IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

RUTH D. POSCH,	:	NO. 02-00,571
Plaintiff	:	
vs.	:	CIVIL ACTION
	:	
JOE ARENA,	:	
Defendant	:	Motion for Post-Trial Relief

OPINION AND ORDER

Before the Court is Defendant's Motion for Post-trial Relief, filed September 30, 2004. Argument on the motion was heard December 17, 2004. At that time, Defendant argued the Court had overlooked certain testimony and it was therefore determined a transcript of certain portions of the hearing, held March 4 and 29, 2004, was necessary. That transcript was completed May 6, 2005.

First, Defendant contends the Court erred in finding the defense of laches unavailable to Defendant. This determination was based on the finding that Defendant "chose to proceed with the knowledge that [Plaintiff] considered him to be trespassing." The Court now agrees with Defendant that the 1996 letter is not relevant to the issue inasmuch as the testimony established the garage was built in 1994 or 1995. This alone does not end the matter, however.

In Harbor Marine Co. v James Nolan, 366 A.2d 936 (Pa. Super. 1976), the Court explained the concept of laches as follows:

> "[I]f the one in possession of land acts from an honest conviction that his legal position is sound, and this belief is based in large part on his adversary's conduct, which leads him to the opinion his title is well founded, and on the faith of which he expends large sums of money, the duty of the rival claimant to assert his title promptly is imperative. . . . [A]ppellees cannot sleep on their rights . . . then, after appellant has moved to his damage, assert their pretensions; they will be held in equity strictly to the principles which govern the law of estoppel. Under the judgment of the court below this property must now be destroyed or this appellant must pay a large sum of money to continue its work. . . . What appellees hope to get is a mere naked right as against the countervailing equities of this appellant. That right sinks into the shadows, and ought not to be discernible by a court of equity."

Id. at 940 (quoting Gailey v. Wilkinsburg Real Estate Trust Co., 129 A. 445, 449 (1925)). Thus, Defendant had the burden of showing that Plaintiff knew he was building his garage in such a manner as to require him to cross Plaintiff's land to access the garage, but said nothing

until after the garage was built. The Court finds Defendant has not met this burden.

Defendant testified that when he showed Plaintiff's husband the inside of the house (which was built prior to the garage), he "believe[d] the walls [of the garage] were up." N.T. March 29, 2004 at 38. He also testified Plaintiff's husband "seen it when it was completed" and answered "yes" when asked if Plaintiff's husband saw it before it was completed. Id. The Court finds this testimony somewhat equivocal. On the other hand, Plaintiff's son testified that he and his father walked over and saw a house being built and that "subsequent to that a garage was built, and that's when my father took notice this is awfully close to the property." Id. at 11. This testimony implies that only the house was being built when Plaintiff's husband and son visited Defendant's property and that they did not view the garage at all until later, after it was completed. Plaintiff's son testified that "[s]hortly thereafter (after viewing the garage) is when he had the first survey done by Mr. Ohl", Id. at 11-12, and in light of evidence the survey was made in the summer of 1996, the Court concludes the more likely scenario is as Plaintiff says: that the garage was not started until after the house was completed[1] and that Plaintiff's husband did not see the garage until after it was completed.[2] Plaintiff can thus hardly be said to have "slept on her rights" when she had no indication her rights were being challenged, and Defendant's "conviction that his legal position is sound" cannot be said to have been based "on his adversary's conduct". Therefore, while Defendant has expended sums of money and thus will be prejudiced by having to refrain from entering upon Plaintiff's land, that prejudice results from his own mistaken belief regarding the boundary and not from any indication from Plaintiff that he was correct in that belief.

Next, Defendant contends "there should be no Order ejecting Arena" from using the right of way since Hertzler intends to allow Arena to use it under the auspices of Hertzler's right to use it. While the issue was not raised directly, the Court does not believe Hertzler may allow Arena to use the right of way to access Arena's property, See Shroder v. Brenneman, 23

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1 This is actually confirmed by Defendant's testimony that the house was built first and that the garage was built "[a]s soon as the house was completed." N.T. March 29, 2004, at 37-38.

2 Plaintiff and her family did not reside on their property; rather, it was used for recreational purposes only, and thus there were periods of time when they were not present on the property.

Pa. 348 (1854),[3] and thus such does not prevent the Court from otherwise ordering ejectment.

Third, Defendant asks the Court to revisit its decision that no easement can be implied as the requisite intent is not supported by the record. After further review, however, the Court believes its original decision is correct.

Fourth, Defendant asks the Court to consider finding an "easement by prescription", based on testimony that "the lane was in use for well over 21 years on a regularly occasional basis for several activities." The elements required for the creation of a prescriptive easement are that use of the land be adverse, open, continuous, notorious and uninterrupted for 21 years. Boyd v. Teeple, 331 A.2d 433 (Pa. 1975). While the testimony may have established a prescriptive easement in Posch over the land referred to as Arena 1, the Court finds no such basis to declare an easement by prescription over Posch's land in favor of Arena 2.

Finally, Defendant asks the Court to modify its verdict to include a resolution of the money claims made by each party. This the Court will do.

ORDER

And now, this day of May, 2005, for the foregoing reasons, Defendant's Motion for Post Trial Relief is hereby granted in part and denied in part. This Court's Verdict of September 21, 2004, is hereby amended to include the following: Judgment on Plaintiff's money claims is hereby entered in favor of Defendant and against Plaintiff; judgment on Defendant's claim for attorney's fees is hereby entered in favor of Plaintiff and against Defendant.

By the Court,

Dudley N. Anderson, Judge

cc: Scott T. Williams, Esquire
Marc Drier, Esquire
Gary Weber, Esquire

3 "It is a well-settled rule of law, that if a man have a right of way over another's land to a particular close, he cannot enlarge it and extend it to other closes, and this is whether his right be by user or by deed. … The right is not personal to [him] but appurtenant to his one specific lot, and the necessary limitation of its extent is found in the terms of the grant. It cannot be carried beyond, without invading the reserved rights of the grantor…." Id. at 350.