IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

THOMAS M. SMITH,	: NO. 17 – 0688
	: NO. 18 – 1541
Plaintiff/Counterclaim-Defendant,	:
	:
vs.	: CIVIL ACTION
	:
CHRISTOPHER W. BARTO,	:
	:
Defendant/Counterclaim-Plaintiff.	:
	: *Decision Post-Trial*

MEMORANDUM OPINION

Before this Court is Plaintiff/Counterclaim-Defendant Thomas M. Smith's ("Plaintiff") suit, requesting the Court find that he possesses the right to traverse Defendant/Counterclaim-Plaintiff Christopher W. Barto's ("Defendant") land based on the legal doctrines of easement by necessity or easement by prescription. Conversely, Defendant filed a counterclaim for a declaratory judgment that Plaintiff possesses neither an easement by necessity nor an easement by prescription. A bench-trial was held on June 3, 2019, and the Court reserved decision. The Court also requested supplemental briefing, which was timely submitted by June 17, 2019. This is the Court's decision after trial.

FINDINGS OF FACT

1) Common grantors Grant P. Barto and Dorthy E. Barto acquired the entire subject property in 1968.[1]

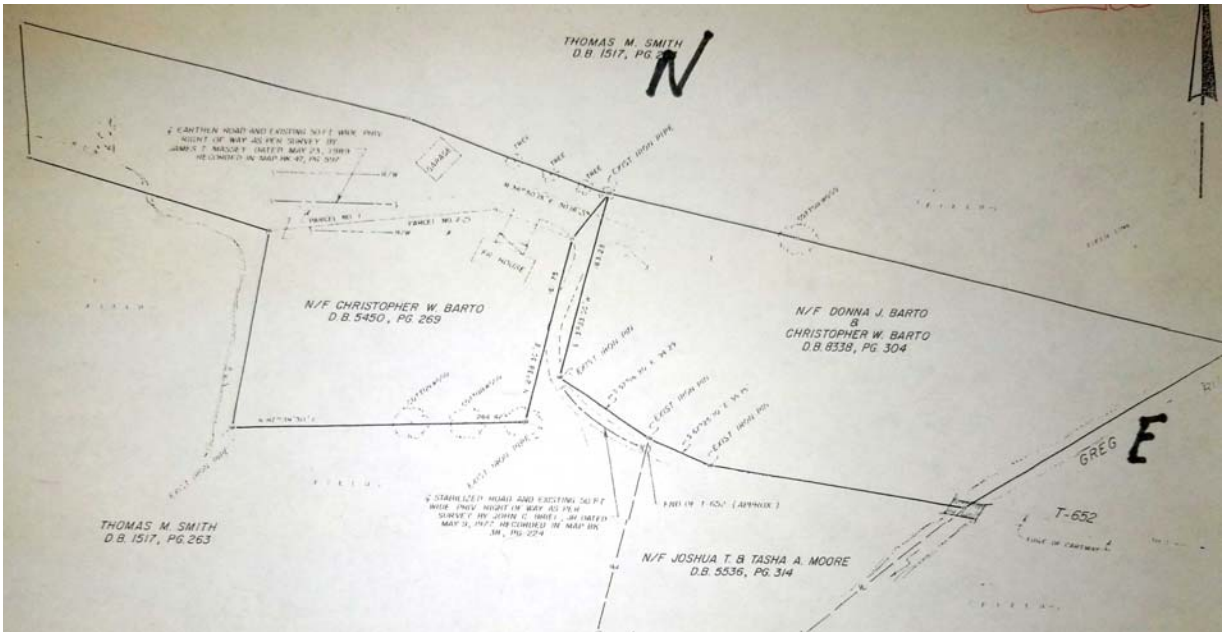
2) Based on subsequent conveyances, Plaintiff acquired his 90 acre tract on March 5, 1990.[2]

[1] Plaintiff and Defendant stipulated to this fact before trial began based on the identical nature of the first fifteen paragraphs in their trial memoranda. Rec. at 1-2.

3) Based on subsequent conveyances, Defendant acquired his 2.09 acre western parcel on September 28, 2005, and his 2.06 acre eastern parcel on June 4, 2014.[3]

4) Defendant's 4.15 acre property is surrounded by Plaintiff's 90 acre property, except a small tract owned by Joshua and Tasha Moore which is not involved in this dispute.[4]

5) Defendant's 4.15 acre property is outlined below:[5]



6) As evident from the above image, Plaintiff owns land to the north ("northern field"), east, west, and south.[6]

7) The land in dispute is the 208 square feet crosshatched parcel ("square parcel") below:[7]

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[2] *See supra* note 1. Plaintiff currently owns a total of approximately 130 acres. Unofficial Draft Transcript at 45 [hereinafter "Tr."].
[3] *See supra* note 1.
[4] Defendant's Exhibit 1; Tr. at 19.
[5] Defendant's Ex. 1.
[6] *Id.*
[7] Plaintiff's Ex. 9; *see also* Plaintiff's Ex. 1, attach. E; *Id.*; Tr. at 17, 46-47.

8) A small stream (left) abuts the western side of Plaintiff's northern field, and a large creek (right) abuts the eastern side:[8]

9) Thus, in order for Plaintiff to access the northern field, Plaintiff must either cross the square parcel, which is owned by Defendant, or one of the runs.[9]

10) Although not captured in the above images, Barto Hollow Road divides Plaintiff's 90 acre tract on the eastern side of his property.[10]

11) Grant Barto Road branches out from Barto Hollow Road and provides motor vehicle access to Defendant's property.[11]

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[8] Tr. at 14, 24, 112-13, 125-26; Defendant's Exs. 16-C; 16-D.
[9] Tr. at 14-15, 28-29; Plaintiff's Ex. 6. Plaintiff testified that the western stream is "four feet, five feet, maybe even six feet deep" in "some places." Tr. at 36. Also, Plaintiff testified a gas line close to the western stream also hindered his ability to mobilize his farm equipment over the stream. Tr. at 36.
[10] Tr. at 38-39; Defendant's Exs. 2 (indicated by red marker), 2-A. Barto Hollow Road lies to the east of Defendant's property.
[11] Tr. at 39; Defendant's Ex. 2.

12) From 1990 to 2000, Edward France ("Mr. France") contracted with Plaintiff to farm the northern field.[12]

13) For an indeterminable quantity and duration, Mr. France accessed the northern field by utilizing the square parcel.[13]

14) In approximately 2000, Plaintiff enrolled the northern field in the United States Department of Agriculture Farm Service Agency's Conservation Reserve Program ("CRP").[14]

15) A condition of the CRP program was that Plaintiff maintain the northern field in a good condition, which involved the use of a haybine conditioner, tractor, and pick-up truck.[15]

16) After approximately 2000, for an indeterminable quantity and duration, Plaintiff utilized the square parcel to access the northern field for CRP maintenance purposes.[16]

17) From 1990 to 2016, Plaintiff and his family utilized the square parcel for hunting purposes during the first two weeks of buck season and three days during doe season.[17]

18) During the first two weeks of buck season, Plaintiff would personally utilize the square parcel during the first Monday and Tuesday after Thanksgiving, as well as on weeknights and during the weekends.[18]

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[12] Tr. at 22-23.
[13] Tr. at 24.
[14] Tr. at 22-23.
[15] Tr. at 23.
[16] Tr. at 23-24.
[17] Tr. at 25-28.
[18] Tr. at 26-27.

19) In 1998, for an indeterminable quantity and duration, Plaintiff also utilized the square parcel to repair damage to the creek and streambeds caused by rain and snow, as well as generally visit the northern parcel.[19]

20) In 2016, Plaintiff stopped hunting based on disputes with his neighbors.[20]

21) Additionally, in 2016, Plaintiff spoke with Defendant regarding Plaintiff's access through the square parcel; Defendant refused to grant Plaintiff such access.[21]

22) Plaintiff continued to utilize the square parcel even after Defendant posted private property/no trespassing signs in 2016.[22]

23) Plaintiff has not commissioned a study regarding the western stream or eastern creek to determine whether it would be possible to cross with his farming machinery.[23]

24) Plaintiff has not applied for any permits from the Department of Environmental Protection related to utilizing the western stream or eastern creek to access his northern field.[24]

CONCLUSIONS OF LAW

25) As the Pennsylvania Superior Court has stated:

> Claiming the existence of an easement by necessity contemplates a situation in which a parcel of land is landlocked. "It is a well-settled principle of law that, in the event property is conveyed and is so situated that access to it from the highway cannot be had except by passing over the remaining land of the grantor, then the grantee is entitled to a way of necessity over the lands of his grantor." The three fundamental requirements for an easement by necessity to arise are the following:

[19] Tr. at 37.
[20] Tr. at 57.
[21] Tr. at 61-62.
[22] Plaintiff's Ex. 10; Tr. 61-62, 105.
[23] Tr. at 42-43.
[24] Tr. at 43, 50.

> 1) The titles to the alleged dominant and servient properties must have been held by one person.
>
> 2) This unity of title must have been severed by a conveyance of one of the tracts.
>
> 3) The easement must be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time of the exercise of the easement.[25]

26) The doctrine of easement by necessity does not apply here.

27) First, Plaintiff has access to his property by way of a public road.[26]

28) Second, Plaintiff's northern field is not "landlocked," as access to his property is not a legal impossibility.[27] He has failed to establish that alternative means could not be utilized to travel into the northern field by way of the eastern creek or western stream.

29) Likewise, Plaintiff does not possess an easement by prescription.

30) " 'An easement or right-of-way by prescription arises by adverse, open, continuous, notorious, and uninterrupted use of the land for twenty-one years.' "[28]

31) An adverse use occurs "where one uses an easement which is apparent whenever he sees fit without leave or license and without objection."[29]

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[25] *Phillippi v. Knotter*, 748 A.2d 757, 760 (Pa. Super. Ct. 2000) (internal citations omitted) (quoting *Possessky v. Diem*, 655 A.2d 1004, 1010 (Pa. Super. Ct. 1995); *Graff v. Scanlan*, 673 A.2d 1028, 1032 (Pa. Commw. Ct. 1996)).

[26] *Phillippi*, 748 A.2d at 761 ("Therefore, the situation caused by the original severance was not that of strict necessity in which property was conveyed in such a way that access to it from a public road could not be had except by passing over the remaining land of the grantor. We believe the term "strict necessity" in this context requires that property be without any access to a public road.").

[27] *See Bartkowski v. Ramondo*, 2018 WL 495213, at *6 (Pa. Super. Ct. Jan. 22, 2018) ("Hence, because a new driveway is possible, even if difficult and expensive, the trial court properly denied the Ramondos' claim for an easement by necessity.").

[28] *Matakitis v. Woodmansee*, 667 A.2d 228, 231 (Pa. Super. Ct. 1995) (quoting *Waltimyer v. Smith*, 556 A.2d 912, 913 (Pa. Super. Ct. 1989)).

[29] *Deeb v. Ferris*, 28 A.2d 355, 356 (Pa. Super. Ct. 1942).

32) An open surface or above ground use is "visible or apparent" if a "reasonably diligent landowner would become aware" of such "intrusions."[30]

33) Also, such open use "must be made with sufficient frequency that the owner of the servient estate has a reasonable opportunity to become aware of it."[31]

34) "[C]onstant use need not be demonstrated in order to establish the continuity of the use. 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.' "[32]

35) " 'Notorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood."[33]

36) Similar to the doctrine of adverse possession,[34] "[t]o meet the open-or-notorious requirement, a use must generally be substantial and reasonably definite so that the landowner should be aware that an adverse use is being made."[35]

37) "Furthermore, the party asserting the easement must demonstrate the above elements by proof that is clear and positive."[36]

38) Plaintiff has failed to meet his burden of establishing that his use was open or notorious for twenty-one (21) years.[37]

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[30] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17(h) (2000); *see also PARC Holdings, Inc. v. Killian*, 785 A.2d 106, 114 (Pa. Super. Ct. 2001) (relying on Restatement (Third) of Property (Servitudes)).
[31] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17(h) (2000).
[32] *Matakitis*, 667 A.2d at 231 (quoting *Newell Rod and Gun Club, Inc. v. Bauer*, 597 A.2d 667, 670 (Pa. Super. Ct. 1991)).
[33] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17(h) (2000).
[34] *See Brennan v. Manchester Crossings, Inc.*, 708 A.2d 815, 821 (Pa. Super. Ct. 1998) ("To establish visible and notorious possession, appellants were required to prove that their conduct was sufficient to place a reasonable person on notice that his land is being held by appellants as their own.").
[35] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17(h) (2000); *accord* RESTATEMENT (FIRST) OF PROPERTY § 458(h)-(i) (1944); *Bodman v. Bodman*, 321 A.2d 910, 912 (Pa. 1974) (relying on Restatement (First) of Property when defining an easement by prescription).
[36] *Walley v. Iraca*, 520 A.2d 886, 889 (Pa. Super. Ct. 1987).
[37] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17(h) (2000).

39) No credible testimony was presented that Plaintiff's intrusions into the ground were apparent to a reasonably diligent landowner. For instance, that tire tracks, exclusive to Plaintiff's use, were evident for a period of time prior to 2016 when Plaintiff approached Defendant about Plaintiff's use.[38]

40) No credible testimony was elicited that Plaintiff's use was to such a frequency that Defendant was provided a "reasonable opportunity to become aware of it."[39] Plaintiff's testimony that he utilized the square parcel is insufficient to meet this element. The amount of time Plaintiff's CRP maintenance after 2000 or his 1998 repair trip spanned as well as the specifics underlying Mr. France's utilization of the square parcel from 1990 to 2000 were not presented to the Court. In fact, Defendant testified to being unaware of Plaintiff's use of the square parcel from 1985 to 2006.[40] Likewise, additional facts were needed at trial regarding Plaintiff's use of the square parcel for hunting, which spanned two-and-a-half weeks, in order for the Court to determine whether Plaintiff's use presented a "reasonable opportunity."[41]

41) Similarly, the record is devoid of testimony that Defendant knew of Plaintiff's use until 2016 when Plaintiff approached Defendant about Plaintiff's use, or that Plaintiff's use was widely known to the "neighborhood." Indeed, Judy Leman, who resided in Defendant's property from 1977 to 2006, testified that she was unaware of anyone's use of the square parcel to access the northern parcel.[42]

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[38] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17(h), illus. 25 (2000) (tire tracks were evident for several weeks after the plaintiff's use at an entry point to the owner's property).
[39] Similarly, Defendant's testimony that he was aware beginning in 2015 that people were hunting in the northern field does not posit how said hunters accessed the northern field. Tr. at 108.
[40] Tr. at 98-99, 102, 125.
[41] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17(h), illus. 26 (2000) (utilizing a road across another's property to transport farming equipment during growing and harvest season, which spanned four months, met the open requirement).
[42] Tr. at 80-81, 85-88.

VERDICT

For the reasons discussed above, the Court finds in Defendant Christopher W. Barto's favor regarding Plaintiff Thomas M. Smith's suit and Defendant Christopher W. Barto's declaratory judgment. Plaintiff Thomas M. Smith's claims for easement by necessity and easement by prescription are **DENIED**. Defendant Christopher W. Barto is the rightful owner of the square parcel, which is part of Defendant Christopher W. Barto's 2.09 acre western parcel. Plaintiff Thomas M. Smith has neither a property interest in Defendant Christopher W. Barto's property nor a right to use the property to access his northern field.[43]

IT IS SO ORDERED this 8th day of August 2019.

BY THE COURT:

_____
Eric R. Linhardt, Judge

cc:
Marc S. Drier, Esq.
Drier & Dieter
Scott A. Williams, Esq.
Williams & Smay
Daryl A. Yount, Esq.
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[43] *See* 42 Pa.C.S.A. § 7532.