IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

NANCY VAN DIJK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 1574-K
	)	
LUIS A. SALDANA and EVA G. SALDANA, husband and wife,	)	
	)	
	)	
Defendants.	)	

MASTER'S REPORT

Date Submitted: January 20, 2005
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Final Report: September 23, 2005

David N. Rutt, Esquire, Kasif I. Chowdhry, Esquire, Moore & Rutt, P.A., Georgetown, Delaware; Attorneys for Plaintiff.

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GLASSCOCK, Master

This matter involves two properties in Milford separated by an 11-foot alleyway. The plaintiff, Nancy Van Dijk, owns a lot at 113 Northwest Front Street. The lot immediately to her north is owned by the defendants, Luis and Eva Saldana. The Van Dijk parcel was subdivided from a larger lot (the "Hynson parcel") in 1987. The subdivision of the Hynson parcel to create what is now the Van Dijk parcel involved creating a new property line running through a party wall between what is now the plaintiff's house and its neighbor to the east, and splitting the Hynson parcel lengthwise north to south. The result is that the Van Dijk property is less than 20 feet wide along its boundary with Northwest Front Street. Plaintiff's house occupies substantially all of this frontage. Therefore, there is no practical means of access from Front Street to the rear portion of the Van Dijk property. When Mrs. Van Dijk or her husband first acquired title to this property, they were informed by their predecessor-in-title that access to the back yard was over the driveway of their neighbor, Philip Staley. Mr. Staley's lot is immediately to the west of the Van Dijk parcel and a driveway runs along the eastern-most section of his property directly adjacent to the western wall of the Van Dijk house. Although Mr. Staley initially gave the Van Dijks permission to use this driveway to reach their back yard, the Van Dijks had no legal right to use the driveway beyond the license granted by Mr. Staley. When a dispute between the neighbors arose, Mr. Staley withdrew this license.

Meanwhile, Mrs. Van Dijk had begun to research her title. She realized that her property was described as bordering an 11-foot wide alley to the north. Mrs. Van Dijk

believed that this description was mistaken because there was no alley apparent and in fact the property to the immediate north of the Hynson lot described as an alley was occupied by a fence and carport owned by the Saldanas.

In further researching her title, Mrs. Van Dijk became convinced that an 11-foot wide alley indeed existed to the north of her lot, created to give her access to the back of her property, that this alley connected to an existing 11-foot wide alley running north and south along the east boundary of the Saldana property and connecting to North Second Street, a public road; and that the Saldanas were improperly blocking the alleyway with their carport and fence. In 2003 she (or her husband) demanded that the Saldanas remove the obstruction. The Saldanas refused, and this lawsuit resulted. Mrs. Van Dijk asserts that an alleyway or easement exists to give her access from the rear of her property to North Second Street, and that the Saldanas are improperly blocking this access. She seeks a mandatory injunction directing them to remove any obstructions from the alley. The Saldanas dispute the existence of an alleyway between their property and the Van Dijk parcel, and in the alternative claim (through adverse possession) the area within their fence and under their carport, which Mrs. Van Dijk has asserted to be blocking the alley. The Saldanas also argue that any rights to an alley appurtenant to Van Dijk's lot have been abandoned. Three questions are therefore presented: 1) Was an express alleyway or easement created providing access for the owners of the Hynson/Van Dijk parcel to North Second Street? 2) Has this alleyway or easement been abandoned? 3) Have the Saldanas extinguished any alleyway and acquired title by adverse possession?

1. The Existence of an Alleyway or Easement

The plaintiff traces her chain of title, through the subdivided Hynson parcel, to an inheritance by Elizabeth Johnson from her mother before 1904. Mrs. Johnson is also the originator of the title (to the extent disclosed by the record before the Court) to the Saldana property. On May 24, 1904 Elizabeth Johnson transferred the Hynson (later Van Dijk) property to Annie Lord Hynson. This warranty deed specifically covenanted to Hynson, and her descendants- in-title, right of ingress and egress to the north of the property, and thence to North Second Street[1], over an alley bounding land "recently conveyed by ... Elizabeth Johnson to ... William H. Lank."

Elizabeth Johnson had previously conveyed what was to become the Saldana parcel to William H. Lank, on March 29, 1904. The deed establishing the Lank/Saldana parcel defines the southern and western boundaries of the parcel as follows:

> A corner for the west line of the said 11 foot alley: thence running with the west line of said 11 foot alley, south 15 degrees east 112 feet to a stone set for the corner of this lot and for the said alley; thence running with the north line of another 11 foot alley, south, 82-1/4 degrees west, 44-3/4 feet to another stone a corner for this lot and foresaid alley; thence

[1] The deed states:

And the said Elizabeth Johnson does hereby covenant, promise and agree to and with the said Annie Lord Hynson, her heirs and assigns that the aforesaid Annie Lord Hynson, or her heirs and assigns, together with her or their servants, agents, workmen, employees and teams, shall and may have the right of ingress, egress and regress to, into and from the said lot of land hereby conveyed through, over and along the said eleven foot alley by which the said lot of land hereby conveyed is partly bound on the north and through and along the eleven foot alley by which the said lot of land recently conveyed by the aforesaid Elizabeth Johnson to the said William H. Lank is bounded on the east and running into North Second Street.

> running with the end of said alley south 5-1/4 degrees east to another stone set for a corner of this lot at the end of said alley and in line of other lands of the said Elizabeth Johnson.

Like the deed to Hynson creating the chain of title to the Hynson/Van Dijk properties, the deed to Lank creating a chain of title to the Saldana lot provides a right-of-way or easement across the alleys for the use of the owners of the Saldana lot.

The alleyways in question are not dedicated to the public. They exist, if at all, as private alleyways, rights-of-ways or easements. Where an owner of property subdivides the property and creates a private alleyway for the service of those lots, and where she retains herself no interest in properties benefitting from the right-of-way, it is presumed (absent evidence to the contrary) that she intended to convey the fee of the alleyway to the abutting lot owners, each to the center line. *See* Smith v. Lowe, Del. Supr. 622 A.2d 642, 646-47 (1993); DuPont v. American Life Insurance Company, Del. Ch., 187 A.2d 421, 423 (1963). I presume, therefore, that when Mrs. Johnson sold the lots which became the Hynson and Saldana lots, in 1904, and created for the use of those lots and the convenience of their owners an alleyway between them, she did not mean to retain the fee interest in the alleyway itself but instead to convey it to the adjacent property owners each to the center line, subject to the use of the owners for ingress and egress, as provided for in the deeds.[2] The defendants point out that the chain of title of record here goes back only to Mrs. Johnson who (according to the deeds) received the property from her mother

[2] *See* footnote 1.

by inheritance. The defendants suggest that this property may have been subdivided before received by Mrs. Johnson, that the alleys predate the 1904 deeds, and that, therefore, answers to ownership of the fee below the alleyway cannot be resolved on the present record. I find, however, that if an alleyway existed prior to Mrs. Johnson's tenure, it would be subject to the same presumption stated above: that is, that ownership of the fee would be in the adjoining property owners, to the midline. In that case, assuming an alleyway was created before Mrs. Johnson's tenure, when she acquired both properties a unity of the burdened and favored parcels was achieved, extinguishing the easement or right-of-way across the alley. *See generally* DuPont, 1987 A.2d 421. The current right-of-way was then created, or recreated, by the deeds out to Lank and to Hynson in 1904. The alleyway has been described in the deeds and surveys of both properties down to the most recent transactions. I have no doubt that an easement or right-of-way across an 11-foot alley lying between what is now the Saldana parcel to the north and the Hynson parcel to the south existed when the latter was subdivided in 1987. The length of that alley was described in the deed to Lank as 44-3/4 feet. Thus, when the Hynson parcel was subdivided, the 11 foot alley abutted the entire northern portion of the eastern most half of the Hynson lot and reached beyond the northeastern boundary of what is now the Van Dijk lot. The easement or right-of-way provided to Mrs. Van Dijk's predecessor-in-title ran with the property and attaches to her lot. Therefore, an easement of record exists for access from the Van Dijk property into and across the 11 foot alley

and thence to North Second Street, unless the right-of-way has been abandoned or forfeited through adverse possession.

Abandonment

It appears from the record that the alley has not been used in recent years. Before the subdivision of the Hynson parcel, access to the back of the property was either across the driveway owned by Mr. Staley, to the west, or from North Second Street down the north-south alley and on to the Hynson property. Mr. Staley testified that cars coming to the Hynson lot would pull down the north-south alley and then directly into the back yard of the property, rather than making use of the east-west alleyway. The east-west alleyway itself, according to the testimony of Mr. Staley and Mr. Saldana, was choked with weeds and brush.

Abandonment of real property is disfavored at law and cannot be shown through mere non-use. To abandon a right-of-way or easement such as that created in favor of the Hynson parcel across the alleyway, some affirmative act must be taken by the owner of the property to indicate an intent to abandon. *E.g.* Pappa v. Prince of Piedmont Society, Del. Ch., No. 13041, Chandler, V.C. (Jan. 27, 1994)(Mem. Op.) at 2. While the record going back to the late '70s, looked at in the light most favorable to the defendants, indicates that the owners of the Hynson parcel did not use the east-west alley[3] the record

[3] The testimony of another neighbor, Mr. Trefney, was that in the years before 1992, he did see cars making use of the alley to access the Hynson property.

is devoid of any action on the part of the plaintiff[4] or her predecessors that indicates a desire to abandon the alleyway.

In their exceptions to the draft version of my report, the Saldanas argue that I have ignored evidence in the record evincing a positive intent to abandon by Mrs. Van Dijk's predecessors. The Saldanas point to the "overgrowth" of brush in the easement, as well as to the existence of what Mrs. Van Dijk described in testimony as a "rotten" elm on the back of her property, with a trunk diameter of approximately 18 inches.[5] Citing Francis v. Macklin, Del. Ch., C.A. No. 947-K, Jacobs, V.C. (July 19, 1990) (Mem. Op.), the Saldanas argue that this evidence, and particularly the existence of the tree, is sufficient to demonstrate the intent of the plaintiff's predecessors to abandon the easement.

The elm tree was not within the easement but was in the rear of the plaintiff's narrow lot, in the area where a driver of a vehicle using the easement would have turned onto the plaintiff's lot. The testimony is in conflict as to whether the existence of the tree effectively blocked vehicular access from the easement to the rear of the Van Dijk property. I need not resolve that dispute, however, because I find that the existence of the tree, even if it blocked vehicles from using the easement, is insufficient to demonstrate an intent to abandon the easement.

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[4] I address the claim that the Saldanas and their predecessors took affirmative steps to assert ownership over the entire alleyway, *infra.*

[5] During the pendency of this action, the elm tree blew down in a storm.

It is clear that in the years proceeding this suit, the easement fell into non-use. It has been blocked in recent years by the Saldana fence and carport and before that was choked with weeds and brush. Whether sufficient evidence exists to demonstrate abandonment is a factual question. Francis, the case on which Mrs. Van Dijk relies,[6] involved a purported easement over an alley running from a public street to the Mispillion River in Milford. At one time, the alley provided access for cargo to be carried from the street to wharves, thence to commercial vessels which navigated the Mispillion. After finding that the defendant in that case had no easement rights in the alley, the Court opined that even had easement rights existed, they would have "long since terminated because of abandonment." The Court noted that a large tree blocked access to the Mispillion, that the wharves had "long ago" collapsed, and, importantly, that bridges had been erected that made the section of the Mispillion served by the alley non-navigable.

In the instant case, as I have found, the alley fell into non-use. In the years before the Saldanas blocked the alley by the erection of the fence and carport, the alley was allowed to grow up into brush and a tree was allowed to grow limiting access across the alley to the back of the Van Dijk parcel.[7] To my mind, this is evidence only of non-use,

[6] The Francis case, interestingly, involved a purported easement only a short distance from the one in contention here.

[7] In their reply brief, the Saldanas argue that the tree was "planted and nurtured" by Mrs. Van Dijk's predecessors in title. They fail to cite evidence supporting this poetic locution, however.

and is insufficient to demonstrate an affirmative intent on Mrs. Van Dijk's predecessors to abandon the easement.

Adverse Possession

The evidence demonstrates that the Saldanas are maintaining a fence and carport that block use of the alley by Mrs. Van Dijk.[8] The Saldanas claim that they have acquired title to this area free of any easement or right-of-way by virtue of adverse possession. In order to demonstrate title by adverse possession, the Saldanas must demonstrate exclusive, open, notorious, continuous and hostile possession of the property in question for a period of 20 years. *E.g.* Acierno v. Goldstein, Del. Ch., No. 20056, Parsons, V.C. (June 29, 2004)(Mem. Op.) at 6. Mrs. Van Dijk and her husband demanded that the Saldanas cease blocking the alleyway no later than 2003. Therefore, the Saldanas must demonstrate a period of possession adverse to the interest of Mrs. Van Dijk commencing no later than 1983.

The Saldanas have erected a carport in the alleyway and enclosed much of the alleyway with a fence. Their current occupation of property is sufficiently open, notorious and hostile to satisfy the requirements of adverse possession. Mr. Saldana testified, however, that he erected the carport and fence shortly after he purchased the property in 1989. The burden remains on the Saldanas, therefore, to demonstrate

[8] I deal with the issues of the location of the alley and the obstructions within it *infra*.

possession adverse to the interest to Mrs. Van Dijk's predecessors between 1983 and 1989.

Mr. Saldana's testimony with respect to this period of possession was not clear. He testified that when he purchased the property there was a garage or shed on his property which is shown in the survey made in connection with his purchase. That building, according to the survey, encroached on the easement but only very slightly at its westernmost extent. Mr. Saldana also testified there was a wooden fence in the same position where he later erected the chain-link fence encompassing much of the easement. He also testified that parts of this fence were "down." I am simply unable to glean from Mr. Saldana's testimony whether there was in fact a sufficiently open, notorious and hostile use sufficient to put Mrs. Van Dijk's predecessors on notice of adverse possession, at the time Mr. Saldana purchased the property. Likewise, nothing in his testimony indicates that the possession by his predecessor, such as it was, dates to 1983.

The defendants also put on the testimony of Mrs. Van Dijk's neighbor, Mr. Staley. Mr. Staley has lived on this property since 1977. He testified that a wooden fence was maintained by the Saldanas' predecessors from before the time he moved to the property in 1977 up until a time it was removed by Mr. Saldana and replaced by the chain-link fence in existence today. According to Staley, the wooden fence ran along the boundary between the alley and the Hynson lot and effectively prevented the owners of that lot from using the alleyway to access their property.

Mr. Staley's testimony, while no doubt sincere, was effectively rebutted by photographs he took in past years, including some from the early 1980s. These photographs do not show a fence between what is now the Saldana property and the Hynson property. What they do show is an area grown up in weeds and brush. When asked about this, Mr. Staley testified that perhaps the fence was covered up in the weeds that existed in that area. Even if that is true, however, a fallen fence covered by weeds is insufficient exercise of dominion and control by the predecessor of the Saldanas to put his neighbors on notice of his adverse claim.

Moreover, all the surveys done during the 20-year adverse possession period, including those done for Mr. Saldana and his predecessors as well as the Van Dijks and their predecessors, show the alleyway void of any obstruction. Finally, the testimony of Mr. Trefney, who lived from 1987 to 1992 on a property east of the Hynson lot, was that the east-west portion of the alley was not blocked by a fence during that time.[9] Loss of title through adverse possession involves a forfeiture, and is disfavored at law. For that reason, demonstration of title by adverse possession requires a showing by clear and convincing evidence that the claimants have possessed the property adversely to their neighbors in a way which is open, notorious and hostile, thereby putting the neighbors on notice that their title was in jeopardy. *E.g.* Miller v. Steele, Del. Ch., No. 2093-S,

[9] I put little reliance in Trefney's testimony, since he may have been referring to the area south of the easement used by owners of the lots subdivided from the Hynson parcel to reach their backyards at that time.

Chandler, Ch. (April 11, 2003)(Mem. Op.) at 2. This possession must continue through an uninterrupted period of 20 years. The Saldanas have demonstrated a period of possession adverse to the Van Dijks and their predecessors for a period of 13 years. While they are permitted to tack the use of the property by their predecessors, and while there is some testimony that the Saldanas predecessors may have adversely possessed the alley, the evidence submitted is far short of clear and convincing for the period between 1983 and 1989. For that reason, the adverse possession claim must fail.

CONCLUSION

I find, therefore, that a private alleyway exists and that the plaintiff has an easement of record to use this alleyway for egress and ingress from her property to North Second Street. I find that insufficient evidence exists to show that this easement was abandoned or lost by adverse possession. Therefore, the plaintiff has demonstrated the first prong required to establish a right to the extraordinary remedy of mandatory injunction. In order to receive the injunctive relief they seek, the plaintiff must demonstrate 1) success on the merits of their claim, here that their easement is blocked by improvements placed in the alley by the Saldanas; 2) that they have suffered irreparable harm thereby[10]; and 3) that a balancing of the equities justifies the relief requested. *E.g.*

[10] I find that blockage of this property right is sufficient to justify this requirement. The evidence at trial, in fact, demonstrated that the inability to reach the rear of the property with a vehicle was a substantial inconvenience to Mrs. Van Dijk.

Draper Communications, Inc. v. Delaware Valley Broadcasters LP, Del. Ch., 505 A.2d 1283, 1288 (1985).

In my view the third prong remains to be satisfied. A comprehensive survey of the former Hynson lot (including the Van Dijk property), the Saldana property and the alley itself has not been presented to the Court. Crucially, while the testimony was sufficient for me to determine that the alleyway is blocked, just what portion of the Saldanas' fence and carport lie within the alleyway is not a matter of record. Therefore, once this report becomes final the plaintiff shall cause a survey to be made showing the alley in relation to the properties in question and the location of the encroachments. Once that is done, I will convene a brief hearing on the costs and practicalities of moving or removing the fence and carport and upon which party equity decrees that burden should fall.[11]

/s/ *Sam Glasscock, III*
Master in Chancery

e-filed

[11] This decision will turn in part upon the long delay in the assertion of their interest in the alley by the Van Dijks' predecessors, together with whatever the facts demonstrate regarding the sequence and expense of erection as well as relocation of improvements by the Saldanas within the alleyway. Of course, if the parties can resolve this issue without Court intervention, so much the better.