Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-027

AUGUST TERM, 2007

Linda C. Nordlund	}	APPEALED FROM:
	}	
v.	}	Addison Superior Court
	}	
Ronald C. Van Nostrand and Elizabeth M. Van Nostrand	}	DOCKET NO. 56-3-06 Ancv
		Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

Plaintiff Linda Nordlund appeals from the trial court's order in this quiet title action. The court determined that defendants Van Nostrands possessed an eighteen-foot wide right-of-way across the northwesterly corner of plaintiff's property, and it denied plaintiff's claim for damages. Plaintiff argues that the court erred in: (1) concluding that her property was subject to a right-of-way benefitting defendants' back parcel and (2) failing to award her any relief at all. We affirm.

The record indicates the following. Reginald and Margaret Farnham at one time owned a large tract of real property in Salisbury, Vermont. The northeasterly portion of their property faced West Shore Road, which runs along Lake Dunmore. In 1953, the Farnhams sold a portion of their property with road frontage (referred to as "the front parcel") to Arthur Shea. They reserved a right-of-way across this lot "between the northerly and southerly lines thereof as the same is now located for the purpose of ingress and egress in connection with other lands of the Grantors." In 1955, the Farnhams conveyed a lot adjacent to the front parcel ("Norlund parcel") to Stanley and Marion Harris. This lot also bordered West Shore Road and it appears that the same right-of-way referenced above also traversed this lot. Thus, in the Harris deed, the Farnhams expressly reserved "a right of way over an old logging road which cuts across the northwesterly corner of the lands hereby conveyed." In 1964, the Harrises conveyed the Norlund parcel to Carroll and Eva Berlin expressly "subject to right of way reserved by said Farnhams" and "described in the Farnham's deed as a logging road." In 1975, the Berlins conveyed the lot to plaintiff's parents, subject to the provision above. In 2000, plaintiff's parents conveyed the lot to plaintiff expressly subject to this same provision.

Meanwhile, in 1965, Mr. Shea reconveyed the front parcel to the Farnhams. Plaintiff also presented evidence that in 1973, the Farnhams conveyed several parcels of the far northerly portion of their property to Alfred and Lois Patterson. It is not apparent that property had any road frontage. In any event, the Patterson deed provided that: "[t]here is also conveyed all of the Grantors' right, title, and interest in a right of way, running from said highway, over lands of one Tarkey, of one Berlin and over the lands, at this time reserved by the Grantors, to the lands hereby conveyed."

In 1980, the Farnhams conveyed certain land, including the "front parcel" as well as land lying behind it, to Michael and Dorothy Kycia. The Kycia deed provided that the conveyance was subject to, among other things, the right-of-way conveyed to the Pattersons by the Farnhams in the 1973 deed. In May 2000, the Kycias conveyed the land to defendants via two deeds. The deed for the twenty-four-acre "back parcel" provided that "[t]here is further conveyed herein the right of way reserved in the Warranty Deed" from the Farnhams to the Harrises dated November 1955. The deed also conveyed the right-of-way reserved in the Shea deed, and stated that the land was subject to the right-of-way conveyed to the Pattersons. The deed for the front parcel, which contained a dwelling and approximately 1.1. acres, also noted the existence of these rights-of-way.

A dispute developed between plaintiff and defendants over use of the right-of-way, and in March 2006, plaintiff filed a complaint for declaratory judgment. After a trial and a site visit, the court issued its order, rejecting plaintiff's argument that the right-of-way had ceased to exist. The court made the following findings. Defendants sought to construct a new modular home on the "front parcel" portion of their property. In order to do so, they improved the right-of-way by adding a gravel base, which allowed the road to support large trucks. In the course of improving the road, defendants cut some trees on plaintiff's land. Defendants also constructed a drainage culvert and swale, as well as a buried conduit for future installation of utilities to the twenty-four acre rear parcel of their property. All of these improvements occurred in close proximity to the right-of-way. The present total width of the right-of-way, the court found, was approximately fifteen feet where it crossed the northwest corner of plaintiff's lot.

After reviewing the deeds in both parties' chain-of-title, the court found that the right-of-way reserved by the Farnhams was an easement appurtenant, which at all times benefitted the rear parcel rather than any particular person. Given this, the court found it of no moment that the deed from the Farnhams to the Kycias did not specifically mention the logging road right-of-way. As the court explained, appurtenant easements are included in conveyances by deeds referring to "appurtenances" even if not otherwise mentioned in the deed. The court also rejected plaintiff's argument that the right-of-way had been extinguished under the doctrine of merger. Having found that defendants had a right to use the right-of-way, the court next determined, based on several findings, that the width of the right-of-way was eighteen feet.

Plaintiff filed a motion to amend, which was denied. As relevant to this appeal, the court rejected plaintiff's assertion that defendants' use of the right-of-way to benefit their front parcel constituted an increased burden on her servient estate. The court found that this issue had not been expressly discussed at trial, and plaintiff had introduced no evidence to suggest that any of defendants' past use materially increased the burden on her neighboring lot. Rather, the court explained, the evidence showed a one-time use of the right-of-way to install the modular home. Plaintiff argued that defendants had used the right-of-way to access the front parcel for paving and other maintenance work on the front parcel, but the court found any such use neither substantial nor ongoing enough to constitute a material burden on plaintiff's property. The court also noted that this issue was never even raised in plaintiff's proposed findings of fact. It therefore denied the motion. This appeal followed.

Plaintiff first argues that the court erred in finding that defendants possessed a right-of-way

over her property. According to plaintiff, the evidence showed that the Farnhams conveyed their interest in the right-of-way to the Pattersons in 1973. Thus, she argues, the Farnhams no longer had any interest in the right-of-way at the time they conveyed the front and back parcels to defendants' predecessor-in-interest. Plaintiff complains that although she raised this issue at trial, the court failed to make any findings regarding the Patterson deed.

Assuming that this argument was properly preserved, we find it without merit. As the trial court found, the right-of-way was an appurtenant easement. See Rowe v. Lavanway, 2006 VT 47, ¶ 12, 904 A.2d 78 ("An appurtenant easement is one that serves a parcel of land rather than a particular person, and a construction that an easement is appurtenant is favored."). "An appurtenant easement runs with the land to which it is appurtenant, and passes with the land to a subsequent grantee with passage of the title of the dominant estate." Kikta v. Hughes, 766 P.2d 321, 323 (N.M. Ct. App. 1988). With several exceptions not relevant here, it is well-established that "an appurtenant benefit may not be severed and transferred separately from all or part of the benefitted property." Restatement (Third) of Property, Servitudes, § 5.6 (2000); see also Crinklewood on the Bellamy Condo. Ass'n v. Crinklewood on the Bellamy Trust, 805 A.2d 427, 430-31 (N.H. 2002) ("It is well settled that a dominant tenement's interest in an easement cannot be severed from the land by transferring it to a third party." citing R. Cunningham, et al., The Law of Property § 8.10 (2d ed. 1993)); Kikta, 766 P.2d at 323 ("An appurtenant easement is incapable of an existence separate from the dominant estate, and any attempted severance from the dominant estate must fail."). Thus, the Farnhams did not and could not "convey away" the easement to the Pattersons in 1973. Instead, the easement ran with the land and passed to the Kycias and then to defendants.[*] Plaintiff's first argument is therefore without merit.

Plaintiff next argues that the court erred in failing to award her damages. According to plaintiff, she is entitled to relief because defendants used the roadway to benefit the front parcel rather than the rear parcel and defendants cut trees outside of the right-of-way. Plaintiff also asserts that the court overestimated the proper width of the right-of-way.

We find no error. The trial court explicitly rejected plaintiff's assertion that defendants' limited use of the easement to benefit the front parcel constituted an ongoing or material burden on plaintiff's property. While plaintiff points to evidence she believes supports a contrary conclusion, it is not the role of this Court to reweigh the evidence on appeal. Cabot v. Cabot, 166 Vt. 485, 497

---

[*] It appears that the Farnhams attempted to convey to the Pattersons a much broader right than the one at issue in this appeal, i.e., the right to use all of the "old logging road," including portions of the road that crossed the Farnhams' property as well as the small portion of the road that crossed plaintiff's property. By deed, it appears that the Pattersons acquired a new easement in the land then owned by the Farnhams and they may have also acquired the right to use the existing easement on plaintiff's property. See, e.g., Il Giardino, LLC v. Belle Haven Land Co., 757 A.2d 1103,1114 n.9 (Conn. 2000) (holding that owner of dominant estate may not, as a matter of law, transfer rights to use an easement in the absence of a conveyance of the fee in the dominant estate, but noting that where appurtenant right-of-way serves dominant estate that is subsequently divided into two parcels of property, owner of any portion of that estate may claim a right to that part of the easement applicable to his or her property, provided that right can be enjoyed without any additional charge or burden to the proprietor of the servient estate).

(1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). The trial court found that defendants' use of the easement to benefit the front parcel was "insubstantial" and we will not disturb its assessment of the evidence on appeal.

As to the removal of trees, the court found that all of the trees that were cut were within the general location of the right-of-way. This appears to also include the removal of a rotten beech tree that was within a small sliver of land that plaintiff claimed was outside the right-of-way.As discussed below, the trial court found that the right-of-way encompassed this sliver of land, and it also found that the woods had encroached onto the right-of-way. Thus, defendants' removal of these trees was consistent with their right to use the easement. See Rowe, 2006 VT 47, ¶ 23 ("In general, a dominant estate is entitled to use an easement in a manner that is reasonably necessary for the convenient enjoyment of the servitude."citation omitted). We therefore find no error in the court's denial of plaintiff's claim for damages.

Finally, the court did not err in determining that the width of the easement was eighteen feet. As the court explained, the language of the original reservation was ambiguous, and it therefore sought to implement the intent of the parties to the original deed. The court thus considered whether the reserved right-of-way extended all the way to the northwest corner of plaintiff's property, or whether it crossed so as to leave a portion beyond its width untouched. The court found it unlikely that the parties would have restricted the width of the easement for the purpose of leaving the dominant estate with an undisturbed portion of property, when that portion of property was of no practical use because it was small, consisted of nothing but ledge, and sloped steeply. Given the general path of the 1955 right-of-way, and given that no purpose would be served by limiting it so as to leave a significant but useless-to-the-servient-estate sliver, the court found that the more reasonable interpretation was that the width should be held to be eighteen feet. The court explained that, based on evidence presented at trial, this width was near the bottom range of the "old-time rights-of-way" for timbering, and it also struck a reasonable balance given the established facts. These findings are supported by the record, and they support the court's conclusion regarding the width of the easement. See V.R.C.P. 52(a)(2); Mullin v.Phelps, 162 Vt. 250, 260 (1994).

Affirmed.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

John A. Dooley, Associate Justice

_____

Denise R. Johnson, Associate Justice