

STATE OF VERMONT

SUPERIOR COURT  
Orange County

CIVIL DIVISION  
Docket No. 146-7-10 Oecv

Black Sand Camp, Ltd.  
Plaintiff

v.

Steven Hill  
Defendant

Findings of Fact, Conclusions of Law, and Order  
Plaintiff's Motion for Injunctive Relief

This dispute involves the right of defendant Steven Hill to use a fifty-foot wide driveway he constructed across property belonging to plaintiff Black Sand Camp ("BSC"), and his right to convey electrical and telephone service across the same. BSC contends that Hill has no rights in the property, and seeks an order prohibiting Hill from using the driveway and conveying the utility services across the property. In response, Hill argues that the facts and circumstances of the case show that he is entitled to either an easement by estoppel or an easement by necessity.

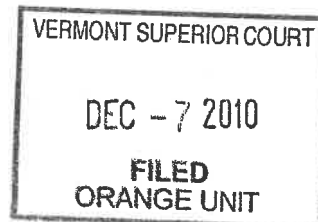
An evidentiary hearing was held on November 8, 2010 on BSC's motion for preliminary injunctive relief. Upon the agreement of the parties, the hearing was consolidated with the trial on the merits of plaintiff's claim for injunctive relief and defendant's amended counterclaims for easement by estoppel and easement by necessity. V.R.C.P. 65(b)(2). Other claims and counterclaims seeking money damages were not considered at the hearing and are not decided by this opinion.

BSC was represented at the hearing by Allen Horsley, Esq. Mr. Hill was present and represented by David Cole, Esq. The following findings of fact, conclusions of law, and order are based on the credible evidence presented during the hearing.

Findings of Fact

BSC owns a small parcel of land in Fairlee, Vermont. Its sole shareholder is Richard Mintz. This case involves the circumstances under which BSC came to purchase the small parcel of land, and what has happened on that land since the purchase.

Mr. Mintz has an adult daughter named Amy Record. She has been a farmer throughout her adult life, and some years ago she moved to Lyme, New Hampshire where she met and married one Walter Record. They farmed together until his unexpected death in August 1996.



After Mr. Record's death, Mr. Hill began helping Ms. Record out at the farm. They became romantically involved in late 1996.

At the time, Mr. Hill was involved in a divorce proceeding. The marital property was a house at the end of Brackett Road in Fairlee, and Mr. Hill and his then-wife were both hoping to be awarded the house in the divorce. The house is accessed by a right-of-way across the small parcel now owned by BSC but then owned by one Fisher, who was an absentee landowner. In December 1996, while the divorce was still pending, Ms. Record and Mr. Hill began living at the marital property.

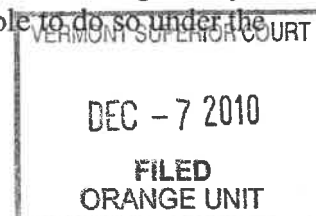
A few months later, in July 1997, Ms. Record purchased an adjoining parcel of land from Sophie Pavlik for \$55,000. Her primary motivation for buying the land was to create a hunting preserve with Mr. Hill. The land was deeded at sixty acres but is actually much larger. Mr. Hill did not make any financial contribution to the purchase price.

During this time, Mr. Mintz was visiting his daughter two or three times a year. He learned about the Pavlik purchase after the fact and saw the property for the first time in the fall of 1997. During this visit, he spoke with Mr. Hill about the plans to create a hunting preserve on the land and saw the improvements that were being made on the parcel, including the clearing of a field and the construction of a pond. Ms. Record was financing these improvements without any financial assistance from Mr. Hill.

At the time, the Pavlik property was accessible only by a deeded right-of-way across the lands then owned by Fisher (the same small parcel that provided access to the marital property owned by the Hills). During Mr. Mintz's visit to the Pavlik property, he saw that the deeded right-of-way was steep and crooked, and agreed that family ownership of the Fisher property would allow for better access to the Pavlik parcel.

Mr. Mintz spoke with his daughter and Mr. Hill about the benefits of buying the Fisher property, and he came to believe that such ownership would be beneficial to his daughter's ownership of the Pavlik property. He asked his daughter to let him know if the property ever came up for sale. After inquiry, Ms. Record learned that Fisher was willing to sell the land for \$22,000. Mr. Mintz agreed to purchase for that price and did so in December 1998. He placed ownership in the name of his corporation, BSC.

Mr. Hill claims that Mr. Mintz made representations at the time of the purchase about how the BSC property was being bought for himself and Ms. Record to use without restriction. Mr. Hill further claims that if he had known that Mr. Mintz "would go back on his word," he would have bought the BSC parcel himself. Yet the evidence showed that Mr. Hill was not in good financial condition around this time—he borrowed \$11,000 from Mr. Mintz in early December 1998 in an attempt to buy out his wife's interest in the marital property, and all of the \$22,000 he eventually received from his wife in the divorce action was used to pay down his credit card debts. It does not appear that Mr. Hill would have been able to purchase the Fisher property without borrowing money, and it was not clear from the evidence whether he would have been able to do so under the



circumstances existing then. In any event, even assuming Mr. Hill had the means, there was nothing to prevent him from making a better offer to purchase the BSC parcel if he had truly wished to do so. Given the issues involved in his divorce, he was aware of the importance of ownership of property.

After it became clear that Mrs. Hill was going to be awarded the Hill marital property (where Mr. Hill and Ms. Record were staying), Ms. Record began talking with her father about improving the seasonal camp on the BSC property. Mr. Mintz agreed and paid for a portion of the renovations. Ms. Record and Mr. Hill moved into the renovated building in March 1999, and began operating the Pavlik property as a game preserve shortly after that.

Ms. Record and Mr. Hill lived in the BSC property rent-free and without a written lease. There was some testimony about an exchange of money from Mr. Mintz to Mr. Hill and back that was labeled as a rent payment but no showing that this created any vested property right in Mr. Hill. Mr. Mintz paid all the taxes and insurance on the property.

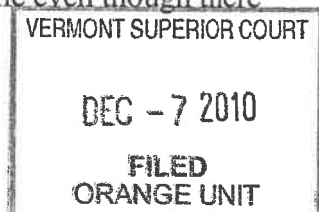
Other improvements were made to the BSC building while Ms. Record and Mr. Hill were living there. Ms. Record provided the primary funding for these projects, while Mr. Hill provided some of the labor. He has filed a counterclaim for unjust enrichment in connection with this labor, but this claim for money damages was not taken up at the November 8th hearing.

Ms. Record and Mr. Hill built a driveway across the BSC parcel sometime in 2001. This gave them access to the Pavlik parcel without having to use the deeded right-of-way, which was preferable because the right-of-way was crooked and steep and came very close to the BSC building. They did not ask Mr. Mintz for permission to build the driveway but he did not object once he learned about it. No deeded right-of-way was given by BSC for the driveway.

The original deeded right-of-way has been largely unused since construction of the 2001 driveway. In addition, a sewer tank has been installed under the right-of-way and thus the way no longer supports travel by heavy vehicles. It is true that Ms. Record submitted zoning applications in connection with this activity but there was no showing that these applications conferred upon Mr. Hill any legal right in the BSC parcel.

A survey of the BSC was done in November 2002. (P. Ex. 6.) It shows the gravel driveway that Ms. Record and Mr. Hill constructed. It does not create any deeded rights to the driveway.

In March 2003, Ms. Record obtained a fifty-foot deeded right of way across the lands of Royle to access the Pavlik parcel. (P. Ex. 8.) This easement also permits the placing of underground utilities. Ms. Record and Mr. Hill built a road over and along this right of way to the Pavlik parcel, and the road still exists at this time even though there



are some washouts that need repair. The washouts could be fixed with a couple of days work with the right equipment.

Sometime before 2005, Mr. Hill and Ms. Record constructed a lodge and a butcher shop on the Pavlik parcel. Mr. Hill connected the power to these new buildings by hooking onto the existing service to the BSC building. Mr. Mintz became aware of the connection sometime after it was done but prior to 2008, and did not object at that time. Mr. Hill did not obtain any easement to connect the power, and apparently did the work without the knowledge of the power company.

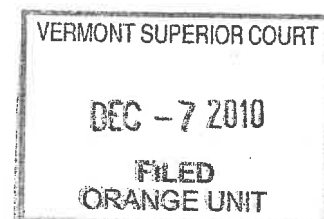
Sometime during 2005, Mr. Mintz spoke with Ms. Record about estate planning with respect to the BSC parcel. It was the first time he had talked with Ms. Record about what would happen to the BSC parcel upon his demise. He told her that he would leave her the BSC parcel and give her sister a corresponding cash gift to keep things even between them. He also intended to leave \$10,000 to Mr. Hill. At the time of this conversation, all of the aforementioned improvements had already been made. Although Mr. Hill claims that this conversation took place much earlier in time, the court does not find that claim to be accurate. The conversation took place in 2005.

It was clear from the evidence that Mr. Hill made no financial contribution to the purchase price of the Pavlik property or to any of the many improvements undertaken on the Pavlik and BSC properties.

It was also clear from the evidence that all of the improvements made upon the BSC property were done with the full knowledge that Mr. Hill had no ownership interest in the property, nor any deeded rights from BSC to use the property, nor any expectation of inheritance. No promises were made by Mr. Mintz to Mr. Hill concerning the disposition of the BSC parcel, and Mr. Hill was aware at all times that he had no written property rights in the BSC parcel (and that Ms. Record had no written property right in the parcel other than the right to use the old deeded sixteen-foot-wide right of way to access the Pavlik parcel). In short, Mr. Hill knew at all times that neither he nor Ms. Record had any deeded right to use the driveway they constructed on the BSC property in 2001.

The credible evidence did not show any representations by Mr. Mintz that would have given Mr. Hill some ownership interest in the BSC property. Indeed, when pressed, Mr. Hill acknowledged that Mr. Mintz had not made any promises to him concerning the BSC property other than that he and Ms. Record could use it.

In October 2008, Ms. Record and Mr. Hill broke up when Mr. Hill became involved with another woman. Mr. Hill moved into the lodge on the Pavlik property at that time, where he remains. Ms. Record continued to live on the BSC property. Mr. Mintz learned of the break-up in the summer of 2009.



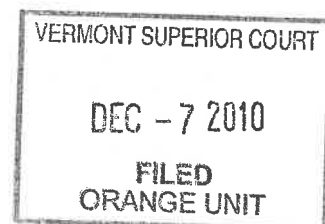
In April 2010, there were further problems between Ms. Record and Mr. Hill that resulted in Ms. Record leaving the BSC property and BSC issuing a notice of trespass against Mr. Hill. (P. Ex. 11). Mr. Hill acknowledges receiving the notice. The BSC building has not been occupied since April 2010. It has been the subject of vandalism since that time. Power remains in service to the BSC building despite Mr. Mintz's efforts to have it shut off.

Mr. Hill suggests that the timing of Mr. Mintz's attempt to have the power turned off was dictated by Mr. Hill bringing an action against Ms. Record in New Hampshire over the dissolution of their business affairs. Mr. Mintz denies any relationship between the two events. The court finds their proximity to be very close in time, but Mr. Mintz's motivation in seeking to have the power turned off is beside the point. Either he has the right to do so or he does not. The court therefore finds no improper motivation by Mr. Mintz in seeking to terminate the power to the BSC building (and thus to those buildings on the Pavlik parcel that Mr. Hill connected through the BSC hook-up).

The New Hampshire action also involves a dispute as to the legal rights to the Pavlik property. Mr. Hill has a deed given to him by Ms. Record which he has not recorded. Ms. Record subsequently deeded the Pavlik property to another party who did record the deed. Neither Ms. Record nor the current deeded owner of the Pavlik property are parties to this case, but title to the Pavlik property is not an issue before the court in this action. Mr. Hill claims he cannot use the Royle right of way to conduct his business interests on the Pavlik property because the current owner of the property has prohibited him from undertaking certain activities there. Yet this action is not the time or place for resolving issues between competing claimants to the Pavlik property. The issue here is whether Mr. Hill has rights by necessity or estoppel across the BSC property.

Mr. Hill claims that the original deeded right of way across the BSC property needs repair and is in any event unusable as a result of the placement of the sewer system. As noted above, he further claims that the Royle right of way does not provide him with access to the Pavlik property on account of the disagreement with the deeded owner of the property. Yet he does not dispute that both rights of way provide access to the Pavlik property from public ways. His claim is not that there is no means of access, but rather that he cannot use those ways without undertaking significant and expensive improvements which cannot be completed in time for him to continue using the Pavlik property as he wishes. As such, he seeks to keep using the 2001 driveway across the BSC property and to keep the utilities running from the BSC building onto the Pavlik property.

Mr. Hill has been aware throughout all of this that he was merely the boyfriend of Ms. Record and that he did not own the BSC property. He was also aware that he was using the BSC property at the permission of Mr. Mintz and that Mr. Mintz could ask him to leave at any time. Mr. Hill was furthermore aware of these things when he elected to terminate his relationship with Ms. Record in October 2008.



### Conclusions of Law

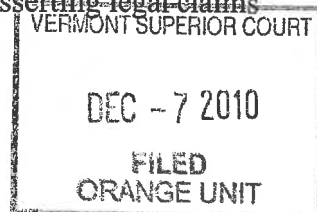
It is undisputed that Mr. Hill has no recorded title to the BSC property, no recorded right to use the driveway that was built in 2001, nor any right to convey power and telephone service across the property. If there is any right to do these things, it must derive from Mr. Hill's arguments that he obtained the rights either by necessity or estoppel.

An easement by necessity requires a showing that there was a division of commonly-owned land that resulted in the creation of a landlocked parcel. *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 206 (2000). At the very outset, therefore, the claim of necessity must fail because there has been no showing here either that the BSC and Pavlik properties were once commonly-owned or that a division of those properties resulted in the creation of a landlocked parcel. *Id.*; see also *Tenney v. Town of Athens*, No. 2009-166, at 2 (Vt. Nov. 18, 2009) (unpub. mem.) (holding that plaintiff was not entitled to an easement by necessity even where she had no road access to her property because there was no evidence "of the conveyance that rendered her lot landlocked").

Even beyond this flaw, Mr. Hill's argument is that he needs to use the 2001 driveway because his grain delivery trucks cannot use the deeded right-of-way. Yet Mr. Hill and Ms. Record used the deeded way for several years, and the cases are clear that new easements will not be created merely because an existing way is hilly and cannot be crossed "without making several turns, and then only with very light loads." *Dee v. Hill*, 73 Vt. 375, 377 (1901). As the cases explain, there is a fundamental distinction between necessity and "mere inconvenience, however great," as it is "settled beyond controversy that no one can claim a way of necessity because of its superior convenience over another way that he has." *Id.* at 378; *Berge v. State*, 2006 VT 116, ¶ 9, 181 Vt. 1.

Moreover, there is the Royle easement. It is undisputed that this easement would provide reasonable access to the Pavlik property if the road were repaired, and it is immaterial to the present dispute that there would be complications in connecting the Royle easement to the existing lodge and butcher shop. It is enough that the Royle easement provides access to the Pavlik property. "[A] way of necessity never exists where a man can get to his own property through his own land, however inconvenient the way through his own land may be." *Dee*, 73 Vt. at 378 (quoting *Hyde v. Jamaica*, 27 Vt. 449, 460 (1855) (internal quotations omitted)). For these reasons, there is no sustainable claim for necessity here.

An easement by estoppel requires the party seeking estoppel to show that he was ignorant of the true facts and that he detrimentally relied upon the representations of the party to be estopped, and that the party to be estopped knew the true facts and intended that his conduct would be acted upon. *Lodge at Bolton Valley Condo Association v. Hamilton*, 2006 VT 41, ¶ 8, 180 Vt. 497 (mem.); *Tallarico v. Brett*, 137 Vt. 52, 59-60 (1979). As with other forms of equitable estoppel, the prevailing principle is the promotion of good faith and fair dealing by preventing parties from asserting legal claims



or defenses against another who has detrimentally relied upon previous, contrary representations. *O'Brien Bros. Partnership v. Plociennik*, 2007 VT 105, ¶ 25, 182 Vt. 409.

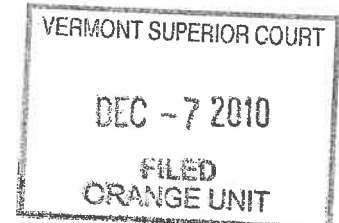
Here, Mr. Hill's claim is that he was promised by Mr. Mintz that he would be able to use the BSC property to access the Pavlik property. He specifically claims that he relied on these promises when he constructed the 2001 driveway, and that he never would have built the driveway if he had known then that Mr. Mintz would "go back on his word and prevent him from using the same for access."

However, the credible evidence did not support Mr. Hill's arguments, or otherwise reveal any promises on the part of Mr. Mintz that gave Mr. Hill an irrevocable right to use the BSC property to access the Pavlik property. The only representation was that Mr. Hill and Ms. Record had permission to use the property. Mr. Hill cannot reasonably have expected that this permission would somehow irrevocably survive his decision to terminate his relationship with the landowner's daughter.

Mr. Hill was fully aware at the time of the construction of the driveway (and at the time of all other major improvements in this case) that his "interest" in the BSC property was dependent upon his status as the boyfriend of the landowner's daughter. He knew that he was not the owner of the property and that he had no recorded interest in the property. And he knew that his use of the property depended upon the good will of his girlfriend's father. He made the improvements on the property with this fully in mind, and without making any effort to secure a more certain interest in the property. As such, it is hardly equitable to say that performing these improvements somehow vested him with an *ownership* interest in the property, or an *irrevocable* interest in using the driveway. Equity does not intervene in favor of one who acted with full knowledge of the situation at hand. *Fisher v. Poole*, 142 Vt. 162, 168 (1982).

Nor did the facts bear out any promise to Mr. Hill that he would be left an interest in the BSC property as part of Mr. Mintz's estate plan. At most, there was a conversation about estate planning in 2005, but this was well after most of the work had been done. It was not a situation where equity might intervene, as, for example, if Mr. Hill had been taking care of the property upon a promise that the property would be conveyed to him upon Mr. Mintz's demise. Cf. *In re Estate of Gorton*, 167 Vt. 357, 363 (1997) (discussing equitable exception to the Statute of Frauds).

Nor do the facts support the assertion that Mr. Mintz acquiesced in the construction of the driveway. Any claim for estoppel by acquiescence applies "only where there is an obligation to speak, and the duty is not performed." *Tallarico v. Brett*, 137 Vt. 52, 59–60 (1979) (quoting *Boston & Maine R.R. v. Howard Hardware Co.*, 123 Vt. 203, 211 (1962)). Here, there was no duty to speak on the part of Mr. Mintz because Mr. Hill was fully aware that he was constructing a driveway across property in which he had no recorded interest. There is no breach of duty associated with a landowner's failure to disclose information that is already within the possession of the party asserting



estoppel. *Tallarico*, 137 Vt. at 60. On these facts, therefore, the court cannot conclude that Mr. Hill is entitled to an easement by estoppel.

Thus, the situation is that Mr. Hill is traveling across the BSC property and conveying electricity and telephone service across the property even though he has no legal right to do so. As such, the court must consider whether BSC is entitled to an injunction to prevent his continuous and repeated trespass upon the property.

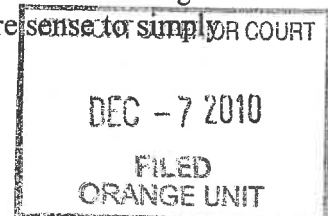
An injunction is an extraordinary remedy that may issue only where the moving party is being threatened by some irreparable harm for which there is no adequate legal remedy, and where the injunction is warranted by a balancing of all the relevant interests and hardships. 11A Wright, Miller, Kane & Marcus, Federal Practice and Procedure: Civil 2d § 2942.

Here, Mr. Hill argues that an injunction is not warranted because there is no irreparable harm, and because money damages would be an appropriate remedy for any trespass. The cases make clear, however, that a landowner has a present interest in the exclusive possession of his or her property, and is entitled to an injunction to stop continuous and repeated trespasses. *Barrell v. Renehan*, 114 Vt. 23, 25 (1944). This is true even where each of the trespasses "taken by itself may not be destructive" or where money damages would be "adequate for each single act if it stood alone." *Id.* The rationale is that the ongoing harm is not any single instance of trespass, but rather the continuous and repeated infringement upon the landowner's right to exclusive possession of the property. *Id.* Injunctive relief is therefore available under the present circumstances.

Mr. Hill also argues that a balancing of the hardships favors him because he will be forced to abandon his home and business if the injunction is granted. Any hardship, however, is one that Mr. Hill brought upon himself by routing the access to his home and business across lands that he knew belonged solely to Mr. Mintz. He could have foreseen that his permission to travel across that property might not survive his decision to end his relationship with Mr. Mintz's daughter. Any hardship upon Mr. Hill does not outweigh the continuous trespass that would be endured by BSC if the motion for injunctive relief were denied.

For these reasons, the court will grant two of BSC's four requests for injunctive relief. BSC is entitled to the following relief: (1) Mr. Hill and any person acting on his behalf are prohibited from entering upon the BSC property at any time and for any purpose, except that the right of Mr. Hill to use the deeded right of way on the BSC property is subject to determination in the pending litigation in New Hampshire; and (2) BSC is authorized to arrange for the termination of all electrical and telephone services on the BSC property and for the removal of all electric or telephone wires running from the BSC property to the Pavlik parcel.

The court is not granting BSC's request that Mr. Hill be instructed to arrange for the termination of the electrical and telephone service. It makes more sense to simply





authorize BSC to accomplish this goal, as it minimizes the likelihood of future litigation over Mr. Hill's efforts to terminate the service. On this point, the court anticipates that the final order will be sufficient for the purposes of the utility companies (CVPS and Fairpoint). If this proves not to be the case, BSC may seek reconsideration of the court's order on this point.

Nor is the court granting BSC's request that Mr. Hill be required to pay the reasonable cost of removing the electrical and telephone wires, at least as a matter of injunctive relief. It would be better to establish the reasonable cost of removal as a matter of money damages after that cost is known and determined.

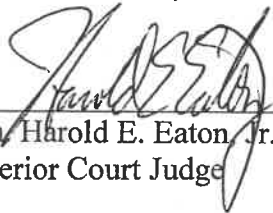
BSC is requested to submit a form order within five days. Mr. Hill may make any objections to the form of the order within five days thereafter. This window should provide Mr. Hill with ample opportunity to make such arrangements as may be necessary to comply with the order.

Mr. Hill has requested a stay pending appeal. Such a motion requires the moving party to demonstrate "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995). Here, a stay would not be appropriate primarily because it would substantially harm another party—namely, the landowner (BSC) who has a very strong interest in ending the continuing trespass across its property. A stay would also harm the public interest in the preservation of property rights. Finally, for the reasons discussed in more detail above, the court is not persuaded that Mr. Hill has shown a strong likelihood of success on the merits. As such, the motion for stay is denied.

### ORDER

- (1) Plaintiff's Motion for Injunctive Relief (MPR #1), filed July 8, 2010, is ***granted in part and denied in part*** as discussed in more detail above;
- (2) Defendant's Motion for Stay Pending Appeal is ***denied***; and
- (3) Plaintiff shall submit a form of judgment within five days, and defendant may submit any objection to the form of the judgment within five days thereafter.

Dated at Chelsea, Vermont this 6 day of December, 2010.

  
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Hon. Harold E. Eaton, Jr.  
Superior Court Judge

