

Bloomer v. Lamphere, No. 476-7-07 Rdcv (Cohen, J., Feb. 11, 2009)

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**STATE OF VERMONT  
RUTLAND COUNTY**

<b>MARY E. BLOOMER</b>	)	<b>Rutland Superior Court</b>
	)	<b>Docket No. 476-7-07 Rdcv</b>
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>DAVID A. LAMPHERE, CORD</b>	)	
<b>LAMPHERE, AND GEORGE</b>	)	
<b>LAMPHERE, TRUSTEES OF THE</b>	)	
<b>LAMPHERE FAMILY TRUST</b>	)	
	)	
<b>Defendants</b>	)	

**DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT,**  
**FILED NOVEMBER 3, 2008**

This matter came on before the Court on Defendants' Motion for Summary Judgment on Plaintiff's claim for prescriptive easement, pursuant to V.R.C.P. 56(c), filed on November 3, 2008. Plaintiff Mary E. Bloomer filed a Memorandum in Opposition on December 1, 2008.

Plaintiff Mary E. Bloomer is represented by William J. Bloomer, Esq.  
Defendants David A. Lamphere, Cord Lamphere and George Lamphere, Trustees of the Lamphere Family Trust, are represented by W. Scott Fewell, Esq.

On July 31, 2008, the Court granted defendants' motion for summary judgment concerning plaintiff's claim for adverse possession, and granted plaintiff's motion to amend her complaint. Plaintiff filed an Amended Complaint on September 18, 2008, in

which she alleged that she had acquired a prescriptive easement over a boat mooring on defendants' property on the shore of Lake Bomoseen. Defendants' argue that as their Motion for Summary Judgment was granted as to plaintiff's claim for adverse possession, so too should their motion be granted concerning the prescriptive easement claim.

### **Summary Judgment Standard**

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397. Furthermore, where, as here, "the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 18 (1995) (internal citations omitted).

### **Background**

Mary E. Bloomer is the record owner of certain property (the "Bloomer Parcel"),

which is located on the east side of Lake Bomoseen, and recorded in Book 111 at Pages 217-18 of the Town of Castleton Land Records. The Bloomer Parcel was originally purchased by Robert Bloomer, Sr., husband of Mary Bloomer, and John Bloomer in 1953.

The Lamphere Family Trust is record owner of real property located to the north and east of the Bloomer Parcel, which deed is recorded at Book 136 at Pages 540-42 of the Town of Castleton Land Records (“Lamphere Property”). The Lamphere Property was originally purchased in 1920 and 1925 by George W. Lamphere and Eva B. Lamphere.

Both the Bloomers and Lampheres used their respective properties on a seasonal basis. The Bloomer Parcel is bounded on the northerly and easterly sides by the Lamphere Property, to the west by Lake Bomoseen, and to the south by the Lertola Property.

The northwesterly corner (above the high water mark) of the record title boundary line of the Bloomer Parcel is identified by a marble marker. The northeasterly corner of the record title boundary line of the Bloomer Parcel is marked by an iron pin. The easterly record boundary line of the Bloomer Parcel runs parallel to Villula Road sixty-six (66) feet in a southerly direction to the Lertola Property, and then westerly a distance of one hundred thirty-two (132) feet to the eastern shore of Lake Bomoseen. The western boundary line of the Bloomer Parcel is the mean low water mark of Lake Bomoseen.

The boat mooring in dispute is located on the southwesterly corner of the Lamphere Property and was installed by George W. Lamphere and a predecessor in title to the Bloomers. The mooring was never used by the Lampheres. Mary Bloomer

contends that it has been maintained by the Bloomer Family.

The Lampheres contend that the mooring is in an obscure place, and neither David Lamphere, Cord Lamphere, nor George Lamphere ever observed any boat affixed to the mooring, notwithstanding their yearly survey of the Lamphere Property and their frequent use of the lake. Mary Bloomer contends that the mooring device had been used by the Bloomer family from at least 1956 through 2002.

On July 26, 2008, David Lamphere, George Lamphere, and Cord Lamphere were walking the property boundaries and noticed that one of the trees that used to have a chain attached to the pipe had been cut down. The wood was piled on the Lampheres' property nearby. A new chain had been put around a large healthy tree with no protection for the tree. The Lampheres removed this new chain from the tree. The condition of the pipe looked to be one end loosely stuck into the bank with the other end in the water. On October 11, 2008, George Lamphere checked the property for any other tree cutting or new chain attachments and found none.

In support of their Motion for summary judgment, defendants attached the affidavit of David Lamphere.

In support of their Memorandum in Opposition, plaintiff attached the affidavits of Robert C. Kinney, Jr., Richard S. Bloomer, Robert A. Bloomer, Jr., and Gary Donahue.

### **Discussion**

To successfully claim an easement through prescription, there must open, notorious, continuous and hostile use of a right-of-way for fifteen years. *Wells v. Rouleau*, 2008 VT 57, ¶ 8 (citing *Guibord v. Scholtz*, 2006 VT 22, ¶ 5, 179 Vt. 623 (mem.); 12 V.S.A. § 501 (establishing statutory time period of fifteen years)). Where

prescriptive use is claimed, Vermont law requires proof similar to that needed to establish adverse possession under claim of right. *Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 156 (1989).

“The general rule is that open and notorious use will be presumed to be adverse and under claim of right, unless there is found an exception which rebuts that presumption, such as evidence of permission of the owner of the land to use the right-of-way.” *Wells v. Rouleau*, 2008 VT 57, ¶ 8 (quoting *Buttolph v. Eriksson*, 160 Vt. 618, 618 (1993) (mem.)).

Defendants have not proffered any evidence that plaintiff had their permission to use the right-of-way. Rather, defendants argue that they never saw a boat tied to the mooring throughout their years on Lake Bomoseen and thus there is no genuine issue of material fact.

Plaintiff has presented evidence that there is a genuine issue of material fact as to whether the use of the boat mooring device was open and notorious – “Any boat attached to this mooring device would be visible from the shoreline just to the north of the wide Bloomer dock, although there are several evergreens growing along the shoreline in this area. The boat could also be seen from the lake.” *Affidavit of Richard S. Bloomer*, March 25, 2008. The Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson*, 2004 VT 15, ¶ 15.

Since there is a genuine issue of material fact as to open and notorious use, there is also a genuine issue of material fact as to the adverse or hostile use of the right of way, through the presumption announced in *Wells v. Rouleau*, 2008 VT 57, ¶ 8.

Plaintiff has proffered evidence by way of affidavits which alleges that a Bloomer boat was moored to the mooring located on the Lamphere property every summer from the years 1956 to 2002. See *Affidavit of Richard S. Bloomer*, March 7, 2008. Further affidavits allege that a boat was moored to the mooring at various times throughout the years 1956 to 2002. See *Affidavit of Robert A. Bloomer, Jr.*; see also *Affidavit of Gary Donahue*; see also *Affidavit of Robert C. Kinney, Jr.* The Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson*, 2004 VT 15, ¶ 15.

Plaintiff has presented evidence that the boat was moored to the device every summer from 1956 to 2002. “Continuous” use is not synonymous with constant use. “It is well established that there may be lapses of time between acts of possession. Whether the amount of time between acts of occupancy interrupts the running of the period depends on circumstances and intention of [the] occupier.” *N.A.S. Holdings, Inc. v. Pafundi*, 169 Vt. 437, 443 (1999); see *Darling v. Ennis*, 138 Vt. 311, 313-14 (1980) (stating “Continuity of use is merely such use as an average owner would make of the property, taking into account its nature and condition.”). Under the circumstances, continuous use of a boat mooring on a lake would include use only during those times when the lake was suitable for boating – that being the summer. Thus, there is a genuine issue of material fact as to whether the boat was moored at the device continuously for fifteen years.

Defendants argue that the issue of open and hostile use of the mooring was already litigated and rejected by the Court in its earlier ruling granting defendants’ motion for summary judgment as to adverse possession. The Court ruled that the

evidence submitted by plaintiff regarding adverse possession did not demonstrate a genuine issue of material fact because there was no evidence that plaintiff and her family intended to exclude others from the disputed areas by virtue of their activities. *Decision on Defendants' Motion for Summary Judgment*, July 31, 2008. While a claim for easement by prescription requires proof similar to that needed to establish adverse possession under claim of right, it does not require the exact same proof. See *Community Feed Store, Inc.*, 151 Vt. at 156. Plaintiff claims use of the right-of-way in this instance, not ownership under adverse possession, thus the use of the mooring device need not be exclusive. The only elements necessary to establish an easement by prescription are that there must open, notorious, continuous and hostile use of a right-of-way for fifteen years. *Wells v. Rouleau*, 2008 VT 57, ¶ 8.

Defendants also argue that they have submitted rebuttal evidence in response to plaintiff's evidence which shows that there is no genuine issue of material fact. It is not the Court's function to weigh the evidence when assessing the merits of a motion for summary judgment, but to determine whether a triable issue of fact exists. *Booska v. Hubbard Insurance Agency, Inc.*, 160 Vt. 305, 309 (1993). Here, there is a triable issue of fact as to each element of a claim for easement by prescription.

### **ORDER**

Defendants' Motion for Summary Judgment, filed November 3, 2008, is  
DENIED.

Dated at Rutland, Vermont this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
Hon. William Cohen  
Superior Court Judge