

**STATE OF VERMONT
ORANGE COUNTY**

HART HOLLOW HUNTING CO.)
)
v.)
)
ROBERT NOYER and EVA NOYER,)
ALAN RUEDA, WILLIAM R. CHASE,)
CHASE & CHASE SURVEYORS AND)
SEPTIC DESIGNERS, INC.)

**Orange Superior Court
Docket No. 153-8-04 Oecv**

FILED DEC 10 2008 ORANGE SUPERIOR COURT
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DECISION

Noyers' Motion to Enforce Settlement Agreement, filed August 11, 2008

This case was originally an ejectment action brought by plaintiff Hart Hollow Hunting Co. against defendants Robert and Eva Noyer. It appears that the Noyers bought property from defendant Alan Rueda, but that the property was actually owned by Plaintiff rather than by Rueda. It also appears that an inaccurate survey was part of the basis of the error.

The parties reached a Settlement Agreement in June 2007, which called for a complicated series of transactions to resolve all disputes. Many of the steps called for in the Settlement Agreement have been completed. The case is before the court on a Motion to Enforce the Settlement Agreement filed on behalf of defendants Noyers.

A hearing was held on November 3, 2008. The Noyers were represented by Attorney Philip White, who appeared by telephone due to a transportation breakdown. Mr. Noyer was present in the courtroom and testified. Attorney Ted Joslin was present representing defendants William R. Chase, Chase & Chase Surveyors, and Septic Designers, Inc. Attorney Craig Weatherly represented plaintiff Hart Hollow Hunting Co. by telephone. Defendant Alan Rueda, who represents himself, failed to appear.

Under the Settlement Agreement, Rueda and Chase were required to identify a parcel of 15 acres with a right of way ("Rueda Subdivision Parcel") to be conveyed from the larger Rueda property to the Noyers. The Noyers were to review the proposed parcel for configuration and value, and if accepted, they were to sell it and use the proceeds to pay Hart Hollow a specified sum as compensation for the property presently occupied by the Noyers (which they will keep under the terms of the Agreement). Detailed sequential steps for accomplishing this are set forth in the Settlement Agreement.

In their motion, the Noyers claim that the right of way providing access to the Rueda subdivision parcel, as shown on the survey completed under the Agreement, crosses wetlands. The Noyers seek a declaration that Rueda is required to provide them with a right of way to the Rueda subdivision that does not cross wetlands, and further seek an order that Rueda and Chase provide a new survey of a new right of way that does not cross wetlands.

Findings of Fact

Based on the evidence presented, the court makes the following findings of fact:

The parties entered into a written Settlement Agreement, which was signed by the last party on June 28, 2007. It called for Chase to help Rueda “identify and define a marketable parcel of land consisting of 15 acres on lands now owned by Rueda. . . . Rueda shall also provide a marked right of way to this parcel of land.” Exhibit #1 (Settlement Agreement), ¶ 8(b).

Noyer was to inspect the proposed parcel with Chase and Rueda to be “satisfied that the parcel so identified can be marketed at a price of \$33,333 or greater. Noyer may also utilize a realtor to review the proposed parcel for advice as to marketability and price.” *Id.*, ¶ 8(c). Noyer had thirty (30) days to determine whether to accept the proposed parcel, or if Noyer determined that it could not sell for \$33,333 within 180 days, the Agreement could be renounced in its entirety. *Id.*

Once the parcel was identified and not renounced by Noyer, Chase was required to “survey the Rueda Subdivision Parcel and the right of way and shall provide a copy of the survey to Noyer.” *Id.*, ¶ 8(d). “Chase and Noyer shall thereafter do a second walk of the property to confirm the boundaries of the Rueda Subdivision Parcel. As long as the boundaries substantially conform with the area earlier identified by Chase and Rueda and inspected by Noyer, Noyer shall accept the Rueda Subdivision Parcel as meeting the requirements of this Agreement and shall have no cause to object on grounds of parcel configuration or value, provided, however, that [terms related to septic system approval that are not applicable here].” *Id.*, ¶ 8(e). Chase and Rueda were to “take all steps necessary to secure the necessary permits, including a survey and designing the septic system,” within 90 days of the Agreement, as long as it was not renounced by Noyer. *Id.*, ¶ 8(f).

In accordance with the steps identified in the Agreement, Noyer was shown the proposed subdivision parcel before Chase prepared a survey for it. Noyer had the opportunity to have a realtor present. Although the right of way was not marked by stakes at the time of the inspection, there is no evidence that Noyer was not shown the proposed location of the right of way. Noyer accepted the proposed lot.

The first 150-200 feet of the right of way to the Rueda Subdivision Parcel have standing water, at times 2 feet deep, and would require expensive fill in preparation for constructing a driveway at that location. There is no evidence that this was not visible to

Noyer and/or a realtor or any other person whom Noyer might have consulted. There is no evidence that Noyer objected to the lack of stakes showing the location of the right of way, or that he asked for stakes to be placed at the proposed location of the right of way. Noyer did not renounce the agreement.

Chase thereupon prepared a survey showing the 15 acre parcel and the right of way location. The survey was prepared on August 2, 2007. There is no evidence that the boundaries of the 15 acres and the route of the right of way did not substantially conform with the area identified previously by Chase and Rueda to Noyer as the proposed Rueda Subdivision Parcel.

Noyer subsequently contacted someone from the State of Vermont Water Quality Department about the area of the proposed right of way. Noyer was referred to the Army Corps of Engineers, which has jurisdiction over certain activities in defined wetlands. On August 13, 2008, Noyer met with Maria Abair of the Army Corps of Engineers on the property. In a subsequent letter, Abair wrote:

Given the nature of the terrain that would have to be crossed by your proposed alignment, construction of a drive in this area would be very expensive. In addition, since it appears that there is an option available that would have a lesser environmental impact, it would likely be difficult to obtain authorization for your proposed alignment.”

Exhibit #3, p. 2.

Conclusions of Law

The Noyers seek a declaration that Rueda must provide them with a right of way that does not cross wetlands. Relying upon *Patch v. Baird*, 140 Vt. 60, 66 (1981), they contend that an implied term of the Settlement Agreement requires Rueda to convey a “convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land as well as their own.” They argue that the presently-proposed right of way is neither convenient nor reasonable based on the Army Corps of Engineers’ representation that it would be “very expensive” and “difficult to obtain authorization” to construct the proposed driveway.

Although Rueda was not present at the hearing, he filed a written objection contending that the Noyers’ proposed alternatives were unreasonable. At the hearing, Hart Hollow and Chase did not take a position on the reasonableness or convenience of the proposed right of way, but asserted that the Noyers had waived their right to object to the configuration of the right of way by not renouncing the agreement within the time frame specified by ¶ 8 of the Settlement Agreement.

Based on the evidence presented at the hearing, the court concludes that the Noyers' present objections are not timely raised. As described above, the Settlement Agreement contained a specific protocol governing both the identification and acceptance of the Rueda Subdivision Parcel and the accompanying right of way. Specifically, under the terms of ¶ 8, Noyer was required to make an inspection of the identified parcel and right of way, and determine within 30 days whether the parcel was acceptable in terms of configuration and value. If Noyer inspected the parcel and did not timely renounce the agreement, ¶ 8(e) of the Settlement Agreement expressly provided that he "shall have no cause to object on grounds of parcel configuration or value."

The evidence showed that Noyer made this inspection. Although the right of way was not marked by stakes at the time of the inspection, there was no evidence that Noyer was not shown the location of the proposed right of way, or that it could not be determined at the time of the inspection that a portion of the proposed right of way was wetlands. The layout and character of a right of way to a lot affects its value. Thus, the time for raising objections to the proposed configuration of the right of way expired at the end of the 30 day period for rejection of the agreement, which has passed.

Based on the specificity of the protocol set forth in the Settlement Agreement for identification and acceptance of the proposed parcel and right of way, the court cannot simply imply that *Patch v. Baird* provides an additional term of the contract, and evaluate the right of way to determine whether it complies with the standards articulated by that case. The reasonableness and convenience of the proposed right of way were both components of the inspection protocol, and the Noyers have already had the opportunity to determine whether constructing a driveway over the proposed alignment would be unreasonably expensive. After inspecting the property, the Noyers did not renounce the agreement.

Moreover, the standards articulated by *Patch v. Baird* do not apply to the creation of every easement or right of way. Rather, *Patch* applies when a deed is granted with an *undefined* right of way over a servient estate. 140 Vt. at 66. "When a deed merely recites a general right-of-way over the servient estate, the owner of the easement is 'entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land as well as their own.'" *Clearwater Realty Co. v. Bouchard*, 146 Vt. 359, 361–62 (1985) (quoting *Patch*, 140 Vt. at 66). The present case is factually distinguishable from *Patch* because the Settlement Agreement specifically contemplated identifying and granting an identified right of way prior to the conveyance of the property by deed. It did not merely provide for an undefined right of way. To the extent that the Noyers now seek to litigate the location of the right of way, the dispute is controlled by the terms of the Settlement Agreement rather than *Patch*.

The present case is also factually distinguishable from *Berge v. State*, 2006 VT 116, 181 Vt. 1, which the Noyers relied upon in their memorandum of law. *Berge* explains that "when, 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 or his

successors in title.” *Id.*, ¶ 6 (quoting *Traders, Inc. v. Bartholomew*, 142 Vt. 486, 491 (1983)). Easements by necessity are created at the instant when two or more parcels are severed, leaving one parcel landlocked. *Bartholomew*, 142 Vt. at 492. In the present case, no easement by necessity has been created because there is no evidence that the parcel has yet been severed from the larger Rueda property without a right of access, and there is no evidence that the parties ever proposed to subdivide and create a new parcel for the Noyers without first identifying the location of its right of access.

Finally, in light of the foregoing discussion, the court has considered whether the Noyers’ duty to raise objections to the configuration and value of the parcel within 30 days may be excused under a theory of impossibility of performance. The theory would be that it would be impossible to perform the remaining conditions of the Settlement Agreement (which is in the nature of an executory contract) because of wetlands restrictions. See generally *Agway, Inc. v. Marotti*, 149 Vt. 191, 193 (1988) (explaining doctrine of impossibility of performance). Vermont case law recognizes only a narrow application of the principle. *Id.*

The evidence presented at the hearing does not support such a theory for two reasons.

First, while hearsay evidence was admitted that showed that it would be “very expensive” to build a driveway in the proposed location (without specifying actual cost figures), the evidence did not establish the degree to which any cost differential exists between the present location and the proposed alternative. The court therefore cannot determine that constructing a driveway within the proposed right of way would constitute “extreme and unreasonable difficulty, expense, injury, or loss to one of the parties.” *Agway, Inc.*, 149 Vt. at 193. Furthermore, as discussed above, the expense of the construction was within the scope of what the Noyers were supposed to evaluate at the time they inspected and approved the parcel’s configuration.

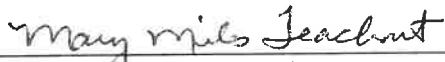
Second, while hearsay evidence also was admitted that showed that it will be “difficult” to obtain permission to construct a driveway in the proposed location, there was no evidence establishing that obtaining a permit would be impossible. The parties have neither applied for a permit to construct a driveway in the proposed location, nor been denied one. Under the reasoning of *Agway*, this is not a sufficient evidentiary showing to justify application of the impossibility doctrine. See *id.* (“If what is agreed to be done is in nature possible and lawful, it must be done.”) (quoting *City of Montpelier v. National Surety Co.*, 97 Vt. 111, 119 (1923)).

For these reasons, the court concludes that the Noyers have not met their evidentiary burden of demonstrating that they are entitled to the relief requested.

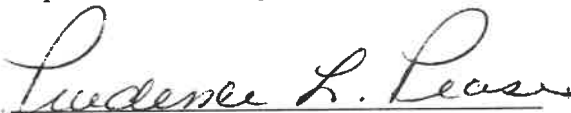
ORDER

For the foregoing reasons, defendants Robert and Eva Noyers' Motion to Enforce Settlement Agreement (MPR #), filed August 11, 2008, is *denied*.


Dated at Chelsea, Vermont this 10th day of December, 2008.



Hon. Mary Miles Teachout
Superior Court Judge



Hon. Prudence Pease (findings only)
Assistant Judge



Hon. Maurice Brown (findings only)
Assistant Judge