STATE OF MAINE

YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-11-056
PAP – YOR – 9/27/2012

HELEN RIVAS ROSE, et al.,

Plaintiffs

v.

ORDER AND JUDGMENT
(TITLE TO REAL ESTATE AFFECTED)

WILLIAM PARSONS, JR., et al.,

Defendants

1. THE PARTIES – The plaintiffs are Helen Rivas Rose of Kennebunk, Maine, and Nathaniel P. Merrill of Medellin, Columbia. They were represented by Alan E. Shepard of Shepard & Read of Kennebunk, Maine.

The defendants are William Parsons, Jr. of Locust Valley, New York, William C. Parsons, Charles B. Parsons, Louise P. Parry, Louise Parsons Smith, David L. Weld, Jr., Christopher P. Weld, and Ashley Taylor all of whom own property in Kennebunk, Maine, Rudolph Hutz of Kennett Square, Pennsylvania, Elizabeth Hutz of Kennett Square, Pennsylvania, Thomas K. Liversidge, Jr. as Trustee of Beach Property Realty Trust of Kennebunk, Maine, Katherine A. Burns of Boston, Massacusetts, Michael A. Greely of Boston, Massachusetts, Jackayla, LLC of Boston, Massachusetts, Ann Ferguson of Yardley, Pennsylvania, Matthew Miller of Scarsdale, New York, along with Stacey Miller, Ben Miller and Ali Giacomin , Llewellyn Parsons Smith of Manchester-by-the-Sea, Massachusetts along with Sarah S. Gerritz, Abigail A.S. Davis and G. Putnam Smith, Jr. and Bonnie Curry of Stamford, Connecticut. They were represented by Peter S. Plumb and Kelly W. McDonald of Murray, Plumb & Murray of Portland, Maine.

Additional defendants were Matthew J. Burns and Debbie P. Burns of Kennebunk, Maine. They were represented by Theodore A. Small of Bernstein Shur of Portland, Maine.

Among the parties in interest was Llewellyn P.H. Alden of Wolfeville, Nova Scotia, Canada, who was represented by Jens-Peter W. Bergen of Kennebunk, Maine.

The United States of America was represented by the United States Attorney for the District of Maine Thomas E. Delahanty, II, of Portland, Maine. It disclaimed any right, title or interest in the disputed land.

Elizabeth W. McMaster and Philip R.B. McMaster of Providence, Rhode Island and Charles Bach McMaster and Joseph P. McMaster of Pepperell, Massachusetts were represented by Thomas Danylik of Woodman Edmands Danylik Austin Smith & Jacques, P.A. of Biddeford, Maine.

Abigail M. Alling of Kennebunk, Maine represented herself.

Julia Read Burns of Kennebunk, Maine was also represented by Mr. Small.

Mary Elizabeth Fluke of Philadelphia, Pennsylvania was represented by Richard Hull and Reid Hayton-Hull of Hull Law Office of Biddeford, Maine.

Horace Liversidge, II, of Kennebunk, Maine was also represented by Mr. Plumb and Mr. McDonald.

2. DOCKET NUMBER - The docket number is RE-11-56.

3. NOTICE - All parties have received notice of the proceedings in accordance with the applicable provisions of the Maine Rules of Civil procedure.

4. DESCRIPTION OF THE REAL ESTATE INVOLVED - The plaintiffs are the owners of an approximately 17-acre parcel of land located in an area between the Atlantic Ocean and Route 9 in the Parsons Beach area of Kennebunk, Maine. Their

property is described in a deed from Frederic Arnold Merrill of March 15, 1978 recorded at Book 2325, Page 83.

The defendants and parties-in-interest all own or potentially had an interest in nearby properties which were part of the larger property owned by Charles Parsons and shown in the Plan of Division of a Part of the Estate of Cha's Parsons of August 10, 1915, Plan Book 8, Page 9. This intra-family dispute involves the question of whether the plaintiffs still have the right to use the areas depicted as Roads "A" and "H" on the 1915 Plan to access the Atlantic Ocean from their larger back lot, formerly described as the Farm Lot.

The plaintiffs maintain that they have the deeded right to use the areas depicted as Roads "A" and "H" and that right has never been lost or, if lost, was reacquired through adverse possession. The defendants' claim that whatever rights once existed have been lost through the doctrines of merger or abandonment or the effects of Maine's "paper street" statute. The dispute has been well briefed and ably argued.

THE PLEADINGS

The plaintiffs have filed a three count third amended complaint. In Count I they have sought a declaratory judgment establishing their continued rights to use the interior roadways, particularly Roads "A" and "H", from the 1915 plan. In Count II they seek similar relief under the alternative theory of adverse possession or prescriptive easement. Their final count is for slander of title based on a letter from Mr. Plumb to plaintiffs' counsel of July 29, 2010, which argued that the plaintiffs no longer had rights of access over Roads "A" and "H".

The defendants have filed a single count counterclaim seeking a declaratory judgment that the plaintiffs "... have no right to utilize 'Road A' or 'Road H' or the beach depicted on the Parsons Plan."

Mary Elizabeth Fluke has also filed a cross-claim seeking a declaration that she has the right to use the roadways and pathways and that she has access to the beach within the bounds of Road H.

The plaintiffs have filed a motion for partial summary judgment on Count I of their complaint. The defendants along with party-in-interest Horace P. Liversidge, II have opposed the plaintiffs' motion and filed their own cross-motion for summary judgment on all counts in both the complaint and counterclaim.

THE ISSUES

The primary argument of the plaintiffs is direct. They argue that their predecessors acquired deeded rights based on the 1915 Plan and that nothing has occurred to terminate those rights. They argue that they and anyone that they rent or sell to has the right to use the interior ways to reach the ocean and to use at least a portion of the beach. They fundamentally disagree with the defendants' arguments that they can use the ways and beach only with the continued permission of the defendants who have granted that alleged privilege only to family members.

The defendants have argued that whatever rights the plaintiffs once had have been lost through the application of either the doctrines of merger or abandonment or by the application of Maine's statute governing public and private ways in proposed, unaccepted ways in subdivisions found at 23 M.R.S.A. §3031. The defendants have also argued that the plaintiffs have not re-acquired any lost rights by adverse possession or through any more recent deeds. Finally the defendants argue that there can be no slander of title since the letter was correct and, at the very least, not malicious.

MERGER

The plaintiffs are correct that Charles Parsons owned a large area at what is now quite properly called Parsons Beach in Kennebunk. He died in 1904 and his property

went into a trust, which created the 1915 plan, which both divided the property and outlined a series of interior roads. Both Roads "A" and "H" provided access from what was called the "Farm Lot" to the Atlantic Ocean. Through a series of deeds it is clear that the earlier owners of the plaintiffs' property had deeded rights. The first question is whether a proper application of the doctrine of merger in the context of easements has extinguished the plaintiffs' right to use all of Road "H" and much of the disputed portion of Road "A".

The doctrine of merger in the context of an easement is succinctly stated in the Restatement (Third) of Property (Servitudes) §7.5 as, "A servitude is terminated when all the benefits and burdens come into a single ownership. Transfer of a previously benefited or burdened parcel into separate ownership does not revive a servitude terminated under the rule of this section...." The rationale for the rule is, at comment a, "A servitude benefit is the right to use the land of another or the right to receive the performance of an obligation on the part of another. A servitude burden is the obligation not to interfere with another's use of the burdened party's land, or the obligation not to use land in the burdened party's possession in particular ways, or the obligation to render a specified performance to another. When the burdens and benefits are united in a single person, or group of persons, the servitude ceases to serve any function. Because no one else has an interest in enforcing the servitude, the servitude terminates. The previously burdened property is free of the servitude...."

These principles are consistent with Maine Law starting with *Dority v. Dunning*, 78 Me. 381,7 (1886) where the Law Court initially made the sweeping and apparently then unremarkable statement, "That an easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right, is a principle of law too general and elementary to be questioned." The

Law Court continued, "But this principle, like many others, is subject to qualifications. In order that unity of title to the two estates should operate to extinguish an existing easement, the ownership of the two estates should be coextensive, equal in validity, quality, and all other circumstances of right." In *Dority* the easement was not extinguished as the one interest was in fee while the other "was but a chattel interest, not only fractional in quantity, but limited in its duration to the term of nine hundred and ninety-nine years". *Dority* at 388.

In *Smith v. Dickson*, 225 A.2d 631,6 (Me. 1967) the Law Court stated, "Any private right of way which may have existed across the Smith lot ended with merger of lots into one ownership."

In *Fitanides v. Holman*, 310 A.2d 65, 67 (Me. 1973) the Law Court noted that since both the dominant and servient estate came into common ownership and "... since the ownership of both parcels was in fee, we find that whatever claim to a right of way which might have existed ended with merger of the subject lots in one owner." The Law Court also stated, at 67, "Once extinguished as here by merger, the easement does not come again into existence upon a separation of the former servient and dominant estates unless a proper new grant or reservation is made. 28 *C.J.S. Easements* §57c."

Lastly in *LeMay v. Anderson*, 397 A.2d 984, 5, n. 3 the Law Court briefly stated, "Unity of title to the dominant and servient estate, of course, extinguishes an easement."

After a review of the written submissions including the initial and second affidavits of Robert Yaroumian and after oral argument I have concluded that there are no material facts in dispute concerning the merger issue and the defendants are correct as a matter of law.

By February 12, 1943 Llewellyn Parsons had obtained ownership of a substantial number of lots such that with one minor exception the easements in Roads "A" and "H" were terminated by merger as to the property she owned. The plaintiffs do not have the right to cross the sections of Road "A" between Lots F and 21 or Lot CC and 21. The easement across Lot 12 is not terminated by merger. The easement involving Road "H" has been terminated in its entirety.

No later deeds revived the easements for the plaintiffs. Llewellyn Parsons did not need to own all of the land referenced in the 1915 plan in order for the doctrine of merger to terminate the easements solely across the land that she owned. See *Cheever v. Graves*, 32 Mass. App. Ct. 601; 592 N.E. 2d 758 (1992). This order and judgment does not resolve any claims to Roads "A" or "H" by people or entities other than the two named plaintiffs.

ABANDONMENT

This issue arises only if the easements were not terminated through merger or through the application of 23 M.R.S.A. §3031 and in fact existed. It is not necessary to reach this issue.

ADVERSE POSSESSION

The plaintiffs have failed to establish that any rights, once lost through merger or through the application of 23 M.R.S.A. §3031, were re-created through adverse possession. See *Androkites v. White*, 2010 ME 133, ¶14, 10 A.3d 677, 681.

PAPER STREETS STATUTE

The Maine statute governing private rights in proposed, unaccepted ways in subdivisions has two paragraphs which are relevant. 23 M.R.S.A. §3031(2). Each side is correct in their interpretation of the paragraph of the sub-section that they emphasized.

The defendants are correct in their assertion pursuant to the first paragraph that since Roads "A" and "H" were not constructed and used as private rights-of-way, any easements in them have been terminated. The plaintiffs are correct that by deed and by the second paragraph of the sub-section the abutting owners own to the centerline of the way. The questions of ownership of the fee interest and the question of the continuing existence of a right-of-way are separate.

SLANDER OF TITLE

Since plaintiffs have failed to establish that there was a false statement made with malice or with reckless disregard of its falsity, their claim for slander of title in Count III of the third amended complaint fails. *Colquhoun v. Webber*, 684 A.2d 405, 9 (Me. 1996).

The entry is:

Judgment for the defendants and party-in-interest Liversidge on Counts I, II and III of the third amended complaint.

Judgment for the defendants and party-in-interest Liversidge on the counterclaim. The plaintiffs' rights in Road "A", except at Lot 12, and Road "H" as depicted in the August 10, 1915 Plan of Division of a Part of the Estate of Cha's Parsons no longer exist and have been terminated as a matter of law.

The defendants are responsible for recording an attested copy of the judgment and paying the appropriate recording fees.

Dated: September 27, 2012

Paul A. Fritzsche
Justice, Superior Court

The applicable appeal period has expired without action or the final judgment has been entered after remand following appeal.

Dated: _____

_____
Clerk

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