

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lyle Davis, Mary Davis, Nickie
Hartzler and Wayne Hartzler,
Appellants-Defendants,

v.

Ray Howard and Rosetta
Howard,
Appellees-Plaintiffs.

June 14, 2021

Court of Appeals Case No.
20A-MI-2007

Interlocutory Appeal from the Vigo
Superior Court

The Honorable Sarah K. Mullican,
Judge

Trial Court Cause No.
84D03-1912-MI-9069

Pyle, Judge.

Statement of the Case

- [1] In this interlocutory appeal, Lyle Davis and Mary Davis (“the Davises”) and Nickie Hartzler and Wayne Hartzler (“the Hartzlers”) (collectively, “the Appellants”), appeal the trial court’s order denying their motion to dismiss the appeal of a legal survey filed by Ray Howard and Rosetta Howard (collectively, “the Howards”). Concluding that the trial court did not err by denying the Appellants’ motion, we affirm the trial court’s interlocutory order.
- [2] We affirm.

Issue

Whether the trial court erred by denying the Appellants’ motion to dismiss.

Facts

- [3] This appeal involves a continuing property dispute between the Howards and the Davises. That dispute partially involves a thirty-foot wide ingress and egress easement in Vigo County (“the thirty-foot easement”).¹ Related litigation involving the thirty-foot easement arose in October 2017, when the Howards filed a complaint for trespass, injunctive relief, and declaratory judgment against the Davises (“the Howard/Davis case”). In relevant part, the

¹ The thirty-foot easement had been granted to the Davises by Robert Harvey (“Harvey”) in 1988 when Harvey conveyed twenty-five acres to the Davises. The thirty-foot easement was described in a Corrective Warranty Deed, which is contained in Deed Record 414, Page 419.

Howards alleged that the thirty-foot easement was “located across” and “partially on” roadway parcels owned by the Howards and that the Davises had been “unlawfully trespassing” on the Howards’ property. (App. Vol. 2 at 11). The Howards acknowledged that the Davises held the thirty-foot easement but asserted that the Davises did not have the right to be on the Howards’ property that was not part of the easement. Additionally, the Howards alleged that the Davises had “stated their intention to remove trees and conduct excavating and groundwork on Howard’s property in an attempt to build a roadway for [the Davises].” (App. Vol. 2 at 11). The Howard/Davis case was filed in Vigo Superior Court #3 and the cause is currently pending at the time of this appeal.²

[4] As part of the Howard/Davis case, the Howards and the Davises entered into a “Stipulation of Legal Survey and Evidentiary Admissibility” (“the Stipulation”) in 2019. The Stipulation provides as follows:

1. On October 6, 2017, Plaintiffs [the Howards] filed their Complaint for Trespass, Injunctive Relief and Declaratory Judgment, against Defendants, Lyle Davis and Mary Davis relating to, in part an ingress and egress easement held by Davis is as described in the Corrective Warranty Deed to Davis dated June 8, 1988 and recorded June 8, 1988 in Deed Record 414, Page 419, of the Vigo County, Indiana Recorder’s Office.
2. Plaintiffs [the Howards] and Defendants [the Davises] have agreed to engage Myers Engineering, Inc. to perform services to complete a survey of the subject real estate pursuant to an

² The cause number for the Howard/Davis case is 84D03-1710-PL-7469. Odyssey indicates that the Howard/Davis case is currently scheduled for a bench trial on September 29 and October 1, 2021.

Agreement for Limited Professional Services, as signed by Matthew J. Voris on behalf of Myers Engineering, Inc. and Jeffrey A. Lewellyn [the Howards' attorney], dated 10-17-18 (the "Agreement"). A copy of the Agreement is attached herewith as Exhibit A.

3. The services to be performed by Myers Engineering, Inc. includes completing the survey work as a "legal survey" pursuant to Indiana Code [§] 36-2-12-1 et. seq.

4. The parties stipulate that Defendants [the Davises] have ingress and egress easement rights as set out in [the] Corrective Warranty Deed from Robert W. Harvey dated June 8, 1988 and recorded June 8, 1988 at Deed Record 414, Page 419, in the records of the Vigo County, Indiana Recorder's Office, which shall include extending access from the existing [c]ounty road known as Daniel Street. To the extent the legal survey [a]ffects the Plaintiffs' [the Howards'] and the Defendants' [the Davises'] real estate interests, the Plaintiffs [the Howards] and the Defendants [the Davises] agree and stipulate to be bound by the results of the survey and the survey shall be admissible for evidentiary purposes in the parties' pending action. Further, the Plaintiffs [the Howards] and the Defendants [the Davises] hereby agree to waive any appeal rights that exist under the statutory process for establishing a legal survey.

5. The Plaintiffs [the Howards] and the Defendants [the Davises] each agree to pay one-half (½) of Myers Engineering's costs of performing a survey pursuant to the Agreement for services.

(App. Vol. 2 at 23; Ex. Vol. at 12). The Stipulation was signed by the Howards, the Davises, and both parties' attorneys. The Agreement for limited professional services, which was referenced by and attached to the Stipulation, provided that the "[d]escription of the services to be provided" was to be for the following:

Boundary Survey [–] retracement survey to establish and monument the thirty[–]foot (30') easement as described in in the Corrective Warranty Deed, recorded June 8, 1988, at Deed Record 414, Page 419, to the extent it [a]ffects property owned by Ray and Rosetta Howard, and to be completed as a “legal survey”.

(App. Vol. 2 at 25; Ex. Vol. at 14).

[5] Thereafter, Earl Spires, Jr. (“Spires”) of Myers Engineering conducted a survey of the property at issue. In September 2019, Spires filed a survey plat with the Vigo County Surveyor. Spires labeled the survey plat as Plat of Legal Survey[:] Showing Ingress/Egress Easement Described on L. Davis Estate One Lot Subdivision & Deed Record 414, Page 419[.]” (App. Vol. 2 at 35; Ex. Vol. at 18). Pursuant to the parties’ Agreement, the survey plat set forth the thirty-foot ingress/egress easement described in the Corrective Warranty Deed and recorded in Deed Record 414, Page 419. However, the survey plat also included an additional easement that was located on the “L. Davis Estate One Lot Subdivision” property and described in a subdivision plat for Tri-Lake Estates. (App. Vol. 2 at 35; Ex. Vol. at 18). This additional easement was a sixty-foot easement.

[6] Believing that the surveyor had exceeded the scope of the requested survey, the Howards filed an “Appeal of Legal Survey” (“the Howards’ survey appeal” or “the survey appeal”) pursuant to INDIANA CODE § 36-2-12-14 on December 9,

2019.³ (App. Vol. 2 at 29). In the Howards' survey appeal, they named the following defendants: (1) the Davises; (2) the Hartzlers; (3) William W. Norris; and (4) Bruce W. Allen, Jr. in his capacity as the Vigo County Surveyor. The defendants were "identified as interested persons in the legal survey process and [we]re named . . . so that they [could] appear and answer as to any interest they have in the property and boundary lines at issue." (App. Vol. 2 at 29). The Howards' survey appeal alleged, in relevant part, as follows:

11. On September 17, 2019[,] the certified Legal Survey was entered in the Legal Survey Book No. 6 Page 89, Vigo County, Indiana 47807 by Bruce W. Allen, Jr., Vigo County Surveyor.

* * * * *

13. That pursuant to Indiana Code § 36-2-12-14[,] "The owner of property surveyed under this chapter may appeal that survey to the circuit court, superior court, or probate court for the county: within ninety (90) days if the owner is a resident of the county. . . ." *Id.* "The right to appeal commences when the plat of the legal survey is entered by the county surveyor in the legal survey record book. *See* Indiana Code § 36-2-12-10[.]

14. Howard hereby files his appeal and objects to this Legal Survey in that the sixty[-]foot (60') easement area shown as being created by Davis One Lot Subdivision, as shown at Plat Record _____, was not owned by Davis when the alleged right of way was created as part of Davis One Lot Subdivision, Davis had no right, title or interest to create the alleged right of way, it violates the

³ The Howards' survey appeal was originally filed Vigo Superior Court #6 but was then transferred to Vigo Superior Court #3 where the Howard/Davis case is pending.

Statute of Frauds and is not a legal right of way or real estate interest.

15. The sixty[-]foot (60') easement area shown on the Legal Survey as being created by Davis One Lot Subdivision should not be drawn on the Legal Survey and a revised survey should be created removing such easement area before the Legal Survey is accepted and recorded in the records of the Recorder of Vigo County, Indiana.

WHEREFORE, the Plaintiffs, Ray Howard and Rosetta Howard, respectfully request the Court to enter judgment ordering: (1) the Surveyor of Vigo County to obtain copies of the relevant field notes and other papers and immediately transmit the same to the court, without requiring an appeal bond; (2) set this matter for hearing to determine the appropriateness of the Myers' Legal Survey; and (3) find and order that a revised survey should be completed removing the sixty[-]foot (60') easement area shown on the Legal Survey as being created by Davis One Lot Subdivision.

(App. Vol. 2 at 30-31) (blank space in original).

- [7] Thereafter, on February 7, 2020, the Appellants filed a motion to dismiss the Howards' survey appeal.⁴ The Appellants argued that the survey appeal should be dismissed based on the Stipulation from the Howard/Davis case. Specifically, the Appellants asserted that the Stipulation was a "binding and enforceable contract" in which the Howards had "expressly and unequivocally agreed to be bound by the results of the legal survey and [had] expressly and

⁴ The Appellants did not specify under which Trial Rule they were filing their motion to dismiss.

unequivocally waived any statutory right to appeal the results of the legal survey.” (App. Vol. 2 at 42, 43). Additionally, the Appellants asserted that the Hartzlers were “third-party beneficiaries of the 2019 Stipulation entitled to enforce its obligations on [the Howards] to the extent [the Howards] seek to exclude the easements or easement dimensions contained in the Legal Survey.” (App. Vol. 2 at 43). The Appellants attached a copy of the Stipulation to their motion to dismiss.

[8] Thereafter, the trial court scheduled the matter for a hearing. During the July 2020 hearing, the trial court allowed the parties to present evidence and witnesses. Included in the evidence presented to the trial court was the Stipulation and the Agreement. The Appellants argued that the trial court should grant its motion to dismiss the Howards’ survey appeal because the Stipulation provided that the parties were waiving any rights to appeal the legal survey. The Howards, on the other hand, argued that the Stipulation did not preclude their survey appeal because Myers Engineering had not performed the limited services that the parties had contracted to be performed, i.e., a survey only of the thirty-foot easement, as set forth by the Stipulation and Agreement. At the end of the hearing, the trial court took the matter under advisement and requested that the parties submit post-hearing briefs.

[9] Thereafter, on September 22, 2020, the trial court issued an order denying the Appellants’ motion to dismiss. Thereafter, the Appellants filed a motion seeking to have the trial court certify its order, and the trial court granted the

motion. The Appellants then sought permission to file this interlocutory appeal, and this Court granted his request. The Appellants now appeals.

Decision

[10] The Appellants challenge the trial court’s interlocutory order denying their motion to dismiss the Howards’ survey appeal. Here, the Appellants attached matters outside the pleadings to their motion to dismiss, and the trial court allowed evidence to be presented during the hearing on the motion. Accordingly, we will review the trial court’s ruling as a denial of summary judgment. *See* Indiana Trial Rule 12 (providing that a motion to dismiss will be treated as a motion for summary judgment where matters outside the pleadings are presented to and not excluded by the trial court).⁵

[11] Our standard of review for summary judgment cases is well settled. When we review a trial court’s grant of a motion for summary judgment, our standard of review is the same as it is for the trial court. *Knighten v. E. Chi. Hous. Auth.*, 45 N.E.3d 788, 791 (Ind. 2015). Summary judgment is appropriate only where the moving party has shown that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). If the moving party meets this burden, then the non-moving party must designate evidence demonstrating a genuine issue of material fact. *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 637 (Ind. 2012). “We

⁵ The parties agree that the summary judgment standard of review is applicable.

construe all factual inferences in favor of the non-moving party and resolve all doubts regarding the existence of a material issue against the moving party.”

Knighten, 45 N.E.3d at 791.

[12] In this appeal, we are called upon to determine whether the trial court properly granted summary judgment in this survey appeal case that involved a retracement survey that was done as a legal survey. A retracement survey is a “survey of real property that has been previously described in documents conveying an interest in that real property.” I.C. § 36-2-19-3. *See also* I.C. § 25-21.5-1-8.7; 865 Ind. Admin. Code 1-12-2(i). A legal survey is a survey used when “[a] landowner desir[es] to establish the location of the line between the landowner’s land and that of an adjoining landowner[.]” I.C. § 36-2-12-10(b). “The lines located and established under [a legal survey in INDIANA CODE § 36-2-12-10(b)] are binding on all landowners affected and their heirs and assigns, unless an appeal is taken under [INDIANA CODE § 36-2-12-14].” I.C. § 36-2-12-10(c). “The right to appeal commences when the plat of the legal survey is entered by the county surveyor in the legal survey record book.” *Id.* An “owner of property surveyed under this chapter [INDIANA CODE § 36-2-12] may appeal that survey to the circuit court, superior court, or probate court for the county . . . within ninety (90) days if the owner is a resident of the county[.]” I.C. § 36-2-12-14(a)(1).

[13] Here, it is undisputed that a legal survey was conducted and filed with the county surveyor and that the Howards filed an appeal of that survey within ninety days of the survey being entered in the legal survey record book.

Instead, the Appellants argue that the Stipulation from the Howard/Davis case precludes the Howards from filing an appeal of the legal survey under INDIANA CODE § 36-2-12-14. The Appellants assert that the Stipulation constitutes a binding and enforceable contract under which the Howards waived any right to appeal the legal survey.

[14] The Howards, on the other hand, assert that they “did not agree to a blanket waiver of rights” under the Stipulation. (Howards’ Br. 4). They contend that the Stipulation “prohibits the right to appeal only as to the specific work or service that was to be performed by Myers Engineering pursuant to the contract” and that because “the work and services performed by Myers Engineering was not performed pursuant to the terms of the contract, then [the] Howard[s] ha[ve] a right to appeal the survey.” (Howards’ Br. 7).

[15] Both parties agree that this appeal turns on the application and interpretation of the Stipulation, which they agree is unambiguous. “Summary judgment is especially appropriate in the context of contract interpretation because the construction of a written contract is a question of law.” *TW Gen. Contracting Servs., Inc. v. First Farmers Bank & Trust*, 904 N.E.2d 1285, 1287-88 (Ind. Ct. App. 2009) (citing *Colonial Penn Ins. Co v. Guzorek*, 690 N.E.2d 664, 667 (Ind. 1997)), *reh’g denied*. “The ultimate goal of any contract interpretation is to determine the intent of the parties when they made the agreement.” *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 813 (Ind. 2012), *reh’g denied*. To do so, “we begin with the plain language of the contract, reading it in context and, whenever possible, construing it so as to render each word, phrase, and

term meaningful, unambiguous, and harmonious with the whole.” *Id.* A court should construe the language of a contract so as not to render any words, phrases, or terms ineffective or meaningless. *Hammerstone v. Ind. Ins. Co.*, 986 N.E.2d 841, 846 (Ind. Ct. App. 2013).

[16] Each party focuses on a different part of the Stipulation in support of its argument. The Appellants focus on the last sentence of paragraph four, which provides that “the Plaintiffs [the Howards] and the Defendants [the Davises] hereby agree to waive any appeal rights that exist under the statutory process for establishing a legal survey.” (App. Vol. 2 at 23; Ex. Vol. at 12). The Appellants specifically contend that the Stipulation reveals that the Howards “clearly and plainly intended and agreed to waive their rights to appeal the legal survey[.]” (Appellants’ Br. 16).

[17] The Howards, on the other hand, rely upon: (1) paragraph two, which provides that the parties “agreed to engage Myers Engineering, Inc. to perform services to complete a survey of the subject real estate pursuant to an Agreement for Limited Professional Services . . . (the “Agreement”)” that was attached as Exhibit A and incorporated into the Stipulation; and (2) that referenced Agreement, which set forth those limited services as a “[b]oundary [s]urvey [–] retracement survey to establish and monument the thirty[–]foot (30’) easement as described in in the Corrective Warranty Deed, recorded June 8, 1988, at Deed Record 414, Page 419, to the extent it [a]ffects property owned by Ray and Rosetta Howard[.]” (App. Vol. 2 at 25; Ex. Vol. at 14). The Howards point out that the legal survey plat filed with the county surveyor was not

limited to a survey of the thirty-foot easement described in Deed Record 414, Page 419. Instead, it also included a sixty-foot easement or right-of-way that was not part of the terms of the Stipulation and Agreement. The Howards argue that they had a right to appeal that part of the legal survey because the Stipulation did not preclude the appeal of the legal survey that included the sixty-foot easement.⁶

[18] When reviewing the four corners of the Stipulation and the incorporated Agreement, it is clear that the subject of the legal survey was the thirty-foot easement described in the Corrective Warranty Deed recorded on June 8, 1988 and contained in Deed Record 414, Page 419 and that the purpose or scope of the survey was limited to a retracement survey to establish the boundary of that specific easement and to be filed as a legal survey. Thus, the waiver provision of the Stipulation provided that the Howards and the Davises would be bound by the results of the survey relating to the thirty-foot easement described contained in Deed Record 414, Page 419. However, the legal survey at issue in this appeal included more than merely an establishment of the thirty-foot easement described contained in Deed Record 414, Page 419. It also included the establishment of boundary lines for a sixty-foot easement that affected the Howards as landowners. The plat of the legal survey was then filed with the county surveyor under INDIANA CODE § 36-2-12-10 for entry into the legal

⁶ The Howards also assert that the existence and validity of the sixty-foot easement is an issue that is part of the pending Howard/Davis case.

record survey book. Under INDIANA CODE § 36-2-12-10(c), the inclusion of this additional easement in the legal survey would be binding on the Howards as landowners unless they were able to appeal the survey pursuant to INDIANA CODE § 36-2-12-14. Because the language of the Stipulation and incorporated Agreement did not include a waiver of statutory appeal rights in regard to the additional sixty-foot easement, the trial court did not err by denying the Appellants' motion seeking to dismiss the Howards appeal of the legal survey. Accordingly, we remand this case for further proceedings under INDIANA CODE § 36-2-12-14.⁷

[19] Affirmed.

Najam, J., and Tavitas, J., concur.

⁷ The Appellants also suggest that they were entitled to an automatic grant of summary judgment because the Howards did not file a summary judgment response with designated evidence to show that the Stipulation “was anything other than an accurate, true and correct legal survey/retracement survey prepared in compliance with Indiana Law regarding legal and retracement surveys.” (Appellants’ Br. 18). We disagree with the Appellants’ argument for multiple reasons. First, a party moving for summary judgment is entitled to summary judgment only if that moving party shows that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *See Hughley*, 15 N.E.3d at 1003. If the moving party meets this burden, then the non-moving party must designate evidence demonstrating a genuine issue of material fact. *See Gill*, 970 N.E.2d at 637. Second, the Howards presented evidence to the trial court in support of their opposition to the Appellants’ motion. We note that this case did not follow the typical procedural path for summary judgment. After the Appellants had filed their motion, the trial court scheduled a hearing and permitted the parties to make arguments and present matters outside the pleadings. During the hearing, both parties, including the Howards, presented evidence to the trial court. Third, the Howards did not need, at this stage of the proceeding, to present evidence regarding the accuracy or correctness of the legal survey. That substantive issue is what the Howards are seeking to challenge by filing their survey appeal under INDIANA CODE § 36-2-12-14. Here, at this summary judgment stage of the case, the issue is simply a procedural one regarding whether the Stipulation precluded the Howards from filing their survey appeal. The trial court determined that the Howards could proceed with their appeal of the legal survey, and we affirm the trial court’s interlocutory order.