IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SALLADASBURG BOROUGH, *Plaintiff* v. LARRY T. SHEDDY, an adult individual and as Trustee of the Larry T. and Sherry L. Sheddy Living Trust, *Defendant*	No. CV-17-0954 SUMMARY JUDGMENT

OPINION AND ORDER

Before the Court is a motion for summary judgment. Upon review of the motions, briefs, the summary judgment record of evidence, and argument, Defendant Borough's motion for summary judgment is GRANTED in part and DENIED in part. The Court provides the following in support of its decision.

FACTUAL BACKGROUND

Defendant Larry Sheddy and Sherry Sheddy are the Trustees of the Larry T. and Sherry L. Sheddy Living Trust and currently hold the record of title of Lycoming County Tax parcel number 50-001-308 and 50-001-319. On January 4, 2001, Larry T. Sheddy had conveyed the aforementioned parcels via Deed to Larry T. Sheddy and Sherry L. Sheddy, Trustees of their successors in trust, under Larry T. and Sherry L. Sheddy Living Trust. The same parcels were granted and conveyed to Larry T. Sheddy by deed of Rosalea A. Breish on December 23, 1986 and recorded in the Lycoming County Deed Book.

The gravamen of Plaintiff Borough's Complaint is that the Borough has maintained and repaired Black Horse Alley and Mysnker Alley as public rights-of-way for a period of time in excess of twenty-one years; Plaintiff Borough contends that this amounts to an accepted dedication of the Alleys. Therefore, Plaintiff seeks a declaration confirming that the Alleys are public right-of-ways for which Defendant Sheddy has no standing to interfere with the public's right to use. Defendant Sheedy asserts that his land, located in the Borough of Salladasburg, encompasses all of a private alley which Plaintiff

claims to be a continuation of Black Horse Alley. Defendant Sheddy argues that there are no references in any of the Deeds pertaining to his parcels of land granting a public right-of-way to the Borough of Salladasburg. Defendant Sheddy owns the land on which Plaintiff's claim is founded, and states that Plaintiff's Complaint makes no assertion of ownership of the Alleys, but contends that a public right-of-way exists and that the Court should grant them ownership.

PROCEDURAL BACKGROUND

A Complaint in Civil Action – Equity was filed by J David Smith, Esquire, on behalf of Plaintiff Salladsburg Borough on June 29, 2017. Preliminary Objections were subsequently filed by Douglas N. Engelman, Esquire, on behalf of Defendant Larry Sheddy on June 12, 2017. Attorney Engelman filed an Answer to Complaint on November 13, 2017, and Attorney Smith responded by filing a Reply to New Matter on December 4, 2017. Defendant Sheddy, through counsel, filed a Motion for Summary Judgement on July 5, 2018, before they filed a Motion to Amend Summary Judgement on July 10, 2018. In turn, Plaintiff Salladasburg Borough filed their own Motion for Summary Judgement on July 16, 2018. Attorney Engleman filed Defendant Sheddy's Answer to Motion for Summary Judgement on August 14, 2018. Attorney Engelman also filed a Pre-Trial Statement on August 21, 2018. Attorney Christopher H. Kenyon, counsel for Plaintiff, filed a Pre-Trail Memorandum on August 22, 2018. Plaintiff and Defendant, both through counsel, filed Briefs on October 1, 2018. Attorney Smith filed another Brief on October 8, 2018; Attorney Engelman filed a Reply Brief on the same day.

SUMMARY JUDGEMENT

Pursuant to Pa. R.C.P. 1035.2, the Court may grant summary judgment at the close of the relevant proceedings if there is no genuine issue of material fact or if an adverse party has failed to produce evidence of facts essential to the cause of action or defense. *Keystone Freight Corp. v. Stricker*, 31 A.3d 967, 971 (Pa. Super. Ct. 2011). A non-moving party to a summary judgment motion cannot rely on its pleadings and answers alone. Pa. R.C.P. 1035.2; 31 A.3d at 971. When deciding a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, with all doubts as to whether a genuine issue of material fact exists being decided in favor of the non-moving party. 31 A.3d at 971. If a non-moving party fails to produce sufficient evidence on an issue on which the party bears the burden of proof, the moving party is entitled to summary judgment as a matter of law. *Keystone*, 31 A.3d at 971 (citing *Young v. Pa. Dep't of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000)). "In determining the existence or non-existence of a genuine issue of a material fact, courts are bound to

adhere to the rule of *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932) which holds that a court may not summarily enter a judgment where the evidence depends upon oral testimony. *Penn Ctr. House, Inc. v. Hoffman*, 520 Pa. 171, 176, 553 A.2d 900, 903 (Pa. 1989). The Pennsylvania Supreme Court held that in order to defeat a Motion for Summary Judgment, Plaintiff must show sufficient evidence on any issue essential to his case and in which he bears the burden of proof such that a jury could return a verdict in his favor. *Ertel v. Patriot-News Co.*, 544 Pa. 93, 674 A.2d 1038 (1996) rearg. den., 117 S.Ct. 512.

DISCUSSION

At issue is whether there are issues of material fact as to Mynsker Alley and Black Horse Alley being legal public right-of ways.

Mynsker Alley

Plaintiff Borough asserts in its Complaint that the Alleys in question are public rights-of-way over which Defendant has no ownership interest. Plaintiff Borough puts for the argument that Defendant Sheddy cannot assert ownership over Mynsker Alley as his deed, nor any preceding deed in his chain of title, encompasses the real property known as Mynsker Alley. Defendant Sheddy received title to the real property identified as Lycoming County Tax Parcel No. 50-001-308 (Lot No. 1 And No. 2) by Deed dated December 23, 1986. Plaintiff Borough contends that the Deed and subsequent conveyances establish that the property line for Mynsker Alley ends at the Alley, and is not inclusive of the Alley:

> No.1. *Beginning* at a post on the Western line of Main Street at the northeastern corner of the lot herein described, cornering on Lot No. 2 herein; thence South thirty five (35) degrees West along the Western line of Main Street, fifty (50) feet to a post cornering *on an alley*; thence North fifty-five (55) degrees West along the Northern line *of said alley*, two hundred (200) feet to *another alley*; fifty (50) feet to Lot No. 2 herein, two hundred (200) feet to the point and place of beginning. Being Lot No. 44 in the Borough of Salladasburg.
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> No. 2. *Beginning* at the point on the Western line of Main Street, cornering on the Lutheran Church lot; thence South thirty-five (35) degrees West along the Western line of main Street, fifty (50) feet to Lot No. 1 herein; thence North thirty-five (35) degrees East along the Eastern line of

said alley, fifty (50) to the said Lutheran Church lot; thence South fifty (50) degrees East along the Southern line of said Lutheran Church lot; two hundred (200) feet to the place of beginning.

Furthermore, Defendant Sheddy provided a report by Daniel Vassallo, P.L.S. of Vassallo Engineering & Surveying Inc. in support of his claim that he is the owner of the Alleys. In a Letter dated May 9, 2018, Mr. Vassallo does not offer any opinion regarding Mynsker Alley, rather, the only opinion offered relative to the ownership of real property is that the "Sheddy Living Trust does own the land on which the Alley designated as Black Horse Alley lies within." The boundaries of Lot No. 1 as described in the Deed dated December 23, 1986, establishes the Southern property line of Lot No. 1 as the Northern line of Mynsker Alley. As there is no mention of Mynsker Alley ever having been conveyed to Defendant Sheddy or his predecessors in title, no claim of ownership can arise. In an attempt to refute Plaintiff Borough's arguments, Defendant Sheddy contends that he has held dominion over his land from the date of conveyance in 1986. Since that time, he avers he has exercised ownership rights over Mynsker Alley, where his septic system is located. The septic system has been in this location for approximately sixty-five (65) years. Defendant Sheddy contends that Plaintiff Borough has never filed a Declaration of Taking or taken any steps to condemn the Alleys in question pursuant to the Eminent Domain Code. Furthermore, Defendant Sheddy demonstrates that neither he, not anyone in the past chain of title of the property in question, ever received any kind of compensation for the taking of the Alleys.

With regard to Mynsker Alley, a motion for summary judgement is appropriate as the non-moving party has an obligation to demonstrate that the uncontroverted facts set forth by Defendant Sheddy are in fact controverted. *Murphy v. Duquesne Univ. of the Holy Ghost,* 777 A.2d 418, 429 (Pa. 2001). Accordingly, this Court holds that Defendant Sheddy has not provided sufficient evidence establishing ownership interest in Mynsker Alley. As there is no mention of Mysnker Alley having been conveyed to Defendant Sheddy or his predecessors in title, there can be no claim of ownership.

Black Horse Alley

In the course of the arguments laid out in each respective parties' Motion for Summary Judgement concur that a public road, street, or alley can be obtained by a Borough by dedication of the owner, or through a taking in which the property owner is compensated for the land taken for public purposes. *Milford v. Burnett*, 288 Pa. 434 (1926) There does not appear to be any dispute between the parties that there was no dedication of record. However, Plaintiff Borough, in an attempt to assert dedication by implication, relies upon an expert report provided by Nate Hollick Land Surveying. Defendant Sheddy

asserts that this expert report was filed in an untimely manner, and that there are no factual averments of record upon which Nate Hollick can opine that implied dedication ever occurred. For an acceptance of an alley by implication there must be a deed of dedication from the landowner. *Borough of Summerhill v. Sherbine*, 88 Pa. Super. 419 (Pa. Super. Ct. 1929). "An acceptance of a dedication of a street by a municipality may be implied as well as express, and may be established by showing acts of dominion over or control of the street by proper authorities." *Wensel v. Twp. of N. Versailles*, 136 Pa. Super. 485, 7 A.2d 590 (1939). Implied acceptance may be indicated by some definite authoritative act of the municipality. *Steel v. Huntingdon Borough*, 191 Pa. 627, 630, 43 A. 398; *Wahl v. McKees Rocks Borough*, 64 Pa. Super. Ct. 155; *Grant v. Dickson City Borough*, 235 Pa. 536, 84 A. 454. Long-continued use by the public as a way may also suffice to establish implied dedication. *Ackerman v. City of Williamsport*, 227 Pa. 591, 76 A. 421. A combination of municipal acts and public use may also be acceptable. *Kniss v. Borough of Duquesne*, 255 Pa. 417, 100 A 132. For Defendant Borough to establish the acceptance of an alley by implication there must first be a deed of dedication from the landowner. If such a deed exists, then any number of precedential decisions could pave the way for Plaintiff's implied dedication. However, without any such deed the legal conclusion that a Borough cannot take property of a landowner through adverse possession must be considered; eminent domain would be the only available remedy. This is affirmed in *Summerhill* when it was stated that "if prior to defendants' deed there was a dedication of these alleys to the public followed by an acceptance of such dedication and a use of the alleys by the public, they became public highways and thereafter the public right could not be lost by nonuser nor title be acquired by adverse possession. As there is no deed of dedication in the matter at hand, Plaintiff Borough cannot have a right to ownership or control other than through eminent domain.

Plaintiff Borough brought forth the notion that "when a borough has continuously used and maintained an alley for public use for twenty-one years, the public has an unalienable right to use the alley, and any interference with the alley is a nuisance of which the borough has the authority to cure." *Borough of Summerhill v. Sherbine*, 88 Pa. Super. 419 (Pa. Super. Ct. 1929). The circumstances presented in *Summerhill* differ from those in the matter at hand; the court in *Summerhill* determined that alleys in question had been dedicated to the public and had been used by the public pursuant to dedication. The matter at bar presents a scenario where the Defendants already hold a deed to Black Horse Alley, and where no dedication has occurred. Defendant Sheddy contends that he has exercised control over the alleys since the Deed of 1986, and has taken steps to put the public on notice of his ownership and control rights. Plaintiff Borough contends that a number of maps provided with Plaintiff's Brief demonstrate an acceptance by the Borough of Black Horse Alley as a public right-of-way. However, as noted in *Summerhill*, a governmental entity cannot take possession of private property of another person other than

through eminent domain and with fair compensation given. Defendant Sheddy cites *Milford v. Burnett*, 136 A. 669, 671 (1927) in an attempt to draw attention to the notion that showing the Alleys in question on a Borough Map amounts to nothing more that creating a "paper street", and does nothing to establish the creation of a public street. "The mere dedication of a street, or its adoption as such by the municipality, is not an acceptance of it so as to make it a public highway; such acts are merely equivalent to a plotting or laying out; it is nothing but a paper street. *Fleck v. Collins*, 28 Pa. Super. Ct. 443, 449. There aforementioned maps also contain some ambiguity concerning the differentiation between private and public alleys.

Defendant Sheddy asserts that he owns the land on which Plaintiff Borough's claim is founded, and that there are no references in the 1986 Deed or any further records granting a public right-of-way to the Borough of Salladasburg. Plaintiff's complaint discusses the classification of Black Horse Alley as a public right-of-way, but does not expressly claim ownership of the Alleys, nor is any record of a deed, easement, or right-of-way showing any right to the land provided. A right of way is an easement. *Lease v. Doll*, 403 A.2d 558 (Pa. 1979), citing, *Merrill v. Mfgrs. Light and Heat Co.*, 409 Pa. 68, 185 A.2d 573 (1962). Assuming *arguendo* that a right-of-way did exist, "the scope of an express easement must be determined by the intention of the parties." *Lease v. Doll*, 403 A.2d 558, 561 (Pa. 1979), citing, *Sigal v. Mfgrs. Light and Heat Co.*, 450 Pa. 228, 299 A.2d 646 (1973). See also, *McNaughton Props., LP v. Barr*, 981 A.2d 222 (Pa. Super. 2009). In the case at bar, there is no mutual intention. As Plaintiff has not established an ownership interest in Black Horse Alley, it must be construed that Plaintiff's assertion is founded upon the Doctrine of Adverse Possession.

The Eminent Domain Code 26 Pa.C.S. § 101 et seq. outlines the procedure which administrates the condemnation of property for public purposes. "When a private or municipal body having the power of eminent domain enters upon the private lands of another and uses the and for its own purposes, the law presumes that it does so under its right of eminent domain." *Commonwealth v. Demaree*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 623, at *12-13 (C.P. Susquehanna Sep. 12, 2011) citing *Hoover v. Jackson*, 524 A.2d 1367, 1369 (n.2) (Pa. Super. 1987).) An entity having the power of eminent domain cannot acquire title to a property through adverse possession. See generally *Hoover v. Jackson*, 524 A.2d 1367, 1369 (n.2) (Pa. Super. 1987); *Ontelaunee Orchards, Inc. v. Rothermel,* 139 Pa. Super.44, 11 A.2d 543 (Pa. Super 1940). "A borough has no more right to acquire land by adverse possession than has a railroad or other company possession the right of eminent domain." *Commonwealth v. Demaree*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 623, at *12-13 (C.P. Susquehanna Sep. 12, 2011) citing *Sayre Land Co. v. Borough of Sayre*, 121 A.2d 579, 582 (Pa. 1956). Defendant Sheddy's contention that Plaintiff has not provided any facts

showing the alley in question was previously condemned and taken pursuant to their power of eminent domain carries some weight. Rather, Plaintiff Borough argues that they have acquired Defendant's property through adverse possession, as opposed to the exclusive procedure of eminent domain. If an entity with the power of eminent domain "originally took title as a purchaser, under a deed containing words purporting to convey the fee, and that from the beginning it exercised acts of dominion over the land tending to show absolute ownership", then the Court may recognize an exception to the rule that entities with the right of eminent domain which allows for adverse possession. *Ontelaunee Orchards, Inc. v. Rothermel,* 139 Pa. Super.44, 11 A.2d 543 (Pa. Super 1940). However, in the case at bar, Plaintiffs have not provided sufficient evidence that they took title to the Alleys as a purchaser. This lends further credence to Defendant Sheddy's notion that there is no genuine issue of material fact, nor is there sufficient evidence to merit a jury trial. The circumstances at hand point towards the legal conclusion that there is no room for the presumption that the entity entered or continued to hold power of eminent domain. *Ontelaunee Orchards, Inc. v. Rothermel,* 139 Pa. Super.44, 11 A.2d 543 (Pa. Super 1940). When considering the evidence put forth by Plaintiff Borough, possessing the power of eminent domain, there are insufficient facts supporting lawful title which would afford Plaintiff the opportunity to proceed under the exception of adverse possession.

Plaintiff Borough also raises a line of argument for a *de facto* taking. However, Plaintiff's Complaint does not adequately flesh out this argument. Rather, Plaintiff's Complaint asserts adverse possession as its primary contention. This, under the circumstances at hand, is a theory to which the Plaintiff cannot recover. A *de facto* taking takes place when there has been a substantial deprivation of a landowner's use and enjoyment of his property. *McGaffic v. City of Newcastle,* 74 A.3d 306 (Pa. Cmwlth. 2013). Pursuant to 42 Pa.C.S. §5527(4), Plaintiff Borough contends that a landowner must bring an action for *de facto* taking within six (6) years of the alleged deprivation of use and enjoyment of his property. *McGaffic v. City of Newcastle,* 74 A.3d 306 (Pa. Cmwlth. 2013). Defendant Sheddy contends that the statute of limitations in this scenario would be twenty-one (21) years pursuant to 42 Pa.C.S.A. § 5530. Assuming *arguendo* that the statute of limitations was in fact six (6) years as opposed to twenty-one (21) years, the first instance of the Borough utilizing Black Horse Alley in a manner adverse to Defendant Sheddy's ownership rights was when they cut down a number of trees in August, 2015. This action led to Defendant Sheddy's initial Complaint.

The Court concludes that no relevant triable issue of fact exists. Accordingly, the Court enters the following order:

SALLADASBURG BOROUGH, *Plaintiff* v. LARRY T. SHEDDY, an adult individual and as Trustee of the Larry T. and Sherry L. Sheddy Living Trust, *Defendant*	No. CV-17-0954 SUMMARY JUDGMENT

ORDER

AND NOW, this **16th** day of **October, 2018** it is ORDERED and DIRECTED that summary judgment is GRANTED in part and DENIED in part. Judgment is entered in favor of Plaintiff Borough of Salladasburg with regard to Mynsker Alley, and in favor of Defendant Larry T. Sheddy with regard to Black Horse Alley. The claims of Defendant Sheddy to Mysnker Alley are extinguished, and the claims of Plaintiff Borough to Black Horse Alley are extinguished.

BY THE COURT,

_____ _____

Date Richard A. Gray, Senior Judge
Specially Presiding

cc: April McDonald, CST
Christopher H. Kenyon, Esquire (*for Plaintiff*)
Douglas N. Engelman, Esquire (*for Defendant*)