IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PAMELA KOCH t/d/b/a STARVING, MARVIN TACK STORE, Plaintiff	:	DOCKET NO. 16-0199
	:	CIVIL ACTION
vs.	:	
DEBORAH ANONIE, Defendant	:	NON-JURY TRIAL

O P I N I O N a n d V E R D I C T

AND NOW, this **11th** day of **October, 2016** after a non-jury trial held on September 28, 2016, and after leaving the record open until October 4, 2016 for further written argument, and having received same, the Court enters verdict in favor of Deborah Anonie and against Pamela Koch t/d/b/a Starving Marvin Tack Store. At issue is what remedy is available to Plaintiff for an existing encroachment under the circumstances of this case.[1] All other claims and counter-claims were resolved prior to trial by separate Order issued that date.

FINDINGS OF FACT

1. In October of 2015, Defendant sold property to Plaintiff.
2. The property is adjacent to Defendant's property.
3. Defendant acquired Plaintiff's property and her own adjacent property at the same time.
4. The motel existed prior to Defendant's acquiring the properties and is estimated to have been there since the 1970s.
5. Prior to the sale from Defendant to Plaintiff, Plaintiff rented the property for over a year and half and ran two stores on it.
6. No survey was done prior to the sale.

[1] Neither Plaintiff's Amended Complaint filed March 9, 2015 or Motion for Preliminary Injunction filed February 10, 2016 identify the encroachment or seek its removal. However, the parties agreed that this was the issue for trial.

7. A survey dated March 2, 2016 by Daniel A. Vassallo shows the boundary line between the Plaintiff and Defendant's property, survey admitted as exhibit P-2.
8. The survey revealed that Defendant's motel encroached on Plaintiff's land at 9.3', 11.9', and 9.9' adjacent to a drop-off at the edge of Plaintiff's property.
9. Neither party was aware of the encroachment prior to the March 2, 2016 survey.
10. The boundary line provided a windfall to Plaintiff as it was not known or considered when setting the price for the property.
11. Had Defendant been aware of the boundary line, Defendant would have required additional money for the purchase of the property.
12. The motel is and was open, visible, permanent and continuous at the time Plaintiff purchased her property.
13. The topography surrounding the encroachment by the building renders the area of the encroachment essentially useless to Plaintiff.
14. Customers have access to Plaintiff's buildings.
15. Plaintiff is not harmed by the encroachment.
16. Encroachment was not willful.
17. Defendant operates a motel/efficiency rental business on her property and receives income from rental of the efficiency unit that is within the portion of the building that encroaches on Plaintiff's land.
18. Defendant would be irreparably harmed by removing encroachment of the building.
19. Defendant repaired a leaking roof on the encroaching motel for the efficiency unit despite knowledge of the encroachment.

20. Water flows from the motel onto Plaintiff's property, creating a concern for Plaintiff as to the stability of the embankment.
21. Removal of the building would cause irreparable harm to Defendant.

CONCLUSIONS OF LAW

22. The encroachment is "de minimis" in light of the circumstances and equities of this case.
23. Equitable considerations in light of the "de minimis" rule weigh against requiring removal of the encroachment.
24. Equity and due care require Defendant to direct the runoff water away from the boundary line and require Defendant to stabilize the embankment.
25. The encroachment is an implied easement from prior use.
26. The existence of an implied easement from prior use weighs against requiring the removal of the encroachment.
27. Plaintiff is not harmed by the encroachment.
28. Defendant would be irreparably harmed by removing encroachment of the building.

DISCUSSION

The issue before the court is whether to order Defendant to remove the portion of the motel encroaching on Plaintiff's land or provide other remedies. The Court will first discuss the equities in the context of the "de minimus rule" and second discuss the implied easement from prior use.

When considering a mandatory injunction to remove a portion of a building, the Court must consider the equities of the whole case. *See, e.g.,* Glinn v. Silver, 64 Pa.Super. 383 (1916). In Yeakel v. Driscoll, 321 Pa. Super. 238, 467 A.2d 1342 (1983), the Superior Court affirmed the trial court's finding "that defendants' encroachment of a width of two (2) inches for twelve (12)

feet constituted a "de minimus" or trivial one," and was subject to the "de minimus" maxim. Yeakel, supra, 467 A.2d 1343-1344. The Court further noted that "a court will not grant equitable relief to a plaintiff who seeks a decree which will do him no good but which will work a hardship on another." Id. (citation omitted).

> [T]he "de minimis" rule … as applied in cases involving requests for mandatory injunctions, holds that a court of equity will deny a request for the removal of a building or structure extending over a boundary line by a minimal distance and encroaching upon adjoining realty, where the expense, difficulty, and hardship of removal of the building would place a disproportionate burden on the defendant. Tioga Coal Co. v. Supermarkets General Corp., 403 Pa. Super. 391, 589 A.2d 242 (Pa. Super. 1991), *citing,* Glinn v. Silver, 64 Pa.Super. 383 (1916); Heine v. Robinson, 108 Pitt.L.J. 139 (1959); Sciaretta v. Mitchell, 20 Beaver L.J. 41 (1958); 28 A.L.R.2d 679.

In the present case, the dispute between the parties arose because of parking spaces. In the process of resolving that dispute, a survey was done which showed that a small portion of Defendant's motel encroached upon Plaintiff's property. Neither party was aware of the encroachment prior to the survey nor when Defendant sold Plaintiff the property. The survey resulted in essentially a windfall to Plaintiff who received more land than she bargained for. Equity does not support ordering removal of the portion of the hotel encroaching on Plaintiff's land under the "de minimus" rule. The hardship on Defendant was shown to be disproportionate to the benefit, if any, to Plaintiff to removing part of the building.

In addition, an implied easement from prior use exists protecting Defendant from an order of removal. An implied easement from prior use/implication at the time of severance exists as follows.

> Where an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way." Bucciarelli v. DeLisa, 547 Pa. 431, 438-439, 691 A.2d 446, 449 (Pa. 1997), *citing*, Tosh v. Witts, supra, 381 Pa. [255] at 258, 113 A.2d [226] at 228.

In the present case, the motel existed at the time Defendant obtained the property and at the time she severed her property to sell part of it to Plaintiff. The reasonable inference is that the parties intended the motel to continue in existence after the sale, particularly because neither party was aware of the encroachment. As such, the Court concludes that the Plaintiff purchased the property subject to the encroachment.

Plaintiff presented testimony about her concerns about the water-flow and stability of the embankment. As such, the court shall require Defendant to attend to these concerns resulting from the encroachment.

Accordingly, the Court enters the following Order and Verdict.

ORDER AND VERDICT

AND NOW this **11th** day of **October, 2016**, following a non-jury trial in this matter, it is ORDERED and DIRECTED that verdict is entered in favor of Deborah Anonie and against Pamela Koch t/d/b/a Starving Marvin Tack Store, denying removal of the encroachment. In furtherance of equity, it is ORDERED and DIRECTED that Defendant shall direct the runoff water away from the boundary line and onto Defendant's property rather than Plaintiff's, and Defendant shall stabilize the embankment to prevent rocks and debris from falling. All other claims and counter-claims were resolved by agreement prior to trial by separate Order issued September 28, 2016.

BY THE COURT,

October 11, 2016
Date

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Richard A. Gray, J.

c: Marc S. Drier, Esq. (for Plaintiff)
Leroy H. Keiler, Esq. (for Defendant)
Gary Weber, Esq. (courtesy copy)