SUPREME COURT OF NOVA SCOTIA
Citation: Balser v. Wiles, 2013 NSSC 278

Date: 20130205
Docket: Ann No. 407756
Registry: Annapolis Royal

Between:

Eleanor W. Balser

Plaintiff

v.

Tara L. Wiles, Joseph Reginald Peck

Defendant

Judge:	The Honourable Justice John D. Murphy
Heard:	February 5, 2013 in Annapolis Royal, Nova Scotia
Written Decision:	September 10, 2013 *{Oral decision rendered February 5, 2013}*
Counsel:	Eleanor W. Balser, plaintiff in person Tara L. Wiles and Joseph Reginald, defendants, in person

By the Court:

BACKGROUND

[1] The parties are neighbours who own adjacent residential properties in Bear River, Nova Scotia. A dispute arose between them as to the correct boundary lines of their properties.

[2] The controversy involves a 12-foot strip of land. In 1979, the Applicant's mother, the previous owner of her property, built a garage that extends onto six of the disputed 12 feet. The remaining six feet south of the garage serve as the Respondents' driveway.

[3] The Applicant brought this proceeding claiming that she held valid legal or "paper" title to the 12 feet of land. In the alternative, she claimed possessory title to the land by operation of the doctrine of adverse possession.

[4] By oral decision on February 5, 2013, I ruled that the Respondents had valid legal title to the land. However, the Applicant has established possessory title to the six feet upon which part of the garage was built through the open, notorious, continuous and exclusive occupation of that portion of the land for a period of 20 years. As a result, the Respondents' claim to six feet of the land, as against the Applicant, has been extinguished.

[5] In my decision, I noted that it was in the best interest of both parties that the Applicant be able to maintain the garage. I informed the parties that I would consider whether the Applicant has any entitlement at law to possession of or access to a portion of the remaining six feet in order to maintain the garage. The following supplemental finding will resolve this issue.

ISSUE

[6] *Is the Applicant entitled to possession of or access to a portion of the remaining six feet of land?*

LAW & ANALYSIS

[7] Having determined the issue of title to the land beneath the garage, the only outstanding issue is the extent, if any, of the Applicant's rights with respect to the remaining six feet of property beside the garage.

[8] I am not satisfied that the Applicant's use of this land was ever of the continuous and exclusive nature required to establish possessory title to any part of the remaining six feet. The Applicant has, however, adduced sufficient evidence to establish an easement in the form of a right-of-way that will allow her to access the first four feet of land beside the garage for the purpose of maintaining the structure.

[9] Charles Macintosh's *The Nova Scotia Real Property Practice Manual*, loose-leaf, (Markham: LexisNexis Canada Inc., 1988-2013) defines an easement as follows at p.13-51:

> An easement is a right one landowner has to utilize land belonging to another and imposes a burden on that land for the benefit of the owner of the land to which the easement is attached.

[10] The four essential characteristics of an easement are set out in Anne Warner La Forest, *Anger and Honsberger: The Law of Real Property*, loose-leaf, 3rd Edition (Toronto: Canada Law Book Ontario, 2012) at p.17-3:

> (a) There must be a dominant and a servient tenement;
>
> (b) An easement must accommodate the dominant tenement;
>
> (c) The dominant and servient owners must be different persons; and
>
> (d) A right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.

[11] An easement can be established through long-time use and enjoyment by one of two means. The first is by the operation of s.32 of the *Limitation of Actions Act*, R.S.N.S. (1989) c.258:

> No claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of twenty-five years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by deed or writing. R.S., c. 258, s. 32; 2001, c. 6, s. 115.

[12] The other method for establishing an easement based on use and enjoyment is by application of the doctrine of lost modern grant. The *Nova Scotia Real Property Practice Manual*, *supra*, describes the doctrine of lost modern grant at p.13-95:

> The doctrine of modern lost grant is a judge-created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant has been made when the enjoyment began, but the deed granting the easement has since been lost. However, the presumption may be rebutted.
>
> The doctrine predates and is an alternative to a finding that a right has arisen by prescription. The doctrine is based upon usage, not a real grant.

[13] The requirements for establishing an easement under the limitations statute or the doctrine of lost modern grant are the same. In **Mason v. Partridge**, 2005 NSCA 144, at para.18, the Nova Scotia Court of Appeal adopted the following passage from the Ontario Court of Appeal's decision in **Henderson v. Volk**, (1982) 35 O.R. (2d) 379:

> 14. It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the Limitations Act. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.

[14] The claimant must also establish that the use was made without violence, secrecy or evasion, and without consent or permission of the servient owner: **Mason v. Partridge**, *supra*, at paras.19-22.

[15] In view of the serious consequences for the servient property owner, a prescriptive easement will be found only where there is clear evidence of both continuous use and acquiescence in such use by the owner of the servient property: **Henderson v. Volk**, *supra*, at para.21.

[16] I am satisfied that the persons who built the garage in 1979 would necessarily have accessed the land beside where the structure was constructed. In

the following few years, maintenance requirements would have been minimal. However, affidavit evidence indicates that by 1988, the Applicant and her mother were carrying out general maintenance of the garage by accessing the south and west sides of the garage. Since the property was conveyed to her in 1995 until the Spring of 2012, the Applicant and her husband have mowed the grass on the south side of the garage, painted the garage, replaced the roof shingles, and fixed a hole in the south wall of the garage.

CONCLUSION

[17] I find that these entries by the Applicant, her mother and her husband upon the Respondents' property were sufficient to create an easement in the form of a right-of-way over a portion of the land. Specifically, a right-of-way has been created over the four-foot strip of land immediately beside the garage, starting at the back of the garage and ending at the street. I have determined four feet to be the proper width of the easement, as that distance corresponds to the Annapolis County set back requirement from a property line for a wooden accessory building wall without windows or doors, and it should provide adequate room for the Applicant to maintain the garage without undue intrusion upon the Respondents' property.

[18] The Applicant's use of the easement is limited to the performance of reasonable maintenance and repair of the garage and must not unreasonably interfere with the use and enjoyment by the Respondents of their property. The Applicant must provide the Respondents with 24 hours notice of her intention to exercise her right of access to their land.

[19] As a result of this decision, the position of the garage in relation to the surrounding property lines is no better and no worse than it was before the filing of this application.

COSTS

[20] As no party was represented by legal counsel at the hearing, and success is divided, the parties shall bear their own costs.

J.