

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT

Mike Einterz
Michael L. Einterz, Jr.
Einterz & Einterz
Zionsville, Indiana

ATTORNEYS FOR APPELLEES

Steven D. Groth
David J. Jurkiewicz
Bose McKinney & Evans, LLP
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

J2 Systems and Supply, LLC,
Appellant-Defendant,

v.

Palmer Properties, LLC and
White Castle Systems, Inc.,
Appellees-Plaintiffs.

October 21, 2021

Court of Appeals Case No.
21A-PL-164

Appeal from the Marion Superior
Court

The Honorable James A. Joven,
Judge

Trial Court Cause No.
49D13-2004-PL-13682

Mathias, Judge.

- [1] The Marion Superior Court entered summary judgment in favor of Palmer Properties, LLC, and White Castle Systems, Inc. (collectively “the Appellees”), declaring that an easement granted to White Castle in a lease agreement

between the Appellees is enforceable against J2 Systems and Supply, LLC (“J2 Systems”), the subsequent purchaser of the property on which the easement is located. J2 Systems appeals and raises two issues:

- I. Whether the easement is valid and enforceable against J2 Systems where the lease agreement was not recorded in the property’s chain of title; and
- II. In the alternative, whether J2 Systems is entitled to a portion of the rent owed under the Appellees’ Lease Agreement for White Castle’s continued use of the easement.

We affirm.

Facts and Procedural History

[2] In October 1994, Palmer Properties owned real estate located at 2368 E. 38th Street and an adjacent property north of the 38th Street property located at 3820 N. Keystone Avenue in Indianapolis. On October 10, 1994, Palmer entered into a lease agreement with White Castle for the 38th Street property. The initial term of the lease agreement was fifteen years and the lease allowed four additional five-year renewals. The legal description of the leased premises describes the twenty-five-foot wide “[a]ccess [e]asement across the [s]outh side”

of Lot 77,¹ which is located on the Keystone Avenue property. Appellant's App. Vol. II, p. 35. The easement extends 158 feet. *Id.*

[3] A memorandum of lease was recorded with the Marion County Recorder as Instrument No. 1994-0178485 in December 1994.² The legal description of the easement, which matched the legal description set forth in the lease, was attached to the memorandum of lease as Exhibit A. *Id.* at 40. The Appellees renewed the lease, but the renewals were not recorded.

[4] The easement was utilized as both a drive-thru lane and to provide ingress and egress between the leased premises and Hillsdale Avenue. Since the mid-1990s, White Castle has continuously occupied and openly utilized the easement granted in the lease agreement. A paved access drive is located on the easement. And the access drive is clearly marked as a drive thru. A fence separates the drive thru on the access easement and the Keystone Avenue property.

[5] In March 2018, Palmer agreed to sell the Keystone Avenue property to J2 Systems. The initial title commitment, completed in April 2018, listed the

¹ The easement is described, in its entirety, as follows: "A 25.00 foot wide non-exclusive Access Easement across the South side of Lot 77 in Highway Park Resubdivision, an Addition to the City of Indianapolis, Indiana, as per plat thereof recorded in Plat Book 18, page 104 in the Office of the Recorder of Marion County, Indiana, the South line of said Easement is described as follows. Beginning at the Southwest corner of said Lot 77; thence along the South line of said Lot, South 89 degrees 41 minutes 00 seconds East (assumed bearing) 158.00 feet and there terminating." Appellant's App. Vol. II, p. 40.

² Indiana Code section 36-2-11-20 provides that a memorandum of a lease may be recorded in lieu of a lease itself if the memorandum is executed by the lessor and lessee and contains certain pertinent information. The lease and memorandum of lease contain the same description of the easement at issue.

memorandum of lease as an Exception to Title. *Id.* at 125. Referencing this title commitment the general manager of Palmer Properties, on May 30, 2018, executed a vendor's affidavit averring:

Vendor has an indefeasible estate in fee simple in the Real Estate; and the Real Estate is free and clear of every kind or description of lien, lease or encumbrance except the following:

A. Restrictions, easements, leases, agreements and any other matters disclosed in said Commitment.

B. Current taxes not delinquent.

C. Whatever matters affecting the Real Estate, if any, are set forth in the above deed as exceptions to title.

Id. at 136. The final title commitment issued in June 2018 deleted the memorandum of lease as an exception to title.

[6] Before J2 Systems and Palmer executed the purchase agreement, Palmer gave J2 Systems a survey of the Keystone Avenue property. The survey contained a description of the easement and referenced the recorded memorandum of lease. *Id.* at 42. A representative of J2 Systems reviewed the survey and personally inspected the property before the purchase agreement was executed. J2 Systems accepted the survey provided by Palmer "as is." *Id.* at 44.

[7] In January 2019, J2 Systems began construction on the Keystone Avenue property and blocked the access drive located on the easement with construction banners, which also prevented ingress and egress via White Castle's drive thru. Thereafter, the Appellees filed a complaint for injunctive

and declaratory judgment requesting that the trial court declare the easement valid and enforceable and seeking to prevent J2 Systems from encroaching on or interfering with the access easement.

[8] On June 9, 2020, J2 Systems filed a motion for summary judgment and argued that the easement was not enforceable against it. In response, the Appellees' filed a cross-motion for summary judgment. The trial court held a hearing on the parties' motions on September 24.

[9] On November 9, the trial court entered summary judgment in the Appellees' favor, concluding that J2 Systems had actual notice of the easement and declaring the easement valid and enforceable. J2 Systems timely filed a motion to correct error and argued, in pertinent part, that the trial court should have granted a portion of the rent Palmer receives from White Castle under the Appellees' lease agreement as compensation for use of the easement. The trial court denied the motion.

[10] J2 Systems appeals the trial court's order granting summary judgment to the Appellees and the order denying its motion to correct error.

Standard of Review

[11] When our court reviews a summary judgment order, we stand in the shoes of the trial court. *See In re Supervised Est. of Kent*, 99 N.E.3d 634, 637 (Ind. 2018) (citation omitted). Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind.

Trial Rule 56(C). We review questions of law de novo. *Ballard v. Lewis*, 8 N.E.3d 190, 193 (Ind. 2014). The fact that the parties have filed cross-motions for summary judgment does not alter our standard for review, as we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012).

I. The Easement Is Valid and Enforceable

[12] J2 Systems argues that an “unrecorded [l]ease and a [m]emorandum of [l]ease recorded on an adjacent parcel is insufficient to create an easement interest that is binding on a subsequent purchaser of real estate.” Appellant’s Br. at 8. The Appellees acknowledge that the lease was not recorded in the chain of title for the Keystone Avenue property—the servient estate—but argue that J2 Systems had actual notice of the easement; therefore, it is valid and enforceable. Appellees’ Br. at 13.

[13] An easement is the right to use the land of another. *Drees Co. v. Thompson*, 868 N.E.2d 32, 41 (Ind. Ct. App. 2007), *trans. denied*. The nature, extent and duration of an easement created by an express agreement or by grant in a deed must be determined by the provisions of the instrument creating the easement. *Larry Mayes Sales, Inc. v. HSI*, 744 N.E.2d 970, 972 (Ind. Ct. App. 2001) (cleaned up).

[14] J2 Systems does not dispute the existence of the easement created by the lease agreement between Palmer and White Castle on the Keystone Avenue property; it argues only that it did not receive proper notice of the easement

prior to purchasing the property. More specifically, J2 Systems maintains that because the memorandum of lease was only recorded in the chain of title for the 38th Street property, it did not have notice of the easement on the Keystone Avenue property it purchased from Palmer. The Appellees assert, and the trial court found, that J2 Systems had actual notice of the easement.

[15] Notice may be constructive or actual:

Constructive notice is provided when a deed or mortgage is properly acknowledged and placed on the record as required by statute. . . . Notice is actual when notice had been directly and personally given to the person to be notified. Additionally, actual notice may be implied or inferred from the fact that the person charged had means of obtaining knowledge which he did not use. Whatever fairly puts a reasonable, prudent person on inquiry is sufficient notice to cause that person to be charged with actual notice, where the means of knowledge are at hand and he omits to make the inquiry from which he would have ascertained the existence of a deed or mortgage. Thus, the means of knowledge combined with the duty to utilize that means equates with knowledge itself. Whether knowledge of an adverse interest will be imputed in any given case is a question of fact to be determined objectively from the totality of the circumstances.

S&S Enters. v. Marathon Ashland Petroleum, LLC, 799 N.E.2d 18, 23 (Ind. Ct. App. 2003) (cleaned up); *see also U.S. Bank, Nat'l Assoc. v. Jewell Invs., Inc.*, 69 N.E.3d 524, 529-30 (Ind. Ct. App. 2017) (describing actual notice).

[16] The following undisputed facts establish that J2 Systems had actual notice. White Castle utilizes the easement for ingress and egress and for its drive-thru lane. It has done so continuously since the mid-1990s. A fence separates the

easement from the Keystone Avenue property. J2 Systems visually inspected the Keystone Avenue property prior to purchase. Palmer provided a survey of the property to J2 Systems, which included the easement. The survey notes that the easement was granted pursuant to instrument 94-178485, the recorded memorandum of lease. Appellant’s App. Vol. II, p. 42. And the recorded memorandum of lease was listed as an exception of title in the initial title commitment.³ In short, J2 Systems had actual notice of White Castle’s easement on the Keystone Avenue property.⁴ See *S&S Enters.*, 799 N.E.2d at 24–25 (explaining that “[t]he law has always imputed to a purchaser of land all information which would have been conveyed by an actual view of the premises, and when one purchases property where a visible state of things exists which could not legally exist without the property being subject to some burden, he is taken to have notice of the nature and extent of the burden”) (cleaned up).

³ The parties did not present evidence to explain why the memorandum of lease was not listed as an exception to title in the final title commitment.

⁴ We are not persuaded by J2 Systems’s reliance on *State v. Anderson*, 241 Ind. 184, 170 N.E.2d 812 (1960). The facts of that case are easily distinguished from the circumstances in this appeal. In *Anderson*, the State Highway Department failed to record its right-of-way easements in the county recorder’s office and our supreme court rejected the State’s argument that it was only required to record those easements with the state highway department. *Id.* at 189-90, 170 N.E.2d at 814–15. The court also rejected the State’s claim that the purchaser had actual notice of the right-of-way easement because “[t]here was no physical indication on the property itself that an additional (wider) right-of-way had been acquired along” the purchaser’s property, which was the right-of-way at issue in the appeal. *Id.* at 191, 170 N.E.2d at 815.

J2 Systems also cites to *Hartig v. Stratman*, 729 N.E.2d 237 (Ind. Ct. App. 2000). However, the only issue in that case relevant to this appeal was whether Hartig had constructive notice of an easement that was not recorded in his chain of title. *Id.* at 240–41. Presumably, given that the issue of actual notice was not considered in the appeal, the parties did not raise it in their appellate briefs.

II. *J2 Systems is Not Entitled to Rent*

[17] J2 Systems argues, in the alternative, that it is entitled to a portion of the rent Palmer collects from White Castle for White Castle’s use of the easement. The Appellees claim that J2 Systems waived this claim because it did not request rent payments until its motion to correct error.

[18] J2 Systems’s claim for rent was not raised in a counterclaim or discussed at the summary judgment hearing. But in a footnote in its motion for summary judgment, J2 Systems argued that it

is entitled to a portion of rents commensurate with the portion of the Leased Premises it owns pursuant to a transfer order. *See Foertsch v. Schaus*, 477 N.E.2d 566, 569 (Ind. [Ct.] App. 1985). Under no circumstances, however, is Palmer imbued with the power to control or collect for real estate it no longer owns.

Appellant’s App. Vol. II, p. 75.⁵ Consequently, the issue was raised in the trial court during the summary judgment proceedings. The Appellees incorrectly claim that the issue was raised for the first time in J2 Systems’s motion to correct error. For these reasons, J2 Systems has not waived its claim that it is entitled to rent for White Castle’s continued use of the easement.

[19] However, J2 Systems has not cited any authority that persuasively supports its rent-entitlement claim. J2 Systems asserts that “the trial court has, in effect,

⁵ *Foertsch* is not persuasive authority on the issue before us as that case involves the transfer of oil and gas leases between the two appealing parties. 477 N.E.2d at 568–69.

added J2 to the Lease as a landlord but erred when it failed to apportion, inter alia, rent between J2 and Palmer.” Appellant’s Br. at 20. And J2 Systems relies on the doctrine of equitable assignment, citing to *Indianapolis Mfg. & Carpenters Union v. Cleveland, C.C.*, 45 Ind. 281 (1873) and *Collins v. McKinney*, 871 N.E.2d 363 (Ind. Ct. App. 2007). But in those cases, “the doctrine of equitable assignment was enlisted to aid landlords whose tenants had effectively—and impermissibly—assigned their leases while hoping to avoid the consequences because the assignment was not ‘official.’” See *Merrillville 2548, Inc. v. BMO Harris Bank N.A.*, 39 N.E.3d 382, 392 (Ind. Ct. App. 2015) (discussing *Indianapolis Manufacturing* and *Collins*). The facts of this case are quite different.

[20] J2 Systems purchased the Keystone Avenue property with actual notice that White Castle had an access easement on the south side of the property for ingress and egress to its restaurant. It is well established that “[w]hoever takes an estate upon which a servitude has been imposed holds it subject to the same servitude, and in the same manner, as it was held by his grantor. A conveyance by the owner of a servient estate does not affect the owner of the easement if the purchaser has notice of its existence.” *Faukboner v. Corder*, 127 Ind. 164, 26 N.E.766, 767 (1891) (cleaned up); see also *Pyramid Coal Corp. v. Pratt*, 229 Ind. 648, 653, 99 N.E.2d 427, 429 (1951) (stating that a purchaser of the servient property takes subject to the easement without reservation).

[21] Contrary to J2 Systems’s claim, the terms of Appellees’ lease are not enforceable against J2 Systems, who is not a party to that agreement. The lease is simply the instrument that created the easement. And for the duration of the

term of that lease agreement, White Castle may continue to enjoy the easement. For these reasons, we conclude that J2 Systems is not entitled to rent for White Castle's continued use of the easement. The trial court did not err when it denied the motion to correct error.

Conclusion

[22] Because J2 Systems had actual notice of White Castle's access easement on the Keystone Avenue property, the easement is valid and enforceable. And J2 Systems is not entitled to a portion of the rent White Castle is obligated to pay under the terms of its lease agreement with Palmer. We therefore affirm the trial court's grant of summary judgment in the Appellees' favor.

[23] Affirmed.

Tavitas, J., and Weissmann, J., concur.