SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0171-16T3

XIAOFEI WANG,

Plaintiff-Respondent,

v.

MEI-YU TSAI,

Defendant-Appellant.

Argued November 13, 2017 - Decided January 12, 2018

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. C-89-14.

Carl G. Archer argued the cause for appellant (Archer Law Office, LLC, attorneys; Carl G. Archer, of counsel and on the briefs).

Donald M. Doherty, Jr., argued the cause for respondent.

PER CURIAM

Defendant Mei-Yu Tsai appeals from a final decision on cross-motions for summary judgment declaring the continued existence of a right of way between her property and that of her

neighbor, plaintiff Xiaofei Wang, and ordering her to remove the fence obstructing plaintiff's access to their shared drive. We affirm, substantially for the reasons expressed by Judge Innes in his June 30, 2016 written opinion.

The essential facts are undisputed. The parties own adjoining properties on Park Place in Princeton Borough. Both properties were once part of a larger parcel that fronted on Nassau Street. Although there is no record of subdivision, in 1922 the owner of the parcel split off and conveyed defendant's lot, reserving to the "centre line of a strip of land, 7 feet wide . . . for a right of way." The following year, again without evidence of subdivision, the owner split off and conveyed plaintiff's lot, reserving to the center of the same strip of land for a right of way. The right of way appears in each deed in both parties' chains of title, although described in plaintiff's deed as "a 7 foot wide common alley."

Defendant acquired her property in 2004. Plaintiff acquired his property in 2013. Both are improved by multi-family dwellings. Defendant's backyard is taken up entirely by a graveled parking area. Plaintiff's backyard is paved with asphalt, as is the shared right of way. Defendant claims the right of way has not been used for vehicular access to either property during her ownership. Although tenants of her building

park in her backyard, they apparently drive through a parking lot for a business on Nassau Street to do so.

Shortly after plaintiff purchased his property, defendant erected a chain link fence down the center of the right of way without plaintiff's knowledge or consent. After the fence went up, the Borough removed the right of way's curb cut to Park Place. After plaintiff's repeated attempts to have defendant remove the fence were unsuccessful, he sued.

Following discovery, the parties filed cross-motions for summary judgment. In a cogent, well-reasoned opinion, Judge Innes found "no ambiguity" in the parties' common predecessor in title having "reserved a right of way in the seven foot wide strip of land between the two lots," which continued "to burden the properties with every transfer of title" and of which defendant was on notice pursuant to N.J.S.A. 46:26A-12. He found defendant adduced no evidence that plaintiff had ever abandoned his interest in the easement. Finally, because the grantor placed no limitation on the easement, the judge found "it is available as a general way," see Nat'l Silk Dyeing Co. v. Grobart, 117 N.J. Eq. 156, 165-66 (Ch. 1934), which on account of its seven-foot width, paved surface leading to parking areas behind both houses and former curb cut to Park Place, supported its use for "ingress and egress of plaintiff's car."

Defendant appeals, contending there were material disputes of fact precluding judgment for plaintiff, including whether the easement was one in gross or an easement appurtenant and whether it had been abandoned. She also argues that plaintiff was without standing to enforce the easement. None of these arguments merits extended discussion. See R. 2:11-3(e)(1)(E).

As Judge Innes carefully explained, the right of way at issue here was created by express reservation in the deeds conveyed to the parties' predecessors in title and appears in the deeds of both chains with each transfer. Accordingly, there is no question but that it is an easement appurtenant. See Rosen v. Keeler, 411 N.J. Super. 439, 450-51 (App. Div. 2010). Defendant argues it cannot be an easement appurtenant because the reservation was to benefit the grantor's retained lands on Nassau Street, which when the Park Place lots were conveyed lost its utility. Leaving aside that the case on which defendant relies for that argument, Leach v. Anderl, 218 N.J. Super. 18, 26 (App. Div. 1987), involved an appurtenant easement by necessity, instead of by express grant as is the case here, the facts do not support her argument.

First, far from falling into inutility, the right of way reserved between the parties' two lots only became useful to the grantor when conveyance of the parties' lots cut off his access

to Park Place. It was only after he had conveyed plaintiff's lot that the former owner would have needed a right of way through other's lands to access Park Place. Second, defendant's lot was created before plaintiff's lot. Accordingly, when he created defendant's lot, the grantor still retained what would become plaintiff's land as part of the dominant tenement. The law is well settled that "those who succeed to the possession of each of the parts into which a dominant tenement may be subdivided thereby succeed to the privileges of use of the servient tenement authorized by the easement." Krause v. Taylor, 135 N.J. Super. 481, 486 (App. Div. 1975) (quoting Restatement (First) of Prop.: Easements Appurtenant § 488 (Am. Law Inst. 1944)). Accordingly, the court was correct to find plaintiff's property the dominant tenement,[1] giving plaintiff standing to sue to enforce his right to use the easement. See Khalil v. Motwani, 376 N.J. Super. 496, 500 (App. Div. 2005).

As for abandonment, because defendant was the party asserting abandonment, the burden was on her to "present clear and convincing evidence of an intention on the part of the owner to abandon the easement," mere non-use is insufficient. See

[1] Plaintiff has not contended that defendant is without a reciprocal right to use the right of way between the properties. Accordingly, we do not address the issue.

Fairclough v. Baumgartner, 8 N.J. 187, 190 (1951). Because defendant's proofs on abandonment, viewed in the light most favorable to her, demonstrated, at best, only a short period of non-use by plaintiff's immediate predecessor, summary judgment on that issue was appropriate. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995) (courts deciding summary judgment motions are required to evaluate the evidence on the motion in light of the burden of persuasion that applies at trial).

Finally, we are satisfied the court was correct that the reserved right of way, having no restriction, "is available as a general way for all purposes to which the dominant tract might be devoted," Caribbean House, Inc. v. N. Hudson Yacht Club, 434 N.J. Super. 220, 227 (App. Div. 2013) (quoting Leasehold Estates, Inc. v. Fulbro Holding Co., 47 N.J. Super. 534, 551 (App. Div. 1957)), including ingress and egress by car.

Accordingly, we affirm the grant of summary judgment to plaintiff, substantially for the reasons expressed by Judge Innes in his clear and comprehensive written opinion of June 30, 2016.

Affirmed.