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THE APPROVAL OF THE COMMITTEE ON OPINIONS

VHSP PROPERTIES, LLC, **Plaintiff**, v. STEVEN VIZOUKIS; MARIA VIZOUKIS; LLOYD AANONSON and CATHERINE AANONSON; JOHN and DIANE KOO; JOAN F. BONALDI; ROBERT and VALERIE SCOZZAFAVA and SAM and LORAINE VOGEL, **Defendants**.	SUPERIOR COURT OF NEW JERSEY BERGEN COUNTY-CHANCERY DIVISION GENERAL EQUITY PART DOCKET NO. C-118-16 Civil Action OPINION

Decided: June 19, 2017

Kevin P. Kelly, Esq. appearing on behalf of the Plaintiff, VHSP Properties, LLC (Kelly, Kelly & Marotta LLC).

Mark D. Madaio, Esq. appearing on behalf of the Defendants, Steven Vizoukis, Maria Vizoukis, Lloyd Aanonson and Catherine Aanonson.

Edward T. Rogan, Esq. appearing on behalf of the Defendants, Robert and Valerie Scozzafava (Edward Rogan & Associates, LLC).

MENELAOS W. TOSKOS, J.S.C.

This litigation concerns a dispute regarding the use of a ten (10') foot right of way (the "10' ROW"). The lands in question straddle a portion of the border between Rockland County, New York and Bergen County, New Jersey. The history of this land and its use stems from a grant by the Lenni Lenape tribe to new world colonists in the late 17th century. Once owned in its entirety by the Haring family, the parcels were deeded out over the centuries. Presently, plaintiff

has title to a portion, located entirely in New York, while the defendants own single family homes in a portion, immediately to the south, located in New Jersey. The 10' ROW runs along the rear of defendants' properties, along the easterly border of plaintiff's property and continues north into a parcel presently owned by defendants, Sam and Loraine Vogel. This parcel also formed part of the original grant. It is for the Vogel property that a 1916 deed expressly granted the 10' ROW to provide access to Orangeburgh Road in Old Tappan, New Jersey.[1] Prior to trial, the Vogels were granted summary judgment.

Certain facts are undisputed. The 10' ROW is paved and was first described in deeds filed in 1916 both in New Jersey and New York. Plaintiff's New York property ("the NY Property") and the New Jersey subdivision containing defendants' properties were under common ownership until 1998 when Limmer Commercial Refrigerator Co., Inc. ("Limmer") deeded the New Jersey parcel to a developer, Redmor LLC ("the NJ Redmor Subdivision"). Shortly after this transaction, Limmer moved a house from the NJ Redmor Subdivision onto the rear of the NY Property. Federally protected wetlands and a brook, "Dorotockey's Run," bisect plaintiff's property. The federally protected wetlands prohibit construction of any man-made improvements. The house is on a permanent foundation. It is located on the eastern portion of the NY Property and is serviced by utilities that run through a fifteen (15') foot wide utility easement over the NJ Redmor Subdivision. The western boundary of plaintiff's property has access on Blaisdell Road in New York. Plaintiff purchased the property from Limmer in 2013.[2] At the time of purchase, the house was located on the eastern rear portion. Plaintiff's NY Property is located in a commercial zone. Plaintiff obtained approval for, constructed and is operating an athletic training facility on the

[1] The Vogel property also has an exclusive 40' ROW running adjacent to the 10' ROW. Although mentioned in testimony during trial, the 40' ROW is not at issue in this litigation.

[2] The purchaser, under deed dated September 16, 2013, was Columcile Properties LLC, a company affiliated with plaintiff. Columcile conveyed title to plaintiff by deed dated March 20, 2015.

western portion of its property. The approval required plaintiff to either remove the house or obtain zoning board approval. In 2015, plaintiff obtained approval from the Zoning Board of Appeals Town of Orangetown, New York ". . . to keep the pre-existing non-conforming building in its present location . . . with the specific condition that the building's use conform with the permitted uses in the LIO Zoning District . . .". The athletic training facility is located on plaintiff's property to the west of the wetlands while the house is located on the portion east of the wetlands. When Limmer conveyed the NJ Redmor Subdivision in 1998, it did not reserve an express right to use the 10' ROW. Prior to its conveyance, Limmer used the NJ Redmor Subdivision to operate the Northern Valley Swim Club. In conjunction with this use, Limmer used the eastern portion of the NY Property as a parking lot for patrons of the swim club. The parking lot was accessed by the 10' ROW.

Procedurally, this case began with the filing of a complaint and eventually a thirteen count second amended complaint. Following trial, only two counts remain for the court's consideration. Count twelve (12), in which plaintiff pleads it has an easement by implication and count thirteen (13) in which plaintiff seeks a declaratory judgment that plaintiff can use the 10' ROW for access to the eastern rear of its property. Plaintiff argues that historically access from its parcel to Orangeburgh Road was accomplished by travelling over the NJ Redmor Subdivision. This access was essentially codified by the 1916 deeds which established by metes and bounds description the 10' ROW. Plaintiff maintains that when the New York and New Jersey properties were separated in 1998, Limmer intended to preserve its use of the 10' ROW despite not specifically reserving an easement in the deed.

Defendants, on the other hand, argue that may not be true since Limmer could easily have reserved an easement but did not do so. Further, defendants contend that prior to 1997, the rear

portion of the property was vacant with no reason to access it. Defendants argue plaintiff purchased the property aware that the house was without access. Consequently, any hardship was, therefore, self-created. Defendants finally argue the NY Property is not landlocked. Plaintiff has access to the lot from Blaisdell Road in New York. Plaintiff made use of the property in accordance with the permitted zoning and does not need to use the rear of the property. Prior to trial, the court granted the uncontested summary judgment motion of the defendants, Vogel. It dismissed all claims against them. As successors to the New York Bible Association, the judgment determines that they enjoy a right to use the 10' ROW for access to their property.

Plaintiff called five witnesses. The first, Robert Costa, an engineer, prepared the plans for the NJ Redmor Subdivision. Mr. Costa identified the 10' ROW on the subdivision map. He testified that prior to the sale, Limmer used the NY Property to provide parking for the Northern Valley Swim Club located on the NJ Redmor Subdivision. There were several structures on the NJ Redmor Subdivision. One was the house which Limmer moved to the plaintiff's NY Property. The move was performed by an experienced company and made use of the 10' ROW. Mr. Costa stated a foundation was created upon which the house was located. Utilities were provided through an easement running over the NJ Redmor Subdivision.

The next witness, Donald Brenner, an engineer and New York attorney, represented Mr. and Mrs. Colbert, the owners of Limmer. They wanted permission from Orangetown to move the house onto the NY Property. The Colberts told him they had a "driveway" onto Orangeburgh Road in New Jersey. Because of Dorotockey's Run and the federal wetlands, there was no access from Blaisdell Road in New York. Mr. Brenner was successful in obtaining the necessary permits. The permission allowed use of the house in accordance with the permitted commercial uses in the

zone. Additionally, it could be used as a residence but only for Colbert family members. Members of the Colbert family occupied the house shortly thereafter.

Mr. Brenner also testified that in 2014 he represented plaintiff before the Orangetown Planning Board to obtain approval for the athletic training facility. This was granted allowing for its construction on the western portion of the lot with access onto Blaisdell Road. The approval noted the existence of the house on the eastern portion and required either its removal or "a variance to keep the structure." (P-37) Subsequently, Mr. Brenner represented plaintiff before the Zoning Board and obtained the variance allowing the house to remain but limiting its use to ". . . conform with the permitted uses in the LIO Zoning District . . .". The house could no longer be used as a residence.

Peter Skae is a principal of plaintiff. He testified that the Colbert family explained to him access to the house was via the 10' ROW. At the time of plaintiff's purchase, the western portion was vacant. Mr. Skae described the house as a permanent structure on a foundation serviced by utilities through an easement over the NJ Redmor Subdivision. Mr. Skae testified as to an exhibit, P-31, containing several historic aerial photographs depicting the 10' ROW. These show the existence of the Northern Valley Swim Club on the NJ Redmor Subdivision with a parking lot located on the eastern portion of the NY Property, accessed by the 10' ROW.

Mr. Skae stated the Army Corps of Engineers would not permit any encroachment over the wetlands since it noted that access to the eastern portion was available through the 10' ROW. He acknowledged that plaintiff relied on the representations of the Colbert family regarding the availability of the 10' ROW and did not obtain a formal opinion from a title abstractor (P-30) until after the closing.

Plaintiff's final witnesses both qualified as title experts. Donald Lynch testified that title to the property began with the "Tappan Patent" granting 16 colonists land from the Lenni Lenape tribe. Two of the colonists were members of the Haring family. It was the Haring family that in 1687 was vested with title to a large piece of land which included the NY Property and the NJ Redmor Subdivision. Mr. Lynch testified that in 1846 the property was divided between two brothers, John and James Haring. By deed dated February 13, 1865, the parcel containing both plaintiff's NY Property and the NJ Redmor Subdivision was conveyed out of the Haring family ownership to Samuel Demarest. This deed mentioned that the conveyance is subject ". . . to a right of way of James Haring over the said premises."

Mr. Lynch then described several transfers of title leading to ownership by Anne Eliza Durie. The parcel directly to the north of her land was owned by the New York Industrial Bible School Association. It also had formed part of the original Haring family parcel. On October 31, 1916 Anne Eliza Durie made a deed ". . . for the purpose of fixing the right of way . . ." over her land[3] "from the land of" the New York Industrial Bible School Association "to the public road."[4] By this conveyance, the deed reflects that the New York Industrial Bible Association "releases and quit claims any and all rights and claims to a right of way over the land of" Anne Eliza Durie. Mr. Lynch opined that since the division of the land between the Haring brothers in 1846 they each enjoyed unrestricted access over their two parcels allowing for ingress and egress from Orangeburgh Road. In exchange for the release of the unrestricted access, the 1916 deed (P-6) limited the access to the 10' ROW now identified in the deed by metes and bounds. Mr. Lynch described the subsequent conveyances, noting each deed from 1917 to 1953 identified the 10' ROW. In 1953, Campbell and Gertrude Phillips conveyed the property to the Limmer Commercial

[3] The parcel containing the NY Property and NJ Redmor Subdivision.
[4] Orangeburgh Road.

Refrigerator Co., Inc. (P-12). It noted the 1916 deed 10' ROW. Mr. Lynch stated, however, that in four subsequent deeds by Limmer, the 10' ROW dropped out of the recital.

Mr. Lynch examined the chain of title, deeds, and visited the site. In his opinion, there exists an implied easement by which plaintiff can use the 10' ROW to access Orangeburgh Road created when Limmer sold the NJ Redmor Subdivision. Rajan Patel also qualified as a title expert. Mr. Patel examined the chain of title, historic photographs and went to the property. He agreed with Mr. Lynch that an easement by implication was created as a result of the 1998 conveyance to Redmor.

After plaintiff rested, defendants presented a title expert, David Ellner, who disagreed with the opinions of Messrs. Lynch and Patel. Mr. Ellner found the 1865 deed to be "unreadable" and "unintelligible." In his opinion, the absence of language in the Limmer deeds identifying the 10' ROW showed there was no intent to keep the easement. Based on the frontage on Blaisdell Road, Mr. Ellner concluded the property is not landlocked and access to Orangeburgh Road was not necessary. Mr. Ellner agreed that there is a higher burden to prove an easement by necessity then to prove an easement by implication. Mr. Ellner admitted that he did not visit the site, or attempt to interview anyone regarding the moving of the house in 1998. Nor was he aware that the 10' ROW was paved.

Findings of Fact

Based on the above cited testimony and documents submitted in evidence, the court makes the following findings of fact. Plaintiff's NY Property and the NJ Redmor Subdivision formed a part of a large piece of land owned by the Haring family. In 1846, the property was divided between two brothers. It is reasonable to conclude that the brothers allowed each other to continue to access roads in New York and New Jersey by travelling over the land of the other. In 1865,

land consisting of the NY Property and the NJ Redmor Subdivision was conveyed out of the Haring family to Samuel R. Demarest. That deed reserved "a right of way of James Haring over the said premises . . .". As in the past, this right of way was unrestricted and not limited to a particular location. Title from Demarest eventually passed to Anne Eliza Durie who, in 1916, granted the New York Industrial Bible School the 10' ROW and eliminated unrestricted access over the two properties. Plaintiff claims an easement by implication to use the 10' ROW. It runs along the rear of defendants' properties, north along the eastern border of plaintiff's property into property owned by Sam and Loraine Vogel. It is depicted on aerial photographs from as far back as 1931. The 10' ROW was identified in the chain of title of title from 1916 until the 1953 deed to Limmer. The NJ Redmor Subdivision was used by Limmer along with the NY Property for the operation of a swim club. The 10' ROW provided access for parking on the eastern part of the NY Property. The federal wetlands and the brook, Dorotockey's Run, divide the NY Property. In 1998, Limmer sold the NJ Redmor Subdivision. Limmer failed to expressly reserve a right to continue using the 10' ROW. Nonetheless, Limmer, with Redmor's knowledge and acquiescence, continued using the 10' ROW to access the eastern part of the NY Property. The house was moved onto the rear of the NY Property with the knowledge and acquiescence of Redmor, who provided a utility easement to Limmer. The required governmental approvals were obtained to locate and use the house in accordance with the zoning code. The only practical and reasonable access to the structure is over the paved 10' ROW.

Conclusions of Law

There are four types of easements: (1) express easement; (2) easement by necessity; (3) easement by prescription; and (4) quasi-easement by implication. Leach v. Anderl, 218 N.J. Super.

18, 24 (App. Div. 1987). Plaintiff contends that it has the benefit of a quasi-easement by implication.

Here, there is no express grant or reservation of an easement. Additionally, the court determines that the ability of plaintiff to develop and use the western portion of its property through access onto Blaisdell Road precludes a finding of an easement by necessity.[5] The court further agrees with defendants that the evidence fails to support an easement by prescription. Plaintiff's use of the 10' ROW was permissive, non-exclusive and, therefore, not adverse. The focus is then limited to whether plaintiff has an easement by implication to use the 10' ROW that arose when Limmer conveyed the New Jersey property to Redmor.

A finding of an easement by implication is based on the severance of once-unified property, where a part of the land had, prior to severance, been used to benefit another part. Cale v. Wanamaker, 121 N.J. Super. 142, 146 (Ch. Div. 1972). Upon conveyance of one of the parts, there may be, in certain circumstances, a pre-existent quasi-easement. This is an implied grant if it is for the benefit of the land conveyed or an implied reservation if it is for the benefit of the part retained. Wolek v. DiFeo, 60 N.J. Super. 324, 329 (Law Div. 1960). The burden of proof to establish an implied easement is by clear and convincing evidence. Clear and convincing evidence should produce in the mind of the trier of fact a "firm belief or conviction as to the truth of the allegations sought to be established." In re Purrazella 134 N.J. 228, 240 (1993).

The conditions giving rise to an implied easement were discussed in A.J. and J.O. Pilar, Inc. v. Lister Corp., 38 N.J. Super. 488, 119 (App. Div.) aff'd, 22 N.J. 75, 123 (1956). In Pilar, the court recognized that in circumstances where a landowner, during a period of unified ownership, utilized a part of the land for the benefit of another part, a quasi-easement may be

[5] Plaintiff has also failed to clearly and convincingly satisfy the high burden to show an easement by necessity.

created. Id. at 496. Such an easement may be found where the use of such is apparent, continuous, permanent, and reasonably necessary for the enjoyment of the dominant land. These elements must be found to have been in existence at the time of the severance of the land.

Significantly, the court held:

> The necessity need not be absolute in the sense that there can be no enjoyment of the land whatsoever without the easement. Here, again, necessity or the reasonable necessity is not the basic factor that creates the implied easement, but it is one of the elements of consideration in ascertaining the real intention of the parties.

Id. at 498.

Therefore, the "necessity" which may give rise to an implied easement does not necessarily require a showing that the owner of the dominant estate has no beneficial enjoyment of the land. Necessity is understood to mean reasonably necessary for convenient, comfortable or beneficial enjoyment of the land. Tidewater Oil Co. v. Camden Securities Co., 49 N.J. Super. 155, 161 (App. Div. 1958). The existence of an implied easement is a fact specific question that centers on the apparent use by the owner at the time of conveyance of a portion of the property. Adams v. Cole, 48 N.J.S. 119, 130 (App. Div. 1957). It is predicated upon the legal fiction that the owner intended to reserve rights in the land conveyed in order to continue the use of that land for the benefit of the land retained.

The court found credible all of the witnesses testifying for plaintiff in the present case. The evidence clearly demonstrates that title was separated between plaintiff's NY Property and the NJ Redmor Subdivision in 1998. Through testimony and exhibits, plaintiff clearly established the use of the NJ Redmor Subdivision to provide access for the plaintiff's NY Property to Orangeburgh Road. The evidence described this access as "meandering" until 1916 when the 10' ROW was fixed and described in the 1916 Durie deed. Historic aerial photographs depict the physical existence of the 10' ROW as far back as 1931 (P-31). It is paved, demonstrating that its use is

permanent in nature. It was used by Limmer in operation of the swim club. On sale of the NJ Redmor Subdivision, Limmer chose to continue using the 10' ROW to provide access to the house located on the eastern portion of the property. Redmor presented no opposition but permitted Limmer to use the 10' ROW to relocate and access the house. Redmor also provided a utility easement to service the house. The reasonable necessity of the implied easement is apparent. It is a material consideration in weighing whether the court can infer that the conveyance of the NJ Redmor Subdivision was intended to include a reservation of a right for Limmer's continued use of the 10' ROW. Since the federally protected wetlands prohibit construction of a driveway, the only reasonable access to the eastern part of the NY Property is through the 10' ROW. Limmer used the 10' ROW for this access during its ownership of both parcels. The court can infer that in reliance on its ability to do so, Limmer relocated the house on the eastern portion of its property.

For the reasons discussed above, the court concludes that plaintiff has satisfied its burden to establish an implied easement. Accordingly, the court will enter judgment in favor of the plaintiff on counts 12 and 13, declaring plaintiff to have an implied easement reserving the right to use the 10' ROW to access plaintiff's property from Orangeburgh Road. The judgment shall also apply to the defaulted defendants, John Koo, Diane Koo and Joan F. Bonaldi.