VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 205-4-11 Wrcv

William S. Bruno and Pamela J. Bruno, Plaintiffs v. Patrick J. Zilvitis and Judy J. Zilvitis, as Individuals and as Trustees of the Zilvitis Realty Trust, and Patrick J. Zilvitis as Trustee of the Patrick J. Zilvitis QPRT, and Judy J. Zilvitis as Trustee of the Judy J. Zilvitis QPRT, Defendants	

Decision on Renewed Motion for Summary Judgment

Factual Background

Plaintiffs sue Defendants over the right to use a private road, Norman Drive, which runs over Defendants' property. Plaintiffs and their predecessors used Norman Drive until approximately 2005. Around 2005, Plaintiffs reworked their property and gained access to an alternative route, Tepper Drive. After Plaintiffs gained access to Tepper Drive, Defendants placed obstacles over Norman Drive. Plaintiffs now seek an easement over Norman Drive.

On December 31, 2012, the Court issued an order denying Plaintiffs' original motion for summary judgment. Among other things, the Court denied Plaintiffs' motion because the Court found factual disputes on whether Tepper Drive was a reasonable practical alternative. The Court also questioned when Tepper Drive became a reasonable practical alternative and whether Plaintiffs had a legal right to use Tepper Drive.

On March 22, 2013, Plaintiffs filed a renewed motion for summary judgment. In their renewed motion, Plaintiffs provided additional information about the history and ownership of Tepper Drive. Defendants opposed Plaintiff's motion on April 24, 2013. Plaintiff's responded to the opposition on May 6, 2013. On May 8, the Court issued an order raising a question of whether the parties' predecessors owned the lands that became Tepper Drive. The parties confirmed that their predecessors appeared to have owned this land.

Standard of Review

The Court now considers arguments presented in Plaintiffs' renewed motion for summary judgment. The Court grants summary judgment "if the movant shows that there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The Court makes all reasonable inferences and resolves all doubts in favor of the non-moving party. *Lamay v. State*, 2012 VT 49, ¶ 6, 191 Vt. 635.

Discussion

1. Simultaneous Conveyance

Plaintiffs first claim the order of conveyance of properties prevented Plaintiffs from obtaining an easement by necessity over Norman Drive.[1] Plaintiffs observe the Ludlow Electric Shop, which originally held the property involved in this case, conveyed two portions of its property on June 15, 1946. The Ludlow Electric Shop first conveyed the northern portion of the Zilivitis land to Mable Hodge. The Ludlow Electric Shop next transferred the southern portion of the Bruno land to the Buxtons. Plaintiffs argue they are legally incapable of having an easement by necessity over Norman Drive. The records of the transfers occur in adjacent pages of the deed book.

"[W]hen, as a result of the division and sale of commonly owned land, one parcel is left entirely without access to a public road, the grantee of the landlocked parcel is entitled to a way of necessity over the remaining lands of the common grantor..." *Traders, Inc. v. Bartholomew*, 142 Vt. 486, 491 (1983). By implication, an easement by necessity cannot arise over lands the common grantor no longer owns. *See id.* Nevertheless, "[a]n easement by necessity may be created when there are simultaneous conveyance by a common grantor, and one of the conveyed lots is landlocked an inaccessible." *Morrell v. Rice*, 622 A.2d 1156, 1158 (Me. 1993). The Restatement (Third) of Property (Servitudes) § 2.15, comment c, also provides: "Implied servitudes can arise when the grantor simultaneously conveys all the grantor's interests to two or more grantees..." Thus, an easement by necessity can arise from a simultaneous conveyance, even if the order of recording would technically preclude an easement by necessity.

In this case, the doctrine of simultaneous conveyance could have allowed Plaintiffs to receive an easement by necessity over Norman Drive. The Ludlow Electric Shop conveyed its properties to Mabel Hodge and the Buxtons on the same day in adjacent pages of the deed book. Assuming that these transfers landlocked Plaintiff's predecessors, they could obtain an easement by necessity over Norman drive. *See Morrell*, 622 A.2d at 1158.

The Court also notes there appears to be factual disputes on the ownership of the surrounding property. Plaintiffs argue the Ludlow Electric Shop retained ownership of adjacent lands after it landlocked Plaintiff's predecessors. Defendants also argue that Ellison Lake Road, the road to which both Norman and Tepper Drive connect, was not always a public road. The Court lacks sufficient knowledge of remaining real estate ownership and use to determine if the easement by necessity would have arose somewhere other than Norman Drive. The location of any alleged alternative easement by necessity involves consideration of facts that are outside the scope of this motion for summary judgment.

[1] As described in the December 31, 2012 order, Defendants argue Plaintiffs had an easement by necessity over Norman Drive until they gained accessed to Tepper Drive. An easement by necessity would prevent Plaintiffs from obtaining a prescriptive easement.

2. *Ownership and Use of Tepper Drive*

The next issue in this case is whether Plaintiffs have the right and ability to use Tepper Drive as a matter of law. Plaintiffs trace the right to use Tepper Drive to a deed with an easement transferred from Lael Sargent to the Rands (Plaintiff's predecessors) on July 15, 1953. The language of the deed itself reads: "There is also conveyed a right of way in common with others along said roadway." Defendants, in their motion opposing summary judgment, dispute whether this easement refers to Norman Drive or Tepper Drive.

When interpreting a deed, "[t]he trial court must determine, as a matter of law, whether an ambiguity exists." *Creed v. Clogston*, 2004 VT 34, ¶ 13, 176 Vt. 436. "In making this determination, the court may consider the circumstances surrounding the making of an agreement." *Id.* Nevertheless, the goal is to "give effect to the intention of the parties…" *Id.* ¶ 17. When the Court determines a deed is ambiguous "the question of what the parties intended… is a question of fact to be determined on all the evidence." *Id.* ¶ 18.

The Court finds Plaintiff's right to use Tepper Drive is a disputed material fact. As matter of law, the language of the deed is ambiguous. The deed neither names the proposed roads nor describes the road. Determining which road the deed covers requires the Court to consider facts that the parties dispute. *See id.* Accordingly, the Court cannot decide this matter on a motion for summary judgment. *See Lamay*, 2012 VT 49, ¶ 6.

Finally, the Court cannot decide, as a matter of law, whether Tepper Drive is a reasonable practical alternative route. Even if Plaintiffs have a deeded right to use Tepper Drive it may be useless as practical matter. For example, Tepper Drive may not be usable much of the year. Additionally, the Court has little information on when, if ever, Tepper Drive became a reasonably practical alternative.

Order

The Court *denies* Plaintiff's renewed motion for summary judgment. The parties are to submit a stipulated discovery order, if necessary, within ten days. Otherwise, this case will be scheduled for pretrial conference at the call of the docket on September 3, 2013.

Dated at Woodstock, Vermont on June 11, 2013

Harold E. Eaton, Jr.
Superior Court Judge

FILED
JUN 11 2013
VERMONT SUPERIOR COURT
WINDSOR UNIT