condominium common expense.

Although Sherman signed the Joinder as president of the board of directors for the association, no vote was taken by the association members to approve the Assignment.

In December 2007, as permitted by the Declaration, GTC recorded the First Supplemental Declaration, which added the 50 Building (referred to in the Declaration as the Additional Real Estate), to the condominium. Several months later, on July 31, 2008, GTC conveyed by warranty deed to KK-Five the three Commercial Units located in the 50 Building. Contemporaneous with the delivery of the warranty deed, GTC terminated the lease agreement with KK-Five.

KK-Five exercised control over the 15 parking spaces during business hours until 2017, when the association concluded that KK-Five did not have exclusive right to the parking spaces. KK-Five subsequently brought this action against the association, asserting claims for declaratory judgment, conversion, breach of contract, and attorney fees. The association then filed an amended answer and counterclaim, seeking a declaration that KK-Five had no exclusive right to use of the 15 parking spaces, and that the parking spaces "are simply common elements of the association upon which [KK-Five] shares the same rights as other members of the association."

The parties filed cross motions for summary judgment. The district court determined that the November 2007 assignment of parking easement rights to KK-Five was "invalid and ineffective," because "under the plain language of Section H, [KK-Five] was not qualified to be assigned the easement rights at the time of the Assignment." The district court also determined that when GTC "conveyed to [KK-Five] the title to the Commercial Units, there was no conveyance of an easement because by that time, the easement had

been extinguished" under the doctrine of merger. Thus, the district court concluded that the "rights, responsibilities, and obligations to the 15 common element parking spaces described in the Assignment run to and benefit [the association]." The district court further stated that "[e]ven if [it] found that an easement for parking rights was granted" to KK-Five, the "plain language of Section H and the Assignment" does not "establish an exclusive easement right to the detriment of all other Association members." The district court, therefore, granted the association's motion for summary judgment, and denied KK-Five's motion for the same. This appeal follows.

D E C I S I O N

KK-Five challenges the district court's grant of summary judgment in favor of the association. Summary judgment is proper if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. We review de novo whether there are genuine fact issues and whether the district court erred in applying the law. *Fenrich v. The Blake School*, 920 N.W.2d 195, 201 (Minn. 2018).

A. Merger doctrine

KK-Five challenges the district court's conclusion that KK-Five does not have parking rights under the easement because, under the doctrine of merger, the easement had been extinguished. "An easement is an interest in land possessed by another which entitles the grantee of the interest to a limited use or enjoyment of that land." *Scherger v. N. Nat. Gas Co.*, 575 N.W.2d 578, 580 (Minn. 1998). But "[t]he merger doctrine is intended to extinguish easements when title to the dominant and servient estates are united in one fee owner simply because one has no need for an easement in property one owns in fee."

Pergament v. Loring Props., Ltd., 599 N.W.2d 146, 151 (Minn. 1999). And extinguished easements are "not revived or reinstated when referred to in a subsequent conveyance." *Id.* at 149.

The district court found that "[i]n the easement reserved by section H of the Declaration, the [50 Building] is the dominant estate and the condominium common elements are the servient estate," but that "Exhibit B to the Declaration, which established the [50 Building] was 'deleted in its entirety' by the First Supplemental Declaration." The district court concluded that as a result, "When GTC added the [50 Building] to the condominium through the First Supplemental Declaration, title to the [50 Building] merged with the title to the condominium, except for the units created by its addition," and, therefore, "the dominant estate and servient estate thereby merged." The district court then stated that as a result of the merger of the dominant and servient estates, the "common element parking rights reserved to the [50 Building] in section H of the Declaration merged with the undivided interests in the common element rights owned by all of the members of [the association], and governed by [the association]." Thus, the district court determined that "[w]ith the elimination of the [50 Building] through merger with the condominium, and the absence of a previous valid assignment of rights to another owner, the easement that ran with the [50 Building] was eliminated."

KK-Five argues that the district court's reasoning is erroneous because "GTC remained the owner of all units in the 50 Building at the time it was added to the condominium." We agree. The Declaration provides: "'Owner' or 'Unit Owner' means Declarant, for so long as it owns a Unit, and each person to whom ownership of a Unit has

been conveyed or transferred, but does not include a holder of an interest as security for an obligation." This definition is consistent with the Minnesota Common Interest Ownership Act (MCIOA), which states that a "unit owner" is a "declarant or other person who owns a unit." Minn. Stat. § 515B.1-103(37) (2018).

Here, under MCIOA and the Declaration, title and ownership of the individual units continued in GTC at the time the 50 Building was added to the condominium. In other words, as KK-Five points out, "while at the time of the conversion the common areas of the [50 Building] became commonly held condominium property, the units in the 50 Building continued to be separately owned by GTC." Because GTC was still the owner of the individual units at the time of the addition of the 50 Building to the condominium, its ownership interest was distinct from that of the association. Moreover, as owner of the individual units of the 50 Building at the time of the conversion, GTC retained its parking easement rights it had reserved under the terms of the Declaration. Therefore, the district court erred by concluding that, under the merger doctrine, the easement was extinguished at the time the 50 Building was added to the condominium.

B. Validity of the easement assignment

The district court also determined that KK-Five is not entitled to the parking rights under the easement because GTC's assignment of the easement to KK-Five was invalid. Specifically, the district court determined that under Article III, section H of the declaration, "the power to assign easement rights could only be exercised in favor of another owner of a portion of [the 50 Building]." The district court then determined that "[a]t the time of the purported assignment of parking rights in November 2007," KK-Five

was not an "owner" of the 50 Building because it "was still leasing" the three Commercial Units in that building. The district court, therefore, concluded that "under the plain language of Section H, [KK-Five] was not qualified to be assigned the easement rights at the time of the Assignment."

KK-Five challenges this decision, arguing that under the plain language of all of the documents in this case, KK-Five is entitled to its parking rights. Conversely, the association argues that at the time of the Assignment, the MCIOA "required that unit owners approve the sort of transfer in question here." The association contends that because no such approval by the unit owners occurred here, the 2007 "assignment of parking rights and the joinder were void." Thus, the association argues that the district court's summary judgment can be affirmed without addressing the district court's conclusion that, under the plain language of the Declaration, KK-Five was not qualified to be assigned the easement rights at the time of the Assignment.

To support its claim, the association cites Minn. Stat. § 515B.3-102(a)(9) (2004), which provides that a Unit Owner's Association has the power to: "*subject to approval by resolution other than declarant or its affiliates at a meeting duly called*, grant . . . private easements . . . through, over or under the common elements." (Emphasis added.) But section 515B.3-102(a)(9) is "subject to the provisions of the declaration." Minn. Stat. § 515B.3-102(2) (2004). And under the terms of the Declaration, GTC specifically reserved and declared "a perpetual easement for parking . . . in favor" of the owner of the 50 Building and stated that the "easement may be assigned to the owner of a portion of the [50 Building] and shall run with and benefit the [50 Building] or specific portion thereof."

Because the association's power is subject to the Declaration, which established GTC's easement rights and the ability to assign them, the Assignment of the easement in 2007 to KK-Five was not invalid due to lack of the association's approval.

The association also contends that "[e]ven if approval of the Assignment [was] not otherwise required, membership approval of the Joinder provision was." According to the association, the "Joinder purported to waive [its] power to assess KK-Five for the cost of maintaining the parking spaces in issue." The association argues that because the Joinder was not approved by a 67% vote of the members as required by the Declaration when there is a restriction of the association's assessment powers, the Joinder was invalid, which in turn, "voids the Assignment of which it is part." We disagree.

The Joinder is not an amendment to the Declaration. Rather, the Declaration, in Article II, section I, already provided that each unit is liable for the percentage of shares of common expense liabilities related to the common elements. Consistent with this provision, the Joinder provides that the association "is responsible for performing [GTC's] obligations under the Parking Agreement, and has and will assess all costs of complying with such obligations and maintaining the parking stalls that are the subject of the Parking Rights against all Condominium Units as a general Condominium common expense." As KK-Five points out in its reply brief, the "Joinder merely acknowledges that each unit owner must pay his or her percentage share for maintaining the common area Parking Stalls, including those located on the Kenwood [Building], which are the subject of the Reciprocal Easement Agreement and the Parking Rights Easement." The Joinder placed no restriction on the association's assessment powers, and there is no dispute that KK-Five

has paid its proportionate share of the condominium common expenses, including those related to the parking spaces. Accordingly, the Joinder, and corresponding Assignment, are not invalid due to the lack of a 67% vote of the association's members.

The association further argues that even if its aforementioned arguments are rejected, the plain language of section H of the Declaration requires that GTC's assignment of parking rights to KK-Five be deemed invalid. We agree. The Declaration specifically reserves and declares the easement for 15 parking spaces in favor of GTC, and then states that the "easement may be assigned to the owner of a portion of the [50 Building] and shall run with and benefit the [50 Building]." But as the district court found, when GTC purportedly assigned the easement to KK-Five in November 2007, KK-Five "was still leasing the Commercial Units . . . . Title to the [Commercial Units] would not be conveyed by GTC [to KK-Five] until the following summer." Because Article III, section H of the Declaration required the easement to be transferred to an "owner" of the 50 Building, and KK-Five was not an "owner" of the 50 Building at the time of the November 2007 Assignment, the district court correctly concluded that KK-Five "was not qualified to be assigned the easement rights at the time of the Assignment."

KK-Five argues that GTC's and KK-Five's conduct demonstrates that at the time of the Assignment, GTC intended to convey the parking rights to KK-Five. But "[e]xtrinsic evidence beyond the four corners of a contract is inadmissible to explain the meaning of a contract that is unambiguous." *Trebelhorn v. Agrawal*, 905 N.W.2d 237, 243 (Minn. App. 2017). The Declaration here is unambiguous and specifically states that the easement may be "assigned to the *owner* of a portion of the [50 Building]." (Emphasis added.) Because

the Declaration is unambiguous, we need not look to GTC and KK-Five's conduct. And because, at the time of the Assignment, KK-Five was a lessee of the 50 Building and not an owner, the district court did not err by concluding that the Assignment of the parking easement to KK-Five in November 2007 was invalid and ineffective.

C. Conveyance of the parking easement by warranty deed

KK-Five argues that even if it was not conveyed the parking rights under the easement by the Assignment, it was conveyed the parking-easement rights when it "became an owner by receipt of the warranty deed for the Commercial Units." We agree. "An easement in gross is the right to use another's property that is personal and revocable." *Block v. Sexton*, 577 N.W.2d 521, 525 (Minn. App. 1998). It benefits "a particular person and not a particular piece of land" and the beneficiary need not, and usually does not, own land adjacent to the easement. *Black's Law Dictionary* 623 (10th ed. 2014) (defining "easement in gross"). In contrast, "[a]n easement appurtenant is one that is granted for the benefit of the grantee's land." *Block*, 577 N.W.2d at 525. An easement appurtenant runs with the land and, therefore, passes to subsequent owners of the land. *See Swedish-Am. Nat'l Bank of Minneapolis v. Conn. Mut. Life Ins. Co.*, 86 N.W. 420, 422 (Minn. 1901); *Heuer v. County of Aitkin*, 645 N.W.2d 753, 759 (Minn. App. 2002).

The easement created in the Declaration was to "run with and benefit the [50 Building] or specific portion thereof." As such, the easement was appurtenant to the 50 Building. And the parties agree that the easement here was appurtenant rather than in gross. An easement appurtenant to the benefit of a particular parcel "passes with the land . . . without express reference to it in the deed of conveyance." *Swedish-Am. Nat'l Bank of*

Minneapolis, 86 N.W. at 422. "It is elementary that an easement once granted is an estate which cannot be abridged or taken away, either by the grantor or his subsequent grantees." *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 790 (Minn. 1970) (quotation omitted).

Because the easement here was appurtenant, the parking easement passed to subsequent owners of the 50 Building. *See Swedish-Am. Nat'l Bank of Minneapolis*, 86 N.W.2d at 422. KK-Five became an "owner" of a portion of the 50 Building when it was conveyed warranty deeds to the three Commercial Units. Consequently, an interest in GTC's parking easement reserved under the Declaration passed to KK-Five when the warranty deed to the three Commercial Units was conveyed to KK-Five. And this interest passed to KK-Five even though the warranty deed does not expressly reference the easement. Therefore, the district court's conclusion that the parking easement rights established in the declaration run to and benefit the association, and that the 15 spaces are simply common elements of the association upon which KK-Five shares the same rights as a member of the association, is erroneous.

D. Scope of the easement

Finally, KK-Five challenges the district court's decision that "[e]ven if [it] found that an easement for parking rights was granted to [KK-Five], the terms . . . do not grant an exclusive easement." Specifically, the district court found that unlike the Reciprocal Easement Agreement between GTC and KGP, which "used the term 'exclusive,'" the "plain language of section H and the Assignment reserve a 'perpetual easement for parking' during normal working hours." The district court determined that because the Declaration

does not use the term "exclusive," to the extent that any parking rights were granted to KK-Five, "those rights are not exclusive" to KK-Five "to the detriment of all other Association members."

The association argues that the district court's decision is correct in that any parking rights that KK-Five acquired would be "non-exclusive," and would be "held in common with the parking rights of the other owners" of the association. Conversely, KK-Five argues that the Declaration "does not contain the word 'exclusive' because the parking rights are bifurcated allowing KK-Five parking rights during the specified hours." KK-Five contends that this bifurcated assignment of parking rights is distinct from the Reciprocal Easement Agreement because under the agreement between KGP and GTC, KGP "as grantor retained no rights to the Kenwood Stalls after the creation of the parking easement over its land." KK-Five contends that, in contrast, the bifurcated nature of the easement granted to it allowed KK-Five to use the parking spaces exclusively during business hours, but also allowed the association to use the parking stalls during non-business hours.

"The parameters of an easement created by a grant depends entirely upon the construction of the terms of the grant." *Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997) (quotation omitted). When the terms of an easement grant are clear, courts apply those terms as written. *See id*. ("[W]hen the language granting the easement is clear and unambiguous, the court's power to determine the extent of the easement grant is limited."); *Minneapolis Athletic Club*, 177 N.W.2d at 789-90 ("[T]he extent of an easement should not be enlarged by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties.").

Here, as a member of the association, the owner of the 50 Building already had non-exclusive rights to use the 15 parking spaces. But the easement created by the Declaration was "reserve[d] . . . in favor of Owner" of the 50 Building and provided the owner of the 50 Building with parking rights to 15 parking spaces during business hours that were distinct from members of the association. Under the terms of the easement, the owner of the 50 Building possessed parking rights to 15 parking spaces during business hours that other members of the association did not possess. To construe the easement as non-exclusive as the association urges would nullify the language of the easement. As a result, the district court erred in concluding that the easement created no more rights than any member of the association had to utilize the common elements. We, therefore, reverse the grant of summary judgment in favor of the association.

Nonetheless, although KK-Five became an "owner" of the 50 Building when it was conveyed warranty deeds to the three Commercial Units, the 50 Building consists of approximately 22 condominiums. Like KK-Five, any owner of a condominium unit in the 50 Building is also an "owner" of the 50 Building under the Declaration and MCIOA. *See* Minn. Stat. § 515B.1-103(37) (defining "unit owner" as a "declarant or person who owns a unit"). The easement does not specifically limit the parking easement rights to a particular owner or a particular unit, nor was there a valid assignment of the parking easement rights to a particular owner as permitted by the Declaration. Without a valid assignment of the parking easement to a particular owner, or any other language reserving the easement as exclusive to a particular owner, we cannot conclude that KK-Five has shown that it has a right to use of 15 parking spaces under the terms of the easement that is exclusive of the

other owners of the 50 Building.[1] Therefore, we affirm the denial of summary judgment in favor of KK-Five and remand for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

[1] We note that the other owners of the 50 Building are not parties to this litigation, nor have they asserted any rights to use the parking spaces under the terms of the easement.