

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PAUL H. SEITZER and STEPHANIE M. SEITZER,	:	NO. 07-02,209
Plaintiffs	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
CHARLES L. PERSUN and ANNE E. PERSUN,	:	
Defendants	:	Motions for Summary Judgment

OPINION AND ORDER

Before the Court are cross motions for summary judgment filed by the parties on May 5, 2008. Argument on the motions was heard June 4, 2008.

The parties own adjoining parcels of real estate and Plaintiffs initiated this action to declare Defendants trespassers and have them ejected from their property with respect to a retaining wall and fence Defendants erected on Plaintiffs' property. Defendants counter-claimed with a request for injunctive relief to keep Plaintiffs from removing the wall without taking precautionary measures while the litigation is pending. In the instant motions for summary judgment, Defendants contend Plaintiffs' action is barred by the statute of limitations, and Plaintiffs contend there are no issues of material fact which would preclude entry of judgment in their favor.

With respect to the issue of the statute of limitations, since the wall was admittedly constructed more than two years before suit was brought, Plaintiffs action may proceed only if construction of the wall is found to be a continuing trespass, rather than a permanent trespass. After review of the relevant case law, the Court believes this is indeed a matter involving a continuing trespass.

The appellate Courts of this Commonwealth have adopted the view of the Restatement of Torts, specifically Sections 161 and 162, that a continuing trespass involves "failure to remove from land in the possession of another a structure, chattel or other thing which he has tortiously erected or placed on the land", whereas a permanent trespass occurs where one "enters land of which another is in possession and destroys or removes a structure standing

upon the land, or digs a well or makes some other excavation or removes earth or some other substance from the land”. See County of Allegheny v. Merrit Construction Company, 454 A.2d 1051 (Pa. Super. 1982); Jones v. Wagner, 624 A.2d 166 (Pa. Super. 1993). Here, Defendants erected a wall and fence on Plaintiffs’ property and their “failure to remove” it constitutes the continuing trespass. Thus, the statute of limitations does not act as a bar to Plaintiffs’ action and Defendants’ motion for summary judgment will be denied.

In their motion, Plaintiffs contend Defendants have admitted the trespass and they are thus entitled to summary judgment on the two counts of trespass, and also that Defendants have admitted that Plaintiffs are out of possession of the land but have a right to possession and thus they are entitled to summary judgment on the count of ejectment. Finally, Plaintiffs contend they are entitled to summary judgment on Defendant’s counter-claim for injunctive relief, pointing to a portion of the expert’s report which indicates that removal of the wall will not cause flooding of Defendants’ basement.

With respect to the counts of trespass, while Defendants admit construction of the wall on Plaintiffs’ property, they also allege they did so with the consent of Plaintiffs. While Plaintiffs contend such consent may be revoked, citing Commonwealth v. Johnston, 263 A.2d 376 (Pa. 1970), that case is inapposite, involving as it did a person who entered property of another with that person’s consent but who was then asked to leave; the Court stated that such refusal to leave at that point made him a trespasser. In the instant case, Defendants’ allegation that Plaintiffs consented to their building the wall raises a claim of equitable estoppel,¹ and as there are issues of fact which must be resolved to address that claim, entry of summary judgment is inappropriate.²

Finally, with respect to the counter-claim for injunctive relief pending the outcome of litigation, by Order of the Honorable Richard A. Gray dated April 23, 2008, Plaintiffs were directed to not remove or alter the stone wall until the case has been resolved. No further action will therefore be taken on the motion for summary judgment on the counter-claim.

¹ See Thayer v. Tax Claim Bureau of Bucks County, 701 A.2d 808, 810 (Pa. Commw. 1997) (“Estoppel is an equitable doctrine requiring innocent reliance by the person seeking the estoppel upon the conduct or representations of the adverse party.”)

² For the same reason, summary judgment on the ejectment claim is also inappropriate; the allegation of consent raises factual issues with respect to Plaintiffs’ “immediate right of possession”.

ORDER

AND NOW, this 5th day of June 2008, for the foregoing reasons, both motions for summary judgment are hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Christian Frey, Esq.
Melody Hanisek, Esq.
Gary Weber, Esq.
Hon. Dudley N. Anderson