11CA1090 Griffin-Hadden Propt v. Bd of Cty Comm 08-16-2012

COLORADO COURT OF APPEALS

Court of Appeals No. 11CA1090
Moffat County District Court No. 09CV102
Honorable Michael A. O'Hara, Judge

Griffin-Hadden Properties, Inc., a Colorado corporation,

Plaintiff-Appellant,

v.

Board of County Commissioners of the County of Moffat, Colorado,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FURMAN
Graham and Sternberg*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced August 16, 2012

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2011.

In this road dedication case, plaintiff, Griffin-Hadden Properties, Inc. (GHP), appeals the trial court's judgment after a bench trial in favor of defendant, the Board of County Commissioners of Moffat County (Board). We reverse and remand for further proceedings.

I. The Disputed Road

GHP, a Colorado corporation, purchased approximately 1,680 acres (Property) in Moffat County (County) in 1973.

At the time of GHP's purchase and afterwards, County Road 47 (CR 47), traveling west, led up to a gate at the Property's eastern boundary line, beyond which there was a road (Road) traveling in a generally westerly direction across the Property. Since GHP bought the Property in 1973, GHP has maintained that CR 47 terminates at the gate and that the Road is not part of CR 47.

The Board, however, asserted that the Road was an extension of CR 47 and instructed the County's sheriff to cut the locks on the gate. The Board threatened to prosecute anyone who relocked the gate.

GHP then filed a complaint and motion for preliminary injunction, requesting a declaration that the Road was not a public highway. The Board filed a counterclaim alleging the Road was a public highway by prescriptive use under section 43-2-201(1)(c), C.R.S. 2011. The Board later discovered commissioners' minutes from 1924, purporting to dedicate the Road as a public highway, and, as a result, it added a new theory of road dedication.

The trial court granted GHP a preliminary injunction, and the case proceeded to trial on the Board's two theories: prescriptive use and dedication.

At the conclusion of the trial, the trial court found that the Board had substantially complied with the road petition process and dedication statutes in 1924, determining that the Road existed at the time of GHP's purchase in 1973 such that a reasonable purchaser would be prompted to inquire further into the facts and circumstances surrounding the roadway and that, had GHP or its agents inquired further, they would have discovered evidence in the County's records to put them on notice of the Road's status as a public highway. Because the court found the Road was dedicated as a public highway, it did not address the issue of prescriptive use.

On appeal, GHP contends the trial court erred in (1) finding that the Board substantially complied with the dedication statutes such that a public highway was dedicated in 1924 on the Property and (2) charging GHP with inquiry notice of the public highway when GHP purchased the Property in 1973. Because we agree with GHP's first contention, we need not address its second contention.

II. Substantial Compliance

We first consider whether the trial court erred in finding that the Board substantially complied with the dedication statutes such that a public highway was dedicated in 1924 on the Property. We conclude it did.

A. Standard of Review

The trial court's conclusion that the Road is a public highway is a mixed question of fact and law. When faced with a mixed question of fact and law, we defer to the trial court's findings of fact as long as they are sufficiently supported by the record, but we review its conclusions of law de novo. *Ferrellgas, Inc. v. Yeiser*, 247 P.3d 1022, 1026 (Colo. 2011)(citing *People v. Vickery*, 229 P.3d 278, 281 (Colo. 2010)).

The construction of dedication statutes is a question of law. *City of Lakewood v. Mavromatis*, 817 P.2d 90, 96 (Colo. 1991). Because interpretation of statutes is a question of law and appellate courts need not defer to the trial court's interpretation, we review compliance with the dedication statutes de novo. *See Id.*

B. 1924 Statutory Requirements for Road Dedication

To answer the question of substantial compliance, we must set forth the statutory requirements for road dedication that existed in 1924, which are contained in the laws of 1921.

The laws of 1921 required, in relevant part, that the Board receive a petition from landowners requesting a road, 1913 Colo. Sess. Laws 285; receive a deposit of money or bond for expenses related to the viewing of the proposed road, 1883 Colo. Sess. Laws 252; appoint viewers, 1889 Colo. Sess. Laws 331; post notice of the proposed road, *id.*; issue warrants directing the appointed viewers to meet at a time and place to view and mark out the proposed road, 1883 Colo. Sess. Laws 253; cause the County's sheriff to serve these warrants upon the viewers, 1885 Colo. Sess. Laws 326; effect the meeting of the viewers, 1883 Colo. Sess. Laws 253; and, if the Board is of the opinion that the road should be laid out, cause a

survey and plat of the same to be made by the County's surveyor giving the courses and distances specifying the land over which the road will extend, *id.*

The laws of 1921 also required the viewers to file a report in the office of the County's clerk and recorder. *Id.* at 254. This report then had to be signed by a majority of the viewers and contain a full statement of their proceedings and a description of the road to be laid out. *Id.* To this report, the viewers had to attach the plat, survey, and report of the surveyor. *Id.* After hearing any objections to the report, if the Board determined to open the road, it had to record the full and final report of the viewers, including the plat and report of the surveyor, in the office of the County's clerk and recorder in a book kept for that purpose, *id.* at 255.

C. Law of Substantial Compliance

To answer the question of substantial compliance, we must also review the legal standard for substantial compliance.

Substantial compliance is the doctrine that, if a good-faith attempt to perform does not meet all of the statutory requirements precisely, the performance will still be considered complete if all essential purposes are accomplished. *See Hines v. New Castle*

Cnty., 640 A.2d 1026, 1029 (Del. 1994); *Consol. Rail Corp. v. Pub. Utilities Comm'n*, 533 N.E.2d 317, 319 (Ohio 1988); *see also Black's Law Dictionary* 1566 (9th ed. 2009).

In our view, the road dedication statutes of 1921 had two essential purposes: (1) to create public highways, *Mavromatis*, 817 P.2d at 96; and (2) to give constructive notice of the establishment of those public highways to subsequent purchasers, *id.*; *see also Bd. of Comm'rs v. Ingram*, 31 Colo. 319, 322, 73 P. 37, 37 (1903).

Hence, we must assess whether either of these two purposes were not accomplished in 1924.

D. Evidence at Trial Regarding Substantial Compliance

It was undisputed that, in 1924, residents of the County petitioned the Board to create a public highway; that the Board appointed viewers to view the petitioned road, received and accepted a report from the viewers, and later ordered a road to be opened to the public; and that a map published in 1929 shows a road, roughly consistent with the road requested in the 1924 petition, traversing the Property.

It was also undisputed that none of these documents or a plat were recorded with the County's clerk and recorder and that no

such documents appear within the County's grantor/grantee index. Moreover, there are no documents in the Property's chain of title — the public record on which title companies ordinarily rely in issuing title insurance policies — that show or evidence the dedication of a public highway on the Property.

Nevertheless, the trial court, relying in part on the existence of the 1929 map, determined the County had satisfied some of the requirements and thereby substantially complied with the laws of 1921 in the road petition process in 1924. The court reasoned that "the road petition process that occurred in 1924, . . . itself not being of record, . . . does [not] put subsequent purchasers on notice that there is a road or county road through the [Property]" but that the County's actions after the dedication process, such as construction of a road in the general location of the petitioned road, combined to give GHP inquiry notice.

We conclude the trial court erred in determining that the Board had substantially complied with the road dedication statutes in existence in 1924 because the Board did not accomplish the second essential purpose of those statutes — giving notice of the

establishment of a public highway to subsequent purchasers. *See Mavromatis*, 817 P.2d at 96.

Road petitions are subject to Colorado's recording acts. *Id.* at 91. These acts were adopted to protect subsequent purchasers of real property against the risk of prior unknown instruments affecting title to that property. *Id.* at 94. Very generally, these acts permit a purchaser to rely on the condition of title as it appears of record. *Page v. Fees-Krey, Inc.*, 617 P.2d 1188, 1193 (Colo. 1980). These acts also serve the important purpose of creating an accessible history of title. *Id.* at 1193 & n.7.

The recording act in existence at the time of the Board's purported road dedication provides, in relevant part:

> All . . . agreements, in writing of, or affecting the title to real estate or any interest therein . . . may be recorded in the office of the recorder of the county wherein such real estate is situated and from and after the filing thereof for record in such office, and not before, . . . instruments in writing shall take effect as to subsequent bona fide purchasers and incumbrancers by mortgage, judgment, or otherwise not having *notice thereof*.

1919 Colo. Sess. Laws 499 (emphasis added).

In 1924, the understanding of "notice thereof" was as follows: "[W]hat is enough to put a purchaser on inquiry is equivalent to actual notice, and . . . when he [or she] has information sufficient to lead him [or her] to a fact[,] he [or she] will be presumed to know it." *Perkins v. Adams*, 16 Colo. App. 96, 100, 63 P. 792, 793 (1901); *see Kerfoot v. Cronin*, 105 Ill. 609 (1882)(doctrine of inquiry notice "does not, when properly understood, assert the broad and unqualified doctrine that every purchaser or mortgagee is charged with notice of every fact that may appear of record, without regard to whether it falls within the line of his chain of title or not"); *Cox v. Milner*, 23 Ill. 476 (1860)(knowledge sufficient to put a person on inquiry notice "makes [that person] chargeable with knowledge of such other facts as might be ascertained by the exercise of ordinary diligence and understanding").

We think that, although the presence of a road on the Property would prompt a reasonable purchaser to inquire further and investigate the chain of title for the Property, such an investigation would not have revealed a public highway because the County failed to record the plat and surveyor's report with the County's

clerk as required by then existing law. *See* 1883 Colo. Sess. Laws 255.

Because the Board did not accomplish one of the essential purposes of the road dedication statutes, we need not address whether it accomplished the other, because substantial compliance requires that both essential purposes be accomplished. *See Joseph A. v. New Mexico Dep't of Human Servs.*, 69 F.3d 1081, 1086 (10th Cir. 1995); *Hines*, 640 A.2d at 1029; *Consol. Rail Corp.*, 533 N.E.2d at 319.

The Board's reliance on *Board of Commissioners v. Brierly*, 39 Colo. 99, 101-02, 88 P. 859, 859-60 (1907), for the proposition that evidence of compliance may be implied from other evidence and records, is misplaced. In *Brierly*, even though the county did not strictly comply with the requirements of the road dedication statutes in creating a public highway, the county accomplished the essential purposes of the road dedication statutes by recording the viewers' report. *See id.* ("There was no provision then requiring the report of the viewers, including the plat of the road located, to be recorded, but it appears from the record before us that the board of county commissioners of Boulder [C]ounty properly required such a

record to be made."). In contrast, there is no evidence here that either the Board or the County recorded the viewers' report or the plat.

The Board's reliance on *Ingram*, 31 Colo. at 322, 73 P. at 37, for the proposition that a public highway can be established without the recording of either the viewers' report or the plat, is also misplaced, primarily because the outcome is directly contrary to the Board's posture on appeal. In *Ingram*, the supreme court affirmed the judgment for a *subsequent purchaser* of the property, reasoning that "[p]ersons having actual notice of the establishment [of the public highway] are . . . bound, but subsequent purchasers of land are not bound by the proceedings before the board for the establishment of a public highway without actual or constructive notice thereof." *Id.* Like the plaintiff in *Ingram*, GHP was a subsequent purchaser with no actual or constructive notice of the purported establishment of CR 47. The facts and rationale in *Ingram* do not assist the Board.

We express no opinion on the Board's alternative theory of public highway by prescriptive use.

The judgment is reversed, and the case is remanded to the trial court for a determination of remaining issues.

JUDGE GRAHAM and JUDGE STERNBERG concur.