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**IN THE
COURT OF APPEALS OF INDIANA**

CABORN DEVELOPMENT, LLC.,)
)
Appellant-Plaintiff,)

vs.)

No. 82A05-0604-CV-200)

MELVIN CHARLES GILLENWATER,)
as Trustee under a written Trust Agreement)
dated October 28, 1997;)
MARY ANN GILLENWATER, as Trustee)
under a written Trust Agreement dated)
October 28, 1997; BANK ONE,)
KENTUCKY, NA; RODER HTS HOCKER)
AMERICA, LLC; and UNITED FIRE)
PROTECTION, INC.,)
Appellee-Defendants.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable J. Douglas Knight, Special Judge
Cause No. 82D03-0407-PL-3319

NOVEMBER 2, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

Caborn Development, LLC, (Caborn) commenced this action claiming it was entitled to an easement over land owned by the Gillenwater trust. After discovery the trial court granted summary judgment to the defendants. Caborn appeals from that judgment.

The case involves two tracts of real estate located in Vanderburgh County near the intersection of Highway 41 and Lynch Road. Prior to December, 1998, they were part of a single parcel of land owned by Robur Corporation.

In December, 1998, Robur sold and conveyed a portion of its parcel to the Gillenwater Trust (the trust real estate). Four years later in December, 2002, it sold and conveyed the remainder to Caborn.

At one time a railroad spur line ran from a nearby railroad across the trust real estate and terminated on the Caborn tract. It is this spur as it crosses the trust real estate that Caborn contends it has an easement to use.

It is admitted that the spur was not used at least since December, 1997. At the time Caborn purchased its real estate there was a fence at about the property line, which crossed the site of the spur. Much of the track was gone and a paved road leading to Lynch Road and a gravel parking lot covered part of the area on the trust property where the spur had been.

There is no express easement for the spur and Caborn admitted that it did not investigate existence of an easement. It simply assumed the spur line could be used.¹

Caborn presents three arguments on appeal. It first contends that it had an implied easement from prior use.

The law concerning such implied easements was established more than a hundred years ago by our supreme court in *John Hancock Mutual Life Ins. Co. v. Patterson*, 103 Ind. 582, 2 N.E. 188, 190. *See, also, Fischer v. Revett*, 438 N.E.2d 995, 997 (Ind. Ct. App. 1982). The general rule is that where, during the unity of title, an owner imposes an apparently permanent and obvious servitude on one part of the land in favor of another part and the servitude is in use when the parts are severed, then if the servitude is reasonably necessary for the fair enjoyment of the part benefited, the law will imply an easement for its continuance.

It has been stressed that an implied easement arises at the time of the severing conveyance because of the circumstances then existing, or it does not arise at all. *Fischer, supra*, at 997; *Whitt v. Ferris*, 596 N.E.2d 230, 235 (Ind. Ct. App. 1992). In other words, if the servitude was not in use at the time the parts were severed, there can be no implied easement from prior use.

Here, it is clear from the admissions that the railway spur was not in use at the time Robur severed its tract by deeding a portion to the trust, nor has the spur been in use

¹ Admissions by Caborn were given by its owner and manager who handled the purchase of the Caborn tract.

at any time since. Accordingly, the trial court correctly determined that there was no implied easement by prior use.

Caborn next argues that the court erred in finding that it was not entitled to an easement by necessity.

Citing prior caselaw, the court in *Wolfe v. Gregory*, 800 N.E.2d 237, 241 (Ind. Ct. App. 2003) reviewed the law on easements of necessity:

An easement of necessity will be implied when ‘there has been a severance of the unity of ownership of a tract of land in such a way as to leave one part without access to a public road.’ An easement of necessity may arise, if ever, only at the time that the parcel is divided and only because of inaccessibility then existing.... To demonstrate that the easement is ‘of necessity,’ a plaintiff must demonstrate more than that the easement would be beneficial or convenient. If the plaintiff has another means of accessing his land, he may not claim a right to pass over the land of another. This rule controls even if the alternate means of access would be more difficult or expensive for the plaintiff.

It is undisputed that Caborn has access to its property from Lynch Road. It could not therefore claim an easement by necessity over the trust land. The court correctly granted summary judgment on this issue.

Finally, Caborn urges that the court should grant it relief in equity regardless of our resolution of the foregoing issues.

One of the honored maxims of equity, however, is that equity aids the vigilant.

When Caborn purchased its real estate it was aware that a fence had been erected across the line of the old railroad spur.² It was aware that much of the track had been removed and a portion of the area where the old spur had run on the trust land was then

² Caborn claims significance from the fact that the fence had a closed gate where it crossed the old spur line. In view of our reasons for resolving the issues as we have, the existence of a gate is superfluous.

covered by a paved road to Lynch Road and a gravel parking lot. Despite this knowledge it made no inquiry or investigation into whether it might use or restore the spur before making its purchase.

Under such circumstances equity will not intervene to save Caborn from its own carelessness.

The judgment is, therefore, affirmed.

SHARPNACK, J., and DARDEN, J., concur.