STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-10-317
VM-CUM-12/9/2010

10

ROBERT N. CENTER,
et al.,

Plaintiffs

v.

MALCOLM F. HALLIDAY,
et al.,

Defendants

ORDER ON MOTION FOR
PRELIMINARY INJUNCTION

Before the court is a motion for preliminary injunction pursuant to M.R. Civ. P. 65. Plaintiffs Robert N. Center and Kathryn W. Henry request that this court enjoin the defendants, Malcolm F. Halliday and Ingigerdur K. Halliday, from

(1) parking on the plaintiffs' lawn and from deviating from the graveled right of way as depicted on the tax map;

(2) interfering with the plaintiffs' right of way across the defendants' land;[1] and

(3) altering or disturbing a pedestrian pathway over which the plaintiffs claim they have a right of passage.

For the following reasons, the motion is granted in part and denied in part.

BACKGROUND

According to the verified complaint, the plaintiff, Robert N. Center, as trustees of the Robert N. Center Living Trust, and plaintiff Kathryn W. Henry, as trustee of the Kathryn W. Henry Living Trust, own land located in Harpswell, Maine.[2] The

[1] The plaintiffs do not address this request in their memorandum.
[2] The plaintiffs are also owners of a second, distinct parcel of land located in Harpswell, Maine.

defendants, as trustees of the Halliday Family Trust, are the owners of adjacent property and access their property by a gravel right of way, which the plaintiffs assert "has appeared on the face of the earth in an unchanged fashion for no less than 40 years." (Compl. ¶ 14; Ex. D.)

From 1979 until approximately 2005, a garage was located at the end of the plaintiffs' driveway. The plaintiffs relocated the garage in 2005 and installed a garden and a lawn in the space. A year before the plaintiffs moved the garage, the defendants acquired a parcel of land from their neighbor, Sharon A. Kirker, which the plaintiffs state gave the defendants a deeded right to park on her land. (See Pl.'s Compl. ¶ 27, Ex. E.) Since the defendants acquired this right and there is no longer a garage at the end of the plaintiffs' driveway, the plaintiffs contend that the defendants started driving across the plaintiffs' land instead of using the graveled right of way to access Ms. Kirker's land.

The plaintiffs, along with others in the community, are the beneficiaries and holders of the right to use a path to the shore.[3] The pedestrian pathway does not encumber the defendants' land. With the consent of Ms. Kirker and the Town of Harpswell, the plaintiffs repaired the path after the winter weather made it unsafe. On July 10, 2010, Mr. Halliday allegedly destroyed the path. (Compl. ¶ 66.) The plaintiffs allege that only Mr. Halliday had the opportunity and means to destroy the path. (Center Aff. ¶ 35.)

DISCUSSION

I. Standard of Review

In order to succeed on a motion for a preliminary injunction, a moving party has the burden of demonstrating the following:

[3] The pedestrian pathway is depicted on the plan recorded at Plan Book 204, Page 585.

1) that plaintiff will suffer irreparable injury if the injunction is not granted;
2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant;
3) that plaintiff has established a likelihood of success on the merits (at most, a probability; at least, a substantial possibility); and
4) that the public interest will not be adversely affected by granting the injunction.

Ingraham v. Univ. of Maine, 441 A.2d 691, 693 (Me. 1982). These four criteria "are not to be applied woodenly or in isolation from each other; rather, the court of equity should weigh all of these factors together in determining whether injunctive relief is proper in the specific circumstances of each case." Dep't of Envtl. Prot. v. Emerson, 563 A.2d 762, 768 (Me. 1989). For example, if the evidence of success on the merits is strong, the showing of irreparable harm may be subject to less stringent requirements. Id. (citation omitted).

II. Graveled Right of Way

a. Irreparable Injury

The plaintiffs assert that there is irreparable injury because there is no remedy at law to compensate them for the loss of the quiet enjoyment and use of their property. "An injury for which there is no adequate remedy at law is an irreparable injury." Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74, 79 (Me. 1980). Despite the defendants' claims, the defendants' unauthorized use of the plaintiffs' property and their disregard of the plaintiffs' property rights have resulted in irreparable injury. No adequate remedy at law could prevent the defendants' alleged continuing trespass on the plaintiffs' lawn. Furthermore, even if the injury is only a "few blades of grass," as the defendants claim, the plaintiffs have shown a likelihood of success on the merits, as discussed below.

b. Balancing of Harms

The plaintiffs assert that there will be no harm to the defendants if this preliminary injunction were to issue. The plaintiffs claim that the defendants will merely be required to remain on the graveled right of way. The defendants, however, claim that the plaintiffs have made it impossible for the defendants to access their property by vehicle. According to the defendants, the plaintiffs have begun parking on the right of way. Additionally, the defendants claim that the plaintiffs' actions restrict the ability of emergency medical personnel to access their property by automobile, which is a concern given the defendants' ages and medical conditions.

Based on the photographs attached to the plaintiffs' affidavits in support of the plaintiffs' verified complaint, the defendants have ample space to park on the graveled right of way granted to them by deed. First, it is clear from these pictures that the defendants park on the lawn. (See Robert Center Aff. ¶ 19, Exs.) Second, it appears as though the defendants drive over the plaintiffs' lawn instead of following the graveled curve in the road. (See Kathryn Henry Aff. ¶ 6, Exs.) Based on these photographs, it appears not only that the defendants have ample space for ingress and egress, but also that the harm to the plaintiffs' property outweighs any inconvenience to the defendants. The plaintiffs have demonstrated that the injury to their land outweighs any harm the defendants will face if they travel on the graveled right of way.

c. Likelihood of Success

A "likelihood of success on the merits" is "at most, a probability; at least, a substantial possibility." Bangor Historic Track, Inc. v. Dep't of Agric., 2003 ME 140, ¶ 9, 837 A.2d 129, 132. Here, the plaintiffs claim that the defendants' easement does not give them the right to drive on the plaintiffs' lawn or park their cars on the right of way.

Alternatively, the plaintiffs contend that if the easement is in a different location than in the deed, as the defendants claim, the defendants abandoned the alternative location.

The contested right of way is defined in deeded easements. "Construction of a deed . . . is a question of law." River Dale Ass'n v. Bloss, 2006 ME 86, ¶ 6, 901 A.2d 809, 811. There is no dispute that there is a deeded right of way across the plaintiffs' land.[4] The defendants dispute the location of the right of way. According to the defendants, the plaintiffs have changed the location of the right of way for their own aesthetic reasons. The right of way is, however, clearly depicted in both the tax map and a survey, recorded in Plan Book 204, page 585 in the Cumberland County Registry of Deeds. (See Pl.'s Compl., Exs. C and D.) Based on these documents, the plaintiffs are likely to establish successfully the location of the right of way as they describe it.

The plaintiffs also claim that the defendants have abandoned any alleged prior location of the easement. "A party asserting abandonment has the burden of proof." Phillips v. Gregg, 628 A.2d 151, 152 (Me. 1993). "The party may meet that burden by showing '(1) a history of nonuse coupled with an act or omission evincing a clear intent to abandon, or (2) adverse possession by the servient estate.'" Id. (quoting Canadian Nat'l Ry. v. Sprague, 609 A.2d 1175, 1179 (Me. 1992)). The plaintiffs claim that the defendants regularly used the graveled right of way in the same location for thirty years. Until 2005, the plaintiffs' garage prevented the defendants from parking where they now claim they have a right of way. The plaintiffs contend, therefore, that the defendants acquiesced to the location of the garage and thus the location of the right of way. As the plaintiffs claim, the defendants' acquiescence to the location of the garage

[4] The right of way, as described in the deed, is defined as "Right of way on easterly side now or formally of Mrs. Lawretta F. Clark's lot; thence on the easterly side now or formally of Sidney I. Gibson's lot; thence on southerly line now or formally of E.H. Blanchard's lot; thence across the corner of now or formally Pierces' lot; thence along the easterly side of little field, to old right of way; thence to Main Road over road as now traveled." (See Pl.'s Compl., Exs. A and B.)

is evidence of an intent to abandon. See Bolduc v. Watson, 639 A.2d 629, 630 (Me. 1994) (six-year acquiescence to a garage across a private easement demonstrates a clear intent to abandon). Though the defendants dispute the past location of the garage, there is at least a substantial possibility that the plaintiffs will succeed on the merits. (See Pl.'s Compl., Ex. D (survey showing the past location of the garage).)[5]

III. Pedestrian Pathway[6]

a. Irreparable Injury

The plaintiffs will suffer irreparable injury if the defendants are allowed to continue to damage the pedestrian pathway. There is no adequate remedy at law to ensure the plaintiffs' safe and comfortable access to the shore.

b. Balancing of Harms

Allowing continued altering or disturbing the pathway harms the plaintiffs only. The pedestrian pathway does not burden the defendants' land. (Center Aff. ¶ 34.).

c. Likelihood of Success

The plaintiffs have shown a likelihood of success on the merits of this claim because, as they contend, the pedestrian pathway is not on the defendants' land. There is nothing in any deed that gives the defendants the right to interfere with the plaintiffs' safe access along the pathway.

d. Public Interest

The public has an interest in preventing damage to the pedestrian pathway. As the plaintiffs assert in the verified complaint, the pathway is for the benefit of others in

---

[5] "In a case involving a dispute between two private parties, this [public interest] factor is of diminished importance. Both parties are using their property for residential purposes, and the public interest is not greatly affected regardless of the outcome." Cyr v. Ruotolo, 1985 Me. Super. LEXIS 371, *22 (Me. Super. Ct. Dec. 27, 1985). The public interest is advanced by landowners complying with the terms of their deeds.

[6] The defendants do not address this issue in their memorandum.

the community as well as the plaintiffs. (Compl. ¶ 61; Center Aff. ¶¶ 32, 34.) Because the pathway assures safe access to the shore, the public interest favors granting the injunction.

The entry is

> The Plaintiff's motion for Preliminary Injunction is GRANTED in part and DENIED in part.
>
> The Defendants, individually and in their capacity as Trustees of the Halliday Family Trust, and their agents, employees, servants, attorneys, guests, and invitees and those that act in concert with them are enjoined from parking on the Plaintiffs' property and from traveling or deviating from the graveled right of way as depicted on the tax map and as shown on the face of the earth. (Compl. Ex. C.)
>
> The Defendants, individually and in their capacity as Trustees of the Halliday Family Trust, and their agents, employees, servants, attorneys, guests, and invitees and those that act in concert with them are further enjoined from altering or disturbing the pedestrian pathway and its components, as depicted on the 2004 Kirker Boundary Survey. (Compl. Ex. D.)
>
> The remainder of the motion is DENIED.

Date: December 9, 2010

Nancy Mills
Justice, Superior Court

. OF COURTS
erland County
Street, Ground Floor
nd, ME 04101

JUDY METCALF ESQ
EATON PEABODY
PO BOX 9
BRUNSWICK ME 04011

:K OF COURTS
berland County
y Street, Ground Floor
and, ME 04101

CHRISTOPHER LEDWICK ESQ
PO BOX 884
BRUNSWICK ME 04011