THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 TERM

AUGUST SESSION

Docket No. 2019-0107

Thomas J. Loeffler

Vs.

Paul Bernier

BRIEF OF THE PLAINTIFF/OPPOSING PARTY THOMAS J. LOEFFLER

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The instant litigation involves a dispute between adjoining property owners regarding the rights of the Plaintiff to the ownership of, access to and rights to improve, a right-of-way which adjoins his property and is shown on recorded plans depicting the Plaintiff's property.

The proceedings were commenced by the Plaintiff's filing of a *Verified Petition for Declaratory and Injunctive Relief, Monetary Damages and Attorney's Fees* with the Rockingham County Superior Court on January 25, 2018. Thomas J. Loeffler vs. Paul Bernier, Rockingham County Superior Court Docket # 218-2018-CV-0074. See, Appendix of Appellant (hereinafter Apd App) at pg. 64. The filing was accompanied by a Request for a Temporary Hearing to halt construction of a fence that the Defendant was in the process of erecting between the Plaintiff's property and the adjoining right-of-way.

A Summons was issued along with a notice of a Temporary Hearing Date. The Defendant was served on January 31, 2018. On or about March 2, 2018 the Defendant, through counsel, filed an Answer, Brief Statement of Defenses and Counterclaim. Following a Temporary Hearing on March 27, 2019, the Court issued an Order enjoining the Defendant from erecting the fence and ordering its removal pending further Order of the Court. The Plaintiff subsequently filed a required Injunction Bond with respect to the removal of the fence. The Order remains in effect at this time.

On or about June 21, 2019, the Parties filed the required Case Structuring and ADR Order, which was approved by the Court (Clerk's Notice dated June 29, 2018).

On or about June 29, 2018 the Plaintiff filed a Motion for Partial Summary Judgment with respect to the Plaintiff's right to construct an access onto the adjoining

right-of-way (the so-called "Second Access"). See, Apd App pg. 49. The filing was accompanied by an Affidavit of the Plaintiff and a Memorandum of Law in Support thereof. See, Apd App pgs. 51 and 61.

Also on June 29, 2018 the Defendant filed a Temporary Restraining Order to prevent the Plaintiff from taking action to actually complete the construction of a second access to his property from the right-of-way. This request was granted by the Court, and the Plaintiff has been unable to complete the desired "Second Access" to the nearly completed home being constructed on his property. Upon a request filed by the Plaintiff, the Defendant was Ordered to file an Injunction Bond. At this moment the Restraining Order remains in place and the Plaintiff ceased all work to complete the Second Access.

On or about July 31, 2019 the Defendant filed an Objection to the Plaintiff's Motion for Partial Summary Judgment. See, Apd App pg. 1. The Objection was accompanied by a Memorandum of Law and Affidavits from Defendant's counsel and the Defendant. See, Apd App pgs. 3, 16, 34.

A hearing on the Motion was held on September 25, 2018. Following the hearing, the Court granted the Plaintiff's Motion for Partial Summary Judgment by Order dated October 17, 2018 (Clerk's Notice dated October 30, 2018). See, pg. 31 *infra*.

The Defendant filed a Motion for Reconsideration on or about November 9, 2018. See, Apd App pg. 36. The Plaintiff filed a timely Objection to the Defendant's Motion.

On January 8, 2019 (Clerk's Notice dated January 10, 2019) the Court Denied the Defendant's Motion for Reconsideration. See, pg. 43, *infra*.

On January 18, 2019 the Plaintiff filed an "Assented To" Motion to Bifurcate the Court's ruling on Partial Summary Judgment because he wished to obtain an "early" ruling on the issue of access in order to complete construction of his house. The Motion was granted by ruling of the Superior Court on January 18, 2019 (Clerk's Notice dated January 24, 2019).

The Defendant filed his Notice of Appeal with this Court on or about February 22, 2019.

The matter is before the Court on the Defendant's appeal of the Superior Court (Wageling, J.) ruling granting the Plaintiff a Partial Summary Judgment.

QUESTIONS PRESENTED

1) Did the Trial Court err in ruling the Plaintiff was entitled to access his property where the property is a lot on a plan approved by the Sandown Planning Board which depicted an adjoining right-of-way as access to said lot and the metes and bounds description in the deed to the property described it as bounded by said right-of-way?

2) Did the Trial Court err in its ruling preventing the Defendant from raising new issues in his Motion to Reconsider, where the issues raised were "readily apparent" prior to the hearing on the Summary Judgment motion?

3) Did the Trial Court err in finding that the Plaintiff did not "abandon" the access from his subdivision lot to the adjoining right-of-way when there is no overt act or evidence of abandonment?

4) Did the Trial Court err in finding that the Plaintiff's access from his subdivision lot to the adjoining right-of-way was not terminated by "impossibility of purpose" where the Plaintiff demonstrated a feasible and necessary access to his property?

STATUTES INVOLVED

491:8-a Motions for Summary Judgment.—

I. A party seeking to recover upon a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment, may, at any time after the defendant has appeared, move for summary judgment in his favor upon all or any part thereof. A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move for a summary judgment in his favor as to all or any part thereof.

II. Any party seeking summary judgment shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits. Copies of all motions and affidavits shall, upon filing, be furnished to opposing counsel or to the opposing party, if the opposing party is not represented by counsel.

III. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

IV. If affidavits are not filed by the party opposing the summary judgment within 30 days, judgment shall be entered on the next judgment day in accordance with the facts. When a motion for summary judgment is made and supported as provided in this section, the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial.

V. If it appears to the court at any time that any of the affidavits presented pursuant to this section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party, the amount of the reasonable expenses which the filing of the affidavits caused him to incur including reasonable attorney's fees. Any offending party or attorney may be found guilty of contempt.

Source. 1955, 46:1. 1959, 264:1. 1965, 139:1; 208:14. 1973, 438:1, 1981, 260:1, eff. Aug. 15, 1981.

STATEMENT OF FACTS

The issues in this case surround land situated primarily in Sandown (with a small portion in Hampstead) formerly owned by members of the Pillsbury family. In June of 1947, a survey and Subdivision Plan of lands owned by the Pillsbury family was prepared by Thomas LaCava, Civil Engineer. The Plan depicts lands South of Angle Pond, North of the present-day Pillsbury Road, and straddling portions of the Town line between Sandown and Hampstead. The Plan is recorded in the Rockingham County Registry of Deeds as Plan 01139. See, Plaintiff's Petition, Exhibit E; Apd App pgs. 84-85. The Plan reflects a creation of twelve (12) lots, numbered 20-31 (inclusive). Lots 21, 23, 25, 27, 29 and 31 are bounded on the West by other lots, and on the East by a 20' "Right-of-Way". Id. The right-of-way proceeds Northerly from Pillsbury Road, and continues past the lots and also served as access to other Pillsbury land. Id.

In June of 1948, members of the Pillsbury family conveyed Lot 29 shown on the 1947 plan to Walter H. Janes and Mary A. Janes by deed dated June 19, 1948 and recorded in the Rockingham County Registry of Deeds in Book 1092, Page 109. See, Exhibit F to Plaintiff's Petition; Apd App at pg. 87. The premises are described as Lot 29, by reference to the Subdivision Plan, and by a metes and bounds description which describes the Easterly boundary as a "twenty foot right-of-way". In addition, the deed contains the following specific language:

> There is further conveyed, as appurtenant to and to be used in connection with the above described premises a right of way over other lands of the above grantors to the public highway, for all necessary purposes of entrance and exit to the conveyed premises.

Id.

In April of 1966, Ernest Pillsbury and Anne Pillsbury (Successors in Interest to the Pillsbury Lands on the 1947 Plan) convey Lot 27 to Nellie Monahan by deed dated April 7, 1966 and recorded in the Rockingham County Registry of Deeds in Book 1815, Page 434. See, Exhibit G to the Plaintiff's Petition; Apd App pg. 89. Like the deed for Lot 29, the conveyed property is described by both reference to the recorded plan, and by a metes and bounds description which describes the Easterly boundary as a 20 foot right-of-way. There is no similar specific language concerning an appurtenant right-of-way but the deed does contain the following language.

> This conveyance is made subject to all the rights of way and restrictions which by contract apply to surrounding lots.

It appears of record that at the time Lot 27 was conveyed to Nellie Monahan, she was the title holder to Lot 29, having gained title in 1955. See, Apd App pg. 31. There is however, nothing in the deed to Lot 27 which indicates the lot needed to be merged, or any restrictions against Nellie Monahan separately conveying either Lots 29 or 27.

In 1968 Ernest Pillsbury files a "Revised Composite Survey" for the Pillsbury Subdivision and obtains Subdivision approval in August of 1968. The Plan, which is dated July 11, 1968, and reflects the signatures of the Sandown Planning Board, is recorded in the Rockingham County Registry of Deeds in August 1968. See, Rockingham County Registry of Deeds Plan 1178; Exhibit D to Plaintiff's Petition; Apd App pg. 82. The Plan approved by the Planning Board shows an additional lot not shown in the 1947 Subdivision (lot 32) and also shows that the "access way" adjoining the Easterly side of Lots 21, 23, 25, 29 and 31 is now 40' wide, with depicted "turn radius" areas adjacent to the Northerly line of Pillsbury Road. Id.

The 1968 plan depicts the name of the apparent record owners of the lots as of the date of its preparation. "Monahan" is listed on both Lots 27 and 29 (which are not shown as combined). Lots 21, 23, 25, 31 and 32 do not reflect any "current owners". Id.

In July 1968 Ernest and Anne Pillsbury convey Lots 21, 23 and 25 to Ceasar by deed dated July 29, 1968 and recorded in the Rockingham County Registry of Deeds in December of 1968 in Book 1946, Page 349. See, Apd App pg. 58. The description references the 1968 Subdivision Plan and the Easterly boundary of the parcel is described as abutting a 40' right-of-way. Id. There is no specific language which speaks of an easement over the right-of-way, and there is no specific language which prevents the separate conveyance or sale of any of the lots.

The "residual/remaining" Pillsbury land as shown on the 1968 Subdivision Plan is eventually conveyed to the Defendant Paul Bernier by deed dated November 13, 2003 and recorded in the Rockingham County Registry of Deeds Book 4195, Page 1133. See, Exhibit H to Plaintiff's Petition; Apd App pg. 91.

The Plaintiff is eventually deeded Lots 27 and 29 by deed dated February 12, 2005 and recorded in the Rockingham County Registry of Deeds in Book 4452, Page 8. See, Exhibit B to Plaintiff's Petition; Apd App pg. 76. In 2006 the Plaintiff and Robert J. Loeffler (the then owner of Lots 21, 23 and 25) secured approval from Planning Boards in both Hampstead and Sandown to do a lot line adjustment subdivision by which the Plaintiff secured additional land consisting of all of Lot 25, and the Easterly Sections of Lots 23 and 21. See, Subdivision Plan recorded in the Rockingham County Registry of

Deeds as Plan D-36135; Plaintiff's Petition, Exhibit C; Apd App pg. 80; Plaintiff's Motion for Partial Summary Judgment, Exhibit A; Apd App pg. 53.

At the time the Plaintiff acquired Lots 27 and 29, there was an existing foundation installed by prior owners. Following the Lot Line Adjustment Subdivision, the Plaintiff obtained a building permit to construct a new home on the property. See, Affidavit in Support of Motion for Partial Summary Judgment; Apd App. Pgs. 51-52.

At some point the Plaintiff determined that he wished to supplement the previously existing access to Lot 29 with an additional access to the property in the vicinity of Lots 21 and 23. Whether or not the Defendant was aware of this desire, or simply anticipated it, the Defendant began erecting a stockade fence between the Plaintiff's property and the adjoining right-of-way, beginning in the vicinity of Pillsbury Road, and proceeding Northerly, in front of the Plaintiff's property. This resulted in the instant litigation being filed. When it was apparent that the Defendant would not concede the Plaintiff had a right to access the right-of-way to create a Southerly access, the Plaintiff filed the Motion for Partial Summary Judgment (See, Apd App pg. 49), which sought permission to construct an access point and associated parking on the Southerly end of the Plaintiff's property. See, Access Plan attached as Exhibit D to Affidavit in Support of Motion for Partial Summary Judgment; Apd App pg. 60. The Motion for Partial Summary Judgment was ultimately granted and the Defendant has now brought the instant appeal.

SUMMARY OF ARGUMENT

This matter comes before the Court on a ruling on a Motion for Partial Summary Judgment. The issue primarily relates to the proper interpretation of deeds, which is a question of law for the Court. The Parties have indicated there are no specific issues of fact which prevent the Court's ruling.

The Plaintiff's property consists of a series of lots first shown on a 1947 Subdivision Plan, and later by a 1968 Revised Subdivision which obtained municipal subdivision approval. The lots are shown as bounded on the East by a right-of-way/access way. The initial deeds to all of the lots are issued by the predecessors in interest to the Defendant, who owned the lots and the land constituting the adjoining right-of-way. Each of the deeds contains a legal description which references (i) the lot number used by plan(s), and (ii) a metes and bounds description which describes the adjoining right-of-way as the Easterly boundary of the lot.

In such circumstances, New Hampshire law establishes an "estoppel by deed" through which the Grantee to the lot (and its Successor) secures a right to access the adjoining right-of-way, and the Grantor (and its Successors) are estopped to deny the access right. The access right by estoppel arises regardless of intent or necessity. See, 700 Lake Avenue Realty Company vs. Dolleman, 121 N.H. 619 (1981).

Likewise, because the initial deeds referenced recorded plans which depicted the adjoining right-of-way as the access to the property, an enforceable equitable servitude arises under the principals of Gagnon vs. Moreau, 107 N.H. 507 (1967). The fact that multiple lots may have been owned by the single owner does not impair the access

rights for each lot in the absence of any circumstance or restriction against subsequent separate conveyance of the parcel by the Grantee.

The Defendant's attempts to raise, via a Motion to Reconsider, arguments regarding abandonment of the easements, or the impossibility of purpose, should be rejected as untimely, given that the issues were "readily apparent" at the time the Motion for Summary Judgment was filed. The Trial Court exercised sustainable discretion in ruling it would not consider such arguments.

Notwithstanding its asserted dismissal of the Defendant's effort to raise late arguments, the Trial Court found any such assertions "unavailing". Abandonment of an Easement requires "a clear, unequivocal and decisive" action by the Easement holders. There is no evidence of such actions. The subdivision plan of the Plaintiff's property does not preclude or renounce the possible access to the right-of-way. Likewise, the purpose of the access easement is not impossible, as demonstrated by the Plaintiff's proposed "Second Access" to the right-of-way.

The Trial Court ruling should be affirmed

ARGUMENT

I. STANDARD OF REVIEW

When this Court reviews a Trial Court grant of Summary Judgment, it must consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. Estate of Day vs. Hanover Insurance Company, 162 N.H. 415, 417 (2011). If this Court's review of the evidence discloses no genuine issue of material fact, then the Trial Court will be upheld if the moving party is entitled to a judgment as a matter of law. Id. This Court reviews the Trial Court's application of the law to the facts *de novo*. Id.

The Trial Court rulings of law are reviewed under a "plain error" standard. 5 N.H. Practice (Wiebusch) 4th Edition (McDonald) §60.54 at n. 7 citing, Cadle Company vs. Bourgeois, 149 N.H. 410 (2003).

Generally, the review of easement documents is ultimately a question of law for the Court to decide. Soukup vs. Brooks, 159 N.H. 9 (2009). A Summary Judgment is appropriate for a ruling when it involves agreed instruments and the legal effect thereof. Cricklewood on the Bellamy Condominium Assoc. vs. Cricklewood on the Bellamy Trust, 147 N.H. 733 (2002).

II. THE RULING THAT THE PLAINTIFF HAS EASEMENT RIGHTS TO ACCESS THE ADJOINING RIGHT-OF-WAY IS CORRECT AS A MATTER OF LAW AND SHOULD BE AFFIRMED

A. No Disputed Issues of Fact

The Trial Court ruling in this matter was based on the Plaintiff's Motion for Partial Summary Judgment (RSA 491:8-a) contending that there were no material facts in dispute, and the Plaintiff was entitled to a Judgment as a matter of law. The "Objection" to the Plaintiff's Motion, filed by the Defendant (See, Apd App pg. 1), was accompanied by an Affidavit (by an Associate Attorney) which simply recited all the relevant deeds and plans of record at the Registry of Deeds. See, Apd App pgs. 16-33. These were (for the most part) the same documents relied upon by the Plaintiff. At the hearing on this matter, it was pointed out that there were no disputed factual issues to decide to reach the decision. Transcript (hereinafter Tr) pgs. 4-5. Defendant's counsel stipulated to the Court that it had all the evidence it needed to render a decision. Tr pgs. 24-26.

Consequently, the Trial Court was in a position to rule on the legal issues involved. The interpretation of a deed is ultimately a question of law for this Court, based on the intention of the parties as found by the Trial Court. Burke vs. Pierro, 159 N.H. 504 (2009). However, if the terms of a deed are clear and unambiguous, those terms govern the interpretation of the parties' intent. Mansur vs. Muskopf, 159 N.H. 216 (2009). And, as noted by Defendant's counsel, the issues in question related to deeds 50 years old (or more), and there was no ability to secure any meaning from any of the original parties to the conveyances. Tr pg. 12.

Consequently, there was no reason the Trial Court could not proceed to issue its ruling.

B. The Plaintiff Lots Have Access To The Adjoining Right-of-Way Through Estoppel By Deed.

The Plaintiff's initial arguments in support of Summary Judgment relied on the theory that all of the Plaintiff's lots were conveyed pursuant to a subdivision plan, relying upon the principal set forth in Gagnon vs. Moreau, 107 N.H. 507 (1967). See, Apd App pgs. 61-63. The memorandum did point out that each of the deeds in question contained descriptions which included language in the metes and bounds description which referenced the adjoining "right-of-way".

In the Defendant's Objection to the Motion, the Defendant pointed out that:

> Where property is conveyed in a deed and one or more calls is an abuttal on a private way there is a grant, or at least a presumption of a grant of an easement in such way when the way is owned by the Grantor.
>
> 700 Lake Avenue Realty Co. vs. Dolleman
> 121 N.H. 619, 623 (1981)
> And authorities cited.

At the hearing on the Summary Judgment Motion, Plaintiff's counsel pointed out the applicability of 700 Lake Realty to the facts in this case. Tr pgs. 6-7. Ultimately the Trial Court adopted this primary line of reasoning in granting the Plaintiff's Motion. Order, pg. 37 *infra*.

The Defendant argues the non-applicability of the 700 Lake Avenue Realty principal arguing the grantee of Lot 21 could not have reasonably relied on access to the right-of-way because that lot has frontage on Pillsbury Road. However, the estoppel by deed theory is not affected by the doctrine of necessity. 700 Lake Avenue Realty supra, citing, Spangler vs. Schaus, 106 R.I. 795; 264 A. 2nd 161 (1970).

The deed for Lots 21, 23 and 25 all were given by the owner of the adjoining right-of-way and referred to the adjoining right-of-way as the Easterly boundary. There is nothing which suggests that the lots could not be separately conveyed by the Grantee. Cf, Roberts vs. Town of Windham, 165 N.H. 186 (2013) (Deeds which described multiple lots by running description does not conclusively result in merger). Consequently, the grantee in this circumstance reasonably expected to receive the access rights associated with the property.

The Court in 700 Lake Avenue Realty held that:

> We are confronted with the situation in which a deed uses a way as a boundary and the grantor owns the way. An implied easement has therefore been created. Greenwood vs. The Wilton Railroad, 23 N.H. (261) at 265 (1851). Because the necessary implication contained by that description appears on the very face of the grantor's deed, he and all parties in privity with him, are estopped to deny the grant.
>
> 700 Lake Avenue Realty, supra at 626.

But the easement is not an implied easement by necessity, consequently the availability of alternate access is irrelevant, at least as construed in New Hampshire. The Defendant's arguments to the contrary must be rejected.

The Defendant attempts to argue that because certain lots were conveyed together (or to owners of adjoining lots) that there should be an assumption that the grantees did not "require" or "reasonably expect" the need for an implied access easement. As pointed out, there is no evidence to support a claim that such grantees could not turn around and separately convey such lots, or that they lacked the ability to do so.

With regard to Lot 21, specifically there is no basis to believe that the owner might not prefer, for a variety of reasons, to access from the adjoining way rather than the public road.

The Trial Court properly applied the "Estoppel by Deed" principal as articulated in the 700 Lake Avenue Realty decision and therefore there was no error of law, and the Trial Court decision should be upheld.

C. The Plaintiff's Right of Access Is Sustainable As An Equitable Servitude

This Court, in its decision in the 700 Lake Avenue Realty matter (supra) takes care to point out that there are "two distinct" theories of law when it comes to lot conveyances:

> (i) Instances where the deed itself represents that the conveyed parcel borders on a way;
>
> (ii) Instance where a deed refers to a plan which indicates the existence or planned construction of streets and ways.
>
> 700 Lake Avenue Realty, supra at 623.

In this case, the deeds to the various lots contained both and therefore the access may be enforced as a covenant enforceable as such. See, Section II(B) infra.

The distinction between covenants and equitable servitudes is detailed in the matter of Arnold vs. Chandler, 121 N.H. 130, 134 (1981). Both can result in the creation of an enforceable right to access the adjoining right-of-way. See, Douglass vs. Company, 76 N.H. 254 (1911); Gagnon vs. Moreau, 107 N.H. 507 (1967).

The "Equitable Servitude" arises through the creation of a "general scheme of development" and binds an owner who acquired the land with notice of a restriction on it. Arnold, supra at 134.

In this case the "owner" who would be subject to the "equitable servitude" would be the Defendant, who acquires with knowledge of the previous subdivision. The Defendant clearly had notice because the Revised Subdivision Plan is referenced in his deed. See, Exhibit H to Plaintiff's Petition; Apd App pgs. 91-92.

Consequently the principal as set forth in Gagnon vs. Moreau, supra with regard to access arising from the Subdivision Plan would also be a separate and distinct ground for the Plaintiff to obtain Summary Judgment. Cf, 5 N.H. Practice, supra at §60.54 n. 4 (A decision that is correct but relies on erroneous grounds will be sustained if valid alternate grounds can be found in the record to support it).

Because the access from Lots 21, 23 and 25 to the adjoining access way can be enforceable as an equitable servitude, the Court ruling granting the Plaintiff Summary Judgment should be upheld.

III. THE TRIAL COURT PROPERLY REJECTED THE DEFENDANT'S CLAIMS OF ABANDONMENT OR IMPOSSIBILITY OF PURPOSE WITH RESPECT TO THE PLAINTIFF'S RIGHT OF ACCESS

A. Rejection of Arguments as Untimely Was Not An Abuse of Discretion

Following the Trial Court's initial ruling on the Plaintiff's Motion for Partial Summary Judgment, the Defendant filed a Motion for Reconsideration, in which he raised for the first time claims of Abandonment of any implied easement and Impossibility of Purpose of the easement rights. See, Apd App pgs. 39-43. The Trial

Court, in its Order on Reconsideration, indicated it was declining to consider those arguments as "new" theories after the hearing citing, Appeal of Vicky Morton, 158 N.H. 76, 79 (2008). See, Order, pg. 48 *infra*. The Defendant challenges that ruling as an abuse of discretion. See, Defendant's Brief, pgs. 10-13. The Defendant's arguments are without merit.

The Plaintiff's Motion for Partial Summary Judgment (See, Apd App pg. 49), the accompanying Affidavit (with attached plan) (See, Apd App pg. 51) and the filed Memorandum of Law (See, Apd App pg. 61) all referenced the Plaintiff's attempt to obtain a "second access" to the adjoining right-of-way in the vicinity of Lots 21 and 23 on the 1968 Subdivision plan. In his Objection to the Plaintiff's Motion (See, Apd App pg. 1) and accompanying Memorandum (See, Apd App pg. 3) the Defendant makes no reference to claims of abandonment or impossibility of purpose.

As noted by the Trial Court, regardless of the theory relied upon by the Court to find easement rights in the Plaintiff (i.e., by reference to plan or by estoppel by deed), the end result is that the Plaintiff would hold easement rights to access the right-of-way. The theories/defenses to the Plaintiff's claims should have been asserted on the presumption that the Court could rule favorably on the Plaintiff's "implied easement" claim founded upon the Gagnon vs. Moreau, (107 N.H. 507 (1967)) premise as argued in the initial Memorandum. See, Apd App pgs. 61-63.

In its decision in Appeal of Vicky Morton, supra, this Court rejected an attempt by an appealing party to argue a point first raised in a Motion to Reconsider. This Court stated:

> "Thus the issue has not been preserved for our review. See, Mountain Valley Mall Assocs. vs. Municipality of Conway, 144 N.H. 642, 654-655,

> 745 A. 2nd 481 (2000) (party cannot raise an issue for the first time in Motion for Reconsideration when the issue was readily apparent at the time the party initially filed for relief); Sklar Realty vs. Town of Merrimack, 125 N.H. 321, 328; 480 A.2nd 149 (1984) (a party may not be entitled to judicial review of matters not raised at the earliest possible time).
>
> Morton, supra at 79.

The Trial Court ruling on a Motion to Reconsider will be upheld absent an abuse of discretion [now determined as the unsustainable exercise of discretion]. Mountain Valley Mall, supra citing, Fortin vs. Manchester Housing Authority, 133 N.H. 154 (1990). See also, 5 N.H. Practice supra at §60.54 n. 7 and cases cited. Given that the claims of "abandonment" and "impossibility" are essentially "affirmative defenses", there is no apparent reason that the Defendant should be excused from not raising them at an earlier time. Cf, Superior Court Rule 9(d) (requirement to plead affirmative defenses in early responsive pleading).

The Trial Court's ruling that the Defendant's claims should not be considered is sustainable and should be upheld.

B. The Claim of Abandonment of the Easement Is Without Merit

Although the Trial Court indicated it was not going to issue a ruling on the Defendant's claim that the Plaintiff "abandoned" its right to an access easement for Lots 21, 23 and 25, the Court did proceed to rule in the alternative, that such an argument, if considered, would be "unavailing". Order, pg. 48 *infra*. Consequently, even if this Court feels that the Trial Court should have fully entertained an argument on abandonment, this Court may still affirm the grant of Summary Judgment to the Plaintiff. See, 5 N.H. Practice, supra at §60.54 n. 4 (a decision that is correct but relies on erroneous grounds will be sustained if valid alternate grounds can be found in the record to support it). The

Plaintiff did not "abandon" his clearly established legal right to access onto the right-of-way adjoining the Plaintiff's property. Abandonment of an easement must involve clear, unequivocal and decisive acts by the owners of the dominant estate, manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence. Titcomb vs. Anthony, 126 N.H. 434 (1985). The Defendant argues that the lot line adjustment subdivision plan somehow shows an "intent to abandon" the access rights enjoyed by portions of the Plaintiff's lands, however, there is no such intention shown on the plans. The "subdivision" plan established borders for the Plaintiff's property, but it was not a "site plan". See, RSA 674:43 (site plan jurisdiction relates to non-residential uses and/or multi-family dwellings of more than 2 units). Consequently, the Plaintiff was not limited in any way as to the location of driveways, or whether or not he could construct an additional driveway. Contrary to the Defendant's assertions, there is no "representation" by the Plaintiff that he would have only one driveway, because the subdivision plan does not regulate the development of lots on which single family homes are constructed.

There is nothing associated with the development of a single family home that implies or requires that a single family home have only a "single" driveway. The Trial Court could take "judicial notice" (See, Rules of Evidence, Section 201) that many single family homes have two (2) driveways for either circulation or access purposes.

The act of consolidating the lots for the purpose of constructing the new home is not an "unequivocal" act reflecting an intent to abandon. See, Downing House Realty vs. Hampe, 127 N.H. 92, 95 (1985) citing, Bruchhausen vs. Walton, 111 N.H. 98 (1971). The holder of an easement does not forfeit a part of it because he has no present need

for it or is unlikely to exercise the whole of it. Downing House supra. The fact that the lot development lends itself to the creation of the Second Access (See, Plaintiff's proposed Access Plan; Apd App pg. 60) is evidence that there was never any intent to abandon the ability to exercise additional access rights to the property. The lot "consolidation" as accomplished by the lot line adjustment plan did not alter the frontage areas adjoining the right-of-way. Consequently, there was no "alteration" of the property in a way that the easement no longer serves any purpose. Cf, 17 N.H. Practice (Szypszak) §8.04

The Trial Court conclusion that an abandonment of the easement could not be sustained should be affirmed.

C. The Claim of Impossibility of Purpose of the Easement Is Without Merit

Although the Trial Court indicated it was not going to issue a ruling on the Defendant's claim that it had become "impossible" for the purpose of the access easement to be accomplished, the Court did proceed to rule in the alternative, that such argument, if considered, would be "unavailing". Order, pgs. 47, 50 *infra.* For the same reasons as set forth above with respect to the "abandonment" argument, this Court should affirm the grant of Summary Judgment to the Plaintiff.

The impossibility of purpose doctrine extinguishes an easement because the purpose of the easement grant is no longer possible. Stowell vs. Andrews, 171 N.H. 289, 295 (2018), citing, Restatement (Third) of Property: Servitudes § 7.10 at 394 (2000). Under the impossibility doctrine, when a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the

purpose for which the servitude was created, and modification of the servitude is not practical or would not be effective, a Court may terminate the servitude. Stowell, supra. In evaluating whether impossibility of purpose is applicable, one must begin with "determining the particular purpose of the easement in question". Id. Then the inquiry shifts to whether the particular purpose still exists. If not, the easement is considered to have expired. Stowell supra at 295, citing, Boissy vs. Chevion, 162 N.H. 388 (2011).

In the Stowell case, the issue was the interpretation of pedestrian easements on certain footpaths, and whether the use was limited to access to steamboat docking sites (which had not existed since the 1930's). The Court held that the easements were not "impossible", ruling that the language about steamboats were "words of description" rather than limitation. Id. The "access" purpose remained viable and not impossible to accomplish.

The "easement" in question in this case is the ability to pass from the area constituting Lot 21, crossing onto the access way, to reach Pillsbury Road. That area still exists and in fact, is labelled as such on the Lot Line Adjustment Plan. See, Exhibit C to Plaintiff's Petition; Apd App pg. 80. Having established the right to pass in this location, it continues to function to provide access as long as the access is reasonable. There is no suggestion that the Plaintiff's proposed use raises any issues of "overburdening" the original created access. E.g., Nadeau vs. Town of Durham, 129 N.H. 663 (1987) (right-of-way for single family dwelling could not serve large housing project).

As noted by the Trial Court, the access easement acquired upon the deeding of Lot 21 was to benefit the land contemplated within Lot 21. Order, pg. 50 infra. That

purpose continues to be fulfilled today by allowance of a "Second Access" to the property. In his brief, the Defendant raises the "specter" of the Plaintiff constructing five (5) separate accesses for the five (5) separate lots. The response to this argument is that all use of the easement is governed by the "rule of reasonable use". Arcidi vs. Town of Rye, 150 N.H. 694, 702 (2004) citing Sakansky vs. Wein, 86 N.H. 337 (1933). The Defendant does not contend, nor is there a basis to contend, that allowing a "Second Access" to the Plaintiff's property creates an "unreasonable use" of the access way. As noted above, the existence of a second access point for a residential property is usual and customary to the point of acceptance for judicial notice. Nowhere does the Defendant contend that the second access is an "unreasonable" use for a home.

The Trial Court conclusion that "impossibility of purpose" did not (does not) arise to prevent the Plaintiff's access to the access way should be affirmed.

CONCLUSION

Based on the foregoing arguments, Thomas J. Loeffler respectfully requests that this Court AFFIRM the decision of the Rockingham County Superior Court.

The Plaintiff Thomas J. Loeffler requests that in the event the Court determines oral argument is necessary, that his attorney, Bernard H. Campbell, Esq. be heard orally, and be allotted the customary time for Oral Argument.

A copy of the decision under Appeal, and the accompanying ruling on the Defendant's Motion to Reconsider are attached hereto.

Respectfully submitted
Thomas J. Loeffler
BY HIS ATTORNEYS,
Beaumont & Campbell, Prof. Ass'n.
1 Stiles Road, Suite 107
Salem, New Hampshire 03079

Dated: August 26, 2019

By: _____
Bernard H. Campbell, Esq.,
Bar ID # 035

CERTIFICATE

In accordance with applicable Rules of the Supreme Court (including Rule 26 (7) and Rule 18(a) of the Supplemental Rules for Electronic Filing), the undersigned certifies that copies of the foregoing Brief on behalf of Thomas Loeffler have been forwarded through the Court Electronic Filing System, on the date shown below to:

Roy W. Tilsley, Jr., Esq.
Bernstein Shur Sawyer & Nelson
P.O. Box 1120
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Attorney for Paul Bernier

Brett W. Allard, Esq.
Bernstein Shur Sawyer & Nelson
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Attorney for Paul Bernier

Additionally, the document is in compliance with the word limitation contained in Rule 16(11) and the number of words in the document is Seven Thousand Nine.

Dated: August 26, 2019

Bernard H. Campbell, Esq.
NH Bar ID #035

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Thomas J Loeffler v Paul Bernier**
Case Number: **218-2018-CV-00074**

Enclosed please find a copy of the court's order of October 17, 2018 relative to:

Plaintiff's Motion for Partial Summary Judgment.

October 30, 2018

Maureen F. O'Neil
Clerk of Court

(218340)

C: Bernard H. Campbell, ESQ; Roy W. Tilsley, ESQ; Brett William Allard, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY SUPERIOR COURT

THOMAS LOEFFLER

v.

PAUL BERNIER

Docket No. 218-2018-CV-0074

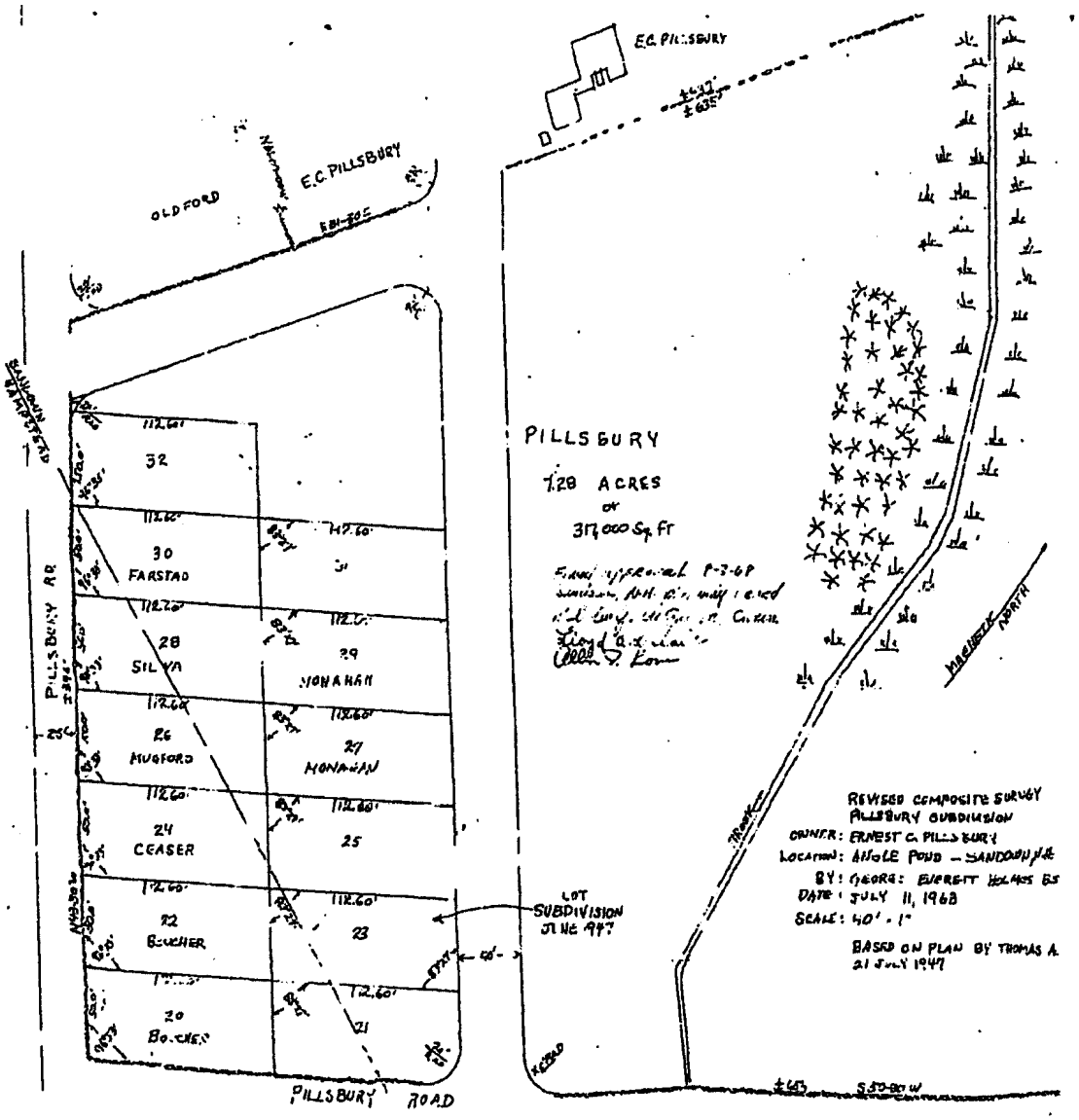
ORDER

On January 25, 2018, Plaintiff Timothy Loeffler ("Plaintiff") initiated this action against Defendant Paul Bernier ("Defendant"). See Doc. 1. The dispute centers on the extent to which Plaintiff may use and/or improve a right-of-way running along Plaintiff's property. Presently before the Court is Plaintiff's June 29, 2018 motion for partial summary judgment, wherein Plaintiff seeks a ruling "that Plaintiff has a right, under New Hampshire law, to access . . . Defendant's right-of-way at the proposed 'second access point.'"[1] See Doc. 17, at 2. Defendant objects. See Doc. 21; see also Doc. 24 (Pl.'s Reply). The Court held a hearing on the matter on September 25, 2018. For the reasons that follow, Plaintiff's motion for partial summary judgment is GRANTED.

Facts

The following facts are undisputed. Plaintiff and Defendant each own land that once belonged to Ernest Pillsbury. See Def.'s Obj., Exs. D–H. As shown in Exhibit D to Defendant's Objection (depicted, in part, on page 2, infra), by 1968 Pillsbury had subdivided and/or sold off the following lots from his land:

[1] The "second access point" would be located on Lot 21. See Doc. 18, ¶¶ 16–17; accord Doc. 17, Ex. D.



See id. at Ex. D. [2]

[2] Ernest Pillsbury originally owned the land in common with other members of his family. The Court need not specify the family members who also owned the land at any given time, because there is no dispute that each such family member signed the relevant deeds when conveying the lots at issue here. Thus, for the sake of simplicity, the Court will refer only to "Pillsbury" when discussing the grantor(s) of the relevant lots.

As shown above, Lots 21, 23, 25, 27, and 29 were each positioned adjacent to a right-of-way running from Pillsbury Road to Pillsbury's home. Id. Although Lot 21 had frontage on Pillsbury Road, Lots 23, 25, 27, and 29 had no road frontage. Id. Rather, each of those lots was bordered by either (1) other lots, or (2) the right-of-way. Id.

Plaintiff presently owns a portion of Lots 21 and 23, and all, or nearly all, of Lots 25, 27, and 29. See Pet. ¶ 10; see also id. at Ex. C (depicting lot line adjustment whereby the majority of Lots 21 and 23 was transferred to the owner of Lots 20 and 22); accord Def.'s Obj. Mem. 1. At the time when each of Plaintiff's lots was first carved out, Pillsbury owned the land underlying the right-of-way. See Def.'s Obj., Exs. D–H. Lot 29 was the first of the lots now owned by Plaintiff which was carved out by Pillsbury. See id. at Ex. E. The deed for Lot 29 described that lot, inter alia, as "proceeding along Lot No. 31 a distance of one hundred twelve and six tenths (112.6) feet to the Westerly side line of a twenty-foot right of way; thence turning a right deflection angle of 83 degrees and 27 minutes and proceeding along Westerly side line of said right of way a distance of fifty feet to a stake; thence turning a right deflection. . . ." Id. (deed dated June 19, 1948). In addition, the deed "further conveyed, as appurtenant to and to be used in connection with the above described premises a right of way over other lands of the above grantors to the public highway, for all necessary purposes of entrance and exit to the conveyed premises. . . ." Id.

In September of 1955, Nellie Monahan became the owner of Lot 29. See id. at Ex. G. Thereafter, in April 1966, Pillsbury conveyed Lot 27 to Monahan. See id. at Ex. F. The corresponding deed described Lot 27, inter alia, as "[b]eginning at a stake located at the Northeasterly corner of the conveyed premises at the Southwesterly side

of a 20 foot Right of way . . . ; thence Southeasterly Fifty (50) feet by said 20 foot Right of Way to a stake at Lot #25. . . ." Id.

Finally, as relevant here, Pillsbury deeded Lots 21, 23, and 25 to Albert and Maura Ceaser in July of 1968. See id. at Ex. H. The corresponding deed described these lots, inter alia, as:

> turning and running in a Northeasterly direction along Lot #27, land of Monahan for a distance of 112.60 feet to a 40 foot right of way and the Easterly corner of Lot #27, land of Monahan; thence turning and running in a Southeasterly direction along the 40 foot right of way for a distance of 150 feet, more or less, to the intersection of said 40 foot right of way and said Pillsbury Road at the said stone wall; thence turning and running in a Southwesterly direction along said Pillsbury Road . . . .

Id.

Standard of Review

In deciding whether to grant summary judgment, the Court considers the pleadings, affidavits, and other evidence, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. See Purdie v. Attorney General, 143 N.H. 661, 663 (1999). "[S]ummary judgment may be granted only where no genuine issue of material fact is present, and the moving party is entitled to judgment as a matter of law." Id. (citation omitted); see also RSA 491:8-a, III (1997). An issue of fact is "material for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." Sandford v. Town of Wolfeboro, 143 N.H. 481, 484 (1999) (citation and quotations omitted). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, sufficient . . . to indicate that a genuine issue of fact exists so that the party should have an opportunity to prove the fact at trial." Phillips v. Verax, 138 N.H. 240, 243 (1994) (citation and quotations omitted). In other words, the non-moving party may not rest

upon mere allegations or denials; instead, "[its] response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue [of material fact] for trial." Panciocco v. Lawyer's Title Ins. Corp., 147 N.H. 610, 613 (2002).

Analysis

In this case, the parties disagree as to whether Lots 21, 23, 25, and/or 27 enjoy access rights to use the right-of-way located on Defendant's property. Plaintiff contends that, pursuant to the plain language of the relevant deeds, each of his lots enjoys such access rights. Defendant disagrees, and argues that a comparison of the relevant deeds belies any suggestion that Pillsbury intended to grant such rights to Lots 21, 23, 25, or 27.[3] Defendant further suggests that there are genuine issues of material fact which preclude an entry of partial summary judgment in this matter.

In essence, the parties disagree as to the proper interpretation of the relevant deeds. Because the proper interpretation of a deed is a question of law, Ettinger v. Pomeroy Ltd. P'ship, 166 N.H. 447, 450 (2014) (citation omitted), the Court may resolve such a dispute in the context of a motion for summary judgment, see RSA 491:8-a, III. When interpreting a deed, the Court must "give it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time." Ettinger, 166 N.H. at 450 (citation omitted). "If the language of the deed is clear and unambiguous," the Court "will interpret the intended meaning from the deed itself

[3] Because Plaintiff has only sought summary judgment concerning his "right, under New Hampshire law, to access . . . Defendant's right-of-way at the proposed 'second access point,'"[3] see Doc. 17, at 2, and the second access point is located on Lot 21, the Court need not determine, at this juncture, whether Plaintiff has any such access rights in connection with Lot 27 (which was created via a different deed than the one that created Lots 21, 23, and 25).

without resort to extrinsic evidence." Id. (citation omitted). "If, however, the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify its terms." Id. (citation omitted).

The New Hampshire Supreme Court has previously recognized that "[w]here property is conveyed in a deed and one or more of the calls is an abuttal on a private way there is a grant or at least a presumption of a grant of an easement in such way when the way is owned by the grantor." 700 Lake Ave. Realty Co. v. Dolleman, 121 N.H. 619, 623 (1981) (quoting 2 G. Thompson, Commentaries on the Modern Law of Real Property s 360, at p. 378 (1980 repl.)). "This rule of law has been recognized in this State since at least 1851." Dolleman, 121 N.H. at 623 (citing Greenwood v. The Wilton Railroad, 23 N.H. 261, 265 (1851)). In such a case, "[i]t is of no consequence . . . that the grantor did not intend to grant an easement, or that the easement is not one of necessity, because the grantor, and all claiming under him, are estopped by deed from denying such an easement exists." Dolleman, 121 N.H. at 623 (citations omitted).

In Dolleman, the New Hampshire Supreme Court emphasized the distinction between a situation in which "the face of the deed itself represents that the conveyed parcel borders on a way," as compared to "a case where the deed only refers to a plan which in turn indicates the existence or planned construction of streets and ways. . . ." Id. (citations omitted). The Dolleman court explained that "[a]lthough both situations appear similar, they involve two distinct rules of law . . . ." Id. (citations omitted). The court also noted that under New Hampshire law, where "restrictions appear on the face of the deed, they may be enforced as covenants, but if they appear outside the deed, an

equitable servitude might result depending on the grantee's awareness of the restrictions." Id. (citation omitted). Thus, "[i]n Greenwood v. The Wilton Railroad, the use of a way as a boundary in the deed operated as an estoppel against the grantor's denying the grantee's right to use the way." Dolleman, 121 N.H. at 624 (citing 23 N.H. at 265, and explaining that "[s]uch an estoppel is one by deed . . . because the deed on its face makes either an express grant or one arising by necessary implication and prevents the grantor from denying the representation made").

As the Dolleman court observed, although Greenwood was decided in 1851, it "has never been specifically overruled." Dolleman, 121 N.H. at 625. Accordingly, the Dolleman court applied Greenwood to the situation before it, "in which a deed use[d] a way as a boundary and the grantor own[ed] the way." Dolleman, 121 N.H. at 626. Citing Greenwood, the Dolleman court concluded that "[a]n implied easement" had "been created." Id. The Dolleman court explained that "[b]ecause the necessary implication contained by that description appear[ed] on the very face of the grantor's deed, he, and all parties in privity with him, [we]re estopped to deny that grant." Id.

The holdings in Dolleman and Greenwood are consistent with the general principle that "[i]n a conveyance or contract to convey an estate in land, description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if the grantor has the power to create the servitude, and if a different intent is not expressed or implied by the circumstances." See Restatement (Third) of Property (Servitudes) § 2.13 (2000) (collecting cases, and explaining that "[a] description of the land conveyed that uses a street, or other way, as a boundary implies that the conveyance includes an easement to use the street or other way"); accord Annotation,

Conveyance of land as bounded by road, street, or other way as giving grantee rights in or to such way, 46 A.L.R. 2d 461 (Originally published in 1956) (collecting cases) ("[I]t is generally held that where a street or other way is called for as a boundary in a conveyance of land, and the grantor owns the fee in the land represented as the way or street, he is estopped, as against the grantee, to deny that the street or other way exists, and an easement in such way passes to the grantee by implication of law.").

According to the Restatement, the basis for this rule "is the assumption that the grantor who uses such a description intends to include the use rights shown on the map, or in the street used as a boundary, and the grantee reasonably expects to receive them. The grantor's description, in effect, constitutes a representation to the grantee that the grantee will receive the use rights." Restatement (Third) of Property (Servitudes) § 2.13, cmt. a. The Massachusetts Appeals Court recently recognized and applied the foregoing principle, explaining that "[t]his principle of estoppel seems to have become a rule of law rather than a mere canon of construction," and noting that "[a] way created by estoppel . . . is not a way by necessity, and the right exists even if there be other ways either public or private leading to the land." Melrose Fish & Game Club, Inc. v. Tennessee Gas Pipeline Co., LLC, 52 N.E.3d 1089, 1093 (Mass. App. Ct. 2016) (citations and quotations omitted).

In this case, as in Dolleman, the deed to Lots 21, 23, and 25 "represent[ed] that the conveyed parcel[s] border[] on" the right-of-way. See Dolleman, 121 N.H. at 623 (citations omitted); Def.'s Obj., Exs. F & H. Thus, because the right-of-way was owned by Pillsbury at the time of the relevant conveyance, the deed establishes "a grant or at least a presumption of a grant of an easement in" the right-of-way. See Dolleman, 121

N.H. at 623. Accordingly, Pillsbury, "and all claiming under him, are estopped by deed from denying such an easement exists." Id. (citations omitted).

In view of the foregoing, the Court is unpersuaded by Defendant's argument that Pillsbury could not have intended to grant an easement to Lots 21, 23, or 25 because Lot 21 already had frontage on Pillsbury Road. As set forth above, "[a] way created by estoppel . . . is not a way by necessity, and the right exists even if there be other ways either public or private leading to the land." Melrose Fish & Game Club, Inc., 52 N.E.3d at 1093 (citations and quotations omitted); accord Dolleman, 121 N.H. at 623. Although the presumption concerning an easement may be overcome "if a different intent is . . . expressed or implied by the circumstances," see Restatement (Third) of Property (Servitudes) § 2.13, the existence of alternate means of access to a parcel is not a circumstance which adequately expresses or implies such a different intent, see id. If the Court were to hold otherwise, then easements recognized under this principle would always be "by necessity," and the law is clear that this is not the case, see Dolleman, 121 N.H. at 623; Melrose Fish & Game Club, Inc., 52 N.E.3d at 1093.

Similarly, the Court is unpersuaded by Defendant's argument that Pillsbury must not have intended to convey such an easement to Lots 21, 23, or 25 because the deed to those lots lacked the express language used in the deed to Lot 29. Compare Def.'s Obj. Ex. H, with Ex. E. As set forth above, "[i]t is of no consequence . . . that the grantor did not intend to grant an easement. . . ." Dolleman, 121 N.H. at 623. Moreover, the principle of "estoppel . . . by deed" turns on what a grantee would reasonably expect based upon the language used on the face of the deed. See Dolleman, 121 N.H. at 624; Restatement (Third) of Property (Servitudes) § 2.13 (explaining that "[a] description

of the land conveyed that uses a street, or other way, as a boundary implies that the conveyance includes an easement to use the street or other way"); id. at cmt. a. (explaining that where a grantor uses a street "as a boundary . . . the grantee reasonably expects to receive . . . use rights"). There is no evidence that the original grantees of Lots 21, 23, or 25, or their assigns, would have conducted that comparison, thereby becoming apprised of Pillsbury's intent. Thus, although the language used in the various deeds may shed light on what Pillsbury intended, it would be unfair to give legal effect to that intention where the deed to Lots 21, 23, and 25, on its face, contained a "necessary implication" that the lots at issue would have an easement in the right-of-way. See Dolleman, 121 N.H. at 626.

In view of the foregoing, the Court concludes that because Pillsbury defined Lots 21, 23, and 25 by using the right-of-way "as a boundary in the deed" at a time when he owned the right-of-way, this "operated as an estoppel against" Pillsbury's (and now Defendant's) "denying the grantee's right to use the way." Dolleman, 121 N.H. at 624. Simply put, the undisputed facts compel the conclusion that Plaintiff is entitled to partial summary judgment with respect to his right to access and use the right-of-way from the proposed second access point on Lot 21.[4] See RSA 491:8-a.

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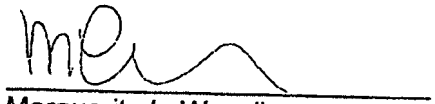
[4] As set forth above, it is possible for the above-described presumption to be overcome where "a different intent is . . . expressed or implied by the circumstances." See Restatement (Third) of Property (Servitudes) § 2.13. Here, Defendant has pointed to circumstances which, in his view, express and/or imply such a different intent. However, for the reasons set forth above, the Court does not agree that the circumstances identified by Defendant can, as a matter of law, overcome the presumption. Thus, in the absence of any evidence which could competently rebut the presumption, the Court may grant summary judgment based upon the presumption. Cf. N.H. R. Ev. R. 301 ("In all actions and proceedings, unless the constitution, a statute, case law, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption."). Moreover, although Defendant suggests that he may yet uncover additional relevant circumstances, such speculation is insufficient to defeat a motion for summary judgment. Cf. RSA 491:8-a, IV ("When a motion for summary judgment is made and supported . . . the adverse party may not rest upon mere allegations or denials . . . but. . . must set forth specific facts showing that there is a genuine issue for trial.").

Conclusion

Consistent with the foregoing, Plaintiff's June 29, 2018 motion for partial summary judgment—wherein Plaintiff seeks a ruling that he has a right to access Defendant's right-of-way at the proposed second access point on Lot 21—is GRANTED. In light of this ruling, and the limited nature of Plaintiff's summary judgment motion, the Temporary Order which the Court originally issued on June 29, 2018, see Doc. 19; see also Docs. 20, 25, is hereby LIFTED IN PART. Specifically, Plaintiff and his agents are no longer prohibited from conducting any construction work within the subject right-of-way—including the removal of trees, survey markers, or rocks—to the extent that such work is necessitated by, and directed related to, Plaintiff's ability to access the right-of-way at the proposed second access point. The prohibitions set forth in the Temporary Order shall otherwise remain in full force and effect, thereby barring Plaintiff and/or his agents from conducting any construction activities within the right-of-way which are not related to the second access point.

So Ordered.

October 17, 2018
Date



Marguerite L. Wageling
Presiding Justice

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NOTICE OF DECISION

File Copy

Case Name: **Thomas J Loeffler v Paul Bernier**
Case Number: **218-2018-CV-00074**

Enclosed please find a copy of the court's order of January 08, 2019 relative to:

Order on Motion to Reconsider and Further Order on Motion to Stay

January 10, 2019

Maureen F. O'Neil
Clerk of Court

(523)

C: Bernard H. Campbell, ESQ; Roy W. Tilsley, ESQ; Brett William Allard, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY SUPERIOR COURT

THOMAS LOEFFLER

v.

PAUL BERNIER

Docket No. 218-2018-CV-0074

ORDER ON MOTION TO RECONSIDER AND FURTHER ORDER ON MOTION TO STAY

This case centers on the extent to which Plaintiff Timothy Loeffler may use and/or improve a right-of-way owned by Defendant Paul Bernier. On October 17, 2018, the Court granted Plaintiff's motion for partial summary judgment vis-à-vis Plaintiff's "right to access Defendant's right-of-way at the proposed second access point. . . ." See Doc. 26, p. 11.[1] Defendant now moves for reconsideration, claiming that the Court relied on a legal theory that Plaintiff had not articulated himself, and thus Defendant "should [now] be permitted to assert additional defenses to" that theory. See Doc. 27, ¶¶ 8–9, 11; see also Doc. 29 (Pl's Obj.). Importantly, Defendant does not claim that the Court's reliance upon this legal theory was improper, or that the Court's rulings concerning the presence of an implied easement pursuant to that legal theory were otherwise erroneous. Rather, Defendant seeks leave to raise new arguments as to why Plaintiff may no longer utilize the implied easement recognized in the Court's October 17, 2018 Order. For the reasons that follow, Defendant's motion is **DENIED**.

[1] The Court also partially lifted a June 29, 2018 Temporary Order prohibiting Plaintiff from conducting any construction activities within the right-of-way. See Doc. 26, p. 11. However, by Margin Order dated November 30, 2018, the Court stayed "that portion of the . . . Order lifting in part the Temporary Order pending this Court's ruling on" Defendant's motion for reconsideration. See Doc. 28, p. 1.

Standard of Review

Under Superior Court Rule 12(e), a party moving for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended . . . ." Super. Ct. Civ. R. 12(e); see Broom v. Continental Cas. Co., 152 N.H. 749, 752 (2005) (noting that the decision to grant or deny a motion for reconsideration is within the trial court's discretion). Although "a party who has received an adverse ruling" may "seek reconsideration, the rule does not purport to authorize either party to submit further evidence bearing on the motion." See Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 492 (1989) (discussing former Superior Court Rule 59-A). In addition, a party seeking reconsideration "cannot raise an issue for the first time in [a] motion for reconsideration when the issue was readily apparent at the time the party initially filed for relief." Appeal of Vicky Morton, 158 N.H. 76, 79 (2008) (summarizing, in part, the holding in Mt. Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 654–55 (2000)).

Analysis

As set forth above, Defendant contends that in concluding that Plaintiff had a right to access Defendant's right-of-way at the proposed second access point on Lot 21, the Court's October 17, 2018 Order relied on a slightly different legal theory than that urged by Plaintiff. Specifically, Defendant argues that Plaintiff claimed entitlement to an implied easement based upon the information contained in the original subdivision plan—which was referenced in the corresponding deeds—whereas the Court focused its analysis on the language of the deed(s) alone. Thus, in Defendant's view, he should

be allowed to assert the following new arguments as to why Plaintiff may no longer avail himself of the implied easement at issue:

> Plaintiff's claim of implied easements for the benefit of [L]ots 21, 23, and 25 fails – regardless of whether they arose by reference to the plan or estoppel by deed – because (1) the Plaintiff has abandoned any such easements; and (2) it is impossible to accomplish the purpose for which the easements were created.

See Doc. 27, ¶ 12.

The Court is unpersuaded by Defendant's arguments as to why he should be allowed to raise these new arguments at this juncture. As set forth above, Defendant concedes that Plaintiff claimed entitlement to an "implied easement." See id. Moreover, in seeking partial summary judgment concerning his implied easement claim vis-à-vis Lots 21, 23, and 25, Plaintiff noted: "Each of the three (3) lots . . . are depicted on the plan as bordering on the right-of-way, *and the deed describes it as a 'right of way.'*" See Doc. 17 Mem., p. 2 (emphasis added). Thus, in seeking partial summary judgment, Plaintiff relied on the information contained within the subdivision plan and the language of the deed. See id. Although Plaintiff may not have cited the cases on which the Court ultimately relied, he plainly argued that the language of the deed itself supported his implied easement claim. See id.

Moreover, in objecting to Plaintiff's motion for partial summary judgment, Defendant quoted the case of 700 Lake Ave. Realty Co. v. Dolleman:

> [w]here property is conveyed in a deed and one or more of the calls is an abuttal on a private way there is a grant *or at least a presumption* of a grant of an easement in such way when the way is owned by the grantor.

See Doc. 21 Mem., p. 8 (quoting, with alteration, Dolleman, 121 N.H. 619, 623 (1981)). Indeed, Defendant's objection cited Dolleman again in conjunction with a substantive

discussion of "an underlying principle of the doctrine of implied easements, which is one of estoppel":

> "An owner retaining land adjoining land being conveyed is prevented by equity from denying that an easement was conveyed if the conveyance is made under circumstances indicating the grantee justifiably relied on conveyance of an easement." See 17 New Hampshire Practice: Real Estate, Ch. 8, §8.02 (citing [Dolleman], 121 N.H. at 625; Gagnon, 107 N.H. at 509). Here, just as the original grantee to [L]ot 27 could not have justifiably relied upon the conveyance of an easement . . . neither could the original grantee of [L]ots 21, 23, and 25 have relied upon the conveyance of an easement because the lots were conveyed together and [L]ot 21 fronts directly on Pillsbury Road, rendering access to the [right-of-way] unnecessary.

Doc. 21 Mem., pp. 10–11.

Relying on, inter alia, Dolleman, the Court concluded in its October 17, 2018 Order that Lots 21, 23, and 25 enjoyed an implied easement over Defendant's right-of-way pursuant to the legal theory of estoppel by deed. See Doc. 26, pp. 6–10. Having (a) cited Dolleman; (b) discussed the legal theory of estoppel by deed; and (c) presented substantive (though unavailing) arguments against the application of that legal theory in his July 31, 2018 objection, Defendant cannot successfully argue that he "had no reason to meaningfully argue the estoppel by deed theory" prior to the Court's October 17, 2018 Order. See Doc. 27, ¶ 11.

Furthermore, Defendant has conceded that the two new arguments he now wishes to raise—abandonment and impossibility of purpose—might have undermined "Plaintiff's claim of implied easements for the benefit of [L]ots 21, 23, and 25 . . . regardless of whether they arose by reference to the plan or estoppel by deed. . . ." See id. at ¶ 12. Accordingly, it is unclear to the Court why the Court's reliance on the language of the deed, as opposed to the subdivision plan, impacted Defendant's need

to raise these arguments. In other words, Defendant has failed to articulate why, given that these new arguments could have potentially undermined a claim of implied easement based upon the subdivision plan, he did not assert these arguments in his July 31, 2018 objection. Simply put, the existence and relevance of Defendant's arguments concerning abandonment and impossibility of purpose were "readily apparent" prior to the Court's October 17, 2018 Order, and the Court therefore declines Defendant's request for leave to assert those new issues in the context of a motion for reconsideration. See Appeal of Vicky Morton, 158 N.H. at 79.

Before concluding, the Court notes that even if Defendant could raise the aforementioned new arguments at this juncture, those arguments would be unavailing. Defendant's theory of abandonment relates to the fact that in consolidating Lots 21, 23, 25, 27, and 29 into a single parcel, Plaintiff filed a Lot Line Adjustment Plan which showed a single proposed driveway without depicting "any other means of access to the" right-of-way. See Doc. 27, ¶ 14. In Defendant's view, "[t]he Lot Line Adjustment Plan indicates [] Plaintiff's intent to abandon any implied easements that may have come into existence . . . via estoppel by deed or otherwise" because the Lot Line Adjustment Plan did not show any "additional driveways." Id. at ¶ 17.

The Court is unpersuaded. As Defendant concedes, "[a]bandonment of an easement must involve clear, unequivocal, and decisive acts by the owner of the dominant estate manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence." Id. at ¶ 18 (citing Titcomb v. Anthony, 126 N.H. 434, 437 (1985)) (quotations omitted). Although Defendant argues that the consolidation of the lots at issue and the construction of a single-family home thereon

"has eliminated the purpose of any implied easements to the [once] independently buildable historic lots," see Doc. 27, ¶ 21, the Court noted in its October 17, 2018 Order that "'[a] way created by estoppel . . . is not a way by necessity, and the right exists even if there be other ways either public or private leading to the land.'" See Doc. 26, p. 9 (quoting Melrose Fish & Game Club, Inc. v. Tennessee Gas Pipeline Co., LLC, 52 N.E.3d 1089, 1093 (Mass. App. Ct. 2016)). Thus, the purpose of the implied easement at issue was to provide access, but not exclusive access, to the land comprising Lots 21, 23, and 25. The consolidation of those lots, and the construction of a home thereon, is not so inconsistent with the need for additional access along the right-of-way that the Court can deem the implied easement abandoned. See Titcomb, 126 N.H. at 437.

Indeed, as Plaintiff notes, the Lot Line Adjustment Plan does not contain an affirmative representation that Plaintiff would never seek to construct additional access points along the right-of-way. See Doc. 29, p. 2. Moreover, Defendant has not established Plaintiff's failure to note the possibility of additional access points along the right-of-way in his Lot Line Adjustment Plan will now bar him from obtaining town approval for the creation of such additional access points. Rather, just as the original grantee of Lots 21, 23, and 25 could use the right-of-way to obtain additional points of access to those lots, Plaintiff may continue to use the right-of-way to obtain additional access to his home at the proposed second access point on Lot 21.[2] Thus, even if Defendant could properly raise his abandonment argument at this juncture, that argument would not warrant reconsideration of the Court's October 17, 2018 Order.

[2] Because Plaintiff's summary judgment request was limited to the proposed second access point, the Court does not consider here whether any additional points of access to Lots 21, 23, and 25 would be permissible.

For similar reasons, Defendant's argument concerning frustration of purpose would also be unavailing. As Defendant notes, "[t]he impossibility of purpose doctrine provides that 'an easement for a particular purpose terminates when it becomes impossible to use the easement for the purpose intended.'" See Doc. 27, ¶ 23 (quoting Boissy v. Chevion, 162 N.H. 388, 393 (2011)). To the extent that the implied easements at issue here—which arose out of the legal theory of estoppel by deed—can be characterized as serving a "particular purpose," that purpose was simply to provide access to the land contained within Lots 21, 23, and 25. Because the Court has previously ruled that the implied easements could be used to provide additional points of access to the land contained within those lots, their consolidation into a single parcel did not frustrate the purpose of the implied easement: Plaintiff can still use the right-of-way to gain additional points of access to the land contained within Lots 21, 23, and 25. Despite the presence of a single residence on that land, there could be any number of reasons why Plaintiff would need additional access points along the right-of-way. Thus, even if Defendant could properly raise his frustration of purpose argument here, that argument would not warrant reconsideration of the Court's October 17, 2018 Order.

In light of the foregoing, Defendant's motion for reconsideration is **DENIED**. The Court now turns to Defendant's motion to stay, which asked the Court to stay its lifting of its June 29, 2018 Temporary Order pending, inter alia, resolution of the motion for reconsideration discussed herein. As noted supra, on November 30, 2018, the Court granted Defendant's stay request pending its ruling on Defendant's motion for reconsideration. The Court has now denied Defendant's motion for reconsideration. Thus, absent a further order from this Court, the term of the stay has ended.

In his motion to stay, Defendant alternatively asked that the stay continue pending an appeal of the Court's ruling on Plaintiff's motion for partial summary judgment. Plaintiff responds to Defendant's request by suggesting that if the Court denies the motion for reconsideration, the Court should bifurcate the issues in this litigation to allow for an immediate appeal of the access issue. Plaintiff does not specifically address Defendant's request to stay. Interestingly, Defendant has not responded to Plaintiff's bifurcation suggestion. The Court has considered these pleadings and rules that Defendant's motion to continue the stay pending appeal is **CONDITIONALLY GRANTED**, subject to Defendant's assent to bifurcation of the issues as Plaintiff has suggested.

Superior Court Rule 46 allows for an appeal of one issue when others remain pending if the Court refers to the rule, identifies the specific order that is to be treated as final on the merits, explains why the issue should be bifurcated, and makes a finding that there is no just reason for a delay as to the claim that is to be severed from the rest of the litigation. See Super. Ct. Civ. R. 46(c)(1). Upon Plaintiff's motion, the Court is inclined to make such a finding here. Defendant would then be required to file an appeal within the prescribed time. If Defendant assents to Plaintiff's motion to bifurcate, the Court will **GRANT** Defendant's motion to stay pending appeal. If the Rule 46 appeal is denied by the Supreme Court, this Court will lift its stay of its June 29, 2018 Temporary Order. Alternatively, if Defendant does not assent to Plaintiff's motion to bifurcate, Defendant's motion to stay will be **DENIED** and the above-described conditional stay will be immediately lifted.

The Court will require Plaintiff to file his motion to bifurcate no later than January 18, 2019. Defendant shall have 10 days to respond. The Court thereafter will review the pleadings and issue an order.

Conclusion

For the reasons set forth above, Defendant's November 9, 2018 motion for reconsideration is **DENIED**. Defendant's request that the Court continue to stay its lifting of its June 29, 2018 Temporary Order pending an appeal of the Court's ruling on Plaintiff's motion for partial summary judgment is **CONDITIONALLY GRANTED**, consistent with the terms outlined above. The Court defers ruling on the balance of Defendant's motion to stay pending further filings as noted herein.

So Ordered.

January 8, 2019
Date

Marguerite L. Wageling
Presiding Justice