IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

NEIL A. CRAIG AND	:	
ROSALIE T. CRAIG,	:	
Plaintiffs	:	
vs.	:	**NO: 09-1880**
	:	
JAMES DULCEY AND	:	
KATHLEEN DULCEY,	:	
Defendants	:	

James A. Schneider, Esquire — Counsel for Plaintiffs
Gretchen D. Sterns, Esquire — Counsel for Defendants

Nanovic, P.J. – February 1, 2011

MEMORANDUM OPINION

Ironically, at issue in this case, is the location of one means of access, Plaintiffs' driveway, which blocks and prohibits, in part, the use of another means of access, a former railroad bed, by Defendants. We must decide whether Plaintiffs, Neil A. Craig and Rosalie T. Craig, are entitled to keep and maintain their above-grade driveway on the railroad bed or whether Defendants, James Dulcey and Kathleen Dulcey, are entitled to have this encroachment removed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1979, Mark Gerhard subdivided approximately 55 acres of property owned by him in Packer Township, Carbon County, Pennsylvania into three separate parcels designated as

Parcels 1, 2 and 3.[1] These parcels are each rectangular in shape, lie parallel to one another and run lengthwise from south to north. The northern boundary of each is the Quakake Creek.

Parcel 1, the western-most parcel, is 20.077 acres in size; Parcel 2, the middle parcel, is 15.220 acres in size; and Parcel 3, the eastern-most parcel, is 20.150 acres in size. Each parcel slopes downward from south to north and each is bisected by an abandoned railroad bed, 50 feet in width, running generally from west to east across the entire Gerhard property. Approximately 75 percent of each parcel lies on the southside of the railroad bed, with the balance bounded between the railroad bed and Quakake Creek on the northside. Each parcel has easement rights in the railroad bed as a means of ingress and egress.

By deed dated May 14, 1979, Gerhard sold what is now Plaintiffs' property, Parcel 3, to Michael J. Bove and his future wife, Helen L. Jacobs. Within a year of this purchase, the Boves built a home on that portion of their property south of the railroad bed and also constructed a driveway leading from their home to the railroad bed. The driveway was built first, beginning in the summer and ending in the fall of 1979.

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[1] The subdivision plan, Plaintiffs' Exhibit 4, was revised in March 1979 to include Parcel 3. Previously, the plan as originally prepared in 1977 included only Parcels 1 and 2. *See* Plaintiffs' Exhibit 4.

For illustrative purposes, an Appendix has been attached to this opinion showing the relative location of the properties involved in this litigation. This Appendix is not to scale.

At the point where the driveway intersects with the southern boundary line for the railroad bed is an embankment with a drop off of approximately eight feet. In order to compensate for this height difference, the Boves placed fill on top of the railroad bed which gradually tapers to the surface of the railroad bed. This built-up area on which the driveway is located and which extends into the railroad bed runs at an oblique angle to the southern boundary of the railroad bed and encroaches on the railroad bed a distance of approximately 86.10 feet along its length and, at its maximum point, approximately 23.61 feet toward its center. In consequence, the area of the railroad bed covered by the driveway, the disputed area, is no longer useable or passable by vehicular traffic on the railroad bed. However, the balance of the width of the railroad bed, approximately 26.39 feet, is open and unobstructed.

Plaintiffs purchased Parcel 3 from Carolyn Keil in 1992. Their deed dated October 20, 1992, is recorded in the Office of the Recorder of Deeds of Carbon County in Deed Book 559 at page 192. The property had previously been purchased by Miss Keil from the Boves in 1985. Since the driveway was first constructed by the Boves on top of the railroad bed in 1979 until the present time, it has remained in the same location as originally constructed.

Defendants claim to have acquired fee ownership of the railroad bed for its entire length through Parcels 1, 2 and 3 from Mark Gerhard, as Executor of his mother's estate, by Deed dated October 12, 2007. In contrast, Plaintiffs claim ownership of that portion of the railroad bed encompassed within the metes and bounds description of their deed. This description for Parcel 3 has remained constant in the chain of title from Mark Gerhard to the Plaintiffs.

Subsequent to their receipt of the October 12, 2007 deed, Defendants sent a series of letters to Plaintiffs claiming ownership of the railroad bed beginning on May 7, 2008, and culminating in a letter dated June 23, 2009, advising that Defendants intended to remove the driveway encroachment from the railroad bed "at [their] discretion after June 30, 2009 without further notice." In response, on July 2, 2009, Plaintiffs commenced the present action by complaint. An amended complaint containing two-counts, each seeking an injunction restraining Defendants from removing or interfering with their driveway as located on the railroad bed, in addition to a claim for general relief, was filed on August 19, 2009. Count 1 claims a prescriptive easement by adverse use of the disputed area for a period of twenty-nine years. Count 2 alleges the existence of an easement implied by necessity attributable to the steepness of their property in the vicinity of the railroad bed and the

consequent need to encroach on the railroad bed. In Defendants' answer filed on February 12, 2010, Defendants deny Plaintiffs' claims and, asserting a right to free and open use of their property, affirmatively counterclaim for an order directing Plaintiffs to remove the driveway encroachment from the railroad bed.

DISCUSSION

Before addressing the issues raised by the parties, two observations must be made. First, the law is no substitute for the facts. Second, the only facts which we can consider are those on the record before us. Both are key to the decision in this case.

As to the first, we begin with the deed from the parties' common grantor, Mark Gerhard, to the Boves. (Plaintiffs' Exhibit 1, Deed dated May 14, 1979 from Mark J. Gerhard to Michael J. Boves and Helen L. Jacobs). This deed on its face conveys fee title to a 20.150 acre parcel. Included within the description for Parcel 3 is the section of the railroad bed lying between the width of this property, a distance of approximately 400 feet. *See* Witman v. Stichter, 149 A. 725, 727 (Pa. 1930) ("[W]hen one legally purchases a tract of land, in accordance with the metes and bounds set forth in the deed of conveyance, he takes title to the entire area, unless

otherwise properly covenanted in the deed."). The Bove deed further "excepts and reserves" to Mark Gerhard, his heirs, successors and assigns, an easement interest only in that portion of the railroad bed located to the west of Parcel 3. (*See* Plaintiffs' Exhibit 1 and Exhibit 4, Plot of Survey – Gerhard Tract; this area is designated by single hatching on the Appendix). This deed also grants the Boves an easement from a public road, identified as T-459, to the western end of the described railroad bed. (This area is designated by cross-hatching on the Appendix). Subsequently, in the deed from Carolyn Keil to Plaintiffs, Plaintiffs have been granted an express easement to use that section of the railroad bed previously excepted and reserved by Gerhard for easement purposes (i.e., the single hatched area in the Appendix) which connects the western boundary of Parcel 3 with the separate easement (i.e., the cross-hatched area in the Appendix) providing access to Route T-459. (Plaintiffs' Exhibit 3, Deed dated October 20, 1992 from Carolyn Keil to Neil A. Craig and Rosalie T. Vitro). This express easement in the railroad bed, according to the Keil deed, has been granted to Plaintiffs by Gerhard in a deed of easement also dated October 20, 1992.

Defendants argue that Gerhard did not have title to the railroad bed at the time of the Bove conveyance and, therefore, could not convey title to this property to the Boves.

The record does not support this contention. To the contrary, Defendants' deed from Gerhard in his capacity as executor of his mother's estate recites that title to the railroad bed was conveyed to Wallace O. Gerhard and Betsy K. Gerhard, his wife, by deed dated February 1972. (Plaintiffs' Exhibit 16, Deed dated October 12, 2007 from Mark J. Gerhard, as Executor of the Estate of Bessie K. Gerhard, Deceased, to James Dulcey and Kathleen Dulcey). The recital in the Bove deed identifies as the source of Gerhard's ownership of Parcel 3 a deed dated September 15, 1977 from Betsy E. Gerhard, *individually* and as Executrix of the Last Will and Testament of Wallace O. Gerhard, Jr. Neither party has placed in evidence a copy of this 1977 deed, however, the chronology of events evidences that Gerhard's mother obtained title to the railroad bed prior to her conveyance of that property of which Parcel 3 was a part to Gerhard and was therefore able to convey title to the railroad bed to her son.[2] Accordingly, the facts in the record before us support the finding that Plaintiffs' predecessor in title, the Boves, acquired title to the disputed section of the railroad bed prior to whatever title Gerhard may have granted to the Defendants in the estate deed of October 12, 2007.

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[2] **Nor have Defendants presented us with a title abstract or other documentation showing that Gerhard did not own the railroad bed at the time of his conveyance to the Boves. *Cf.* Pa.R.C.P. 1054 (b) (requiring the parties in an action in ejectment to "set forth in the complaint or answer an abstract of the title upon which the party relies at least from the common source of the adverse titles of the parties").**

This finding, that Plaintiffs are the fee owners of the disputed area of the railroad bed on which their driveway is located, nullifies Plaintiffs' claims that they acquired prescriptive rights or an easement by necessity in this same area.[3] Likewise, Defendants' claim to remove the driveway predicated on their alleged ownership of the railroad bed is precluded. What remains is Defendants' claim as the holder of an easement interest in the railroad bed to free and unobstructed use of this right-of-way.

On this issue, the question to be determined is whether Plaintiffs' conduct, and that of their predecessors, extinguished Defendants' easement rights in the disputed area by

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[3] **Were this not the case, Plaintiffs' claim to a prescriptive easement would nevertheless fail.**

> **An easement is a liberty, privilege, or advantage which one may have in the lands of another without profit. * * * It may be merely negative * * * and may be created by a covenant or agreement not to use land in a certain way * * *. *But it cannot be an estate or interest in the land itself, or a right to any part of it.* Slegel v. Lauer, 148 Pa. 236, 240, 23 A. 996, 997, 15 L.R.A. 547. An easement is a right in the owner of one parcel of land by reason of such ownership to use the land of another for a special purpose *not inconsistent with a general property in the owner*.**

Clements v. Sannuti 51 A.2d 697, 698 (Pa. 1947) (citations and quotation marks omitted) (emphasis in original). Here, the use Plaintiffs and their predecessors have made of the railroad bed is wholly inconsistent with the rights of the owner, being in effect a claim to a fee since it requires the permanent, actual and exclusive possession of the disputed area. Consequently, such use does not qualify as an easement.

Nor would Plaintiffs be successful had they set forth a claim of adverse possession to title ownership of the portion of the railroad bed occupied by the extended driveway. Plaintiffs have not in their own right used this area for a period in excess of twenty-one years and, while the periods of adverse possession of prior owners may be tacked onto the period of possession of a present owner, for this to occur the previous owners must have included in their deed a grant of any inchoate rights acquired by incompleted adverse possession. Baylor v. Soska, 658 A.2d 743, 746 (Pa. 1995). The deeds of neither the Boves nor Carolyn Keil purport to convey any rights acquired by adverse possession of the area in dispute.

adverse possession. To do so, such conduct "must demonstrate a visible, notorious and continuous adverse and hostile use of [the disputed area] which is inconsistent with the use made and rights held by the easement holder, not merely possession which is inconsistent with another's claim of title." Estojak v. Mazsa, 562 A.2d 271, 275 (Pa. 1989).

In the present case, we believe these standards have been met. The driveway extension constructed on the railroad bed was in existence, unchanged, for almost thirty years prior to the commencement of litigation. Its presence has been actual, continuous and visible for more than twenty-one years. We also find that the nature of the obstruction and its effect on prohibiting any travel over the area of the railroad bed occupied by the driveway extension establishes the requisite adverse, notorious and hostile possession inconsistent with the easement rights claimed by Defendants.[4]

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[4] Contrary to Defendants' request, we find that the Boves' construction of the driveway on the railroad bed in 1979 was not permissive. Permission was neither obtained nor sought from Mark Gerhard or his mother. Moreover, even had we found to the contrary, such permission being personal to the Boves would have been revoked upon the Boves' conveyance of Parcel 3 to Carolyn Keil; her continued use of the extended driveway for ingress and egress to her property after her purchase from the Boves would be adverse. Orth v. Werkheiser, 451 A.2d 1026, 1029 (Pa.Super. 1982) (holding that a use which begins as permissive becomes adverse when continued by the purchasers of property from the person to whom permission was given). Such use by Miss Keil and the Plaintiffs existed for twenty-four years prior to the commencement of Plaintiffs' suit. Nor is tacking an impediment to Plaintiffs' claim, as would be the case with the acquisition of a fee interest by adverse possession, since such does not apply to easements. Predwitch v. Chrobak, 142 A.2d 388, 389 (Pa.Super. 1958) (holding that easements pass by conveyance of the estates to which they are appurtenant).

CONCLUSION

For the reasons given, Plaintiffs' claims to an easement as the source of their right to maintain the extended driveway constructed on the railroad bed are nonsustainable, as is the basis given by Defendants for seeking the removable of the encroachment. Nevertheless, because the facts support Plaintiffs' right to maintain this driveway, as a court of equity, we find Plaintiffs are entitled to the issuance of an injunction restraining and enjoining the Defendants from interfering with or obstructing Plaintiffs' driveway and access to the former railroad as a means of ingress and egress to their property. Township of Salisbury v. Vito, 285 A.2d 529, 531 (Pa. 1971) (recognizing the power of a chancellor to shape and render a decree which accords with the equities in the case when, as here, the complaint includes a prayer for general relief).

BY THE COURT:

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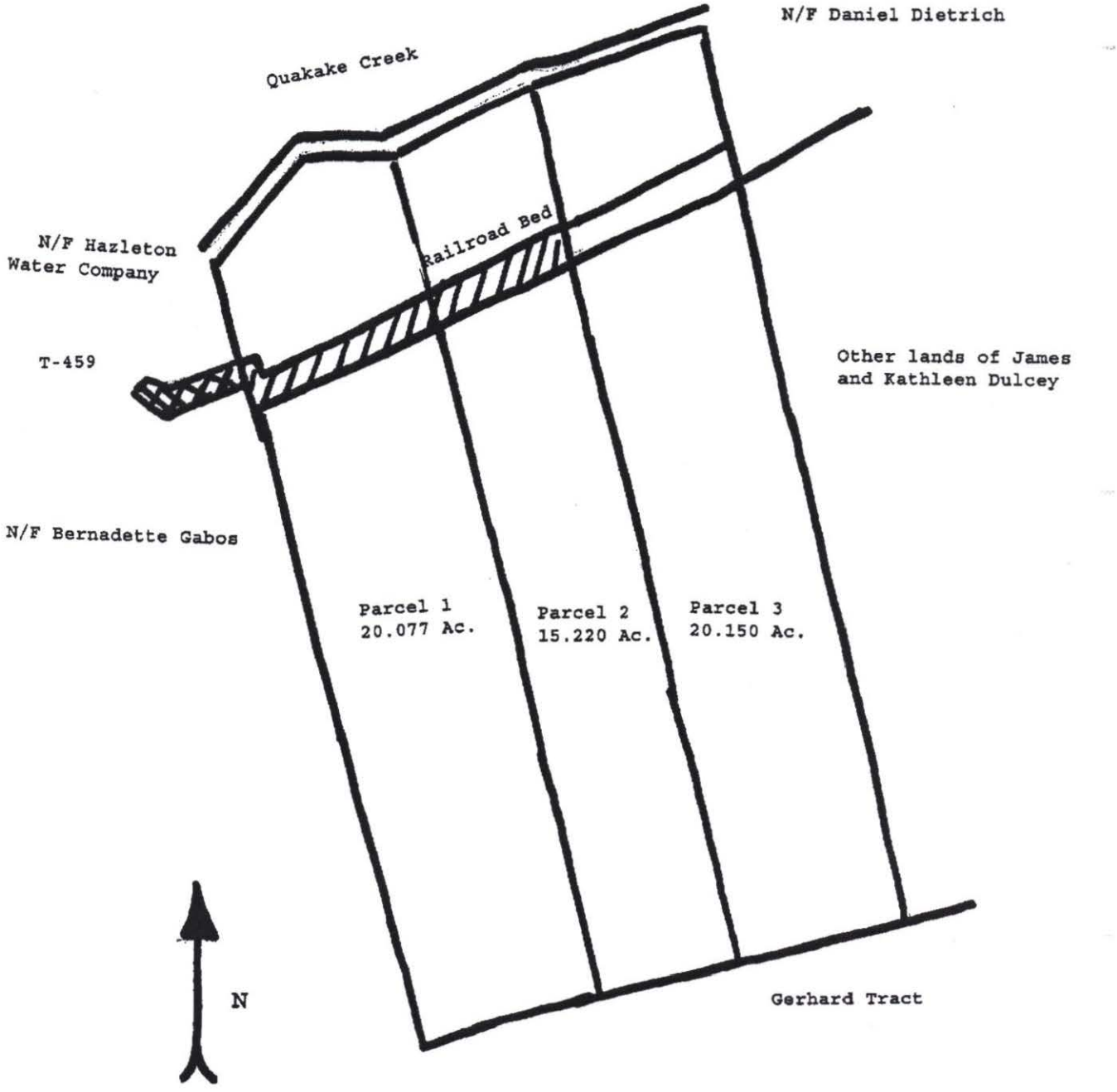
P.J.


N/F Daniel Dietrich
Quakake Creek
N/F Hazleton
Water Company
Railroad Bed
T-459
Other lands of James
and Kathleen Dulcey
N/F Bernadette Gabos
Parcel 1
20.077 Ac.
Parcel 2
15.220 Ac.
Parcel 3
20.150 Ac.
N
Gerhard Tract

Appendix