STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: NOVEMBER 9, 2012)

BUTTERFLY REALTY and DAIRYLAND, INC.	:	
V.	:	**C.A. No. W.C. 2010-406**
JAMES ROMANELLA & SONS, INC.	:	

DECISION

LANPHEAR, J. The matter was originally tried before this Court without a jury. The Defendants prevailed in the underlying suit and Plaintiffs Butterfly Realty and Dairyland Inc. appealed. On June 17, 2012, the Decision was vacated and remanded by our Supreme Court for more specific factual findings on the prescriptive easement elements of actual, open, notorious, continuous, and hostile use.

On remand, both parties waived further evidentiary hearings and briefed the outstanding issues.

I

Facts[1] and Travel

The facts as previously found in Butterfly v. Romanella, WC 2010-406, (R.I. Sup. Ct. 2010) and reviewed by our Supreme Court in Butterfly v. Romanella, No. 2011-120-Appeal,

[1] As the facts of this case are largely undisputed, there is no need to comment at length on the credibility of the witnesses. Shawn Martin and Rita Martin, the operators of the liquor store and owners of Butterfly, were clear, direct, credible and consistent, except where indicated herein. Charles Sposato, a principal of Romanella Inc., was eager to respond to questions, and cooperative on cross-examination. He was clear about limiting the extent of his knowledge throughout the questioning. Craig Jackson, an operator of the Auto Audio store, was well spoken, familiar with the issues in advance, and limited his answers to areas of his knowledge. James Romanella, another owner of the Romanella entity, was more soft-spoken and limited with his short responses.

(R.I. 2011) are supplemented as necessary.

In 1957, Plaintiff, Dairyland Inc., took title to Assessor's Plat 77, Lot 331 in Westerly, Rhode Island. Lot 331 is located immediately north of Assessor's Plat 77, Lots 329 and 330. Lot 331 has frontage on Granite Street where it meets East Avenue. In the 1970s, Defendant James Romanella & Sons, Inc. ("Romanella") took possession of Assessor's Plat 7, Lots 329 and 330. Upon taking possession of the lots, Romanella constructed a small shopping center.

A commercial building on Lot 331 extends onto Lot 332, occupying the western half of each lot. The commercial building contains two separate storefronts—a larger one spanning both lots and smaller one at the southwest corner of the building. A loading dock for the commercial building lies in a slightly recessed section of its southwest corner. This loading dock encroaches on the Romanella property.

In 1985, Shawn Martin formed Butterfly Realty with Larry Zuckerman to take title to Lot 332. Romanella conveyed Lot 332 to Butterfly Realty on August 8, 1985.[2] On the same day, he also leased Lot 331 from Dairyland and assigned the lease to Butterfly Realty. Because of the encroachment of the building and the limited vehicular access to that corner, Romanella deeded an express easement to Butterfly Realty to use a small strip of land to access the commercial building's loading dock.

The granted 1985 easement permits the "ingress and egress to and from the loading dock at the southwest corner of the building at Lot 331 by vehicles, and, on foot, but not semi-trailers, for loading and unloading equipment and merchandise for Grantee's place of business and for no other purpose." It provides for passage alongside the southern edge of Butterfly's building along a strip ranging in width from approximately 15 to 20 feet.

[2] Dairyland Inc. was owner of Lot 331 at that time and remains so today.

To access the loading dock, commercial vehicles would usually take one of two routes through the parking area. A vehicle taking the "brown route"[3] would reach the loading dock by entering directly onto Lot 330 from East Avenue, proceeding west between the two buildings, pulling around to the west side of the laundromat[4], and then backing up to the loading dock. A vehicle taking the "green route" would reach the loading dock by entering onto Lot 331 from Granite Street, crossing over several painted parking spaces before entering Lot 330, merging with the "brown route," and then backing up to the loading dock.

Butterfly Realty did not use the easement or loading docks. Instead, it allowed a string of tenants to receive deliveries by using the easement. The entire easement was not regularly used for deliveries. Instead, the independent distributors used a variety of routes to access the loading dock. From 1985 to 1989, Shawn Martin and his wife operated a liquor store out of the larger store front of the commercial building. The liquor store received 12 to 15 deliveries per week. Distributor deliveries were made directly to the loading dock usually by way of the green or brown routes.

After the liquor store vacated the commercial building, several other businesses leased it, or portions of it, from Butterfly Realty. From 1991 through 2006, AutoZone[5] leased a portion of the commercial building. Supplies were delivered to AutoZone weekly usually by use of the brown or the green routes. Because of their size, the tractor trailers would enter the lot, pull up to the west side of the laundromat, and then back into the loading dock.[6]

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[3] The routes are colored on Exhibit 14.

[4] The laundromat is a one story building on the Romanella parcel, to the south of the brown route, as is shown on Exhibit 14 as building no. 3.

[5] During the trial, AutoZone was also referred to as ADAP.

[6] If cars were not parked along the southern side of the building, the loading dock could be accessed by a truck backing into the lot from Granite Street. The boundary area between the two parties and the location of the easement is not easy to discern from the property itself. There were no boundary markers or obvious boundaries before May 2010, when a surveyor sprayed dotted lines on the lot.

An Auto Audio store also leased a portion of the commercial building from Butterfly Realty. Auto Audio received bulk deliveries from UPS twice a day during its tenancy. These deliveries were received in small trucks that were usually driven directly to the loading dock using the green or brown routes. These trucks did not routinely do the "Y" turn to back up to the dock.

From 1985 through 2006, for one month each year, Christmas trees were sold in a fenced off area by a tenant of Romanella. This area covered six parking spaces to the northwest of the Romanella laundromat building, plus, additional area extending north. The area used increased in size, because as Ms. Martin put it, "each year [the trees] would take a little more space." When the Christmas trees were being sold, AutoZone employees parked their personal cars on the Butterfly lot so the trailers could reach the loading dock. Before 2005, a manager from AutoZone complained to Romanella that the Christmas tree sales impeded access to the loading dock. Romanella responded by informing the AutoZone manager that Romanella owned the lot and tersely suggested that AutoZone should use smaller delivery trucks.

The area used by the Romanella tenant for Christmas tree sales was substantial and blocked Butterfly's use of the alleged easement. Exhibit 14 was marked by Mr. Williams, an employee of Auto Zone. (Tr. at 48, lines 1-3) Using his marks, the tree lot extended out some 40 feet from the laundromat, beyond the brown route. Mr. Charles Sposato, an owner of Romanella, agreed with this sketch (Tr. at 91, line 2) and suggested the space was 35 to 40 feet from the laundromat, but the lot was sometimes even larger. (Tr. at 90, line 16). Mr. Williams acknowledged that the usual route was not open when the Christmas trees were being sold. (Tr. at pp. 42-43, 51, line 22 through p. 52, line 3.) The trucks could not use the path marked in brown. (Tr. at 61-62.)

There was insufficient evidence to establish that the green route was used regularly. Ms. Martin testified that the green route was used on only four occasions (Tr. at 15, line 17). Although it is difficult to see the disputed area from inside the liquor store, she asserted that cars were routinely parked in the spaces under the green route. (Tr. at 17, lines 8-12). Mr. Williams testified that 50 foot trucks could back up to the loading dock even though he drew the Christmas tree lot as blocking the brown route and he acknowledged cars were parked next to the Butterfly building. (Tr. at 43; at 52 lines 2-3). In sum, the Court finds no credible evidence that the green route was used, and finds it was not used during the annual sale of the Christmas trees.[7]

Romanella maintains an office on the northern edge of their property, west of the Laundromat, and to the south of the loading dock. Tenants, customers and employees of Romanella used the disputed areas along with multiple entrances on the two lots on a regular basis. Deliveries were made to the Romanella tenants by driving through the easement area and then turning south at the rear of the plaza. Romanella occasionally moved vehicles for the trucks but has also chided the truck operators for blocking the lot and damaging the building. Romanella asphalted, seal-coated, and striped its lot up to the approximate area of the area of the easement.

Mr. Sposato occupied the office in the building with a window facing the easement. After a delivery truck struck the Romanella building, Mr. Sposato investigated the easement agreement in May 2010. Romanella then installed concrete pylons along the southwest borders of the express easement. The pylons made it nearly impossible for delivery trucks to pull directly up to the loading dock, as had been done previously.

[7] In its previous Decision, this Court avoided commenting on the credibility of the witnesses at length. Now, it must specifically address the use of the various routes alleged to have been taken and the inconsistencies between the witnesses and inherent within the witnesses testimony touches upon this finding. The Court does not find the testimony of Ms. Martin or Mr. Williams credible on the issue of the use of routes during the holiday season.

In response, Butterfly and Dairyland Inc. filed for declaratory and injunctive relief pursuant to G.L. 1956 § 8-2-13, §34-16-4, and §9-30-1 et seq. Butterfly sought to quiet title and acquire a prescriptive easement along the disputed area. Romanella filed a counterclaim requesting a permanent injunction to prevent Butterfly Realty from trespassing.

After a series of motions regarding preliminary injunctions and stays, this Court ultimately found in favor of Defendant James Romanella & Sons, Inc. This Court did not find a prescriptive easement on grounds that Plaintiffs did not show that the use of the disputed area was consistent or hostile. Butterfly Realty v. James Romanella & Sons, Inc., 45 A.3d 584 (R.I. 2012).

II

Analysis

A

Prescriptive Easements

Prescriptive easements, granted by implication, allow non-owners limited use of another's realty. A party claiming a prescriptive easement must establish "actual, open, notorious, hostile, and continuous use under a claim of right for at least ten years." Drescher v. Johannessen, 45 A.3d 1218, 1227-28 (R.I. 2012) (quoting Hilley, 972 A.2d at 651-52; Nardone v. Ritacco, 936 A.2d 200, 205 (R.I. 2007)); Burke-Tarr Co. v. Ferland Corp., 724 A.2d 1014, 1020 (R.I. 1999). Each of those elements must be proven "by clear and satisfactory evidence" by the party seeking the prescriptive easement. Drescher, 45 A.3d at 1227-28; Hilley, 972 A.2d at 651-52; see also Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 831 (R.I. 2001) (requiring "clear and convincing evidence"). The fact-finder determines whether this burden is satisfied. Drescher, 45 A.3d at 1227-28. In its most recent cases, our Supreme Court has

repeatedly indicated that the claimant must establish its case by clear and convincing evidence. Hazard v. East Hills, Inc., 45 A.3d 1262, 1271 (R.I. 2012); Drescher v. Johannessen, 45 A.3d 1218, 1227 (R.I. 2012); Butterfly Realty v. James Romanella & Sons, Inc., 45 A.3d 584, 590 (R.I.,2012); Cahill v. Morrow, 11 A.3d 82, 88 (R.I. 2011).

Generally, a party seeking to establish a prescriptive easement has a heavy burden—"[p]rescriptive rights are not favored in the law . . . since they necessarily work corresponding losses or forfeitures on the rights of other persons[.]" Id. (quoting 25 Am. Jur. 2d Easements and Licenses § 39 at 536 (2004)); see Cahill v. Morrow, 11 A.3d 82, 88 (R.I. 2011); McAusland v. Carrier, 880 A.2d 861, 864 n.5 (R.I. 2005) ("One who claims a prescriptive easement must bear a substantial evidentiary burden before the courts will recognize the validity of the claim[.]"). Accordingly, failure to meet any one element is fatal to the claim.

1

Actual Use

First, a claimant must demonstrate by clear and satisfactory evidence that it actually used the property over which it claims a prescriptive easement. Actual use means use-in-fact of a type which would ordinarily be employed by the true owner. See Anthony v. Searle, 681 A.2d 892, 897 (R.I. 1996); Russo v. Stearns Farms Realty, Inc., 367 A. 2d 714, 717 (R.I. 1977). In Drescher, the plaintiff's use of the defendant's driveway constituted "actual" use, because it placed the true owner on notice of the use. 45 A.3d at 1227-28. Similarly, in Anthony, the Rhode Island Supreme Court upheld the trial court's conclusion that the plaintiff's use was "actual" when the plaintiff had in-fact used and cultivated the land for the mandated statutory period. 681 A.2d at 898. In each of those cases, the court concluded that the use was actual

based on uncontroverted evidence that the plaintiff had used the property in-fact. See Drescher, 45 A.3d at 1227-28; Anthony, 681 A.2d at 897.

Based on uncontroverted evidence of Butterfly Realty's use of the brown and green routes, this Court finds that Butterfly Realty's use was actual. Butterfly Realty allowed a string of tenants to receive deliveries at the loading dock. See Drescher, 45 A.3d at 1227. Its tenants used the brown and green routes, receiving deliveries from distributors which drove trucks and tractor trailers by way of those routes. There is no dispute that the tenants used the property at issue, or that the tenants' use of that property was of a type that would ordinarily be employed by a true owner. See Drescher, 45 A.3d at 1227-28; Anthony, 681 A.2d at 897.

2

Open and Notorious

Additionally, a claimant must demonstrate by clear and satisfactory evidence that it openly and notoriously used the property over which it seeks a prescriptive easement. The "open and notorious" requirement affords the record owner notice of the claimant's use so the ripening of the easement may be stopped. Burke-Tarr Co. v. Ferland Corp., 724 A.2d 1014, 1020 (R.I. 1999). Recently in Drescher, 45 A.3d at 1223, 1228 our high court agreed that the claimant failed to establish open and notorious use, when the use was a right of way was merely periodical "occasionally with weeks, but never more than a month, elapsing between such sojourns".

As indicated, the disputed area consists of a section of a commercial parking lot, between retail stores. The space is used for employee parking, customer parking, ingress and egress and receiving deliveries. In such a case, whether the *claimant* is using the disputed in a manner which is open and notorious is more questionable. Surely, claimant's customers and employees use the area – owners invite people to enter such lots to increase the likelihood of retail sales.

Moreover, an express easement existed on a portion of the property, in an area not marked or clearly evident to Romanella. Therefore, the Court concludes that the claimant used the disputed area openly, but the entire public was allowed to do so.

The term "notorious" has a broader meaning. Merriam Webster's online dictionary[8] defines notorious as "generally known and talked of; especially: widely and unfavorably known". See also American Heritage Dictionary, 5th Ed, 2011. Proof of notorious use is limited, but frankly, the high court appears to have been satisfied that the use was notorious when the claimant maintained a continuing physical presence in the area in Reitsma. Accordingly, this Court concludes that the claimant has minimally satisfied the requirement for clear and convincing proof of open and notorious use.

3

Hostile

To establish a prescriptive easement, a claimant must establish by clear and satisfactory evidence that the claimant's use of the property was hostile. Hostile use requires that the use be wrongful and without regard to the rights of the owner. That is, a claimant establishes hostility sufficient to support a prescriptive easement if the claimant can "demonstrate objective trespassory acts that are adverse to the rights of the true owner[.]" Butterfly Realty v. James Romanella & Sons, Inc., 45 A.3d 584, 590 (R.I. 2012) (citing Reitsma, 774 A.2d at 832). If a claimant uses the true owner's property under an express easement, or with implied permission, however, the use cannot ripen into an easement by prescription. See Tefft v. Reynolds, 43 R.I. 538, 542, 113 A. 787, 789 (1921) ("It is the well settled rule that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by

[8] www.merriam-webster.com

prescription, since one of the elements essential to the acquisition of the easement, namely, user as of right, as distinguished from permissive use, is lacking.").

Whether the true owner has given implied permission is a question of fact determined based on the totality of the circumstances. That permission can be inferred from the relationship between the parties, agreements between the parties, or acts or omissions by the true owner. Mere failure to protest a specific use cannot constitute permission. Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A. 2d 826, 833 (R.I. 2001). Nonetheless, failure to protest in conjunction with assistance, or some other action or omission by the true owner can be sufficient to demonstrate implied permission. Drescher v. Johannessen, 45 A.3d 1218, 1229 (R.I. 2012) (noting that "an inference of permissive use defeats the element of hostile use" (citing Burke–Tarr Co. v. Ferland Corp., 724 A.2d 1014, 1019 (R.I. 1999))). For example, in Chaner v. Calarco, the Appeals Division of the New York Supreme Court concluded that the owner was entitled to summary judgment dismissing the plaintiff's claim of adverse possession. 77 A.D.3d 1217, 1218-19 (2010), leave to appeal denied, 945 N.E.2d 1032 (2011). In that case, the owner produced evidence that the claimant and the owner had a close and cooperative relationship, and that the owner had helped the claimant cultivate and maintain the land. Id. This evidence, taken in conjunction with the owner's lack of protest, constituted sufficient indicia of permission to bar a claim of adverse possession.

This Court finds that Butterfly's use of the trucking routes, although exceeding the scope of the express easement,[9] was not "hostile" because Romanella implicitly permitted the use to continue. See Altieri v. Dolan, 423 A.2d 482, 484 (R.I. 1980) (concluding that the use was not adverse, because "driveway was used on a friendly and neighborly basis).

[9] This Court is not convinced that the owners or the employees of the parties knew the exact location of the easement at the time that Butterfly was using the disputed area.

Mr. Sposato candidly acknowledges that he assisted the larger trucks by encouraging other vehicles to be moved out of the way. Later, Romanella was far less cooperative. It revoked permission when a tractor-trailer struck the Romanella building. Then, it installed concrete pylons along the southwest border of the easement, effectively making it impossible for delivery trucks to use the route. Romanella also blocked the area during the each Christmas season. Butterfly complied with each new directive of Romanella. At trial Butterfly did not show any "affirmative act constituting notice to [the true owner] that the occupancy was hostile to the owner and they were claiming the property as their own." Drescher, at 1229 citing Picerne v. Sylvestre, 122 R.I. 85, 92, 404 A.2d 476, 480 (1979), and Martineau v. King, 120 R.I. 265, 269, 386 A.2d 1117, 1119 (1978).

Romanella's assent, accompanied with various restrictions, controlled the use of the area. The use was not hostile to Romanella but accommodating to the record owner and to Butterfly, but governed by Romanella's specific directives at the time. Being neighborly while actively controlling the use of one's property should not be construed as establishment of the hostility necessary to suffer the loss of a property right. Altieri v. Dolan, 423 A.2d 482 (R.I. 1980) In Altieri, the high court found that cooperative use of a shared driveway by agreement and with permission over many years prevented the claimant from establishing hostile use. The facts of the case at bar are strikingly similar to this case at bar. See also Cahill v. Morrow, 11 A.3d 82, 91-3 (R.I. 2011)

Hostility has not been shown.

4

Continuous Use

To succeed on a claim for a prescriptive easement, a claimant must also be able to show by clear and satisfactory evidence that the claimant's use of the property was continuous. The plain language of the state mandates continuous use: "for the space of ten (10) years… for and during that time claiming the same to be his…" G.L. § 34-7-1.

While in Reitsma, 774 A.2d at 836, "witnesses testified to years of unfettered access" that was not the case here. At times Romanella actively assisted in the use of the disputed area, at other times, it banned access. Butterfly complied.

Continuous use means use that is uninterrupted and enjoyed as frequently as convenient or necessary. See Confederated Salish & Kootenai Tribes of Flathead Reservation v. Vulles, 437 F.2d 177, 180 (9th Cir. 1971); Denardo v. Stanton, 906 N.E.2d 1024, 1029 (Mass. App. Ct. 2009), review denied, 454 Mass. 1108 (2009). Thus, a break in use—reflective either of a break in the claimant's state of mind, or a break in the claimant's ability to use the land—suffices to destroy continuity. The break in use need not be permanent, or even lengthy. Indeed, a break in use even of a few days can be sufficient to destroy continuity. See Trask v. Nozisko, 134 P.3d 544, 550 (Colo. Ct. App. 2006) (holding that landowner interrupted adverse use by constructing a dirt berm and trench across the driveway, which prevented access for three days); Rice v. Miller, 238 N.W.2d 609, 611 (Minn. 1976) (finding that continuity was interrupted when landowner built barrier across beach access road for several months each year); see also Pittman v. Lowther, 610 S.E.2d 479, 481 (S.C. 2005) ("[A]ctions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical

barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief.").

An offer to purchase has been found manifest, direct evidence that the claimant's title was subservient to the true owner's interest and broke the ten-year continuity. Cahill, at 93. In the case at bar, Butterfly complied with Romanella's directives, including the yearly prohibition from using the purported easement during the sale of Christmas trees.[10] The assertion of these rights, and the compliance by Butterfly, broke the ten-year chain. Butterfly failed to establish continued use for a period of ten years.

This Court finds that the claimant's use of the green and brown routes was not continuous for the statutory period of ten years. For approximately one month out of every year, Romanella sold Christmas trees from a fenced off area on the north-side of the laundromat. Although the size of this lot varied from year-to-year, the fenced area extended beyond the parking spaces by approximately ten feet. Smaller trucks and consumer vehicles were still usually able to make it through this narrowed passage. The tractor-trailers, however, sometimes had more difficulty. Furthermore, some truck and trailer drivers avoided the brown and green routes entirely during this season, using instead a curb cut on the Romanella property south of the laundromat. See Trask, 134 P.3d at 550. Thus, at least during certain days when the Christmas tree lot was present, any potentially "hostile" use that Butterfly Realty may have been employing was interrupted. See Pittman, 610 S.E.2d at 481. This interruption of Butterfly Realty's use prevents any assertion of "continuous use."

[10]"The north side, because like I said, the customers are parked here. The Christmas operation is here. (Indication) There's no room for anybody to really get through there in my opinion." Tr. at 93, lines 18-21, testimony of Charles Sposato.

III

Conclusion

For the reasons set forth above, judgment shall enter in favor of Defendant James Romanella & Sons, Inc., and against Plaintiffs Dairyland, Inc. and Butterfly Realty. The claim for a prescriptive easement fails because Plaintiffs were unable to demonstrate either the elements of hostility or continuity, both of which are required to succeed in this claim. Judgment shall enter against Butterfly and for Romanella on the prescriptive easement claim.