

would show only that Plaintiff failed to make his needs and wishes clear and that Defendant failed to ask questions to clarify them. And in *Hill v. Grandey*, 132 Vt. 460, 468 (1974), the Vermont Supreme Court held that it is the insured's responsibility, not the agent's duty, to make the insured's needs and wishes clear:

An insurance contract arises out of the insured's desire to be protected in a particular manner against a specific kind of obligation. *It is his responsibility to adequately convey, albeit in laymen's terms, the nature of his wishes, in order to obtain the protection requested* An agent may point out to him the advantages of additional coverage and may ferret out additional facts from the insured applicable to such coverage, *but he is under no obligation to do so.*

Id. (Emphasis added.) Once the insured communicates what he needs and wishes, it is the agent's duty to procure a policy that meets those needs and wishes.* But the agent does not have a duty to ask questions to clarify those needs and desires. *Id.* And this is logical, since what is on the property and what needs to be covered are not matters within the expertise of the agent, but are instead matters that "lay more peculiarly within the knowledge of the insured." *Id.*

Plaintiff suggests this situation is distinguishable from *Hill* because the illegible survey map arguably should have indicated to Livingston the need to ask questions. The Court would be reluctant to give any weight or effect to an illegible document accompanying a packet of floor plans and photos, at least in the absence of attendant facts or circumstances which would have called it to Livingston's attention. Even if it did, however, this would not be a point of distinction because a similar argument was made and rejected in *Hill*. There, the plaintiff insured had leased a poultry farm operation from someone who had previously insured it through the defendant agent. As a side-line to the main poultry farm business, the operation also had an off-premises barbecue business. The plaintiff insured told the defendant agent he wanted the same coverage his predecessor had, and this was done. When an accident occurred in the off-premises barbecue business, the plaintiff insured learned that his predecessor did not have insurance for that part of the business, and he did not either. The plaintiff insured argued that because the defendant knew about the lease, he should have realized the need to ask further questions to discover the scope of the plaintiff's coverage needs. The Court rejected this argument, reasoning that where there is no duty to inquire in the first place, the availability of information which may have indicated a useful line of inquiry cannot create one. 132 Vt. at 469-70. There may be circumstances in which the information provided is too hazy to even provide a policy without further questions. As long as there is "sufficient information . . . to write a valid

contract of insurance" which covers the insured's basic stated needs, however, the agent's failure to pursue a line of inquiry which could have refined or expanded on those stated needs is not a basis for liability. *Id.* at 469.

It follows that the disputed questions of fact Plaintiff points to are not material, and that Defendant is entitled to judgment as a matter of law.

Order

Defendant's motion for summary judgment is GRANTED.

PROPERTY - EASEMENTS - SERVITUDES IMPLIED FROM PRIOR USE

Docket No. 611-12-02 Wrcv

**CHRISTIAN NAST and
CONSTANCE NAST**

v.

**BRUCE MERRITT and
GLORIA MERRITT**

Windsor Superior Court

February 18, 2004

TEACHOUT, J. At a status conference on December 12, 2003, the court proposed to revisit the parties' Motions for Summary Judgment with respect to the issue of an implied easement. Both parties' Motions had previously been denied in an Entry Order of August 6, 2003. Both parties were in agreement with the court's proposal to reconsider the implied easement issue only, and a schedule for supplemental memos was established. The court has reviewed the original motions as well as the supplemental memoranda.

The court adopts as controlling the standard set forth in the Restatement (Third) of Property: Servitudes § 2.12(4). The text is as follows:

§ 2.12 Servitudes Implied From Prior Use

Unless a contrary intent is expressed or implied, the circumstance that prior to a conveyance severing the ownership of land into two or more parts, a use was made of one part for the benefit of another, implies that a servitude was created to continue the prior use if, at the time of the severance, the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use.

The following factors tend to establish that the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use; (4) the prior use was for underground utilities serving either parcel.

Restatement (Third) of Property: Servitudes § 2.12(4)

The policy reasons for this standard are

Notes to Text:

* See also *Booska v. Hubbard Ins. Agency, Inc.*, 160 Vt. 305, 309-10 (1993), quoting *Roque v. Co-Operative Fire Ins. Ass'n of Vt.*, 140 Vt. 321, 326 (1981) (insurance agent's duty is "to use reasonable care and diligence to procure insurance that will meet the needs and wishes of the prospective insured, as stated by the insured").

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sound. As stated in Comment g, when property is sold, buyers and sellers expect utilities to be part of the package purchased. The law should recognize this principle by placing the burden on the seller who claims that underground utility service was excluded from the transaction: the seller should reasonably have to show that (1) the parties addressed the fact that utility lines were not located on the property to be sold but on retained land, and (2) as a result of their discussion or negotiations, the parties decided that no easement would be transferred.

While this section of the Restatement has not been adopted yet in any case decided by the Vermont Supreme Court, the Court has referred to the Third Restatement section on Servitudes in analyzing servitude law related to presumed grants. *Chittenden v. Waterbury Center Community Church*, 168 Vt. 478, 489-90 (1998). The Court has also adopted Third Restatement of Property policy with respect to the related subject of servitudes created by necessity. *Myers v. LaCasse*, 2003 VT 86 and 86A at ¶¶ 16, 14 Vt.L.W. 252 and 286 (2003), 2003 WL 22057306 (foreclosure of junior mortgage resulted in easement by necessity that was not subject to foreclosure of senior mortgage). The adoption of the Third Restatement standard with respect to easements implied from prior use is consistent with the use of the Third Restatement of Property on Servitudes as a contemporary policy resource, and with prior law concerning implied easement for functions essential to use of the property. *McElroy v. McLeay*, 71 Vt. 396 (1899).

Applying that principle to the facts of this case, it was reasonable for the Nasts to expect that when they purchased an 89-acre parcel of land in 1998 with a luxury house with many amenities, the package they were purchasing included electric and telephone lines to serve the house. There is no evidence that the Merritts and Nasts, either on their own or through counsel, discussed or deliberately focused on the fact that the electricity and telephone lines serving the house were not on the 89 acres, but under a road to be retained by the Merritts. There is evidence of some indirect reference to this issue, as described below, and such evidence brings us to the application of the Restatement § 2.12(4) to the facts of this case.

The Merritts' position is that the Nasts' counsel was presented, shortly before closing, with a document that included as one of many provisions a right "to make use of the customer owned utility underground utility lines" under the Old Wagon road. The Merritts point out that the Nasts' counsel rejected this document on the Nasts' behalf. Therefore, the Merritts argue, the Nasts had been alerted to the fact that the utility lines were on land to be retained by the Merritts, had considered the opportunity to obtain an easement; and had rejected it. The Merritts' position is that these facts show that off-premises utility lines was the subject of negotiation which ended in the purchasers taking the position that they did not want the easement, and therefore no easement should be implied. The Nasts' position is that the facts do not show such an intent, and that using the Restatement standard, a utility line easement should be implied.

The material facts are undisputed concerning the content and circumstances surrounding the offer to the Nasts of a document which would have transferred to them a right relating to use of the underground utility lines.

In February of 1993, some years before the Merritts sold the 89 acres to the Nasts, the Merritts had recorded a 5-page document entitled Declaration of Subdivision by Bruce E. Merritt

Windsor County Clerk and Gloria King Merritt (See Appendix G, Defendants' Statement of Undisputed Facts filed June 9, 2003). In it, the Merritts, who owned more than 89 acres, purported to create a 3-lot subdivision which included easements to be held by the various owners of the subdivided lots. When the Nasts' attorney did a title search prior to closing, he discovered this document, and when he communicated with the Merritts' attorney prior to closing, he specifically demanded that a provision be added to the deed from the Merritts to nullify the terms of this document.

On or about June 1, 1998, the Merritts' attorney faxed a proposed property description for the warranty deed to the Nasts' attorney. It included a provision that the "property includes and is subject to" five provisions, two of which were new restrictions, one of which made the conveyance subject to power line easements of record, one of which passed on benefits from a prior recorded deed, and another as follows:

4) The right of Christian A. Nast, his heirs and assigns, to maintain, repair and replace the customer owned underground utility line located under the so-called "Old Wagon Road" in its current location, with the covenant and upon the condition that upon the completion of any maintenance, repair or replacement, the land shall be returned to its previous condition at the expense of the Grantee.

Despite including this provision in the proposed deed as one of five subparagraphs, the Merritts' attorney did not inform the

Nasts' attorney that the electric and telephone lines were located off the premises to be conveyed. While the proposed language offered the right to maintain the utility line, it did not grant either ownership of the lines or a right to use them.

On June 12, 1998, a few days before closing, Mr. Merritt took a new 7 page document to the Town Clerk's Office for recording, and delivered a copy to the Nasts' attorney's office. This new document was entitled Revision of Declaration of Subdivision by Bruce E. and Gloria King Merritt (See Appendix J, Defendants' Statement of Undisputed Facts filed June 9, 2003). It again purported to create a 3-lot subdivision, and set forth easements to be held by the various owners of the subdivided lots, some of which were restrictions that had not been part of the terms of the Purchase and Sales Agreement. This originated not from the Merritts' attorney, with whom the Nasts' attorney was working to prepare for the closing, but from the Merritts themselves, and it included last-minute encumbrances on the property to be purchased. It was in this document, on pages 3-4, that language appears as one of five proposed terms affecting Parcel 1 as follows:

4) The right to make use of the customer owned underground utility line and phone lines under the so-called "Old Wagon Road." Included in this benefit is the right to maintain, repair and replace the said underground utility line in its current location with the covenant and upon the condition that upon the completion of any maintenance, repair or replacement, the land shall be returned to its previous condition at the expense of the owner of Parcel 1.

On page 5 of the same document, a "[r]ight of way for the benefit of the owner of Parcel 1 to make use of the existing privately owned underground utility and phone lines currently buried beneath the so called 'Old Wagon Road' is included as one of six terms affecting Parcel 2.

When Nasts' attorney became aware of this Revised Declaration and the fact that it was at the Town Clerk's Office for recording, he spoke with the Merritts' attorney and rejected the idea that the Nasts would purchase the property subject to this new Revised Declaration. As a result, the document was removed from the Town Clerk's office prior to the closing. There is no evidence that Paragraph 4 in this document received any specific attention or negotiation from either the attorneys or the parties, either before or after the eleventh hour appearance and withdrawal of this document.

It was not until 2002 that the Merritts first told the Nasts that the Nasts lacked the right to use the underground utility lines.

These facts show that it was only in an oblique manner that the Merritts informed the Nasts that electric and telephone lines were not on the 89 acres but on land to be retained by the Merritts. This important fact

was not addressed in the lengthy Purchase and Sales Agreement, and was not highlighted in any way in preparation for closing, despite the fact that it affected essential use of the property. Rather, although it was a significant fact, it appeared only as an underlying circumstance of a single item in a lengthy document prepared and introduced by the Merritts on their own at the last minute, during a period when the attorneys were communicating directly on final closing preparations. The document as a whole was a distraction introduced in an irregular manner, and Paragraph 4 was a minor part of it.

The fact that the Nasts' attorney rejected the entire Revised Declaration on their behalf cannot be held to be equivalent to a deliberate decision by the Nasts to reject the offer of a critical utility easement. There were simply no negotiations between or on behalf of the parties over whether or not an off-premises utility easement would be included in the transfer. The manner in which the subject came up cannot even be held to provide clear and sufficient notice of the fact that the utility lines were off the 89 acres, much less treated as a clear invitation to negotiate on whether or not the Nasts wished to acquire an easement for continued use of existing utility lines or had alternate plans for utility service. The court cannot find that the Nasts were made aware, in an effective manner, of the off-premises location of utility service lines critical to the use of the house they were buying, nor that they manifested an intent to reject or abandon the use of those lines.

In sum, the facts, even taken in a light most favorable to the Merritts, do not support the Merritts' claim that the Nasts were offered an easement for use of underground utility lines and rejected it. Thus under the principle of Restatement (Third) of Property, Servitudes § 2.12(4), the Nasts are entitled to an implied easement for utility service to the residence and improvements they purchased, to the extent of the service at the time of the sale of the property in 1998. An easement cannot be implied for any expanded use. *Wheeler v. Taylor*, 114 Vt. 33, 36 (1944).

Order

Plaintiffs' Motion for Summary Judgment is GRANTED and Defendants' Motion for Summary Judgment is DENIED with respect to Count II, Implied Easement. Plaintiffs hold an easement for underground electric and telephone lines along the route where those lines are located, together with a right to use existing lines and to repair, maintain, and replace those lines. The improvements to be served by those utility lines are limited to any buildings or facilities that were in existence and supplied with service by those lines at the time of the sale in June of 1998.

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