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NO. COA04-1406

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

CHESTNUT BRANCH, L.L.C.,  
Plaintiff,

v.

Buncombe County  
No. 02 CVS 1645

PUBLIC INTEREST PROJECTS,  
INC.,  
Defendant/Third  
Party Plaintiff,

v.

THE CITY OF ASHEVILLE,  
Third Party  
Defendant.

Appeal by defendant from orders entered 16 July 2002 by Judge James L. Baker, and 10 June 2004 by Judge E. Penn Dameron, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 20 September 2005.

*Ferikes & Bleyntat, PLLC, by Edward L. Bleyntat, Jr. and Susan L. Evans, for plaintiff-appellee.*

*Northup & McConnell, P.L.L.C, by Isaac N. Northup, Jr., for defendant-appellant.*

BRYANT, Judge.

Public Interest Projects, Inc. (defendant) appeals from an order entered 16 July 2002 granting plaintiff's motion for a preliminary injunction; and orders entered 10 June 2004 granting plaintiff's motion for summary judgment, granting plaintiff's

prayers for declaratory judgment and permanent injunction, and denying defendant's motions for declaratory relief, injunctive relief, and summary judgment. For the reasons below, we affirm the orders of the trial court.

*Facts*

Chestnut Branch, L.L.C., (plaintiff) is the owner of the Castanea Building, an historical building fronting Haywood Street in Asheville, North Carolina. Defendant owns the Old Asheville Hotel Building, which is adjacent to the Castanea Building at the corner of Haywood Street and Walnut Street.

Running through the Old Asheville Hotel Building is a covered alleyway (also referred to as the "Entranceway") which separates the hotel's first floor lobby and laundry facilities from the rest of the Old Asheville Hotel Building. This alleyway was the subject of a twelve-foot right-of-way referenced in the chain of title for both properties. The alleyway had not been used for several years and had been blocked off at both ends with wooden structures and walls. On the first floor of the Old Asheville Hotel Building, opposite the hotel's lobby and separated by the alleyway, defendant has leased space to Zambra Restaurant which uses the covered alleyway for table space. The covered alleyway extends through the width of the Old Asheville Hotel Building and, when unobstructed, opens onto a courtyard patio plaintiff constructed at the rear of the Castanea Building. At least five retail spaces are located at the courtyard level of the Castanea Building. Tenants leased these

spaces in reliance on the covered alleyway being unblocked and the easement that is a subject of this lawsuit being opened.

Plaintiff purchased the Castanea building on 1 March 1999. Prior to the purchase, plaintiff and defendant entered into negotiations concerning the use of the covered alleyway and the patio area behind the Castanea Building. On 8 February 1999, defendant submitted to plaintiff a proposed agreement regarding an easement over the covered alleyway. In a letter accompanying the proposed agreement defendant's President stated:

We understand [plaintiff] would like some prior commitment on our part to agree to give renewed recognition to an easement through the old alleyway on our adjoining properties. Given our knowledge and respect for [plaintiff] we are glad to agree to execute the attached Declaration of Easement and Permissive Use . . . .

This Declaration of Easement and Grant of Permissive Use (the Declaration) was subsequently executed 1 March 1999 and recorded 5 March 1999 with the Buncombe County Register of Deeds. Under the Declaration, the parties agreed that:

1. The owners of each property, and their heirs, successors, assigns, tenants, and invitees shall have an easement for pedestrian ingress and egress over the Entranceway; but
2. Existing encroachments intruding into or on the Entranceway and new encroachments for features reasonably necessary for access to a Building, such as steps and ramps, or for security, such as a gate, are hereby expressly allowed and approved, so long as said encroachment does not unreasonably limit private pedestrian access over the Entranceway.

Under the grant of permissive use, defendant agreed to grant permission to plaintiff for:

[A]ccess over existing open walkways and parking areas, unless and until [defendant], in its sole discretion decides to terminate said use:

1. for vehicular access over the designated driveways located in the parking lot to the rear of the existing Buildings, to and from the loading dock location the property of [defendant]; and
2. for pedestrian ingress and egress for emergency exiting and for deliveries to the loading dock located on the property of [defendant] . . . .

The parties further provided for the suspension of the easement until:

the issuance of a Certificate of Occupancy for at least one residential, retail, mercantile, or other business related unit which abuts and is at the same level . . . as the Entranceway, or until the permissive access . . . is terminated, whichever occurs first.

On 8 October 2001, plaintiff's tenant "Sensibilities" received a permanent Certificate of Occupancy. Defendant subsequently refused to open up the alleyway as required under the Declaration of Easement.

*Procedural History*

Plaintiff filed its complaint in this action on 8 April 2002. On 18 April 2002, plaintiff filed a motion for a preliminary injunction, which was granted by the trial court in an order entered 16 July 2002. On 1 May 2003, defendant added the City of Asheville as a third-party defendant, alleging the City was liable to defendant for violating its constitutional rights when it

approved plaintiff's construction plans treating the easement area as emergency exiting.

Following discovery, a hearing on these matters was held on 30 April 2004 in Buncombe County Superior Court before the Honorable E. Penn Dameron, Jr. By orders entered 10 June 2004, the trial court allowed all of plaintiff's motions for relief, including declaratory judgment, permanent injunction, partial summary judgment on plaintiff's claims, and summary judgment on defendant's counterclaims. The trial court denied defendant's motions for declaratory relief, injunctive relief, and summary judgment. By order entered 9 July 2004, the trial court certified this matter for immediate appeal pursuant to Rule 54 of the North Carolina Rules of Civil Procedure. Defendant appeals.

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Defendant raises as issues whether the trial court erred in:

- (I) finding that the survey attached to the Declaration establishes the easement and allows it to be located on the ground;
- (II) finding that plaintiff, its tenants, customers, employees and invitees would be entitled to use the easement because the use impermissibly expanded the scope of any easement;
- (III) finding defendant had failed to open the alleyway;
- (IV) granting a preliminary and permanent injunction to plaintiff;
- (V) finding that no construction may be done on the easement which would affect the code-compliance of plaintiff's building;
- (VI) denying defendant's motion for relief, in finding defendant liable for breach of contract, trespass, and ejection, and in dismissing defendant's

counterclaims; (VII) its provisional finding of promissory estoppel; and (VIII) allowing plaintiff's claim for declaratory judgment.

I

Defendant first argues the trial court erred in finding that the survey attached to the Declaration establishes the easement and allows it to be located on the ground. The parties agreed that plaintiff would be responsible for recording the Declaration along with an attached survey showing the "Entranceway" and the boundaries of the easement. Defendant contends plaintiff created a patent ambiguity by recording a survey with no reference to an "Entranceway" anywhere on its face. Defendant argues that while there is a notation on the survey of "12' R/W" where the covered alleyway exists, this is insufficient to provide reasonable certainty as to the location of the "Entranceway" as no other calls or descriptions of the easement are given. Defendant argues the easement must fail because there is nothing within the four corners of the recorded Declaration and survey to provide certainty as to the location of the easement and no clear indication where, if at all, the easement would run behind plaintiff's property.

"An easement is an interest in land, and is generally created by deed." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962).

When an easement is created by deed, either by express grant or by reservation, the description thereof must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers. . . . *There must*

*be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.*

It is to be stressed that an alleged grant or reservation of an easement will be void and ineffectual only when there is such an uncertainty appearing on the face of the instrument itself that the court -- *reading the language in the light of all the facts and circumstances referred to in the instrument* -- is yet unable to derive therefrom the intention of the parties as to what land was to be conveyed.

*Allen v. Duvall*, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984) (internal citations and quotations omitted) (second emphasis added). With respect to the location of an easement, "[t]he law endeavors to give effect to the intention of the parties, whenever it can be done consistently with rational construction.'" *Parrish v. Hayworth*, 138 N.C. App. 637, 642, 532 S.E.2d 202, 206 (2000) (quoting *Allen*, 311 N.C. at 251, 316 S.E.2d at 271).

If there is language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land, then the failure to precisely locate the easement results in a latent ambiguity. *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942). Where an ambiguity in the description is latent, "it will not be held to be void for uncertainty but parol evidence will be admitted to fit the description to the thing intended." *Id.* "The purpose of parol evidence, however, is to fit the description to the property--not to create a description." *Id.* Concerning extrinsic or parol evidence, our Supreme Court has held that:

Although extrinsic evidence is not permitted in order to add to, detract from, or vary the terms of an integrated written agreement, extrinsic evidence is admissible in order to explain what those terms are. Therefore, extrinsic evidence as to the circumstances under which a written instrument was made has been held to be admissible in ascertaining the parties' expressed intentions, subject to the limitation that extrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible.

*Century Commc'ns, Inc. v. Housing Auth. of the City of Wilson*, 313 N.C. 143, 146-47, 326 S.E.2d 261, 264 (1985) (citations and quotations omitted).

A patent ambiguity, however, results where an uncertainty appearing in the deed is such that "the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed." *Umberger*, 221 N.C. at 180, 19 S.E.2d at 485. "If the ambiguity in the description in a deed is patent the attempted conveyance or reservation . . . is void for uncertainty." *Id.*

Here, the easement granted is "for pedestrian ingress and egress over the Entranceway," where the "Entranceway" is described "as shown on the attached survey[.]" While the attached survey does not include any mention of an "Entranceway," it does include a notation for a covered alleyway running through defendant's property described as a twelve-foot right-of-way. As the easement described in the Declaration is one granting a right-of-way to the parties and their "heirs, successors, assigns, tenants, and



invitees," see *Black's Law Dictionary* 1326 (7th ed. 1999) (defining 'right-of-way' in pertinent part as "a person's legal right . . . to pass through grounds or property owned by another"), the notation indicating a twelve-foot right-of-way on the survey referenced by the Declaration is sufficient to serve as a pointer or a guide to the ascertainment of the location of the land. Thus any ambiguity in the deed granting the easement was latent and parol evidence is permitted to fit the "Entranceway" to the property. From the record before this Court, it is clear that the "Entranceway" is the covered alleyway running through defendant's property described as a twelve-foot right-of-way on the survey attached to the Declaration. This assignment of error is overruled.

## II

Defendant next argues the trial court erred in finding that plaintiff, its tenants, customers, employees and invitees are entitled to use the easement because the use impermissibly expanded the scope of the easement. Defendant argues the easement granted was limited to private pedestrian ingress and egress and plaintiff's use of the easement for emergency exit purposes is an impermissible expansion of the scope of the easement. Defendant contends the easement was to be used only for private pedestrian access and that "at certain times, no access would be allowed to pedestrians unless they were in possession of information as to how to unlock a gate."

In support of its argument defendant cites to two published opinions in which this Court held an easement could not be enlarged: *Moore v. Leveris*, 128 N.C. App. 276, 495 S.E.2d 153 (1998) (where the easement permitted ingress and egress by the public, this Court held the easement could not be used to install a sewer line); and *Swaim v. Simpson*, 120 N.C. App. 863, 463 S.E.2d 785 (1995) (where the easement allowed the plaintiff ingress and egress across the defendant's property, this Court held it could not be expanded to allow the installation of underground utility and telephone lines). The facts of this matter are clearly distinguishable from those in *Leveris* and *Simpson*; there both easements granted ingress and egress rights and there was an attempt to use the easements to install permanent utility lines. In the instant case, the easement grants pedestrian ingress and egress through the covered alleyway. Plaintiff's designation of the easement for emergency exiting purposes does not change the type of use of the easement. Plaintiff is still using the easement for purposes of pedestrian ingress and egress. Thus, the trial court's finding that plaintiff, its tenants, customers, employees and invitees are entitled to use the easement does not impermissibly expand the scope of the easement.

Defendant also asserts the inclusion of emergency exiting in the permissive use provision and the exclusion of such a use in the easement provision establish that emergency exit use of the easement is beyond the bounds agreed to by defendant. The Declaration contains permissive use provisions which grant

plaintiff "access over existing open walkways and parking areas . . . for pedestrian ingress and egress for emergency exiting and for deliveries to the load dock located on the property of [defendant] . . . ." In contrast to defendant's argument, this provision, when coupled with the requirement that the covered alleyway must be opened if defendant terminated plaintiff's permissive access, indicates the scope of the easement included ingress and egress for emergency exiting.

Defendant further argues that because the Declaration expressly allowed the installation of gates for security purposes, plaintiff's use of the easement for emergency exiting purposes denies defendant its rights under the easement. Under the express terms of the Declaration any gates installed must not "unreasonably limit private pedestrian access over the Entranceway." While plaintiff's use of the easement for ingress and egress for emergency exiting purposes will limit the type of gates and locking mechanisms defendant may install for security purposes, defendant has granted plaintiff an easement over the alleyway for pedestrian ingress and egress and cannot impede the use of that easement. Defendant argues that it is entitled to install gates which would completely secure the covered alleyway and would require a key or knowledge of a security code to open during evening and nighttime hours. Any such gating system violates the express terms of the granted easement. The easement granted is for pedestrian ingress and egress over the alleyway for plaintiff, its "heirs, successors, assigns, tenants, and invitees." Requiring a key or security code

to open the gates would impede at least the use of the easement by plaintiff's invitees because regular customers coming to the businesses of plaintiff's tenants cannot be expected to have the necessary key or security code to open the gates. Plaintiff has proposed gating options which would comply with the emergency exiting requirements. While these options may be less secure, defendant is not entitled to complete security where that security unreasonably limits private pedestrian access over the alleyway. This assignment of error is overruled.

*III*

Defendant next argues the trial court erred in finding defendant had failed to open the covered alleyway. Defendant's argument rests on its contention that either no valid easement exists or that the use of the easement as a fire exit is an impermissible use of the easement and thus it is not required to remove the obstructions blocking each end of the covered alleyway. Both of defendant's contentions are incorrect, see Issues *I & II*, *supra*, and defendant is required under the terms of the Declaration to open the easement. This assignment of error is overruled.

*IV*

Defendant next argues the trial court erred in granting a preliminary and permanent injunction to plaintiff. "A preliminary mandatory injunction may be issued when an easement into one's property has been obstructed." *Jolliff v. Winslow*, 24 N.C. App. 107, 109, 210 S.E.2d 221, 222 (1974). "The question whether a preliminary mandatory injunction should be issued, rests in the

sound discretion of the trial court." *Creel v. Piedmont Natural Gas Co.*, 254 N.C. 324, 325, 118 S.E.2d 761, 761 (1961) (per curiam). "'As a final decree in the case [a mandatory injunction] would be issued as a writ to compel compliance in the nature of an execution.'" *Ingle v. Stubbins*, 240 N.C. 382, 390, 82 S.E.2d 388, 395 (1954) (citations and quotations omitted). As discussed in Issues I & II, *supra*, the trial court did not err in finding that defendant granted plaintiff a valid easement over the alleyway and that defendant was obstructing plaintiff's use of that easement by barricading the openings to the alleyway. Defendant has shown no abuse of discretion by the trial court and plaintiff is entitled to an injunction to protect and enforce its rights to use the easement. This assignment of error is overruled.

V

Defendant also argues the trial court erred in finding that no construction may be done on the easement which would affect the code-compliance of plaintiff's building. Defendant's argument in this issue relates to the installation of security gates which we discussed in Issue II, *supra*. For the reasons discussed in Issue II, *supra*, this assignment of error is overruled.

VI

Defendant also contends the trial court erred in denying its motion for relief; in finding defendant liable for breach of contract, trespass, and ejection; and in dismissing defendant's counterclaims. Defendant concedes it only brings forward these assignments of error for preservation purposes on appeal.

Defendant presents no argument and cites no authority in support of these contentions and we deem them abandoned. See N.C. R. App. P. 28(b)(6); *State v. Augustine*, 359 N.C. 709, 738, 616 S.E.2d 515, 535 (2005). These assignments of error are overruled.

VII

Defendant next argues the trial court erred in making a provisional finding that plaintiff would be entitled to summary judgment on its claim of promissory estoppel. In its order granting summary judgment for plaintiff, the trial court held:

Plaintiff has sought summary judgment on its fifth claim for relief, alleging promissory estoppel, in connection with plaintiff and defendant entering into the Declaration of Easement and Grant of Permissive Use (sometimes, "Declaration of Easement") that is a subject of this action. Promissory estoppel does not apply at this stage of the proceeding, as there is no contractual defect shown in the Declaration of Easement. However, if the courts of the Appellate Division determine that there is a contractual defect, then and in that event the elements of promissory estoppel would be satisfied and plaintiff would be entitled to an order of summary judgment on its fifth claim for relief.

As we hold that the Declaration, under its terms, grants a valid and enforceable easement to plaintiff and that defendant cannot burden plaintiff's easement with gates impeding ingress and egress over the easement, this argument is overruled.

VIII

Defendant lastly argues the trial court erred in allowing plaintiff's claim for declaratory judgment. Again, defendant presents no argument and cites no authority in support of this

claim and we deem it abandoned. See N.C. R. App. P. 28(b)(6);  
*Augustine*, 359 N.C. at 738, 616 S.E.2d at 535.

Affirmed.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).