IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CLINTON TOWNSHIP VOLUNTEER FIRE COMPANY,	:	
Plaintiff	:	**No. 06-02415**
	:	
vs.	:	**CIVIL ACTION**
	:	
	:	
BARRY L. SMITH, JR. and MICHELLE L. SMITH,	:	**Non-jury Verdict**
Defendants	:	

VERDICT

This matter came before the Court for a bench trial. Plaintiff filed a complaint seeking injunctive relief, monetary damages, and attorney fees for Defendants' alleged trespass on their property, which purportedly included burning brush on their property, cutting trees and removing topsoil from their property, moving the location of the existing drive by placing shale on their property, and parking vehicles on their property. After reviewing handwritten notes of the trial and the parties' memoranda and briefs, the Court finds as follows:

1. Parcel 07-01-218, which Defendants are purchasing from C. Roger McRae pursuant to an Article of Agreement, extends to the southern line of Johnson Lane, but does not encompass all of lot 81 of the Susquehanna Heights Addition.

2. Plaintiff does not own all of White Street west of parcel 07-01-218; Plaintiff only owns the 20 feet north of the centerline of White Street.

3. Defendants have the right to use Johnson Lane and the portion of White Street west of parcel 07-01-218 for ingress and egress. Defendants do not have the right to park vehicles on Johnson Lane or the portion of White Street west of parcel 07-01-

218.

4. Plaintiff, as owner of the portion of lot 81 west of parcel 07-01-218, also has the right to use Johnson Lane and the portion of White Street west of parcel 07-01-218 for ingress and egress but does not have the right to park vehicles on these streets/alleys.

5. Defendants trespassed on Plaintiff's property when they moved the existing stabilized drive, when they burned brush on Plaintiff's property,[1] and when they cut trees and brush from the western portion of lot 81. Defendants shall pay Plaintiff $500 as damages for these trespasses. Within 60 days, Defendant also shall move the shale off Plaintiff's property and place it on Johnson Lane as it is depicted in the surveys.

6. Plaintiff's request for attorney fees is denied.

7. Plaintiff's request for damages for soil removal is denied.

DISCUSSION

The most difficult issue in this case was determining who owned the disputed portions of lots 79, 80 and 81. The difficulty arose from the poor description in the deed from Tebbs to Faust, (Defendants' predecessor in title to parcel 07-01-218), which reads as follows:

> BEGINNING at an iron stake in the west line of Schnee Avenue, said stake being on the north line of land of Lee Rhone; thence along the same and land of Charles Knorr, south 66 degrees 40 minutes west 125.0 feet to an iron stake on the east line of land of the Grantors; thence along the same north 22 degrees 50 minutes west 50.4 feet to a point in the south right-of-way line of Clinton Drive (as shown on Plan), thence along said right-of-way line of Clinton Drive in an easterly direction 128.0 feet to a stake in the east line of the aforesaid Schnee Avenue; thence along the west line of Schnee Avenue south 22 degrees 50 minutes east 76 feet to an iron stake, the place of beginning.

1 Regardless of whether the brush was burned where it is depicted on Plaintiff's Exhibit 22 and 23 or across the drive, the burning would have occurred on Plaintiff's property since the Court found Plaintiff owned the portion of lot 81 west of parcel 07-01-218.

There are numerous errors, inconsistencies and problems with this description. First, the right-of-way was misnamed in the deed. Although not specifically mentioned in the deed, the land being conveyed was within the Susquehanna Heights Addition, specifically lots 79, 80 and portions of lot 81. This land was part of parcel No. 4 in the deed from Johnson to Tebbs on June 20, 1949, which was recorded on August 8, 1949 in Deed Book 363 at page 319. The plan of the Susquehanna Heights Addition shows the right-of-way as Johnson Lane, not Clinton Drive. Clinton Drive is about 600 feet north of the parcel in question. Furthermore, at the time of the conveyance, the right-of-way was only depicted on paper. The township never opened it as a street, lane or drive and it was not visible on the ground. The testimony presented at trial showed that the first time any drive or lane was evident was in the 1980s when it was put in by Plaintiff.

Second, there is one reference in the deed to a stake in the east line of Schnee Avenue when all the rest of the references are to the west line of Schnee Avenue.

Third, the courses and distances are not 100% accurate, and neither surveyor used the exact courses and distances called for in the deed. The deed lists the eastern and western boundaries as south 22 degrees 50 minutes east 76 feet and north 22 degrees 50 minutes west 50.4 feet, respectively. The eastern boundary, however, is the west line of Schnee Avenue, which runs south 12 degrees 59 minutes east, not south 22 degrees 50 minutes east. Similarly, the deed courses and distances for the southern boundary line were south 66 degrees 40 minutes west. Both surveyors, however, found the north line of the lands of Rhone and Knorr were south 77 degrees 1 minute east.

Although the right-of-way on the Plan is not Clinton Drive, the language of

the deed shows the grantor's intent for the northern boundary of the parcel to be the right-of-way line depicted on the Plan. In Murrer v. American Oil Company, 241 Pa.Super. 120, 359 A.2d 817, (1976), the Superior Court found courses and distances prevailed over a call for adjoiner as being more consistent with the grantor's intent. In so finding, the Superior Court quoted with approval the following excerpts from Baker v. Roslyn Swim Club, 206 Pa.Super. 192, 198, 213 A.2d 145, 149 (1965):

> Though some of the terms of description…are entitled usually to more probative value than others, yet, in the end, the true construction ascertainable by the totality of their combined effect and not wholly and exclusively by any one term when it is irreconcilable with the other terms of description. To lay down the hard and fast rule that only monuments…are determinative elements of a description…is to make the rule contended for more important than the underlying intent of the contracting parties….
>
> Where, however, it is apparent that a mistake exists with respect to the calls, an inferior means of location may control a higher one. In the last analysis the call adopted as the controlling one should be that most consistent with the apparent intention of the grantor.

Murrer, supra at 127, 359 A.2d 820. The right-of-way on the Plan was Johnson Lane. The description for the northern boundary of parcel 07-01-218 is along the south right-of-way line in an easterly direction; no courses are used for this description. It appears that Plaintiff's surveyor used an iron pipe in the west line of Schnee Avenue as the monument to determine the northern boundary line instead of the right-of-way line of Johnson Lane because Clinton Drive was named in the deed and because Johnson Lane was a "paper road." Naming the right-of-way Clinton Drive, however, is as obvious a mistake as the grantor listing the terminus of the northern line as a stake in the **east** line of Schnee Avenue. The surveyors ignored this obvious mistake and kept the northeast corner on the west line of Schnee Avenue, but they ignored the right-of-way language altogether because it was

misnamed Clinton Drive in the deed. In every other instance the surveyors chose the adjoiner rather than the courses and distances, and they adjusted the courses and distances for the western boundary so they would be parallel with Schnee Avenue. When it came to the northern boundary, however, they did not use the right-of-way line, despite no courses being listed in the deed. The Court believes this is contrary to the grantor's clear intent that the grant extend all the way to the right-of-way line. Therefore, even if the stake or iron pin in the west line of Schnee Avenue was a monument with higher priority than the right-of-way line for a "paper" road, the Court finds that the right-of-way line is most consistent with the intention of the grantor and takes precedence under Murrer.

The Court rejects Defendants argument that their parcel should include all of lot 81. The Court does not believe Tebbs intended to convey all of lot 81 to Faust. The only property south of Johnson Lane and west of Schnee Avenue expressly conveyed from Johnson to Tebbs were lots 79, 80 and 81 of the Susquehanna Heights Addition.[2] See No. 4 of Deed from Johnson to Tebbs, Deed Book 363, page 320; Defendant's Exhibit 3 (plan of Susquehanna Heights Addition). If Tebbs intended to convey the entirety of lot 81 to Faust, he would not have indicated that the western boundary line was along the lands of the grantor.

The Court also rejects Plaintiff's contention that it owns all of what is depicted on the plan as White Street west of parcel number 07-01-218. Although the "corrective" deed in 2006 from Tebbs Estate to Plaintiff purports to convey the entire western portion of White Street to Plaintiff, there is no evidence to show that Tebbs or his

2 After the description, the deed from Tebbs to Faust states: "BEING a part of the same premises conveyed to the Grantors herein by John C. Johnson, et al, by deed dated June 20, 1949, and recorded in the Office of the recorder of Deeds in and for Lycoming County on August 8, 1949."

estate ever owned the southern half of White Street. Johnson conveyed lots 79, 80 and 81 of the Susquehanna Heights Addition to Tebbs. Lots 79, 80 and 81 as depicted on the plan of the Susquehanna Heights Addition are bounded by Schnee Avenue, White Street and Johnson Lane.[3] In 1906, E.M. Beers, the original owner of the land contained in the Susquehanna Heights Addition, dedicated to public use the alleys and streets laid out on the plan. See Defendants' Exhibit 3. The municipality never acted upon this dedication. Plaintiff acknowledged in its brief that where the municipality does not accept the dedication or open the street within twenty-one years, the owners of the abutting land take title to the center line of the street if the street is a boundary. See Rahn v. Hess, 378 Pa. 264, 270, 106 A.2d 461, 463-63 (Pa. 1954); Murphy v. Martini, 884 A.2d 262, 266 (Pa.Super. 2005). Therefore, the Court finds Plaintiff owns the northern twenty feet of White Street to the center line and the northern ten feet of Johnson Lane to the center line north of parcel 07-01-218.[4] Defendants own the southern ten feet of Johnson Lane from the northern boundary of parcel 07-01-218 to the center line.

Regardless of who owns Johnson Lane and White Street west of parcel 07-01-218, Defendants have the right to use that portion of White Street and all of Johnson Lane for ingress and egress, as does Plaintiff.[5] The Pennsylvania Superior Court has noted that it is

> a well settled principle of law… that where upon a sale of lots

3 These three lots form a triangle on the Susquehanna Heights Addition plan. The western line of Schnee Avenue is the eastern boundary line of lot 79. White Street is the southern boundary of all three lots. Johnson Lane also borders all three lots and runs from White Street northeast to Schnee Avenue.

4 Plaintiff may own all twenty feet of Johnson Lane where it borders the portion of lot 81 west of parcel 07-01-218, since it owns that portion of lot 81 and the property north of Johnson Lane. Nevertheless, Defendants would still have a private contractual right of easement to use Johnson Lane, as will be discussed in more detail in the next section of this decision.

5 The Court is not addressing that portion of White Street contained within parcel 07-01-318, because Plaintiff has not made any claim to own or use that portion. Furthermore, it is likely the private right of easement to that portion of White Street was extinguished when Faust built his house in the 1950s and a portion of it extended into what was designated on the plan as White Street.

> reference is made to a map or plot, which calls for certain streets and alleys, this constitutes a dedication of these ways to the use of purchasers as public ways and a map or plan so referred to becomes a material and essential part of the conveyance with the same effect as though copied into the deed….The fact that a street may not in fact be open or that there is no acceptance by the municipality of the street as a public road does not affect the continuing private contractual rights of property owners within the plan to use the streets.

Drusedum v. Guernaccini, 251 Pa.Super. 504, 508-09, 380 A.2d 894, 896 (1977)(citations omitted). The common grantor to both parties is Tebbs. The deed from Johnson to Tebbs conveys certain building lots of the Susquehanna Heights Addition, including lots 79, 80 and 81. The deed from Tebbs to Faust also refers to the right-of-way as shown on the plan, although it is misnamed Clinton Drive instead of Johnson Lane. McRae purchased the Faust property (parcel 07-01-218) at a tax sale. Defendants entered an Article of Agreement to purchase the Faust property from McRae. The Article of Agreement contains the same description referring to the plan as the deed from Tebbs to Faust. Since Defendants own property within the Susquehanna Heights Addition and the plan is referenced in their chain of title, Defendants have a private contractual right to use the streets and alleys depicted on the plan for ingress and egress, which include Johnson Lane and the portions of White Street disputed by the parties. The Court, however, is precluding either party from parking vehicles on White Street and Johnson Lane. The Court finds that parking vehicles on these streets or alleys would interfere with or impair one's ability to use them for ingress and egress and would lead to future disputes between the parties.

The Court denied Plaintiff's request for attorney fees because Pennsylvania follows the rule that there can be no recovery of attorney fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties or some other established

exception. Merlino v. Delaware County, 556 Pa. 422, 425, 728 A.2d 949, 951 (1999).

The Court rejected Plaintiff's claim for damages for soil removal. The Court did not believe Plaintiff had met their burden of proof. Mr. Winder testified that he received a phone call that a skid steer was dumping shale on Plaintiff's side of the drive. Mr. Winder stated he believed some top soil had to have been removed because the drive was not higher than the rest of the land after the shale had been placed on it. It was Mr. Winder's opinion that 12 to 20 dump truck loads of top soil were removed. The Court finds Mr. Winder's opinion is assumption or speculation. If 12-20 dump truck load of top soil had been removed, one would think someone would have called the Fire Company as happened with the skid steer dumping shale. It certainly would take some time and effort to dig up 12 to 20 loads of top soil and remove it from the area in question, which would be at least as noticeable, if not more so, than the skid steer dumping shale. Furthermore, Mr. Smith testified that he simply graded the area with the skid steer before he dumped the shale.

Accordingly, the following is entered:

ORDER

AND NOW, this ____ day of March, 2008, in accordance with the foregoing discussion, it is ORDERED and DIRECTED as follows:

1. Parcel 07-01-218, which Defendants are purchasing from C. Roger McRae pursuant to an Article of Agreement, extends to the southern line of Johnson Lane, but does not encompass all of lot 81 of the Susquehanna Heights Addition.

2. Plaintiff does not own all of White Street west of parcel 07-01-218; Plaintiff only owns the 20 feet north of the centerline of White Street.

3. Defendants have the right to use Johnson Lane and the portion of White Street west of parcel 07-01-218 for ingress and egress. Defendants do not have the right to park vehicles on Johnson Lane or the portion of White Street west of parcel 07-01-218.

4. Plaintiff, as owner of the portion of lot 81 west of parcel 07-01-218, also has the right to use Johnson Lane and the portion of White Street west of parcel 07-01-218 for ingress and egress but does not have the right to park vehicles on these streets/alleys.

5. Defendants trespassed on Plaintiff's property when they moved the existing stabilized drive, when they burned brush on Plaintiff's property, and when they cut trees and brush from the western portion of lot 81. Defendants shall pay Plaintiff $500 as damages for these trespasses. Within 60 days, Defendant also shall move the shale off Plaintiff's property and place it on Johnson Lane as it is depicted in the surveys.

6. Plaintiff's request for attorney fees is denied.

7. Plaintiff's request for damages for soil removal is denied.

By The Court,

_____

Kenneth D. Brown,
President Judge

cc: Michael Collins, Esquire
Howard Langdon, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)