18-P-1267 Appeals Court

ANGELA BENVENUTO & others[1] vs. 204 HANOVER, LLC, & another.[2]

No. 18-P-1267.

Suffolk. December 12, 2019. - March 9, 2020.

Present: Desmond, Sacks, & Ditkoff, JJ.

Easement. Real Property, Easement. Way, Private: extinguishment. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on December 30, 2014.

The case was heard by Elizabeth M. Fahey, J., on motions for summary judgment.

Rebecca H. Newman for 204 Hanover, LLC.
George R. Jabour for the plaintiffs.

SACKS, J. Defendant 204 Hanover, LLC (204 Hanover), owner of the land and building at 204 Hanover Street in Boston,

[1] Nicholas Romano, Natalie Romano, and Florence Dolan.

[2] Brookline Bank. The bank has not participated in this appeal.

appeals from the entry of summary judgment in favor of the owners of the adjacent land and building at 206-208 Hanover Street, plaintiffs Angela Benvenuto and her three siblings.[3] The judgment, as amended, declared that an express right of way easement over the plaintiffs' land, granted to 204 Hanover's predecessors in interest, had been extinguished by the plaintiffs' adverse use. Critical to the motion judge's allowance of the plaintiffs' summary judgment motion was the judge's conclusion that, because certain deposition testimony favorable to 204 Hanover was contradicted by other testimony at the same deposition, the favorable testimony did not create a genuine issue of material fact. The judge based this conclusion on an analogy to the principle that "a party cannot create a disputed issue of fact by the expedient of contradicting by affidavit statements previously made under oath at a deposition." O'Brien v. Analog Devices, Inc., 34 Mass. App. Ct. 905, 906 (1993). We hold that this principle did not warrant disregard of the witness's self-contradictory deposition testimony in this case. We therefore reverse the amended judgment.

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[3] Although it appears that the plaintiffs did not have record title at the time this action was filed, the judge ruled that they were the parcel's rightful owners and had standing to sue, a conclusion that 204 Hanover does not challenge on appeal.

Background. The essential undisputed facts are as follows. A bank owned both properties until 1941, when it conveyed 206-208 Hanover Street[4] to one of the plaintiffs' predecessors in interest (their father), subject to an easement. Specifically, the deed provided that the bank

> "reserve[d] for itself, its successors and assigns the right to pass and repass over the strip of land running Northwesterly from Hanover Street, marked Way on [a plan recorded therewith], to use in common with the grantee, his heirs and assigns and the owners and occupants of [206-208 Hanover Street] for all purposes of ingress and egress for which such way may conveniently and properly be used. This Way is to be a common passageway for the benefit of the owners and occupants of [both lots], as shown on said plan."

The bank later conveyed the 204 Hanover Street property to one of 204 Hanover's predecessors in interest.

The area at issue is a three-foot-wide passageway located on the 206-208 Hanover Street parcel; it begins at Hanover Street and runs in the narrow space between the buildings on the two parcels. Tenants of 206-208 Hanover Street use the passageway to pass between Hanover Street and a building entrance leading to their apartments. Tenants of 204 Hanover Street's ground-floor commercial space access that space through a front door leading to the street, although a door located at

[4] Although the deeds refer to the property as 206-208 Hanover Street, the parties refer to it as "206R-208" Hanover Street. The difference is immaterial for present purposes.

the rear of the space opens onto the passageway. Tenants of 204 Hanover Street's upper floors gain access to their apartments through a separate door from the street.

At some point -- as early as 1972, according to Benvenuto, or as late as 2000 or thereafter, according to 204 Hanover -- the plaintiffs or their predecessors in interest installed an iron gate across the passageway where it began at Hanover Street. They installed a lock that prevented the gate from being opened from the Hanover Street side without a key, although whether a key was required to open the gate from the passageway side is unclear. They gave keys to their own tenants but not to the owners or tenants of 204 Hanover Street. They also attempted by other means to deny access to the passageway to 204 Hanover Street's owners and tenants; the extent to which they succeeded was a major focus of the summary judgment papers.

In 2013, defendant 204 Hanover acquired the property. In late 2014, the plaintiffs filed this action, asserting that 204 Hanover's easement had been extinguished by the plaintiffs' adverse use of the passageway for the preceding approximately forty years.[5] In February of 2015, 204 Hanover counterclaimed,

[5] The plaintiffs later amended their complaint to add Brookline Bank as a defendant, alleging that it held a mortgage on the 204 Hanover Street property.

seeking an order that the gate be removed, an injunction against the plaintiffs' further interference with its use of the passageway, and damages.[6] On cross motions for summary judgment, the judge allowed the plaintiffs' motion, ruling that their and their predecessors' undisputed acts to prevent 204 Hanover's predecessors from using the passageway, over a period of more than twenty years, had extinguished the easement. From the amended judgment so declaring, 204 Hanover appealed.

Discussion. "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). Here, to obtain summary judgment on their extinguishment claim, the plaintiffs were required to show on the facts not genuinely disputed that they or their predecessors had used their 206-208 Hanover Street property in a manner adverse to the easement, meaning, at a minimum, "irreconcilable with the rights" of the easement holder.[7] Patterson v. Simonds,

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[6] 204 Hanover asserted that the plaintiffs sought to extinguish the easement in order to prevent 204 Hanover from operating a restaurant on its premises.

[7] For present purposes we need not attempt a comprehensive description of the precise degree of adversity required. See Cater v. Bednarek, 462 Mass. 523, 528 n.16 (2012).

324 Mass. 344, 352 (1949). The adverse use must have been open, notorious, and continuous for at least twenty years. See Brennan v. DeCosta, 24 Mass. App. Ct. 968, 969 (1987). We conclude that on two critical issues -- the date the gate was installed, and how the passageway was used -- the judge erred in determining that the facts regarding adverse use were not genuinely disputed.

1. Date of gate's installation. Benvenuto's 2017 affidavit asserted that the plaintiffs or their predecessors in interest erected the gate "approximately [forty] years ago," i.e., about 1977. Her 2018 affidavit asserted that although she could "not remember the exact date," she believed the gate had been installed "on or about, 1972."

In response, 204 Hanover submitted the deposition testimony of Kathleen Briana, who had operated a photography store on the ground floor of 204 Hanover Street for ten to twelve years beginning sometime in the 1990s, perhaps 1996 or 1998. Briana initially testified: "I don't think [the gate] was there when I moved in. I think [Benvenuto] added that after." Next, asked if she knew when the gate was installed, Briana answered: "I would have to say, if I had to guess, I would say four to five years after I was there. It wasn't in right away. I remember there not being a gate there." This testimony, if believed, would put the installation of the gate in the year 2000 or

thereafter, meaning it had been in place for less than the twenty years required to extinguish the easement.[8]

But Briana was "not 100 percent" certain about the date the gate was installed. "I'm guessing. . . . I'm not going to say definitely. I mean, [Benvenuto] would be able to tell you when she put it up." And later in Briana's deposition, when asked if there was no gate there when she first moved in, she replied: "I think there was a -- no, there was a gate always there. I think there was always a gate there."

Faced with this testimony, the judge concluded that "it is clear that Ms. Briana was not sure when the gate was erected," and that her "contradictory statements cannot create a genuine issue of material fact." As we have noted, supra, in support of this ruling, the judge analogized to the principle that "a party cannot create a disputed issue of fact by the expedient of contradicting by affidavit statements previously made under oath at a deposition." O'Brien, 34 Mass. App. Ct. at 906, citing Radobenko v. Automated Equip. Corp., 520 F.2d 540, 544 (9th Cir.

[8] 204 Hanover asserts that the plaintiffs' adverse use was interrupted, at the latest, by its February 2015 counterclaim, meaning that such use would have had to begin before February of 1995 in order to extinguish the easement. 204 Hanover relies on an analogy to Pugatch v. Stoloff, 41 Mass. App. Ct. 536, 542 n.8 (1996) ("complaint to establish title to land . . . interrupts adverse possession of that land"). We need not resolve the issue.

1975), and Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969). The judge also gave some weight to Briana's testimony that [Benvenuto] "would be able to tell you when she put it up," coupled with what the judge termed Benvenuto's "clear recollection" as of 2017 that the gate had been up for "approximately [forty] years, or more."

To the extent that the judge concluded there was no dispute that the gate had been installed in approximately 1977, O'Brien was not a sufficient basis to do so.[9] The principle of O'Brien, sometimes known as the "'sham' affidavit rule," Smaland Beach Ass'n v. Genova, 461 Mass. 214, 229 n.24 (2012), did not warrant disregard of the witness's self-contradictory testimony within the same deposition. The sham affidavit rule is based on the recognition that "[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." Perma Research & Dev.

[9] Nor could the dispute be eliminated by combining (1) Briana's statement deferring to Benvenuto on the question of how long after the beginning of Briana's tenancy the gate was installed, with (2) Benvenuto's "clear recollection" that the gate had been installed some forty years ago, long before Briana's tenancy began. Such reasoning would violate the requirement to view the evidence in the light most favorable to the nonmoving party -- here, 204 Hanover. See Augat, Inc., 410 Mass. at 120.

Co., 410 F.2d at 578. A party who manufactures an issue of fact in this manner has not created a "genuine issue" for summary judgment purposes, id.; "sham issues . . . should not subject the [moving party] to the burden of a trial." Radobenko, 520 F.2d at 544.

Briana's deposition testimony here did not create this danger. First, she was neither a party nor had any significant interest in this case,[10] and an exception to the sham affidavit rule is that "a conflicting affidavit from a disinterested witness may suffice to prevent summary judgment when the court determines that nothing in the record suggests that its introduction was solely to create a genuine dispute of fact." 10A C.A. Wright, A.R. Miller, & M.K. Kane, Federal Practice and Procedure § 2726.1, at 468-469 (2016). Second and more importantly, this case did not involve the "expedient" of a postdeposition affidavit. Contrast O'Brien, 34 Mass. App. Ct. at 906. Rather, Briana gave her conflicting statements within a single deposition, where it remained open to either party to ask

[10] The plaintiffs note that Briana testified that she had been "upset" by an incident (discussed infra) in which Benvenuto had blocked her from moving a machine down the passageway. But this hardly establishes that Briana was an interested witness. The judge properly did not rely on this factor as a basis to disregard Briana's testimony. It could, of course, go to weight, if the case proceeds to trial.

her to elect one version or the other, or to clarify the inconsistency in some other way. The inconsistency was not cleared up, however, and thus left a genuine issue of fact.[11]

Our decision in Palermo v. Brennan, 41 Mass. App. Ct. 503 (1996), helps illustrate the point. In Palermo, the plaintiff, in opposition to the defendant's motion for summary judgment on statute of limitations grounds, relied on her deposition testimony that she did not become aware, until a date that rendered her suit timely, that the defendant's conduct had caused her harm. Id. at 508. The defendant pointed to other statements in the plaintiff's deposition suggesting that she was aware of that fact several years earlier, so as to render her suit untimely. Id. at 507-508. A motion judge ruled those statements sufficient to grant summary judgment dismissing the action as time-barred. Id. at 508. We reversed, concluding that the statements relied upon by the defendant amounted to "conflicting evidentiary admissions." Id. Unlike in O'Brien, the plaintiff's deposition testimony had not made her

[11] We do not deal here with the situation in which a deponent, as a deposition proceeds, refers to and clarifies her earlier testimony in a manner that plainly changes its import. In such a situation, although there may be no expressly self-contradictory testimony, and no express election between versions, a judge on summary judgment would properly consider the plain import of the clarified testimony.

understanding "altogether plain." Id., quoting O'Brien, 34 Mass. App. Ct. at 906. Accordingly, and because the plaintiff had not made any "clear election between versions," any inconsistencies in her testimony "create[d] a factual conflict that must be resolved by the jury."[12] Palermo, supra.

Several Federal Circuit Courts of Appeals have similarly concluded that contradictory statements within a nonmoving party's deposition create an issue of fact that (where material) precludes summary judgment for the moving party. See O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 593–595 (6th Cir. 2009), overruled in part on other grounds, Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016); Kennett-Murray Corp. v. Bone, 622 F.2d 887, 894 (5th Cir. 1980). As one court has explained, the nonmoving party's conflicting versions may create a credibility question, but because the evidence must be viewed in the light

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[12] In Palermo, 41 Mass. App. Ct. at 508, before the plaintiff was deposed, she had signed an affidavit stating (consistent with some of her deposition testimony) that she was unaware that the defendant's conduct had caused her harm until the later of the two years in question. Particularly in light of the cases discussed infra, we do not consider the existence of a consistent predeposition affidavit essential to the reasoning or result in Palermo. We note in passing that in the present case, before Briana was deposed, she had signed an affidavit stating that her tenancy at 204 Hanover Street began in 1993, earlier than indicated at her deposition. Our conclusion that summary judgment for the plaintiffs was unwarranted here does not rely on any factual issue created by that affidavit.

most favorable to that nonmoving party, a judge cannot credit the version more favorable to the moving party and grant summary judgment on that basis. See Mest v. Cabot Corp., 449 F.3d 502, 514 (3d Cir. 2006). See also Burns v. Board of County Comm'rs of Jackson County, 330 F.3d 1275, 1282–1283 (10th Cir. 2003); Jamison v. Barnes, 8 So. 3d 238, 245 (Miss. Ct. App. 2008); McAlhany v. Carter, 415 S.C. 54, 64-66 (Ct. App. 2015). The conflicting versions create an issue of fact.[13]

The principle that a witness's conflicting statements within a single examination create an issue of fact is not limited to the deposition context. At trial, when a witness gives "conflicting or inconsistent statements . . . in the course of an examination, . . . the general rule" is that "it is for the jury to say what the truth is," and a directed verdict

[13] Doe v. Harbor Sch., Inc., 446 Mass. 245 (2006), is not to the contrary. In that case, the court recognized that certain statements in the plaintiff's deposition testimony supported her position on when her claim accrued, but it nevertheless upheld summary judgment for the defendants on statute of limitations grounds. Id. at 261. The court explained that, "[i]n the context of the entire record," the helpful statements in Doe's deposition "lack[ed] the detail and force of Doe's self-defeating testimony elsewhere," id., including elsewhere in her own deposition. Id. at 260. The court supported its conclusion by citing O'Brien for the proposition that a "plaintiff cannot use her own conflicting deposition testimony to create [a] material issue of fact to surmount summary judgment." Id. at 261, citing O'Brien, 34 Mass. App. Ct. at 906. Doe does not govern here; that portion of Briana's testimony more favorable to the plaintiffs was no more detailed or forceful than the portions favorable to 204 Hanover. Nor was Briana a party.

premised on one or the other version is inappropriate. Sullivan v. Boston Elevated Ry. Co., 224 Mass. 405, 406 (1916). See Delano v. Garrettson-Ellis Lumber Co., 361 Mass. 500, 502 (1972); Keeley v. Miller Drug Co., 324 Mass. 692, 694 (1949). Cf. Adoption of Larry, 434 Mass. 456, 466 (2001) (where witness's trial testimony contained inconsistent statements, finder of fact "was free to choose either version, or neither, as the truth"). Where, however, such a witness "finally adheres definitely to one [statement] in preference to the other as being the truth . . . the witness is bound." Sullivan, supra. See Delano, supra; Keeley, supra; Tupper v. Boston Elevated Ry. Co., 204 Mass. 151, 152-153 (1910) (affirming directed verdict for defendant where plaintiff, in trial testimony, elected version of events in which defendant was not negligent). This latter rule "has been applied to party-witnesses only where the version adhered to is less favorable to that party than the repudiated version." Adoption of Larry, supra. Here, however, Briana neither was a party nor chose to adhere to one version of her testimony and repudiate another.

Accordingly, in this case there existed a genuine issue of material fact regarding when the gate was installed.[14] Viewing

[14] 204 Hanover contends that even if the gate had been installed as early as the 1970s, such adverse use was interrupted by a 1984 deed, from one of the plaintiffs'

the evidence in the light most favorable to 204 Hanover as the nonmoving party, the installation could have occurred as late as the year 2000, which would mean that the plaintiffs' adverse use had not lasted the twenty years required for extinguishment. They therefore were not entitled to summary judgment on this ground.[15]

2. Use of passageway. The judge concluded that in addition to erecting the gate, Benvenuto herself had engaged in other acts that extinguished the easement. The judge relied on Briana's deposition testimony that Benvenuto had "treated [the passageway] like she owned it," and in at least one instance had prevented Briana from using it. Our review of the record discloses that these facts, even if undisputed, did not

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predecessors in interest to another, that recognized the existence of the easement. We are not persuaded. See Robert v. O'Connell, 269 Mass. 532, 536-537 (1930).

[15] In denying 204 Hanover's subsequent motion to reconsider her summary judgment ruling, the judge stated that Briana's deposition testimony, "on the whole, establishes that she lacks personal knowledge concerning the erection of the gate." Briana plainly has personal knowledge whether the gate was in place when her tenancy began, and, if it was not, then at what later time it was installed. The question is the accuracy of her recall. That her testimony was internally inconsistent on the first point, and imprecise on the second point, furnishes no basis to disregard the testimony altogether. This is not a case where the undisputed facts established that a deponent lacked relevant personal knowledge.

establish the twenty years of adverse use required to extinguish the easement.

First, although Briana testified that Benvenuto treated the passageway as if she owned it, Briana also testified, as discussed supra, that the gate was not in place when she began her tenancy, less than twenty years before 204 Hanover formally asserted its claim to the easement. Nothing in Briana's deposition suggests that Benvenuto, at any time before the gate's installation, treated the passageway as if she owned it.

Second, the incident in which Benvenuto prevented Briana from using the passageway was, according to Briana, a one-time occurrence. Briana testified that she had needed to move a $150,000 machine down the passageway and through the back door of her store, because it was too wide to fit through the store's front door. Benvenuto, however, stopped her from doing so, because, according to Briana, Benvenuto "was afraid the bricks were going to get scratched." Briana thus had to remove her store's front door to move the machine inside. But Briana testified that there were no other similar incidents during her tenancy. And her deposition transcript contains no suggestion

of any other instance in which Benvenuto forbade her to use the passageway.[16]

Third, Briana testified that she did use the passageway on some occasions to pass from her store out to Hanover Street. "When [she] needed to use the alley, [she] just went through [her] store and then went around." She was able to open the gate from the inside, without a key. Also, when she needed her store's floor waxed, the waxing company would "come through the front, they would start from the front, wax the whole floor and then they'd roll out their equipment through the alley."[17] On at least one occasion, she went out her back door and down the passageway, opened the gate from the inside, and let the waxing company in.

In sum, Briana's testimony, if believed and viewed in the light most favorable to 204 Hanover, would tend to negate the plaintiffs' claim to have used the passageway for twenty continuous years in a manner that was irreconcilable with the existence of the easement. See Brennan, 24 Mass. App. Ct. at

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[16] Although the judge stated that Briana had recounted several such instances, our review discloses only the one just described.

[17] Briana testified that at some point during her tenancy, she was no longer able to let the waxing company leave by the alley; whether this was because the gate had been changed or the lock had been changed, she was unsure.

969. Summary judgment for the plaintiffs on their claim of extinguishment by adverse use was thus unwarranted.[18]

3. Abandonment. We decline the plaintiffs' invitation to affirm the judgment on the alternative ground that the easement has been extinguished by abandonment. To succeed on such a theory, the plaintiffs would be required to prove not mere lack of use, but "acts by the owner of the dominant estate conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence" (citation omitted). First Nat'l Bank of Boston v. Konner, 373 Mass. 463, 466–467 (1977). See Cater v. Bednarek, 462 Mass. 523, 528 n.15 (2012). On this record, the plaintiffs have not shown as a matter of undisputed fact that 204 Hanover or its predecessors manifested any such intent or purpose.

To be sure, "failure to protest acts which are inconsistent with the existence of an easement, particularly where one has knowledge of the right to use the easement, permits an inference of abandonment." The 107 Manor Ave. LLC v. Fontanella, 74 Mass. App. Ct. 155, 158 (2009). And it is undisputed that when Briana

[18] The plaintiffs further suggest that, even if the passageway was used or required by law to be usable as a second, emergency means of egress from 204 Hanover Street, the easement for regular passage has been extinguished by adverse use. But, on this record, the dispute of fact over when the gate was installed precludes any ruling of such partial extinguishment.

complained to her landlord (204 Hanover's predecessor in interest) about the machine incident, the landlord told Briana about the easement but apparently did not protest directly to the plaintiffs. A mere failure to protest, however, is not enough to establish abandonment. The plaintiffs would also have to show, as in The 107 Manor Ave. LLC, some affirmative conduct by 204 Hanover or its predecessors that was inconsistent with the exercise of the easement. Id. at 159. This they have not done.

Conclusion. The amended judgment for the plaintiffs is reversed.

So ordered.