

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 Motion for Partial Summary Judgment

Factual Background

Plaintiffs, the Brunos, sue Defendants, the Zilvitises, for an easement over Norman Drive, which runs through Defendants' land. Until 2004, Plaintiffs used Norman Drive to access their property. Both Plaintiffs and Defendants believed Plaintiffs had a right to use Norman Drive from a deeded easement or an easement by necessity. In 2004, Plaintiffs rebuilt their home and altered their land to access an alternate exit—Tepper Drive. Plaintiffs then used Norman Drive and Tepper Drive until Defendants installed obstacles to block Plaintiff's use of Norman Drive. Plaintiffs now seek to enforce either an alleged deeded easement or a prescriptive easement. Defendants argue no deeded easement exists and Plaintiffs' use of Norman Drive until 2004 was permissive because Plaintiffs had an easement by necessity until they altered their property.

The properties involved all once belonged to the Ludlow Electric Shop, Inc.¹ The Ludlow Electric Shop conveyed its property to several owners, including Lael Sargent. On July 15, 1953

¹ The chain of title is extensive. The Ludlow Electric Shop received the properties from Francis and E.H. O'Brien on September 23, 1944. The Ludlow Electric Shop deeded the southern portion of what is now the Bruno property to George and Rosaline Buxton on June 15, 1946. On the same day, the Ludlow Electric Shop deeded the northern portion of what is now the Zilvitis property to Mabel Hodge. On January 3, 1948, the Ludlow Electric Shop deeded the remainder of the properties involved to Lael Sargent. On July 9, 1952, the Buxtons deeded the southern Bruno property to Paul and Mildred Rand. On April 11, 1953, Mable Hodge deeded the northern Zilvitis property to Charles and Lucille Waldo. On May 20, 1953, Sargent deeded the southern Zilvitis property to the Waldos. On July 15, 1953, Sargent deeded the northern Bruno property to the Rands. On July 24, 1953, Sargent attempted to deed an easement over Norman Drive to the Rands and Waldos. Later, the Rands deeded the entire Bruno property to Russell and Margaret Bean. On April 18, 1969, the Beans deeded the Bruno property to Lewis and Janet Amunizato. The Amunizatos transferred the Bruno property to Karen Puglisi on September 1, 1972. Lucille Waldo deeded part of

FILED

DEC 31 2012

Sargent deeded some of the property now owned by the Brunos and Zilvitises to the Rands and the Waldos. On July 24, 1953, nine days after deeding the properties, Sargent attempted grant the Rands and the Waldos a deeded easement over Norman Drive. After several other transactions, the Brunos received their entire property on October 28, 1976. The Zilvitises received pieces of their property on April 4, 1983, August 18, 1984, and March 5, 1999.

Plaintiffs and their predecessors used Norman Drive to access their property until approximately 2004. In 2004, Plaintiffs altered their land to gain access to Tepper Drive—a private road that abuts the eastern portions of Plaintiffs’ and Defendants’ properties. Neither party disputes the feasibility of altering the property before 2004. Tepper Drive existed as a road that was passable by cars in the summer since 1964 and as a footpath before 1964. The parties do not indicate who owns Tepper Drive, what rights Plaintiffs have over Tepper Drive, and when Plaintiffs received the right to access Tepper Drive. Plaintiffs note only that nobody has objected to Plaintiffs’ use of Tepper Drive and Plaintiffs rights over Tepper Drive have not changed during their ownership of their property.

The current case arose when Defendants blocked Plaintiffs’ use of Norman Drive by installing obstacles. Defendants argue both they and their predecessors allowed Plaintiffs and Plaintiffs’ predecessors to use Norman Drive because Plaintiffs had an easement by necessity over Norman Drive. Defendants further argue the easement by necessity ceased when Plaintiffs reconstructed their property and gained access to Tepper Drive in 2004. Plaintiffs counter with two alternative claims: (1) they have a deeded easement over Norman Drive; and, (2) they have a prescriptive easement over Norman Drive.

Procedural History

On September 5, 2012, Plaintiffs filed for partial summary judgment on their prescriptive easement claim (count II). Defendants opposed Plaintiff’s motion for partial summary judgment on October 9, 2012. Plaintiff responded to Defendants’ opposition on October 22, 2012

Standard of Review

The Court grants summary judgment if “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(c)(3) (2000). The Court makes all reasonable inferences and resolves all doubts in favor of the non-moving party. *Lamay v. State*, 2012 VT 49, ¶ 6.

the northern portion of the Zilvitis property to Kenneth and Lorraine Nims on July 29, 1974. On May 16, 1975, the Nimses deeded the same portion of the Zilvitis property to John and Judith Montgomery. On July 20, 1976, Karen Puglisi deeded the Bruno property to Victoria Kubris. Kubris deeded the Bruno property to William and Pamela Bruno on October 28, 1976. The Montgomerys deeded their part of the northern Zilvitis property to Robert and Mary Coop on July 29, 1977. On September 20, 1980, the Coops deeded their part of the northern Zilvitis property to Robert Finn. Finn deeded his part of the northern Zilvitis property to Patrick and Judy Zilvitis on April 4, 1983. Lucille Waldo deeded her remaining property on the northern and southern part of the Zilvitis property to the Zilvitises on August 18, 1984. On July 18, 1986, Sargent deeded what is now the southeastern portion of the Zilvitis land to Stephen Greene. On March 5, 1999, Greene deeded the southeastern portion of the Zilvitis land to the Zilvitis realty trust.

Discussion

The first issue in this case is whether there is a deeded easement over Norman Drive. Although Plaintiffs only moved for summary judgment on the prescriptive easement question, the Court must first determine if there is a deeded easement because a deeded easement would defeat an easement by prescription. See *MacDonough-Webster Lodge No. 26 v. Wells*, 2003 VT 70, ¶ 27, 175 Vt. 382. A grantor cannot grant an easement over land she no longer owns. See Restatement (Third) of Property: Servitudes: § 2.1 (indicating an owner of the servient estate may grant an easement by satisfying the statute of frauds and showing intent to create an easement). The deed history and the analysis presented by Plaintiffs' expert indicate Sargent did not attempt to create an easement until after she had transferred the relevant properties. Therefore, Plaintiffs have no deeded easement concerning Norman Drive.

The larger issue in the case is whether Plaintiffs have a prescriptive easement over Norman Drive. To receive a prescriptive easement, a claimant must show "open, notorious, continuous and hostile use of a right-of-way for fifteen years." *Wells v. Rouleau*, 2008 VT 57, ¶ 8, 184 Vt. 536; see 12 V.S.A. § 501 (setting the statutory period of fifteen years). Open and notorious use is presumed to be adverse and hostile. *Wells*, 2008 VT 57, ¶ 8. Permission or the existence of another easement would defeat the hostility requirement. *MacDonough-Webster*, 2003 VT 70, ¶ 27. Determination of the existence of a prescriptive easement thus requires consideration of whether Plaintiffs had an easement by necessity over Norman Drive or had Defendant's permission to use the Norman Drive.

First, the Court must consider if the existence of Tepper Drive as an alternative route would defeat an easement by necessity. An easement by necessity exists over the remaining parcels where a common grantor divides lands and conveys a landlocked parcel. *Berge v. State*, 2006 VT 116, ¶ 6, 181 Vt. 1. Inconvenience and expense do not create necessity. *Id.* ¶ 9. However, an alternative exit will defeat an easement by necessity because it is inconsistent with a parcel being landlocked. An alternative route must allow Plaintiffs "reasonably consistent, practical means of reaching [their] property." *Id.* ¶ 10. Once created, an easement by necessity exists "so long as the necessity exists." *Id.* ¶ 6.

The Court lacks sufficient information to determine whether Tepper Drive is a reasonably consistent and practical means of reaching Plaintiffs' property. The only evidence the Court received indicates Tepper Drive became accessible by cars during the summer around 1964. The Court does not know if Tepper Drive is currently accessible outside of the summer or if so, when it became accessible during the entire year. The Court also lacks information on what rights Plaintiffs have to use Tepper Drive. Under these facts, the Court cannot determine as a matter of law that Tepper Drive is an alternative route that defeats necessity.² See *Lamay*, 2012 VT 49, ¶ 6.

² The ambiguous facts around Tepper Drive raise several potential scenarios. In the event that Plaintiffs have no right to use Tepper Drive, Plaintiffs would likely have an easement by necessity over Norman Drive. If Plaintiffs have the right to use Tepper Drive and Tepper Drive has been a reasonably practical alternative since 1964, then Plaintiffs prescriptively used Norman Drive for more than fifteen years. It is also possible that Tepper Drive became a reasonably practical alternative sometime within the fifteen year statutory period. For example, Tepper Drive may have become a viable alternative route in 2000. If so, Tepper Drive would prevent easement by necessity and mean Plaintiffs failed to meet the time requirement for a prescriptive easement over Norman Drive.

Discussion

The first issue in this case is whether there is a deeded easement over Norman Drive. Although Plaintiffs only moved for summary judgment on the prescriptive easement question, the Court must first determine if there is a deeded easement because a deeded easement would defeat an easement by prescription. See *MacDonough-Webster Lodge No. 26 v. Wells*, 2003 VT 70, ¶ 27, 175 Vt. 382. A grantor cannot grant an easement over land she no longer owns. See Restatement (Third) of Property: Servitudes: § 2.1 (indicating an owner of the servient estate may grant an easement by satisfying the statute of frauds and showing intent to create an easement). The deed history and the analysis presented by Plaintiffs' expert indicate Sargent did not attempt to create an easement until after she had transferred the relevant properties. Therefore, Plaintiffs have no deeded easement concerning Norman Drive.

The larger issue in the case is whether Plaintiffs have a prescriptive easement over Norman Drive. To receive a prescriptive easement, a claimant must show "open, notorious, continuous and hostile use of a right-of-way for fifteen years." *Wells v. Rouleau*, 2008 VT 57, ¶ 8, 184 Vt. 536; see 12 V.S.A. § 501 (setting the statutory period of fifteen years). Open and notorious use is presumed to be adverse and hostile. *Wells*, 2008 VT 57, ¶ 8. Permission or the existence of another easement would defeat the hostility requirement. *MacDonough-Webster*, 2003 VT 70, ¶ 27. Determination of the existence of a prescriptive easement thus requires consideration of whether Plaintiffs had an easement by necessity over Norman Drive or had Defendant's permission to use the Norman Drive.

First, the Court must consider if the existence of Tepper Drive as an alternative route would defeat an easement by necessity. An easement by necessity exists over the remaining parcels where a common grantor divides lands and conveys a landlocked parcel. *Berge v. State*, 2006 VT 116, ¶ 6, 181 Vt. 1. Inconvenience and expense do not create necessity. *Id.* ¶ 9. However, an alternative exit will defeat an easement by necessity because it is inconsistent with a parcel being landlocked. An alternative route must allow Plaintiffs "reasonably consistent, practical means of reaching [their] property." *Id.* ¶ 10. Once created, an easement by necessity exists "so long as the necessity exists." *Id.* ¶ 6.

The Court lacks sufficient information to determine whether Tepper Drive is a reasonably consistent and practical means of reaching Plaintiffs' property. The only evidence the Court received indicates Tepper Drive became accessible by cars during the summer around 1964. The Court does not know if Tepper Drive is currently accessible outside of the summer or if so, when it became accessible during the entire year. The Court also lacks information on what rights Plaintiffs have to use Tepper Drive. Under these facts, the Court cannot determine as a matter of law that Tepper Drive is an alternative route that defeats necessity.² See *Lamay*, 2012 VT 49, ¶ 6.

² The ambiguous facts around Tepper Drive raise several potential scenarios. In the event that Plaintiffs have no right to use Tepper Drive, Plaintiffs would likely have an easement by necessity over Norman Drive. If Plaintiffs have the right to use Tepper Drive and Tepper Drive has been a reasonably practical alternative since 1964, then Plaintiffs prescriptively used Norman Drive for more than fifteen years. It is also possible that Tepper Drive became a reasonably practical alternative sometime within the fifteen year statutory period. For example, Tepper Drive may have become a viable alternative route in 2000. If so, Tepper Drive would prevent easement by necessity and mean Plaintiffs failed to meet the time requirement for a prescriptive easement over Norman Drive.

For the sake of clarity going forward, the Court considers Defendants' argument that Plaintiffs' use of Norman Drive was permissive because Plaintiffs had an easement by necessity until Plaintiffs altered the easement by altering their property to access Tepper Drive. The presence of natural obstacles, which may have been inconvenient and expensive to remove, would not make Plaintiffs' property landlocked. See *Berge*, 2006 VT 116, ¶ 9. The question of whether and when Plaintiffs had an easement by necessity over Norman Drive does not depend on when Plaintiffs altered their property to make accessing Tepper Drive more convenient.

The Court also considers if acquiescence based on a perceived easement, either deeded or by necessity, would make Plaintiffs' use of Norman Drive permissive. An adverse use includes "a use that is made pursuant to the terms of an intended but imperfectly created servitude." Restatement (Third) of Property: Servitudes § 2.16. Sargent attempted to create an easement but failed because she waited until she no longer owned the relevant properties to create that easement. See Restatement (Third) of Property: Servitudes: § 2.1. Reliance on the language in the July 24, 1953 deeds would not defeat prescription. For similar reasons, acquiescence based on an incorrect belief in the existence of an easement by necessity would also not defeat prescription.


Additionally, as indicated by Judge DiMauro's August 27, 2012 order, the Court will not consider the dispute over the conditional-use permit. The Town of Ludlow's zoning actions do not influence the Court's evaluation of whether Plaintiffs have an easement over Norman Drive.

The Court must deny Plaintiffs' request for partial summary judgment. At trial, the Court must determine whether Tepper Drive is a reasonably practical alternative and the basis of Plaintiff's right to use Tepper Drive. The status of Tepper Drive determines whether and when Plaintiffs had an easement by necessity over Norman Drive. In turn, whether Plaintiffs prescriptively used Norman Drive depends on whether and when they had an easement by necessity.

Order

The Court *denies* Plaintiffs' motion for partial summary judgment.

Dated at Woodstock, Vermont on December 31, 2012.


Harold E. Eaton, Jr.
Superior Court Judge

FILED

DEC 31 2012

VERMONT SUPERIOR COURT
WINDSOR UNIT