UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
LOEWEN GROUP INTERNATIONAL, INC., a Delaware corporation, et al.,	)	Case No. 99-1244 (PJW)
	)	Jointly Administered
Debtors.	)	
	)	
WILLIAM R. ELDRIDGE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adv. Proc. No. 01-42 (PJW)
	)	
LOEWEN GROUP INTERNATIONAL, INC. and SIENA GROUP, L.L.C.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

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Dated: September 4, 2002

WALSH, J.

Before the Court are the cross-motions (Docs. # 40 and 48, respectively) of William R. Eldridge ("Plaintiff") and Loewen Group International, Inc. ("LGII") and Siena Group, L.L.C. ("Siena") (collectively, "Defendants") for summary judgment in this adversary proceeding. Plaintiff seeks summary judgment solely with respect to the issue of liability. For the reasons discussed below, Plaintiff's motion (Doc. # 40) for summary judgment will be granted; Defendants' joint motion (Doc. # 48) for summary judgment will be denied.

BACKGROUND

LGII is a Delaware corporation which owns and operates funeral homes and cemeteries throughout the United States. On June 1, 1999 ("Petition Date"), LGII and approximately 830 of its direct and indirect subsidiaries and/or affiliates (collectively, "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.[1] Debtors' chapter 11 cases were consolidated for procedural purposes and administered jointly. On December 5, 2001, Debtors' Fourth Amended Joint Plan of Reorganization was confirmed (Doc. # 8671, Case No. 99-1244).

Plaintiff is a Michigan resident who, prior to October 25, 1996, was the sole shareholder of Michigan Cemetery Management

[1] Some of the Debtors filed for bankruptcy subsequent to June 1, 1999.

Corporation, Inc. ("MCMCI"), a Michigan corporation which owned and operated various cemeteries in the Detroit area. (Pl.'s Br. (Doc. # 41) at 2.) Prior to the Petition Date, in the fall of 1996, Plaintiff and Defendants entered into a series of real estate transfers ("Transfers") pursuant to which Siena acquired title to most of Oakland Hills Memorial Gardens ("Oakland Hills" or the "Cemetery"), a cemetery previously owned by MCMCI and located in Novi, Michigan at the corner of Novi and Twelve Mile Roads. (Id.; Defs.' Mot. (Doc. # 48) at 2.) Excluded from the Transfers were approximately 1.15 acres located at the northeast corner of the property ("Corner Property") to which Plaintiff retained title. (Pl.'s Br. (Doc. # 41) at 2; Defs.' Mot. (Doc. # 48) at 2-3.) At that time, the Cemetery's main and only true entrance ("Original Entrance") was located on the Corner Property.[2] (Pl.'s Br. (Doc. # 41) at 2-3; Defs.' Mot. (Doc. # 48) at 2-3.)

On October 21, 1996, the parties entered into an easement agreement ("Easement Agreement"), pursuant to which Plaintiff granted Defendants a two year easement ("Easement") on the Corner Property for the purpose of accessing Oakland Hills.[3] (Pl.'s Br.

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[2] The Original Entrance consists of a paved driveway that is accessible from either Novi or Twelve Mile Roads. (Pl.'s Br. (Doc. # 41) at 3, n.2; Giwa Depo at 8.) An "historic" brick arch stretches across the driveway.

[3] While Siena owned Oakland Hills subsequent to the Transfers, LGII was providing operational and sales management services with respect thereto pursuant to a contract ("Sales Agreement") executed between Defendants on or about October 25, 1996. (Defs.' Mot. (Doc.

(Doc. # 41) at 3; Defs.' Mot. (Doc. # 48) at 2-3.) The Easement Agreement provides in pertinent part:

> The Grantor hereby grants to the Grantee, it successors and assigns, a two year easement, commencing on the date of execution hereof and terminating on the second anniversary of the date hereof, on, over and across all of [the Corner Property] for the exclusive use of [the Corner Property] by Grantee and its successors, assigns, employees, customers, designees, contractors, invitees, and all visitors to the [Cemetery], as a landscaped entranceway to and from Twelve Mile Road for vehicular and pedestrian access to the [Cemetery] (the "Easement"). This Easement shall terminate at any time and immediately upon Grantee's completion of construction of an alternative main access entryway to [the Cemetery] and, in any event, shall terminate in two years as otherwise provided hereby.

(Easement Agreement ¶ 1) (emphasis added). The Easement Agreement further provides: "The rule of strict construction does not apply to this grant. This grant shall be given a reasonable construction so that it accomplishes the intention of the parties to confer the full and exclusive use of [the Corner Property] as an entranceway to the [Cemetery]." (Id. at ¶ 5.)

By its terms, the Easement Agreement was to automatically expire upon the earlier of the construction of a new entrance to the Cemetery ("New Entrance") or October 21, 1998 ("Automatic Termination Date"). (Id. at ¶¶ 1, 6.[4]) While LGII "took the lead" in constructing a New Entrance and was working toward obtaining the

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48) at 2-3.)

[4] Paragraph 6 of the Easement Agreement provides: "This Easement shall terminate automatically on the second anniversary date of the date this document is executed."

necessary permits from the City of Novi ("City") by October of 1997, Defendants failed to construct a New Entrance prior to the Automatic Termination Date. (Defs.' Mot. (Doc. # 48) at 4.) As a result, Defendants continued to use the Original Entrance until at least mid-December 2000. (Id. at 4-5; Pl.'s Br. (Doc. # 41) at 4.) In September of 2000, Plaintiff notified Defendants that he intended to chain off the Original Entrance to the Cemetery as a result of Defendants' continued use thereof without Plaintiff's permission.[5] (Kaiser Depo. at 17-19; Letter from Pl.'s counsel to Defs. ("Letter"), Defs.' Opp'n (Doc. # 47), Ex. G.) Subsequently, in late fall of 2000, Defendants obtained from the City the permits needed to construct a New Entrance, and thereafter contracted with Pumford Construction Company to install a gravel road leading from Novi Road into the Cemetery. (Defs.' Opp'n (Doc. # 47) at 5.) This New Entrance was "completed and usable" in December 2000 or January 2001, at which time Defendants notified the general public, by a sign posted at the Original Entrance, that the New Entrance was to be used by all visitors to the Cemetery. (Id.) In addition,

[5] The parties disagree as to whether Plaintiff complained about Defendants' use of the Corner Property after the Automatic Termination Date, but prior to September of 2000. Plaintiff contends that he occasionally spoke to an agent/employee of one of the Defendants between October 22, 1998 and September of 2000 to ask Defendants to stop using the Corner Property and inquire about the construction of a New Entrance. (Pl.'s Depo. at 45-80, 91-92.) Defendants disagree and contend that their use of the Corner Property subsequent to the Automatic Termination Date was done "without Plaintiff's objection" until September 2000. (Defs.' Opp'n (Doc. # 47) at 4.)

Defendants specifically notified funeral directors about the New Entrance by letter. (Id.) Once Plaintiff "was assured by the Cemetery that its new entrance was up and running," he blocked off access to the Original Entrance with a rope. (Pl.'s Br. (Doc. # 47) at 8.)[6] The parties disagree as to whether Defendants, their agents/employees, and/or the general public actually stopped using the Original Entrance to access the Cemetery subsequent to the construction of the New Entrance. (Pl.'s Depo. at 86, 109-12; Defs.' Mot. (Doc. # 48) at 5.)

Plaintiff commenced the instant adversary proceeding on January 18, 2001, asserting claims against both Defendants for trespass and unjust enrichment and seeking damages as a result of Defendants' allegedly unauthorized use of the Corner Property from October 22, 1998 until at least mid-December 2001. (Pl.'s Br. (Doc. # 41) at v.) On March 29, 2001, Siena filed its answer to the Complaint along with a cross claim ("Cross Claim") (Doc. # 5) against LGII seeking indemnification and/or contribution with respect to the instant litigation. On February 8, 2002, Plaintiff filed his motion (Doc. # 40) for summary judgment solely with respect to the issue of Defendants' liability on his claims for trespass and unjust enrichment. That same date Siena filed a motion

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[6] Plaintiff testified that he waited to block off the Original Entrance until the New Entrance was constructed because he did not want to "do anything to hurt... the lot owners of Oakland Hills or the people that are in a mourning process". (Pl.'s Depo. at 38.)

(Doc. # 42) for summary judgment on its Cross Claim against LGII as a result of LGII's failure to file a timely response thereto. (Id. at ¶¶ 12-13.).[7] Defendants then filed a joint opposition (Doc. # 47) to Plaintiff's motion for summary judgment on March 8, 2002, and thereafter, filed their own joint motion (Doc. # 48) for summary judgment on March 15, 2002.[8] Subsequently, on June 14, 2002, this Court entered an Order (Doc. # 57) granting Siena's motion for summary judgment on its Cross Claim against LGII.

DISCUSSION

The parties agree that Michigan law governs the instant dispute. (See Pl.'s Br. (Doc. # 41) at 11-12; Defs.' Mot. (Doc. # 48) at 6-11.) Plaintiff argues that he is entitled to summary judgment because the undisputed facts demonstrate that Defendants trespassed on the Corner Property after the Automatic Termination Date, and that they have been unjustly enriched from their use of

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[7] In its motion, Siena argued that: (1) pursuant to the Sales Agreement, LGII was responsible for providing and paying for all capital expenditures necessary for the operation of Oakland Hills, including the construction of the New Entrance (Id. at ¶¶ 7-9); (2) the Sales Agreement contained an indemnification provision providing that LGII would indemnify and hold Siena harmless for any and all losses arising from such services (Id.); and (3) LGII further agreed to retain all liability arising out of the instant proceeding, and to indemnify Siena for any judgment, costs and/or expenses resulting therefrom pursuant to an Asset Purchase Agreement executed by Defendants subsequent to the commencement of this proceeding (Id. at ¶¶ 10-11).

[8] This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law with respect to both motions (Docs. # 40, 48).

the Corner Property in running their business without Plaintiff's permission. (Pl.'s Br. (Doc. # 41) at 10.) In response, Defendants argue that Plaintiff's motion for summary judgment should be denied because a genuine issue of material fact exists as to when Plaintiff first notified Defendants that he did not approve of their use of the Corner Property after the Automatic Termination Date. (Defs.' Opp'n (Doc. # 47) at 6, 13.) In addition, Defendants also argue that they are entitled to summary judgment because: (1) no trespass occurred because an implied easement by way of necessity and/or an easement implied from an existing quasi-easement automatically went into effect after the Automatic Termination Date (Defs.' Opp'n (Doc. # 47) at 6-12; Defs.' Mot. (Doc. # 48) at 6-11); (2) Plaintiff's claim for trespass is barred by the equitable doctrines of laches, waiver and estoppel (Defs.' Opp'n (Doc. # 47) at 12-13; Defs.' Mot. (Doc. # 48) at 11); and (3) Plaintiff's claim for unjust enrichment must fail because no compensation is due where there is an implied easement by necessity (Defs.' Opp'n (Doc. # 47) at 14; Defs.' Mot. (Doc. # 48) at 12). I will address each of these arguments separately.

I. Standard for Summary Judgment

Defendants first argue that Plaintiff's motion for summary judgment should be denied because a genuine issue of material fact exists as to when Plaintiff first notified Defendants that he did not approve of their use of the Corner Property after

the Automatic Termination Date. (Defs.' Opp'n (Doc. # 47) at 6, 13.) I disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).[9] The moving party bears the initial responsibility of proving that no genuine issue of material fact is in dispute. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). Once the moving party has carried its burden of demonstrating that no genuine issue of material fact exists, the party opposing summary judgment must advance more than conclusory statements and allegations. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362-63 (3d Cir. 1992). Rather, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288, 88 S.Ct. 1575, 1592 (1968), citing Fed.R.Civ.P. 56(e). In ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, and must construe all reasonable inferences in favor thereof. See, e.g., Anderson v. Liberty Lobby Inc., 477 U.S.

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[9] Federal Rule of Civil Procedure 56(c) is applicable to this proceeding in bankruptcy pursuant to Fed. R. Bankr. P. 7056.

242, 255, 106 S.Ct. 2505, 2513 (1986).

Here, I find that the record, when viewed in a light most favorable to Defendants, demonstrates that no genuine issues of material fact are in dispute and that Plaintiff is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c). Although Defendants disagree and argue that Plaintiff's motion should be denied because a dispute exists as to when Plaintiff first objected to Defendants' use of the Corner Property (Defs.' Opp'n (Doc. # 47) at 6, 13), I find such a dispute to be immaterial. Whether Plaintiff complained to Defendants of their use of the Corner Property prior to September 2000 has no bearing on the determination of Defendants' liability for trespass and/or unjust enrichment under Michigan law. See discussion infra, Part II-IV. As a result, any dispute with respect thereto does not preclude summary judgment. See Fed.R.Civ.P. 56(c).[10] Resolution of the parties' dispute turns solely on a determination of: (1) whether Defendants had an implied easement under Michigan law, either by way of necessity or implied from a quasi-easement; (2) whether Plaintiff's claims are barred by the equitable doctrines of laches, waiver and/or estoppel, and (3) whether Defendants' use of the Corner Property subsequent to the Automatic Termination Date

[10] In addition, the fact that Defendants have, themselves, moved for summary judgment on essentially the same set of facts makes it difficult to see how Defendants can legitimately argue that genuine issues of material fact exist for the purposes of Plaintiff's motion, but that none exist for the purposes of their own.

resulted in unjust enrichment. Because these constitute legal issues that do not depend, in any way, on the resolution of a factual dispute, summary judgment is proper. See id.

II. Easement by Implication

Defendants do not dispute that absent an implied right to use the Corner Property subsequent to the Automatic Termination Date, they would be guilty of trespass.[11] Nevertheless, they argue that no trespass occurred upon the Corner Property subsequent to the Automatic Termination Date because an implied easement by way of necessity and/or an easement implied from a quasi-easement automatically went into effect upon such date. (Defs.' Opp'n (Doc. # 47) at 6-12; Defs.' Mot. (Doc. # 48) at 6-11.) I disagree.[12]

An implied easement by necessity arises when a parcel of land is severed into more than one parcel, leaving the dominant

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[11] "A trespass is an unauthorized invasion upon the private property of another." American Transmission, Inc. v. Channel 7 of Detroit, Inc., 609 N.W.2d 607, 613 (Mich. Ct. App. 2000).

[12] As a preliminary matter, I note that LGII first raised the defense of an implied easement by necessity in Defendants' opposition (Doc. # 47) to Plaintiff's motion for summary judgment, filed on March 8, 2002. This defense raises two issues: (1) whether LGII should be permitted to amend its answer to include this defense as an additional affirmative defense; and, if so, (2) whether an implied easement by necessity "went into effect" subsequent to the Automatic Termination Date such that it would constitute a viable defense to Plaintiff's claims for trespass and unjust enrichment. However, because I find that no implied easement by way of necessity "went into effect" subsequent to the Automatic Termination Date, see discussion infra, Part II, Defendant's "implied easement" defense fails and therefore, there is no need to determine whether LGII should be permitted to amend its answer.

parcel without a means of access. Schmidt v. Eger, 289 N.W.2d 851, 854 (Mich. Ct. App. 1980). Such an easement is established at the time of severance and is based on the presumed intent of the parties, as well as the public policy favoring the productive and beneficial enjoyment of property. Id. Before an implied easement by necessity may arise, the party asserting the easement must demonstrate that is it strictly necessary for the enjoyment of the property. Id.[13] Such "necessity must not be created by the party claiming the [easement]." Waubun Beach Ass'n v. Wilson, 265 N.W. 474, 480 (Mich. 1936).

Distinct from an easement implied by necessity is an easement implied from a quasi-easement. This latter type of easement arises where, at the severance of an estate, "an obvious and apparently permanent servitude already exists over one part of the estate and in favor of the other." Schmidt, 289 N.W.2d at 854. Such an easement may only be found where its previous use in the possession of the common grantor was visible, apparent, and continuous. Rannels v. Marx, 98 N.W.2d 583, 585 (Mich. 1959). In contrast to an implied easement by necessity, an implied easement

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[13] Defendants assert that "[t]here appears to be some confusion in the Michigan courts as to whether an implied easement by necessity requires a showing of strict or reasonable necessity." (Defs.' Mot. (Doc. # 48) at 7, n.9) (comparing Schmidt v. Eger, 289 N.W.2d at 854 with Chapdelaine v. Sochocki, 635 N.W.2d 339, 343 (Mich. Ct. App. 2001)). Whether an easement implied by necessity requires a showing of strict or reasonable necessary is irrelevant for the purposes of the instant dispute. See discussion infra, Part II.

arising from a quasi-easement requires only a showing that the easement is reasonably necessary to the convenient use of the property.[14] Id.

Defendants cite several cases in support of their argument that an easement implied by necessity arose on the Corner Property subsequent to the Automatic Termination Date. See generally Kamm v. Bygrave, 96 N.W.2d 770 (Mich. 1959); Waubun Beach Ass'n v. Wilson, 265 N.W. 474 (Mich. 1936); Schmidt v. Eger, 289 N.W.2d 851 (Mich. Ct. App. 1980); Birch Forest Club v. Rose, 179 N.W.2d 39 (Mich. Ct. App. 1970). However, the instant matter differs from those cases in that here, Defendants were granted an *express* Easement in the Corner Property at the time the Transfers took place. Such Easement arose as a result of a written Easement Agreement pursuant to which Defendants knowingly, willingly and contractually limited their rights to use the Easement until the earlier of two years or the construction of a New Entrance. (Easement Agreement ¶ 1, 6.) Having failed to construct the New Entrance prior to the Automatic Termination Date, Defendants now argue that they had a continuing right to use the Easement pursuant to an implied easement by necessity. Although Defendants attempt to support their argument with the contention that the granting of

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[14] In light of the fact that both types of easements require some showing of necessity, I will hereinafter refer to them generally as "easements implied by necessity" or "implied easements by necessity".

an express easement only "defers the availability" of an implied easement until the express easement expires (Defs.' Mot. (Doc. # 48) at 9), Defendants have cited no legal authority which supports such a proposition.[15] In fact, at least one case cited by Defendants seems to support the opposite conclusion. See MacCaskill v. Ebbert, 739 P.2d 414, 418 (Idaho Ct. App. 1987) ("[W]e did not declare that intent is irrelevant or that the parties are powerless to bargain away an easement by necessity."); see also Smith, 311 P.2d at 336 ("Upon the execution of the written 'Driveway Agreement' the apparent easement, implied from the original grant, and passing to the successors in title, merged into the express or formal easement upon which the plaintiffs base their cause of action."). For this reason, and the reasons discussed below, I

[15] The cases cited by Defendants in support of this proposition are inapposite. While Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 594 (Fed. Cl. 1997) and Feldstein v. Segall, 81 A.2d 610, 615 (Md. 1951) contain dicta stating that the granting of a *license* defers availability of an implied easement by way of necessity until the expiration or revocation of the license, a license differs from an easement in that while an easement is an interest in property, a license, which may be revoked at any time, is not. Therefore, while one could argue that "necessity" continues upon the grant of a revocable license, it does not necessarily follow that such "necessity" would continue upon the creation of an express easement where one of the contracting parties willingly restricts its right to the easement- i.e., its property interest- to a limited term. In addition, I find Smith v. Harris, 311 P.2d 325 (Kan. 1957) to be inapplicable because that case involved the validity of an express easement. See generally id. (holding that foreclosure sale did not terminate express easement despite the fact that the foreclosure petition failed to mention the agreement creating the easement and therefore, the easement inured to the benefit of the purchaser at the foreclosure sale and his grantee).

find Defendants' arguments to be unpersuasive.

As discussed above, easements implied by necessity are based on the *presumed* intent of the parties in a situation where a common grantor severs a parcel of land into two or more parcels such that one of the new parcels becomes landlocked. Schmidt, 289 N.W.2d at 854. In such situations where the owner of the landlocked parcel is left without an express easement, courts are willing to imply an easement by necessity because they *presume* that: (1) the parties intended an existing access to continue, and/or (2) when the grantor conveyed the dominant parcel, he also conveyed that which is necessary for the beneficial use thereof. See, e.g., Rannels, 98 N.W.2d at 585 ("At time [sic] of sale of the property without reference to the quasi-easement, an easement is held to exist by implication because of the obvious intention of the parties."); Kamm, 96 N.W.2d at 774 ("'The parties are presumed to have contracted with reference to the condition of the property at the time of sale, and to have intended that the grantee should have the means of using the property granted.'") (quoting Nat'l Exch. Bank v. Cunningham, 22 N.E. 924 (Ohio 1889)); see also Burling v. Leiter, 262 N.W. 388, 391 (Mich. 1935) ("The rule of implication is founded upon the mere necessity of the case and the impossibility of admitting that the contract and the intention of the parties to it would be complete without the implication."). Here, there is no need for the Court to presume what the parties intended because

such intent has been clearly and unambiguously expressed in the Easement Agreement.[16] The Easement Agreement clearly indicated that Defendants' Easement in the Corner Property was to expire on the Automatic Termination Date even if Defendants failed to construct a New Entrance to the Cemetery prior to that date. See Chapdelaine, 635 N.W.2d at 343 ("In a conveyance that deprives the owner of access to his property, access rights will be implied *unless the parties clearly indicate they intended a contrary result*.") (emphasis added); see also Kamm, 96 N.W.2d at 774 ("It is a well-settled doctrine of the law of easements that *where there are no restrictive words in the grant* the conveyance of the land will pass to the grantee all those apparent and continuous easements which have been used, and are at the time of the grant used, by the owner of the entirety for the benefit of the parcel granted...")(quoting Nat'l Exch. Bank v. Cunningham, 22 N.E. 924 (Ohio 1889) (emphasis added). Although Defendants argue that the Court's focus on the Easement Agreement is misplaced because "[a]n easement by necessity

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[16] I am not convinced by Defendants' argument that the record does not support Plaintiff's argument the parties did not intend an easement by necessity to arise on the Automatic Termination Date, but rather, supports Defendants' argument that the parties did not intend to cut off access to the Cemetery. (Defs.' Reply (Doc. # 55) at 2-3.) The parties' intent, as evidenced by paragraphs 1 and 6 of the Easement Agreement, was clearly that Defendants would have an Easement to use the Corner Property to access the Cemetery until the earlier of the construction of a New Entrance, or the Automatic Termination Date. (Easement Agreement ¶¶ 1, 6.) Under no circumstances does the Agreement indicate that the parties intended the Easement to continue past such date. (See id.) Defendants' argument to the contrary is without merit.

is a creation of Michigan law that is not dependent on a contract" (Defs.' Reply (Doc. # 55) at 2), I find this argument to be unpersuasive. The fact that easements by necessity are not dependent on contracts does not lend itself to the conclusion that one can not contractually eliminate -i.e., bargain away- an easement by necessity. Just because courts may imply an easement by necessity where the parties fail to contract for one does not mean that they can extend the term of an express easement agreement under the guise of implying an easement by necessity. This is particularly true where, as here, Defendants were aware of the "necessity" at the time the Easement Agreement was entered into, assumed responsibility for eliminating the "necessity" by agreeing to construct a New Entrance, and failed to take care of such responsibility within the requisite time frame. Under these circumstances, I find that any "necessity" for an easement subsequent to the Automatic Termination Date has resulted from Defendants' own conduct and/or inaction. See Waubun Beach Ass'n, 265 N.W. at 480 ("[N]ecessity must not be created by the party claiming the right of way.").

Despite Defendants' argument that their failure to obtain the proper permitting necessary to construct the New Entrance prior to the Automatic Termination Date resulted through no fault of their own, but from the fact that "[t]he City is known to be one of the toughest townships in Detroit from which to obtain building

permits" (Defs.' Opp'n (Doc. # 47) at 10), I find the reason for Defendants' inability/failure to obtain the proper permitting necessary to complete the New Entrance prior to the Automatic Termination Date to be immaterial. Defendants' willingly and knowingly entered into the Easement Agreement which, by its owned terms, continued for no longer than two years. By limiting their express Easement to two years, Defendants assumed the risk that the New Entrance would not be completed by the Automatic Termination Date. The fact that "[t]he City is known to be one of the toughest townships in Detroit from which to obtain building permits" only supports my conclusion. Assuming this statement to be accurate, Defendants knew or should have known of their potential difficulty in obtaining a permit prior to both the Transfers and the execution of the Easement Agreement. As such, Defendants could have either purchased the Corner Property along with the Cemetery, or negotiated a longer term for the Easement Agreement. In the alternative, having limited themselves to a two-year Easement, once it became apparent that they would be unable to obtain the proper permitting to construct a New Entrance prior to the Automatic Termination Date, Defendants should have attempted to negotiate an extension of the Easement Agreement with Plaintiff. Having chosen not to do so, and having knowingly and willingly purchased the Cemetery without access thereto while limiting themselves to a two-year Easement, Defendants cannot now argue that they simply had the

continued right to use the Corner Property without compensating Plaintiff pursuant to an easement implied by necessity which arose at the time of the Transfers, yet lay dormant until the Automatic Termination Date. Indeed, such an argument is undermined by the fact that Defendants entered into the Easement Agreement in the first place.

III. Laches

Defendants next argue that Plaintiff's claim for trespass is barred by the equitable doctrines of laches, waiver and estoppel. (Defs.' Opp'n (Doc. # 47) at 12-13; Defs.' Mot. (Doc. # 48) at 11.) I disagree.

Defendants cite no legal authority in support of their argument that Plaintiff's claim for trespass is barred by the equitable doctrines of waiver and/or estoppel. They simply assert that "[l]aches operates as a valid defense to a claim for trespass under Michigan law," and that such defense "may be raised against an owner of land for an unreasonable delay in asserting his rights when the interest of the public has become involved." (Defs.' Mot. (Doc. # 48) at 11; Defs.' Opp'n (Doc. # 47) at 12.) In support of their contention that the doctrines of laches, waiver and/or estoppel should apply to bar the instant proceeding, Defendants argue that: (1) Plaintiff "did nothing to assert his rights for two years," and "never put his demand for defendants to cease using the Property in writing" (Defs.' Opp'n (Doc. # 47) at 12); and (2)

Plaintiff's acknowledgment that he did not block the Original Entrance until after the New Entrance was constructed because he "felt that there was a third-party interest in terms of the public, the lot owners, funeral directors and [he] wasn't interested in hurting them" indicates that Plaintiff "intentionally sat on his rights" (Defs.' Mot. (Doc. # 48) at 11). I find these arguments to be unpersuasive.

The doctrine of laches is viewed by the Michigan courts as "the equitable counterpart to the statute of limitations defense available at law." Eberhard v. Harper-Grace Hosp., 445 N.W.2d 469, 474 (Mich. Ct. App. 1989). As such, "[m]ere delay in asserting a claim for a period less than that in the statute of limitations does not constitute such laches as will defeat recovery in law or equity." McRaild v. Shepard Lincoln Mercury, 367 N.W.2d 404, 411 (Mich. Ct. App. 1985). Rather, to support a defense of laches, there must be a showing of: (1) the passage of time combined with, (2) prejudice to the defendant, and (3) a lack of due diligence on the part of the plaintiff. Gallagher v. Keefe, 591 N.W.2d 297, 300 (Mich. Ct. App. 1998); Eberhard, 445 N.W.2d at 475; see also Pub. Health Dept. v. Rivergate Manor, 550 N.W.2d 515, 520 (Mich. 1996) ("[The doctrine of laches] is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party."); Kipp v. Van Wagoner, 281 N.W. 592, 595

(Mich. 1938) ("'The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right.'") (quoting Angeloff v. Smith, 235 N.W. 823, 824 (Mich. 1931)). The burden of such a showing is on the defendant. Gallagher, 591 N.W.2d at 300.

Here, I find that Defendants have failed to meet their burden of demonstrating that Plaintiff's claim for trespass should be barred by the doctrine of laches. The record, when viewed in a light most favorable to Defendants, contains no evidence that Plaintiff's alleged "delay" in commencing the instant action was unreasonable or that it resulted in prejudice to Defendants or from a lack of due diligence on the part of Plaintiff. Defendants do not allege that the "delay" prejudiced them in any way and in fact, it did not. Although Defendants' arguments suggests that Plaintiff's "delay" in commencing the instant action was unreasonable, such argument is undermined by the fact that the statutes of limitations applicable in Michigan to actions for trespass and unjust enrichment are three years. See MICH. COMP. LAWS ANN. § 600.5805(8) (three year statute of limitations for injury to property); see also Hoop v. Nesse, et al., Nos. 221516 and 221559, 2001 Mich. App. LEXIS 2596, at *5 (Mich. Ct. App. Sept. 4, 2001) ("An action that arises based on 'implication of law' is subject to a three-year limitation period despite the fact that it is based on

a contract theory.") (citing Lear v. Brighton Twp., 459 N.W.2d 26, 27 (Mich. Ct. App. 1990)). Because Plaintiff has commenced the instant proceeding within the requisite time period, I find his "[m]ere delay" in waiting to do so until a little over two years after the Automatic Termination Date to be insufficient, in and of itself, to support a defense of laches. See McRaild, 367 N.W.2d at 411.

In addition, although Defendants argue that Plaintiff's claims should be barred because Plaintiff "did nothing to assert his rights for two years," and "never put his demand for defendants to cease using the Property in writing" (Defs.' Opp'n (Doc. # 47) at 12), Defendants fail to cite any case law and/or evidence in support of the proposition that Plaintiff had a duty to demand that Defendants stop using the Corner Property subsequent to the Automatic Termination Date, or that Plaintiff's failure to make such a demand constitutes a waiver of his right to assert claims for trespass and unjust enrichment.[17] As such, whether Plaintiff failed to prevent Defendants and/or the public from using the Corner Property subsequent to the Automatic Termination Date or to "put his demand for defendants to cease using the Property in writing" is immaterial.

[17] I find the case Hayes v. Livingston, 34 Mich. 384 (Mich. 1876) to be inapposite.

Similarly, I am not convinced by Defendants' argument that the instant action should be barred in light of Plaintiff's acknowledgment that he did not block the Original Entrance until after the New Entrance was constructed because he "felt that there was a third-party interest in terms of the public, the lot owners, funeral directors and [he] wasn't interested in hurting them". (Defs.' Mot. (Doc. # 48) at 11.) While it is true that in certain circumstances, detriment to the public may be a relevant factor to be considered in determining whether the doctrine of laches should apply to bar a claim, see Gallagher, 591 N.W.2d at 300; VanStock v. Bangor Twp., 232 N.W.2d 387, 391-92 (Mich. Ct. App. 1975), such is not the case here. The fact that Plaintiff waited a little over two years to commence this proceeding has resulted in neither injury to the public, nor significant expense to Defendants.[18] That the public may have also used the Corner Property to access the Cemetery subsequent to the Automatic Termination Date does not mean that the public has "become involved" such that it would be inequitable to enforce Plaintiff's claims against Defendant. Cf. VanStock, 232 N.W.2d at 392 ("If the defendants' statements are true, plaintiff stood by for 19 years while the road was used by

[18] Defendants assert that Siena incurred the cost of maintaining the Corner Property during the time Defendants continued the use thereof subsequent to the Automatic Termination Date. While the cost of such maintenance may be relevant to a determination of Plaintiff's damages, it is insignificant for the purposes of determining Defendants' liability.

the public and maintained by the county road commission and township.") (citing Kipp, 281 N.W. at 596 (finding that laches barred plaintiffs' remedy of an injunction where plaintiffs permitted the erection of a high embankment and railroad tracks as part of a system of viaducts directly in front of their property, such construction was completed at enormous cost, and plaintiffs made no objection to the construction until five years after it had been completed and in use). This is not a situation in which the Corner Property continues to be the only entrance to the Cemetery and Plaintiff seeks to bar Defendants and the public from the use thereof. It is an action for damages against Defendants that has neither a direct, nor indirect impact on the public and/or its access to the Cemetery.[19] In light thereof, and the facts that: (1) this action was commenced within the applicable statute of limitations, and (2) Defendants have shown neither prejudice, nor a lack of due diligence on the part of Plaintiff, I find that the doctrines of laches waiver, and/or estoppel to be inapplicable to

[19] The public's use of the Corner Property subsequent to the Automatic Termination Date may be a relevant factor in determining the amount of damages to which Plaintiff may be entitled to recover from Defendants, particularly with respect to those members of the public who became patrons of the Cemetery during the time in which it was owned and operated by MCMCI. However, as discussed above, it has no bearing on the issue of Defendants' liability on a claim for trespass, commenced within the applicable statute of limitations, which has resulted from Defendants' knowing and intentional continued use of the Easement subsequent to the expiration thereof.

the instant proceeding.[20]

IV. Plaintiff's Claim for Unjust Enrichment

Defendants next argue that Plaintiff's claim for unjust enrichment must fail because no compensation is due where there is an implied easement by necessity. (Defs.' Opp'n (Doc. # 47) at 14; Defs.' Mot. (Doc. # 48) at 12.) In light of the discussion set forth in Part II of this Opinion, I find Defendants' argument to be without merit.

The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff; and (2) an inequity resulting to plaintiff because of the retention of the benefit by the defendant. Barber v. SMH(US), Inc., 509 N.W.2d 791, 796 (Mich. Ct. App. 1993); B&M Die Co. v. Ford Motor Co., 421 N.W.2d 620, 622 (Mich. Ct. App. 1988). In such circumstances, where there is no express contract dealing with the same subject matter, the law operates to imply a contract to prevent unjust enrichment. Barber, 509 N.W.2d at 796. However, because the doctrine of unjust enrichment "vitiates normal contract

[20] "The vital principle of equitable estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." Birch Forest Club, 179 N.W.2d at 42. There is nothing on the record to indicate that Plaintiff's conduct is that which led Defendants to continue using the Corner Property subsequent to the Automatic Termination Date. Indeed, Defendants' argument that they continued to do so because they had an implied easement by necessity indicates the opposite.

principles," Michigan courts employ caution when dealing with such claims. Kammer Asphalt Paving Co. v. East China Twp. Sch., 504 N.W.2d 635, 640 (Mich. 1993); see also B&M Die Co., 421 N.W.2d at 622.

Here I find that the facts, when viewed in a light most favorable to Defendants, support Plaintiff's claim for unjust enrichment. As discussed in Part II of this Opinion, Defendants had no legal or equitable right to use the Corner Property subsequent to the Automatic Termination Date, but continued to do so for over two years. See discussion, supra Parts II and III. This continued use of the Corner Property without Plaintiff's permission resulted in a benefit to Defendants to the extent it enabled them to continue operating their respective businesses without having to compensate Plaintiff for the use of his Property. Under the circumstances, see id., I find that it would be inequitable to allow Defendants to retain the benefit of their use of the Corner Property subsequent to the Automatic Termination Date without having to compensate Plaintiff therefor.

CONCLUSION

For the reasons discussed above, Plaintiff's motion (Doc. # 40) for summary judgment solely on the issue of Defendants' liability is granted and Defendants' joint motion (Doc. # 48) for summary judgment is denied.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
LOEWEN GROUP INTERNATIONAL, INC., a Delaware corporation, et al.,	)	Case No. 99-1244 (PJW)
	)	Jointly Administered
Debtors.	)	
	)	
WILLIAM R. ELDRIDGE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adv. Proc. No. 01-42 (PJW)
	)	
LOEWEN GROUP INTERNATIONAL, INC. and SIENA GROUP, L.L.C.,	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in the Court's Memorandum Opinion of this date, it is ORDERED that:

(i) the motion (Doc. # 40) of Plaintiff William R. Eldridge for summary judgment solely on the issue of liability is granted; and

(ii) the joint motion (Doc. # 48) of Defendants Loewen International Group, Inc. and Siena Group, L.L.C. for summary judgment is denied.

_____
Peter J. Walsh
United States Bankruptcy Judge

Dated: September 4, 2002