NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SOKNOH PARTNERS, LLC,

Appellant,

v.

AUDIO VISIONS SOUTH, INC.; GEORGE T. LIU; SUSAN RAYE LIU; WILLIAM H. TODD; and MARTHA EDWARDS,

Appellees.

Case No. 2D20-324

Opinion dated May 12, 2021.

Appeal from the Circuit Court for Hillsborough County; William P. Levens, Senior Judge, and Caroline T. Arkin, Judge.

Alicia R. Whiting-Bozich and Mahlon Barlow of Sivyer Barlow & Watson, P.A., Tampa, for Appellant.

Duane A. Daiker and Jaime Austrich of Shumaker, Loop and Kendrick, LLP, Tampa, for Appellees Audio Visions South, Inc., George T. Liu, and Susan Raye Liu.

No appearance for remaining Appellees.

SILBERMAN, Judge.

After a sale of real property, this dispute arose over a parking easement. Soknoh Partners, LLC (the Buyer), filed an action to quiet title against Audio Visions South, Inc., George T. Liu, and Susan Raye Liu (collectively, the Defendants). The Buyer also alleged a second count against the Lius for slander of title.[1] The Buyer now appeals a partial final judgment in favor of the Defendants and contends that the trial court erred in granting summary judgment in their favor. Because a genuine issue of material fact remains regarding whether the Buyer had notice of the easement and because the Defendants are not entitled to a judgment as a matter of law, we reverse the order granting summary judgment and the partial final judgment and remand for further proceedings.

The real property at issue consists of two parcels referred to as (1) the Sterling building and (2) the McKay lot (collectively, the Property). In 1996, William H. Todd and Terry Edwards purchased the Property. When Terry Edwards passed away, Martha Edwards received his one-half interest in the Property. On September 17, 2014, the Buyer, a limited liability company owned and operated by Robert Curtis and Bill Curtis, purchased the Property from William H. Todd and Martha Edwards (the Sellers). Audio Visions is a business located across the street from the Property, and Mr. Liu is a director and officer of Audio Visions.

After the sale to the Buyer, a "Private Easement Agreement for Parking" dated and executed by the grantors in December of 1996 and executed by the grantees in December of 1997 (the Parking Easement) was recorded in the public records of Hillsborough County on December 5, 2014. A corrected version of the Parking

[1]A third count of the operative complaint was stricken and is not at issue.

Easement was recorded on December 11, 2014, to add a legal description. The grantors of the easement were William H. Todd and Terry W. Edwards, and the grantees were George T. and Susan Raye Liu. The Parking Easement provides that its covenants run with the land.

The Buyer filed suit, and in the operative pleading, the amended complaint, the Buyer alleged that it had no notice of the Parking Easement before it purchased the Property. The Buyer sought, among other things, to have the Defendants' claim or interest—the Parking Easement—canceled and the cloud removed from the Buyer's title. The Defendants later filed a motion for summary judgment.

The Defendants' summary judgment evidence included George Liu's affidavit, Robert Curtis's deposition, and a declaration from Martha Edwards. That evidence showed that Robert Curtis conducted the due diligence on behalf of the Buyer prior to the purchase. By reviewing the Sellers' business records, Curtis learned that Audio Visions was paying one-half of the property taxes for the McKay lot. He asked why and was told that Audio Visions needed parking. Martha Edwards told Curtis that Audio Visions had the right to use parking spaces on the McKay lot in exchange for paying one-half of the property taxes on the lot. Curtis asked if there was a written agreement, and Martha Edwards told Curtis that it was "a handshake deal" and that her late husband, Terry Edwards, had been a "handshake type of guy." The Sellers' property manager also told Curtis that there was nothing in writing.

Curtis did not ask how long the agreement had been in place or whether it was intended to continue in the future. During his visits to the Property, Curtis never saw Audio Visons' trucks or customers' vehicles parked in the McKay lot. He never

spoke with anyone from Audio Visions or with George or Susan Liu. Curtis believed there was no written agreement because he was told there was none. Curtis admitted that he knew that he was not going to honor the oral agreement because the Buyer's "project would not have worked." The title search for the Property did not note the Parking Easement. Martha Edwards did not know that the Parking Easement existed until after it was recorded in December 2014. The closing affidavit that the Sellers provided to the Buyer asserted that there were no unrecorded easements or claims of easements as to the Property.

Three weeks before the discovery deadline expired, Judge Levens conducted the summary judgment hearing. The parties argued the issue of notice to the Buyer. In addition, the Defendants' counsel requested time to have the Sellers' depositions that were taken two days previously transcribed and filed. Defense counsel argued that Todd's deposition would raise an issue regarding the authenticity of his signature on the easement agreement and an issue regarding the use of the McKay lot. Defense counsel argued that Audio Visions did not actually use the lot for parking because there was a "side deal" for parking at a more convenient location. He also asserted that there was an issue of what the Buyer had notice of and if the Buyer had notice of "a landlord-tenant deal." The trial court stated that it would take the matter under advisement and allow defense counsel to file the deposition transcripts with the court.

Five days later, and before the depositions had been able to be transcribed and filed, the trial court entered its order granting the defense motion for summary judgment on counts one and two. In its order, the trial court determined that

the Parking Easement "recorded on December 5, 2014, and re-recorded to add the legal description on December 11, 2014, was and remains a binding encumbrance on the real estate at issue." The trial court determined that "[i]t is clear that the [Buyer's] principals knew of the parking agreement before buying the land; they also knew that the Defendants had been paying one-half of the property taxes on the subject land for the privilege of using the easement." The trial court also found that the Parking Easement was properly signed and complied with the statute of frauds.

The Buyer filed a motion for "rehearing" pursuant to Florida Rule of Civil Procedure 1.530 directed to the order granting the motion for summary judgment. The Buyer argued that the trial court had failed to consider the Sellers' deposition testimony, particularly Todd's deposition. The Buyer argued that it was a jury question as to whether it made a reasonable inquiry so as to be on implied actual notice. According to Todd's deposition, when asked about the Audio Visions line item on financial documents showing revenue for taxes on the McKay lot, Todd believed that he told Curtis that Audio Visons "rented" ten spaces from the Sellers. Todd explained that he would have described it as "rented" because "[s]o much time had passed" that he did not remember the Parking Easement from eighteen years earlier. It was not until he received a copy of the Parking Easement after the sale in 2014 that he remembered about the easement.

Subsequently a successor judge, Judge Arkin, determined that the motion for rehearing was premature and denied it without prejudice.[2] Judge Arkin also

[2]Based on our determination that the Defendants failed to establish that they were entitled to summary judgment, we need not reach the issue of whether the trial court erred in failing to treat the mislabeled motion for rehearing as a motion for

rendered a partial final judgment in favor of the Defendants on counts one and two. At the time of the judgment, a third-party claim against the Sellers remained pending. Subsequent counsel for the Buyer filed a motion for rehearing that did not raise the failure to consider the Sellers' deposition testimony. Judge Arkin denied that motion. The Buyer now appeals.

We conduct a de novo review of an order granting a motion for summary judgment. Knowles v. JPMorgan Chase Bank, N.A., 994 So. 2d 1218, 1219 (Fla. 2d DCA 2008). A movant is entitled to summary judgment "if the pleadings and summary judgment evidence on file show 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." Fla. R. Civ. P. 1.510(c).[3] "If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." Atria Grp., LLC v. One Progress Plaza, II, LLC, 170 So. 3d 884, 886 (Fla. 2d DCA 2015) (quoting Knowles, 994 So. 2d at 1219). When the defendant moves for summary judgment, "the court's function is solely to determine whether the record conclusively shows that the moving party proved a negative, that is, 'the nonexistence of a genuine issue of a material fact.' " Land Dev. Servs., Inc. v. Gulf View Townhomes, LLC, 75 So. 3d 865, 869 (Fla. 2d DCA 2011)

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reconsideration. See Seigler v. Bell, 148 So. 3d 473, 479 (Fla. 5th DCA 2014) (stating that "[n]omenclature does not control" and that motions directed to "nonfinal orders shall be treated as motions for reconsideration").

[3]The Florida Supreme Court amended rule 1.510 to adopt the federal summary judgment standard, but the amendment is not effective until May 1, 2021. See In re Amendments to Fla. Rule of Civil Procedure 1.510, 309 So. 3d 192, 192 (Fla. 2020).

(quoting Winston Park, Ltd. v. City of Coconut Creek, 872 So. 2d 415, 418 (Fla. 4th DCA 2004)).

The Buyer argues that the trial court erred in determining that prior to purchasing the Property the Buyer had notice of the unrecorded Parking Easement. The recording statute provides in relevant part that

> [n]o conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law.

§ 695.01(1), Fla. Stat. (2014). The statute thus applies only when "the subsequent purchaser is without notice." Harkless v. Laubhan, 278 So. 3d 728, 733 (Fla. 2d DCA 2019) (quoting Ruotal Corp., N.W. v. Ottati, 391 So. 2d 308, 309 (Fla. 4th DCA 1980)). To be a bona fide purchaser, a buyer must have "had no knowledge of the claimed interest against the challenged property at the time of the transaction." Id. (emphasis added). When determining whether a party is a bona fide purchaser, there are three types of notice to consider: actual, implied, and constructive. See id. Actual notice is also referred to as "[e]xpress actual notice," and implied notice is also referred to as "implied actual notice." Sheres v. Genender, 965 So. 2d 1268, 1271 (Fla. 4th DCA 2007).

As to constructive notice, the Parking Easement was not recorded in the public records before the sale to the Buyer and not mentioned in the recorded deeds for the Property. " 'Constructive notice' is the inference of such knowledge by operation of law, as under a recording statute." Regions Bank v. Deluca, 97 So. 3d 879, 884 (Fla. 2d DCA 2012) (quoting McCausland v. Davis, 204 So. 2d 334, 335-36 (Fla. 2d DCA

1967)). Thus, the Buyer had no constructive notice via recorded instruments. See Harkless, 278 So. 3d at 734 (stating that the purchasers of property did not have constructive notice of a "reservation of the right to receive rental income" when the lease was not recorded).

Actual notice that is express requires direct or personal knowledge. See Harkless, 278 So. 3d at 733; Sheres, 965 So. 2d at 1271. It is undisputed that the Buyer had knowledge of what was believed to be an unwritten parking agreement. The Buyer knew that the agreement allowed Audio Visions to use parking spaces on the MacKay lot in exchange for paying one-half of the property taxes on the lot. But the Buyer had no personal knowledge of the claimed interest—an easement. For instance, in Citgo Petroleum Corp. v. Florida East Coast Railway Co., 706 So. 2d 383, 386 (Fla. 4th DCA 1998), a railway company had actual knowledge that Citgo was constructing a pipeline on the subject property. However, the court determined as a matter of law that this put the railway company only on inquiry notice of Citgo's unrecorded easement. Id.

Here, Robert Curtis had actual knowledge that the Sellers were receiving revenue from Audio Visions, a business across the street from the Property. He inquired and was told that the payment was in exchange for the use of parking spaces. He asked if the agreement was in writing and was told that it was an unwritten "handshake deal." Martha Edwards, an owner of the property, did not even have knowledge of the written Parking Easement until it was recorded in the public records in December 2014 after the sale. The summary judgment evidence simply does not show that the Buyer had actual notice of the claimed interest in real property, an easement. The payment by Audio Visons for the use of parking spaces is equally consistent with

an oral rental agreement—a tenancy at will—as it is with a written agreement granting an easement. See § 83.01, Fla. Stat. (2014) ("Any lease of lands and tenements, or either, made shall be deemed and held to be a tenancy at will unless it shall be in writing signed by the lessor."). Therefore, as a matter of law, the Defendants were not entitled to summary judgment on the basis that the Buyer had actual notice of the easement interest.

With respect to implied notice, the Defendants failed to show the absence of any genuine issue of material fact. Implied actual notice "is notice that is 'inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use.' " Sheres, 965 So. 2d at 1271 (quoting Sapp v. Warner, 141 So. 124, 127 (Fla. 1932)). Whether a purchaser made a sufficient inquiry is a question of fact largely dependent upon the circumstances in a given case. See Harkless, 278 So. 3d at 733. Those circumstances known to the purchaser "must be such as should reasonably suggest inquiry and lead him to inquiry." Id. at 734 (quoting Citizens Prop. Ins. Corp. v. Eur. Woodcraft & Mica Design, Inc., 49 So. 3d 774, 777 (Fla. 4th DCA 2010)).

The reasonableness of an inquiry was a question of fact in Starlines International Corp. v. Union Planters Bank, 976 So. 2d 1172, 1177 (Fla. 4th DCA 2008), and the court reversed a final summary judgment in favor of the bank. Starlines involved a mortgage foreclosure action in which a subsequent purchaser of a one-half interest in the real property secured by the mortgage asserted that it had a superior interest to that of the bank. Id. at 1174-75. The recorded mortgage identified a promissory note that contained a dragnet clause. Id. at 1174. The note was not

recorded, and neither the note nor the mortgage indicated that the mortgage also secured a prior note. Id. at 1176. The purchaser asked the seller whether the mortgage secured any pre-existing debt and was told no. Id. at 1177. The bank argued that the purchaser's inquiry was insufficient and that the purchaser should have inquired of the bank regarding pre-existing debt. Id. In reversing the final summary judgment the court stated, "We believe there is a genuine issue of fact at least as to whether a reasonable person should have inquired further after receiving a negative response from the borrower." Id.

Here, when Robert Curtis conducted the due diligence for the Buyer and became aware that Audio Visions was paying one-half of the taxes on the McKay lot in exchange for the use of parking spaces, he was put on inquiry notice. It is undisputed that Curtis made an inquiry. He asked Martha Edwards and the Seller's property manager if the parking agreement was in writing. He was told that the agreement was not in writing and that it was a handshake deal. The title search and closing affidavit supported what he was told. However, he did not ask any further about the terms of the agreement or if the arrangement was intended to continue into the future. And he did not inquire of the Lius or anyone at Audio Visions regarding the parking agreement. Curtis indicated that he did not plan to honor what he was told was an oral agreement because if he did, the Buyer's project would not work.

The issue of whether Curtis's inquiry was sufficient, or whether a reasonable buyer would have inquired further, is a question of fact and not properly resolved on a motion for summary judgment. See id. (determining that a fact issue remained "as to whether a reasonable person should have inquired further after

receiving a negative response"). Therefore, we reverse the order granting summary judgment and the partial final judgment in favor of the Defendants and remand for further proceedings.

Reversed and remanded.

MORRIS and LABRIT, JJ., Concur.