IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MATTHEW OKKELBERG, Plaintiff	:	No. 21-01104
vs.	:	CIVIL ACTION – LAW
ARCHITECTURAL DEVELOPMENT, LLC, Defendant	:	

OPINION AND ORDER

AND NOW, this 24th day of October 2022, following an evidentiary hearing on Defendant's Preliminary Objection to the Complaint raising the question of actual possession of the Disputed Property, the Court hereby issues the following OPINION and ORDER.

BACKGROUND

Plaintiff commenced this action by filing a Complaint on October 29, 2021. The Complaint alleged that Plaintiff and Defendant own adjoining properties in Montgomery ("Plaintiff's Parcel" and "Defendant's Parcel"). The Complaint alleges that both parties claim ownership of a strip of land along the boundary between the properties (the "Disputed Property"). The Complaint avers that the deed granting Plaintiff ownership of Plaintiff's Parcel and the deed granting Defendant ownership of Defendant's Parcel each purport to convey the Disputed Property to the respective grantee.

Plaintiff attached a prior deed to Plaintiff's Parcel as Exhibit A and the most recent deed to Defendant's Parcel as Exhibit B. Exhibit A is a May 30, 2015 deed

between grantor The Lightning Group, Inc. and Joseph F. and Eileen S. Okkelberg.[1] Exhibit A describes a single trapezoidal parcel; Plaintiff avers that the Disputed Property constitutes the easternmost portion of this parcel. Exhibit B is a November 17, 2004 quitclaim deed between grantor Brodart Co. and Defendant. Exhibit B purports to transfer two separate pieces of land to Defendant: "Parcel No. 1" to the east and "Parcel No. 2" to the west. Plaintiff avers that "Parcel No. 2" is the Disputed Property.

The Complaint ultimately contends that Plaintiff's title to the Disputed Property is superior to Defendant's title. The Complaint contains three counts: Count I – Action to Quiet Title; Count II – Ejectment; and Count III – Declaratory Judgment.

On November 29, 2021, Defendant filed a single Preliminary Objection to the Complaint in the nature of a demurrer.[2] Defendant contends that it has "been in undisputed physical possession of" the Disputed Property since it obtained title to Defendant's Parcel in 2004, and that its predecessors in interest were in possession of the Disputed Property for at least four years prior to that transfer. Noting that "the plaintiff in an action to quiet title must be in possession of the land in controversy; if he is out of possession, his sole remedy is an action in ejectment,"[3] Defendant's

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[1] As noted below, following the death of Joseph F. Okkelberg, Eileen S. Okkelberg deeded Plaintiff's Parcel to Plaintiff on August 10, 2021.
[2] Pa. R.C.P. 1028(a)(4) permits preliminary objections raising the grounds of "legal insufficiency of a pleading (demurrer)."
[3] Defendant cites *Plauchak v. Boling*, 653 A.2d 671, 675 (Pa. Super. 1995) for this proposition.

Preliminary Objection argues that the Court must dismiss Count I of the Complaint, sounding in quiet title because Plaintiff is not in possession of the Disputed Property.

Plaintiff filed an Answer to the Preliminary Objection on December 3, 2021 and a Brief in Support of the Answer on December 16, 2021. The essence of Plaintiff's Answer is that Rule of Civil Procedure 1020(c) allows "causes of action and defenses [to] be pleaded in the alternative," and Plaintiff intended to bring the quiet title and ejectment actions in the alternative.

The Court heard argument on Defendant's Preliminary Objection on February 14, 2022 and issued an Order on February 22, 2022. The Court agreed with Defendant that a plaintiff may not maintain simultaneous causes of action for quiet title and ejectment, as under Pennsylvania law, "[w]hen both parties claim they are in possession of the same piece of land, 'the trial court must determine which party exercised dominion and control over the property before determining what is the proper form of action in such a case.'"[4] Counsel for both parties agreed that the Court should hold an evidentiary hearing "to determine which party was in possession of the disputed piece of property" following discovery. The Court scheduled the evidentiary hearing for May 25, 2022.

EVIDENTIARY HEARING ON POSSESSION

At the evidentiary hearing, Plaintiff first called Jenny Johnson ("Johnson"), a paralegal at the law firm representing Plaintiff, to identify Plaintiff's Exhibits 1 through

[4] *Moore v. Duran*, 687 A.2d 822 (Pa. Super. 1996).

16.[5] Plaintiff's Exhibits 1 through 4 consist of a series of four deeds establishing a chain of title in the portion of Defendant's Parcel described in Exhibit B to the Complaint as Parcel No. 1 as follows:

- Plaintiff's Exhibit 1: December 19, 2003 deed from Brodart Co. to Defendant.
- Plaintiff's Exhibit 2: July 1, 1983 deed from Brodart Industries of Pennsylvania to Broco.[6]
- Plaintiff's Exhibit 3: May 24, 1965 deed from Samart Corporation to JAD Corp.[7]
- Plaintiff's Exhibit 4: November 9, 1959 deed from Leonard Furniture Company to Samart Corporation.

None of the four deeds in this title mentioned the parcel described in Exhibit B to the Complaint as Parcel No. 2, or otherwise referred to the Disputed Property.

Plaintiff's Exhibit 5 is the November 17, 2004 quitclaim deed from Brodart Co. to Defendant previously attached to the Complaint as Exhibit B. As noted above, Plaintiff's Exhibit 5 differs from Plaintiffs' Exhibits 1 through 4 in that it purports to transfer not just Parcel No. 1 but also Parcel No. 2, the Disputed Property, to Defendants. Johnson testified that Plaintiff's Exhibit 5 does not state why Brodart Co. believed it had title to Parcel No. 2 as of November 17, 2004.

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[5] The Court took judicial notice of Plaintiff's Exhibits 1 through 5 and 8 through 14, which were each deeds filed of record in Lycoming County.
[6] Plaintiff's Exhibit 1 explains that Broco changed its name to Brodart Co. on July 2, 1983.
[7] Plaintiff's Exhibit 2 explains that JAD Corp. merged two other companies to form Bro-Dart Industries of Pennsylvania on December 22, 1971.

Plaintiff's Exhibit 6 is a map Johnson created to illustrate the relative size and location of Parcel No. 1 and Parcel No. 2. This map indicates that Parcel No. 2 is a thin strip of land bordering the western edge of Parcel No. 1. The map states "per [the description in Plaintiff's Exhibits 1 through 4], western line of Parcel 1 runs along land n/f of 'Eastern Furniture Manufacturing Company' (aka [Plaintiff's] predecessor in title)."

Plaintiff's Exhibit 7 is a print-out of tax assessment information for Montgomery Borough parcel 35-006-603, which is Defendant's Parcel. Johnson highlighted that the tax assessment describes Defendant's Parcel as consisting of 5.56 acres, and testified that Parcel No. 1 – without Parcel No. 2, the disputed property – consists of 5.5561 acres, which rounds to 5.56.[8]

Plaintiff's Exhibits 8 through 14 consist of a series of seven deeds establishing a chain of title to Plaintiff's Parcel as follows:

- Plaintiff's Exhibit 8: August 10, 2021 deed from Eileen S. Okkelberg to Plaintiff.
- Plaintiff's Exhibit 9: May 30, 2015 deed from The Lightning Group, Inc. to Joseph F. Okkelberg and Eileen S. Okkelberg.
- Plaintiff's Exhibit 10: May 5, 2015 Deed from the Lycoming County Industrial Development Authority to The Lightning Group, Inc.
- Plaintiff's Exhibit 11: January 15, 1975 deed from Rochelle Furniture Mfg. Co. to the Lycoming County Industrial Development Authority.

[8] Thus, Plaintiff suggests that Defendant has been paying taxes solely on the portion of Defendant's Parcel consisting of Parcel No. 1, and not on Parcel No. 2, the Disputed Property.

- Plaintiff's Exhibit 12: February 2, 1947 deed from Frank Irvin and Ferol W. Irvin to Rochelle Furniture Mfg. Co.

- Plaintiff's Exhibit 13: June 29, 1945 deed from Eastern Furniture Mfg. Co. to Frank Irvin.[9]

- Plaintiff's Exhibit 14: February 17, 1944 deed from The Lycoming Upholstering Company to Eastern Furniture Mfg. Co.

Plaintiff's Exhibit 15 is a map created by Johnson to illustrate Plaintiff's Parcel. Plaintiff attached this map to the Complaint, contending that the easternmost portion of the parcel illustrated by this map is the Disputed Property.

Plaintiff's Exhibit 16 is a print-out of tax assessment information for Montgomery Borough parcel 35-006-604, which is Plaintiff's Parcel. Johnson highlighted that the tax assessment describes Plaintiff's Parcel as consisting of 2.39 acres, and testified that Plaintiff's Parcel as illustrated in Plaintiff's Exhibit 15 – which includes the Disputed Property – consists of 2.3854 acres, which rounds to 2.39.[10]

Johnson testified that based upon her review, the metes and bounds in Plaintiff's Exhibits 8 through 14 are consistent and contain the Disputed Property.

On cross-examination, Johnson explained that her job consists largely of conducting title searches, which she has been doing for twelve years. Johnson stated she creates maps like Plaintiff's Exhibits 6 and 15 for each title search she

[9] Exhibit 12 states that Ferol W. Irvin was Frank Irvin's wife; the Court assumes for this analysis that the parcel became the marital property of Frank and Ferol W. Irvin by operation of law without the need for an additional transfer.

[10] Thus, Plaintiff suggests that he and his predecessors in interest have been paying taxes on the Disputed Property, which the Montgomery Borough tax assessment authority considers to be part of Plaintiff's Parcel and not Defendant's Parcel.

does, and does so utilizing the descriptions of the property contained in the deeds themselves.

Plaintiff's second witness was Daniel A. Vassallo, P.L.S.[11] ("Vassallo"), whom Plaintiff called as an expert.[12] Vassallo testified that he became a surveyor in 1978, and since then has conducted thousands of surveys and testified as an expert witness more than a dozen times. Vassallo explained that Plaintiff hired him to perform a boundary line survey between Montgomery Borough Tax Parcels 35-006-604 (Plaintiff's Parcel) and 35-006-603 (Defendant's Parcel). To do so, he reviewed the deeds forming the chains of custody of the two properties, visited the site twice, and analyzed the metes and bounds describing the properties. He stated that he personally spent less than an hour at the site, but he and his employees spent approximately seven or eight hours at the site in total conducting a physical assessment of the boundary line.

Plaintiff introduced two prior surveys as Plaintiff's Exhibits 17 and 18. Plaintiff's Exhibit 17 is a survey of Parcel 35-006-604 from 1924 by Mark Krause, showing subdivisions of what was then the "Miller Estate." Plaintiff's Exhibit 18 is a 2018 survey prepared by Timothy Wentz and Wentz Surveying for Defendant (the "Wentz Survey"). Vassallo pointed out that the Wentz Survey depicts a gravel drive

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[11] Professional Land Surveyor.

[12] Defendant objected to the admission of Vassallo's expert testimony, indicating that it was not aware that Plaintiff planned to offer such testimony at the evidentiary hearing. Defendant agreed that Plaintiff had provided a copy of Vassallo's expert report approximately a month before the hearing, but argued that Plaintiff had not given notice that the report pertained to the issue of possession rather than the merits of the case generally. The Court overruled Defendant's objection and allowed Vassallo to provide expert testimony.

within a thin strip of land west of the building on Defendant's Parcel.[13] Vassallo explained that this is the same strip of land described as Parcel No. 2 in Plaintiff's Exhibit 5.

Plaintiff next introduced Plaintiff's Exhibit 19, a survey prepared by Vassallo on April 28, 2022. Vassallo explained that he found no support for the position that Defendant has title for Parcel No. 2, and believes that it properly belongs in Plaintiff's Parcel. Furthermore, Vassallo testified that he believes the Wentz Survey contains a handful of errors, most notably setting the boundary between Parcel No. 1 and Parcel No. 2 approximately four feet west of its actual location.[14] In doing so, Plaintiff argues, the Waltz Survey indicates that Defendant's Parcel extends four feet farther west than it actually does. Vassallo testified that whereas the Wentz survey indicates the building on Defendant's Parcel comes within 0.7 feet of the boundary between Parcel No. 1 and Parcel No. 2 but does not cross it, Vassallo believes that the building on Defendant's Parcel actually does cross the boundary between Parcel No. 1 and Parcel No. 2 by a few feet.[15] In other words, because Vassallo believes

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[13] Plaintiff's Exhibit 18 contains an annotation of this strip of land that reads "deed overlap - see note 1." Note 1 states "Both deeds indicated overlap of the same area. The Okkelberg deed recorded June 4, 2015 includes this area as part of the only tract mentioned. There is no exception indicated on their deed. The Architectural Development, LLC quitclaim deed was recorded on December 22, 2004 and includes Parcels 1 & 2 as shown. The previous deed in the Parcel 1 chain of title did not include Parcel 2. There is no reference to a previous deed in any chain of title in the recital for Parcel 2. It is necessary to consult with an attorney to determine if Architectural Development, LLC has title to Parcel 2 as shown."

[14] Specifically, Vassallo contends that the Wentz Report placed the southern corner of this boundary 3.84 feet west of its actual location and the northern corner of this boundary 4.17 feet west of its actual location, with the error in the interior of the boundary gradually increasing between those two figures as one travels northward.

[15] Because Plaintiff avers that Parcel No. 2, the disputed property, is his, based on the Vassallo survey he believes that Defendant's building actually encroaches onto his property.

Plaintiff owns Parcel No. 2 (the Disputed Property), Vassallo believes that a sliver of Defendant's building rests on Plaintiff's land.

On cross-examination, Vassallo clarified that he also reviewed a 2004 survey by Larson Design Group that Plaintiff did not submit as an exhibit. Vassallo suggested that this survey was the first time Parcel No. 2 was delineated. Vassallo testified that he did not observe Defendant use the gravel driveway located on the Disputed Property during his brief time at the site. He stated that Plaintiff can access the gravel driveway from his property, although two telephone poles are located west of the gravel driveway, on the western boundary of Parcel No. 2. Vassallo explained that he had never been to these particular properties before this survey, though he had previously performed surveying work in the nearby area.

At this point, Plaintiff introduced Plaintiff's Exhibits 21, 22, and 23, which are the transcripts of the April 5, 2022 depositions of Lynn Whitmoyer, Stephen Bolinsky, and Nathan Morris, respectively, each employees of Construction Specialties, a company closely affiliated with Defendant.

Next, Plaintiff testified. He explained that Plaintiff's Parcel contains a number of buildings. The largest of these contains two stories of approximately 15,000 square feet each, and was formerly a furniture factory but is now essentially a warehouse. Other buildings on Plaintiff's Parcel include "old kilns" and a building currently rented by the Montgomery Area Emergency Management Agency. Plaintiff testified that his father began renting space in the main building and running a flea

market there in 2013 or 2014 before purchasing the entire property from the previous owner, Lightning Group, Inc., on May 30, 2015.

Plaintiff testified that he began visiting the property when his father began renting space there, helping his father move items into and out of the building. He stated that they used the gravel drive on the Disputed Property to access the rear of the main building weekly, and that while his father ran the flea market their use of the gravel drive was never interrupted, challenged or contested. Plaintiff stated that he did not recall ever seeing anyone else use the gravel drive. Plaintiff explained that after his father passed away in 2019, he continued to use the gravel drive to load items into and haul items away from the main building. Plaintiff clarified that he occasionally saw maintenance workers on the gravel drive and observed a UGI Utilities truck there on a single occasion, but never observed any other vehicles on the drive.

Plaintiff introduced Plaintiff's Exhibits 24 through 33, consisting of photographs of the property, buildings and gravel drive, illustrating the various buildings and features to which the witnesses and exhibits had previously referred. Plaintiff reiterated that prior to this lawsuit no one had ever challenged his use of the drive or suggested that Plaintiff does not own the Disputed Property.

On cross-examination, Plaintiff testified that he had never asked Defendant not to use the gravel drive or told Defendant that he believed portions of their buildings jutted into Plaintiff's Parcel. Plaintiff explained that he does not maintain the gravel driveway itself but does trim the grass and weeds west of the drive. He

clarified that he had never seen any employees of Defendant on the gravel drive, though he assumed they did some work to maintain it. Plaintiff similarly assumed that at least some of the maintenance workers he has seen on the gravel drive were contractors there to do work on behalf of Defendant, including plowing snow from the drive.

When asked if Defendant might be consistently utilizing the gravel drive when Plaintiff is not there, Plaintiff suggested that this was unlikely, noting that he is now typically at the property five days a week, although he spends most of his time there inside. Plaintiff explained that he has gradually installed a number of security cameras on the property, but these cameras only store video for 48 hours to 2 weeks before the files are overwritten.

Plaintiff agreed that Defendant placed a "no trespassing" sign at the front of the gravel drive, explaining that the sign had been there since he began visiting the property in 2013 or 2014. Plaintiff testified that he has not followed that instruction and does not know its legal effect. Plaintiff explained that, because of the sign, he previously hesitated to maintain the gravel drive, only doing so when "desperately needed."

At this point, the Court admitted Plaintiff's Exhibits 1 through 19 and 21 through 33, and Plaintiff rested.

In lieu of presenting live testimony, Defendant proposed, and Plaintiff stipulated, that the Court consider the following specific portions of the three depositions marked as Plaintiff's Exhibits 21 through 23:

- Deposition of Stephen Bolinsky: Pages 20 through 24.
- Deposition of Lynn Whitmoyer: Pages 8 through 19.
- Deposition of Nathan Morris: Pages 11 through 19.

At his deposition, Stephen Bolinsky ("Bolinsky") testified that he has been an employee of Construction Specialties ("CS"), which is a corporate entity related to Defendant, since 2012. He stated that from that time to the beginning of the COVID-19 pandemic in 2020, he visited Defendant's Parcel monthly.

Regarding the Disputed Property, Bolinsky testified that he would occasionally visually inspect the exterior of the building on Defendant's Parcel, which required him to walk down the gravel drive. He explained that CS employees would use the gravel drive to service the building's exterior, as well as to place gravel and plowing snow to maintain the drive, and that Lynn Whitmoyer and Nate Morris would be able to provide more detail concerning this maintenance work. Bolinsky noted that the gravel drive was also the only means of access to the building's handicap ramp, which predated Bolinsky's employment with CS, though the building is not publically accessible and he was not aware of any CS employee who needed to use the ramp to access the building. Bolinsky elaborated that he believes the ramp is there to comply with legal requirements. Bolinsky was not aware of any other use of the gravel drive by CS.

Lynn Whitmoyer ("Whitmoyer") testified at his deposition that he began working with CS in 1992 and recently became maintenance supervisor, in charge of maintenance at all CS facilities including Defendant's Parcel. He explained that

since CS began using the facility in 2004 until his recent change in title, his maintenance duties were unchanged and included performing maintenance work at Defendant's Parcel.

Whitmoyer stated that he was not involved in the creation of the Wentz Survey, but had seen it after learning of the dispute over the ownership of the Disputed Property. He testified that he and other CS workers have "traveled back and forth across that drive for maintenance purposes" for years, noting that there are air conditioning units along the side of the building facing the drive. He explained that he has also used the drive to take a snow blower to the handicap ramp, bring boiler service equipment to the boiler room in the rear of the building, and haul material to the rear of the building to build a portion of a deck.

Whitmoyer explained that CS installed the handicap ramp, as well as a nearby handicap parking space, around the time they began using the building in order to comply with the ADA. Whitmoyer agreed that the building is not open to the public, and was not aware of anyone who needed to use the handicap ramp to access the building. He stated that the handicap ramp is sometimes the easiest way to get machines and snow removal equipment in and out of the building, but did not know of any other ways in which CS used the ramp. Whitmoyer stated he was aware that CS occasionally brings in stone for upkeep of the gravel driveway, but he was not personally involved in that process. Whitmoyer believed utilities providers may use the gravel drive to access electric poles but had not personally observed this.

Whitmoyer explained that he did not personally do work along the side of the building facing the gravel drive, but had observed other employees performing work there. He testified that CS must occasionally repaint the building's siding, though he did not know how often this occurred or whether the building had been painted in the last ten years. He reiterated that he was aware of CS adding stone to the gravel driveway and plowing snow from the gravel driveway, and stated that when Steam Specialties performs annual maintenance on the building's boiler room they drive a truck down the gravel drive.

At Nathan Morris's ("Morris") deposition, he testified that he has worked for CS since 1995, and as part of his present duties he visits Defendant's Parcel approximately weekly. He explained that he has walked along the gravel drive for building inspections separate from those performed by Bolinsky. Morris testified he was aware of CS using the gravel drive to access the handicap ramp, service the building, including its air conditioning units and electrical system, and replace siding. He stated that Whitmoyer would schedule servicing, but most exterior building maintenance projects were contracted to other companies.

Morris agreed that the building is not open to the public and he was not aware of any CS employee who needed to use the handicap ramp to access the building; his understanding was that it was installed to comply with legal requirements. He stated he has used the ramp approximately ten to fifteen times to access the building while doing maintenance work in that area. The only other use of the ramp Morris was aware of was occasional movement of equipment into and out of the

building, though he did not recall exact dates on which that occurred. Specifically, Morris agreed that no product created at the facility is moved in or out of the building via the handicap ramp and gravel driveway for shipping purposes. Morris clarified that the handicap ramp had already been installed when he visited Defendant's Parcel for the first time in 2006.

At the conclusion of the evidentiary hearing, Defendant argued that it had used the gravel drive since 2003, and believed its predecessor in interest had used the drive as well. From that time until the commencement of this action, Defendant claimed, no one had ever told Defendant it was not permitted to use the gravel drive.

Plaintiff characterized Defendant's use of the gravel drive as an intermittent trespass, which Plaintiff argued is insufficient to establish ownership or possession. Plaintiff argued that because no one has ever used the handicap ramp for its intended purpose, Defendant's use of the gravel drive has been intermittent and solely for convenience. Plaintiff contended that his claim of title to the Disputed Property is clearly superior to Defendant's, and noted that he has used the gravel drive weekly to access his own property. During that time, Plaintiff argued, no one ever told him that he was not permitted to do so, fenced or chained off the drive, or otherwise restricted his use of the drive. Plaintiff suggested that, because the testimony and evidence establishes that Plaintiff is the title owner of the Disputed Property and Defendant's building sits partially upon the Disputed Property, he must maintain an ejectment action for that portion of the building. With regard to the

gravel drive, however, Defendant did not possess it or the remainder of the disputed property that did not contain portions of Defendant's building.

ANALYSIS

The Supreme Court of Pennsylvania has explained that "the issue of possession is inextricably linked to jurisdiction in an Action in Ejectment," because such an action "can succeed only if the plaintiff is out of possession, and if he has a present right to immediate possession."[16] When parties dispute the ownership of land, there are three forms of action a party may bring, depending on whether either party has possession, and thus a right to ejectment. If the plaintiff is out of possession but believes he possesses the right to immediate possession, he may properly bring an action in ejectment. If the plaintiff is in possession but the defendant could institute an action in ejectment – that is, if the *defendant* is out of possession but believes he has the present right to immediate possession – the plaintiff's appropriate form of action is an action to quiet title under Rule of Civil Procedure 1061(b)(1) "to compel an adverse party to commence an action of ejectment...." If *neither* party may bring an action in ejectment, then the plaintiff may appropriately institute an action to quite title under Rule 1061(b)(2) "to determine any right, lien, title or interest in the land or determine the validity or discharge of any document, obligation or deed affecting any right, lien, title or interest in land...." Because possession is a jurisdictional issue governing which form of action a

[16] *Siskos v. Britz*, 790 A.2d 1000, 1008 (Pa. 2002).

plaintiff may institute, a party may not bring these three actions in the alternative.[17] Rather, a court must first determine which party has actual possession of the disputed property.

"There is no precise definition of what constitutes possession of real property," and "the determination of possession is dependent upon the facts of each case, and to a large extent upon the character of the land in question."[18] Generally, "actual possession of land means dominion over the property; it is not the equivalent of occupancy."[19] Consistent actions "which would characterize an owner's use," such as "cutting the lawn and... planting and maintaining... plants" is generally sufficient to establish possession.[20]

To determine which form of action is appropriate here, the Court must determine whether Plaintiff or Defendant is in possession of the Disputed Property. The evidence shows that Plaintiff has good chain of title to the Disputed Property, and Montgomery Borough appears to include the Disputed Property in Plaintiff's Parcel for tax purposes. Although Defendant may ultimately marshal some explanation for why the November 17, 2004 quitclaim deed includes the Disputed Property as Parcel No. 2, no such evidence appears of record at present. It is

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[17] *Id.*

[18] *Moore*, 687 A.2d at 827 (Pa. Super. 1996).

[19] *Id.*

[20] *Glenn v. Shuey*, 595 A.2d 606, 611 (Pa. Super.) (overruled on other grounds). Although the Supreme Court of Pennsylvania abrogated the primary holding of *Glenn* in *Zeglin v. Gahagen*, 812 A.2d 558, 562 (Pa. 2002), the Court in that case agreed that "occupancy with open manifestations of ownership" is generally sufficient to establish possession.

similarly undisputed that Plaintiff has used the gravel drive approximately weekly to access his building for eight or nine years.

The evidence also shows, however, that Defendant has used the gravel drive consistently, if not exactly frequently, for nearly two decades. During this time, Defendant has performed maintenance of the gravel drive, plowing snow and adding rocks. Plaintiff testified that until recently, Defendant's no trespassing sign discouraged him from performing his own maintenance of the gravel drive. Maintenance workers employed by CS testified that they have used the gravel drive to move equipment into and out of Defendant's building as well as to visually inspect and perform maintenance on the west side of the building. Additionally, although the surveys admitted into evidence disagree, Plaintiff's expert testified that Defendant's building extends into the Disputed Property by a few feet; Defendant presented no expert or lay testimony to rebut this conclusion.

The Court finds that Defendant is in possession of the Disputed Property. Although both parties have consistently used the gravel drive to move items into and out of their buildings for years, Defendant has been performing maintenance on the gravel drive whereas Plaintiff has not. Defendant's no trespassing sign, whether referring to the gravel drive specifically or Defendant's Parcel generally, was placed in such a way as to discourage Plaintiff from performing maintenance on the gravel drive. Finally, the evidence suggests that Defendant's building physically encroaches onto the Disputed Property. Each of these factors is characteristic of an *owner's* use of property. Conversely, Plaintiff's use of the gravel drive is more

consistent not with ownership but with entitlement to a prescriptive easement, which is characterized by "a settled course of conduct that indicates an attitude of mind on the part of those using the property that such use is the exercise of a property right."[21] In other words, Plaintiff has clearly acted in a manner that indicates his belief that he has a right to use the gravel drive, but his use of the gravel drive prior to this lawsuit has not necessarily been characteristic of a belief in ownership. Therefore, the Court will sustain Defendant's Preliminary Objection and dismiss Count I (Action to Quiet Title) of the Complaint. Count II (Ejectment) and Count III (Declaratory Judgment) of the Complaint remain operative.

The Court stresses that its finding that Defendant is in possession of the Disputed Property is for the purposes of determining the appropriate form of action in light of jurisdictional considerations and is not dispositive of any ultimate issues in this case. Defendant's possession of the property may be one factor in a defense to Plaintiff's claim of superior title and an immediate right to possession of the Disputed Property, but it is not by itself sufficient to establish adverse possession, the existence or nonexistence of an easement, or any other respective property rights.

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[21] *Moore*, 687 A.2d at 826.

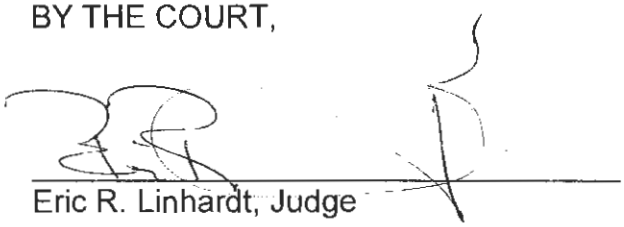
ORDER

For the foregoing reasons, the Court finds that Defendant is in possession of the Disputed Property. Therefore, the Court SUSTAINS Defendant's Preliminary Objection to Plaintiff's Complaint. Count I of Plaintiff's Complaint, an action to quiet title, is hereby STRICKEN. Count II, an action in ejectment, and Count III, seeking a declaratory judgment, remain operative.

Defendant shall file an Answer to Plaintiff's Complaint within twenty (20) days of the Date of this Order.

IT IS SO ORDERED this 24th day of October 2022.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr
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