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

REPLY BRIEF OF THE APPELLANT

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ARGUMENT

The Appellees argue, in short, that a temporary easement *must* end and that, because the Easement does not provide a specific timeline, the Court should imply a deadline by use of the Rule of Reason. The Appellees do not present any argument that the Easement imposes any burden on the Arell Property or otherwise interferes with the use thereof. This alone is sufficient grounds for reversal. See Heartz v. City of Concord, 148 N.H. 325, 332 (2002) (holding that the rule of reason does not apply "if the complaining party fails to make sufficient factual allegations of unreasonable use or burden").

Instead, as discussed below, the Appellees raise immaterial and irrelevant issues of fact, and misconstrue past Superior Court decisions to attempt to convince this Court to impose an affirmative duty upon the Palmers to discontinue using the only water source for their home. As discussed below, the Appellees' argument is unsupported by the law or the underlying facts.

I. THE APPELLEES RELY ON IRRELEVANT AND IMMATERIAL FACTUAL ISSUES

a. The subsequent installation of an accessory dwelling is irrelevant to whether the Easement was intended to impose an affirmative duty on the Palmers.

The Appellees repeatedly raise the issue of an accessory dwelling (the manufactured housing unit) placed on the Palmer Property. As a preliminary matter, this issue is irrelevant and immaterial. The Appellees,

in their Petition for Declaratory Judgment and Injunctive Relief, never discussed the accessory dwelling. See App. 3-8. Nor did the Appellees ever allege that the Palmers, by installing the accessory dwelling, were overburdening the Easement or the Arell Property, or that the accessory dwelling somehow interfered with the use of the Arell Property. See id. At the hearing on the motions for summary judgment, the Appellees acknowledged that they did not include any such allegation. See Tr. 18:8-11. There is no evidence that the accessory dwelling has any impact whatsoever on the Appellees or the Arell Property.

The only issue before the Court is the interpretation of the Easement and whether the Palmers have an affirmative duty to end that Easement. The accessory dwelling has no relevance to that issue. Easements are interpreted to effect the grantor's intent based on the facts and circumstances at the time it was granted. See Appletree Mall Assocs., LLC v. Ravenna Inv. Assocs., 162 N.H. 344, 347 (2011). A subsequently installed accessory dwelling, as a matter of law, *cannot* be relevant to determining the Grantor's intent.

To briefly address the Appellees' argument, however, the accessory dwelling was installed as a temporary living space for Janis Monty-Palmer's parents who needed to be nearby during their declining health. See App. 187. It was essentially a temporary in-law apartment. Such a use would be a permissible expansion of the Easement and is no different than if the Palmers added an addition to their house to create more bedrooms. See Downing House Realty v. Hampe, 127 N.H. 92, 96 (1985) (use of an easement may be expanded if "the change in use is a normal development from conditions existing at the time of the grant"). See also Ettinger v.

Pomeroy Ltd. P'ship, 166 N.H. 447, 452 (2014) ("the mere addition of other land to the dominant estate does not necessarily constitute an overburden or misuse of an easement"). Whether an expansion of use constitutes impermissible overburdening of a servient estate depends on a consideration of "all of the surrounding circumstances, including location, the uses of both parties' properties and the advantage of one owner's use and the disadvantage to the other owner caused by that use." Downing, 127 N.H. at 96 (internal quotations omitted). The Appellees have never identified or alleged any material interference or disadvantage caused by the accessory dwelling or the use of the Well generally. In fact, the Well does not serve the Appellees' house, and the Palmers' use of the well has no impact on the water supply for the Arell Property. See App. 58, 59, 60, 65, 66, 67, 70, 73, 75, 79, 80, 83, 85, 89, 90. Therefore the Appellees suffer no burden by the Palmers' use of the Well. It would appear that the only reason the Appellees desire to terminate the Easement is that they simply do not want the Well to remain in existence.

Even assuming, *arguendo*, that the accessory dwelling *did* overburden the Easement, interfere with the use of the Arell Property, or was otherwise unreasonable, the appropriate remedy would be injunctive relief requiring the use of the accessory dwelling to be discontinued, not the forfeiture of the Easement. See Anna H. Cardone Revocable Tr. v. Cardone, 160 N.H. 521, 528 (2010); See also *Restatement (Third) of Property (Servitudes)* § 8.3 (2000), cmt. c ("a court order of forfeiture for excessive use is warranted only if injunctive relief cannot practicably be used to prevent excessive or unauthorized use of the servitude").

b. The Appellees' Argument that the Palmers can develop an alternative water source because they built a pool and a deck is entirely speculative and inapposite.

The Appellees argue that because the Palmers have made improvements to their home, such as a pool and a deck and repaving their driveway, the Court should ignore any contemplation of the cost that developing a new water source would impose upon the Palmers. See, e.g., Brief of the Appellees, p18. The Appellees do not, and did not before the Trial Court, provide any evidence as to the cost of either the Palmers' improvements, or even evidence as the detailed nature of the improvements, such as the type of pool, size of the deck, or length of the driveway from which one could even begin to speculate as to the cost. Nor did the Appellees provide any evidence regarding the cost to develop and maintain a new water source on the Palmers Property. The Appellees ask the Court to speculate as to the cost of a pool, speculate as to the cost of the deck, and then assume that, the Palmers can therefore afford to pay *any amount whatsoever* to develop a new water source. The Appellees' argument also assumes without evidence that a water source of equivalent potability as the Well can be established on the Palmers Property.

The rule of reason, if it applied,[1] would require the Plaintiff (*i.e.*, the Appellants) to present evidence as to the "the advantages and disadvantages to each party". Arcidi v. Town of Rye, 150 N.H. 694, 702 (2004). The Appellants cannot avoid this burden by simply pointing out that the

[1] As discussed below and in the Brief of the Appellant, it does not.

Palmers have a pool and claim that, therefore, any possible disadvantages to the Palmers are immaterial.

Even if the cost of the Palmers' residential improvements exceeded the cost of developing a new well (which is speculative, at best), this argument misapplies the rule of reason. The rule of reason requires balancing the advantages and disadvantages of the use of the Easement to each party. Arcidi, 150 N.H. at 702. In other words, the rule of reason asks whether the burden to the Palmers from the cost of developing a new water source and discontinuing the use of the Well are greater than the burden the continued use of the Easement places on the Appellees. See id. Given that the Appellees have been unable to identify *any* material burden caused by the Easement, *any* material cost to the Palmers should resolve the rule of reason in their favor. It cannot be disputed that developing a new well (and maintaining such well and water treatment equipment) will have *some* cost. And so the Appellees ask the Court to ignore that cost because the Palmers built a new deck.

Moreover, the Appellants' position was not even adopted by the Trial Court. The Trial Court, recognizing that information regarding the cost of developing a new water source was essential to making a determination, ordered the Palmers to investigate those costs. See Trial Court's Order, Brief of the Appellant, Pages 35-36. The Trial Court rejected the Appellees' position that improvements to the Palmers' home render them able to bear any conceivable cost to develop a new well. This Court should do the same.

II. THE APPELLEES MISCONTRUE THE RELIED-UPON PRECEDENT.

The Appellees rely heavily on the Superior Court's decision in Dalser Realty, LLC v. Manchester Housing and Redevelopment Authority, Inc., Super Ct. No. 216-2015-CV-00651, 2017 WL 8773146 (2017). In Dalser, a temporary easement was granted, to expire "upon completion of construction of the new road over Parcels B, C, and D on the Lot Line Adjustment Plan" and the deed provided that all work was to be done in an "expeditious manner". Id., p2, 5. The Superior Court, after evaluating all of the underlying facts, made two conclusions. First, the easement referenced a specific new road and multiple elements of extrinsic evidence indicated an intent that it be completed expeditiously. Id., p5-6. Second, the delays in completing that new road, and the continued use of the easement, were interfering with the use of the servient estate. Id., p7.

Neither of those conclusions can be made here. Multiple significant facts in Dalser not found here include:

- The deed in Dalser, provided that work be completed in an "expeditious manner". Id., p5. The Palmers' Easement contains no timeframe or express expectation of completion whatsoever.

- In Dalser, the easement referenced a specific plan of construction. Id., p2. The Palmers' Easement does not, nor does it otherwise indicate that any new water source was contemplated.

- The development plan incorporated in the deed in Dalser expressly required the construction of all improvements to "commence and be completed within a reasonable time". Id.,

p6. The Palmer Deed contains no such express requirement, nor does any other document.

- The contract for the purchase of the dominant estate in Dalser expressly provided "an expedited timeline for development of the property". Id., p6. No such provision exists in this case.

- The grantor of the easement in Dalser represented that the permanent access road to terminate the easement would be constructed early in the development process. Id., p6. There is no evidence of any representations of the Grantor in this case that the Easement would terminate or an alternative water source would be constructed on any timeline whatsoever.

- The Dalser court found that the continued use of the easement interfered with the servient estate holder's use of his property by preventing the expansion of his business. Id., p7. In this case, the Appellees have not introduced any evidence (or even alleged in any manner) to establish that the Easement interferes with the Appellees' use of the Arell Property or burdens them in any way whatsoever; nor did the Trial Court find any interference or burden.

In other words, the deed and the extrinsic evidence in Dalser all expressly indicated an intent that the permanent road be constructed promptly, and the servient estate was being harmed by the delay. In the present case, there is no language in the Palmer Deed, no extrinsic evidence supporting the Appellees' position, and no harm to the Appellees by the Palmers' continued use of the Easement.

III. THE APPELLEES FAIL TO IDENTIFY ANY BURDEN ON OR INTEFERENCE WITH THE USE OF THE ARELL PROPERTY.

As discussed in the Appellants' Brief, the Appellees did not produce any material evidence of, or even allege, any burden imposed upon them by the Palmers' continued use of the Easement. In the Brief of the Appellees, the Appellees do not dispute or even address this issue. The Appellees object to the Palmers' accessory dwelling as unreasonable, but fail to identify *any negative impact whatsoever* on the Appellees.

If the Easement is ambiguous, as the Appellees argue, then the Palmer Deed must be interpreted to effect the Grantor's intent based on the extrinsic evidence.[2] Flanagan v. Prudhomme, 138 N.H. 561, 566 (1994). If any terms of the Easement remain unclear after the consideration of the extrinsic evidence, the rule of reason may be applicable. Heartz, 148 N.H. at 331. However, "any uncertainty created [in a deed] must be resolved against the grantors." Kennett Corp. v. Pondwood, Inc., 108 N.H. 30, 34 (1967).

The rule of reason balances the advantages and disadvantages to each party. Arcidi, 150 N.H. at 702. In this case, there are no factors weighing in favor of imposing an affirmative duty to terminate the Easement. The Easement imposes no costs on the Appellees, The Easement interferes with no use of the Arell Property. In the balancing test of the rule of reason, there is a "zero" on the Appellees' side of the scale. In these

[2] As discussed in the Brief of the Appellants, *all* of the extrinsic evidence before the Court weighed against the imposition of any affirmative duty on the Palmers to terminate the Easement. More specifically, the Grantor, for multiple years after the Palmers purchased the Palmer Property, never indicated a belief that the Palmers should be developing a new water source or ever objected to their failure to do so. See App. 41-42; 48.

cases, the rule of reason cannot be applied. See Heartz, 148 N.H. at 332 (the rule of reason does not apply "if the complaining party fails to make sufficient factual allegations of unreasonable use or burden").

On the other side of the scale, the Palmers rely upon the Easement as their sole source of water for their residence. See App. 40, 47. It cannot be denied that developing a new water source would impose some costs (including costs of treatment to obtain potable water), as well as the loss of the remaining benefit of any maintenance and improvements made to the Well by the Palmers in the past. Accordingly, even if the rule of reason were applicable here, it weighs in favor of the Palmers.

CONCLUSION

As discussed above, the Appellees rely on immaterial factual issues and misconstrue case law. The Appellees, however, have failed to identify any way in which the Easement imposes a burden upon them or interferes with their use of the Arell Property. The Trial Court therefore erred by applying the rule of reason and imposing an affirmative duty on the Palmers not found in the language of the Easement and not supported by the extrinsic evidence.

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.

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 3,000 words. This brief contains 2512 words.

Respectfully submitted,
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Date: March 25, 2020

By: /s/ Timothy E. Britain

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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).

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