

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0670

MARS BEACH, LLC

VERSUS

EDWARD McQUIRTER

Judgment Rendered: NOV 01 2017

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On Appeal from the
20th Judicial District Court
In and for the Parish of West Feliciana
State of Louisiana
Trial Court No. 22,691

Honorable William G. Carmichael, Judge Presiding

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Edward McQuirter

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

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HIGGINBOTHAM, J.

In this property dispute, Mr. Edward McQuirter appeals the district court's judgment finding that he was not entitled to a predial servitude of passage on the property of Mars Beach, LLC, and granting a permanent injunction in favor of Mars Beach and its members prohibiting Mr. McQuirter from threatening, harming, or harassing said individuals, and prohibiting Mr. McQuirter from coming on the property of Mars Beach.

FACTS AND PROCEDURAL HISTORY

On June 12, 1978, Mr. McQuirter and Ms. Aline Brown purchased a 1.08 acre tract of land from Mr. Lloyd Lindsey and several members of his family. The tract was identified as lot number 753 of Rosemond Campsites with its northern boundary on Sligo Road in St. Francisville, Louisiana. Eventually, Ms. Brown transferred her interest in the property to Mr. McQuirter. Mr. McQuirter built a home on the lot and began living there in 1982.

A 209 x 40 foot tract of land measuring .191 acre is located between Mr. McQuirter's lot and lot 752. The .191 acre tract is currently owned by Mars Beach and provides road frontage on Sligo Road so that Mars Beach can access its 74.55 acres of property located behind Mr. McQuirter's lot. On that .191 acre tract is a gravel road that Mr. McQuirter, with permission of Mars Beach and the previous owners of the tract of land, used to access his driveway before Mars Beach filed suit.¹

Mars Beach purchased the 74.55 acres of property from Daniel Properties, LLP. Before Mars Beach purchased the property, a survey was done by Wilson Land Surveying, LLC. The survey indicated that a shed owned by Mr. McQuirter was encroaching on the property of Mars Beach's ancestor in title, Daniel Properties. Therefore, on October 6, 2004, Mr. McQuirter and Daniel Properties, entered into a

¹ Mr. McQuirter's property has several feet of frontage on Sligo road and he is able to access his property without using the .191 acre tract.

boundary agreement (the boundary agreement), which extended the northern boundary between the western and eastern boundaries of Mr. McQuirter's property upward so that the northern boundary of his property would include the shed. As part of the boundary agreement, Mr. McQuirter declared:

[H]e does convey, transfer and quitclaim any and all rights, title and interest which he may have or had to the movable and immovable property which now lies outside the boundaries of Lot 753, as well as the use or possession of same, as described above...in favor of **DANIEL**, his heirs, successors and assigns.

After purchasing the property, Mars Beach's majority member, Mr. John Naquin, met with Mr. McQuirter and told Mr. McQuirter that he could continue to use the gravel road located on the .191 acre tract to access his driveway for the time being, but that eventually a fence would be erected, and Mr. McQuirter would no longer have access to the gravel road. Ultimately, the relationship between Mr. McQuirter and Mr. Naquin deteriorated, because Mr. Naquin suspected that Mr. McQuirter ran over cypress trees he planted, placed salt on a fig tree on Mr. Naquin's property, and fired numerous shots to intimidate Mr. Naquin when he was on his property. Thereafter, Mars Beach filed a petition for declaratory judgment and injunctive relief with the district court seeking a restraining order prohibiting Mr. McQuirter from trespassing on the property of Mars Beach, or threatening, harming, or harassing any members of Mars Beach.

Mr. McQuirter answered the petition and filed a reconventional demand asserting possession of a predial servitude of passage on the .191 acre tract between his lot and lot 753, requesting a judgment declaring that he is the owner of a servitude and of a right of use over the .191 acre tract, and seeking damages for Mars Beach's interference with his use of the .191 acre tract. Mr. McQuirter also sought an injunction ordering Mars Beach to refrain from interfering with his possession and use of the .191 acre tract.

In a judgment signed on June 8, 2016, the district court granted a preliminary injunction in favor of Mars Beach and its members prohibiting Mr. McQuirter from

threatening, harming, or harassing said individuals and prohibiting Mr. McQuirter from coming on the property of Mars Beach. The June 8, 2016 judgment recognized the boundaries of Mars Beach's property as shown on the survey by Wilson Land Surveying, LLC, dated April 4, 2003, and revised on September 23, 2004, which included the .191 acre tract.

On November 22, 2016, the matter came before the district court for a trial on Mars Beach's request for a permanent injunction and declaratory judgment, and Mr. McQuirter's reconventional demand. After trial, the district court issued reasons for judgment concluding that Mr. McQuirter did not possess a predial servitude of passage, and even if he had, he transferred any and all right to property outside of his lot in the boundary agreement. On December 20, 2016, the district court signed a judgment dismissing Mr. McQuirter's reconventional demand, making the preliminary injunction entered on behalf of Mars Beach on June 8, 2016, permanent. The judgment further judicially recognized the boundaries of Mars Beach's property as follows:

Beginning at a ½" iron pipe found at the southeast corner of Lot 753 where same intersects the northern right-of-way line of Sligo Road; thence from said POINT OF BEGINNING, proceed North 32° 18' 13" East 214.45 feet to a point marked by a ½" iron pipe; thence North 89° 13'48" West 316.12 feet to a point and corner marked by a ½" iron pipe; thence South 03° 04' 03" West 187.44 feet to a 1½" iron pipe found on the northern right-of-way line of Sligo Road at the southwest corner of Lot 753, being the eastern, northern and western boundaries of Lot 753 as they border the property of Mars Beach, L.L.C.

It is from this judgment that Mr. McQuirter appeals assigning the following assignments of error:

1. The [District] Court committed legal error in failing to find that Appellant had a predial servitude of passage by title;
2. The [District] Court was manifestly erroneous and clearly wrong in finding Appellant has no right to use any of the property owned by Mars Beach, L.L.C. particularly the Road Right-of-Way;
3. The [District] Court was manifestly erroneous and clearly wrong in failing to find sufficient evidence to disprove the authentic act which purports to be a boundary agreement and;

4. The [District] Court was manifestly erroneous and clearly wrong in finding that [Mr. McQuirter] benefitted from the purported boundary agreement by increasing the size of his lot to include an encroaching shed.

LAW AND ANALYSIS

In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong. **Bonin v. Ferrellgas, Inc.**, 2003-3024 (La. 7/2/04), 877 So.2d 89, 94-95. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly wrong. **Bonin**, 877 So.2d at 95. Similarly, where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review. **Bonin**, 877 So.2d at 98.

A predial servitude is a charge on a servient estate for the benefit of a dominant estate. La. Civ. Code art. 646. Louisiana Civil Code article 705 defines a servitude of passage as follows:

The servitude of passage is the right for the benefit of the dominant estate whereby persons, animals, utilities, or vehicles are permitted to pass through the servient estate. Unless the title provides otherwise, the extent of the right and the mode of its exercise shall be suitable for the kind of traffic or utility necessary for the reasonable use of the dominant estate.

Louisiana Civil Code article 771 provides: "[a] predial servitude is extinguished by an express and written renunciation by the owner of the dominant estate." Accordingly, the renunciation of a predial servitude may be made only by an express written declaration in a unilateral juridical act or in a contract with the owner of the servient estate.

In his first and second assignments of error, Mr. McQuirter contends that the district court erred in concluding that he did not acquire a predial servitude by title nor a right to use the .191 acre tract. As pointed out by the district court, any alleged servitude was extinguished by the express and written renunciation by Mr.

McQuirter in the boundary agreement which he allegedly entered into on October 6, 2004. The boundary agreement clearly stated that Mr. McQuirter conveyed any and all rights, title, and interest which he may have or had to the movable and immovable property which now lies outside the boundaries of Lot 753, as well as the use or possession of same. Since the boundary agreement appears to waive any right of use that Mr. McQuirter would have in the .191 acre tract, we will first address Mr. McQuirter's third and fourth assignments of error related to the validity of the boundary agreement.

In his third assignment of error, Mr. McQuirter contends that the district court erred in finding that he offered insufficient evidence to disprove the purported boundary agreement. The boundary agreement was an authentic act executed before a notary public in the presence of two witnesses and signed by Mr. McQuirter and Mr. Edward Daniels, the managing partner of Daniel Properties. See La. Civ. Code art. 1833. Under La. Civ. Code art. 1835, “[a]n authentic act constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors by universal or particular title.” The law accords a high degree of sanctity to authentic acts. **DiVincenti v. McIntyre**, 611 So.2d 140, 141 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1264 (La. 1993). Thus, because an authentic act is clothed with a presumption of genuineness, the party attacking its authenticity bears the burden of proving its invalidity. **Id.** Moreover, in order to overcome the presumption of genuineness, the attacking party must meet a higher burden of proof than a mere preponderance of the evidence. **Id.** Because an authentic act is presumed to be valid, regardless of whether it is attacked on the grounds that an included signature is a forgery or that the act was not executed before a notary and two witnesses, convincing proof must be presented to invalidate the act. See Id. Mr. McQuirter as the party attacking the validity of the boundary agreement bears the heavy burden of providing convincing proof to invalidate the boundary agreement.

During his testimony, Mr. McQuirter claimed that he had never seen the boundary agreement and that it was not his signature located on the document. Linda Cummings, who was Mr. McQuirter's girlfriend at the time the boundary agreement was signed, was a witness on the boundary agreement. Ms. Cummings testified that she had no recollection of witnessing the boundary agreement, but that it was her signature as well as Mr. McQuirter's signature on the document. Mr. Daniel testified that he and Mr. McQuirter executed the boundary agreement to stop Mr. McQuirter's further encroachment onto his property. Mr. Daniel recognized the boundary agreement and testified that he signed the document. Ms. Stacie Tanner was the other witness on the document. She testified that she did not remember signing the document, but recognized her signature and said that on numerous occasions she came to the office of the attorney who prepared the document to witness documents that were executed. As pointed out by Mars Beach's counsel, Mr. McQuirter's signature on the boundary agreement is clearly similar to his signature on the act of cash sale when he purchased lot 753.

After considering the evidence, the district court in its well-considered written reasons concluded that Mr. McQuirter's assertion that he did not sign the document "without more, is simply insufficient to disprove the authentic act." The district court carefully considered the evidence presented in this matter, and its reasonable evaluations of credibility and conclusion that Mr. McQuirter did not provide convincing evidence to invalidate the boundary agreement cannot be disturbed on appeal.

In his fourth assignment of error, Mr. McQuirter contends that the district court erred in finding that he benefitted from the boundary agreement by increasing the size of his lot. It is Mr. McQuirter's position that his shed was not encroaching on the property of Daniel Properties and that he gained nothing from the boundary agreement. He relied on the testimony that was given at the hearing for the preliminary injunction by Mr. Tobias Ford, who performed a survey of Mr.

McQuirter's property. Mr. Ford testified that he found a monument on his survey that was different from the survey of Mr. Charles Wilson, who surveyed the property for Mr. Daniel, and that the shed was on Mr. McQuirter's property. However, Mr. Ford also testified that he wished he had the opportunity to look at Mr. Wilson's maps again. Mr. Daniel testified that he conceded some of his property in the boundary agreement because of the location of the shed. Mr. Wilson testified that in the boundary agreement he "moved the lines back northerly to take in the shed and increase the size of Mr. McQuirter's lot a little bit." The district court in its reasons for judgment noted that the boundary agreement "benefitted [Mr. McQuirter] by increasing the size of his lot." Again, the district court's evaluation of the conflicting testimony and conclusion that Mr. McQuirter's lot size was increased is certainly reasonable and cannot be disturbed on appeal.

Because we agree with the district court's conclusion that the boundary agreement was valid, and Mr. McQuirter in the written boundary agreement expressly extinguished any interest, use or possession outside of the legal description of lot 753 of the Rosemound campsites, we find no error in the district court judgment rendered in favor of Mars Beach, finding that Mr. McQuirter did not have a predial servitude of passage on the property of Mars Beach and granting a permanent injunction in favor of Mars Beach and its members prohibiting Mr. McQuirter from threatening, harming, or harassing said individuals, and prohibiting Mr. McQuirter from coming on the property of Mars Beach.²

ANSWER TO APPEAL

Mars Beach answered Mr. McQuirter's appeal seeking an award for damages for frivolous appeal. Damages for frivolous appeal are awarded pursuant to La. Code Civ. P. art. 2164. However, since this statute is penal in nature, it must be strictly

² As we have concluded that any alleged servitude whether by title or prescription was extinguished by the boundary agreement, it is unnecessary to address Mr. McQuirter's first and second assignments of error.

construed. **Nungesser v. Nungesser**, 558 So.2d 695, 701 (La. App. 1st Cir.), writ denied, 560 So.2d 30 (La. 1990); **Fisk v. Mathews**, 525 So.2d 223, 227 (La. App. 1st Cir. 1988). Moreover, appeals are favored and penalties for frivolous appeal will not be imposed unless they are clearly due. **Nungesser**, 558 So.2d at 702; **Fisk**, 525 So.2d at 227. Even when an appeal lacks serious legal merit, damages for a frivolous appeal will not be awarded unless it is clear that the appeal was taken solely for the purpose of delay or that appellant is not serious in the position he advocates. **Fisk**, 525 So.2d at 227.

In the present case, Mr. McQuirter submitted an appellate brief, with citations of authority, setting forth his position on appeal. Although we find no merit in the assignments of error raised by Mr. McQuirter, we feel that he was sincere in advocating his position and did not take this appeal solely for the purpose of delay. Accordingly, we find that damages for frivolous appeal are not warranted.

CONCLUSION

For the foregoing reasons, the judgment of the district court in favor of Mars Beach, LLC, is affirmed. All costs of these proceedings are assessed to appellant, Mr. Edward McQuirter.

AFFIRMED.