SUPREME COURT OF NOVA SCOTIA
Citation: Cobalt Investments Ltd. v. Panko, 2012 NSSC 34

Date: 20120120
Docket: Hfx No. 346645
Registry: Halifax

Between:

Cobalt Investments Limited, a body corporate, incorporated under the laws of Nova Scotia and Halifax County Condominium Corporation No. 268

Applicants

v.

Adam Panko of 1974 Prince Arthur Street, Halifax, Nova Scotia

Respondent

Judge:	The Honourable Justice Michael J. Wood
Heard:	January 16, 2012, in Halifax, Nova Scotia
Decision:	January 20, 2012 (Orally)
Release of Written Decision:	January 23, 2012
Counsel:	John Di Costanzo, for the applicants Adam A. Panko, self-represented respondent

By the Court: (Orally)

[1] This is an application in court brought by Cobalt Investments Limited and Halifax County Condominium Corporation No. 268 against Adam Panko. The application sought an order enforcing the terms of an easement over property owned by Mr. Panko at civil address 1974 Prince Arthur Street, in Halifax, Nova Scotia. The draft order filed by the applicants indicated that the following relief was being requested:

1. An injunction restraining Mr. Panko, his tenants, agents, employees and invitees from blocking or in any way interfering with the applicants' use of the easement.

2. An order requiring Mr. Panko to remove that portion of the stone wall, garbage cans, debris and plants located on the easement.

[2] At the commencement of the hearing, counsel for the applicants withdrew their request for an order requiring Mr. Panko to remove those items allegedly located on the easement. Counsel advised that the applicants were now seeking a declaration that the easement as described in the legal description for the applicants' property was valid and enforceable.

[3] In support of their requests, the applicants filed two affidavits of Daniel Wolthausen, an officer and director of both applicants. In response, Mr. Panko filed two affidavits of his own, as well as affidavits from Nan Armour and Geraldine Lancaster, who are tenants of Cobalt and reside in the property which has the benefit of the easement.

[4] At the hearing of the application, all deponents were cross-examined, with the exception of Ms. Armour.

[5] Halifax County Condominium Corporation No. 268 is a three unit condominium located at 1980 Prince Arthur Street, in Halifax. In 2010, Cobalt Investments Limited acquired all three units in the condominium as rental investment properties. Mr. Panko acquired the adjoining property at 1974 Prince Arthur Street in 2010 and has resided there since that time.

[6] The easement in question allows access to residents of both properties along a shared driveway for purposes of accessing parking areas located to the rear of the lots.

[7] The portion of the easement in issue is located to the west of the rear line of the condominium lot. There is a large chestnut tree located on that property line. The tree is completely surrounded by asphalt surface, which represents a combination of driveway and parking spaces for the two properties. In this area, the easement covers a ten foot strip on the Panko lot. This is also the area where Mr. Panko and his tenants park their vehicles.

[8] In December, 2010, Mr. Wolthausen approached Mr. Panko and requested that he share in the cost of a commercial snow clearing service which had been retained to clear the shared driveway and parking areas. Mr. Panko indicated that he was not interested in paying for such a service.

[9] Following an exchange of e-mails, Mr. Wolthausen advised Mr. Panko on January 6, 2011 that he wanted Mr. Panko and his tenants to stop parking on the area of the easement behind the chestnut tree. This was the first time such a request had been made by the applicants to Mr. Panko.

[10] There is no evidence that as of January, 2011 any tenants of Cobalt had used or intended to use that portion of the easement behind the chestnut tree. Although these tenants use the shared driveway to access Prince Arthur Street, the evidence indicated that they veered off the easement and across the condominium lot in front of the chestnut tree to access their parking areas. Ms. Lancaster has resided in the condominium property for sixteen years and had never used that portion of the easement behind the tree for access. There is no evidence from any tenants of Cobalt that the vehicles of Mr. Panko and his tenants limited their access to their parking areas.

[11] On January 24, 2011, Mr. Wolthausen sent a further e-mail to Mr. Panko demanding that parking on the easement stop. On January 31, 2011, counsel for Cobalt wrote to Mr. Panko and repeated the request to stop parking on the easement. The letter set out a proposal on the following terms:

1. Mr. Panko and his tenants would no longer block any part of the easement.

2. Mr. Panko would contribute to the costs of snow plowing.

3. Cobalt would not take any legal action to enforce removal of the walkway, garbage cans and debris on the easement.

4. The arrangement could be terminated by either party on three months notice.

[12] The letter demanded a response within five days, failing which Cobalt would make an application for injunctive relief and costs.

[13] On February 10, 2011, having not received any response from Mr. Panko, counsel for Cobalt advised that the proposal was withdrawn and that legal proceedings would be commenced.

[14] Prior to January 31, 2011, Mr. Panko had moved his trailer to give more room for parking of vehicles for himself and his tenants in order to avoid obstructing the easement. In addition, on February 7, 2011, he advised his tenant by e-mail that her car was parked on the easement and should be moved. This request was complied with.

[15] Subsequent to receiving notice from counsel for Cobalt that the proposal of January 31, 2011 was withdrawn, Mr. Panko sent him the following e-mail:

> Please inform your client that I am not in favor of settling our disagreements through litigation. I am not interested in a dispute at all and hope to avoid one. As soon as I became aware of the possibility of trespass or blocking easements, I informed my housemates of those boundaries. I have repeated this warning to them. Please know that I do not take responsibility for their actions beyond this.
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> My position is that I have the right to pass, in equity, on the side of the tree closest to his condos in that general parking area. However, rather than establish his right in court I would prefer to simply negotiate it as a registered easement. Please inform your client that I am willing to exchange the right for his Quinpool Road residents to travel through my driveway on Prince Arthur Street, in exchange for the release of his easement in my parking area and for an easement to pass in the general parking area on the side of the tree closest to his Prince Arthur Condos.

[16] There does not appear to have been any response to Mr. Panko's proposal prior to commencement of these proceedings in April, 2011.

[17] The affidavit of Mr. Wolthausen deposed to on March 31, 2011 attaches as exhibits a number of photographs showing vehicles partially encroaching on the easement. These photographs are not dated, but Mr. Wolthausen testified that he believes they were taken in December, 2010 or January, 2011. At the time that he took these photographs, Mr. Wolthausen did not contact Mr. Panko and ask that the vehicles be moved. Mr. Panko acknowledges that the photographs do show vehicles parked on the easement, and that these are owned by himself and his tenants.

[18] Following commencement of this proceeding, Mr. Panko filed a Notice of Contest requesting that the application be dismissed primarily because the walkway, shrubs and garbage bins were not interfering with the use of the easement and the easement had not been made impassable or blocked. The Notice also denied that the applicants had been inconvenienced in any way as the easement was not required to access their property.

[19] In the summer of 2011, Mr. Panko cut trees on his property and moved his wood shelter further back from the area of the easement. The purpose and result of this work was to expand the area for parking on his property in order to ensure that vehicles did not encroach on the easement.

[20] There was no evidence of any parking on the easement or other obstruction after the winter of 2010-11, with the exception of two incidents. In July, 2011, Mr. Panko was carrying out work on his trailer over the course of a weekend. The trailer and some wood were located within the easement. At that time, Mr. Panko was not asked to move the wood or trailer, and would have done so if this request had been made. One evening in November, 2011, Mr. Wolthausen observed Mr. Panko's car hitched to the trailer and both were located within the easement. They were gone within two hours. Again, Mr. Panko was not asked to move the vehicles. There is no evidence that any tenant of Cobalt was inconvenienced on either occasion.

[21] The position of the applicants is that Mr. Panko and his tenants had obstructed the easement as described, and would not agree to keep the easement

clear at all times. As a result, they had no choice but to commence these proceedings, seeking injunctive relief.

[22] Mr. Panko says that once the easement and Cobalt's desire for access were brought to his attention in January, 2011, he took steps to make sure that this happened. This included moving his trailer, providing notice to his tenants and the physical changes made in the summer of 2011 to enlarge his parking areas. He says that at no time was any tenant of Cobalt prevented from accessing their parking.

[23] I will first deal with the request of the applicants for a declaration as to the existence of the easement.

[24] Declaratory relief is discretionary and is to be given in order to define the respective rights and obligations of parties to a dispute. *The Law of Declaratory Judgments* (3rd ed.) (Carswell, 2007) at p. 23 states:

> While the court has an extremely wide jurisdiction, it will not entertain an action or a motion seeking relief where there is no dispute between the parties, or where the dispute does not reveal any difficulty with respect to the rights vested in one of the parties. Proof of a dispute is in effect proof that judicial intervention is not only helpful but indeed necessary for resolution of the issue.

[25] In this case, there is no dispute with respect to the existence of the easement as described in the legal description to the property of the applicants.

[26] Although the notice of contest disputes that Panko obstructed the easement, it does not deny its existence. The brief, affidavits and submissions of Mr. Panko all confirm his acknowledgment of the existence of the easement. In the circumstances, there is no purpose to be accomplished by issuing a declaration confirming the easement, and I will not do so.

[27] I will now deal with the request for injunctive relief.

[28] Counsel for the applicants agrees that in order to obtain an injunction, there must be evidence of a substantial interference with the use of the easement by Mr. Panko or his tenants. The applicants say that the evidence which they have filed satisfies this requirement.

[29] With an easement, the owner of the servient tenement still has legal title to the property. As owner, they are entitled to use their property provided this does not undermine the rights of the holder of the easement. There will have to be some balancing of the respective interests of the parties in their use of this common area. In considering disputes arising out of the alleged obstruction of easements, courts will consider the degree of impact on the use of the easement and whether the obstruction is permanent or temporary. Goddard, *The Law of Easements* (8th ed.) describes the principles in the following passage from p. 501:

> Obstructions of ways may be either permanent or temporary in their character: that is, the obstacle or the means used for obstruction may be placed in the way or adopted with the intention, evident from its character, that it shall not be removed, or it may be a movable object which it may be inferred the party obstructing the way will sooner or later take away, or can be removed if occasion requires and replaced. Thus the obstruction may be caused by a fence fixed to the earth or by the ploughing up of a path or breaking down of a bridge; or it may, on the other hand, be produced by the placing of a cart or bales of goods in the middle of a road. When obstructions are permanent in their character, little difficulty can arise as to the right of action, but questions have several times arisen whether obstructions of a merely temporary character are sufficient to support an action; for temporary obstructions may be, and have sometimes been, so continually repeated as to interfere with the use of a right of way to a very serious extent, or indeed as much as permanent obstructions. ...

[30] The degree of interference necessary to trigger intervention by the court was described in *Gale on Easements* (14th ed.) at p. 352-3 as follows:

> As regards the disturbance of private rights of way, it has been laid down that in a public highway any obstruction is a wrong if appreciable, but in the case of a private right of way the obstruction is not actionable unless it is substantial. ... In deciding what is a substantial interference with the dominant owner's reasonable user of the way, all the circumstances must be considered; for example, the reciprocal rights of the persons entitled to use the way; also the case of persons carrying burdens along the way. ...

[31] These authorities indicate that in order to succeed, the applicants must prove that the actions of Mr. Panko and his tenants in temporarily obstructing the easement amounted to a substantial interference in the use of that easement. What is substantial will be a question of fact that needs to be determined in all of the circumstances.

[32] Justice Hart in *Miller v. MacLean*, 7 N.S.R. (2d) 371 dealt with a dispute between the parties entitled to the shared use of a right of way. There was significant evidence of various actions taken, which had the effect of interfering with the use of the easement. After referring to the principles set out in Goddard and Gale, the Court made the following comments at paras. 54 and 55:

> [54] The natural user of an easement such as this would, in my opinion, include the right to a temporary parking of vehicles but would not permit the semi-permanent or permanent obstruction of any part of the way. Nor would it permit the use of the right-of-way for an purpose other than ingress and egress to and from the points of termination.
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> [55] The parking and dismantling of old vehicles in the area of easement, the deposit of brush and logs in the cul-de-sac, the playing of hockey or other games and the placing of lunch boxes on the roadway and the blocking of the roadway are not activities which would be permitted within a proper construction of the reasonable use of the easement. The carrying out of this type of activity by the defendants and their children amount to a substantial interference with the plaintiffs' lawful right to use the Private Access Road.

[33] In considering the evidence before me, I am satisfied that the parking of vehicles on the easement which took place in December, 2010 and January, 2011 could amount to a substantial interference with the use of the easement. In some photographs, it is clear that the easement was completely obstructed. What is not clear is how long these obstructions remained in place, or whether anyone was, in fact, inconvenienced in any way.

[34] Obstructions of the nature shown in the photographs could justify injunctive relief if they occur with any degree of regularity. It should not be up to the applicants, as the beneficiaries of the easement, to respond after the fact when their rights have been interfered with. If they can satisfy the Court that there has been substantial interference with their rights, and there is a risk that this will continue, they should be granted an injunction.

[35] It is important to remember that an injunction is discretionary and intended to prevent future harm, where the risk of that harm has been clearly established. Here, the only alleged obstructions of the easement in the last ten months are the two incidents in July and November, 2011 previously described. In my view, these

activities do not represent substantial interference with the rights of the applicants. They were temporary and consistent with Mr. Panko's right to use his own property. Mr. Panko indicated that he would have moved the vehicles and wood if necessary, but he was never asked to do so.

[36] Mr. Panko testified that he will not obstruct the easement, and his actions indicate that he has taken steps to ensure this. Counsel for the applicants argues that these actions are only the result of this proceeding and the threat of court intervention. That may be true, but Mr. Panko is clearly on notice that he must be diligent to ensure that the rights of the applicants are respected.

[37] In all of the circumstances, I am not satisfied that an injunction is necessary to protect the interests of the applicants, and so will not grant the order sought. Should Mr. Panko not live up to his assurances to respect the applicants' right to use the easement and the matter return to court, it may very well be that the applicants will be granted an injunction.

[38] As a footnote, I want to make the observation that it is unfortunate that this matter had to proceed as far as it did. What started as a request to share snow clearing expenses, has led to a dispute over matters which do not appear to have previously been in issue. The reality is that these parties are neighbours, with a shared driveway. Such an arrangement is not particularly unusual on the peninsula of Halifax. I was struck by the testimony of Ms. Lancaster, who indicated that she had a great deal of respect for both Messrs. Wolthausen and Panko, and considered them to be honourable persons. That was my impression as well, and I would encourage them to work together in order to find a solution to their differences, which does not require the further expenditure of significant resources on litigation.

[39] After hearing submissions from the parties and considering the various offers of settlement, I award costs to the respondent in the amount of $350.00.

Wood, J.