



ATTORNEY FOR APPELLANTS

Jonathon T. Cook
Anderson, Indiana

ATTORNEY FOR APPELLEE

Nathaniel R. Sinn
Cleveland, Ohio

IN THE
COURT OF APPEALS OF INDIANA

Elda Corporation and Anderson
Mounds Theater, LLC,
Appellants-Defendants,

v.

Holliday, LLC,
Appellee-Plaintiff.

May 17, 2021

Court of Appeals Case No.
20A-PL-2316

Appeal from the Madison Circuit
Court

The Honorable David A. Happe,
Judge

The Honorable Kevin M. Eads,
Magistrate

Trial Court Cause No.
48C04-2003-PL-76

Altice, Judge.

Case Summary

- [1] Elda Corporation (Elda) and Anderson Mounds Theater, LLC (Anderson Mounds) (collectively, Appellants) appeal the trial court's grant of partial summary judgment in favor of Holliday, LLC (Holliday), which determined that Holliday was entitled to use various improvements on a parcel of land and

was not obligated to pay rent to Appellants. Appellants contend that they are entitled to an order of ejectment against Holliday for immediate possession of the land, rent, and damages.

[2] We affirm.

Facts and Procedural History

[3] Elda became the record owner of approximately thirty acres of real property (the Land) in Madison County in 1955. In 1963, Elda granted a ground lease to Simon Property Group (Simon) that included buildings and paved parking areas (the Improvements Parcel). The monthly rent under the ground lease was \$70,236.80, and Simon operated Mounds Mall on the property. Thereafter, in 1993, Simon transferred its interest in the ground lease and the Improvements Parcel to Bayview Malls, LLC (Bayview). Bayview subsequently transferred those interests to Anderson Mounds.

[4] From the outset, the Improvements Parcel was severed and identified separately from the Land by its own property tax parcel number. The parcels have been historically taxed separately as real property, and the Improvements Parcel has always been assessed to the ground lease tenant with a note stating, “Improvements on Leased Ground.” *Appellant’s Appendix Vol. II* at 29-31.

[5] At some point, Anderson Mounds failed to pay property tax on the Improvements Parcel. That parcel went up for tax sale, and IBYH, LLC

(IBYH) purchased the Improvements Parcel at a tax sale on April 8, 2019.

IBYH subsequently transferred the sale certificate to Holliday.

[6] At no point did Elda challenge the tax sale, and after the redemption period expired, Holliday applied for—and received—a tax deed to the Improvements Parcel on October 3, 2019. The tax sale certificate noted that the purchase was for “Improvements ONLY.” *Id.* at 7, 18. The trial court subsequently corrected a clerical error on the certificate and ordered the county auditor to execute and deliver a tax deed to Holliday for the Improvements Parcel. The order also provided that “the tax deed . . . is an estate in fee simple, *free and clear of all liens and encumbrances created or suffered before or after the tax sale*, except those liens granted priority under federal law, and liens of the state or any political subdivision thereof. . . .” *Appendix Vol. II* at 26 (emphasis added).

[7] On November 13, 2019, Elda served Holliday with a “Notice to Quit, Notice of Default, Notice of Termination & Demand.” *Id.* at 7-8, 20, 34-35. The notices demanded that Holliday either agree to the terms of the previous ground lease or “vacate the premises.” *Id.* Elda claimed that Holliday was in unlawful possession of its land, beginning October 2019.

[8] As Elda threatened legal action against Holliday if it did not comply, Holliday sued Elda for a declaratory judgment on March 25, 2020. Among other things, Holliday requested the trial court to determine that Elda had no right to collect rent from Holliday or eject Holliday from the Land. Holliday claimed that the Improvements Parcel tax deed vested in it an estate in fee simple absolute, free

and clear of the ground lease and all other encumbrances. Elda then filed a counterclaim seeking to eject Holliday from the premises and requested damages for Holliday's alleged wrongful occupation of the Land.

[9] On July 2, 2020, Elda filed a motion for “final partial summary judgment,” requesting that the trial court enter an order of ejectment against Holliday, and to award attorney's fees and damages. *Appellant's Appendix Vol. II* at 46. Elda asserted that the ground lease was still valid and that Holliday has refused to pay rent for its continued occupation of the Land while operating on the Improvements Parcel.

[10] Holliday opposed Elda's motion and subsequently filed its own motion for summary judgment, requesting that the trial court determine as a matter of law that it owes no rent to Elda and that Elda lacks standing to seek ejectment. Holliday claimed that it was not bound by the previously recorded ground lease because the Improvements Parcel was severed from the Land, and it owned that parcel in fee simple absolute.

[11] Following a hearing on the pending motions, the trial court entered partial summary judgment in Holliday's favor on November 24, 2020, concluding that the Improvements Parcel was severed and taxed separately from the Land and that Holliday was the fee simple owner of the Improvements Parcel because Elda failed to challenge the tax sale and did not pursue any redemption rights. Thus, the trial court determined that Elda had no right to eject Holliday from the Land or collect rent for Holliday's exercise of its rights under the

Improvements Parcel. In its order, the trial court included the following findings of fact and conclusions of law:

When ELDA authorized Simon to construct the Improvements, a new component of the real estate was created, a set of appurtenances which are collectively known as the Improvements. Simon and its various successors were constrained in their ability to use the Improvements by a contract with ELDA, the ground lease. Appurtenances and fixtures are considered part of the real estate. . . . I.C. 6-1.1-10-37(b) includes in the definition of ‘real property’ ‘a building or fixture situated on land located within this state.’ The significance of the definition is that all such interests, including improvements, are assessed as real estate. . . .

. . .

There is no privity of contract between ELDA and Holliday. Crucially, in the oral argument of the summary judgment motions, ELDA *agreed* that the tax deed terminated the prior ground lease by operation of law. Thus, it appears ELDA has abandoned any potential privity of estate argument and that the ground lease was a covenant running with the land. ELDA has not argued that the ground lease runs with the land. . . .

ELDA simply contends that, as the Improvements rest on the Ground, Holliday *ipso facto* is occupying the Ground. However, the Improvements are also part of the real estate in this case, one that has been separately created, and separately owned for over fifty years. The relationship between the prior owners of the Improvements and ELDA had been defined by a ground lease.

. . .

Normally, a building would be part of the land, and would thus, be owned by the landowner. However, the court concludes that the land and a building and/or other appurtenances, such as the improvements here, can be owned separately. Indeed, this is something that ELDA concedes as it agrees that Holliday owns the Improvements in ‘fee simple absolute.’

Certainly, the owner of a right relative to land may exercise that right without being deemed a trespasser on the land or impermissibly using the land. Such is the case with exercising an easement. The owner of an easement has right to access the land for purpose of utilizing that easement. . . . The owner of mineral or oil rights has a right to access.

[T]he circumstances of this case, in light of ELDA’s voluntary concession that the ground lease is no more, indicate that the statute did clear ELDA’s claim for ground rent.

How could ELDA have defended its interest and avoided the current predicament? In the agreed absence of privity of estate, ELDA could have paid the taxes on the Improvements and sought recompense from its ground lessee; or redeemed the Improvements. It did neither.

. . .

In summary, the parties agree that Holliday owns the Improvements in fee simple absolute and that ELDA has no ground lease with Holliday. As Holliday owns the Improvements, the court holds that it is entitled to use them. There is no ground lease to circumscribe Holliday’s ability to use its property without payment to ELDA. The ground lease is no more because ELDA slept.

The court finds and orders as a matter of law that Holliday is not obligated to pay rent to ELDA for occupying and using the improvements.

The court further finds and orders as a matter of law that ELDA may not bring an ejectment action against Holliday.

Appendix Vol. II at 7-16 (emphasis in original). Elda now appeals.

Discussion and Decision

I. Standard of Review

[12] Our standard of review on summary judgment is well settled:

The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012). Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. *Id.* Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party. *Id.* Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law.

A House Mechanics, Inc. v. Massey, 124 N.E.3d 1257, 1262 (Ind. Ct. App. 2019) (quoting *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016)). We also note when, as here, the trial court enters findings of fact and

conclusions of law in its summary judgment ruling, they aid our review, but they do not bind us. *Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018). Nor is our standard of review or analysis altered by the parties’ filing of cross-motions for summary judgment—we simply consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. *Erie Indemnity Co. v. Estate of Harris*, 99 N.E.3d 625, 629 (Ind. 2018).

II. The Claims

A. Jurisdiction

[13] A threshold issue that we must address before considering the merits of Elda’s appeal is whether this case is properly before us, as Holliday asserts that the trial court’s partial summary judgment order is not appealable. *See DuSablon v. Jackson Cty. Bank*, 132 N.E.3d 69, 75 (Ind. Ct. App. 2019) (observing that jurisdiction must be considered before determining the rights of the parties on the merits), *trans. denied*.

[14] This court has jurisdiction over appeals from final judgments and over appeals of interlocutory orders under Indiana Appellate Rule 14. “An appeal from an interlocutory order is not allowed unless specifically authorized by the Indiana Constitution, statutes, or the rules of court. The authorization is to be strictly construed, and any attempt to perfect an appeal without such authorization warrants a dismissal.” *Allstate Ins. Co. v. Scrogan*, 801 N.E.2d 191, 193 (Ind. Ct. App. 2004), *trans. denied*.

[15] Although Holliday asserts that we lack jurisdiction over this appeal, App. R. 14 provides:

A. Interlocutory appeals of right. – Appeals from the following interlocutory orders are taken as a matter of right by filing a Notice of Appeal with the Clerk within thirty (30) days after the notation of the interlocutory order in the Chronological Case Summary:

. . .

(4) For the sale or delivery of the possession of real property. . . .

[16] In this case, the trial court’s order specifically provides that Holliday is entitled to possession of the Improvements Parcel and in turn, the Land upon which it sits without Elda having the right to bring an action of ejection against Holliday. The order further characterizes both the Land and the Improvements Parcel as real property. For these reasons, we reject Holliday’s contention that this court lacks subject matter jurisdiction over this appeal, and we will proceed to address Elda’s claims on the merits.

B. The Improvements Parcel

[17] Elda argues that the trial court should have ordered Holliday to pay rent for the use of the Land because all that was conveyed to Holliday through the tax deed was a leasehold interest in the Improvements Parcel. Therefore, Elda claims that it has the right to eject Holliday as a trespasser on the Land and/or collect rent and damages from Holliday pursuant to the ground lease.

[18] A tax deed “vests in the grantee an estate in fee simple absolute.” Ind. Code § 6-1.1-25-4.6(f).¹ And “fee simple” has been defined as the “entire and absolute interest and property in land.” *Alsman v. Walters*, 106 N.E. 879, 880 (Ind. 1914).

[19] Here, the designated evidence established that the fee simple interest to the Improvements Parcel had been severed from the Land and has always been identified by a separate tax number. The prior record title holder to the Improvements Parcel—Anderson Mounds—failed to pay the requisite property taxes, such that the property was subject to tax sale by Madison County. *See* Ind. Code § 6-1.1-24-1(a), (c).² As a result, the Madison County Board of

¹ Exceptions to this rule include:

- (1) all easements, covenants, declarations, and other deed restrictions shown by public records;
- (2) laws, ordinances, and regulations concerning governmental police powers, including zoning, building, land use, improvements on the land, land division, and environmental protection; and
- (3) liens and encumbrances created or suffered by the grantee.

I.C. § 6-1.1-25-4.6(f) (1) – (3).

² This statute provides that

(a) On or after January 1 of each calendar year in which a tax sale will be held in a county and not later than fifty-one (51) days after the first tax payment due date in that calendar year, the county treasurer shall certify to the county auditor a list of real property on which any of the following exist:

- (1) Any property taxes or special assessments certified to the county auditor for collection by the county treasurer that are delinquent as determined under I.C. § 6-1.1-37-10 and the prior year’s spring installment or before delinquent property taxes, special assessments, penalties, fees, or interest due exceed twenty-five dollars (\$25).
- (2) Any unpaid costs are due under section 2(c) of this chapter from a prior tax sale.

...

Commissioners obtained title to the Improvements Parcel, and IBYH subsequently purchased the title to the Improvements Parcel at a tax sale and later transferred the certificate to Holliday. Elda took no action in response to the tax sale, such as challenging the sale's validity.³ Thus, Elda has no title or interest in the Improvements Property, and Holliday applied for and received a tax deed for the property, which is prima facie evidence of valid title in fee simple. *See* I.C. § 6-1.1-25-4.6(g).

[20] After receiving a tax sale certificate for the property, Holliday received a court order for a tax deed to the Improvements Parcel. The trial court ordered the

(c) Except as otherwise provided in this chapter, the real property so listed is eligible for sale in the manner prescribed in this chapter.

³ Ind. Code § 6-1.1-25-16 provides that a person may defeat the title conveyed by a tax deed if:

- (1) the tract or real property described in the deed was not subject to the taxes for which it was sold;
- (2) the delinquent taxes or special assessments for which the tract or real property was sold were paid before the sale;
- (3) the tract or real property was not assessed for the taxes and special assessments for which it was sold;
- (4) the tract or real property was redeemed before the expiration of the period of redemption (as specified in section 4 of this chapter);
- (5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the tract or real property, which states either that no taxes were due at the time the sale was made or that the tract or real property was not subject to taxation;
- (6) the description of the tract or real property was so imperfect as to fail to describe it with reasonable certainty; or
- (7) the notices required by IC 6-1.1-24-2, IC 6-1.1-24-4, and sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections.

Improvements Parcel deed to be “an estate in fee simple absolute, free and clear of all liens and encumbrances.” *Appellant’s Appendix Vol. II* at 26. As a result, to the extent that any ground lease may have encumbered the Improvements Parcel prior to the tax sale, the trial court’s order and subsequently issued tax deed eliminated it and all other encumbrances from Holliday’s title. *See* I.C. § 6-1.1-25-4(f).

[21] We reject Elda’s claim that Holliday’s rightful possession of the Improvements Parcel necessarily amounts to a wrongful possession of the Land. For instance, a panel of this court has recognized that an “improvements only” title holder may enjoy the rights to his property without trespassing upon the enjoyment rights of the title holder of the land. *See, e.g., Mutchman v. Consolidation Coal Co.*, 666 N.E.2d 461, 466 (Ind. Ct. App. 1996) (recognizing that the grant of title to the surface coal impliedly includes the right to mine that coal). Here, title to the Land is vested in Elda, and title to the Improvements Parcel is vested in Holliday. In the context of this case, the Improvements Parcel constitutes real property in the same legal sense as the Land. Thus, the real estate interests can co-exist and Holliday can exercise its rights on the Improvements Parcel without being found to have trespassed on the Land that Elda owns.

[22] In sum, Holliday has title to the Improvements Parcel in fee simple, free and clear of all encumbrances including the prior ground lease, and its ownership of the Improvements Parcel does not amount to a wrongful possession of the Land. Although Elda could have prevented such a result at various times before and after the tax sale, it did not. Therefore, because Holliday is neither a

trespasser nor a lessee, Elda is not entitled to ejectment, rent, or damages. For these reasons, the trial court properly granted partial summary judgment in Holliday's favor.

[23] Judgment affirmed.

Kirsch, J. and Weissmann, J., concur.