

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

FOREST E. HAFER, JR.,	:	NO: 99-00775
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL ACTION
MARY JEAN GOULD-EARLEY,	:	
Defendant	:	
	:	
vs.	:	
	:	
HAROLD B. BOWER and	:	
DORIS B. BOWER,	:	
Additional Defendants.	:	

**OPINION and ORDER**

The Plaintiff has filed a declaratory judgment action requesting the court declare the Plaintiff has an easement by necessity across the land of Defendant and Additional Defendants for access to Plaintiff's land from T488. The Plaintiff claims this easement by necessity arises from a deed from the heirs of J.P. Lehman to H.G. Fenderson dated June 17, 1905, and recorded in Lycoming County Deed Book 191, Page 227.

On April 14, 2000, the Defendant and Additional Defendants filed a Joint Motion for Summary Judgment. On April 17, 2000, the Plaintiff filed a Cross-Motion for Summary Judgment. Argument was held on the parties respective motions for summary judgment on May 31, 2000.

**FINDINGS OF FACT:**

The Defendant owns approximately one hundred sixteen (116) acres of farmland and woodland located in Hepburn and Loyalsock Townships, Lycoming County, Pennsylvania, extending for approximately one (1) mile in a westerly direction from T488 (Lehman Drive). The Defendant purchased this land from the Additional Defendants on August 9, 1995, subject to a reservation by Additional Defendants of a long-term lease of approximately twenty (20) acres. The Defendant's

Deed is recorded in Record Book 2464, Page 5. Defendant's property is Tax Parcel No. 15-309-139 (hereinafter "parcel 139").

Plaintiff is the owner of a thirty (30) acre parcel which partially adjoins a portion of the western boundary of Defendant's land. Plaintiff purchased his thirty (30) acre parcel from Octave M. Lizott et. ux., by deed dated June 17, 1947, recorded in Lycoming County Deed Book 349, Page 418. Plaintiff's property is Tax Parcel 15-309-232A (hereinafter "parcel 232A").

**Discussion:**

A motion for summary judgment may be granted when there is no genuine issue of material fact regarding a necessary element of the cause of action or if, after completion of discovery, the plaintiff has failed to produce evidence of a fact essential to prove the cause of action. Pa.R.C.P. 1035.2. The purpose of the rule is to eliminate cases where a party cannot prevail on a claim or defense. Eaddy v. Hamaty, 694 A.2d 639, 649 (Pa.Super. 1997). The Defendant and Additional Defendants contend that the plaintiff cannot prevail because the Plaintiff cannot prove one of the elements necessary to prove an easement by necessity.

For an easement of necessity to arise, there must be unity of ownership of the dominant and servient estate, and the necessity must exist when the land is severed. Possessky v. Diem, 655 A.2d 1004 (Pa.Super. 1995). In the present action, the Plaintiff claims that an easement by necessity arises from a deed from the heirs of J.P. Lehman to H.G. Fenderson, dated June 17, 1905, and recorded in Lycoming County Deed Book 191, Page 227. Fenderson was a predecessor in title to the Plaintiff's land.

The property which is presently owned by the Plaintiff was conveyed to J.P. Lehman on April 6, 1893, in Lycoming County Deed Book 136, Page 220. J. P. Lehman died on November 14, 1903, leaving a Last Will and Testament. A review of the Last Will and Testament reveals that J.P. Lehman specifically devised a parcel of land, parcel 139, to his son, Daniel D. Lehman. The remaining real estate owned by J.P. Lehman at the time of his death, became the property of his heirs. Under the

common law, a devisee was entitled to immediate possession of land devised to him under a testator's will, and title to land specifically devised by testator passed to the devisee at the time of the testator's death. Hamilton v. Porter, 63 Pa. 332 (1870). Section 104 of the Fiduciaries Act of 1949 did not change the common law, as stated in Brown v. Bailey, 2 Fid. Rep. 342 (1952). Currently, under Section 301(b) of the Probate, Estates, and Fiduciaries Code, a specific devise of real estate passes title to the devisee upon the death of testator.

Thus, as of the date of J.P. Lehman's death in 1903, parcel 139 became the property of Daniel D. Lehman, and the remaining real estate owned by J.P. Lehman, parcel 232A, became the property of the Lehman heirs. Although the 1905 deed relied on by the Plaintiff clearly transferred parcel 232A, the 1905 deed by the heirs of J.P. Lehman did not impact parcel 139 because the heirs of J.P. Lehman did not own parcel 139 in 1905. Accordingly, Plaintiff's claim to an easement by necessity over parcel 139 fails because no unity of ownership of the servient estate, parcel 139, and the dominant estate, parcel 232A, existed at the time of the 1905 transfer of property from the J.P. Lehman heirs to H.G. Fenderson.

Although the Court finds that an easement by necessity did not arise because unity of ownership did not exist, the Defendant and Additional Defendants note correctly that even if this Court were to find that an easement by necessity was created, any easement was extinguished, as a matter of law, on two separate occasions when the necessity of the easement ceased to exist.

In 1907, H.G. Fenderson, while still owning parcel 232A, purchased tax parcel 224 which had access to T613 (Log Run Road).

In 1931, Octave M. Lizott, et. ux., while owning the forty (40) acres to the south now known as parcels 232, 232.01, 232.02, and 232.03 became the owner of parcel 232A with access to T613. This 40-acre parcel had access to T-613 (Log Run Road). Each of these transactions eliminated any claimed necessity for access over parcel 139 and, thereby, would have caused the extinguishment of any alleged easement. Possessky, supra.

Although not plead in Plaintiff's Complaint, the Plaintiff has also advanced a claim for easement by implication. In determining whether an easement has been created by implication, Pennsylvania courts have utilized two different tests: the traditional test and the Restatement test. The traditional test has been described as follows:

Three things are regarded as essential to create an easement by implication on the severance of the unity of ownership in an estate; first, a separation of title; second, that, before the separation takes place, the use which gives rise to the easement, shall have been so long continued, and so obvious or manifest, as to show that it was meant to be permanent; and third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. To these three, another essential element is sometimes added – that the servitude shall be continuous and self-acting, as distinguished from discontinuous and used only from time to time. Possessky, supra, p. 1008.

The Restatement test “emphasizes a balancing approach, designed to ascertain the actual or implied intention of the parties.” In determining whether an easement by implication exists, under either the traditional or Restatement test, the focus is on the time of the conveyance from the common owner. Possessky, supra, p. 1009. Because no unity of ownership existed at the time of the 1905 deed, Plaintiff's claim for easement by implication must also fail as a matter of law.

## **ORDER**

AND NOW, this 9<sup>th</sup>, day of June, 2000, the Defendant and Additional Defendants' Joint Motion for Summary Judgment filed April 19, 2000, is hereby GRANTED, and Plaintiff's Complaint is dismissed with prejudice. The Plaintiff's Motion for Summary Judgment filed April 24, 2000 is hereby DENIED.

BY THE COURT,

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Clinton W. Smith, P.J.