COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

Submitted: December 22, 2004
Decided: December 29, 2004

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Re: In the Matter of Lot No. 36, 62 Millwright Drive
C.A. No. 19868-NC

Dear Counsel:

This action is before the court on a motion for summary judgment. Petitioners David and Cheryl Rutter seek to quiet title as to the boundary between their property and the property of respondent Nancy Birowski. This action first came before the court on May 5, 2004 on cross motions for summary judgment. In a letter opinion dated May 10, 2004,[1] I denied Birowski's motion for summary judgment on her adverse possession counterclaim for failure to prove hostile possession, but permitted her to amend her counterclaim to allege that an oral agreement to revise the boundary line existed. Birowski did so and filed an amended motion for summary judgment. That motion is considered here.

[1] *In re Lot No. 36*, 2004 WL 1087336 (Del. Ch. May 10, 2004).

The facts underlying this action were more fully set out in the May 10 opinion and are not disputed. In summary, Birowski, with her then-husband, and the Mileys, the Rutters' predecessors-in-interest, purchased adjoining properties in 1964. The boundary line between the two properties, to the displeasure of all concerned, ran diagonally from a point in front of the Birowskis' house to a point in back of the Mileys' house. The Birowskis and Mileys came to an oral agreement in 1966, designating a straightened line between the two houses that permitted the Birowskis to use the protruding triangular portion of the Mileys' front yard and permitted the Mileys to use the protruding triangular portion of the Birowskis' back yard. Effectively, the two families traded triangular portions of their respective lots, roughly equal in area, creating conventional square front and back yards for both families while maintaining the original square footage of both lots. Fences erected on both sides of the straightened boundary stand to the present day.

Both Birowski and the Mileys acknowledge the mutuality of this agreement, as well as its functional effect as an exchange of property. In a note dated June 18, 2002, James Miley wrote: "September 1966: A verbal agreement was made between the Mileys and Birowskis that we would straighten the property line, between us, on our own."[2] Miley's deposition testimony further clarifies this arrangement:

[2] Resp't Opening Br. Supp. Mot. Summ. J. (filed Oct. 6, 2004), Ex. 3 at 3.

> Q: Okay. Did you at some point in time do something about [the property line] or want to make a change?
> A: Well, in 1966 we wrote letters to the mortgage company wanting to straighten out the line between the two houses. We didn't want their front yard, their — we didn't want them to have our backyard, so we agreed between the two of us that we would straighten the line out. I put a fence up and they put a fence up.
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> * * *
>
> Q: Did it really have any impact in the overall lot size? Did your overall lot size change much or the Birowski's to your knowledge?
> A: No, it didn't change hardly at all.
> Q: Just basically swapped front yard for backyard?
> A: Yes. We would have had all their front yard and they would have had all our backyard.[3]

Nancy Birowski's affidavit testimony affirms Miley's description of the 1966 agreement:

> In about 1966, we agreed with the Mileys to straighten out the property line ourselves. We did not want their backyard and they did not want our front yard. We simply made a straight line between our properties and each of use installed a fence, both of which remain today. After the property line was moved, we took care of the land on our side of the new fences, including flowers, landscaping and cutting the grass. The Mileys did the same on their side of the fence. Both of us used the property as our own.[4]

Regrettably, however, the Birowskis and the Mileys never embodied their agreement in a writing.

In 1995, the Mileys sold their property to the Rutters. The Rutters were fully on notice that the boundary on their deed was not consistent with the boundary actually used by the Mileys and the Birowskis, as reflected by the fence

[3] Resp't Opening Br. Supp. Mot. Summ. J. (filed Oct. 6, 2004), Ex. 4 at 5-6.
[4] Resp't Opening Br. Supp. Mot. Summ. J. (filed Oct. 6, 2004), Ex. 7 ¶¶ 5-7.

lines. A note on the "Mortgagees Inspection Plan," prepared in connection with the Rutters' purchase of the Mileys' property and dated December 22, 1995, plainly states: "According to present owner, J.C. Miley, he and his neighbor agreed to place a fence on the agreed line of division. No document was prepared."[5] Although the Rutters contemplated doing something to clarify what they were purchasing, they ultimately did nothing, and closed the sale without objection.

In 2001, after having lived with the boundaries defined by the fence line for nearly six years, the Rutters proposed to Borowski that a formal alteration of the property line be made to conform to the fence line. Birowski initially agreed, but after the Rutters had hired a surveyor and began to perform some of the necessary work, Birowski discovered that the Rutters' proposed boundary was not actually the existing fence line, but a new boundary located several feet closer to her house than the existing fence line. Birowski changed her mind and indicated that she did not wish to proceed. The Rutters' proposed boundary deviated from the existing fence line because they had built a garage on their property, supposedly relying on the original property line (which they knew was inconsistent with the long-standing fence line). This structure complied with local building codes, but only with respect to the original property line — the structure was built so close to the existing fence line that it would violate the County Code if that fence line was

[5] Resp't Opening Br. Supp. Mot. Summ. J. (filed Oct. 6, 2004), Ex. 5.

recognized as the true property line. Several feet of additional space were required in order to avoid a Code violation. In response to Birowski's refusal to accept the modified boundary, the Rutters filed this suit and now seek to re-establish the original boundary line between the two properties and remove the encroaching fence.[6]

In the initial opinion in this case, I summarized the standard for evaluating a summary judgment motion thusly:

> Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The moving party must show that no genuine issue of material fact exists, at which point the burden shifts to the nonmoving party to substantiate its adverse claim by showing that there are material issues of fact in dispute. Although I must view all evidence in the light most favorable to the nonmoving party, it is insufficient for a nonmoving party to merely assert the existence of a disputed fact; the disputed fact must be material to the final disposition of the case.[7]

Here, the question is whether there is a triable doubt that the boundary line established by the Birowskis and the Mileys almost forty years ago is by now the actual boundary line, supplanting the boundary recorded on the property deeds. I conclude that there is no triable doubt about that question.

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[6] The idea that either the Rutters or Birowski would prefer to reinstate the original boundary line between the two properties, dividing their back and front yards, respectively, is somewhat bewildering. The reader may infer that the parties hold one another in low esteem. That inference would be correct, counsel for the parties agree. The parties' mutual antipathy is what has driven this obviously irrational litigation.

[7] *Mitchell v. Dorman*, 2004 WL 117580, at *2 (Del. Ch. Jan. 16, 2004) (footnotes and quotations omitted).

Initially, the Rutters propose that the doctrine of laches be applied to prevent Birowski from asserting the 1966 agreement establishing the boundary now marked by the fence line, arguing that they have suffered prejudice in having built their garage in a manner not in compliance with that boundary. I decline to do so for several reasons. There was no need for Birowski to assert the enforcement of the agreement between herself and the Mileys as long as she and the Mileys were in accord, which was the case for almost thirty years. Although, perhaps, Birowski and the Mileys should have filed corrected deeds and otherwise complied with the formalities of real property conveyance, the reality is that they were content living with the boundary fixed in 1966. Likewise, the Rutters were content to live with this boundary for nearly six years. It was only when they sued her that Birowski knew that her neighbors had developed a serious objection to the fence line boundary.

When the Rutters sued, Birowski promptly interposed objections based initially on adverse possession and ultimately on the more appropriate affirmative defenses addressed in this motion. As important, the Rutters' assertion of a laches defense at this time comes with ill grace. In the May 10 opinion, I rejected Birowski's not-illogical argument that the Rutters filed this case too late, having lived with the agreed boundary for nearly six years and having known about the boundary problem before closing on the purchase in 1995. I denied Birowski's laches motion, however, so that each side could present its arguments on the merits, finding no prejudice to Birowski. Had the Rutters argued then that

Birowski was barred by laches when Birowski sought to bar the Rutters' claims based on laches, I might well have granted Birowski's laches-based motion. For the Rutters to go to settlement knowing of the established fence line, sit on their rights for years on end, and then claim that Birowski cannot respond with affirmative defenses, is brazen and inequitable. Having declined in the May 10 opinion to find that the Rutters' delay in seeking to quiet title constituted laches, I cannot equitably find that Birowski's affirmative defenses to the Rutters' stale claim is untimely. Of the parties before the court, the Rutters are the ones who acted with the most torpor, and are thus in no position to interpose a laches defense themselves.

Returning to Birowski's motion for summary judgment, she seeks to enforce an oral agreement of some vintage. Of course, oral agreements for conveyance of land are normally unenforceable under the statute of frauds.[8] An oral agreement may nevertheless be honored in cases presenting various exceptions to the statute of frauds. Taking a cue from the May 10 opinion, Birowski argues that the oral agreement to "straighten out" the boundary line is enforceable under three exceptions to the statute of frauds: 1) the doctrine of practical location, 2) the doctrine of acquiescence, and 3) the doctrine of partial performance.

[8] *See* 6 *Del. C.* § 2714(a); *see also Street v. McIlvaine,* 1995 WL 214350, at *3 (Del. Ch. Mar. 23, 1995).

In *Street v. McIlvaine*, this court considered the application of the doctrine of partial performance in the context of a disputed border between adjoining properties.[9] While noting that the doctrine of partial performance applies to oral agreements between adjoining landowners to fix boundaries, *Street* nevertheless declined to apply that doctrine, stating that, given the facts of that case, the doctrine of practical location more clearly provided an applicable exception to the statute of frauds.[10] The Rutters argue that here, as in *Street*, the doctrine of partial performance is inapplicable.

The *Street* case considered a disputed boundary line, allegedly set by an oral agreement between two adjoining landowners. Some years before the alleged agreement, the condemnation of a certain portion of the land at issue created some uncertainty regarding the true location of the common border. The landowners purportedly agreed upon a boundary when one of the landowners sold his property. The purchaser in that transaction did not obtain a survey of the land, but merely relied upon the described boundary. Later surveys determined that the agreed boundary did not conform to the actual boundary. Following numerous conveyances, dispute arose, and an action to quiet title ensued.

Then-Vice Chancellor, now Chief Justice, Steele, in the *Street* opinion, described the doctrine of practical location as "the real property boundary line

[9] 1995 WL 214350 (Del. Ch. Mar. 23, 1995).
[10] *Street*, 1995 WL 214350, at *4.

'variation' on the 'theme' of part performance."[11] Unlike partial performance, practical location applies exclusively to border disputes. Practical location is applied to resolve "a boundary line which is not well defined or is doubtful."[12] *Street* thus held that, where an agreement allegedly sets a boundary that was not exactly known by either party, the doctrine of practical location is the more clearly applicable doctrine.

The facts here are distinguishable from those in *Street*. Here, the boundary between the Birowskis' and Mileys' properties was clearly established, and the agreement was not to identify the boundary, but to alter it. On these facts, the boundary line "variation" is not applicable,[13] but the partial performance "theme" is.

The doctrine of partial performance assumes an oral agreement, the terms of which cannot be ascertained, but which is evidenced by performance by which the terms and intent of that agreement can be inferred.[14] Further, acts performed pursuant to an alleged oral agreement are evidence of the terms of that

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[11] *Id.* at *6.
[12] *Id.* at *4.
[13] The doctrine of acquiescence also applies only where a boundary is unknown, and is similarly inapplicable here. *See* 2 Herbert Thorndike Tiffany, *The Law of Real Property* § 654 at 684 (1939) ("The requirement that the true line be not known and that there be a dispute as to its location . . . [is required] to establish the boundary line by implied agreement or acquiescence").
[14] *See Houston v. Townsend*, 1833 WL 353, at *6 (Del. Ch. Term, 1833).

> The act relied on as part performance should be such as would not have been done independent of some contract or agreement relative to land; because, as you are from the act performed to infer a contract, it must therefore be an act of that description which will not admit any other inference.

agreement.[15] It is a venerable and well-settled rule of law that the statute of frauds does not bar enforcement of an oral agreement that is supported by evidence of partial performance of that agreement.[16] More specifically, partial performance will defeat the statute of frauds and render enforceable an oral contract for the conveyance of real property.[17]

Here, the intent of the oral agreement between the Mileys and the Birowskis was clearly to accomplish the objective of "straightening out" the property line through mutual conveyances of approximately equal amounts of property.[18] The terms of the oral contract may be inferred by the clear and enduring affirmative acts of both parties in agreeing upon a dividing line, constructing fences on either side of that line, and maintaining the property on their respective sides of the line as if it were their own for some thirty years. The rational inference drawn from the erection and continual maintenance of fences on

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[15] *Id.* at *4 ("[I]n cases of part performance, [parol evidence is admitted] to prove the terms of a parol contract relative to land.").

[16] *See, e.g., Quillen v. Sayers*, 482 A.2d 744, 747 (Del. 1984) ("[A] well settled general exception to the restrictions of the statute of frauds exists when there is evidence of actual part performance of an oral agreement."); *Durand v. Snedeker*, 177 A.2d 649, 651-2 (Del. Ch. 1962) ("[A]ctual part performance of an oral contract is recognized as a substitute for the statute of frauds on the theory that acts of performance constitute substantial evidence of a contract."); *Cannon v. Collins*, 1867 WL 1294, at *4 (Del. Ch. Mar. Term, 1867) ("The effect of part performance [of a parol contract] is to take the case, in equity, wholly out of the Statute [of Frauds]. . .").

[17] *See Shepherd v. Niles*, 125 A. 669 (Del. Ch. 1924); *Houston v. Townsend*, 1833 WL 353 (Del. Ch. Term, 1833); *see also Street*, 1995 WL 214350, at *4 (collecting cases applying the doctrine of partial performance to oral agreements involving real property).

[18] *See* 4 Caroline N. Brown, *Corbin on Contracts*, § 17.13 at 469-470 (rev. ed. 1997) ("If one of two adjoining landowners agrees to move the division fence and to convey to the other the strip of land intervening . . . [i]t is clearly intended to be a contract for the sale of land and it actually so operates.").

the agreed boundary is that the oral agreement contemplated the permanent exchange of roughly equivalent, though more conveniently and rationally located, swatches of land.[19]

Because the terms of the agreement, as evidenced by performance, are clear and unambiguous, because the agreement is both fair and reasonable, because performance was mutual, and because the contract is fully made and complete in every respect except for the writing, the oral agreement between the Birowskis and Mileys to "straighten out" their common property line through mutual conveyance of land is excepted from the statute of frauds under the doctrine of partial performance.[20] Where oral contracts are excepted from the statute of frauds under

[19] The Rutters argue that such an exchange would not have been effective vis-à-vis the mortgagee of the Mileys' land. That argument was not fairly presented, as no supportive authority was cited, and it is impossible to discern what harm, if any, flowed to the mortgagee, or why the Rutters have standing to raise the mortgagee's contractual rights, whatever they might have been. In any event, the exchange did not reduce the size of the Mileys' lot and was unlikely to have contravened the mortgagee's security interest in the land. The "straightening out" of the original, irrational property line would more likely have increased the property value; indeed, the Rutters, knowing at purchase that the fence line did not reflect the actual boundary between the two properties, were content to enjoy the benefits of the status quo for nearly six years.

[20] *See* 37 C.J.S. *Statute of Frauds* § 171 at 483 (1997).

> In order for partial performance to take an oral contract for the sale of real estate out of the statute of frauds, the contract must be fully made and completed in every respect, except for the writing, and the parol agreement must be certain, clear, unambiguous, and unequivocal. The oral contract must also be fair, reasonable, and just. The asserted partial performance must have been performed with the knowledge, consent, or acquiescence of the party to be charged.

the doctrine of partial performance, those contracts are fully enforceable.[21] Contracts for conveyance of land that are enforceable by virtue of part performance are entitled to specific performance,[22] and conveyances by specific performance are enforceable against successors-in-title.[23] Consequently, the oral contract between the Birowskis and the Mileys constituted a binding conveyance that also binds the Rutters, the Mileys' successors-in-interest.

The Rutters' primary argument is that they cannot be forced to honor an oral agreement to which they were never a party. That argument is unpersuasive. The mutual conveyance of property between the Birowskis and the Mileys was effective upon performance of their oral contract in 1966, and the Mileys' interest in their property has reflected this conveyance since that time. The Rutters, as successors-in-interest to the Mileys, are not being forced to honor a contract to convey land to Birowski now, rather, they simply purchased the Mileys' interest as it existed in 1995, and as of that time, that interest was different than the formal deeds suggested — as the survey the Rutters received plainly showed.

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[21] *See* 37 C.J.S. *Statute of Frauds* § 167 at 476 (1997) ("[Where partial performance of an oral contract is found], equity will regard the case as being removed from the operation of the statute [of frauds] and will enforce the contract by decreeing specific performance of it . . . .").
[22] *See* 10 Richard A. Lord, *Williston on Contracts*, § 28:4 at 289-292 (4th ed. 1999).
[23] *See Powell on Real Property*, § 81.04[1][a] at 81-173 (Michael Allan Wolfe, ed., 2002) ("The courts have enforced the right to a decree of specific performance beyond the original parties to a contracts, so that the agreement is enforceable by and against their successors-in-interest.").

American common law authorities suggest that property interests resolved through agreements are binding on successors-in-title.[24] For example, it is well-settled that disputed boundary lines, when resolved through application of practical location and acquiescence, run with the land.[25] These doctrines are based on "the sound public policy to avoid litigation over boundary lines."[26] Notably, this case differs from practical location and acquiescence cases only in that the original boundary was known — but the key issue is the same — that a boundary was clearly fixed by oral agreement, physical establishment, and ongoing conduct of the parties honoring that boundary. The same policy objectives advanced by the doctrines of practical location and acquiescence are at play here, and the

[24] *See* 2 Herbert Thorndike Tiffany, *The Law of Real Property* § 654 at 682 (1939) ("An agreement as to a common boundary line, which is effectual as between parties thereto, also concludes their successors in title . . . .").

[25] *See* 12 Am. Jur. 2d *Boundaries* § 83 (2004) ("A boundary established by acquiescence is binding on the parties and their successors in interest."); 6 George W. Thompson, *Commentaries on the Modern Law of Real Property* § 3035 at 520 (1962) ("After a disputed boundary has been established by agreement, a subsequent conveyance by the parties to the agreement . . . by the same description as that under which the title was acquired and possession held prior to the agreement, will pass the title according to the agreed boundary.").

[26] *See* 1995 WL 214350, at *5 (Del. Ch. Mar. 23, 1995); *see also* 12 Am. Jur. 2d *Boundaries* § 83 (2004) ("[The doctrine of acquiescence] is a rule of repose for the purpose of quieting titles and discouraging confusing and vexatious litigation."); 11 C.J.S. *Boundaries* § 67 (1995) ("The objects of the agreed boundary doctrine are to secure repose, to prevent strife and disputes concerning boundaries, and to make titles permanent and stable . . . ."); 6 George W. Thompson, *Commentaries on the Modern Law of Real Property* § 3036 at 530 (1962) ("The rule of acquiescence appears to have been adopted as a rule of repose, for the purpose of quieting titles, and preventing the uncertainty and confusion, and consequent litigation, which would be likely to result from the disturbance of boundary lines so long established.").

equitable application of a similar rule — that property interests resolved through the enforcement of partially performed oral contracts run with the land — appropriately serves those objectives. If boundaries established by practical location and acquiescence run with the land when they conflict with the recorded deed, clearly a boundary fixed by an oral agreement excepted from the statute of frauds should also. To hold otherwise would be a foolish inconsistency, not based in reason.

The Rutters claim to have relied upon the recorded boundary line in building a new garage that would be non-conforming if the existing fence line remained in place. But their own survey — and their daily existence living with the boundary defined by the fences — revealed the "living boundary" between the properties. To the extent that the Rutters built while fully aware of the anomalous border, the fences that had existed for more than thirty years, and a County Code having a set-back requirement, they did so at their own risk. Although one hopes relevant county officials will take this dispute rationally into account, the Rutters' decision to build before resolving this uncertainty is no barrier to summary judgment.

This is not to say that Birowski is faultless — both she and the Mileys should have acted with more formality. That said, there is no triable dispute that an oral agreement was made and partially performed with the required certainty. Knowing the problem that existed, the Rutters should have dealt with it before closing, at a time when the Mileys were at the table. At that point, the Rutters

might well have been able to get the Mileys and Birowski to bear the entire cost of formally redrawing the boundaries.

That, of course, did not happen, and the Rutters' only proposed solution was one that unreasonably required Birowski to give up a portion of her property for no compensation. Given that history, the parties shall bear equally the costs of recording a new boundary line and connected deeds. The boundary line shall be as established by the 1966 agreement running parallel to and equidistantly between the existing fences. I hope that the parties can cooperate by having their attorneys work together to accomplish the formal recording in the most cost-effective way possible. A final order shall be submitted by the parties within 20 days. Each side shall bear its own costs.

Very truly yours,

/s/ Leo E. Strine, Jr.