NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

VGW
JEW

NUMBER 2013 CA 1958

JOHN G. W. WONG, JONATHAN WONG
AND CHRISTOPHER WONG

VERSUS

ALLEY SQUARE I, L.L.C., DARRYL D. SMITH AND
DARRYL D. SMITH MANAGEMENT, INC.

Judgment Rendered: MAY 02 2014

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Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court Number 2007-0004072

Honorable Robert H. Morrison, III, Judge

* * * * * * *

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Plaintiffs – John G. W. Wong, et al.

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Attorney for Appellees
Defendants – Alley Square I, L.L.C., Darryl Smith, and Darryl D. Smith Management, Inc.

* * * * * *

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

Crain, J. concurs in the result

WELCH, J.

In this property dispute, the plaintiffs, John G.W. Wong, Jonathan Wong, and Christopher Michael Wong, appeal a trial court judgment in favor of the defendants, Alley Square I, L.L.C., Darryl D. Smith, and Darryl D. Smith Management, Inc., that dismissed the plaintiffs' petition for removal of wrongful encroachments on their property, for trespass, for damages and for injunctive and other relief. We affirm the judgment and issue this opinion in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.2(A)(5), (6), (7), and (8).

The plaintiffs' property and the defendants' property are adjacent to each other and were previously owned by a common ancestor-in-title, Preservation Properties, L.L.C. The trial court's judgment on appeal herein was rendered following its factual determination that an apparent servitude on the plaintiffs' property was created by destination of the owner, *i.e.*, the common ancestor-in-title of the plaintiffs' property and the defendants' property, in accordance with La. C.C. arts. 735, 740, and 741.

The trial court issued extensive reasons for judgment, which we attach hereto as Appendix A and make a part hereof, that adequately explain the decision.[1] After a thorough review of the record, we find no manifest error in the trial court's factual findings and conclusions of law. The record fully supports its determination that the plaintiffs' property and the defendants' property were owned by a common ancestor-in-title when the encroachments affecting the plaintiffs' property were constructed and that those encroachments were constructed for benefit of the property now owned by the defendants. Thus, the common ancestor in-title established a relationship between the two properties by which a portion of the property now owned by the plaintiffs became a servient

[1] We note that on the second page of the Reasons for Judgment, the first sentence of the second full paragraph contains a typographical error. Specifically, the sentence reads in part "after the collapsed building was removed from what is <u>not</u> Plaintiffs' lot" (underlining added), when it should actually read, "from what is <u>now</u> plaintiffs' lot."

estate to the property now owned by the defendants. See La. C.C. art. 741. When the two properties ceased to belong to the same owner (*i.e.*, plaintiffs' and the defendants' common ancestor-in-title) and since there was no express provision to the contrary, an apparent servitude by destination of the owner came into existence. See La. C.C. art. 741.

Since an apparent servitude was acquired for the benefit of the defendants' property on the property now owned by the plaintiffs, the trial court properly dismissed the plaintiffs' action, which sought the removal of the encroachments from the servitude and damages for the encroachments. Therefore, we affirm the trial court's July 16, 2013 judgment. All costs of this appeal are assessed to the plaintiffs/appellants, John G.W. Wong, Jonathan Wong, and Christopher Michael Wong.

AFFIRMED.

JOHN G. W. WONG, ET ALS	:	NUMBER 2007-004072, DIVISION "C"
	:	21ST JUDICIAL DISTRICT COURT
VERSUS	:	PARISH OF TANGIPAHOA
ALLEY SQUARE I, L.L.C., ET AL	:	STATE OF LOUISIANA
FILED: July 16, 2013	:	DY. CLERK:

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REASONS FOR JUDGMENT

This action arises as a property dispute, with related claim for damages. The primary question is whether the prior owner of both Plaintiffs' property and Defendant's property, which abut each other, effectively created a servitude by destination under Article 741 of the Civil Code, and, if not, the rights and damages Plaintiffs are entitled to claim. An additional issue raised just at trial by Defendant is whether Plaintiffs' claims have prescribed.

Plaintiffs' property is now essentially a vacant lot in the old portion of downtown Hammond. A building formerly erected on this property had collapsed long prior to Plaintiffs' acquisition, and only portions of the slab of this building remained. Defendant's property lies just to the South of Plaintiffs' lot, and is improved with a building which was converted to commercial use, also many years ago.

Defendant's property was conveyed from the common ancestor in title by deed dated March 2, 2002. Plaintiff's lot was conveyed by act dated October 10 2002, from a third entity which had purchased the lot from the common ancestor on March 2, 2002. None of these deeds contain any reference to the creation or reservation of any servitude of passage, view or light (nor any prohibition of view or light as per Civil Code Articles 702 or 704). An "act of correction" was executed by Plaintiffs' vendor on October 9, 2007, declaring that the property was intended to be conveyed to Plaintiffs "without the imposition of any type of apparent servitude, servitude by destination of owners or acquisitive prescription; or, without any type of servitude or right-of-way of any nature or kind on the property". While possibly involving some of the same principals, it is noted that the corporate vendors to Defendant and to Plaintiffs were different entities, however.

At some point, during a period of common ownership of both Plaintiffs' lot and Defendant's building, the parties' common ancestor in title caused or permitted several doors and windows to be placed into the wall on the North side of Defendant's building. Two of these windows were "bay"

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windows which protrude beyond the wall of the building onto Plaintiffs' lot. In addition, some type of landing had been installed in concrete outside the doors, and a walkway along the side of the building, also on what is now Plaintiffs' lot, had been installed and utilized to provide access from the street to the side doors in the building. A further issue is as to a balcony on a second building owned by Defendant, to the East of Plaintiffs' lot, which allegedly overhangs from the second floor of that building, creating an encroachment above Plaintiffs' lot.

John Gewalt was the former owner of all of the lots in question. These lots had been conveyed at various times to corporate entities of which he was a principal, but Mr. Gewalt had remained involved with the properties for some time. Over the course of time, Gewalt had done renovations to the building on Defendant's lot, and it had housed at various times commercial enterprises including a bar and restaurant, and office and apartment space.

According to the testimony of several witnesses, after the collapsed building was removed from what is not Plaintiffs' lot, Gewalt relocated a door accessing a stair case to the second floor of the building, moving the entrance from the street side to the Northwest corner, facing Plaintiffs' lot, and constructing a landing which encroached on that lot. Also, at some point variously placed between 1998 and 2000, he had a contractor open holes in the North side of the building, in which the bay windows and exterior doors were placed. Triangular shaped concrete landings were poured outside the doors, again on Plaintiffs' present lot, which were connected with a walkway of gravel and/or brick, which allowed access from the street over the South portion of the vacant lot, to the doors on the North side of the building. Defendant, after acquiring the building, had poured a paved sidewalk in its place.

After purchasing this lot, Plaintiffs formulated plans to construct a three story building on the lot. The plans called for a commercial space on the ground floor, with upscale apartments on the top two floors. Plaintiffs' witnesses testified that this plan was not feasible if provisions were made to continue access along the South side of the property and the North side of Defendant's building. The testimony included statements that to allow such access would require a ten foot setback from Defendant's building. The vacant lot is only 25 feet wide, and a net width of 15 feet would make the ground floor of the proposed building unworkable. Plaintiffs presented a damage claim for the income lost through the inability to construct this building. The Court notes that even providing such a setback on the first floor would not address potential issues of view and light from the windows on Defendant's building.

Defendant had known Mr. Gewalt for some time, and had formerly been employed by him in his commercial ventures. He generally stated that the windows and access had been provided for the building for years, and that his understanding when he purchased the building that his property would continue to enjoy these advantages.

On the other hand, Plaintiffs testified that at the time of their acquisition, they were assured by Mr. Gewalt that they would have the use of the entire 25 foot width of the lot. One plaintiff testified specifically that as to the landing giving access to the side door on the street, he was assured that Mr. Gewalt would not keep any claim to this.

Mr. Gewalt was deposed on two occasions, first for trial and then again for the exception. His testimony seemed to diverge in the two depositions. He stated that when he owned all of the lots, his plan was for a development that would incorporate the vacant lot into the overall layout. The sidewalk "... was to be the main entrance to a central plaza in what we call the Alley Square Complex, the series of buildings pinwheeling around an open courtyard." He further acknowledged the presence of the walkway on the vacant lot as an entrance walkway when he sold the property to Plaintiffs, and said that in discussions he had with Plaintiffs before the sale, he stated that the windows and entrance "would have to be dealt with". He further stated:

> ... we did talk about the projection of the bay windows, access to light from the ground level and the entrance to the apartments. And I said there were architectural solutions to work around this, but you should have no difficulty, because the Cheers building (Defendant's property) can be reconfigured to be non-dependent on the property at 107 (Plaintiffs' property).

It is noted that this testimony does not line up with the subsequent "act of correction" Gewalt signed years after Plaintiffs' purchase, as set forth above, wherein he stated his intention was to convey the whole 25 foot width to Plaintiffs free from any encroachments.

Testimony from Defendant and other witnesses indicated that, after the additional door had been cut into the North wall of the building now owned by Defendant, further to the East from the street side, that this door had been utilized for access to the building. A former tenant who had operated a restaurant and lounge in the building, stated that the business had used the vacant lot space as a courtyard for their customers, and as a means of access and egress to the business.

PRESCRIPTION

As above noted, Defendant raised the exception of prescription shortly prior to the commencement of trial. Defendant contends that he has acquired the rights in question by acquisitive prescription.

Until the doors and windows were installed in the North wall of the property, none of these claims existed. As above stated, the evidence tends to show that this was done in 1998 or later. Further, until 2002, there was a common owner of both tracts. A person cannot prescribe against himself. This lawsuit was filed in 2007, and has been pending since that time. Prescription has been interrupted, as the rights sought to be acquired through prescription are at issue. For these reasons, this Court determines that this claim is without merit.

SERVITUDE BY DESTINATION

Civil Code Article 741 provides in pertinent part:

> Destination of the owner is a relationship established between two estates owned by the same owner that would be a predial servitude if the estates belonged to different owners.
>
> When the two estates cease to belong to the same owner, unless there is express provision to the contrary, an apparent servitude comes into existence of right . . .

Our courts have held that where the owner of two estates, between which there exists an apparent servitude by destination, sells one of them without any mention of the servitude in the title, the dominant estate nevertheless continues to enjoy the servitude.

Woodcock v. Baldwin, 51 La. Ann. 989, 26 So. 46 (La. 1899)

Gillis v. Nelson, 16 La. Ann. 275, (La. 1861)

A window, even boarded up, is an apparent sign of a servitude and will continue to exist as such even if the deed is silent.

Taylor v. Boulware, 35 La. Ann. 469, (La. 1883)

Where the owner of lots on both sides of a division wall makes an opening or window in the wall, it is an act constituting the "destination du pere de famille" and is equivalent to title creating a servitude as soon as a division of the ownership of the property takes place.

Lavillebeuvre v. Cosgrove, 13 La. Ann. 323 (La. 1858)

Once a servitude by destination is established, the owner of the servient estate cannot later abolish it.

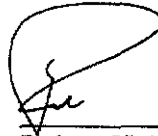
Faunce v. City of New Orleans, 148 So. 57, (Orleans 1933)

Applying these principles to the present case, this Court finds that the evidence establishes that Mr. Gewalt, while the owner of both Plaintiffs' and Defendant's lots, placed windows, doors, landings, the latter of which expressed an obvious action to create light, view and passage from the vacant lot, and amounts to a creation of a servitude by destination. Any attempt to later abolish these servitudes, either through the act of correction, or his expressions of his intentions (which were negated by his first deposition testimony) were legally ineffective.

As to the overhanging balcony on the other lot on the East end of Plaintiffs' lot, the same principles would apply. In addition, given the deed language as to the conveyance being "less and except" a ten foot servitude on this end, it is not apparent to the Court that Plaintiffs can claim any right as to this alleged encroachment.

For these reasons, judgment will be rendered in favor of Defendant and against Plaintiffs, dismissing this suit.

Amite, Louisiana, this 16th day of July, 2013.



Robert H. Morrison, III
Judge, Division "C"

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