

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

THOMAS M. SMITH,  
Plaintiff,  
vs.

CHRISTOPHER W. BARTO,  
Defendant.

: NO. 18 - 1541  
:  
:  
: CIVIL ACTION  
:  
:  
: *Preliminary Objections;*  
: *Motion for Consolidation*

**ORDER**

AND NOW, after argument was heard on January 11, 2019 regarding *Defendant's Preliminary Objections and Plaintiff's Motion for Consolidation with CV-2017-000688*, the Court finds the following:

1. *Plaintiff's Motion for Consolidation with CV-17-0688* is **GRANTED IN PART**. Plaintiff is seeking a new scheduling order that allows discovery in this matter, but assigns it the May-June 2019 trial term it possessed when filed under case number CV-17-0688.<sup>1</sup> Plaintiff admits that this case “involves the same issues, subject matter and [] witnesses” as his original complaint in the CV-17-0688 matter.<sup>2</sup> Since discovery was already completed in CV-17-0688, and Plaintiff's complaint in this case is a verbatim recitation of his complaint in CV-17-0688, the Court sees no reason to allow discovery in this case. Therefore, it is hereby *ORDERED* that the cases are consolidated and the trial term will remain May-June 2019 for both CV-18-1541 and CV-17-0688. Discovery shall not be reopened.

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<sup>1</sup> Plaintiff's Motion for Consolidation, ¶10 (hereinafter “Plaintiff's Motion”). The Court granted Plaintiff's discontinuance request without prejudice, but allowed Defendant's counterclaim to remain on the trial list. *Smith v. Barto*, No. 17-688, Order (Aug. 13, 2018) (granting discontinuance); *Smith v. Barto*, No. 17-688, Order (Aug. 30, 2018) (finding that Plaintiff's discontinuance did not affect Defendant's counterclaim).

<sup>2</sup> Plaintiff's Motion, ¶8.

2. *Defendant's First Preliminary Objection* is **SUSTAINED**. Plaintiff's first count in his complaint concerns "easement by necessity." Defendant argues that Plaintiff has not properly pled all the elements of easement by necessity. Specifically, Plaintiff has not pled that the subject property is landlocked. Plaintiff argues that such a fact can be inferred from paragraph twelve of his complaint. However, paragraph twelve only alleges that the easement existed at the time of severance.<sup>3</sup> The Court agrees with Defendant. The parcel must be landlocked in order for Plaintiff to allege an easement by necessity;<sup>4</sup> therefore, Plaintiff must amend his complaint to allege such fact within twenty (20) days of this opinion's date.

3. *Defendant's Second Preliminary Objection* is deemed **MOOT**, as the Court addressed *Plaintiff's Motion for Consolidation* above.

**IT IS SO ORDERED this 18<sup>th</sup> day of January 2019.**

BY THE COURT:

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Eric R. Linhardt, Judge

ERL/zs

cc: Scott A. Williams, Esq.  
*Williams & Smay*  
Daryl A. Yount, Esq.  
*McNerney, Page, Vanderlin & Hall*  
Case file: CV-2017-000688  
Gary Weber, Esq. (Lycoming Reporter)

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<sup>3</sup> Plaintiff's Complaint at 2 ("easement by necessity arose because it is necessary for the owner of the dominant tenant, namely the Plaintiff, to use the Defendant's land for access as described on the within description [], and this easement existed both at time of severance of title as well as the time of the beginning of the easement or use of the easement by the Plaintiff").

<sup>4</sup> *Witner v. Titus*, 2017 WL 430884, at \*7-8 (Pa. Super. Ct. Jan. 31, 2017).