

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DEAN S. LEHMAN, GENE S. LEHMAN,	:	NO. 18-1552
WILBERT F. LEHMAN, SR., and ROBERT J. LEHMAN,	:	
Plaintiffs,	:	
	:	
vs.	:	CIVIL ACTION - LAW
	:	
STEVEN and KIMBER SMITH and MICHAEL and	:	
DOROTHEA LEHMAN,	:	
Defendants.	:	

VERDICT, OPINION, AND ORDER

Background

Plaintiffs Dean S. Lehman, Gene S. Lehman, Wilbert F. Lehman, Sr., and Robert J. Lehman (collectively “Plaintiffs”) initiated this action on October 23, 2018 by the filing of a Civil Complaint in Quiet Title and Assumpsit. The Plaintiffs, who are brothers, jointly own Tax Parcel No. 25-247-116 (“the Busler Tract”) along with their brother, Defendant Michael V. Lehman. Samuel and Mae Lehman, parents to Plaintiffs and Michael Lehman, first obtained the Busler Tract in 1956. In 1983, Mae Lehman, having become the sole owner of the Busler Tract following the death of Samuel Lehman, placed the property into an irrevocable trust on behalf of her sons. In December of 1987, Michael Lehman and his wife, Dorothea A. Lehman, purchased a property adjacent to the Busler Tract, Tax Parcel No. 25-247-117 (“the Lehman Farm”).

In 1994, the five Lehman brothers entered into a “Real Estate Ownership Agreement” in anticipation of taking joint ownership of the Busler Tract. The Agreement provided that the brothers would take the Busler Tract as tenants-in-common with right of first refusal if one party sought to sell or transfer his interest in the property.¹ The brothers obtained legal title to the Busler Tract in 1995.

After Samuel and Mae Lehman obtained the Busler Tract in 1956, the Lehman family had regularly used an access road on bordering property, now owned by David

¹ See Complaint (Ex. C –Real Estate Ownership Agreement) (Oct. 23, 2018).

E. Winter and Norma M. Winter, to access the Busler Tract for hunting and to gather firewood. In 1996, shortly after the Lehman brothers purchased the Busler Tract, Dean Lehman, with the assistance of Michael Lehman, relocated this access road onto a southern portion of the Lehman Farm. Plaintiffs have since utilized the relocated roadway to access the Busler Tract.

In January of 2018, Michael and Dorothea Lehman transferred the Lehman Farm to their daughter, Kimber I. Smith, and her husband, Steven A. Smith. Around the time of the transfer, Michael Lehman made statements to Dean Lehman that he or his successors-in-interest, Kimber Smith and Steven Smith, could block the existing access road at the point that it crossed the Lehman Farm at any time, prompting Plaintiffs to file this quiet title action. Plaintiffs seek an order of the Court declaring the rights of Plaintiffs and their successors and assigns to the Busler Tract to use the portion of a roadway crossing the Lehman Farm as an access road to the Busler Tract.

Count I of the Complaint asserts that Plaintiffs have obtained an Easement by Estoppel over the roadway. Count II asserts that when Michael Lehman conveyed title in the Lehman Farm to his successors, Kimber Smith and Steven Smith, the easement on the Lehman Farm was obvious, apparent, and in current use, and so the easement remained in effect under the doctrine of Apparent Easement. Count III asserts that Plaintiffs have obtained a Prescriptive Easement over the roadway.

Count IV, seeking Specific Enforcement of an Agreement, asserts that pursuant to a "Real Estate Ownership Agreement" entered into by Plaintiffs and Defendant Michael Lehman on December 30, 1994, Michael Lehman cannot deny Plaintiffs access over the disputed roadway absent the concurrence of at least four of the five Lehman brothers. Count V seeks recovery in Assumpsit of at least \$4,000.00 in costs and expenses resulting from the litigation of the foregoing action, pursuant to an indemnity clause included in the aforementioned Real Estate Ownership Agreement.

Defendants' Answer and New Matter to Plaintiff's Complaint was docketed on February 1, 2019.² Defendants' New Matter raised various affirmative defenses, including the defense that Plaintiffs' use of the roadway on the Farm Property was permissive, precluding a prescriptive easement,³ and the defense that the claimed access road substantially crosses unenclosed woodland area, which would also preclude a prescriptive easement.⁴ Defendants' New Matter additionally asserts that there is a separate access road from the Busler Tract through the adjacent property of Kenneth Ertel and Nathan Welshans to Township Route 303, Pine Woods Road, which would preclude an easement by necessity.⁵ Defendants' New Matter further asserts that Michael Lehman never deeded any right-of-way or permanent easement agreement over the roadway at issue, and had indeed refused to do the same, and therefore there can be no express easement, as the Statute of Frauds requires an agreement for an interest in real property to pass in writing.⁶

The Court held a Civil Non-Jury Trial on Plaintiffs' Quiet Title action and claim for Assumpsit on September 9, 2020. Following opening argument by Plaintiffs' counsel, Marc Drier, Esquire, and Defendants' counsel, Charles Rosamilia, Jr., Esquire, Plaintiffs' counsel called three witnesses, Dean Lehman, David Winter, and Robert Lehman.⁷ Following the direct and cross-examination of these witnesses,

² Plaintiffs filed a Reply to New Matter on December 14, 2018, indicating that Defendants had already prepared and served the Answer and New Matter upon Plaintiffs by that time. Indeed, Defendants' Answer and New Matter is signed by Defendants' counsel, Charles R. Rosamilia, Jr. Esquire, and dated November 16, 2018. The Court can only assume that the delay in filing or docketing of the Answer and New Matter was the result of oversight on the part of Defendants' counsel or an administrative error on the part of the Court.

³ See *Walley v. Iraca*, 520 A.2d 886, 890 (Pa. Super. 1987) (holding that once alleged holder of a prescriptive easement has met his or her burden of proof by showing use that there was adverse, open, notorious, and continuous use for an uninterrupted period of twenty-one years, the burden then shifts to the landowner to establish that the use was by a grant of permission).

⁴ See 68 P.S. § 411 (prohibiting prescriptive easements that pass through unenclosed woodland).

⁵ See *Bodman v. Bodman*, 321 A.2d 910, 912 (Pa. 1974) ("An easement by necessity may be created when after severance from adjoining property, a piece of land is without access to a public highway.").

⁶ See 33 P.S. § 1.

⁷ Plaintiffs' counsel provided at opening argument that Plaintiff Gene Lehman was in the hospital and therefore unavailable to testify, and Plaintiff Wilber Lehman, Sr. was at a doctor's appointment concerning a heart issue, and was therefore also unavailable to testify.

Defendants' counsel called Kimber Smith and Steven Smith as witnesses. Neither party called Michael Lehman as a witness. Counsel then made closing argument.

Before addressing the substance of Plaintiffs' claims, the Court will address the admissibility of Defendants' Exhibits 3 and 4. At trial, the Court reserved ruling on the admissibility of these Exhibits pending further investigation into the applicable rules of evidence.

Analysis

A. Defendants' Exhibits 3 and 4

At trial, Plaintiffs' counsel objected to the admission of Defendants' Exhibits 3 and 4 on the basis that such Exhibits constitute hearsay. Defendants' counsel contended that the Exhibits would be admissible pursuant to a hearsay exception for statements in historical documents. Defendants' Exhibit 3 is a two-page excerpt from a book on local history titled, "Nipponese Valley: A View of the Past." The second page of Exhibit 3 includes a photograph of a farmhouse described as "Busler Place," provides a brief chronology of ownership of Busler Place, and describes an "old road" running from the front of Busler Place, "west to the Nathan Sweitzer Welshans Farm on to Joe Welshans property in the Pine Woods." Defendants' Exhibit 4 consists of five pages, sourced from Facebook, describing properties constructed on the Busler Tract in the 19th Century, and discussing historical access roads passing through the Busler Tract.

Pennsylvania Rules of Evidence Rule 803(16) creates an "ancient document" hearsay exception, which encompasses "statement[s] in a document that is at least 30 years old and whose authenticity is established."⁸ "[T]o qualify as an ancient document, it is necessary to show that the document is (a) over 30 years old; (b) free of erasures, alterations, etc., and (c) in proper custody."⁹ The exception, "creates a presumption that a document under the conditions set forth above is self-

⁸ Pa. R. Evid. 803(16).

⁹ *Lesnick v. Chartiers Nat. Gas Co.*, 889 A.2d 1282, 1283 (Pa. Super. 2005) (citing *Louden v. Apollo Gas Co.*, 417 A.2d 1185 (Pa. Super. 1980)).

authenticating; otherwise, the antiquity of the document itself would, by definition, create great difficulty or impossibility of actual authentication.”¹⁰ Such ancient documents may include, *inter alia*, “ancient maps, records, surveys, ancient town plots, historical books which have been generally treated as authentic, [and] reports made by disinterested parties apparently conversant with the facts and now dead[.]”¹¹

No evidence was presented at trial, nor is there any indication from Exhibits 3 and 4 themselves, that Exhibits 3 and 4 date back more than 30 years. Additionally, Exhibits 3 and 4 are not plainly free from alterations. The second page of Exhibit 4 contains a handwritten alteration, in which a reference to “Ralph Busler, father of William Busler” is crossed out and amended to “Ralph Busler, son of William Busler[.]” Further, there was no testimony as to chain of title that would ensure that these documents remained in proper custody. Indeed, while Exhibit 3 is identified as being compiled by Wayne O. Welshans, no evidence was provided as to who compiled Exhibit 4. Additionally, there was no evidence or testimony presented as to Wayne Welshans’ credentials. As pages of “historical books,” no evidence was presented that Exhibits 3 and 4 have generally been treated as authentic. Exhibits 3 and 4 are therefore inadmissible under the ancient documents hearsay exception. The Court further notes that Pennsylvania has not adopted Federal Rule of Evidence 803(18) allowing an exception to the hearsay rule for learned treatises.¹² The Court therefore SUSTAINS the objection of Defendants’ counsel and rules that Defendants’ Exhibits 3 and 4 are INADMISSIBLE.

B. Easement by Estoppel / Irrevocable License

Plaintiffs’ first theory of liability as presented within Count I of the Complaint is that Plaintiffs have obtained an easement by estoppel over the claimed access road. “An easement by estoppel—traditionally considered an irrevocable license in Pennsylvania—will arise when a landowner permits a use of property under

¹⁰ *Louden v. Apollo Gas Co.*, 417 A.2d 1185, 1187 (Pa. Super. 1980).

¹¹ *Hostetter v. Com.*, 80 A.2d 719, 720 (Pa. 1951).

¹² *Aldridge v. Edmunds*, 750 A.2d 292, 296-97 (Pa. 2000).

circumstances suggesting that the permission will not be revoked, and the user changes his or her position in reasonable reliance on that permission.”¹³ An irrevocable license may be agreed upon in writing, but is typically oral.¹⁴ An irrevocable license may be found in situations where the presumptive licensee has expended money or labor in reliance of the permitted use, which may include the erection or construction of permanent improvements on the presumptive licensee’s own property.¹⁵ Successors in title will take subject to an irrevocable license if they had notice of the license before purchase.¹⁶

Defendants assert that the doctrine of irrevocable license does not apply to this case, as Plaintiffs have not demonstrated a substantial expenditure in reliance on the license to use the access road.¹⁷ Defendants note that as per the Complaint, Plaintiffs assert that at most, they expended approximately \$4,000.00 in labor and expenses to install the claimed access road, which would equate to only \$166.00 in costs annually over twenty-four years, from 1996 when the access road was installed, to the present date.

Indeed Plaintiffs’ claim for labor and expenses is somewhat less than \$4,000.00. At trial, Plaintiff Dean Lehman testified that after obtaining the verbal agreement of his brother, Defendant Michael Lehman, to put in the access road over the Lehman Farm property to Busler Tract, he personally installed the road, with some assistance from Michael Lehman. Dean Lehman estimated his own labor and expenses in laying down the road, not including work done by Michael Lehman, as totaling \$3,912.50 and over twenty-four hours of labor;¹⁸ these expenses were

¹³ *Kapp v. Norfolk Southern Railway Co.*, 350 F.Supp.2d 597, 611–12 (M.D. Pa. 2004) (citing *Morning Call, Inc. v. Bell Atlantic–Pa., Inc.*, 761 A.2d 139, 144 (Pa. Super. 2000)).

¹⁴ *Vill. of Four Seasons Ass’n, Inc. v. Elk Mountain Ski Resort, Inc.*, 103 A.3d 814, 824 (Pa. Super. 2014) (citing *Kovach v. Gen. Tel. Co.*, 489 A.2d 883, 885 (Pa. Super. 1985)).

¹⁵ *Dailey’s Chevrolet, Inc. v. Worster Realities, Inc.*, 458 A.2d 956, 960 (Pa. Super. 1983).

¹⁶ *Id.* (citing *Harkins v. Zamichieli*, 405 A.2d 495, 498 (Pa. Super. 1979)).

¹⁷ *LARA, Inc. v. Dorney Park Coaster Co.*, 542 A.2d 220, 224 (Pa. Commw. 1988) (citations omitted) (“Pennsylvania has recognized an equitable theory of an irrevocable license when there has been substantial expenditure in reliance on the license.”).

¹⁸ The exact total of hours spent on labor is not clear to the Court from Dean Lehman’s testimony and Plaintiff’s Exhibit 8.

itemized in Plaintiff's Exhibit 8.¹⁹ When questioned how much Michael Lehman contributed in terms of labor and expenses, Dean Lehman estimated \$180.00. Dean Lehman acknowledged that none of the other Lehman brothers were involved in installing the access road.

The Court notes that as an equitable doctrine, a party wishing to establish an irrevocable license must demonstrate a substantial cost or detriment in reliance of a licensed use. However, what constitutes a substantial cost or detriment is fact-specific. For example, in *Messinger v. Washington Township*, the Pennsylvania Superior Court found that \$100.00 expended by the Township as licensee in installing a drainage pipe was a sufficient expenditure to support the creation of an irrevocable license when considering both the relative value of the underlying land supporting the drainage pipe and the potential expense to the Township in relocating the pipe.²⁰ Further, an expenditure need not only be in the form of money or labor, but may include any detriment undertaken on part of the licensee in order to establish the irrevocable license.²¹ Finally, evidence that the burden on the subservient property is minimal, or that the use of the subservient property was established to the mutual benefit of the licensor and licensee, are equitable considerations supportive of the creation of an irrevocable license.²²

Taking these factors into consideration, the Court finds that the \$3,912.50 expended by Dean Lehman in expenses and over twenty-four hours in labor in installing the access road constituted a substantial cost. The Court further finds, based on the testimony presented, that this cost was incurred based on the understanding of both Dean Lehman and Michael Lehman that the Lehman brothers would be able to continually use the claimed road to access the Busler Tract, an

¹⁹ Dean Lehman acknowledged on cross-examination that Plaintiff's Exhibit 8 was prepared for trial, and that the listed labor and expenses was drawn from memory. However, the \$3,912.50 figure was not controverted by any other party. The Court is satisfied as to the general accuracy of Dean Lehman's estimation of his own labor and expenses.

²⁰ See *Messinger v. Washington Twp.*, 137 A.2d 890 (Pa. Super. 1958).

²¹ See e.g., *Zamichielli*, 405 A.2d at 498 (holding that when licensees allowed licensors to transplant their shrubbery hedge and extend their driveway into licensees' property in exchange for permission to use the licensors' driveway for parking, this was a detriment supportive of an irrevocable license).

understanding that was not controverted until 2018 when Michael Lehman threatened to block the road. This establishes detrimental reliance. The Court notes that it considers the issue of substantiality from the point at which the expense was incurred. While \$3,912.50 may not be a substantial amount when considered over the course of twenty-four years, it was a substantial amount in 1996 when Dean Lehman, through his own labor and out-of-pocket expenditures, paved the road.²³ Michael Lehman's own contribution represented a comparatively small portion of the labor and expenses in establishing the road.

Further, the Court notes that, pursuant to the testimony of Dean Lehman and Robert Lehman, prior to the installation of the access road across the Lehman Farm in 1996, the Lehman brothers used another access road, on bordering property now owned by David E. Winter and Norma M. Winter, to access the Busler Tract.²⁴ Both Dean Lehman and Robert Lehman testified that their family regularly used this road, without express permission from the adjoining landowners, since at least the late 1960s to access the Busler Tract for hunting and to gather firewood. Dean Lehman testified that David Winter had requested that the Lehman's relocate this access road, which passed near the Winter home.²⁵ The Lehmans voluntarily agreed to move the access road to cross the Lehman Farm, after which David Winter regraded and seeded the prior road. In agreeing to move the access road to cross the Lehman Farm, Plaintiffs chose not to claim a prescriptive easement over the preexisting access road bordering the Winter Property. This detrimental reliance will also support a finding of an irrevocable license.

²² See *Morning Call, Inc.*, 761 A.2d at 144 (Pa. Super. 2000).

²³ See *Zivari v. Willis*, 611 A.2d 293, 296 (Pa. Super. 1992) (citations omitted) ("Initially, [the licensor's] statement created a license revocable at will. However, this, otherwise revocable license, became irrevocable once appellees expended money and treated their own property in a manner that they would not otherwise have treated it, but for the license.").

²⁴ This former road is marked in red on Plaintiffs' Exhibits 5A and 7A.

²⁵ David Winter testified that it was actually the Zieglers, the preceding owners of what is now the Winter Property, who asked the Lehmans to relocate the access road. However, Mr. Winter testified that he purchased the property from the Zieglers in 1994 with the knowledge that the Lehmans had agreed to relocate the access road.

Additionally, the relocation of the access road benefited not only Plaintiffs, but also Defendant Michael Smith, who remains a joint owner of the Busler Tract. Even after having sold his interest in the Lehman Farm to the Smiths, Michael Smith as a licensee would be able to use the claimed access road for ingress to and egress from the Busler Tract without permission. This equitable factor also supports a finding of an irrevocable license. Pursuant to the foregoing, the Court finds that Plaintiffs have OBTAINED AN IRREVOCABLE LICENSE over the claimed access road.

Lastly, Kimber Smith testified at trial that she has been living on the Lehman Farm property since 2003, fifteen years prior to her taking title. The Court is satisfied that pursuant to the testimony of Plaintiffs' witnesses, the claimed access road located on the southern portion of the Lehman Farm is plainly visible, and that Plaintiffs' have regularly made open and apparent use of the access road. Neither Kimber Smith nor Steven Smith alleged that they were unaware of Plaintiffs' use of the road at the time of purchasing the Lehman Farm. The Court finds that Defendants Kimber Smith and Steven Smith became successors in interest to the Farm Property with notice of Plaintiffs' use of the access road at time of purchase. Therefore, the irrevocable license is effective against all Defendants. Having ruled on this basis, the Court declines to address Plaintiffs' claims that they have an apparent easement and prescriptive easement over the claimed access road, and Plaintiffs' claim that the "Real Estate Ownership Agreement" precludes Defendant Michael Lehman from barring Plaintiffs' use of the road to access the Busler Tract.

C. Assumpsit

The Court next addresses Plaintiffs' argument under Count V of the Complaint, that pursuant to an indemnity clause within a Real Estate Ownership Agreement entered into by Plaintiffs and Defendant Michael Lehman in 1994 regarding ownership of the Busler Tract, Michael Lehman must indemnify Plaintiffs the costs for bringing this action. The Real Estate Ownership Agreement is attached as Exhibit 2 to Plaintiff's Complaint. Paragraph 2 of the Real Estate Ownership Agreement reads:

Indemnity. Each party shall indemnify and hold harmless the other parties against all debts, liens, judgments or charges of any nature whatsoever accruing against the Premises by reason of any act or failure to act of the indemnifying party.

Further, paragraph 8 reads:

Management. All actions of the co-tenants with respect to the Premises shall be governed by a vote of the holders of a majority in interest in the Premises. In the event of a deadlock, the decision of Dean S. Lehman shall control.

Plaintiffs argue that, pursuant to the Real Estate Ownership Agreement, Defendant Michael Lehman lacked the authority to block the access road across the Lehman Farm to the Busler tract without an agreement of the majority of the co-tenant Lehman Brothers. Plaintiffs moreover assert that as Michael Lehman precipitated this action by threatening to block the access, the indemnification clause takes effect.²⁶ Defendants assert that the Real Estate Ownership Agreement, which concerns the Busler Tract, cannot be construed as applying to a dispute involving a portion of roadway crossing a separate parcel of property, namely the Lehman Farm. The Court is inclined to agree. The foregoing case does not involve a debt, lien, judgment or charge against the Busler Tract. Plaintiffs' quiet title action, although impacting access to the Busler Tract, involves the Lehman Farm property, not the Busler Tract.

Further, as Plaintiffs have acknowledged by their own testimony, Michael and Dorothea Lehman transferred their interest in the Lehman Farm to Kimber Smith and Steven Smith in January of 2018. At the time that Plaintiffs filed their Complaint on October 23, 2018, Michael Lehman no longer had an ownership interest in the Lehman Farm. If Michael Smith had carried out his threat to block the access road in 2018, it would presumably be with the leave of the Smiths, who were then the full

²⁶ Indeed, Defendants assert that as Michael Lehman did not actually take any action to block the access road, Plaintiffs' filing of their claim was premature. However, the Court notes that pursuant to Pa.R.C.P. 1061(b)(2), quiet title actions in general may be commenced "to determine a right, lien, title or interest in the land[.]" Michael Lehman's threat to block the access road raised the issue of whether

owners of the Lehman Farm and would have ultimate authority over whether Plaintiffs could use the access road. However, the Smiths were not parties to the Real Estate Ownership Agreement. The Court therefore DENIES Plaintiffs' claim by Assumpsit.

VERDICT

AND NOW, for the foregoing reasons, the Court hereby finds in favor Plaintiffs Dean S. Lehman, Gene S. Lehman, Wilbert F. Lehman, Sr., and Robert J. Lehman, and against Defendants Steven and Kimber Smith and Michael and Dorothea Lehman as to Count I.

Plaintiffs have established an Easement by Estoppel or Irrevocable License over the access road crossing the Lehman Farm at Tax Parcel 25-247-117. The Defendants and their heirs or assigns are forever barred from asserting any right, lien, title, or interest inconsistent with the interest or claim of Plaintiffs set forth in the Complaint, or otherwise preventing or interfering with Plaintiffs' use of the access road for ingress to or egress from the Busler Tract at Tax Parcel 25-247-116.

Unless Defendants file a timely post-sentence motion within ten (10) days or appeal within thirty (30) days, Plaintiffs may praecipe the Prothonotary for entry of judgment granting quiet title upon the property in accordance with Pa.R.C.P. 1061(b)(2) and further, upon filing of the final judgment with the Prothonotary, Plaintiffs shall record certified copies of this verdict and the final judgment with the Lycoming County Recorder of Deeds.

Ruling on this basis, the Court declines to address Counts II through IV of the Complaint. The Court denies Plaintiffs Count V claim for recovery by Assumpsit. The parties shall bear their own costs.

Plaintiffs had a right to use the portion of the access road crossing the Lehman Farm absent permission.

IT IS SO ORDERED this 22nd day of September 2020.

BY THE COURT,

Eric R. Linhardt, Judge

cc: Marc Drier, Esquire
Charles Rosamilia, Jr., Esquire
241 W Main Street, Lock Haven PA 17745
Gary Weber, Esq. / Lycoming Reporter