IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony a/k/a Antonio Mascaro and Donna C. Mascaro	:	
v.	:	
North Penn Water Authority, Appellant	:	No. 147 C.D. 2011
	:	Argued: October 18, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: November 17, 2011

North Penn Water Authority (NPWA) appeals an order of the Court of Common Pleas of Bucks County (trial court) granting the motion for summary judgment filed by Anthony and Donna Mascaro (together, Landowners) because NPWA failed to comply with the use requirements of the easement agreement regarding the water well site located on Landowners' property. Discerning no error in the trial court's opinion, we affirm.

The basic facts of this case are not in dispute. On June 11, 1975, the Philadelphia Electric Company (PECO) entered into an Agreement of Easement (Easement) with NPWA for the construction and use of a water well site on a

parcel of property located in the Township of Hilltown in Bucks County. The terms of the Easement explicitly grant:

> unto the Grantee, its Successors and Assigns, the right, liberty, and privilege to use for the purpose of laying, constructing, using, maintaining, repairing, renewing, and replacing a water well site, together with the necessary appurtenances. . . .

(Agreement of Easement at 1.) Addendum No. 1 of the Easement further defines the purpose of the Easement as follows:

> The laying, constructing, using, maintaining, repairing, renewing, and replacing a water well site, consisting of pumps, pumping equipment, chlorination purification and chlorine retention equipment, piping valves, fire hydrants, masonry buildings, drainage piping, and any other necessary appurtenances.

(Addendum No. 1 at 3.) Central to this litigation is the Easement's forfeiture clause, found in paragraph 17, which states:

> The right of way and easement granted hereunder shall remain in force and effect only so long as same shall be *used for the purposes* herein set forth. In the event that Grantee shall *cease to use said premises* for said purposes for a period of one (1) year, this Grant and the easement herein contained shall become null and void and all rights in and to the land included in the right of way and easement shall revert to Grantor. In this event, Grantee shall, within 120 days of such termination, remove all facilities and appurtenances located on said premises. Upon Grantee's failure to do so, same shall be deemed abandoned and at Grantor's option, title thereto

> shall pass to Grantor or Grantor may cause same to be removed at Grantee's expense.

(Agreement of Easement at 5.) (Emphasis added.)

Pursuant to the Easement, NPWA constructed two water wells on the Property in 1980, which the parties refer to as wells N.P.-29 and N.P.-30. Each well consisted of the items listed in Addendum No. 1 – pumps, pumping equipment, chlorination purification and chlorine retention equipment, piping valves, fire hydrants, masonry buildings, and drainage piping – and are collectively referred to as the water well site. In addition, NPWA constructed an access road, utility lines and water lines, which were necessary for the functionality of the water well site. On November 15, 2004, Landowners purchased the Property by special warranty deed from PECO making them successors in interest to the Grantor under the Easement.

It is undisputed that from 1980 until 1991, the water well site was continuously used because NPWA regularly pumped water from both wells in order to supply the surrounding community. It is also undisputed that in July of 1991, NPWA changed the use of the well site from "frequent" to "emergency," meaning that the wells would not be regularly operated and would only be used to provide water in emergency situations. According to Landowners, neither well has operated, actually pumped water, since January 1995, and both wells are currently designated only for emergency use. Due to its non-use and lack of regular maintenance or repairs, the condition of the water well site has continuously deteriorated since 1991.

Given the alleged non-use and dilapidated state of the well site, Landowners filed a complaint with the trial court to quiet title and for declaratory judgment on March 15, 2007. In the complaint, Landowners alleged:

> at some point prior to June 24, 2003, NPWA ceased using, maintaining, repairing, caring for, and completely neglected the Easement and allowed the utility corridor, right of way and appurtenance to deteriorate into a dilapidated, unusable, dangerous and defective condition. . . .

(Complaint at ¶ 10.) Landowners requested judgment in their favor to quiet title with respect to the property as well as a declaration from the trial court that the Easement was void and that all rights in and to the property reverted to Landowners as successors in interest to PECO, the original Grantor. Count five of the complaint also alleged interference with Landowners' right of peaceful enjoyment of their property. Landowners sought damages in an amount in excess of $50,000 plus interest, costs, delay damages and attorneys' fees.

NPWA filed an answer denying the allegations, stating that at all relevant times it has "used, maintained, repaired and cared for and continues to use, maintain, repair and care for the Easement as a source of water in event of emergency." (Answer at ¶ 10.) In support of this argument, NPWA pointed to the fact that the wells were listed with the Delaware River Basin Authority as emergency wells. NPWA denied the allegation that the corridor and appurtenances were in a dilapidated state and denied Landowners' assertion that the language of the Easement mandated that it revert back to Landowners. According to NPWA, the continued availability of these wells was of vital importance to the health and welfare of the community because they provided a back-up source of water in the

event NPWA's main source was contaminated, ran low or was otherwise unable to meet the community's demands for water. NPWA denied the allegation that it manifested an intent to abandon the Easement. Finally, NPWA alleged new matter, including that Landowners failed to state a claim upon which relief could be granted and that Landowners' claims were barred by the applicable statute of limitations and the principles of laches or estoppel.

Three years later after discovery was completed, Landowners filed a motion for summary judgment alleging there were no genuine issues of material fact and only a question of law remained as to the interpretation of the Easement's forfeiture provision regarding "use" of the water well site. Landowners argued that the term "use" in the Easement meant using, maintaining or repairing the water well site and that NPWA had failed to do any of these things for at least the past several years. Landowners attached several reports to their summary judgment motion. The November 1996 Comprehensive Groundwater Monitoring Report prepared by Earth Data, Inc., stated that well N.P.-29 "was removed from service in January 1995 and has remained inactive." A later report prepared by Earth Data Northeast, Inc. listed both wells as inactive for the years 1998 through 2004. Landowners also submitted numerous photographs showing the water well site in a state of disrepair with rusted pipes, a rusted door to the pump house which was missing a door knob or any way to keep trespassers out, and seriously overgrown vegetation. Landowners argued that the language of the Agreement was clear and unambiguous and that the reports as well as photographs submitted into evidence clearly demonstrated that NPWA failed to use, maintain or repair the wells for a period well in excess of one year.

NPWA argued that the mere fact that it constructed two wells on the property meant that it was and is "using" the property as a water well site pursuant to the terms of the Easement. According to NPWA, the fact that the wells remained registered as "inactive," for emergency use only, did not mean that it was not using the water well site and that the presence of working pumps or other requirements for a functioning well were unnecessary. NPWA claimed that it did not have to be continuously pumping water from the wells in order to satisfy the use term of the Easement; the mere fact that these wells existed on the property and that they were designated for emergency use and registered with the Delaware River Basin Authority meant that NPWA was "using" the well site. In the alternative, NPWA argued that the reports and photographs at least created a question of fact as to whether the wells were or could be used, making summary judgment inappropriate.

After oral argument, the trial court granted Landowners' motion for summary judgment and found that the term "use" was defined by the Easement "to mean yearly use, repair, and maintenance, i.e. an operational water well site." (December 7, 2010 Trial Court Opinion at 10.) The trial court noted that NPWA failed to produce any evidence that either well had been used, maintained or repaired since 2004, when Landowners purchased the property, and that Landowners produced substantial evidence documenting the inactivity and deterioration of the wells. The trial court rejected NPWA's argument that actual pumping of water from the wells was inconsequential and that the mere presence of a water well site on the property was enough to satisfy the use requirement of the Easement. The trial court stated that to accept this interpretation would render the forfeiture provision of the Easement meaningless because so long as NPWA did not remove the wells from the property they would be considered in use, even

if NPWA did not pump water from, maintain or repair the wells for one hundred years. Instead, the trial court interpreted the language of the Easement to require yearly use, repair or maintenance of the water well site. However, NPWA failed to provide any evidence that water was pumped from the wells or that yearly maintenance or repairs were performed since 1991. In fact, NPWA admitted that the wells were not currently operable. The trial court found that the language of the Easement was not ambiguous and that it evidenced the parties' clear intent to limit the Easement to a finite period and a restrictive set of uses. Therefore, the trial court found that NPWA violated the forfeiture clause of the Easement and all rights in and to the right of way and easement reverted back to Landowners. This appeal followed.[1]

First, we address NPWA's argument on appeal[2] that Landowners were required, as a matter of law, to establish unequivocally that NPWA abandoned the water well sites in order to void the easement. NPWA points to the following test for abandonment of an easement as announced by the Supreme Court of Pennsylvania:

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[1] This case was originally appealed to the Superior Court, which transferred the matter to this Court on February 3, 2011. However, jurisdiction properly lies with the Superior Court. Because no party has objected to jurisdiction, and in the interest of judicial economy, we decline to transfer the matter back to the Superior Court. *See* 42 Pa. C.S. §§704, 705.

[2] Our review of a trial court order granting summary judgment is limited to determining whether the trial court abused its discretion or committed an error of law. *Manley v. Fitzgerald*, 997 A.2d 1235, 1238 n.2 (Pa. Cmwlth. 2010). Summary judgment may only be granted when, after examining the record in the light most favorable to the non-moving party, the record clearly demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

> [T]he law requires that there be showing of intent of the owner of the dominant tenement to abandon the easement, coupled with either (1) adverse possession by the owner of the servient tenement; or (2) affirmative acts by the owner of the easement that renders the use of the easement impossible; or (3) obstruction of the easement by the owner of the easement in a manner that is inconsistent with its further enjoyment.

Gabel v. Cambruzzi, 532 Pa. 584, 589, 616 A.2d 1364, 1367 (1992) (quoting *Ruffalo v. Walters*, 465 Pa. 236, 238-39, 348 A.2d 740, 741 (1975)). NPWA argues that mere nonuse is not enough to establish intent to abandon the Easement and that Landowners failed to meet the above test.

However, abandonment is not the only way to extinguish an easement and neither Landowners nor the trial court relied upon the theory of abandonment, even though there is significant evidence to demonstrate the wells were abandoned. As the trial court points out, paragraph 17 of the Easement contains an express provision regarding forfeiture. The Easement specifically states that it "shall remain in force and effect *only so long as* same shall be used for the purposes herein set forth." This express provision is a valid way to extinguish an easement and manifests the intent of the parties that the Easement has both temporal and use limitations. Because the Easement contains a valid forfeiture provision upon which the trial court based its decision, NPWA's argument regarding abandonment is without merit.

NPWA then argues that the trial court erred or abused its discretion in its interpretation of the Easement and its use requirements to require that the well

be used, maintained or repaired to be "used' within the meaning of the Easement. According to NPWA, the language of the Easement contemplates the creation and maintenance of a water well *site*, meaning only that NPWA has the right to use the subject property as a *location* for a water well. NPWA argues that it is neither required to continuously pump water from the wells as a condition of the Easement, nor are the wells required to be operational. According to NPWA, the Easement only requires that it maintain a water well site on the property. Because NPWA constructed two wells and their necessary appurtenances on the property and such wells have been designated for emergency use since 1991, NPWA argues that it has continuously *used* the property for the requisite purposes as outlined in the Easement. In the alternative, NPWA argues that the forfeiture provision of the Easement is ambiguous. We disagree.

It is well settled that when reviewing an express easement, the language of the agreement of easement controls unless it is ambiguous. *Baney v. Eoute*, 784 A.2d 132, 136 (Pa. Super. 2001). The terms of the agreement as well as the extent of the rights conveyed by it are interpreted by applying general principles of contract law. *Hann v. Saylor*, 562 A.2d 891, 893 (Pa. Super. 1989). A contract is not rendered ambiguous merely because the parties do not agree on its proper construction. *Baney*, 784 A.2d at 136 (citing *Samuel Rappaport Family Partnership v. Meridian Bank*, 657 A.2d 17, 21 (Pa. Super. 1995)). Rather, a contract is ambiguous if, and only if, it is reasonably susceptible of different constructions and is obscure in meaning. *Baney*, 784 A.2d at 136; *Samuel Rappaport*, 657 A.2d at 21.

Interpretation of the Easement in the present case hinges on the meaning of the word "use." The plain language of the forfeiture provision in

paragraph 17 makes clear that NPWA had, as the trial court phrased it, a recurrent set of obligations to "use" the Easement on a yearly basis in conformance with "the purposes herein set forth," or face forfeiture. The Easement specifically grants "use" of the property to NPWA "for the purpose of laying, constructing, using, maintaining, repairing, renewing, and replacing a water well site, together with the necessary appurtenances." Addendum No. 1 further defines the purpose of the Easement as follows:

> The laying, constructing, using, maintaining, repairing, renewing, and replacing a water well site, consisting of pumps, pumping equipment, chlorination purification and chlorine retention equipment, piping valves, fire hydrants, masonry buildings, drainage piping, and any other necessary appurtenances.

(Addendum No. 1 at 3). This language is clear that the parties intended the Easement to have both substantive and temporal limitations. As the trial court points out, the parties used active, on-going terms such as "using, maintaining, and repairing" to describe the purpose of the Easement, as opposed to simply stating a one-time requirement that wells must be constructed on the property. This language evidences an intent that NPWA's rights be linked to regular, active obligations regarding the property. We agree with the trial court that the terms of the Easement are not ambiguous and that the clear language required NPWA to use, maintain or repair the water well site on a yearly basis in order to avoid forfeiture.

We agree with the trial court that NPWA's interpretation of the use provision is untenable and would render the forfeiture provision mere surplusage. If we were to accept this interpretation, it would mean that the one-time act of

constructing a water well site would constitute "use" of the property from now until the wells and appurtenances are removed, which might not occur for the next 50 or 100 years, if ever. Such an interpretation is belied by the statement in the forfeiture provision that the Easement shall be null and void and all rights shall revert back to the Grantor "[i]n the event that Grantee shall cease to use said premises for said purposes *for a period of one (1) year*." NPWA's interpretation cannot possibly be reconciled with this one year time limitation because its interpretation does not *ever* require active use, maintenance or repair. We agree with the trial court's determination that the term "use" is clearly defined and delineated within the Easement and, therefore, is not ambiguous.[3]

Finally, NPWA argues that summary judgment was not appropriate because there is an issue of material fact left to decide – whether or not NPWA actually used, maintained or repaired the water well site on a yearly basis. However, this issue is not in dispute. NPWA has done absolutely nothing, taken no action with respect to the water well site in well over a year. NPWA failed to produce any evidence that water was pumped from either well within the past two decades. NPWA's argument that the wells are in use because they are registered with the Delaware River Basin Authority as emergency wells is somewhat persuasive. However, NPWA admits in its brief to this Court and throughout the record that the wells are not currently operational and would require repairs in order to function on even an emergency basis. In addition, it is clear from the pictures and reports submitted to the trial court that NPWA has failed to perform

[3] NPWA's assertion that the trial court opinion requires that it continuously pump water from the two wells located on the property is simply false. The trial court never stated that flow from the wells must be continuous; it merely stated that the wells must be used, maintained or repaired at least once a year.

yearly maintenance or even the smallest of repairs on the water well site in years. This prolonged inactivity clearly fails to meet the use requirement of the Easement which mandates some form of activity or active use on at least a yearly basis, and amounts to substantial evidence to support the trial court's opinion.

Accordingly, for all of the foregoing reasons, the order of the trial court is affirmed.

DAN PELLEGRINI, Judge

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O R D E R

AND NOW, this 17th day of November, 2011, the order of the Court of Common Pleas of Bucks County, dated October 7, 2010, is affirmed.

DAN PELLEGRINI, Judge