

IN THE COURT OF COMMON PLEAS OF  
LYCOMING COUNTY, PA

DEAN CARSON WILLIAMSPORT, LLC, :  
Plaintiff : NO: 07-00402  
vs. :  
TERRA FIRMA DEVELOPMENT, LLC : CIVIL ACTION  
and TOWNSHIP OF LOYALSOCK :  
Defendants :

**OPINION AND ORDER**

AND NOW, this 6<sup>th</sup> day of October, 2009, following a non-jury trial in the above-captioned matter, this Court makes the following findings of fact:

1. The Plaintiff is the owner of real property situate in Loyalsock Township, Lycoming County, commonly known as the TJ Maxx Plaza (hereinafter “the Plaza Parcel”).
2. The Defendant, Terra Firma Development, LLC (hereinafter “Terra Firma”) is the owner of real property situate in Loyalsock Township, Lycoming County, and located immediately west of the western boundary of the Plaza Parcel (hereinafter the “Terra Firma Parcel”).
3. Terra Firma acquired the Terra Firma Parcel in 2004.
4. Terra Firma’s predecessor in title, Mid-Penn Magazine Agency, Inc., acquired the property by deed dated January 28, 1959, which Deed included easement language which permitted ingress and egress to and from the land through a right-of-way east of the property.

5. The Deed conveying ownership to Terra Firma included identical easement language.
6. Cross Summary Judgment Motions were filed by the parties with regard to the construction of the express deed grant.
7. On July 16, 2009, this Court issued an Opinion and Order on the parties' Motions for Summary Judgment.
8. In its Order of July 16, 2009, this Court ruled that the Defendant, Terra Firma, had a right "to use that portion of the Plaza Parcel lying directly east of its eastern boundary and along the entire frontage of the Terra Firma parcel, known as Eck Circle, for ingress and egress."
9. The issues remaining before this Court involve whether Terra Firma has established a prescriptive easement, and whether the Plaintiff has a right to construct a fence along Eck Circle and to enjoin Terra Firma's use of the Plaza Parcel Parking lot.
10. The issue of the prescriptive easement relates to whether Terra Firma has acquired the right to longitudinal access to the entire length and termini of Eck Circle.
11. In establishing its right to a prescriptive easement Terra Firma presented the testimony of Alan Demel, Jane Gardner and Paul Nyman.
12. Between the years 1959 and 2004 Alan Demel was involved with the ownership and operation of the Terra Firma Parcel.

13. Between the years 1959 and 2004 Alan Demel's family regularly accessed the entire eastern frontage of the Terra Firma Parcel via Eck Circle by vehicle and by foot.
14. Between the years 1959 and 2004, Alan Demel regularly witnessed others walking across Eck Circle to access the front of the building located on the Terra Firma Parcel.
15. Although permission was obtained by Terra Firma's predecessor, Mid-Penn Magazine from the Plaintiff's predecessor, Le-Main Associates for use of Le-Main's parking lot, the agreement between the parties did not reference Eck Circle nor any right to use of the area known as Eck Circle.
16. Paul Nyman has delivered mail for the United States Postal Service to the Terra Firma Parcel since 1980.
17. Since approximately 1980, Paul Nyman has regularly parked on the eastern side of the Terra Firma Parcel between the western border of the easement and the front of the Terra Firma building and walked the mail to the front of the Terra Firma building.
18. Paul Nyman never asked the owner of the Plaza Parcel for permission to park his vehicle on Eck Circle or immediately in front of the building located on the Terra Firma Parcel.
19. Jane Gardner worked at the Book Nook, the business located on the northeastern corner of the Terra Firma building, from 1987 through 2001.
20. Prior to becoming employed at the Book Nook, Jane Gardner was a customer of the business.

21. When she began working for the Book Nook Ms. Gardner, and other employees and customers, parked in the Plaza Parcel and walked across Eck Circle to the Book Nook.
22. Jane Gardner never asked the owner of the Plaza Parcel for permission to walk across Eck Circle to access the Book Nook.

### **OPINION**

By Opinion and Order dated July 16, 2009, this Court ruled that the Defendant, Terra Firma, had a right “to use that portion of the Plaza Parcel lying directly east of its eastern boundary and along the entire frontage of the Terra Firma parcel, known as Eck Circle, for ingress and egress.” Pursuant to Dyba v. Borowitz, 7 A.2d 500 (Pa.Super. 1939), this Court held that the easement grant for ingress and egress did not, however, grant full longitudinal access, as an easement grant conveys “nothing but the right of passage and reserves all incidents of ownership not granted.” Id. at 501. Accordingly, this Court deferred ruling on the issue of whether the Defendant “had established a prescriptive easement over longitudinal access to the easement.” This Court additionally deferred the issues of “Plaintiff’s right to construct a fence along Eck Circle as well as the issue of enjoinder of Defendant’s use of the Plaza Parcel Parking lot.”

After careful review of the testimony presented by the parties’ respective witnesses, this Court finds that Terra Firma has acquired a prescriptive easement to use the entire length of that portion of Plaintiff’s land known as Eck Circle, for

unobstructed ingress and egress to and from the Terra Firma parcel along the entire eastern frontage of the Terra Firma parcel.

In order to establish an easement or right-of-way by prescription, the party asserting the easement must demonstrate use of the property that is (1) adverse, (2) open, (3) notorious, (4) continuous and uninterrupted for a period of twenty-one (21) years. Walley v. IRACA, 520 A.2d 886 (Pa.Super. 1987). The party asserting the easement must demonstrate the elements “by proof that is clear and positive.” Id. at 889, citing Adshead v. Sprung, 375 A.2d 83, 84 (Pa.Super. 1977).

In reaching its decision, the Court found the testimony of Alan H. Demel to be credible and reliable. Mr. Demel’s family purchased the Terra Firma parcel property in 1959. In 2004 the property was transferred to TF Development LLC, its current owner. Between 1959 and 2004 Mr. Demel was involved with the ownership and operation of the Terra Firma Parcel. Mr. Demel provided extensive testimony regarding the uses of the subject property between 1959 and 2004, including use of the roadway known as Eck Circle. According to Mr. Demel, since 1959 vehicles have regularly used Eck Circle to access the whole Terra Firma building, including the entire eastern front of the building. Mr. Demel testified that since approximately 1962, when the Big N was in the Plaza area, individuals walked across Eck Circle to access the front of Mid-Penn Magazine building and to access the Book Nook. The roadway known as Eck Circle was used to perform maintenance throughout that time period. Landscaping was performed via Eck Circle. Litigation developed in 1978

because individuals were walking across Eck Circle to access the Terra Firma Parcel.<sup>1</sup> Although Mr. Demel testified that permission was obtained for use of the subject property, the permission obtained related to an agreement which allowed Mid-Penn, Terra Firma's predecessor, to use Le-Main's, the Plaintiff's predecessor, parking lot in exchange for the payment of monthly common area maintenance charges by Mid-Penn. Notably, neither the Agreement nor the Endorsement to the Agreement dated February 7, 1984 reference Eck Circle, or the right to use of the area known as Eck Circle. Mr. Demel testified that use of the roadway known as Eck Circle was not concealed in anyway, and that the only time that the use was interrupted was in 1972 when Hurricane Agnes caused flooding, and in 1978 when Howard Dean directed that snow piles be dumped in the southeast corner of the road which stopped ingress and egress for approximately one to two days.

Although Mr. Demel additionally testified that there were a few months in approximately 2003 that the Terra Firma building may have been without a tenant, this Court believes that sufficient evidence exists to support the elements of continuous and uninterrupted use. In reviewing the evidence necessary to establish continuous and uninterrupted use, the Pennsylvania Supreme Court has held:

[T]he evidence need not show a constant use in order to establish continuity; rather, continuity is established if the evidence shows a settled course of conduct indicating an attitude of mind on the part of the user or users that the use is the exercise of a property right.

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Further, we note that while there is an absence of direct proof showing a use at various times during the necessary twenty-one year period in which the prescriptive right is alleged to have arisen, the evidence does not suggest the

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<sup>1</sup> In its counterclaim to Mid-Penn's 1978 action, Le-Main Associates admitted that, as early as 1972 Mid-Penn allowed its "stockbrokers, employees, customers and business invitees to use" the right-of-way "for the purpose of parking and conducting and doing business" on the Terra Firma parcel.

use was interrupted during this period. To be interrupted an obstruction must interrupt the actual use and the obstruction must be accompanied by an intent to cause an interruption in use. *Margoline v. Holefelder*, 420 Pa. 544, 218 A.2d 227 (1966). No obstruction to use with the requisite accompanying intent was shown instantly. The gates which crossed the road temporarily were never locked and the dam which caused difficulty in crossing the stream was not shown to have been built with the intent of obstructing use. *Id.* at 737 - 738.

See also *Moore v. Duran*, 687 A.2d 822, 826 (Pa.Super. 1996).

As the only evidence of an interruption, or intentional obstruction, related to a temporary snow pile in 1978, this Court finds that the use of the subject property was not effectively interrupted by the Plaintiff. Moreover, a settled course of conduct demonstrating an attitude of mind on the part of the users of Eck Circle was clearly established through the testimony of Mr. Demel, and was buttressed by Terra Firma's other fact witnesses, Paul Nyman and Jane Gardner.

Paul Nyman, a letter carrier for the United States Postal Service testified that he started delivering mail to the Plaza Parcel in 1980. Deliveries to the Terra Firma parcel were occasional between 1980 and 1994 and then became regular following 1994. When Mr. Nyman accessed the building he would travel from the west, from K.C. Larson Design, and would head east, take a left onto Eck Circle and park in front of the building to make his deliveries to Mid-Penn Magazine and the Book Nook. This practice began in the early 1980s. Depending on how busy it was, he would either pull parallel on the street known as Eck Circle, or would pull into a space directly in front of the entrance to the Book Nook. In all of the years in which Mr. Nyman made deliveries to any of the businesses located on the Terra Firma parcel, Mr. Nyman never asked permission to park on Eck Circle or to pull into the area immediately in front of the Terra Firma building.

Although Mr. Nyman's testimony was inconsistent at times on the issue of parking observed on the Terra Firma Parcel, Mr. Nyman's testimony generally buttressed the testimony of Alan Demel which this Court has found to be credible. Moreover, this Court finds that Mr. Nyman's testimony clearly establishes longitudinal access off of Eck Circle and into the Terra Firma building from 1980 on.<sup>2</sup>

Jane Gardner began working for the Book Nook in February of 1987. At the time Ms. Gardner began working at the Book Nook, parking was available and well-established in front of the Book Nook. When she began working for the Book Nook she parked in the Plaza Parcel and walked across Eck Circle to the Book Nook. Other employees and customers of the Book Nook parked in the same vicinity across the road, or would park to the side of the store. When Ms. Gardner visited the store various times in the early 1980s, she parked in front of the Book Nook. Ms. Gardner never asked permission of the Plaza Parcel owner to walk across the roadway known as Eck Circle and never asked for permission to park in front of the Book Nook.

The testimony of Alan Demel, Paul Nyman and Jane Gardner establishes that, for at least twenty-one years, the owners, employees, tenants and invitees of the Terra Firma Parcel have used the right-of-way known as Eck Circle to access the entire frontage of that parcel. To the extent that this right was not specifically granted in the deed, the owners, employees, tenants and invitees have so used the right-of-way in an

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<sup>2</sup> Although the Plaintiff characterizes the issue before this Court as one of "longitudinal parking" access, this Court views the issue as one of full longitudinal access to the entire length and termini of Eck Circle. The use of an easement by the dominant tenement owner whenever he or she sees fit, without seeking permission, is sufficient to establish the adverse use necessary to prove a prescriptive easement. Gehres v. Falls Twp., 948 A.2d 249, 253 (Pa.Comm. 2008). Moreover, prescriptive easements can be established by testimony of foot traffic alone. See Moore v. Duran, 687 A.2d 822 (Pa.Super. 1996)(Evidence establishing easement by prescription included testimony that the property at issue was used for driving cows from the farm).

adverse, open, continuous, notorious and uninterrupted manner. Therefore, Terra Firma Development, LLC has acquired a prescriptive easement to access the entire eastern side of the Terra Firma parcel via the right-of-way known as Eck Circle.

Having found the Terra Firma has acquired a prescriptive easement to use the entire length of that portion of Plaintiff's land known as Eck Circle for unobstructed ingress and egress to and from the Terra Firma parcel along the entire eastern frontage of the Terra Firma parcel, this Court finds that placement of any fence along the eastern boundary of the Terra Firma parcel would constitute an unreasonable interference with the use to which the easement known as Eck Circle has been put. See Mulville v. Cooper, 93 Pa.Super. 139 (1927)(Owner of servient tenement has no right to diminish the free and full use of an easement). Accordingly, the Plaintiff is not entitled to erect a fence on the Terra Firma parcel side of the subject easement and the Plaintiff's request for injunctive relief is denied.

**ORDER**

AND NOW this 6<sup>th</sup> day of October, 2009, this Court finds that the Defendant, Terra Firma Development, LLC has acquired a prescriptive easement to longitudinal access to the entire length and termini of Eck Circle. As Terra Firma's easement is contiguous with Terra Firma's eastern boundary, the Plaintiff's request to construct a fence on the western boundary of its property is DENIED. Terra Firma Development, LLC has no right to parking on the east side of Eck Circle. The Plaintiff's request for injunctive relief and payment of attorneys' fees and costs is DENIED.

BY THE COURT,

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Richard A. Gray, J.

cc: Dan Mathers, Esquire  
N. Randall Sees, Esquire  
Charles F. Greevy, III, Esquire  
Gary Weber, Esquire