

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2020 TERM

DOCKET NO. 2019-0553

Richard D. Arell, Jr. and Natalie E. Allard-Arell

v.

Henry M. Palmer & Janis A. Monty-Palmer

APPEAL FROM DECISION OF THE
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF THE APPELLANT

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QUESTIONS PRESENTED

1. Whether the Trial Court erred by finding that a “temporary easement” for access to a well “until such time as Grantees have another water source available” was ambiguous as to the intended duration of the easement?

See Motion for Summary Judgment, located in the Appendix to the Brief of the Appellant (hereinafter “App.”) at Pages 28-29; Reply to Plaintiffs’ Objection to Defendants’ Motion for Summary Judgment and Objection to Plaintiffs’ Cross-Motion for Summary Judgment (the “Reply”), App. 169-172. See also Transcript of the July 12, 2019 Hearing on Motion for Summary Judgment (“Tr.”) at 4:24-5:18, 7:18-21.

2. Whether the Trial Court erred by finding that the rule of reason imposed an affirmative duty on the easement holder to pursue the conditions to terminate the easement by constructing a new well in the absence of any language in the easement creating such a duty, the absence of any evidence of any burden on or interference with the use of the servient estate, and the absence of any evidence that the advantages to the Plaintiffs outweighed the disadvantages to the Defendants?

See Motion for Summary Judgment, App. 32; Reply, App. 172-175. See also Tr. 8:25-10:9.

3. Whether the Trial Court erred by shifting the burden of proof to the Defendants by ordering them to investigate evidence necessary for application of the rule of reason, including, but not limited to, the cost of constructing a new well on their property and the customary

cost of establishing a well generally, when the Plaintiffs failed to produce any such evidence to support their claims?

See Motion for Summary Judgment, App. 32; Reply, App. 168, 177. See also Tr. 9:20-23; 24:6-25:2.

TEXT OF STATUTES INVOLVED IN THE CASE

Not Applicable

STATEMENT OF THE FACTS AND OF THE CASE

This matter relates to a determinable easement and whether the word temporary imposes an affirmative duty on the dominant estate holder to seek to fulfill the defeasible condition. The Appellants, the Palmers, currently benefit from an easement burdening the Appellees' property which allows the Palmers to use a well on the Plaintiffs' property (the "Well") which provides the sole supply of potable water to the Palmers' residence (the "Easement"). The Appellees initiated this action to terminate the Easement.

In 2000, the Palmers purchased certain real property located on Canterbury Road, so-called, in Chichester, New Hampshire (Town of Chichester Tax Map 6 Lot 5) (the "Palmer Property"). App. 44-45. (the "Palmer Deed"). The Palmer Property was previously owned by Esther Edmunds as Trustee of the Esther L. Edmunds Revocable Trust (the "Edmunds Trust" or the "Grantor"). App. 40, 44-45, 47. At the time the Palmers purchased the Palmer Property, the Edmunds Trust also held title to an undeveloped tract of land across the road from the Palmer Property (Town of Chichester Tax Map 3 Lot 0119) (the "Remaining Trust Land" also referred to herein as the "Arell Property"). App. 40, 47, 51-55. The Well is located on the Remaining Trust Land, now owned by the Appellees. Id. Because the Well was (and remains) the only source of potable water for the Palmer Property, the Grantor also conveyed the Easement to the Palmers to allow them to continue to use the Well.

The Easement provides as follows:

A temporary easement over a portion of said Tax Map 3, Lot 0119 owned by Grantor [*i.e.*, the Remaining Trust Land] to access the existing well located on that lot [*i.e.*, the Well] for purposes of serving the single family residence located on the premises herein conveyed [*i.e.*, the Palmer Property] until such time as Grantees have another water source available. Grantees shall be responsible for all costs and liabilities associated with the maintenance, repair, and operation of the well, water lines, pumps, and similar matters related to Grantee's utilization of the well.

App. 44-45.

Following their purchase of the Palmer Property, the Palmers made no effort to develop an alternative water source. App. 41-42, 48. For the entirety of the Grantor's ownership of the Remaining Trust Land, the Grantor did not object to the Palmers continued use of the Well. Id.

On or about August 22, 2002, the Edmunds Trust sold the Remaining Trust Land to the Appellees. App 51-55 (the "Arell Deed"). The Arell Deed expressly states that it is "subject to the Well Rights in favor of Henry M. Palmer and Janis A. Monty-Palmer in [the Palmer Deed]". Id.

Since the Palmers purchased the Palmer Property, no other water source has become available. App. 41, 48, 62, 69, 74, 80, 84, 90. The Well remains the only water source currently available to the Palmers', and is exclusively used by the Palmers. App. 42, 48. The Arell Property does not rely on the Well as a water source or make any other use of the Well. App. 41, 48. Nor does any other property or person. Id.

There is no evidence that the Palmers' use of the Well has any impact on the water supply for the Arell Property. App. 58, 59, 60, 65, 66, 67, 70, 73, 75, 79, 80, 83, 85, 89, 90. In fact, in discovery, the Appellees

failed to produce any evidence or even assert that the Palmers' use of the Well has *any* interference whatsoever with the use of the Arell Property, beyond the generic burden of encumbrance imposed by any easement on any servient estate. Id. Similarly, at the hearing on the cross-motions for summary judgment, the only interference the Appellees could identify was that the litigation they initiated had become more contentious and difficult than they had anticipated. Tr. 15:7-15:15. As counsel for Plaintiff acknowledged, "Defendants are correct, they [the Plaintiffs] are not burdened [by] it [*i.e.*, the Easement]". Tr. 15:9-10.

Additionally, the Plaintiffs did not produce any evidence that a new well could feasibly be dug on the Palmer Property. App. 62, 69, 74, 80, 84, 90. The Plaintiffs only offered speculation that, because other properties had wells, the Palmers could dig one too. Id. The Plaintiffs, however, did not produce any evidence regarding the cost of digging a new well or developing an alternative water source on the Palmer Property.

The Trial Court, when interpreting the Easement, found that the Easement was ambiguous because of the use of the word "temporary". See Trial Court's Order, Pages 33-34. In other words, the Trial Court found that the word "temporary" could mean, as the Defendants argued, that the Easement lasted only until the condition subsequent, *i.e.* that another water source became available. Id. Alternatively, the Trial Court found that the word temporary could have meant that the Easement was intended to only have a brief existence and that the Palmers were under an affirmative obligation to terminate their Easement by developing an alternative water source. Id.

Having found that the Easement was ambiguous, the Trial Court applied the “rule of reason”. Despite the lack of *any* material evidence of interference with the use of the servient estate, the Trial Court found that continued use of the Easement after nineteen years was unreasonably burdensome. Trial Court’s Order, Pages 34-35. The Trial Court then ordered the Defendants to investigate the cost of establishing a new well and, within three years, either develop a new well or establish that doing so would be unusually expensive or cost prohibitive. Trial Court’s Order, Pages 35-36. This appeal follows.

SUMMARY OF THE ARGUMENT

The Easement must be interpreted to give it the meaning intended by the original parties thereto. The Easement states that it is temporary because it contains a defeasible condition, *i.e.*, “until such time as Grantees have another water source available”. The Easement contains no language imposing an affirmative duty to seek its termination. Nor does the language of the Easement imply an affirmative duty. For example, the Easement does not say “until such time as the Grantees *are able to secure* another water source” or “for so long as necessary to allow the Grantees to develop another water source” or any number of other possibilities the Grantor could have used.

The fact that the word temporary could be removed from the Easement without changing the defeasible condition does not mean that the word temporary *must* be given independent, separate meaning. For example, if a deed granted a “temporary easement for ten years”, the word temporary could be removed without significantly impairing the easement’s interpretation. Yet it would be unreasonable to argue that the word temporary imposed an additional limitation on the easement not contained in the language of the deed. The Palmers’ Easement is a temporary easement because it terminates upon the satisfaction of a condition subsequent. That condition subsequent is expressly provided in the Palmer Deed, and has nothing to do with the mere passage of time.

Even if the Easement were ambiguous, *arguendo*, neither the extrinsic evidence nor the rule of reason impose an affirmative duty. The only extrinsic evidence available was that the Grantor, while it owned the

servient estate, *never* objected to the Palmers' continued use of the Easement or failure to seek an alternative water source. Similarly, although the Plaintiffs asserted that the rule of reason required the Palmers to affirmatively seek to terminate their Easement, the Plaintiffs were unable to establish or even assert *any* interference or material burden upon the servient estate. At the same time, there is no reasonable dispute that developing a new water source would impose costs upon the Palmers. The rule of reason does not require a dominant estate to incur costs and disadvantages in order to alleviate nonexistent burdens on the servient estate. If that were the case, every easement ever granted would include an affirmative duty to seek its termination.

Finally, the Trial Court erred when it ordered the Palmers, the Defendants, to investigate the costs of developing a new water source. The Trial Court's order implicitly acknowledges that there is insufficient evidence for the rule of reason to impose an affirmative duty to develop a new well. In other words, the Trial Court acknowledged that the rule of reason would not require the Palmers to develop a new well that was cost prohibitive or inordinately expensive. The Trial Court erred, however, by imposing this cost upon the Defendants. The Appellees, as the Plaintiffs, asserted that the rule of reason imposed an affirmative duty upon the Defendants. The Plaintiffs therefore had the burden of proof to establish that the balance of advantages and disadvantages of the Easement weighed in favor of an affirmative duty on the part of the Palmers to seek its termination. Having determined that insufficient evidence was presented to establish an affirmative duty, the Trial Court erred by ordering the

Defendants to incur the costs of investigating and producing the evidence necessary to prove the Plaintiffs' claims.

ARGUMENT

I. LEGAL STANDARD

The interpretation of a deed is a question of law and subject to *de novo* review. See White v. Auger, 171 N.H. 660, 663 (2019). When interpreting the language of an easement, it must be given the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time. Appletree Mall Assocs., LLC v. Ravenna Inv. Assocs., 162 N.H. 344, 347 (2011); Lussier v. New England Power Co., 133 N.H. 753, 756 (1990). “When, however, the words of the deed are clear and their meanings unambiguous, there is neither a need to resort to extrinsic facts and circumstances to aid our determination” Lussier, 133 N.H. at 756.

Language is ambiguous when it is open to more than one reasonable interpretation. See Attorney Gen. v. Loreto Publications, Inc., 169 N.H. 68, 74 (2016). “[A]ny uncertainty created [in a deed] must be resolved against the grantors.” Kennett Corp. v. Pondwood, Inc., 108 N.H. 30, 34 (1967). A subsequent grantee's interpretation of language in a deed “has no bearing” upon the interpretation thereof. LeBaron v. Wight, 156 N.H. 583, 586 (2007).

When interpreting an easement, forfeiture or termination of easements is disfavored and, when in doubt, courts should favor the continuance of an easement. See White, 171 N.H. at 664 (Courts “generally disfavor interpreting deed conditions in such a way that would cause a forfeiture of the property upon breach of such conditions”); Anna H. Cardone Revocable Tr. v. Cardone, 160 N.H. 521, 528 (2010) (“conditions

subsequent are strictly construed and, where ambiguous, are construed against forfeiture”). See also, e.g., Preferred Real Estate Equities, Inc. v. Hous. Sys., Inc., 548 S.E.2d 646, 648 (Ga. App. 2001) (“where a party attempts to terminate an easement according to a forfeiture clause contained in a deed, the forfeiture clause is subject to a very strict construction,”) (internal quotations omitted); Short v. Wise, 718 P.2d 604, 607 (Kan. 1986); “Courts of equity do not favor forfeiture of easements or licenses and will be alert for ways to grant relief against such forfeiture.”); Wichita Falls Grain Co. v. Taylor Foundry Co., 649 S.W.2d 798, 800 (Tex. App. 1983) (“It is well settled that the law does not favor forfeitures, that a deed will be construed to avoid a forfeiture if possible, and that forfeiture provisions will be construed most strongly against the grantor”).

II. THE PALMERS’ EASEMENT IS UNAMBIGUOUS AND DOES NOT IMPOSE AN AFFIRMATIVE DUTY ON THE PALMERS TO TERMINATE THE EASEMENT

- i. *The clear and unambiguous language of the Easement does not impose an affirmative duty on the Palmers’ to terminate the Easement.*

The Easement, by its clear and unambiguous terms, lasts “until such time as [the Palmers] have another water source available”. App. 44-45. The Palmer Deed expressly imposes several affirmative duties upon the Palmers, specifically that the Palmers “shall be responsible for all costs and liabilities associated with the maintenance, repair, and operation of the well, water lines, pumps, and similar matters related to [the Palmers’] utilization of the well”. See id. Had the Grantor intended to impose the affirmative

duty to seek out and develop a new water source, the Grantor could have done so. Instead, the imposition of duties to maintain and repair the Well suggest that the Easement was *not* intended to be a brief, short-term stop-gap until the Palmers could dig their own well, but was intended to last long enough to require ongoing maintenance and repairs.

The language of the defeasible condition subsequent itself similarly indicates no affirmative duty was intended. The condition “until such time as [the Palmers] have another water source” is written passively. The Easement does not, for example, last “until the Palmers are able to develop another water source”, or “only so long as necessary for the Palmers to develop an alternative water source”. There are numerous possibilities for how the Grantor could have phrased the Easement to indicate that the Palmers were intended to affirmatively seek out a new water source. The Grantor did not do so. Instead the Grantor chose language suggesting that no affirmative duty applied, and that the Easement lasted until the Palmers no longer had a use for it.

The absence of any language expressly providing an affirmative duty to terminate the Easement cannot suggest that an affirmative duty exists or even create an ambiguity as to whether an affirmative duty exists. Such a conclusion would require a grantor to expressly disclaim any and all conceivable affirmative duties that could have been imposed. The Trial Court erred by finding that the language was ambiguous where there is no language imposing an affirmative duty.

- ii. *The existence of a defeasible condition does not imply an affirmative duty or even an intent that the Easement necessarily terminate.*

The Easement, by its clear terms, is a determinable easement which “ends automatically upon the happening of the stated event”. See J.W. Bruce & J.W. Ely, Jr., *Law of Easements and Licenses in Land* §10.02[1] (2001). See also Chapin v. Sch. Dist. No. 2 in Winchester, 35 N.H. 445, 450 (1857). The existence of a condition subsequent, however, does not evidence an intent that the easement holder affirmatively seek to end the easement, nor even an intent that the easement necessarily end. See J.W. Bruce & J.W. Ely, Jr., *Law of Easements and Licenses in Land* §10.01 (2001).

Moreover, servitudes may be expressly or inherently limited in duration. Some forms of express and inherent limitations, however, do not destroy the potentially perpetual duration of an easement. For example, an easement may be defeasible upon the happening of a certain event that may never occur. Various inherent limitations may also never be triggered to destroy the easement. For instance, an easement for a particular purpose may continue to be used for the designated purpose.

Id. In other words, a determinable easement is “an estate which may last forever, but which may end on the happening of a merely possible event” See Steele v. Pfeifer, 310 N.W.2d 782, 787 (S.D. 1981); Irvin v. Petitfils, 112 P.2d 688, 690 (Cal. App. 1941).

For example, an easement could be drafted to allow a right of way for a railroad and to terminate when the railroad was no longer in use without imposing an obligation that the grantee cease operating the railroad. See, e.g., Wiggins Ferry Co. v. Ohio & M. Ry. Co., 94 Ill. 83, 93

(1879) (“It is true, the estate here may not endure forever; it may be terminated by the failure to use and employ the rights and easements granted in the manner prescribed in the grant; but if they shall be so used and employed the grant is forever”). The Easement here is precisely the same, in that it allows for the use of the Well, and terminates when the Well is no longer being used. App. 44-45. This does *not* impose a duty to stop using the Well, any more than the grantee in Wiggins had a duty to cease operating a railroad or to develop an alternative route. See Wiggins, 94 Ill. at 93 (1879).

It is helpful to compare the Easement to an easement by necessity. Unlike the Easement, an easement by necessity is not expressly granted, but is implied by law due to specific circumstances. See Burke v. Pierro, 159 N.H. 504, 511 (2009). Like the Easement, however, an easement by necessity terminates upon a condition subsequent, specifically when the easement is no longer necessary for the enjoyment of the dominant estate. See Abbott v. Stewartstown, 47 N.H. 228, 229-30 (1866). An easement by necessity, however, *does not* imply an affirmative duty on the dominant estate holder to seek to abate the necessity. See, e.g., PGA N. II of Fla., LLC v. Div. of Admin., State of Fla. Dep't of Transp., 126 So. 3d 1150, 1154 (Fla. Dist. Ct. App. 2012) (“a *potential* future means of access to a public road by way of an express easement across lands of another does not defeat a way of necessity”) (emphasis added); Bode v. Bode, 494 N.W.2d 301, 304 (Minn. Ct. App. 1992) (access easement by necessity did not terminate when dominant estate holder was offered and refused an alternative means of access). The Easement, as an express easement freely granted between two parties in an arms-length transaction, should not grant

fewer rights than an easement implied by law, especially in the absence of any language to the contrary.

If, after the granting of the Easement, the Town installed municipal water supply in the area, the Easement would terminate and the Palmers would be required to convert to municipal water supply. If the Palmers decided to develop a new well, such as for convenience or to take advantage of newer technology, the Easement would terminate and they could not continue to use the original Well as a backup or additional water supply. None of these conditions have occurred. The Easement continues in perpetuity until the condition subsequent is satisfied.

iii. The word “temporary” does not necessarily mean “short-lived” and does not create an independent defeasible condition beyond the express terms of the Easement.

The Trial Court put special significance on the word “temporary” in the Easement. The Trial Court found that, unless an affirmative duty is imposed on the Palmers, the word “temporary” would become a “redundancy” or “mere surplusage” and must be given significance independent from the condition subsequent. This is an erroneous conclusion.

There is no requirement that each individual word in a deed be given independent meaning divorced from the other words in the deed. It would be unreasonable to suggest that a deed granting a “temporary easement that expires in ten years” must give independent meaning to the word “temporary” simply because it would be redundant with the phrase “expires in ten years”. A “conditional easement that terminates when the property is

no longer in use as a church” would not necessarily imply that there are other, unspoken conditions.

The Palmer Deed grants a “temporary easement” and then clarifies that general description by providing the specific defeasible condition *i.e.*, when a new water source becomes available. Providing the specific condition of termination cannot reasonably render the term “temporary” ambiguous. The defeasible condition *clarifies* the term “temporary easement”, it does not render it ambiguous. The Trial Court’s ruling suggests that any “temporary easement” that expressly provides for conditions of termination becomes ambiguous.

The Trial Court erred by finding that that the Palmer Deed was ambiguous and its decision should be overturned.

III. EVEN IF THE PALMER DEED WERE AMBIGUOUS,
EXTRINSIC EVIDENCE AND THE RULE OF REASON
INDICATE THAT THERE IS NO AFFIRMATIVE DUTY TO
TERMINATE THE EASEMENT.

Assuming, for the sake of argument only, that the Easement is ambiguous, the Trial Court nevertheless erred by imposing an affirmative duty to terminate the Easement on the Palmers. If the Easement is ambiguous, it must still be interpreted to give it the “meaning intended by the parties at the time they wrote it”. Appletree, 162 N.H. at 347. In doing so, “[e]xtrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify the terms”. Flanagan v. Prudhomme, 138 N.H. 561, 566 (1994).

The *only* extrinsic evidence before the Trial Court supported the Palmers’ position that the Easement did not impose an affirmative duty to

seek a new water supply. After the Palmers purchased the Palmer Property, they took no steps towards digging a new well or developing a new water supply. App. 41-42, 48. They continued to use the Well in a manner entirely consistent with an intent that no such affirmative duty exists. Id. The conduct of the Grantor was similarly consistent with that interpretation. The Grantor never objected to the Palmers' continued use of the Well, or otherwise indicated that the Grantor believed the Palmers should be attempting to develop their own water supply. Id. The Appellees failed to present any extrinsic evidence to support the imposition of an affirmative duty upon the Palmers. App. 61, 68, 74, 79-80, 84, 90.

The Trial Court, however, rather than relying on the extrinsic evidence, applied the rule of reason. The rule of reason prohibits a use of an easement if it creates an unreasonable burden on the servient estate. See Arcidi v. Town of Rye, 150 N.H. 694, 702 (2004). "Reasonableness is a question of fact that is determined by considering the surrounding circumstances, such as location and the use of the parties' properties, and the advantages and disadvantages to each party." Id.

The rule of reason does not apply, however, "if the complaining party fails to make sufficient factual allegations of unreasonable use or burden" Heartz v. City of Concord, 148 N.H. 325, 332 (2002). As noted above, the Plaintiffs failed to make *any* showing or allegation of a material burden on the servient estate, unreasonable or otherwise. App. 58, 59, 60, 65, 66, 67, 70, 73, 75, 79, 80, 83, 85, 89, 90. The only burden alleged by the Plaintiffs was that the Easement is "inconsistent with the rights of the

[Appellees] to maintain full sole dominion over their entire parcel.” Id.¹ This is a tautological burden placed on every servient estate by every easement. If the inability to exercise “full sole dominion over the entire parcel” were sufficient to terminate an easement, no easement could ever exist. In fact, at the hearing on the cross-motions for summary judgment, the Appellees acknowledged that “Defendants are correct, they [the Plaintiffs] are not burdened [by] it [*i.e.*, the Easement]”. Tr. 15:9-10. Accordingly, as a matter of law, the Trial Court erred by even applying the rule of reason. See Heartz, 148 N.H. at 332.

Even if the rule of reason could be applied, however, it weighs *against* the imposition of an affirmative duty. The rule of reason requires the court to balance the advantages and disadvantages to each party of the use of an easement. As discussed above, the Plaintiffs failed to present any evidence of any disadvantage to them caused by the Palmers’ use of the Well or any advantage to be gained by the discontinued use, other than that they would rather not have an easement burdening their property. App. 58, 59, 60, 65, 66, 67, 70, 73, 75, 79, 80, 83, 85, 89, 90. On the other hand, the disadvantages faced by the Palmers of ceasing to use the Easement are the costs of having to investigate and develop a new water supply. It must be remembered that the Well was the original and only source of water for the Palmer Property at the time of the conveyance. App. 42, 48; Tr. 3 18-22.

Despite having the burden of proof, the Plaintiffs did not produce any evidence as to those costs, or even that developing a new water supply

¹ The Appellees also alleged that an accessory dwelling was added to the Palmer Property, but failed to allege any way in which this burdened or interfered with the use of the Arell Property. Id. Furthermore, the Appellees never argues that the addition of an accessory dwelling overburdened the Easement or the Arell Property. Tr. 18:8-11.

was feasible (for example, there must have been some reason the Well was originally constructed on the Arell Property and not on the Palmer Property) other than speculation. App. 62, 69, 74, 80, 84, 90. It cannot be disputed, however, that developing a new well would impose costs in time, money, and physical space. Likewise, the advantages to the Palmers in continuing to use the Well are undeniable: continuing to have a supply of potable water to their residence as promised when they purchased the Palmer Property.

Given the advantages and disadvantages to the Palmers (continued access to water against the undetermined cost of developing a new well) and to the Appellees (none), the rule of reason can only weigh in favor of allowing the Palmers the continued use of the Well. The Trial Court erred in finding that the rule of reason imposes a duty on the Palmers to terminate their Easement.

IV. THE TRIAL COURT'S ORDER IMPROPERLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANTS BY REQUIRING THEM TO INVESTIGATE AND PRODUCE EVIDENCE NECESSARY TO PROVE THE PLAINTIFFS' CLAIMS.

As noted above, the Trial Court erroneously found that the Easement imposed an affirmative duty on the Palmers to terminate that Easement. The Trial Court, however, recognized the lack of evidence as to the costs this would impose upon the Palmers. The Trial Court therefore ordered the Palmers to investigate the costs of developing a new water supply and then either develop that water supply, or return to present evidence that doing so would be inordinately expensive.

The Palmers, however, did not bear the burden of proof in this matter. The Plaintiffs asserted that the rule or reason imposed an affirmative duty not present in the language of the Easement, and thus bore the burden of proof. Therefore, the Plaintiffs, not the Palmers, bore the burden of proving that the balance of advantages and disadvantages weighed in favor of terminating the Easement. See Dunlop v. Daigle, 122 N.H. 295, 298 (1982) (“In a civil action the burden of proof is generally on the plaintiff to establish its case by a preponderance of the evidence”). In essence, the Trial Court recognized that the Plaintiffs had not presented enough evidence to support their claims and so ordered the Defendants to do so instead. This improperly shifted the burden of proof to the Defendant to investigate and produce evidence that their continued use of the Easement was not unreasonable. The Trial Court erred in this regard and its decision should be overturned.

CONCLUSION

As discussed above, the Trial Court erred by finding that the Appellants had a duty to terminate their Easement under the rule of reason, and that the Appellants must either terminate their Easement or bear the burden of disproving the Plaintiffs' allegations. The Trial Court's order is contrary to the plan language of the Easement, all available extrinsic evidence, and the rule of reason (to the extent it applied).

For the reasons stated above, Henry M. Palmer and Janice Monty-Palmer respectfully request that this Honorable Court: (a) reverse the Trial Court's decision of August 30, 2019, (b) find that the Palmers have no affirmative duty to seek the termination of their Easement; and (c) grant such other and further relief as is just, equitable, and appropriate.

ORAL ARGUMENT

Jeffrey C. Christensen will argue the case for the appellant, and 15 minutes are requested for this purpose.

CERTIFICATION PURSUANT TO RULE 26(7)

Pursuant to Supreme Court Rule 26(7), I hereby certify that every issue specifically raised herein (a) has been presented in the proceedings below and (b) has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. I further hereby certify the within brief complies with the word limitation in Supreme Court Rule 16(11) of 9,500 words. This brief contains 4,889 words.

CERTIFICATION PURSUANT TO RULE 16(3)(i)

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that the decision being appealed was in writing, and that a true and accurate copy of the same is appended to this brief.

Respectfully submitted,
JANIS A. MONTY-PALMER and HENRY M.
PALMER,

By Their Attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Date: February 5, 2020

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document is being served electronically upon Karyn P. Forbes, Shaheen & Gordon, P.A., and to Erich J. Hasselbacher, Brook & Scott, PLLC, through the Court's electronic filing system, in compliance with Supreme Court Rule 16(3).

/s/Timothy E. Britain
Timothy E. Britain, Esq.

ADDENDUM

COPY OF DECISION BELOW BEING APPEALED30

4821-7960-2866, v. 1

**THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT**

MERRIMACK, SS.

No. 217-2018-CV-376

RICHARD ARELL, JR. & NATALIE ALLARD-ARELL

v.

HENRY PALMER & JANICE MONTY-PALMER

&

BANK OF AMERICA, N.A.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case arises out of a dispute between neighbors over rights to use of a well. The well at issue is located on the property of the Plaintiffs, Richard Arell, Jr. and Natalie Allard-Arell (collectively, the "Arells"), and is being used by Defendants Henry Palmer and Janice Monty-Palmer (collectively, the "Palmers") pursuant to a deeded easement. While the parties dispute several issues concerning the Palmers' use of the well, the central dispute concerns the meaning of the term "temporary" within the language of the deeded easement. The Arells and the Palmers also seek certain forms of injunctive relief. Presently before the Court are cross-motions for summary judgment filed by the Arells and the Palmers. For the reasons that follow, those motions are each GRANTED IN PART and DENIED IN PART.

I. Background

Unless otherwise noted, the following facts (which have been taken from the parties' pleadings) do not appear to be in dispute. In 2000, the Palmers purchased a parcel of land located on Canterbury Road in Chichester, New Hampshire. (Def.'s Mot.

Summ. J. at 2.) The Palmer property was previously owned by Esther Edmunds as Trustee of the Esther L. Edmunds Revocable Trust. (Id.) At the time the Palmers purchased the Palmer property, the Edmunds Trust also held title to an undeveloped tract of land located across the road. (Id.) A well situated on that land serviced the residence on the Palmer property. (Id.) When the Edmunds Trust conveyed the Palmer property to the Palmers, it also conveyed an easement to the Palmers which allowed them use of the aforementioned well. (Id. at 3.) The language of the deeded easement reads as follows:

A temporary easement over a portion of said Tax Map 3, Lot 0119 owned by Grantor to access the existing well located on that lot for purposes of serving the single family residence located on the premises herein conveyed until such time as Grantees have another water source available. Grantees shall be responsible for all costs and liabilities associated with the maintenance, repair, and operation of the well, water lines, pumps, and similar matters related to Grantee's utilization of the well.

(Id. Ex. A.)

In 2002—approximately two years after the Edmunds Trust conveyed the Palmer property and the above-described easement to the Palmers—the Edmunds Trust sold the land on which the aforementioned well was situated to the Arells (hereinafter the “Arell property”). (Pls.’ Mot. Summ. J. at 3.) At some point over the last seventeen years, the relationship between the Arells and the Palmers became contentious. (Id. at 4; Def’s Mot. Summ. J. at 3.) The Arells now seek to have the Palmers cease using the well located on the Arell property, arguing that the use of the term “temporary” in the deed implies an end date to the use of the easement. (Pls.’ Mot. Summ. J. at 4.) The Palmers object, contending that their right to use the well is indefinite. (Id. at 3–4.)

II. Legal Standard

In this declaratory judgment action, the Arells seek a ruling consistent with their proffered interpretation of the easement language. This action is therefore governed by RSA 491:22, I, which provides that “[a]ny person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court’s judgment or decree thereon shall be conclusive.” In such matters, a plaintiff “is not seeking to enforce a claim against the defendant, but rather a judicial declaration as to the existence and effect of a relation between him and the defendant.” Benson v. New Hampshire Ins. Guar. Ass’n, 151 N.H. 590, 593–94 (2004). “The remedy of declaratory judgment affords relief from uncertainty and insecurity created by a doubt as to rights, status or legal relations existing between the parties.” Id.

Here, the Arells and the Palmers each seek summary judgment in connection with the above-described petition for declaratory judgment. “The mission of the summary judgment procedure is to pierce the pleadings and assess the proof in order to determine if there is a genuine issue of material fact requiring a formal trial of the action.” Weaver v. Stewart, 169 N.H. 420, 425 (2016). “When determining a ruling on cross-motions for summary judgment, the Court considers the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, determines whether the moving party is entitled to judgment as a matter of law.” Franciosa v. Hidden Pond Farm, Inc., 171 N.H. 350, 354 (2018).

III. Analysis

The parties' cross-motions for summary judgment raise the following four issues: (A) the significance, if any, of the term "temporary" in the language of the deeded easement; (B) whether the Palmers may transfer the easement; (C) whether either the Arells or the Palmers are entitled to injunctive relief; and (D) whether the Palmers are entitled to attorney's fees. The Court will address each issue in turn.

A. Significance of the term "temporary" in the deeded easement

The first issue the Court must resolve is the proper interpretation of the word "temporary" within the deeded easement. The Arells argue that the use of the word "temporary" within the deed should be given separate meaning from the rest of the deed. (Pls.' Mot. Summ. J. at 6). The Palmers argue that the word "temporary" would be ambiguous if left on its own, but is instead modified by the conditions laid out later in the deed: i.e., "until such time as Grantees shall have another water source available." (Hearing on Mot. for Summ. J. July 12, 2019.)

The proper interpretation of a deed is a question of law. Appletree Mall Assocs., LLC v. Ravenna Inv. Assocs., 162 N.H. 344, 347 (2011). It is a general rule of contracts, well accepted in federal law and multiple state jurisdictions, that rules of construction require that no word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts, can be given to it. E.g., Thiem v. Thomas, 119 N.H. 598, 603 (1979). Accordingly, the Court applies that general rule here. Having done so, the Court concludes that the word "temporary" can be given a reasonable interpretation while remaining consistent with the rest of the language of the easement. Id. The Court thus does not view the term

“temporary” as a redundancy or mere surplusage, and must instead determine the meaning of that term vis-à-vis the Palmers’ easement rights.

“In interpreting a deed, [courts] give it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time.”

Appletree Mall Assocs., LLC, 162 N.H. at 347. The Court must first examine the plain language of the document. Id. If the language of the deed is clear and unambiguous, the Court must interpret the intended meaning from the deed itself. Stowell v. Andrews, 171 N.H. 289, 296 (2018). However, when faced with an ambiguity, the Court may apply the “rule of reason” in order to “give reasonable meaning to unclear or general terms in an easement deed.” Lussier v. New England Power Co., 133 N.H. 753, 756 (1990).

Here, both parties argue that the language of the deed is unambiguous in favor of their respective positions. However, the Court finds that either of the parties’ suggested interpretations could fit within the meaning of the word “temporary,” making the term ambiguous. See Great Am. Dining, Inc. v. Philadelphia Indem. Ins. Co., 164 N.H. 612, 616 (2013) (explaining that “[i]f more than one reasonable interpretation is possible,” then the relevant contract “contains an ambiguity”). Accordingly, the Court applies the “rule of reason” to determine what meaning the parties intended to assign the term when the easement was granted. Sakansky v. Wein, 86 N.H. 337 (1933). “The rule of reason is a rule of interpretation. Its office is either to give a meaning to words which the parties or their ancestors in title have actually used . . . or else to give a detailed definition to rights created by general words either actually used, or whose existence is implied by law.” Id. “Reasonableness is a question of fact that is

determined by considering the surrounding circumstances, such as location and the use of the parties' properties, and the advantages and disadvantages to each party."

Arcidi v. Town of Rye, 150 N.H. 694, 702 (2004).

In this case, the Palmers have enjoyed use of the "temporary" easement for nineteen years. While the deed does not explicitly assign the Palmers an affirmative duty to seek another water source, it is unreasonable to assume that "becomes available" means the spontaneous appearance of a well or access to public water, which has not occurred in the past nineteen years and so seems unlikely to occur. Consequently, although the Palmers claim no affirmative duty to seek another water source, there is simply no other mechanism by which the easement can end. In light of these considerations, the Court concludes that, at this juncture, it is reasonable that the Palmers be ordered to take reasonable steps to create a well on their own property. This includes investigating the viability of such well and creating one, if it can be done at or near the customary cost of developing a well in the area. Therefore, the Court grants the Palmers a period of three years from the date of this order to create a well on their own parcel. If the Palmers determine after a thorough investigation that it is not possible to dig a viable well on their property, or that the cost far exceeds the customary cost of creating a well, then they can seek a further hearing in this Court to address the continuation of the easement.

Thus, the Arells' Motion for Summary Judgment is GRANTED insofar as it seeks a ruling that the Palmers must take reasonable steps to create a well on their own parcel within 3 years, but DENIED as to the suggested deadline of 1 year. In the Court's view, a three-year timeframe is more appropriate under the circumstances. As

explained above, the Palmers' Motion for Summary Judgment is DENIED as it relates to their responsibility to seek an alternative water source.

B. Transferability of the deeded easement

The Arells have also asked the Court to determine whether the deeded easement is transferable with title, or whether it ceases upon death or sale of the estate by the Palmers. To answer this question, the Court must first determine whether the deeded easement is appurtenant or in gross.

The most important classification of easements differentiates between easements appurtenant and easements in gross. Generally speaking, 'appurtenant' means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land. 'In gross' means that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land.

An appurtenant easement creates two distinct estates: the dominant estate, which is the land that benefits from the use of the easement; and the servient estate, which is the land burdened by the easement. The significance of the 'appurtenant' label is that ownership of the easement appertains, or is linked, to the dominant estate. The easement is owned not by the grantee as an individual, but by the grantee qua owner of the dominant estate. Legally, the easement is one of the rights and privileges of owning the particular parcel of real estate identified as dominant. Thus an appurtenant easement is incapable of existence separate and apart from the dominant estate. The benefit of an appurtenant easement can be used only in conjunction with ownership or occupancy of a particular parcel of land.

By contrast, an easement in gross is owned by an individual person, with ownership of the easement not linked or tied to the ownership of any other interest in property. For an easement in gross, there is a servient estate, but, because the easement benefits its holder whether or not the holder owns or possesses other land, there is no dominant estate or benefited land.

Whether an easement by prescription is appurtenant or in gross is determined by the use of the servient estate. If the prescriptive use was for the benefit of the possessor of a particular parcel, the

easement is appurtenant. Otherwise, it is in gross. To determine whether a prescriptive easement is appurtenant or in gross, courts may examine whether the easement rights logically have 'free standing' value, meaning whether the rights are of value to anyone other than the owner of a particular lot. They may also examine whether the adverse use took place in connection with and for the benefit of a particular parcel of land.

Stowell v. Andrews, 171 N.H. 289, 298–99 (2018) (citations omitted).

The Court begins this analysis by analyzing the use of the servient estate. See Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land § 2.3 (2016). Here, the well has no free standing value to members of the public. See Stowell, 171 N.H. at 294 (finding that an easement with no "free standing value" weighs in favor of an appurtenant easement). Presumably, if the Palmers no longer resided on their current property, they would derive no benefit from an ability to use the well. See id. In other words, the easement would be "more useful" to a successive owner of the dominant estate than it would be to the former owner of the dominant estate. See Jacqueline P. Hand & James Charles Smith, Neighboring Property Owners § 7.07 (1988) (a version of the "free standing" value test is asking if the property right would be "more useful" to a successor owner of allegedly benefitted land than to its original holder). The deed does not contain termination language concerning transfer of ownership or title, but instead provides that the easement lasts "until such time as Grantees shall have another water source available." In light of the foregoing, the Court concludes that the easement was meant to benefit the parcel of land owned by the Palmers. It is therefore appurtenant to the land and continues to benefit that parcel upon death of the Palmers or transfer of ownership of title, until such time as an alternate water source becomes available, under the terms set forth above.

Consequently, the Palmers' Motion for summary judgment is GRANTED, and the Arell's Motion for Summary Judgment is DENIED, with respect to the transferability of the easement at issue.

C. Injunction Requests

The Arells and the Palmers have each requested injunctions in connection with the well. The Arells have requested that the Court enjoin the Palmers from using the well at the deadline for which they are to seek an alternative water source, i.e., three years. The Palmers have requested that the Court enjoin the Arells from interfering with their use of the well.

"The injunction is an extraordinary remedy which is only granted under circumstances where a plaintiff has no adequate remedy at law and is likely to suffer irreparable harm unless the conduct of the defendant is enjoined." Timberlane Reg'l Sch. Dist. v. Timberlane Reg'l Ed. Ass'n, 114 N.H. 245, 250 (1974). "A mere possibility or fear that injury will occur is insufficient to justify granting equitable relief." Meredith Hardware, Inc. v. Belknap Realty Tr., 117 N.H. 22, 26 (1977). The Court will apply these standards to each request for injunctive relief, beginning with the Arells' request.

The Arells request a future injunction concerning a deadline which has not yet passed. At this point, however, the Court does not find that the Arells have satisfied the burden for obtaining injunctive relief. Accordingly, the Arells' Motion for Summary Judgment is DENIED as it relates to this issue. (Def.'s Mot. Summ. J. Ex. D No. 8–9.)

The Palmers' request for an injunction is equally flawed. The Palmers request an injunction against the Arells from interference with the use of their well. The only evidence that the Palmers have presented in connection with this request is the fact that

the Arells have asked that the Palmers discontinue use of the well. In the Court's view, this does not constitute irreparable harm.¹ Further, the Palmers have presented no evidence to the Court that an alternative remedy at law is unavailable. Therefore, the Palmers' Motion for Summary Judgment is DENIED as to this issue.

D. Attorney's Fees

The Palmers have requested attorney's fees based on the theory that "[w]here an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate." Harkeem v. Adams, 117 N.H. 687, 691 (1977) (awarding attorney's fees in an employment compensation claim, finding that the parties were disparately situated to afford the costs of litigation while the opposing party acted in bad faith to prolong the litigation). The only evidence presented by the Palmers that the Arells have acted in bad faith is their assertion that the Arells' request for a declaratory judgment is baseless. This Court finds that the Arells' motion was not baseless, and thus the Palmers' request for attorney's fees is DENIED.

IV. Conclusion

For the reasons set forth above, the Court concludes that it is reasonable to give the Palmers three years in which they must take steps to create a well on their property. The Court also rules that the deeded easement runs appurtenant to the land and is transferable. The Court further concludes that neither party is entitled to injunctive relief. Finally, the Court concludes that the Palmers are not entitled to attorney's fees where there has not been an adequate showing that the Arells acted in bad faith by

¹ While there have been allegations that the well was previously tampered with, there is no evidence before the Court which establishes that the Arells are responsible for that alleged event.

bringing a suit for declaratory judgment. The pending cross-motions for summary judgment are each GRANTED IN PART and DENIED IN PART, consistent with the rulings set forth herein.

SO ORDERED.

Date 8/30/19


John C. Kissinger, Jr.
Presiding Justice