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.	:
	: *Plaintiff's Post-Verdict Motion*

ORDER

AND NOW, following review of the Post-Verdict Motion filed by Plaintiff/Counterclaim Defendant Thomas M. Smith ("Plaintiff") in response to the Court's Memorandum Opinion of August 9, 2019 ("Memorandum Opinion"), the Court hereby issues the following ORDER.

Background

The foregoing litigation concerns whether Plaintiff has established an easement allowing passage over a 208 square foot crosshatched parcel ("square parcel") located on the property of Defendant/Counterclaim Plaintiff Christopher W. Barto ("Defendant"). Plaintiff initiated this action by filing a Complaint on April 26, 2017, followed by a First Amended Complaint filed June 16, 2017. Plaintiff's First Amended Complaint alleges easement by necessity and easement by prescription over the square parcel, and raises claims for ejectment and trespass based on Defendant's alleged encroachment onto Plaintiff's land. Plaintiff's action was docketed under CV-17-0688. Defendant filed an Answer, New Matter and Counterclaim on July 18, 2017 asserting Plaintiff could not claim an easement by either necessity or prescription.

Following the close of discovery, Defendant filed a Motion in Limine to Preclude Witness Testimony on July 6, 2018, requesting that the Court preclude testimony of those witnesses not identified during discovery. Following argument, on July 18, 2018 the Court issued an Order Granting Defendant's Motion in Limine. Plaintiff filed a Motion for Reconsideration of the July 18th Order on July 26, 2019. However, before

the Court had the opportunity to hold argument on the Motion for Reconsideration, on August 1, 2018 Plaintiff filed a Praecipe to Discontinue Without Prejudice. While the Court granted the Praecipe to Discontinue, Defendant did not withdraw his counterclaim. The Court thereafter granted Plaintiff's Application for Continuance of the trial then scheduled for the fall 2018 trial term on the basis that Plaintiff was experiencing medical issues requiring surgery.

Thereafter, on October 22, 2018 Plaintiff initiated a new action against Defendant by filing a Complaint under docket CV-18-1541. The allegations in the October 22nd Complaint mirror those raised in Plaintiff's First Amended Complaint filed under docket CV-17-0688. Plaintiff then filed a Motion to Consolidate the actions on December 14, 2018. In his Motion to Consolidate, Plaintiff asserted that he had filed the Praecipe to Discontinue Without Prejudice because of the severity of his medical issues, but was refiling a Complaint in light of Defendant's decision to proceed on his counterclaim. Defendant filed Preliminary Objections to the Complaint on November 11, 2018 raising demurrer as to the legal insufficiency of Plaintiff's easement by necessity claim and demurrer as to the reopening of the action.

On January 22, 2019, following argument on Defendants' Preliminary Objections and Plaintiff's Motion for Consolidation, the Court granted the Motion for Consolidation in part, but held that discovery would not be reopened pending trial. The Court sustained Defendant's first demurrer on the basis that Plaintiff had failed to allege that his property was landlocked and held that Defendant's second demurrer was moot in light of the Court's decision to grant the Motion for Consolidation. Plaintiff thereafter filed an Amendment to Complaint on January 30, 2019 that added the assertion that the northern field is landlocked. Plaintiff also filed a Motion for Reconsideration of the Court's January 22nd Order, arguing that discovery should be reopened. The Court denied Plaintiff's Motion for Reconsideration by Order issued March 15, 2019, reiterating that Plaintiff would not be permitted to call any witnesses whose names had not been provided prior to the close of discovery.

Prior to trial, the parties filed a joint stipulation under which Plaintiff withdrew his claims for trespass and ejectment. A Civil Non-Jury Trial was held June 3 and June 7, 2019. Following trial, this Court issued a Memorandum Opinion ruling that Plaintiff had

failed to establish an easement by either prescription or necessity over the square parcel.

While not contesting the Court's credibility determinations, Plaintiff in his Post-Verdict Motion contends that the Court misapplied the applicable law to the facts within its Memorandum Opinion.[1] Plaintiff first contends that the Court erred in relying upon Restatement (Third) of Property (Servitudes) § 2.17(h) ("section 2.17") in summarizing the factors needed to establish a prescriptive easement, as section 2.17 has not been adopted by the Pennsylvania appellate courts.[2] Next, Plaintiff contends that the Court erred in placing the burden on Plaintiff to prove that his use of the square parcel was sufficiently substantial to put Defendant on notice, when lack of awareness due to insufficiency of use constitutes an *affirmative defense*, which Defendant never raised.[3] Finally, Plaintiff contends that the Court erred in failing to find the existence of an easement by necessity when Plaintiff and his expert demonstrated at trial that the square parcel is the sole method available to access the northern field by vehicle.[4]

Analysis

1) <u>Did the Court err in relying upon Restatement (Third) of Property (Servitudes) § 2.17(h)?</u>

To establish an easement by prescription in Pennsylvania, a party must establish: "(1) adverse, (2) open, (3) notorious, (4) continuous and uninterrupted use for a period of 21 years."[5] This Court in its Memorandum Opinion held that Plaintiff had failed to meet his burden of establishing that his use of the square parcel was open and notorious for the period of twenty-one (21) years.[6] The Court provided several bases for determining that Plaintiff had failed to meet the open and notorious requirement, supported in part by illustrations derived from section 2.17. First, the Court held that Plaintiff failed to provide credible testimony that his intrusions on the square parcel

[1] Plaintiff's Brief in Support of Post-Verdict Motion 1 (Sept. 23, 2019) ("Plaintiff's Brief in Support").
[2] Plaintiff's Brief in Support at 2.
[3] Plaintiff's Brief in Support at 6.
[4] Plaintiff's Brief in Support at 7.
[5] *Burkett v. Smyder*, 535 A.2d 671, 673 (Pa. Super. 1988).
[6] *Smith v. Barto*, CV-17-0688 / CV-18-1541; Memorandum Opinion ¶ 38 (Aug. 9, 2019) ("Memorandum Opinion") (citing RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17(h) (2000)).

would have been apparent to a reasonably diligent landowner.[7] Next, the Court held that Plaintiff failed to provide credible testimony that Plaintiff's use was of such frequency as to provide Defendant with a reasonable opportunity to become aware of it.[8] Finally, the Court held that the record was devoid of testimony that Defendant knew of Plaintiff's use of the square parcel prior to 2016, or that Plaintiff's use was widely known to the neighborhood.[9]

Plaintiff asserts in his Post-Verdict Motion that in relying upon section 2.17 and illustrative cases from other jurisdictions, the Court has applied a heightened standard not adopted by the Pennsylvania appellate courts. Plaintiff correctly identifies that while the Pennsylvania appellate courts have adopted certain sections of the Restatement of Property,[10] the courts have declined to apply other sections of the Restatement inconsistent with Pennsylvania law.[11] Additionally, Plaintiff argues that several of the Pennsylvania cases cited by the Court in its Memorandum Opinion are not applicable to the current issue, as those cases involve expressly granted easements,[12] adverse possession of land as opposed to an easement,[13] or the expansion of a preexisting easement.[14]

This Court's own review has failed to identify any Pennsylvania appellate court decisions that cite directly to section 2.17. The Court finds that certain requirements for establishing open and notorious use cited by the Court in the Memorandum Opinion, specifically the requirement that the use be actually known to the owner or widely

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[7] Memorandum Opinion ¶ 39 (citing RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17(h), illus. 25 (2000) (tire tracks evident for several weeks after the plaintiff's use at an entry point to the owner's property demonstrated open and notorious use)).
[8] Memorandum Opinion ¶ 40 (citing 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)).
[9] Memorandum Opinion ¶ 41.
[10] Plaintiff's Brief in Support at 4 (citing *PARC Holdings v. Killian*, 785 A.2d 106 (Pa. Super. 2001) (adopting section 4.10 of the Restatement)).
[11] Plaintiff's Brief in Support at 5 (citing First *Commonwealth Bank v. Heller*, 863 A.2d 1153, 1157-58 (Pa. Super. 2005) (finding Restatement section 7.6 "compelling and very persuasive" but inconsistent with Pennsylvania law)).
[12] Plaintiff's Brief in Support at 4 (referencing the Court's citation to *PARC Holdings*, *supra* n.10).
[13] Plaintiff's Brief in Support at 4 (referencing the Court's citation to *Brennan v. Manchester*, 708 A.2d 875 (Pa. Super. 1998)).
[14] Plaintiff's Brief in Support at 4 (referencing the Court's citation to *Bodman v. Bodman*, 321 A.2d 910 (Pa. 1970)).

known to the neighborhood,[15] implemented a more stringent standard than that required under Pennsylvania law. In light of this finding, the Court must determine whether Plaintiff has provided sufficient evidence demonstrating that his use of the square parcel was "open and notorious" under the applicable Pennsylvania law.

Under Pennsylvania law, to establish open and notorious use, a party seeking to establish a prescriptive easement must demonstrate "either that the land owner against whom the use is claimed has actual notice of the use or has had a reasonable opportunity to learn of its existence."[16] The close proximity of the property-owner's residence to the property against which the use is claimed may satisfy the open and notorious requirement.[17] Strong continuity and frequency of use can also satisfy the open and notorious requirement.[18] The presence of physical alterations to the property due to the use may also satisfy the open and notorious requirement.[19]

The Court affirms its prior holding that Plaintiff has failed to provide sufficient evidence that his use of the square parcel to access the northern field was open and notorious, providing Defendant a reasonable opportunity to become aware of such use. While the square parcel is within close proximity of Defendant's home,[20] the Court holds that this level of proximity alone is not sufficient to satisfy the open and notorious requirement. While the Court credited testimony that Plaintiff, Plaintiff's agent Edward France, and Plaintiff's family used the square parcel "for an indeterminable quantity and duration" between 1990 to 2016 to access the northern field for hunting and maintenance,[21] the Court found that the lack of evidence as to the frequency of this use failed to support a finding that a reasonably diligent landowner would be on notice of the

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[15] Memorandum Opinion ¶ 35.
[16] *Koresko v. Farley*, 844 A.2d 607 (Pa. Commw. 2004) (interpreting Restatement (Third) of Property (Servitudes) § 458 within the prescriptive easement context).
[17] *See Adshead v. Sprung*, 375 A.2d 83 (Pa. Super. 1977) (finding that plaintiff's use of driveway was "open and notorious" as driveway was located immediately adjacent to defendants' property).
[18] *See Baslego v. Kruleskie*, 162 Pa. Super. 174 (Pa. Super. 1948) (testimony that gateway, steps, and areaway were used as a means of ingress and egress to appellee's home continuously for 39 years, sometimes two to three times a day, satisfied the open and notorious requirement).
[19] *Gehres v. Falls Twp.*, 948 A.2d 249 (Pa. Commw. 2008) (Township's installation and periodic cleaning of drainage pipes on the property under dispute satisfied open and notorious requirement).
[20] *See Adshead v. Sprung*, 375 A.2d 83 (Pa. Super. 1977); People's Natural Gas Co., LLC v. Camesi, No. 1502 WDA 2016; 2017 WL 3711063 (Pa. Super. Aug. 29, 2017) (holding that plaintiff's use of driveway immediately adjacent to defendants' property was sufficient to satisfy notorious requirement).
[21] *See* Memorandum Opinion ¶¶ 13-19.

use.[22] The Court also determined that there was no physical evidence of Plaintiff's use of the square parcel prior to 2016. The only testimony that the Court credited as to this matter was Defendant's assertion that that he first discovered tire tracks on the square parcel in 2016, after which he spoke with Plaintiff and expressly denied access over the square parcel.[23]

Plaintiff cites the Pennsylvania Superior Court's decisions in *Matakitis v. Woodmansee* and *Burkett v. Smyder* for the proposition that use a few times per year may support a prescriptive easement.[24] However, the *Burkett* Court explicitly focused on the "open and continuous" elements of establishing a prescriptive easement.[25] The *Matakitis* Court similarly focused on whether infrequent use can satisfy the continuity requirement.[26] These cases stand for the proposition that infrequent but regular use may satisfy the *continuity* requirement of the four-factor test for establishing a prescriptive easement. However, they do not establish that such infrequent use would be sufficient to satisfy the *notoriety* requirement.

"The party asserting a prescriptive easement must demonstrate each element of such an easement by proof that is clear and positive."[27] The Court holds that Plaintiff has failed to satisfy the notoriety requirement by providing clear and positive evidence that Defendant had a reasonable opportunity to become aware of Plaintiff's use of the square parcel.

2) <u>Did the Court err in placing the burden on Plaintiff to demonstrate that he used the square parcel with sufficient frequency as to put Defendant on notice?</u>

The party seeking to establish a prescriptive easement bears the burden of proving each element – adverse, open, notorious, continuous and uninterrupted for twenty-one

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[22] *See* Memorandum Opinion ¶ 40.
[23] *See* Memorandum Opinion ¶ 39.
[24] Plaintiff's Brief in Support at 5 (citing *Matakitis v. Woodmansee*, 667 A.2d 228 (Pa. Super. 1995) (use of right of way three to four times a year sufficient to establish prescriptive easement); *Burkett v. Smyder*, 535 A.2d 671 (Pa. Super. 1988) (use of roadway several non-specified times a year sufficient to establish prescriptive easement)).
[25] *Burkett*, 535 A.2d at 672.
[26] *See Matakitis*, 667 A.2d at 231. Before holding that appellees met the four standards required to establish a prescriptive easement, the Superior Court defined the standard for establishing continuity of use. It is not clear from opinion itself whether appellants had actual notice of the use.

(21) years – by clear and positive evidence.[28] It is only after that party has established all four elements that the burden then shifts to the owner of the servient estate to assert an affirmative defense, such as that the use of the servient estate was through agreement or permission.[29] Defendant was not required to raise Plaintiff's infrequency of use as an affirmative defense because Plaintiff bore the burden of first establishing the "notorious" element of his claim. Frequency of use is one element supportive of a finding that a use was "notorious." Therefore, the Court affirms that the burden was on Plaintiff to demonstrate that his use of the square parcel was of such frequency as to put a reasonable person on notice.

3) <u>Did the Court err in failing to find an easement by necessity?</u>

Within Pennsylvania, "[a]n easement by necessity is always of strict necessity."[30] Strict necessity requires that no portion of the singular property have access to a public road. "Allowing an individual to use the doctrine of easement by necessity to ensure that each portion of his or her singular property has access to a public road would be far too expansive for this intrusive doctrine."[31] As noted by the Court in its Memorandum Opinion, the fact that Plaintiff's property has access to a public road precludes the doctrine of easement by necessity.[32]

Additionally, Plaintiff has failed to establish that access to his property is legally impossible and that he is therefore "landlocked," implicating strict necessity. While the Pennsylvania Supreme Court has recently held that strict necessity may apply "[w]here it is manifestly impracticable, even though theoretically possible, to create ingress and egress across one's own property[,]"[33] the burden falls upon the party seeking to establish the easement by necessity to show why creating methods of alternate access would be manifestly impracticable.[34] Plaintiff did not provide any evidence at trial

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[27] *Burkett*, 535 A.2d at 673.
[28] *See Kaufer v. Beccaris*, 584 A.2d 357 (Pa. Super. 1991).
[29] *Id.*
[30] *Graff v. Scanlan*, 673 A.2d 1028, 1032 (Pa. Commw. 1996).
[31] *Phillipipi v. Knotter*, 748 A.2d 757, 760 (Pa. Super. 2000).
[32] Memorandum Opinion ¶ 27 (citing *Phillipipi*, 748 A.2d at 761).
[33] Bartkowski v. Ramondo, No. 60 MAP 2018, 2019 WL 5607447, at * 9 (Pa. Oct. 31, 2019) (pub. pending).
[34] Id. at * 10 ("The burden to establish the necessity for an easement across the property of one's neighbor falls squarely upon on the shoulders of the party seeking it.").

regarding the cost or practicability of obtaining a permit to construct a bridge over the streams bisecting his property, which would enable passage to the north field. The Court cannot find based on the evidence of record that Plaintiff has established a claim for an easement by necessity.

Conclusion

Pursuant on the foregoing Opinion, Plaintiff's Post-Verdict Motion is DENIED.

IT IS SO ORDERED this 15th day of January 2020.

BY THE COURT:

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Eric R. Linhardt, Judge

cc:
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