IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DEL-CHAPEL ASSOCIATES, a Delaware general partnership, and THOMAS L. RUGER and ERIS MARIE SCOTT, Plaintiffs, v. CONECTIV, a Delaware corporation, Defendant.	))))))))))))	C.A. No. 19498-VCL

MEMORANDUM OPINION AND ORDER

Submitted: January 22, 2008
Decided: May 5, 2008

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LAMB, Vice Chancellor.

This is an action for trespass that ultimately concerns the possessory rights of defendant electric power utility that acquired a license to string electric wires and related facilities along a railroad right of way from Conrail (and its predecessors in interest) at a time the right of way was being used for railroad purposes. Sometime later, Conrail abandoned its use of the lands in question and, through a series of transactions, the plaintiffs came to hold a variety of legal interests in the parcels land comprising the old right of way.

The issue presented in this motion for partial summary judgment filed by the plaintiffs is whether their possessory interest in the property is subject to the utility's license. The utility's license, however, was both expressly and impliedly terminable upon the termination of Conrail's possessory interest in the property. Thus, because Conrail's abandonment of the right of way for railroad purposes terminated all of its interest in the large parts of the right of way it did not own in fee simple absolute, the utility's license also largely ended at that time, and its continued occupation of substantial parts of the land is without justification.

I.

A. The Parties

Del-Chapel Associates ("Del-Chapel") is a Delaware partnership in which Thomas L. Ruger and Eris Marie Scott (as successor to her late husband, Virgil) are principals. Between 1987 and 2001, Virgil Scott, Ruger, and a third individual

acquired the parcels of land along both sides of a former railroad right of way. Over time, Del-Chapel came to own some of those parcels.

The named defendant is Conectiv, Inc., a Delaware corporation. A footnote to the answer states that Conectiv is a holding company of the stock of Delmarva Power & Light Company. The complaint has not been amended to show this relationship, but Delmarva has actively defended the case on Conectiv's behalf.

B. Facts

This trespass action involves seven parcels of land that were once part of the Pomeroy Branch Railroad's spur located in Newark, Delaware. The parcels are known as parcels 5-5, 5-7, 5-10, 5-11, 5-12, 6-3, and 6-6 (collectively, the "Parcels"). According to one of the deeds in the record, the total property comprises a tract with the dimensions of 50 feet wide by 1.4 miles long, totaling approximately 12.5 acres. The railroad companies that operated along this spur owned a variety of legal interests in the land. For example, title to parcels 5-7 and 6-6 was held in fee simple absolute. By contrast parcel 5-5 was held as a fee simple determinable, and the remaining parcels consisted of mere of rights of way. Ultimately, these various interests came to be held by Consolidated Railroad Corporation ("Conrail"). As the law now recognizes, the railroad companies

retained possessory interests in parcel 5-5 and those rights of way only so long as they used the land for railroad purposes.[1]

Beginning in or about 1939, Delmarva entered into the first of six license agreements with the operators of the spur rail line. The first five licenses were with the Pennsylvania Railroad Company (itself a lessee of the property) and had the same general form, allowing for the installation and upgrading of electric power transmission facilities, the payment of annual license fees, and the indemnification of the railroad for loss. These licenses all provided that "the Railroad Company, in consideration of the payments and privileges herein named, hereby grants to the Licensee, insofar as the Railroad Company's present title enables it so to do, the right to construct, use, maintain, renew and remove the said wires, cables, pipe lines, and appurtenances at the said location . . . ."[2] Pursuant to these licenses, Delmarva installed poles, wires and other equipment necessary for the transmission of electricity over the Parcels. There is no dispute that these electric power transmission facilities were on the Parcels and obvious at all relevant times.

By 1981, Conrail was the operator and was offering the Parcels for sale. Although Delmarva was apparently aware of these facts, it did not pursue a

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[1] *See Smith v. Smith*, 622 A.2d 642, 647-48 (Del. 1993); *State ex. rel. Dep't of Trans. v. Penn Central Corp.*, 445 A.2d 939, 943-45 (Del. Super. 1982).
[2] PX 16.

purchase of the Parcels. Rather, in January 1982, Conrail and Delmarva entered into the final license agreement. The 1982 license agreement differed from its predecessors in several respects. Notably, the consideration changed from relatively modest annual amounts to a lump sum of $116,000, and a clause was added making the license terminable upon mutual consent.[3] The 1982 license agreement also contained a new paragraph stating:

> Anything herein contained to the contrary notwithstanding, there shall be no obligation on the part of the Railroad to continue operation of the line of railroad in the vicinity of the FACILITIES to prevent the termination of the Licensee's occupation rights . . . on account of an abandonment of line or service by the Railroad; nor shall there be any obligation upon the Railroad to perfect its title in order to continue in existence the said occupation rights after such abandonment of line or service.[4]

On October 22, 1982, Conrail notified the Delaware Department of Transportation ("DelDOT") that it "intended" to abandon the railroad spur.[5] Still, Delmarva made no attempts to purchase the land. Rather, nearly four years later, on October 17, 1986, Ruger, Scott, and their associate contracted to purchase Conrail's interest in the entire spur, including all of the Parcels, from Conrail. Conrail quitclaimed its interest in the spur to them on February 25, 1987, for a

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[3] PX 7 ¶ 15. The paragraph states in full: "This Agreement shall be terminable upon mutual consent of the parties hereto, provided that this Agreement may be terminated by the Railroad upon the violation of any of the terms, covenants and conditions of this Agreement on the part of the Licensee which are not timely and reasonably cured."

[4] *Id.* ¶ 17.

[5] Under Delaware law, it was illegal for Conrail to abandon the property until Conrail gave such notice pursuant to 2 *Del. C.* § 1803.

purchase price of $275,000.[6] The quitclaim deed states that the purchasers took the railroad spur "UNDER and SUBJECT, however, to . . . (3) any easements or agreements of record or otherwise affecting the land hereby conveyed, and to the state of facts which a personal inspection or accurate survey would disclose, and to any pipes, wires, poles, cables . . . or systems and their appurtenances now existing and remaining in, on, under, over, across, through the herein conveyed premises . . . ."[7] In addition, Conrail reserved the right to enter the property and remove the rail and railroad facilities and did so in the summer of 1987.

By the time that settlement occurred, circumstances had arisen clouding title to various Parcels.[8] Specifically, Conrail held only a fee simple determinable interest in parcel 5-5 and only held railroad rights of way to parcels 5-10, 5-11, and 5-12. Once Conrail abandoned any use of the spur for railroad purposes, questions arose about the continuing validity of Conrail's title to parcel 5-5 due to the possibility that title reverted to the heirs of the property owners who made the original conveyances to Conrail in 1883, William Dean and Margaret Dean (the "Dean heirs").[9] Similarly, the act of abandonment called into question the continued validity of the railroad rights of way.[10] Thus, the only certain effect of

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[6] PX 6.
[7] *Id.*
[8] *See Ruger v. Funk*, No. 04-210, 1996 WL 110072, at *1 (Del. Ch. Jan. 22, 1996).
[9] *See Penn Central*, 445 A.2d 939.
[10] *See Smith*, 622 A.2d at 647.

the 1987 quitclaim deed was to convey fee simple absolute title only as to parcels 5-7 and 6-6. As eventually became apparent, the acquisition of good title to the parcels other than parcels 5-7 and 6-6 depended on acquiring ownership of the abutting properties, as the owners of those properties were eventually recognized as having the fee simple interests in those lands.

The plaintiffs went about acquiring good title to the other parcels in a variety of ways. They had already separately obtained title in land referred to as the Budd Plant property that straddled parcels 5-11 and 5-12.[11] Some years later, after cases were decided holding that the cessation of the use of railroad rights of way for railroad purposes results in a termination of the right of way, Del-Chapel filed a quiet title action with respect to parcels 5-11 and 5-12, and this court entered an order quieting title on April 28, 1999.

In 1987, the Dean heirs filed suit in the Court of Chancery seeking a determination of their rights with respect to parcel 5-5. By order of October 20, 1989, this court determined that Ruger, Scott, and their associate were "vested with color of title to the property."[12] They then filed a quiet title action against the Dean heirs, and obtained a quitclaim deed for parcel 5-5 in exchange for a cash payment.[13]

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[11] PX 10.
[12] *See Ruger*, 1996 WL 110072, at *1.
[13] PX 14, 24.

In 1997, Ruger and Scott obtained quitclaim deeds to three parcels of land abutting parcel 5-10. At the same time, Del-Chapel obtained a deed to the fourth parcel of land abutting parcel 5-10.[14] Through these purchases, the plaintiffs obtained fee simple title to parcel 5-10. Del-Chapel's title to parcel 6-3 has never been established.

In 1999, the plaintiffs conveyed by deed parcels 5-11, 5-12, 6-3, and 6-6 to CHF-Delaware, LLC. As part of the transaction, Del-Chapel retained by separate instrument a perpetual easement over these parcels.[15] In 2005, the plaintiffs conveyed by deed parcels 5-5, 5-7, and 5-10 to DelDOT.[16] In that deed of conveyance, the plaintiffs again reserved a perpetual easement over the conveyed parcels.[17]

Delmarva continues to have electric power transmission facilities running over the land. Rather than condemn the Parcels pursuant to legislation passed by the General Assembly in 1994 allowing public utility companies to acquire by condemnation an easement over lands that were formerly railroad rights of way, Delmarva relies on the 1982 license agreement with Conrail to justify its assertion of a right of possession.[18]

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[14] PX 15.
[15] PX 4.
[16] PX 5.
[17] In each of the deeds, CHF-Delaware and DelDOT retained the right to maintain this action and to damages.
[18] 26 *Del. C.* § 908.

II.

To prevail on summary judgment, the moving party must "demonstrate that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law."[19] "The court must view the evidence presented in the light most favorable to the non-moving party, and the moving party bears the burden of demonstrating the absence of a material factual dispute."[20] Once the moving party has demonstrated such facts, and those facts entitle it to summary judgment, the burden shifts to the non-moving party to present "specific facts showing that there is a genuine issue of fact for trial."[21] The non-moving party "may not rest upon the mere allegations or denials [contained in the pleadings]."[22]

The tort of trespass consists of entry onto real property without the permission of the owner.[23] Like an action for ejectment, trespass is a possessory action.[24] Thus, "in order to maintain such an action, the plaintiffs . . . have to show that the defendant made an unauthorized entry . . . or otherwise physically

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[19] *Levy v. HLI Operating Co., Inc.*, 924 A.2d 210, 219 (Del. Ch. 2007).
[20] *Id.*
[21] *Id.* (citing Court of Chancery Rule 56(e)).
[22] *Id.*
[23] *See Fairthorne Maint. Corp. v. Ramunno*, No. 2124, 2007 WL 2214318, at *5 (Del. Ch. July 20, 2007).
[24] *Old Time Petroleum Co. v. Tsaganos*, No. 5218, 1978 WL 4973, at *3 (Del. Ch. Nov. 8, 1978) (stating "[t]he gist of an action of trespass upon the freehold is the injury to the possession") (citing *Ripley v. Yale*, 16 Vt. 257, 260 (1844)).

interfered with their right to possession and use."[25] In a case such as this, in which both parties claim a right to possession and use in the disputed land, "the parties [are] both put upon their proof of title, and that party must prevail who [proves] the legal title to be in him."[26]

III.

In this case, both Delmarva and the plaintiffs claim a right to possession and use in the Parcels. Specifically, Delmarva argues that its interest in the Parcels derives from the 1982 license between itself and Conrail, is superior to any interest that the plaintiffs might have in the Parcels, and therefore the plaintiffs cannot maintain this trespass action. As a result, the court must analyze each party's claim to use and possess the Parcels and then determine whose right is superior.

A. The Plaintiffs' Interest

The parties agree that the plaintiffs have at least color of title in each of the Parcels. Specifically, Delmarva does not contest that Conrail quitclaimed its interest in the spur to Ruger, Scott, and their associate on February 25, 1987,[27] thereby conveying its fee simple interest in parcels 5-7 and 6-6. Nor does Delmarva contest that Conrail abandoned the spur by 1987, thereby causing title in

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[25] *Burris v. Cross*, 583 A.2d 1364, 1377 (Del. Super. 1990) (citing *Heathergreen Commons Condo. Ass'n v. Paul*, 503 A.2d 636, 643 (Del. Ch. 1985)).
[26] *Spicer v. Dashiells*, 94 A. 901, 902 (Del. Super. 1915).
[27] PX 6.

the other Parcels to revert to owners of land abutting parcels 5-5, 5-10, 5-11, and 5-12. Relatedly, the parties agree that Ruger, Scott, and their associate purchased the Budd Plant property, which abuts parcels 5-11 and 5-12, in 1979, and that Ruger and Scott obtained quitclaim deeds to three parcels of land abutting parcel 5-10, while Del-Chapel obtained one deed to a fourth parcel of land abutting parcel 5-10.[28] Therefore, there is no dispute that the plaintiffs obtained fee simple title in those three parcels. Finally, the parties agree that the plaintiffs obtained a quitclaim deed from the Dean heirs for parcel 5-5 as part of a settlement in 1990. Thus, Delmarva has made no argument seriously challenging that the plaintiffs obtained color of title in the Parcels. The plaintiffs then sold the Parcels in 1999 and 2005, retaining the easements upon which this trespass action is based.

Delmarva challenges the validity of these easements, pointing out that the plaintiffs have not paid taxes on the land, maintained them as assets in their financial records, or sought to develop the easements even though they were retained for the purpose of installing and maintaining telecommunications and electric power transmission facilities. These alleged deficiencies, however, do not render the easements legally defective. There is no dispute that the plaintiffs bargained for, received, and recorded easements over the land. The plaintiffs' tax and financial treatments are wholly irrelevant; they are matters of tax, accounting,

[28] PX 15.

and partnership law, not property law. Further, as the plaintiffs note, Delmarva has interfered with the plaintiffs' ability to develop the land. In fact, the plaintiffs' notices to Delmarva of its trespass, and their attempts to have Delmarva removed from the property or pay for using it, can be seen as attempts to develop the easements for their retained purposes.

Delmarva further contends that alleged procedural errors in the actions to quiet title in parcels 5-5, 5-10, 5-11, and 5-12 were so fundamental as to render the orders issued in those actions unenforceable. Specifically, Delmarva argues that on March 5, 1990, the plaintiffs' title insurance company filed an action against the Dean heirs to quiet the plaintiffs' title in parcel 5-5. Paragraph 16 of the complaint stated that the plaintiffs would join all parties "if any, known or unknown, to own or use the Property." The plaintiffs were fully aware that Delmarva was using the property, yet Delmarva was never joined as a party. The plaintiffs did, however, publish notice of the litigation. Eventually, they negotiated a settlement with the Dean heirs in which they received their quitclaim deed in parcel 5-5 from the Dean heirs in return for a cash payment. The court later entered a quiet title order as to parcel 5-5.

Delmarva argues that the court approved the settlement and entered its quiet title order based on the plaintiffs' false representations that they would join all parties known to use the property. Delmarva also states that had it been given

notice of the action, it would have attempted itself to negotiate a settlement with the Dean heirs. Therefore, Delmarva argues, the plaintiffs are judicially estopped from arguing that they ever had quiet title in parcel 5-5. In addition, Delmarva owned property abutting the southwest side of parcel 5-5 and claims that, due to this property interest, "procedural due process required" that it be given notice.

Delmarva also challenges the plaintiffs' conduct in the 1999 action filed to quiet title in parcels 5-11 and 5-12. Delmarva was named as a defendant, given notice, and participated in the proceedings. Nevertheless, according to Delmarva, the plaintiffs again deprived Delmarva of its due rights and acted inequitably in the litigation. Specifically, Delmarva argues that its counsel advised the court at an April 20, 1999 hearing that the plaintiffs would grant Delmarva an easement for its power lines. The plaintiffs' counsel did not object. In addition, Delmarva points out that the court expressly advised the plaintiff to give notice to all parties, including Delmarva, prior to entry of any orders. According to Delmarva, however, Delmarva was never given such notice and was never given an easement. Accordingly, Delmarva argues that the plaintiffs acted inequitably, and therefore cannot argue that they had quiet title in those parcels.

The court finds that these errors did not affect the validity of the quiet title orders. As to the order quieting title in parcel 5-5, Delmarva has not shown that the plaintiffs' failure to join it in litigation quieting title in parcel 5-5 was improper.

Delmarva knew by 1981 that the railroad spur was for sale and it did not need notice of the quiet title action to enter into negotiations with the Dean heirs; it simply needed to approach the Dean heirs and negotiate. Instead, Delmarva sat idly by while the plaintiffs negotiated the purchase of parcel 5-5. That Delmarva did not act on its own suggests that Delmarva had no intention to negotiate with the Dean heirs whether it received notice of the plaintiffs' action or not. Further, it is noteworthy that, before the quiet title action was filed, the Court of Chancery found that two owners of land abutting parcel 5-5 had no color of title to the parcel.[29] The plaintiffs' published notice of the action provided Delmarva notice fitting to its interest.

Similarly, the alleged errors in the action to quiet title in parcels 5-10, 5-11, and 5-12 did not render the quiet title order invalid. First, Delmarva overstates the plaintiffs' alleged promise to give Delmarva an easement. At the April 20, 1999 hearing, Delmarva's counsel noted the possibility that discussions over the grant of such an easement could "break down."[30] Delmarva likewise overstates the extent of the plaintiffs' counsel's allegedly improper conduct. Delmarva believes that the plaintiffs acted inequitably simply because the plaintiffs' counsel did not object to

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[29] *See* PX 23 (order in *Matt Slapp Subaru, Inc. v. Ruger, et al.* and *Pomeroy Realty Co. v. Ruger, et al.*, Case Nos. 8997 and 8998 (Del. Ch. Oct. 20, 1989)).
[30] PX 32 at 14 (transcript of rule to show cause hearing, *Del-Chapel Assoc. v. Ruger, et. al.*, Case No. 16942 (Del. Ch. Apr. 20, 1999)).

Delmarva's counsel's representation about the promised easement at the hearing. But counsel's silence is quite different than an affirmative representation, and Delmarva's counsel chose not to have the plaintiffs' counsel confirm his understanding in open court.

In addition, the court finds nothing inequitable about the court's entry of the order without notice to Delmarva. Delmarva should not have been surprised that an order quieting title was entered shortly after the April 20, 1999 hearing. At the hearing, the court told Delmarva's counsel, "[w]e all know this has to be done in very short order," and admonished Delmarva's counsel to speak with the plaintiffs' counsel about the proposed easement.[31] Yet Delmarva's counsel never initiated such discussions. For these reasons, the court does not find that the plaintiffs acted inequitably in the action to quiet title in parcels 5-10, 5-11, 5-12.

B. Delmarva's Interest

Delmarva's alleged interest in the Parcels derives from the 1982 Conrail license. That agreement states that Delmarva has the right to use the Parcels for specific activities "insofar as [Conrail] has the legal right and its present title permits" Conrail to confer such rights of use. Thus, by the terms of the license, Delmarva's interest in the Parcels is derivative of and dependent upon the existence of Conrail's interest in the Parcels. This arrangement makes sense, as

[31] *Id.* at 28-29.

Conrail could not convey an interest in land to Delmarva that was greater than the interest it held.[32] Thus, when Conrail abandoned the use of the spur for railroad purposes–losing its rights of way and its fee simple determinable interest–Delmarva simultaneously lost its license to that land. The parties agree that Conrail's interest in parcels 5-5, 5-10, 5-11, 5-12, and 6-3 terminated once Conrail ceased using the land for railroad purposes. Although the exact date of this abandonment is disputed, it is undisputed that Conrail abandoned the railroad no later than 1987. Consequently, Delmarva's license to use these parcels terminated no later than 1987.

Nonetheless, Delmarva argues that the plaintiffs took title to the Parcels subject to the 1982 license, and that therefore Delmarva retains an interest in the Parcels sufficient to defeat the plaintiffs' trespass action. Delmarva argues that its license has become irrevocable due to the large expenditures it made developing the land in reliance on the license. Delmarva further contends that the license

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[32] *Forwood v. Delmarva P & L Co.*, No. 10948, 1998 WL 136572, at *8 (Del. Ch. Mar. 16, 1998) (noting that Delmarva's license in that case "was derivative of and dependent on [its licensor's] right of way" and terminated when the licensor abandoned the right of way); *see also Anolick v. Holy Trinity Greek Orthodox Church, Inc.*, 787 A.2d 732, 740 n.11 (Del. Ch. 2001) (holding "[n]o deed can operate so as to convey an interest which the grantor does not have in the land described in the deed, or so as to convey a greater estate or interest than the grantor has") (quoting 23 AM. JUR. 2D *Deeds* § 336 (1983)); *Scureman v. Judge*, 626 A.2d 5, 16 (Del. Ch. 1992); 75 AM. JUR. 2d *Trespass* § 77 (2008) (stating "the actor's privilege to enter land created by consent of the possessor is terminated . . . by a transfer or other termination of the possessor's possessory interest in the land"); RESTATEMENT (SECOND) OF TORTS § 171 (1965) (explaining that "[a] consent given by one in possession of land ceases to be effective as conferring a privilege to enter or remain, when the interest of the licensor in the land is terminated").

could only be terminated by mutual consent, and it did not give such consent. Finally, Delmarva maintains that it has gained title to the Parcels through adverse possession. Delmarva claims that the license remains intact as to each and every parcel of land identified in the license, including those over which Conrail had only a right of way or fee simple determinable. Alternatively, Delmarva argues that even if the license is terminated as to the parcels over which Conrail simply had a right of way or fee simple determinable, it remains effective over parcels 5-7 and 6-6, which Conrail held in fee simple.

1. Irrevocable License

It is true that a license can become irrevocable, at least between the parties to the license and those in privity with them, where the licensee expends a large amount of money to make permanent improvements on the land under the justifiable assumption that the parties intended the license to be permanent.[33] In this case, the license was of no fixed duration, being terminable by mutual consent. Notably, however, paragraph 17 of the 1982 license clearly reflects the parties' shared understanding that "the Licensee's occupation rights at any crossing or

[33] *Carriage Realty P'ship v. All-Tech Auto Auto., Inc.*, No. 18440, 2001 WL 1526301, at *8 (Del. Ch. Nov. 27, 2001) (collecting cases); *Jackson & Sharp Co. v. Philadelphia, Wilmington and Baltimore Railroad Co.*, 4 Del. Ch. 180 (Del. Ch. 1871) (refusing to hold that license had been rendered irrevocable because "although the connection of the car works with the railroad was doubtless contemplated on both sides as one to be in fact permanent," "[i]t [was] agreed that no stipulation or promise" that the license become irrevocable was expressed by the parties, "nor did the general usage connected with granting this sort of accommodation by the [licensor] justify the inference that a perpetual easement in this track was conceded . . .").

occupation covered hereunder" might terminate should Conrail abandon its use of the spur for railroad purposes.[34] That is, the license itself demonstrates Delmarva's awareness that the abandonment of that use by Conrail could lead to the termination of its right to occupy some or all of the property in question. This is in keeping with the general principle that Conrail, as licensor, could not grant rights greater than it possessed.[35] Because Conrail's possessory rights over large segments of the spur always depended on its continued use of the property for railroad purposes, its power to grant licenses to others to use that property was similarly circumscribed. For these reasons, the court rejects the argument that the 1982 license, in its entirety, became irrevocable.

2. Adverse Possession

To establish a prescriptive right in real estate, Delmarva must demonstrate that its occupation has been open, notorious, adverse, continuous, and exclusive for 20 years.[36] According to Delmarva, Conrail abandoned the railroad in 1981 when it put the spur up for sale, presumably because it had ceased operating a railroad. Delmarva argues that at that point its license expired, thus making its continued maintenance of electric power transmission facilities on the Parcels open, notorious, adverse, and exclusive. Further, because this complaint was filed on

[34] PX 7 ¶ 17.
[35] *See supra* note 32.
[36] *See Cox v. Lakshman*, 567 A.2d 34 (Del. 1989) (TABLE); 10 *Del. C.* § 7901.

March 22, 2002, Delmarva argues its adverse possession was continuous for over 20 years. The plaintiffs assert that Conrail abandoned the railroad much later, either when it sold the property to the plaintiffs or removed the railroad tracks in 1987. Thus, according to the plaintiffs, the 1982 license remained in force until 1987, making Delmarva's use of the Parcels permissive, rather than adverse, until that time.

Delmarva has not established that its use of the Parcels has been adverse for over 20 years, or that there is a material dispute as to the date on which Conrail abandoned the railroad spur. First, as late as July 1987, Delmarva met with and asked Ruger and Scott for permission to change a static wire on its facilities pursuant to its license agreement. This fact alone demonstrates that Delmarva did not view its possession as adverse before 1987. Second, Delmarva's argument that Conrail abandoned the railroad spur when it ceased operations in 1981 is unreasonable. As an initial matter, the argument is entirely inconsistent with the fact that Delmarva and Conrail entered into the 1982 license agreement in January 1982. It is difficult to imagine that Delmarva entered into that agreement and paid $116,000 believing that Conrail already lacked the power to convey such a license. More importantly, a mere cessation or interruption of operations on a railroad does not equate to abandonment of the right of way. Rather, abandonment of a railroad

depends upon a showing of the intent to abandon and some act carrying out the intent.[37]

Viewing this standard generously in favor of Delmarva, the earliest date Conrail could have abandoned the railroad was October 22, 1982, when it notified DelDOT of an *intent* to abandon the right of way. As a result, Delmarva's possession was not adverse for the requisite 20 years when suit was filed in March 2002, and its adverse possession claim fails.

3. Parcels 5-7 And 6-6

Delmarva points out that the 1999 easement by which the plaintiffs retained their interest in parcels 5-11, 5-12, and 6-3 after selling them to CHF-Delaware states Del-Chapel took the easement "subject, at all times, to all matters of record or any state of facts that is apparent or that an accurate survey or inspection of the property would disclose."[38] According to Delmarva, the 1982 license was recorded, and the existence of its facilities on those parcels was apparent. Therefore, Delmarva argues, Del-Chapel took the easement subject to the license and the existing facilities.

Delmarva's problem is that when the sale of these lands took place in 1999 Delmarva no longer had a valid license with respect to them and continued to

[37] *Penn Central*, 445 A.2d at 948.
[38] PX 4.

occupy those lands only as a trespasser. The general rule that a purchaser of land takes the land subject to burdens of which he or she had either actual or constructive notice applies only in those cases where there is actually a valid burden on the land. In this case, however, Delmarva's license had terminated at the time Conrail abandoned the right of way.[39]

This reasoning does not apply, however, with the same force with respect to parcels 5-7 and 6-6, which Conrail owned in fee simple absolute. As to those parcels, Conrail's powers were not circumscribed by its continued use of the property for railroad purposes. Thus, Conrail was free to commit itself and its successors and assigns to the full terms of the license. Moreover, when it quitclaimed those parcels to the plaintiffs, the grant was specifically made subject to licenses of record and to any wires, poles cables, etc. then existing "together with the right to maintain, repair, renew, replace, use and remove the same." Thus, the plaintiffs took their interest in parcels 5-7 and 6-6 subject to Delmarva's

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[39] The court questions whether the plaintiffs can be said to have granted Delmarva a license to use the Parcels simply because they purchased the land knowing about the presence of the poles, wires, and other equipment. *See* 25 AM. JUR. 2d *Easements and Licenses* § 118, 121 (2008). In this case, the plaintiffs did not obtain title to parcel 5-5 until 1990. They were unsure of the exact nature of their title in parcels 5-11 and 5-12 until the *Smith* decision was rendered in 1993. And the plaintiffs purchased parcel 5-10 in 1997. Yet as early as 1990, the plaintiffs had informed Delmarva that its facilities were trespassing on parcels 5-6 and 5-7. Regardless, to the extent an implied license can be found in this case, such a license would be revocable for the same reasons that the 1982 license is revocable–there was no understanding that the license was to be permanent. *See supra* note 33; *see also Hionis v. Shipp*, No. 270, 2005 WL 1490455, at *4 (Del. Ch. June 16, 2005).

license, and it would be inequitable to deprive Delmarva of the rights it has in those parcels simply because its rights in others terminated.

Nonetheless, Delmarva's license as to parcels 5-7 and 6-6 terminated because Delmarva breached the 1982 license agreement. The preamble of the 1982 license agreement precisely articulates the scope of use granted to Delmarva. It provides Delmarva the right to construct, maintain, repair, alter, renew, relocate, and ultimately remove: (1) one circuit, 34,000 volts, (2) one circuit, 138,000 volts, and (3) the poles, anchors, and guys necessary to support those circuits. The license also provides: "The rights conferred hereby shall be the privilege of the Licensee only, and no assignment or transfer hereof shall be made, or other use be permitted than for the purpose stated on page one without the consent and agreement in writing of the Railroad being first had and obtained."[40] Notably, the license grants the licensor the right to terminate the license "upon the violation of any of the terms, covenants and conditions of this Amendment on the part of the Licensee which are not timely and reasonably cured."[41]

Despite these clear terms, Delmarva admits that, in 1998, it installed a 96 strand fiber optic cable over the Parcels. Delmarva subsequently assigned the use of this cable to an unrelated communications company called Cavalier Telephone.

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[40] PX 7 at ¶ 14.
[41] PX 7 ¶ 15.

Ruger testified at his deposition that in 1999, shortly after the cable was installed, he called Delmarva and was directed to an individual named Terry Vance. According to Ruger's deposition testimony, Ruger told Vance that Delmarva had no authority to install the cable. Nevertheless, Delmarva did not remove the cable. In addition, the complaint filed in March 2002 similarly put Delmarva on notice of the plaintiffs' objection to the cable.[42] Still, Delmarva has not removed the cable. Delmarva's only defense is that installation of the cable was a *de minimis* alteration "given the size and breadth of the existing Delmarva facilities" that in "no way meaningfully alter[s] operations or appearance."[43] At the very least, Delmarva argues, there is a question of fact as to whether the cable constitutes more than a *de minimis* breach of the license.

On these facts, it is clear that Delmarva has breached the 1982 license agreement.[44] The 1982 license agreement articulates the uses for which Delmarva has a license to use parcels 5-7 and 6-6, *viz*. installation, maintenance, and removal of two circuits of definite size, along with their supporting wires and poles. Because "this court has never recognized a *de minimis* exception to trespass

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[42] Compl. ¶ 16.
[43] Def.'s Ans. Br. 29-30.
[44] The plaintiffs originally argued that Delmarva also breached the license agreement by installing a "static wire" on its facilities. Delmarva responded that the wire was installed to upgrade the electric power transmission facilities, thereby falling under their right under the license to "renew" its facilities. The plaintiffs seem to have abandoned this claim, referring to the static wire only briefly in their reply as "a static wire . . . [Delmarva] portrayed as simply a maintenance upgrade." *See* Pls.' Reply Br. 26.

liability,"[45] and because Delmarva assigned the cable to an unrelated company in addition to installing it, Delmarva has exceeded the scope of its license. Delmarva was given notice of these violations, yet failed to cure. The plaintiffs thereby gained the right to terminate the license, which they have done.[46]

C. The Plaintiffs Are Entitled To Partial Summary Judgment

Based on the foregoing, the undisputed, material facts demonstrate that the plaintiffs' right to possess and use the Parcels is superior to Delmarva's. The plaintiffs quieted title to parcels 5-5, 5-10, 5-11, and 5-12. Even assuming that the quiet title actions were invalid due to alleged errors, the plaintiffs have shown they obtained at least color of fee simple title in the Parcels. The plaintiffs then obtained recorded easements over the Parcels when the land was sold. In contrast, Delmarva has identified no interest that it retains in the Parcels. Instead, Delmarva's electric power transmission facilities remain on those parcels without

[45] *Fairthorne*, 2007 WL 2214318, at *5 n.34 (citing *Barton v. Gillen*, No. 5090, 1976 WL 7940, at *1 (Del. Ch. Dec. 1, 1976)).

[46] Of course this holding applies to the license in its entirety, but it is particularly salient with regard to parcels 5-7 and 6-6. This holding also comports with the general rule that one can be a trespasser despite "authority under [a] license to enter the property" if the actions taken exceeded the permission given. *Fairthorne*, 2007 WL 2214318, at *5 n.34 (citing *Gordon v. Nat'l R.R. Passenger Corp.*, No. 10753, 2002 WL 550472, at *5 (Del. Ch. Apr. 5, 2002)); 75 AM. JUR. 2d *Trespass* § 74 (stating "[c]onsent from the owner of land is a valid defense to a trespass action of acts done within its scope. The acts of the party accused of trespass must not exceed . . . the purposes for which the consent was given.").

the consent of anyone who holds a present possessory interest. Therefore, the plaintiffs have established Delmarva's liability for trespass.[47]

D. Laches And Balance Of The Equities

Delmarva makes arguments based on notions of laches, the balancing of hardships, and the public interest. These arguments relate to the remedy the plaintiffs seek, particularly whether the court will award them injunctive relief.[48] This motion for partial summary judgment, however, is limited to Delmarva's liability for trespass. Therefore, it is unnecessary to address these arguments at this time.

IV.

For the reasons discussed herein, the plaintiffs' motion for partial summary judgment is GRANTED. IT IS SO ORDERED.

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[47] *See Fairthorne*, 2007 WL 2214318, at *5 (stating "elements of trespass are entry onto real property without the permission of the owner").
[48] *Forwood*, 1998 WL 136572, at *9.