IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALPHA BUILDERS, INC., a Delaware corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No. 698-N
DENNIS and LOIS SULLIVAN,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: October 5, 2004
Decided: November 5, 2004

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PARSONS, Vice Chancellor

Plaintiff, Alpha Builders, Inc. ("Alpha"), has requested a preliminary injunction enjoining Defendants, Dennis and Lois Sullivan (the "Sullivans"), from inhibiting the use of a right-of-way by Alpha, its agents, employees, equipment, guests or potential buyers. For the following reasons, the Court denies Alpha's request.

I. FACTS[1]

Plaintiff, Alpha, is a Delaware corporation engaged in the purchase of building sites and construction of new homes. Alpha purchased lot 1B known as 581 Tolham Drive, in Bear, Delaware (the "Property") on March 20, 2003. The Property was originally owned by James Clower ("Clower"), and includes an easement over other lots in the same subdivision owned by Clower or his grantees (the "Clower Subdivision").[2] Defendants, the Sullivans, own three adjoining lots that abut the Property and parts of the Clower Subdivision along their southern property line. The Sullivans' lots originally were owned by Calvin and Marguerite Hamilton (the "Hamiltons") and Howard and Cora Toliver (the "Tolivers").[3] Of the Sullivans' deeds to the three parcels, two stem from the Tolivers[4] and the third is from the Hamiltons.[5]

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1 Unless otherwise noted, all facts are as stated in the Complaint or are undisputed as indicated in the briefing or at the preliminary injunction hearing.

2 *See* Plaintiffs Trial Exhibit ("PTX") E.

3 *See* PTX C.

4 The second deed is indirectly from the Tolivers; they sold the lot to Robert and Brenda Mitchell, who then sold it to the Sullivans. Tr. at 87-88.

5 Defendants' Opposition Letter Memorandum ("DOL") Exhibits 1-3.

The Tolivers, Hamiltons and Clower took various actions over time to subdivide their respective properties. On December 9, 1964, the Tolivers and Hamiltons had a subdivision plan (the "1964 Plan") prepared for them by a civil engineering and surveying company.[6] The 1964 Plan depicts a 50 foot right-of-way along the original Clower/Hamilton-Toliver property line (the "Property Line") - 25 feet on each side. The 1964 Plan was not signed by the Tolivers, Hamiltons or Clower, and was not recorded. According to Alpha, however, it was not the practice to record subdivision plans at that time. On March 21, 1983, Clower recorded a subdivision plan (the "1983 Plan"), which also depicted a 50 foot right-of-way along the Property Line.[7] The 1983 Plan was signed by Clower but not by the Tolivers or Hamiltons.

Alpha began constructing a house on the Property in March 2004 with the intent of selling it. To reach the Property, Alpha traveled over Tolham Drive, a double lane drive that straddled the Property Line. At a point before the Property, Tolham Drive narrows to a single lane approximately 8 feet in width located solely on the south side of the Property Line, which is the Sullivan's property (the "Driveway").

Initially, the Sullivans permitted Alpha to use the Driveway to reach the Property, although the parties dispute whether the Sullivans attached any conditions to their consent. In particular, Mr. Sullivan testified that he told Alpha that they could traverse the Driveway so long as they widened it to two lanes, using land on the north side of the

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6 PTX C.

7 PTX E.

Property Line.[8] Alpha denies making any such agreement,[9] and did not widen the drive. In any event, the Sullivans later placed a locked gate across the Driveway that has prevented Alpha and their employees, agents and potential buyers from using it to reach the Property.

Alpha then filed this action on September 14, 2004, moved for expedited proceedings and requested a preliminary injunction. The parties engaged in discovery and participated in a hearing on Alpha's request for preliminary injunctive relief on October 5, 2004. The immediate relief Alpha seeks is a preliminary injunction enjoining the Sullivans from inhibiting Alpha's use of the Driveway to access its Property.[10]

II. ANALYSIS

A. Jurisdiction

The Court must assure itself as a threshold matter that it has subject matter jurisdiction before it addresses whether preliminary injunctive relief should be granted. In this case, Alpha seeks the following: a declaratory judgment finding that the 50 foot right-of-way is open to the use and enjoyment of all property owners abutting the right-of-way; a preliminary, and thereafter a permanent, injunction enjoining the Sullivans from inhibiting the use of the right-of-way by Alpha, its agents, employees, equipment,

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8 Tr. at 90-91, 100.

9 Tr. at 118.

10 In their opposition to Alpha's request for a preliminary injunction, the Sullivans assert that the Complaint should be dismissed for failure to state a claim. DOL at 3. Defendants have not moved for such relief and there has been no briefing with respect to it. Thus, that argument is not ripe for determination at this time.

guests or parties interested in the Property; and damages, as determined by the Court. The Sullivans argue that this Court lacks jurisdiction because there is an adequate remedy at law in the form of monetary damages.[11] They suggest that Alpha can eliminate the alleged irreparable harm by installing a driveway on its easement on the north side of the Property line across the lots in the Clower Subdivision. The Sullivans contend that the cost of this alternative could readily be calculated and, if proven unnecessary, could be claimed by Alpha as damages, which would constitute an adequate remedy at law.

Under 10 *Del. C.* § 341, the Court of Chancery has jurisdiction to "hear and determine all matters and causes in equity." A request for injunctive relief clearly constitutes equitable relief over which this Court has jurisdiction.[12] The Court of Chancery also has jurisdiction to hear all matters in which the remedy at law is inadequate.[13] A legal remedy must be full, fair, and complete in order to constitute an adequate remedy at law.[14] In determining whether there is equity jurisdiction, however, the court will "take a practical view of the complaint and will not permit a suit to be brought in the Court where a complete legal remedy otherwise exists but where the claimant has prayed for some traditional equitable relief as an 'open sesame' to the

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11 DOL at 3.

12 *See Theis v. Bd. of Educ.*, 2000 WL 341061, at *3 (Del. Ch. Mar. 17, 2000). *See generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 2-3[b] (2004).

13 *Clark v. Teeven Holding Co.*, 625 A.2d 869, 875 (Del. Ch. 1992).

14 *El Paso Gas Co. v. Transamerican Gas Corp.*, 669 A.2d 36, 39 (Del. 1995).

Court."[15] Thus, to determine jurisdiction, the Court will examine the allegations in the pleadings in light of what the movant actually seeks to gain.[16]

If Alpha were to succeed at trial in proving the existence of an easement over the Sullivans' property, Alpha could seek entry of an injunction enforcing that easement, regardless of whether or not they had installed a driveway over the Clower Subdivision. In that case, monetary damages would not constitute an adequate remedy at law. Therefore, the Court concludes that it does have jurisdiction over Alpha's claims.

B. Applicable Preliminary Injunction Standard

The parties disagree as to the standard applicable to Alpha's request for a preliminary injunction. Alpha contends that the well known standard generally applicable in the preliminary injunction context applies to this case.[17] The Sullivans argue that Alpha not only seeks to prohibit them from blocking the Driveway, but also to have the Court direct them to open their gate and, ultimately, to take it down. According to the Sullivans, Alpha therefore seeks a *mandatory* injunction for which they must meet a higher standard. That standard requires the moving party to demonstrate "that they are entitled to judgment as a matter of law on the merits of their claim," not just a reasonable

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15 *Clark*, 625 A.2d at 875 (quoting *Int'l Business Machines Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991)).

16 *Clark*, 625 A.2d at 879.

17 Opening Brief of Plaintiff in Support of its Request for Preliminary Injunction ("POB") at 6-7.

likelihood of success on the merits as is generally required for a preliminary injunction.[18] This Court has utilized the higher mandatory injunction standard where, instead of seeking "to preserve the status quo as interim relief, Petitioners, as a practical matter, seek the very relief that they would hope to receive in a final decision on the merits."[19]

Alpha's pending request for a preliminary injunction does not warrant use of the mandatory injunction standard. Alpha's request does not seek the "very relief that they would hope to receive in a final decision on the merits." It does not seek, for example, a permanent injunction directing the Sullivans to take down the gate they erected across their driveway. Rather, Alpha seeks a preliminary injunction to enjoin and prohibit the Sullivans from inhibiting in any manner the use of the Driveway by Alpha or its agents or guests to access the Property until this dispute is resolved.[20] If the Court were to grant Alpha's request, the Sullivans could comply simply by unlocking their gate and not interfering with Alpha's ingress or egress. Requiring such a minor affirmative act does not amount to granting Alpha the final relief it seeks. Therefore, the Court will apply the general preliminary injunction standard.

C. Alpha's Request for a Preliminary Injunction

A preliminary injunction is a powerful remedy available in extraordinary circumstances. A court may grant a preliminary injunction where the movants

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18 *Joyland Daycare Ctr. v. Dep't of Serv. for Children, Youth & Their Families*, 1996 WL 74713, at *2 (Del. Ch. Jan. 22, 1996).

19 *Id.*

20 Compl. Prayer for Relief; POB at 6.

demonstrate: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of the equities that tips in favor of issuance of the requested relief.[21] While some showing is required as to each element, there is no steadfast formula for the relative weight each deserves. Accordingly, a strong demonstration as to one element may serve to overcome a marginal demonstration of another.[22] Nevertheless, preliminary injunctive relief should not be granted if the injury may be adequately compensated for after a full trial on the merits, either by an award of damages or by some form of final equitable relief.[23]

1. Reasonable probability of success on the merits

The first requirement for granting a preliminary injunction is that movants demonstrate a reasonable probability of success on the merits. Alpha has not made such a showing. Alpha contends that the succession of documents (the 1964 Plan depicting the 50 foot right-of-way, the 1983 Plan that was recorded but not signed by the Tollivers or Hamiltons and contains a notation that it supersedes the 1964 Plan, and the Sullivans' deeds that reference the 50 foot right-of-way) give rise to an easement created by express grant.[24] The Sullivans contend that no such easement was ever created. They argue that because the 1983 Plan was never signed by their predecessors in interest, the Tolivers and

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21 *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987).

22 *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).

23 *Id.* at 586.

24 See POB at 9-10; Tr. at 23-33.

Hamiltons, it fails to satisfy the statute of frauds.[25] The Sullivans also have presented evidence, in the form of an affidavit of Mrs. Cora Toliver, that the 50 foot easement reference contained in the 1964 Plan actually reflected a future desire of the Tolivers to attempt to create an easement, not a present intent to create one.[26]

The owner of property may create an easement across it through, among other things, an express grant. Such a grant may be contained within the language of a deed or in a separate document.[27] This Court has held that the creation of an easement by express grant should be accomplished through a writing, "containing plain and direct language evidencing the grantor's intent to create a right in the nature of an easement."[28] In the absence of such "plain and direct" language, parol evidence may be admitted.[29] Parol evidence, however, must "clearly prove that the ambiguous language used was intended

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25 DOL at 5.

26 Defendants Trial Exhibit ("DTX") 1. Alpha objected to this affidavit as hearsay. It is not unusual, however, for the Court to rely on affidavit evidence at the preliminary injunction stage. Thus, the Court will admit the affidavit, but give it limited weight since the affiant was not deposed.

27 *See, e.g., Hanby v. Wereschk*, 207 A.2d 369, 369-70 (Del. 1965) (finding that easement was granted through a deed that gave plaintiffs "'the free and uninterrupted right, use and privilege of the lane extending from the northwesterly corner of the [plaintiffs] lot * * * continuing in a northerly and northeasterly direction over other lands' of the defendants.").

28 *Rago v. Judge*, 1989 WL 25802, at *5 (Del. Ch. Mar. 16, 1989) (citing New York Court of Appeals case law), *aff'd*, 570 A.2d 253 (Del. 1990). Both parties have directed the Court to cases from other jurisdictions as well as various treatises in their briefs. Because there is Delaware precedent that is, at least, equally apposite, the Court will follow that precedent to the extent it applies.

29 *Judge v. Rago*, 570 A.2d 253, 257 (Del. 1990).

by all parties to create such an easement."[30] It is also well settled that the Delaware Statute of Frauds, 6 *Del. C.* § 2714(a), requires that a writing, signed by the party to be charged with granting the interest, exist before any action to enforce a conveyance occurs.[31]

Looking to the three documents that Alpha cites as support for their claimed easement (*i.e.*, the 1964 Plan, the 1983 Plan and the Sullivan deeds) and the limited additional evidence of record at this preliminary stage, the Court concludes that Alpha has not demonstrated a reasonable probability of success on the merits.

The 1964 Plan is ambiguous in terms of whether the parties intended to create an easement. The 1964 Plan appears to have been made for the benefit of the Hamiltons and Tolivers, not for the Clowers.[32] Therefore, it is not clear whether there ever was an agreement among those three groups in 1964 to create an express easement by way of the 1964 Plan. Also, the only parol evidence presented on this point (Mrs. Toliver's affidavit) does not "clearly prove that the ambiguous language used was intended by all parties to create such an easement." To the contrary, it suggests something much less definite – *i.e.*, an intention to attempt to create an easement in the future.

The 1983 Plan, signed and recorded by Clower, does not contain the signatures of the Hamiltons and Tollivers, who are alleged to have granted the easement on the south

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30 *Id*.

31 *See, e.g., Hardesty v. Baynum Enter., Inc.*, 1993 WL 133067, at *3 (Del. Ch. Apr. 19, 1993).

32 *See* PTX C.

side of the Property Line. Therefore, it is subject to challenge at this point for failure to satisfy the Statute of Frauds.

Finally, each of the Sullivans' deeds from the Tolivers contains a reference to the 50 foot right-of-way in its description of the boundaries of the property. Specifically, the deeds state that the land is "situated on a 50 foot wide right-of-way" and that the land "[b]egin[s] at a point in the centerline of a 50 foot wide right-of-way, said point being a corner for Lot No. 4."[33] Additionally, the Sullivans' deed from the Hamiltons notes that the lot they are conveying is "more particularly described in accordance with a recent survey prepared [*i.e.*, the 1964 Plan]."[34] These deeds arguably support an inference that the Hamiltons and Tolivers intended to create a 50 foot right-of-way. This Court in *Rago v. Judge*, however, observed that language in a lease that a grant is "subject to an access agreement" where no written access agreement exists at best creates an ambiguity, not an actual easement.[35]

Where there are ambiguities in a deed, it must be "read and construed in light of the intent of the parties as determined by the facts and circumstances surrounding the transaction and any uncertainties must be resolved in favor of the grantee [the Sullivans in this case] as long as such construction does not violate any apparent intention of the

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33 DOL Exs. 1-2.

34 DOL Ex. 3.

35 *Rago*, 1990 WL 25802, at *5.

parties."[36] The factual record at this stage of the proceedings is scant. The documents, read together, do suggest that the requisite intent to create a 50 foot right-of-way *may* have existed. Mrs. Toliver's affidavit, however, suggests otherwise. Thus, while it is possible that Alpha ultimately might succeed on the merits of its claim, it has not demonstrated a *reasonable probability* of success as is required to obtain a preliminary injunction.

2. Imminent threat of irreparable injury

The second requirement for granting a preliminary injunction is that movants demonstrate that they face an imminent threat of irreparable injury in the absence of an injunction. Alpha has not demonstrated such imminent and irreparable injury. At the hearing and in its briefs, Alpha argued that they will suffer imminent and irreparable injury because: (1) they are unsure of the Sullivans' financial ability to pay any damages award that might arise; (2) the house Alpha is constructing is only partially finished and may be damaged from weather and vandalism, if left as is; (3) interest on its construction loan continues to accrue; and (4) they are losing, and have lost, buyers for the house because of the Sullivans' actions, and that the damage resulting from the loss of such potential buyers will be difficult to quantify.[37] The Sullivans argue that the harm Alpha

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[36] *Id*.

[37] POB at 10.

has identified is not irreparable and, as noted previously, that Alpha could construct a driveway on the lots of the Clower Subdivision to gain access to the Property.[38]

Irreparable harm generally exists where the injury cannot be adequately compensated in damages. The injury claims "must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice."[39] Since a preliminary injunction is an extraordinary form of equitable relief, it "should not be granted if the injury to Plaintiff is merely speculative."[40]

Alpha has made only a weak showing of irreparable harm. They have presented no evidence that the Sullivans lack sufficient assets to be able to pay a future monetary award, and mere speculation is not sufficient to support a finding of irreparable harm. Damages to the house built on the Property, as well as any additional costs associated with Alpha's construction loans caused by the Sullivans' actions, should be fully recoverable through an award of monetary damages. Similarly, Alpha's argument that the lost buyer and potential loss of prospective buyers in the future constitute irreparable harm is not persuasive. While there is case support for the proposition that damages that are not calculable may constitute irreparable harm,[41] Alpha's ability to prove its entitlement to, and the amount of, damages from loss of a prospective buyer appears

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38 DOL at 7.

39 *State of Delaware State Educ. Ass'n*, 326 A.2d 868, 875 (Del. Ch. 1974).

40 *Cantor*, 724 A.2d at 586.

41 *See, e.g., T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536, 557 (Del. Ch. 2000) (quoting *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, 532 A.2d 1324, 1341 (Del. Ch. 1987)); *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1088 (1988).

somewhat speculative. Mere apprehension of uncertain damage or insufficient remedy will not support a finding of irreparable harm.[42] Here, it is not clear that any damages will result from the loss of any buyers.[43] Moreover, if any damages do occur, Alpha has not shown that those damages likely would not be quantifiable.

If the Court were to refuse Alpha's request for a preliminary injunction, there would be no irreparable denial of justice. Alpha could attempt to develop its case further and continue to pursue a permanent injunction through a full trial on the merits. Furthermore, Alpha can ameliorate the harm it fears by constructing a driveway over the Clower Subdivision to allow its agents and potential buyers to access the house. If, after trial, the Court determines that Alpha does have an easement that allows them to travel freely over the Sullivans' Driveway, Alpha should have an adequate remedy at law in the form of a claim for damages. Those damages might include the costs of constructing the additional driveway and any other losses Alpha might suffer in the form of increased interest costs, damage to the house and so on.

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[42] *Tate & Lyle PLC v. Staley Continental, Inc.*, 1988 WL 46064, at *8 (Del. Ch. May 9, 1988) (citing *Bayard v. Martin*, 101 A.2d 329 (Del. 1953)).

[43] The actual buyer of the house may, for example, purchase it at a higher price than the lost buyer, or lost potential buyers, would have. Also, it may be speculative to ascribe the loss of potential buyers solely to the Sullivans' refusal to allow potential buyers access to the house. There could be other factors, such as the underlying cloud on the Property's title, that is merely brought to light by the Sullivans' actions. Additionally, underlying market forces affecting the housing market, more than any action taken by the Sullivans, may affect the decisions of potential buyers. *Cf. Cantor*, 724 A.2d at 586 (finding that market forces rather than the actions of the party would be more likely to affect any damages that would be incurred).

3. Balance of equities

The third factor to be considered in evaluating a request for a preliminary injunction is whether a balancing of the equities favors the movants. Alpha has demonstrated that the balance of equities here tips slightly in their favor. If the Court does not issue an injunction, Alpha will continue to have difficulty showing the Property to potential buyers, risk weather and vandalism damage to the house, and pay interest on its construction loan at least until it constructs a driveway over the easement on the Clower Subdivision. In addition, Alpha will incur additional costs to construct the new driveway. On the other hand, if the Court were to issue an injunction, the Sullivans would be required, at a minimum, to unlock the gate on their driveway. They also are likely to suffer some additional harm, as well. At the time of the hearing, for example, Alpha had not yet made much effort to build the second half of the driveway, which would be on the Clower Subdivision side of the Property Line.[44] Consequently, preliminarily enjoining the Sullivans from blocking the Driveway would subject it to heavier use. The evidence indicated that some damage to the Sullivans' property already has occurred as a result of Alpha's earlier use of the Driveway. In addition, the Sullivans claim that they have suffered emotionally from the actions of Alpha.[45]

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[44] Regardless of whether there was an agreement between the Sullivans and Alpha to widen the Driveway, Alpha knew that it was important to the Sullivans that Alpha widen the Driveway. Presumably, that would benefit property owners on both sides of the Property Line.

[45] DOL at 7.

The Court is sensitive to the disruption and damage the Sullivans claim to have suffered. Furthermore, Alpha conceivably could sell the Property in such a manner that the Sullivans would be left with the difficult choice of either battling the issue over use of the Driveway with their new neighbors or acquiescing to having the full burden of what allegedly was to be a 50 foot right-of-way fall on them. Thus, the balance of equities, at most, only slightly favors Alpha.

III. CONCLUSION

For the reasons stated above, the Court concludes that Alpha has not made a sufficient showing of either a reasonable probability of success on the merits or irreparable harm. Though Alpha has demonstrated that the equitable balance tips slightly in its favor, this demonstration it is not sufficient to overcome the marginal showings as to the other two requirements for a preliminary injunction. Thus, the Court DENIES Alpha's request for a preliminary injunction.

IT IS SO ORDERED.