IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PHILIP CARTANZA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1480-K
	)	
JAMES LEBEAU, SR.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: November 9, 2005
Decided: March 28, 2006
Revised: April 3, 2006

R. Brandon Jones, Esquire, HUDSON, JONES, JAYWORK & FISHER, LLC, Dover, Delaware, *Attorneys for Plaintiff*

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PARSONS, Vice Chancellor.

Pending before the Court is Plaintiff, Philip Cartanza's, motion for leave to file an Amended Complaint (the "Proposed Complaint"). In the Proposed Complaint, Cartanza seeks to substitute Cartanza Farms, Limited Partnership for himself as Plaintiff. He also seeks an order: (1) declaring plaintiff's right "naturally, historically, by necessity and/or by prescription" to maintain and continue the natural flow of surface water from Cartanza's property onto Defendant, James LeBeau, Sr.'s, property (the "LeBeau Property")[1] and through a drainage ditch located on the LeBeau Property; (2) declaring plaintiff's right by prescription to continue the out flow of water from the tile field system installed over 30 years ago on Cartanza's property onto the LeBeau Property and through the drainage ditch; (3) declaring plaintiff's right naturally, historically, by necessity or by prescription to enter the Lebeau Property for the purpose of maintaining the drainage ditch to allow the continued flow of water from his property through the ditch to the Little Creek greater drainage system; and (4) awarding plaintiff its attorney's fees and costs. For the reasons stated below, the Court grants Cartanza's motion.

I. FACTS

Cartanza and his wife purchased real property in Little Creek, Kent County, Delaware, on or about January 22, 1973. On February 12, 1982 the Cartanzas transferred title to the real property to Cartanza Farms, Limited Partnership, a Delaware limited partnership.[2] The LeBeau Property abuts and adjoins Cartanza's property.

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[1] The Proposed Complaint refers to the LeBeau Property simply as the Property.

[2] Philip Cartanza is deceased. Pl.'s Opening Br. in Support of Mot. to Amend Compl. ("POB") at 2. LeBeau's answering brief is cited in similar format as "DAB at ____."

A drainage ditch runs between the Cartanza and LeBeau properties.[3] A portion of the Cartanza property adjoining the LeBeau Property includes a naturally occurring rise that causes all surface water to flow naturally downward, in a south-southeasterly direction, into the drainage ditch located on and between the two properties.[4] More than 30 years ago, Cartanza installed tile wells on another portion of his property beyond the rise to help drain it.[5] Water from the tile wells drained through drainage pipes on the Cartanza property onto the LeBeau Property at the property line and then through the drainage ditch to the Little Creek greater drainage system.[6]

By 1998 the ditch had become overgrown and clogged. In or about 1998, therefore, Cartanza installed drainage pipes on the LeBeau Property that routed the water from the Cartanza property and the original pipes around the overgrown portion of the ditch to the Little Creek drainage system. In response to LeBeau's challenge to that change, Cartanza now seeks to revert back to draining its property as it did before the 1998 modification.

Cartanza also alleges that LeBeau and his predecessors in interest failed to maintain the drainage ditch on the LeBeau Property. As a result, Cartanza found it necessary to enter the LeBeau Property and maintain the ditch. Thus, Cartanza further

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3 Compl. ¶ 6. Unless otherwise noted, all references to the Proposed Complaint are in the form "Compl. ¶ ____."

4 *Id*. ¶ 7.

5 *Id*. ¶ 8.

6 *Id.*

contends that it has an easement by prescription and necessity, arising out of the easement to drain its water over the LeBeau Property, to enter onto the Property and maintain the drainage ditch.

II. PROCEDURAL HISTORY

Cartanza filed his original complaint (the "Original Complaint") on May 15, 2001, against Olive P. Gafford, Frederick Q. Bramble, Gafford's guardian, and LeBeau.[7] The Original Complaint asserted three claims for relief. First, Cartanza claimed to be the rightful owner of a portion of the LeBeau Property pursuant to a written agreement he had with Bramble, acting on behalf of Gafford. Second, the Original Complaint alleged that Cartanza is entitled to an easement to use the LeBeau Property for certain electrical lines, drainage pipes, tile fields, and irrigation equipment located upon or crossing over the LeBeau Property. And third, the Original Complaint asserted that each of the defendants were estopped from terminating Cartanza's lease of a portion of the LeBeau Property.

LeBeau filed an answer and counterclaim on June 6, 2001. The counterclaim seeks damages and attorney's fees on the grounds that Cartanza filed this lawsuit in bad faith.

On May 6, 2004, I dismissed Gafford and Bramble as defendants pursuant to Court of Chancery Rule 25(a)(1). LeBeau then moved for summary judgment. At argument on that motion Plaintiff conceded that it had no credible right or claim to use

[7] Gafford is LeBeau's predecessor in interest. She became incapacitated when she suffered a stroke in August of 1996, and the Court of Chancery appointed Bramble as her legal guardian. Gafford passed away on September 14, 2001.

the LeBeau Property based on any of the claims asserted in the Original Complaint. Plaintiff continued to assert, however, that it had a prescriptive easement to drain water into and through the ditch located on the LeBeau Property. After discussing the matter with counsel, I stayed proceedings on the motion for summary judgment and gave Plaintiff the opportunity to file a motion to amend the complaint to clarify the basis for any remaining claims for relief. Plaintiff formally moved to amend on April 29, 2005.

The Proposed Complaint seeks to substitute Cartanza Farms, Limited Partnership for Philip Cartanza as Plaintiff. It also deletes the original claims for relief and substitutes a more limited claim in their place. In addition to requesting attorney's fees and costs, the amended claim seeks a declaratory judgment that Cartanza Farms has the right by necessity or prescription (1) to maintain and continue the natural flow of surface water from the Cartanza property, including the tile field system, onto the LeBeau Property and through the drainage ditch and (2) to enter the LeBeau Property for the purpose of maintaining the drainage ditch. LeBeau urges the Court to deny Cartanza's leave to amend.

III. ANALYSIS

A. Standards

1. Motion to amend

Court of Chancery Rule 15(a) provides that after the period for filing the initial pleadings has expired, "a party may amend the party's pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Rule 15(a) is designed to implement the modern philosophy that cases are to be tried on their merits, not on the pleadings.[8] Rule 15 provides for liberal granting of amendments when justice requires.[9] To defeat a motion to amend, the party opposing the motion must show undue or demonstrable prejudice or bad faith by the moving party.[10] Further, courts will not test the sufficiency of pleadings in ruling on a motion to amend.[11] A court will not grant a motion to amend, however, if the amendment would be futile.[12] An amendment is futile if it would not survive a motion to dismiss under Court of Chancery Rule 12(b)(6). Thus, as with a motion to dismiss, in determining whether a proposed amended complaint would be futile the court accepts as true all the well-pled facts and takes no evidence with respect to them.[13]

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8 *Garrod v. Good*, 203 A.2d 112, 114 (Del. 1964).

9 *Mullen v. Alarm Guard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993).

10 *Gotham Partners v. Hallwood Realty*, 1999 WL 1022069, at *2 (Del. Ch. Oct. 18, 1999).

11 *Rodriquez v. Palmer*, 2001 WL 1628317, at *3 (Del. Super. Sept. 26, 2001).

12 *Zimmerman v. Braddock*, 2005 WL 2266566, at *6 (Del. Ch. Sept. 8, 2005).

13 In their briefs both parties cite evidence extrinsic to the Proposed Complaint. Specifically, the briefs cite to Bramble's deposition, Cartanza's son Paul's deposition and the lease agreement between Cartanza and Gafford. Because these materials were neither attached to, nor incorporated by reference into, the Proposed Complaint they are extrinsic to it and beyond what this Court could consider on a motion to dismiss. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004). It also is irrelevant that the lease was incorporated into the Original Complaint, because the motion to amend involves only the allegations of the Proposed Complaint. Consequently, the Court has not considered the cited extrinsic evidence in ruling upon Cartanza's motion to amend.

2. Easement by prescription

To establish a prescriptive easement a party must demonstrate by clear and convincing evidence that they or a person in privity with them used the disputed property (i) openly, (ii) notoriously, (iii) exclusively, and (iv) adversely to the rights of others for an uninterrupted period of 20 years.[14]

B. Was Cartanza's Use Hostile and Adverse?[15]

A use is hostile or adverse if it is inconsistent with the rights of the owner.[16] The use must not be subordinate or subservient to the owner's rights.[17] Where the use of the disputed property is open and visible and there is no semblance of proof that the use was permissive, a court may find the use adverse.[18]

The Proposed Complaint avers that for more than 30 years Cartanza used the disputed ditch for drainage and later entered the LeBeau Property to maintain it.[19] These facts support an inference that Cartanza's use of the LeBeau Property was open and

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14 *Johnson v. Bell*, 2003 WL 23021932, at *2 (Del. Ch. Dec. 11, 2003).

15 In denying that Cartanza's use of the prior drainage system was hostile or adverse LeBeau relies primarily on the lease agreement between Cartanza and Gafford and the depositions of Cartanza and Bramble. As previously stated, the lease and depositions are beyond the scope of what I may consider in assessing whether Cartanza's amendments are futile. Instead, I must focus on whether Cartanza adequately pled a hostile or adverse use of the prior drainage system.

16 *Brown v. Houston Ventures, L.L.C.*, 2003 WL 136181, at *5 n.21 (Del. Ch. Jan. 3, 2003). The terms "adverse use" and "hostile use" are synonymous. *Id.*

17 *Id.*

18 *Cordrey v. Dorey*, 1996 WL 633293, at *4 (Del. Ch. Oct. 4, 1996) (internal quotations omitted).

19 Compl. ¶ 10.

visible. Moreover, nothing in the Proposed Complaint suggests that Cartanza's use was permissive. Therefore, the Court reasonably could infer from the Proposed Complaint, including the allegations that Cartanza drained its property by natural flow and the original tile field pipe through the ditch, that Cartanza's use was adverse.[20] Thus, the Proposed Complaint would not be futile for failure adequately to aver hostile and adverse use.

C. Did Cartanza Abandon the Easement?

LeBeau contends that Cartanza does not have a prescriptive easement to use the drainage ditch because he abandoned it when he installed a pipe routing the water around the ditch in 1998. Further, LeBeau asserts that Cartanza cannot transfer any rights he had in the old drainage system to the new one. Cartanza responds that he never abandoned use of the drainage ditch because, even though the current drainage system bypasses the ditch, he has continued to use the ditch to the extent drainage water could enter it. In the alternative, Cartanza argues that even if use of the ditch did cease in 1998, the modification occurred after its prescriptive right matured through 20 years of use and did not effect an abandonment of that prescriptive right.

"Abandonment is a question of intention and may be proved by a cessation of use coupled with circumstances clearly showing an intention to abandon the right."[21] A

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[20] *Brown*, 2003 WL 136181, at *5 ("The [plaintiffs] used the Driveway as if they had a legal right to use the Driveway and, thus, they satisfy their burden of demonstrating that their use was adverse to [defendants].").

[21] *Strahin v. Lantz*, 456 S.E.2d 12, 15 (W. Va. 1995) (quoting 6B Michie's Jurisprudence, Easements § 18 at 166-67 (1985)).

defendant has the burden of proving abandonment of an easement by prescription by clear and convincing evidence.[22] Mere nonuse for less than the prescriptive period will not raise a presumption of abandonment.[23] Rather, whether particular actions constitute proof of intent to abandon an easement by prescription depends on the unique facts of each case.

The alleged abandonment in this case involves fairly unique circumstances. Accepting the allegations in the Proposed Complaint as true for purposes of Cartanza's motion to amend, Cartanza had established a prescriptive drainage easement over the LeBeau Property by 1998. The issue is whether Cartanza's 1998 modification of the drainage system in relation to the ditch on the LeBeau Property, as described in the Proposed Complaint, constitutes an abandonment of its previously established drainage easement.

Neither the parties nor the Court have found any Delaware case directly on point. Thus, the Court must look to other jurisdictions for guidance. Generally courts have held that once an easement by prescription for drainage exists a subsequent change in the manner by which a property is drained will not result in abandonment of that easement. For example, in *Nickman v. Kirschner* the defendants installed a 30-inch cement tube in 1918 to drain surface water from a lagoon or low area of approximately 80 acres located on land owned and leased by defendants over and through plaintiff's property.[24] Over the

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22 *Id*. (citing 6B Michie's Jurisprudence, Easements § 18 at 167).

23 *Bringhurst v. O'Donnell*, 124 A. 795, 798 (Del. Ch. 1924).

24 273 N.W.2d 675, 677 (Neb. 1979).

years the cement tube began to deteriorate and break away until eventually it did not drain efficiently. In the summer of 1976 defendants replaced the tube with an open ditch having a 12-foot flat bottom and variable height sidewalls. The Supreme Court of Nebraska held that defendants had a prescriptive easement and that their replacement of the broken and silted cement tube with a ditch to regain efficient drainage did not destroy the easement.[25]

Similarly, in this case Cartanza used the ditch in question to drain its property for more than 20 years.[26] Moreover, Cartanza never stopped draining water over the Lebeau Property; instead, he merely changed the manner in which water drained from his property because the ditch had become clogged. In that sense, Cartanza's actions resemble those of the defendants in *Nickman* where the tube had become an ineffective means to drain their property.

In his brief LeBeau relies on an A.L.R. annotation to support his position that Cartanza abandoned any right he had in the drainage ditch by changing the piping in 1998.[27] According to the passage of the annotation LeBeau relies on, "[c]onstruction of a new route for the drains or pipes, even though only slightly removed from the old one [constitutes] an abandonment of the user as first initiated and the commencement of a

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25 *Id.* at 679.

26 *Compare Nickman*, 273 N.W.2d at 679, *with Totel v. Bonnefoy*, 14 N.E. 687 (Ill. 1888) (plaintiff failed to acquire an easement by prescription when he moved a drainage ditch a few feet away from the location of the original ditch before the 20-year prescriptive period expired).

27 DAB at 10.

new user which did not ripen into a prescriptive easement *where the necessary period of time had not elapsed since the change had been made*."[28] This statement does not address the issue presented here, however, because it deals with a change that occurred *before* the prescriptive period elapsed. In contrast, the Proposed Complaint alleges that Cartanza made the 1998 modification *after* it already had used the drainage ditch for more than 20 years. Therefore, the cited annotation is not persuasive.

In sum, based on the unique circumstances of this case and the paucity of relevant precedent, I conclude that Cartanza's Proposed Complaint is sufficient to withstand a motion to dismiss based on abandonment of the easement, and therefore would not be futile.

D. Is the Amendment Untimely or Unfairly Prejudicial?

LeBeau contends that Cartanza unduly delayed in filing its motion to amend by filing it after argument on LeBeau's motion for summary judgment. Cartanza denies that allowance of the amendment would cause any material prejudice to LeBeau.

While Rule 15 indicates that leave to amend is to be liberally conferred, it remains a matter of the court's discretion to grant such motions.[29] In exercising that discretion, courts consider a number of factors, including bad faith, undue delay, dilatory motive, repeated failures to cure by prior amendment, undue prejudice, and futility of

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[28] Crabb, J.H., Annotation, *Easement by Prescription in Artificial Drains, Pipes, or Sewers*, 55 A.L.R.2d 1144 § 11 (emphasis added).

[29] *Fields v. Kent County*, 2006 WL 345014, at *4 (Del. Ch. Feb. 2, 2006).

amendment.[30] Filing a motion to amend after briefing on summary judgment does raise the possibility of undue delay.[31] Inexcusable delay or repeated attempts at amendment can justify denial of leave to amend, but delay alone may not warrant such a denial.[32]

Where it appears that a plaintiff's purpose in seeking amendment and asserting a new claim is his or her anticipation of an adverse ruling on the original claims, leave to amend has been denied.[33] Courts have limited this result, however, to situations where the allegations in the amended pleading contradict those in the original complaint.[34]

No such circumstances exist in this case, and to some extent Cartanza's delay is excusable. LeBeau has not pointed to any facts in the Proposed Complaint which contradict the Original Complaint.[35] In addition, Defendant's motion for summary judgment was productive in that it caused Cartanza to abandon its original claims and significantly narrow the scope of the Proposed Complaint.

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30 *Id.*

31 *Buckson v. Town of Camden*, 2001 WL 1671443, at *7 (Del. Ch. Dec. 4, 2001).

32 *Parker v. State*, 2003 WL 24011961, at *3 (Del. Super. Oct. 14, 2003); *see also Buckson*, 2001 WL 1671443, at *7 (allowing amendment to the complaint even though plaintiff did not move to amend until after briefing on summary judgment).

33 *See Parker v. State*, 2003 WL 24011961, at *13 & n.100 (Del. Super. Oct. 14, 2003).

34 *See Parker v. State of Delaware*, 2004 WL 2830889, at *6 (Del. Super. Apr. 23, 2004).

35 Indeed, LeBeau explicitly recognized the possibility of Cartanza's current claim in his summary judgment brief. Def.'s Opening Br. in Supp. of Mot. for Summ. J. at 9-10.

LeBeau also asserts that Cartanza's motion to amend unfairly prejudices him due to loss of evidence as a result of the deaths of Phillip Cartanza and Olive Gafford. Plaintiff responds that Gafford's death will not prejudice LeBeau because she never had the capacity to be a witness in this lawsuit. Particularly, Gafford suffered a stroke in 1996 which rendered her entirely incapacitated and therefore unable to testify until she passed away on September 14, 2001--four months after Cartanza filed his Original Complaint. Further, Plaintiff's counsel contends that Cartanza's death did not prejudice LeBeau because he had time to depose Cartanza before he died.

I agree that LeBeau has not shown that the timing of the motion to amend prejudiced him in any material respect. As noted above, Gafford was never available to testify. As to Cartanza, neither the Proposed Complaint nor the briefing on the motion to amend indicate when he died. Even assuming that Cartanza died shortly after the Original Complaint was filed and that LeBeau could not reasonably have been expected to depose him before then, I am not convinced that the unavailability of Cartanza's testimony will prejudice LeBeau to such an extent as to warrant denial of the motion to amend. Nor is there any evidence that Cartanza acted out of a dilatory motive. The facts of this case and the relatively few pertinent cases appear to have contributed to Cartanza's failure to pinpoint sooner the precise nature of its claim. Therefore, Cartanza's amendment is not untimely or unfairly prejudicial.

IV. CONCLUSION

For the reasons stated, I grant Cartanza's motion to amend. Cartanza shall submit a form of implementing order promptly, on notice to LeBeau. The proposed order shall

include for filing, upon approval by the Court, a signed version of the Proposed Complaint. The parties also shall confer and file on or before April 28, 2006 a proposed scheduling order for the completion of pretrial proceedings and for trial in this action.

IT IS SO ORDERED.