VERMONT SUPERIOR COURT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 317-5-18 Wncv

Susan T. Hoyt
Plaintiff

v.

Bernhardt Von Trapp
Defendant

Opinion and Order on Cross-Motions for Summary Judgment

Plaintiff Susan T. Hoyt initiated this action seeking to quiet title to a portion of her property that her ex-husband, Defendant Bernhardt Von Trapp, claims is burdened by a right of way (ROW) providing access to his contiguous property. Mr. Von Trapp counterclaimed seeking declaratory relief on the same issue. Mr. Von Trapp claims that the access right benefitting his property arose under 19 V.S.A. § 717(c) or the common law as an incident of the 1903 discontinuance of a public road crossing Ms. Hoyt's property. Mr. Von Trapp claims no other rights in Ms. Hoyt's property. The parties have filed cross-motions for summary judgment on this issue.

1. The Summary Judgment Standard

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a

matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial). The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers*, Inc., 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts or affidavits to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991).

2. The Undisputed Facts

The factual record includes a description of the basic deed history and pictorial depictions of the history of the two smaller parcels that are at issue in this case, both of which were originally part of a larger parcel. The facts are presented in detail in Ms. Hoyt's statement of undisputed material facts and are attested to by her expert, Byron L. Kidder, a Vermont licensed land surveyor, who claims to so opine based on his analysis of primary materials. Mr. Von Trapp asserts that all such facts are disputed because they are vague, lack foundation, it is unclear who drew the pictorial depictions, and for unspecified lack of compliance with Vt. R. Evid. 702, all without further explanation.

Mr. Von Trapp's objections are insufficient for summary judgment purposes. Mr. Kidder appears to be a properly qualified expert and his testimony appears to

fall within the scope of his expertise. There is no apparent conflict with Rule 702. Otherwise, the basic deed history and pictorial depictions appear to be fully sufficient to demonstrate how and when the two parcels at issue in this case arose in relation to the alleged discontinuance of Long Road, from which the disputed ROW allegedly arose. The facts are material to that extent. If Mr. Von Trapp believes that the deed history and pictorial depictions are inadmissible or inaccurate in some way that matters, he has failed to explain and support that contention. This is insufficient for summary judgment purposes. *See* 10A Mary Kay Kane, *Fed. Prac. & Proc. Civ.* § 2727.2 (4th ed.) ("[A] party opposing summary judgment and arguing that a material fact is genuinely disputed must support that contention either by citing to materials in the record supporting a genuine factual dispute or by showing that the material in the record does not establish the absence of a genuine dispute.").[1]

In any event, neither in his filings nor at oral argument did Mr. Von Trapp raise a dispute as to any fact that the Court finds is material to resolution of the case. Accordingly, the facts material to summary judgment are undisputed.

The two parcels at issue in this case, Ms. Hoyt's property over which the disputed ROW allegedly travels and Mr. Von Trapp's contiguous property, were once part of a larger parcel known as Tucker Farm. The larger parcel was owned by the Tuckers as of 1898 and abutted and had access from several public roads. Mr.

[1] Mr. Von Trapp did not seek formal relief pursuant to Vt. R. Civ. P. 56(d) due to any purported inability to "present facts essential to justify [his] opposition."

Von Trapp claims that, up until its discontinuance in 1903, a public road, known as Long Road, crossed a portion of Tucker Farm. He maintains that it crossed directly through Tucker Farm across what is now Ms. Hoyt's parcel to what is now his parcel. After its discontinuance, the full length of "road" did not continue to be used within the Tucker Farm parcel. As of today, the parties dispute the precise location of the former "road."

After the discontinuance of Long Road, Tucker Farm was eventually conveyed intact (without subdivision) to several intermediary grantees over the years. Mr. Von Trapp's parents acquired it in 1960. Mr. Von Trapp's parents subsequently divided and conveyed away several parts of Tucker Farm. They conveyed one parcel to Ms. Hoyt and Mr. Von Trapp jointly; they were married at the time.

Ms. Hoyt and Mr. Von Trapp thereafter acquired two additional parcels that had been parts of the original Tucker Farm. All three parcels were contiguous and formed one jointly held Hoyt/Von Trapp property, all of which at one time had been part of the greater Tucker Farm parcel. In the course of their subsequent divorce, in 1993, Ms. Hoyt and Mr. Von Trapp subdivided this joint property into two parts, quitclaiming one to Ms. Hoyt and the other to Mr. Von Trapp.

In this case, Mr. Von Trapp claims a right to cross the parcel quitclaimed to Ms. Hoyt in 1993, via an alleged portion of Long Road that was discontinued in

1903, to reach a portion of the parcel quitclaimed to him in 1993.[2] The claimed ROW would allow him conveniently to access that portion of his property directly from Palmer Hill Road. Mr. Von Trapp has access to his parcel from other public roads. But, accessing the relevant portion of his property from the remainder of his property requires a much longer and less convenient route around Ms. Hoyt's property. The 1993 quitclaim deeds reflect no reservation of any such access right or other deeded right across Ms. Hoyt's property, and Mr. Von Trapp claims no way of necessity. The record is silent as to whether the parties attempted to negotiate a reserved right of way in the disputed location in the course of creating these two parcels in 1993.

3. Analysis

Mr. Von Trapp argues that his claimed ROW arose as a matter of law when Long Road was discontinued in 1903, either under 19 V.S.A. § 717(c) or the common law. To properly analyze this issue, it is important first to understand the general status of property rights when a public road is discontinued.

The common law is clear that a public road typically exists as an easement crossing privately held land, and when the public right of way is discontinued, the remaining rights devolve to the abutting fee owners.

> Unless the contrary is made to appear by competent evidence, the established rule of the common law followed in a majority of the states is that the abutting landowner will be held to own the fee in the public

[2] Ms. Hoyt disputes that Long Road ever existed in the location where Mr. Von Trapp claims the ROW, but any such dispute is immaterial to the Court's analysis. For purposes of summary judgment, the Court accepts the location described by Mr. Von Trapp.

> way in front of his or her property to the center of it, subject to the public easement, unless the owner has been divested of title, as by an accepted dedication, condemnation, or by other means. Regardless of how a street was dedicated to the public, title to a street that is vacated or abandoned vests in the owners of the lots abutting the street.

10A *McQuillin Mun. Corp*. § 30:35 (3d ed.) (footnotes omitted). This legal presumption is the long-established law of Vermont. *See Murray v. Webster*, 123 Vt. 194, 199 (1962). It recognizes that "the administration of town affairs, particularly in regard to highways, are seldom conducted by officials skilled in the law" and ensures that title to the fee can be clearly determined regardless. *Id*. It is also reflected in Vermont statute: "If the discontinued highway is not designated as a trail, the right-of-way shall belong to the owners of the adjoining lands. If it is located between the lands of two different owners, it shall be returned to the lots to which it originally belonged, if they can be determined; if not it shall be equally divided between the owners of the lands on each side." 19 V.S.A. § 775.

The common law, however, also allows certain abutters a continued right of access *across other landowners' property* if a public roadway is discontinued. It preserves a limited private right in favor of one who relied on the public road for access to a parcel that, otherwise, would lose access due to the discontinuance of the public right. The Vermont Supreme Court has stated the applicable general common law principle simply as follows: "when a public road is discontinued or abandoned, the abutting landowner retains the private right of access." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 207 (2000). The *Okemo* Court expressly relied upon a Utah case, which explains: "[A] landowner whose property

abuts a public road possesses, by operation of law, a private easement of access to that property across the public road. A subsequent abandonment of a public right-of-way over such a road has no effect on a private easement owned by an abutting landowner." *Gillmor v. Wright*, 850 P.2d 431, 437–38 (Utah 1993) (citations omitted), cited in *Okemo*, 171 Vt. at 207. Simply put, if a landowner needed the public right of way to access his parcel, he retains a substituted private right of way when the public right is discontinued so that access to his parcel will be preserved.[3]

In 2006, this common law right was codified, in arguably different form, as follows: "A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way." 19 V.S.A. § 717(c); *see also Merritt v Daiello*, No. 49-1-08 Wmcv, 2008 WL 8054434 (Vt. Super. Ct. Apr. 30, 2008) (describing § 717(c) as the codification of the common law principle described

[3] The private right could only benefit one who does not own the property on which the public easement traveled because one cannot have an easement of access over one's own property. When one becomes the owner of property both benefited and burdened by the same easement, the easement is extinguished by operation of the merger doctrine and cannot "be re-created by the mere subsequent separation of the parcels." *Capital Candy Co. v. Savard*, 135 Vt. 14, 16 (1976). Ordinarily, this occurs when the benefited parcel and the burdened parcel come into common ownership. In this case, the private access right would never have arisen in the first place because it never could have benefited the owners of Tucker Farm on their own property.

in *Okemo*). As with the common law, subsection 717(c) describes a right of retention made necessary at the time of discontinuance by the discontinuance.

Whether the analysis in this case proceeds under the common law or 19 V.S.A. § 717(c), the result is the same. Both parties agree that the relevant point in time to analyze the issue is when Long Road was discontinued in 1903. At that point, all relevant portions of former Long Road were entirely within the boundaries of Tucker Farm. At discontinuance of the public way, under 19 V.S.A. § 775, *all* rights related to the "road" devolved to the owners of Tucker Farm. No substitute private right of way in place of the public right of way arose to benefit the owners of Tucker Farm because they owned the entire affected parcel and could not have relied on *any* right of way, public or private, to access internal portions of their own property. The Tuckers were free to access any part of their parcel from any other part of their parcel and had no need of any additional private rights over anyone else's property, which accordingly did not arise as an incident of the discontinuance. Mr. Von Trapp has unearthed no authorities to the effect that the common law should operate in any different manner on these facts.

In short, after the discontinuance, the Tuckers owned the land on which the former Long Road was laid out in fee simple. They could do what they wished with it. Indeed, at oral argument, Mr. Von Trapp acknowledged that, in 1905, the Tuckers could have chosen to build swimming pools across the entire length of the former Long Road, and there would have been no basis to stop them, at least based on the former public use of the "road."

Mr. Von Trapp's need or desire for a more convenient ROW many years after the discontinuance, and following extensive subdivision of Tucker Farm and reconfiguration of internal, subdivided parcels, is not protected by 19 V.S.A. § 717(c) or the common law. Neither source of authority forever embeds a parcel over which a long-ago discontinued public road once traveled with some dormant right of access along its route that may be resurrected in the future whenever the grantee of a newly subdivided parcel deems it advantageous. The relevant point to assess the existence of a ROW is 1903. At that juncture, under the common law and Section 775 the lands associated with Long Road all became the private lands of Tucker Farm and no ROW or easement remained.

As two landowners choosing to divide their jointly held properties, the parties might have chosen to create such a ROW or an easement in the 1993 deed creating Mr. Von Trapp's parcel. For whatever reason, they did not. Mr. Von Trapp asserts no other legal bases for a claimed ROW across Ms. Hoyt's property.[4]

Order

For the foregoing reasons, Ms. Hoyt's Motion for Summary Judgment is granted. Mr. Von Trapp's Motion for Summary Judgment is denied. Plaintiff shall submit a proposed Judgment Order.

Dated this __ day of November 2019 at Montpelier, Vermont.

[4] Given the Court's determinations, it is unnecessary to address Ms. Hoyt's other arguments.

Timothy B. Tomasi,
Superior Court Judge