

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

SALLY A. SOMSEL,

Plaintiff,

vs

File No. 91-5479-NI
HON. PHILIP E. RODGERS, JR.

HUGH HERSHA, AMY HERSHA and JOHN
ELZINGA,

Defendants.

SALLY A. SOMSEL,

Plaintiff,

vs

File No. 91-5556-NI
HON. PHILIP E. RODGERS, JR.

CARL E. POTT and ROSE A. POTT,

Defendants.

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Attorneys for Plaintiff

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Hugh and Amy Hersha

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Attorney for Defendant
John Elzinga

Philip J. Crowley (P24218)
Attorney for Defendants
Carl and Rose Pott

DECISION AND ORDER

The Defendant John Elzinga has submitted a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff's complaint arises out of an automobile accident which occurred on U.S. 31, adjacent to the Elzinga farm. At approximately 11:00 p.m.

on July 30, 1989, Plaintiff states that she suddenly encountered two horses on the roadway directly in front of her vehicle. She was unable to avoid the horses and the resultant collision caused her to veer into the southbound lane of U.S. 31 where a subsequent collision occurred with a southbound vehicle.

The Defendant Elzinga's Motion for Summary Disposition is predicated upon the Defendant's asserted lack of control over, and possession of, the subject property and horses. Plaintiff has responded asserting that her claims are legally sufficient and that there exists a genuine issue of material fact which precludes granting Defendant's motion.

The Court has reviewed the motion, the briefs filed by counsel, deposition transcripts and other documentary evidence referred to the Court by counsel and has entertained their oral arguments. Pursuant to the applicable standard of review and for the reasons set forth ahead, the Defendant Elzinga's motion is granted.

The resolution of Defendant's motion turns on a determination concerning Defendant Elzinga's interest in the real property where the horses were pastured. The Court has made its decision pursuant to MCR 2.116(C)(10). The standard of review for which is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741 (1989).

"A motion for summary disposition brought under MCR 2.116 (C) (10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G) (5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer 389 Mich 363, 371-372; 207 NW2d 316 (1973).

The party opposing an MCR 2.116 (C) (10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW 2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G) (4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372."

In examining the legal basis of the complaint and taking Plaintiff's well plead factual allegations as true, Plaintiff cannot show that a genuine issue of material fact exists upon which reasonable minds could differ.

It is undisputed that Defendant Elzinga had no property interest in the horses and that he neither kept them nor had them in his care as those terms are used in the applicable statute. MCLA 433.11(b); MSA 18.789(1)(b). The only material fact argued by Plaintiff in opposition to Defendant's motion is whether the Defendant Elzinga maintained legal occupancy of the property where the horses were pastured. A review of the deposition transcripts, court file, affidavits and the parties' written submissions indicates that the Defendant John Elzinga originally granted Amy Hersha permission to pasture horses on his farm with the understanding that she was responsible for erecting and maintaining fences and that he would be paid a nominal amount of rent.

John Elzinga's affidavit indicates that he leased the premises for a nominal amount of rent. He further refers to the requirement of rent in his deposition testimony and explained his desire to charge nominal rent to avoid any later claim of adverse possession. See, John Elzinga deposition transcript p 27. Mr. Elzinga also testified that he had no use for the property and did not want control over it. Id. p 21.

Although Plaintiff argues that the relationship with Amy Hersha is indicative of a license, Plaintiff ignores that very shortly after the original agreement was arrived at, the Defendant Elzinga entered into a lease agreement with Rose Pott, Amy Hersha's

mother, for the same property. Ms. Pott also testified during her deposition regarding the rental relationship with John Elzinga, a relationship of many years duration. Ms. Pott indicated that not only did she pay rent but that she did not seek permission from the Defendant Elzinga to pasture more animals within the enclosure, that the Defendant Elzinga did not attempt to control the number of animals within the pasture and that he never interfered with her use of the property. See, Rose Pott deposition transcript pp 7, 20 and 21.

This testimony is uncontested. The Court is convinced, then, that whether or not the original arrangement with Amy Hersha was a lease or a license, it became a leasehold arrangement many years prior to this accident. The fact that rent was charged on a consistent basis and the fact that the Defendant Elzinga did not interfere with the tenant's use of the leasehold or assert any control over the property during the many years the lease was in effect are conclusive. In the absence of any evidence to the contrary, reasonable minds may not speculate as to the parties' intent and convert a leasehold interest into a license for purposes of mining the deeper pockets of a landlord who had no interest in, or legal liability for, activities occurring on land which he did not occupy or control.

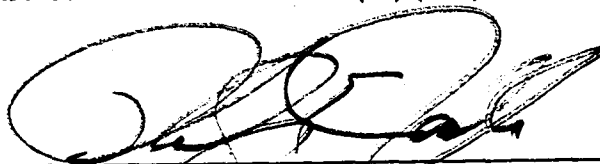
Assuming the relationship between the Defendant Elzinga and Ross Pott was one of landlord and tenant, Plaintiff finally argues that factual issues still remain regarding the Defendant Elzinga's retained control of his own adjoining property and his personal knowledge that, from time to time, the horses would get loose and wander onto his property. Plaintiff argues that a jury should be allowed to determine whether the Defendant Elzinga should have exercised reasonable care to ensure that the horses were maintained within an adequate enclosure which would have prevented them from straying onto his property and then onto highway U.S. 31 where they would pose a danger to the traveling public.

Plaintiff's argument presupposes a duty to inspect the tenant's fencing, bring deficiencies to the tenant's attention and,

if not seasonably corrected, make repairs. No authority has been provided to this Court which would create such a duty on a landlord in general or a farmer leasing land in particular. The common law of landlord-tenant in this state does not, in the opinion of the Court, impose an obligation upon farmers who lease land to supervise the operations of the tenants to determine which lands are being used for crops as opposed to the pasturing of animals and to inspect their tenants fences to insure the safety of the traveling public on highways adjacent to leased lands. This duty properly lies with the tenant and, in the absence of appellate authority to the contrary, the Court must reject Plaintiff's argument.

For all of the foregoing reasons, the Court has determined that Plaintiff's claim against the Defendant Elzinga may not proceed to trial and that the Defendant Elzinga's Motion for Summary Disposition is granted. MCR 2.116(C)(10).

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 5/13/92