IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MOONSHADOW PROPERTIES LLC,
Plaintiff/Appellant,

v.

MASJID OMAR IBN AL-KHATTAB,
Defendant/Appellee.

No. 1 CA-CV 19-0790
FILED 2-2-2021

Appeal from the Superior Court in Maricopa County
No. CV2016-091847
The Honorable Daniel J. Kiley, Judge

AFFIRMED

COUNSEL

Zuber Lawler and Del Duca, LLP, Phoenix
By Robert A. Mandel
Counsel for Plaintiff/Appellant

Osborn Maledon, PA, Phoenix
By Colin F. Campbell, Joshua David Rothenberg Bendor
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge D. Steven Williams joined.

W E I N Z W E I G, Judge:

INTRODUCTION

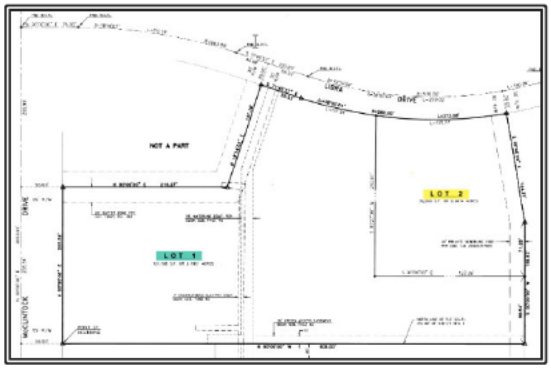
¶1 This appeal concerns a real estate dispute between a mosque, Masjid Omar Ibn Al-Khattab ("Mosque"), and a medical center, Moonshadow Properties LLC ("Moonshadow"). Moonshadow and the Mosque own adjacent parcels in Tempe. To expand its parking footprint and meet Tempe parking requirements, Moonshadow sued the Mosque, asserting an implied easement over the Mosque's parking spaces. After a bench trial, the superior court rejected Moonshadow's implied easement claim. Moonshadow appeals. Because the court's ruling was supported by substantial evidence, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Following a bench trial, we view the facts in the light most favorable to upholding the court's ruling. *Ariz. Biltmore Hotel Villas Condos. Ass'n v. Conlon Grp. Ariz., LLC*, 249 Ariz. 326, 329, ¶ 3 (App. 2020).

A. TDMC Acquires Lot 1 and Lot 2

¶3 At issue are adjacent lots in Tempe—Lot 1 and Lot 2—as this diagram shows. TDMC Renovations, LLC ("TDMC") purchased Lot 1 in 2002 to renovate and reopen a vacant medical center on the parcel. For medical centers of this size, the Tempe City Code required TDMC to provide 197 parking spaces. Lot 1 only had 111 parking spaces, however, 86 less than required.



¶4 To address the parking deficiency, TDMC first sought a variance from the City Code's parking requirements based on shared parking agreements it negotiated

with two neighbors—the Mosque and a church. Unable to obtain the variance, TDMC bought Lot 2 in 2003, built a second parking lot on Lot 2 and allocated 86 of Lot 2's parking spots to Lot 1.

¶5 By February 2004, TDMC's development plan was therefore compliant with City Code requirements and TDMC received City approval. Even so, TDMC's managing member, Dr. Steven Linnerson, recalled that employees and patients continued to park on Lot 1 because it was closer to the medical building. And the superior court found the overflow spots on Lot 2 "generally remain[ed] unused."

B. Moonshadow Acquires Lot 1 and Linnberg Acquires Lot 2

¶6 Moonshadow acquired Lot 1 from TDMC in February 2006 by special warranty deed. The warranty deed never mentions an easement for Lot 1 to use Lot 2's parking lot.

¶7 TDMC also wanted to sell Lot 2 to Moonshadow, but Moonshadow declined. Moonshadow's principal, Dr. Mikol Davis, testified about this decision at trial, explaining that he concluded Moonshadow had enough parking spots for patients and employees between Lot 1 and the shared parking agreements, adding "[w]e've never had a problem." Consequently, TDMC instead sold Lot 2 to Linnberg LLC ("Linnberg") in May 2006.

C. The Mosque Acquires Lot 2 and Moonshadow Seeks Financing

¶8 About five years later, in April 2011, the Mosque purchased Lot 2 from Linnberg. Despite negotiations between the Mosque, Moonshadow and Linnberg, the Mosque never agreed on a reciprocal parking agreement between Lots 1 and 2.

¶9 In late 2015, almost five years later, Dr. Davis emailed a Mosque leader, writing that "[w]e are very happy with the current arrangement but we applied for a new loan" and "[t]he lender insists that we have a parking arrangement we cannot revoke" for "six years." Moonshadow found another lender that did not require a permanent parking agreement and the loan was finalized by February 2016.

D. This Lawsuit

¶10 Moonshadow sued the Mosque in March 2016 to avoid regulatory compliance issues and future financing concerns. Moonshadow

alleged that Lot 1 had an implied easement to use Lot 2 for parking overflow. After a bench trial, the superior court issued a 26-page minute entry finding that Moonshadow had no easement over Lot 2, later awarding the Mosque attorney fees under A.R.S. § 12-341.01 and entering judgment for the Mosque. Moonshadow timely appeals. We have jurisdiction. *See* A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

DISCUSSION

¶11 On appeal from a bench trial, we will affirm the court's judgment if it is correct for any reason. *FL Receivables Tr. 2002–A v. Ariz. Mills, L.L.C.*, 230 Ariz. 160, 166, ¶ 24 (App. 2012). "We defer to a superior court's findings of fact unless clearly erroneous, but we review its conclusions of law de novo." *Town of Marana v. Pima Cty.*, 230 Ariz. 142, 152, ¶ 46 (App. 2012). "A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue of Ariz.*, 206 Ariz. 480, 482, ¶ 9 (App. 2003).

A. Implied Easement from Prior Use

¶12 Arizona law recognizes an action for implied easement to "acquire an interest in land . . . on the theory that whenever one conveys property[,] he [or she] includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment." *Koestel v. Buena Vista Pub. Serv. Corp.*, 138 Ariz. 578, 580 (App. 1984). An implied easement from prior use thus arises only from an earlier land conveyance and represents "an attempt to infer the intention of the parties" who meant to include an easement but did not. *Id.* (citing Restatement of Property § 476 cmt. a (1944)).

¶13 An implied easement from prior use has three distinct, essential elements:

> (1) the existence of a single tract of land so arranged that one portion of it derives benefit from the other, the division thereof by a single owner into two or more parcels, and the separation of title;
>
> (2) before separation occurs, the use must have been long, continued, obvious, or manifest, to a degree which shows permanency; and
>
> (3) the use of the claimed easement must be essential to the beneficial enjoyment of the parcel to be benefitted.

Id. All three elements must be proven. *Cf. Pugh v. Cook*, 153 Ariz. 246, 248 (App. 1987) (finding that when a party has failed to show the beneficial enjoyment claim, the entire easement claim fails).

1. Single common tract and separation of title

¶14 The first element is not genuinely contested. TDMC owned Lot 1 and Lot 2 as "a single tract of land," Lot 1 "derive[d] a benefit from" Lot 2, and TDMC sold Lot 1 to Moonshadow and Lot 2 to Linnberg, thus dividing the lots "into two or more parcels" and "separat[ing] the title." *Koestel*, 138 Ariz. at 580.

2. Long and continued use

¶15 For the second element, Moonshadow must prove that Lot 1's beneficial use of Lot 2 was "so long [and] continued prior to the severance and so obvious as to show that it was meant to be permanent," and not "a mere temporary provision or arrangement made for the convenience of the entire estate." *Id.* Based on the trial record, the superior court found "no evidence that Lot 1 made long and continued use of Lot 2 for parking purposes before the separation of title." The record contains reasonable evidence to support this finding.

¶16 First, the record shows that Lot 1 used Lot 2's parking lot for almost two years—from March 2004 to February 2006—before the separation of title, which the superior court found "falls short of establishing the requisite 'longstanding' use." The law supports this finding. *See, e.g.*, *Rhode v. Beztak of Ariz., Inc.*, 164 Ariz. 383, 387-88 (App. 1990) (affirming summary judgment, concluding use of nearly a year did not, as a matter of law, constitute longstanding use); *Lester v. Galambos*, 811 S.E.2d 661, 665 (N.C. App. 2018) (affirming summary judgment, noting "[t]he shortest time heretofore recognized as sufficient to imply an easement is thirteen years. However, the majority of cases finding an easement by prior use were cases with a use in excess of 30 years." (citations and internal quotation marks omitted)); *see also* T.C. Williams, Annotation, *Roadway or Pathway Used at Time of Severance of Tract as Visible or Apparent Easement*, 164 A.L.R. 1001 (1946).

¶17 Second, even during that short period, the court received testimony and evidence that Lot 1 did not use Lot 2's parking lot. For instance, Dr. Linnerson testified that the medical center's patients and employees used Lot 1 for parking and rarely used Lot 2's overflow parking spaces. Nor did Dr. Linnerson view the parking arrangement between Lot

1 and Lot 2 as permanent. Moreover, no parking easement is mentioned, much less reserved, in the warranty deeds conveying Lot 2 to Linnberg and then the Mosque. This testimony was particularly persuasive given Dr. Linnerson's long history with and unique knowledge of the property; first as TDMC's managing member, then as part of Linnberg, and finally as Moonshadow's property manager.

¶18 A representative of the Mosque agreed. He told the City that "we rarely see any car parked on Lot 2" and "[e]ven Lot 1 parking does not fill up to 70% of capacity." The beneficial use was therefore not "long" or "obvious" enough to attract the Mosque's attention. Further, the Mosque acquired Lot 2 in 2011 by warranty deed that never mentions a parking easement. Beyond that, the court received "aerial photographs of the lots showing unused parking spaces on Lot 1."

¶19 Moonshadow counters by pointing to trial evidence it views as more favorable to its claim, including the testimony of Dr. Davis, its principal, that Lot 2 was often used for parking. But the court heard this evidence and found it unpersuasive because Moonshadow promised but never provided corroborating photographs, and Dr. Davis only visited the medical center a few times per year. And again, we will affirm the court's findings if supported by substantial evidence, "even if substantial conflicting evidence exists." *Kocher*, 206 Ariz. at 482, ¶ 9.

¶20 Moonshadow also argues the superior court examined the wrong "use" to reject the implied easement. Moonshadow argues the proper focus was Lot 1's "use" of Lot 2's parking spaces to maintain compliance with the City Code's parking requirements. But even if accepted, Moonshadow still failed to prove this use was "so long [and] continued" as if "meant to be permanent" rather than a temporary convenience of one owner. *Koestel*, 138 Ariz. at 580.

¶21 What's more, the record shows that Moonshadow had alternative paths to meet the City Code's parking requirements, short of "implying and imposing a burden over the lands of another through imposition of an easement by implication." *O'Hara v. Chi. Title & Tr. Co.*, 450 N.E.2d 1183, 1190 (Ill. App. 1983) (rejecting implied easement where plaintiff had less intrusive alternatives). Most obvious, Moonshadow could have bought Lot 2 when offered the chance. It also could have negotiated agreements with its neighbors, including the Mosque, to expand its parking capacity. And yet, the superior court found "no evidence that

Moonshadow made any attempt to pursue [other] option[s] . . . that could resolve any need it may have for additional parking."[1]

3. Essential to beneficial enjoyment

¶22 The trial record also includes reasonable evidence to support the court's finding that Moonshadow never proved the third element—that the implied easement was essential for its beneficial enjoyment of Lot 1. *See Koestel*, 138 Ariz. at 580. Among other evidence, the record shows that patients and employees historically parked on Lot 1, not Lot 2. Moreover, as emphasized by the court, Moonshadow waited ten years to "first raise[] the issue of a parking easement on Lot 2." This extended period undercuts Moonshadow's argument that the parking easement was "essential." Indeed, Moonshadow did not raise the issue until its lender expressed interest. As Dr. Davis explained, Moonshadow "needed a parking agreement simply to meet its lender's requirements," not its own parking requirements.

¶23 Because the trial record contains reasonable evidence to support the superior court's findings and conclusions that Moonshadow did not meet the second and third requirements for an implied easement, we affirm. *See Pugh*, 153 Ariz. at 248.

B. Attorney Fees

¶24 Moonshadow also contests the superior court's award of attorney fees to the Mosque under A.R.S. § 12-341.01. "We will not disturb the trial court's discretionary award of fees if there is any reasonable basis for it." *Hale v. Amphitheater School Dist. No. 10*, 192 Ariz. 111, 117, ¶ 20 (App. 1998).

¶25 Moonshadow argues this dispute did not arise out of an express or implied contract under A.R.S. § 12-341.01. The record shows otherwise. Moonshadow itself alleged this lawsuit "arises out of contract" in its complaint and requested attorney fees under A.R.S. § 12-341.01 if successful. Beyond that, "[p]rinciples of contract interpretation apply to easements," *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 66, ¶ 16 (App. 2011), and Moonshadow sought to imply an

[1] Moonshadow also argues the superior court erroneously focused on the "subjective intent" of TDMC and Moonshadow rather than the "objective-intent focused analysis" required under Arizona law. We need not reach this argument, however, because our holding rests on different, dispositive grounds.

easement under prior transactions. And Section 12-341.01 expressly applies to implied contracts. A.R.S. § 12-341.01(A). As for the amount of fees awarded, the court examined the Mosque's billing records and declarations of counsel. Moonshadow shows no abuse of discretion.

CONCLUSION

¶26 We affirm the superior court's final judgment and award of attorney fees.

¶27 Both parties seek their attorney fees and costs on appeal under ARCAP 21 and A.R.S. § 12-341.01. As the successful party, we grant the Mosque its reasonable attorney fees under A.R.S. § 12-341.01 and taxable costs on appeal, contingent upon compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA