

STATE OF MAINE  
CUMBERLAND, ss

SUPERIOR COURT  
CIVIL ACTION  
CUMSC-AP-10-20

GARY SLEEPER, RAMONA  
SLEEPER, RICHARD ROY and  
HOLLY ROY,

Plaintiffs

v.

JUDGMENT

DONALD R. LORING, MARILYN  
P. LORING, HARRY GREENLAW,  
and ANN GREENLAW,

Defendants

STATE OF MAINE  
Cumberland, ss, Clerk's Office  
JUN 12 2015  
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Following the Law Court's decision in this case, *Sleeper v. Loring*, 2013 ME 112, 83 A.3d 769, on remand the court must answer three questions: (1) who is the fee simple owner of Lot 40A? (2) do plaintiffs have the right to build and maintain a dock on Lot 40A under the terms of the easement? (3) are plaintiffs overburdening their easement?<sup>1</sup>

1. Fee Simple Title

In June 1955, the North Sebago Shores Subdivision (the Subdivision) was developed for D. Wilson Hawkes. (Stipulation ¶ 1.) Wilson Hawkes held title to the entire subdivision property in trust for the benefit of himself, Delmont R. Hawkes, Beryl Josephson, and Arnold Josephson. (Stipulation ¶ 2.) Delmont Hawkes conveyed his interest to the other three beneficiaries of the trust in 1970. (Stipulation ¶ 5.) The trust existed until August 24, 1972 when all of the trust property, including Lot 40A, was conveyed to Wilson Hawkes, Beryl Josephson,

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<sup>1</sup> The court has already determined that no other parties need to be joined under M.R. Civ. P. 19(a). See 9/29/14 Order.

and Arnold Josephson, as co-partners of Hawkes Lumber Company. (Stipulation ¶ 6.)

In 1976, Beryl and Arnold Josephson brought a partition action for several parcels of land they held as tenants in common with Wilson Hawkes, including the subdivision property. (Stipulation ¶ 7.) On December 23, 1976 the Superior Court entered a judgment (“Partition Judgment”) which required the parties to convey the “Caggiano Lot,” which included Lot 40A, to their attorneys Charlton Smith and Sumner Bernstein. (Defs.’ Ex. 3.) The attorneys were then required to list the property for sale and divide the proceeds equally between Wilson Hawkes, Beryl Josephson, and Arnold Josephson. (Defs.’ Ex. 3.) The Josephsons and Wilson Hawkes executed quitclaim deeds conveying the Caggiano lot to Attorney Smith and Attorney Bernstein. (Stipulation ¶ 8.) The two attorneys sold the property on August 31, 1977 and delivered a quitclaim deed to Bradley Benson, purporting to convey the Caggiano Lot. (Stipulation ¶ 9.)

On appeal, the Law Court interpreted the quitclaim deed delivered to Bradley Benson from the attorneys. *Sleeper*, 2013 ME 112, ¶ 11, 83 A.3d 769. The court held that the deed was unambiguous and did not convey title to Lot 40A. *Id.* ¶ 16. Thus, Smith and Bernstein retained title to Lot 40A. *Id.* Attorney Bernstein died in 2002. (Stipulation ¶ 11.) On June 11, 2012, Attorney Smith executed a quitclaim deed to the Lorings and the Greenlaws, conveying all of his interest in Lot 40A to the Lorings and the Greenlaws. (Stipulation ¶ 15.) The parties dispute whether this deed conveyed the entire interest that Smith and Bernstein acquired in 1976 pursuant to the Partition Judgment.

Defendants argue that the Partition Judgment created a trust and that Attorneys Bernstein and Smith were obligated under the judgment to acquire

and sell all of the property constituting the Caggiano lot, which includes Lot 40A. They argue that all elements of a trust under Maine law are present, specifically (1) trustees (Bernstein and Smith), (2) beneficiaries (Hawkes and the Josephsons), and (3) trust property (the Caggiano Lot). *See* 18-B M.R.S. § 401 (2014).

While Smith and Bernstein purported to convey the Caggiano Lot to Bradley Benson, the deed to Benson did not actually convey Lot 40A. Thus, Smith and Bernstein continued to hold title to Lot 40A as cotrustees. Under 18-B M.R.S. § 704(1), a vacancy in trusteeship occurs if one of the trustees dies. “If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled.” 18-B M.R.S. § 704(2). When Bernstein died in 2002, there was a vacancy in the trusteeship, but because Smith remained a trustee, that vacancy did not need to be filled. Accordingly, defendants argue, when Smith quitclaimed his interest in Lot 40A to the defendants, he conveyed the entirety of the interest Smith and Bernstein acquired as trustees.

Plaintiffs rely on the Statute of Frauds, 33 M.R.S. § 851, which provides, “[t]here can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney.” In this case, the deed conveying the Caggiano Lot to Bernstein and Smith is signed by the parties.<sup>2</sup> That deed explicitly refers to the 1976 Partition Judgment, which establishes the intent to create a trust. The deed and the judgment together satisfy the writing requirement. *See Blake v. Collins*, 69 Me. 156, 157 (1879) (“Any writing, however informal, from which the existence of

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<sup>2</sup> A trust may also have arisen by implication of law and therefore would not be subject to the writing requirement.

a trust in the estate and the terms of it can be sufficiently understood, whether it was intended by the signer as such or not, is sufficient.”).

The court agrees with defendants that the Partition Judgment effectively created a trust. This interpretation is consistent with the equitable powers of the Superior Court to appoint a trustee for the sale of property in a partition action. *See* 33 M.R.S. § 153(1); 4 M.R.S. § 152(5)(L); *Boyle v. Boyle*, 1999 ME 128, ¶ 14, 736 A.2d 273 (“Section 153 grants authority to the Superior Court . . . to appoint a trustee to sell real estate, on the petition of any person who has possessory interest in the real estate, even though the real estate is subject to a contingent remainder interest.”). It is irrelevant that the court did not use the terms “trustee” and “trust” when it ordered the parties to convey their property to Bernstein and Smith. *See* Restatement (Second) of Trusts § 23 cmt. a (1959) (“[N]o particular form of words or conduct is necessary for the manifestation of intention to create a trust.”). All elements necessary to create a trust in this case were satisfied.

When Smith conveyed Lot 40A to the Greenlaws and the Lorings in 2012, he was simply acting according to the 1976 Partition Judgment. That judgment ordered the attorneys to sell the entirety of the Caggiano Lot—they were not allowed to retain any interest in that property. Smith testified that the two attorneys did not intend to retain any portion of the Caggiano Lot, and in fact had received full consideration for the entirety of the property. Smith was therefore obligated by the judgment to convey any remaining interest in Lot 40A to the defendants as the successors-in-interest to Bradley Benson. (Stipulation ¶ 12.) When Smith quit-claimed his interest in 2012, the Greenlaws and the Lorings acquired fee simple title to Lot 40A.

## 2. Scope of the Easement

The Greenlaws own Lot 40 on the Subdivision Plan and the Lorings own Lot 41. (Defs.' Exs. 8-9.) Each family has 40 feet of frontage on Sebago Lake. (*Id.*) The Sleepers own Lot 71 and the Roys own Lots 74 and 75. (Pls.' Ex. 5.) The plaintiffs' lots are all back lots with no lake frontage. (*See* Stipulation ¶ 1.) Plaintiffs' deeds include a right of way, which states: "Also a right of way from the road to the shore of the lake over Lot 40-A as shown on said plan." (Pl.'s Exs. 1-3.) The Law Court concluded that this language is ambiguous as to the purpose of the right of way. *Sleeper*, 2013 ME 112, ¶ 22, 83 A.3d 769. In remanding to this court, the Law Court set forth the test for this court to apply: "when the purpose of an express easement is not clear, a court must ascertain the objectively manifested intention of the parties to the original conveyance in light of circumstances in existence recently prior to the execution of the conveyance, as well as use of the easement and acts acquiesced to during the years shortly after the original grant." *Id.* ¶ 20.

The court held a bench trial on November 3-5, 2014. Defendants' witnesses testified that Hawkes intended to construct a boat ramp at the end of Lot 40A. There is no evidence, however, that he ever took any steps to construct a boat ramp. While this may have been Hawkes's original plan, the court concludes that the scope of the right of way over Lot 40A is not limited to the construction of a boat ramp to the exclusion of a dock. The evidence supports this conclusion for several reasons.

First, the court notes that the shore at Lot 40A is rocky, making a boat ramp impractical. In addition, the right of way across the lot was granted only to back lot owners. If Hawkes intended to create a boat ramp at Lot 40A, then he

likely would have granted access to both front and back lot owners. The fact that he granted the right of way only to back lot owners suggests that it was intended to provide them general access to the lake, which in that area, is best accomplished by using a dock.

Historical use of Lot 40A confirms that the scope of the easement includes the right to build and maintain a dock. Based on the testimony at trial, the court finds that John Lestage constructed a dock at the end of Lot 40A in either 1957 or 1958. This is the dock pictured in Plaintiffs' Exhibit 23. This dock was located in approximately the same location as plaintiffs' dock is now. There is no evidence that Hawkes, the developer, ever objected to the dock, and the dock remained in the same location until the 1970s, after the Lestages sold their property. In fact, Hawkes continued to convey deeds that included express easements over Lot 40A until 1961, after the dock was built.

Defendants' witness Jon Hebert testified that the dock pictured in Plaintiff's Exhibit 23 was actually built on the neighboring Marston property. Hebert believed, however, that the Marstons had 55 or 60 feet of lake frontage, when in fact they only had 40 feet. The court does not credit his testimony regarding the location of the Lestage dock.

Based on the circumstances at Lot 40A around the time Hawkes conveyed the easements, the court concludes that plaintiffs' dock is within the scope of the easements. The plaintiffs are permitted to keep and maintain a dock at its current location at the end of Lot 40A.

### 3. Overburdening Analysis

To determine whether plaintiffs are overburdening the easement, the court "evaluate[s] whether it is reasonable to conclude that a particular use was

within the contemplation of the parties to the conveyance and, in that context, whether the contested use made of the servient estate by the dominant estate exceeds the rights granted to the user." *Flaherty v. Muther*, 2011 ME 32, ¶ 74, 17 A.3d 640.

Although plaintiffs are entitled to build and maintain a dock at the end of Lot 40A, use of the easement is limited to accessing the lake. Plaintiffs may temporarily tie a boat up to the dock because one of the purposes of accessing the lake is for boating. Plaintiffs' easement does not allow them to set up a table and chairs; store property on the lot, including sections of the dock when not in use; or conduct any other activity on Lot 40A that is not related to accessing the lake.

One issue that has not been adequately addressed by the parties is the permitted width and length of the dock. Although there was some testimony on this issue, it is unclear to the court how large the dock at Lot 40A is compared with the Lestage dock and compared with other docks in the area. In the interest of resolving this case completely and finally, the court will schedule a hearing and take additional testimony, if necessary, to determine the permitted width and length of plaintiffs' dock.

#### CONCLUSION

Defendants own Lot 40A pursuant to the 2007 deed from Bradley Benson and 2012 corrective deed from Attorney Smith subject to express easements in plaintiffs' deeds. Plaintiffs' easement rights across Lot 40A include the right to build and maintain a dock of a size to be determined by the court in a future hearing. The easement rights do not include the right to set up a table and chairs, store property on the lot, or engage in any activity unrelated to accessing the lake.

The entry is:

Fee simple title to Lot 40A of the Subdivision lies with Defendants Donald Loring, Marilyn Loring, Harry Greenlaw and Ann Greenlaw by virtue of the deed from Charlton Smith dated June 11, 2012 and recorded in the Cumberland County Registry of Deeds in Book 29658, Page 347, subject to the rights of others to pass and re-pass on the same;

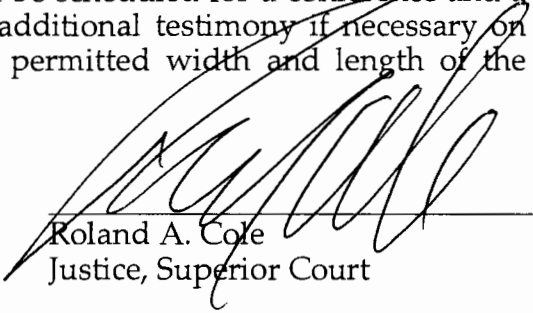
The deed language that provides Plaintiffs with a right of way from the road to the shore of Sebago Lake over Lot 40A includes the right to build and maintain a dock at the end of Lot 40A;

The deed language does not give Plaintiffs the right to do any of the following on Lot 40A: place chairs or a picnic table, store any personal property, or use the lot for any activity other than accessing Sebago Lake.

This matter shall be scheduled for a conference and a hearing to take additional testimony if necessary on the issue of the permitted width and length of the dock.

Date:

June 12, 2015

  
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Roland A. Cole  
Justice, Superior Court



Date Filed 07-06-10

Cumberland  
County

Docket No. AP-10-20

Action 80B Appeal

GARY SLEEPER  
RAMONA SLEEPER  
RICHARD ROY  
HOLLY ROY

~~TOWN OF SEBAGO~~  
DONALD R LORING  
MARILYN P LORING  
HARRY GREENLAQ  
ANN GREENLAW

vs.

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William H Dale Esq (OBO Defendants  
Greenlaw and Loring)

Date of  
Entry

2010