

STATE OF MAINE  
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT  
Location: Portland  
Docket No. BCD-RE-11-03

TESTA'S, INC.,

Plaintiff/Counterclaim Defendant,

v.

## DECISION AND JUDGMENT

JACK COOPERSMITH, et al.,

Defendants/Counterclaim Plaintiffs,

and

THOMAS J. TESTA, JR., ANNA T. STRIEFEL,  
MLS PROPERTIES, LLC, and JOAN PURCELL,

Parties-in-Interest

On September 9 – 11, 2013, this matter was tried to the Court on Plaintiff's Complaint and Defendants' Counterclaim. The central issue generated by the complaint and counterclaim is whether Defendants' property benefits from an easement over Plaintiff's property in Bar Harbor, Maine.<sup>1</sup> After consideration of the evidence, the Court makes the following findings:

### Findings of Fact<sup>2</sup>

1. Plaintiff owns certain real property located on Main Street in Bar Harbor, Maine, which consists of several contiguous lots (the Testa property).

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<sup>1</sup> At the trial, Plaintiff withdrew its claim under the Unfair Trade Practices Act.

<sup>2</sup> The Court will set forth some of the basic facts established at trial. The enumerated facts are not, however, an exhaustive list of all of the Court's factual findings. As part of the Court's analysis in the Discussion section that follows, the Court makes additional findings.

2. Defendants also own certain property on Main Street in Bar Harbor, Maine, which property they acquired by deed dated November 1, 2005 (the Coopersmith property).

3. The Coopersmith property includes a retail business with space for parking immediately behind the building.

4. The deed to the prior owners of the Coopersmith property included a right of way over adjoining property, at least a portion of which is now the Testa property, to permit access to the rear of the Coopersmith property. The Coopersmiths' deed also includes a grant of a right of way.

5. The Coopersmiths' predecessors-in-title accessed the rear of their property over the Testa property for business deliveries and other purposes.

6. In the 1970's, Plaintiff's predecessor-in-title developed plans to expand the parking area behind the Testa property and the Coopersmith property. The expansion included the construction of a concrete wall that would prevent the owners of the Coopersmith property from accessing the rear of their property in the manner they were accustomed.

7. Philip and Nathan Sanborn were the owners of the Coopersmith property at the time of the proposed construction of the concrete wall. Catherine Riccardo was the record owner of real property that abutted the Coopersmith property along Main Street. Ms. Riccardo's daughter, Joan Purcell, operated a retail business out of the building on the property (the Purcell property).

8. Philip and Nathan Sanborn, together with Joan Purcell and Catherine Riccardo, commenced a lawsuit on September 9, 1977, in Hancock County Superior Court against Joseph and Michele Testa, the then owners of the Testa property, in an effort to prevent the construction of the concrete wall (the lawsuit). They alleged that the construction would interfere with their rights of way. On September 29, 1977, the court entered a temporary restraining order

prohibiting the defendants in the case (the Testas) from interfering with the access of the plaintiffs to their property.

9. During the course of the lawsuit, the Sanborns and Riccardo negotiated an agreement with Joseph and Michele Testa, Jr., by which agreement the Sanborns and Riccardo would be able to access the rear of their properties over a portion of the Testa property.

10. Joseph Testa, Michele Testa, Jr., Philip Sanborn, and Nathan Sanborn signed the agreement in June 1978. The court's record does not reflect any court activity after the execution of the agreement by the Sanborns and the Testas. Catherine Riccardo did not sign the agreement. Ms. Riccardo's failure to sign the agreement was not the result of any objection that she had to the terms of the agreement. Given that the parties undertook no further action regarding the lawsuit after June 1978, and given that after June 1978, Ms. Purcell, the occupant of the parcel owned by Ms. Riccardo, accessed the rear of the Purcell property over the Testa property, Ms. Riccardo assented to the terms of the June 1978 agreement.

11. The Hancock County Superior Court dismissed the lawsuit on October 15, 1980, pursuant to M.R. Civ. P. 41(b) for failure to prosecute the lawsuit.

12. After the execution of the agreement in 1978, the Sanborns, their successors-in-title, and Ms. Purcell accessed the rear of their property over the Testa property in a manner consistent with the parties' agreement.

13. The deeds in the chain of title to the Coopersmith property and the Purcell property include language that provides for a right of way over a portion of the parking area currently owned by Plaintiff.

14. In or about 2010, the Town of Bar Harbor passed an ordinance that eliminated the need for businesses to have a minimum amount of parking space available for customers. This

change made the parking area behind the Coopersmith property and the Purcell property available for potential development.

15. From time to time after their purchase of the Coopersmith property, Defendants' ability to access their property from the rear of the building has been hindered.

#### Discussion

In this action, both parties request that the Court enter a declaratory judgment regarding Defendants' assertion of an easement over Plaintiff's property for the benefit of the Coopersmith property. Defendants also seek to recover damages for Plaintiff's alleged nuisance and unreasonable interference with Plaintiff's easement rights. The Court will first address the parties' request for declaratory judgment.

At trial, both parties presented evidence regarding the right of way or easement language in the chain of title to the Coopersmith property and the Purcell property. In addition, the parties submitted evidence as to the historical use of the parking area behind the Coopersmith and Purcell properties. Through the historical evidence, Defendants attempt to establish the existence of a prescriptive easement over the Testa property. As explained below, after consideration of the evidence, the Court concludes that Defendants have an appurtenant easement over the Testa property from Main Street to the rear of the Coopersmith property as the result of the June 1978 agreement by which the parties' predecessors in title resolved the lawsuit.<sup>3</sup>

The lawsuit was commenced as the result of the efforts of Plaintiff's predecessors-in-title to construct a wall that would prevent Defendants' predecessors-in-title from accessing their property over the Testa property. In the lawsuit, Defendants, Ms. Riccardo and Ms. Purcell

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<sup>3</sup> Because the Court concludes that the parties' agreed to an express easement in June 1978, the Court does not address Defendants' contention that they have an express easement by deed, a prescriptive easement, or a quasi-easement.

maintained that they had a legal right to cross the Testa property to access Defendants' property. The only logical conclusion is that the parties negotiated a resolution of the lawsuit, which agreement would allow Plaintiff's predecessor-in-title to complete construction of the parking lot, including the wall, and allow Defendants' predecessor-in-title to continue to have access to the rear of their property. Consistent with this conclusion, the Court record contains no reference to any substantive action in the case after the Testas and Sanborns signed the agreement in June 1978. Given that the parties' reached a resolution of the access issues to resolve the lawsuit, the parties' failure to object to the dismissal of the action pursuant to M.R. Civ. P. 41(b) is not surprising.

Despite the fact that Plaintiffs' predecessors-in-title signed the June 1978 agreement that ended the lawsuit, Plaintiffs contend that the agreement is not valid because Catherine Riccardo did not sign the agreement. First, Ms. Riccardo's signature was not necessary to establish an enforceable agreement between the Testas and the Sanborns. In other words, the Testas and the Sanborns are the only necessary parties to establish an easement over the Testa property for the benefit of the Coopersmith property. Thus, all parties necessary to establish an easement over the Testa property for the benefit of the Coopersmith property signed the agreement.

Furthermore, if Ms. Riccardo's assent to the agreement was necessary, the Defendants have established that she consented to the terms of the agreement. In essence, Plaintiff argues that even though its predecessors-in-title, Joseph Testa and Michele Testa, Jr., negotiated and signed the agreement, acted in accordance with and abided by the terms of the agreement, the Court should invalidate the agreement because Ms. Riccardo did not sign and thereby did not consent to the terms of the agreement.

The absence of Ms. Riccardo's signature on the agreement is not the result of her objection to any of the terms of the agreement. Indeed, there is no evidence that Ms. Riccardo expressed to any person that she had any concerns about the terms of the agreement.

The evidence in fact demonstrates that Ms. Riccardo consented to and, through her daughter who occupied the property, endorsed and acted in accordance with the terms of the agreement. Ms. Riccardo was an owner of the property in name only. Ms. Riccardo's daughter, Joan Purcell, transferred the property to Ms. Riccardo as part of her effort to protect the asset should her husband incur any future liability.<sup>4</sup> Ms. Purcell, who occupied the Purcell property at all pertinent times, testified that she understood that the parties ended the lawsuit with an agreement that permitted her to access the rear of the property from Main Street over the Testa property. Ms. Purcell continued to operate a business out of the property until she sold the property to Defendants in 2012. While occupying the Purcell property, in accordance with the terms of the June 1978 agreement, Ms. Purcell continuously accessed the rear of the property from Main Street over the Testa property. Simply stated, Plaintiff's contention that the agreement is invalid because Ms. Riccardo did not assent to the terms of the agreement is not supported by competent, reliable evidence.

In this case, Plaintiff has asserted that if the June 1978 agreement is valid, it only conveyed a personal license to the Sanborns. That is, Plaintiff contends that the interest did not run with the land and, therefore, Defendants are not the beneficiaries of the right of way. "The construction of language creating an easement is a question of law." *Anchors v. Manter*, 1998 ME 152, ¶ 16, 714 A.2d 134, 138 (citing, *Fine Line, Inc. v. Blake*, 677 A.2d 1061, 1063 (Me.

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<sup>4</sup> Ms. Purcell testified that after her husband had been involved in a motor vehicle accident, she became concerned that if her husband were involved in a future accident in which a person was injured, the property could be at risk. She testified, therefore, that she transferred the property to her mother to avoid exposure for any claims that might arise as the result of her husband's future conduct.

1996)).<sup>5</sup> The legal question is whether in the Court's view, Defendants obtained an appurtenant easement over the Testa property or whether their predecessors merely obtained an easement personal to the grantees.<sup>6</sup>

"The traditional rules of construction for grants or reservations of easements require that whenever possible an easement be fairly construed to be appurtenant to the land of the person for whose use the easement is created." *Anchors v. Manter*, 1998 ME 152, ¶ 10, 714 A.2d 134, 138 (quoting, *LeMay v. Anderson*, 397 A.2d 984, 987 (Me. 1979)). Not insignificantly, the expert witnesses for both the Plaintiff and Defendants opined that if valid, the agreement conveyed an appurtenant easement. The indicia of an appurtenant easement are clearly present in the agreement. Perhaps most importantly, use of the right of way as expressed in the agreement is not limited to a specific person or persons, which is an essential distinguishing feature between a easement in gross (i.e., a personal easement) and an easement appurtenant. *Wentworth v. Sebra*, 2003 ME 97, ¶¶ 12, 13, 829 A.2d 520, 524. In particular, the agreement provided that the right of way could be used by the "[Sanborns' and Riccardo's] immediate families, for delivery purposes or persons occupying said land of Sanborn and Riccardo under a written lease." In the Court's view, consistent with the only expert testimony presented at trial, this language plainly

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<sup>5</sup> Plaintiff argued that the agreement could be read to convey a license, and, therefore, the agreement was ambiguous and Plaintiff should be able to present the testimony of the Testas' counsel as to his intent when drafting the agreement. Given that the expert witnesses for the Plaintiff and Defendants agreed that the agreement conveyed an appurtenant easement, and given the plain language of the agreement, the Court determined, contrary to Plaintiff's argument, that the agreement was not ambiguous. In addition, the Court was not convinced that the intent of the Testas' counsel in drafting the agreement was relevant. The Court, therefore, excluded the testimony of Testas' counsel.

<sup>6</sup> "The law recognizes two different types of easements or rights of use over the property of another: easements appurtenant and easements in gross. Grantors create easements appurtenant to benefit a dominant estate and such easements run with the land. To be appurtenant, the easement must be attached or related to a dominant estate. In contrast, easements in gross are personal interests in land or the right to use another's land. They are not appurtenant to any estate in land and do not belong to any person by virtue of his ownership of an estate in other land. An easement in gross is generally not assignable and terminates upon the death of the grantee." *Wentworth v. Sebra*, 2003 ME 97, ¶¶ 12, 13, 829 A.2d 520, 524.

creates an interest that benefitted the Coopersmith property and the Purcell property and was not, as Plaintiff argues, an interest granted only to Philip Sanborn, Nathan Sanborn and Catherine Riccardo.

Plaintiff also argues that in the event the Court determines that the parties entered into a binding agreement in June 1978, the agreement is terminated because Defendants abused the easement. In support of its contention, Plaintiff cites the term of the June 1978 agreement that provides, “[a]ny abuse of the access given hereunder by Sanborn [Defendants’ predecessor] or Riccardo shall terminate and cancel this Agreement with respect to the party abusing said access.]” Plaintiff asserts that Defendants abused the easement because either Defendants or those performing work for Defendants parked in or used portions of the parking area that were beyond the scope of Defendants’ rights of access.

Plaintiff’s argument is unpersuasive. Plaintiff presented photographs that depicted the temporary use in May 2013 of portions of the parking area by contractor’s or others who were arguably Defendants’ agents. Even if Plaintiff were to prove that Defendants were responsible for some or all of the use of the parking lot as depicted on the photographs, Plaintiff has not established sufficient grounds to terminate the agreement. The agreement does not permit termination in the event of isolated, limited, use that might extend beyond the use contemplated by the agreement. The fact that the conduct occurred well before the tourist season began in earnest further convinces the Court that the alleged conduct does not constitute abuse.

In their counterclaim, Defendants assert claims of nuisance and unreasonable interference with easement rights. To prevail on their common law nuisance claim, Defendants must establish that “(1) the [counterclaim] defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use; (2) there was some interference with the



use and enjoyment of the land of the kind intended, although the amount and extent of that interference may not have been anticipated or intended; (3) the interference that resulted and the physical harm, if any, from that interference proved to be substantial ... The substantial interference requirement is to satisfy the need for a showing that the land is reduced in value because of the defendant's conduct; and (4) the interference that came about under such circumstances was of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land." *Charlton v. Town of Oxford*, 2001 ME 104, ¶ 36, 774 A.2d 366, 377.

Here, while Defendants introduced evidence that on occasion one of Plaintiff's employees parked in an area that interfered with Defendants' ability to access their property, the Court is not convinced that Plaintiff's employee acted at the direction of the Plaintiff in an effort to interfere with Defendants' access. In addition, Defendants have not proven by competent, reliable evidence that they have suffered monetary damages, including a diminution in value of Defendants' property, as the result of Plaintiff's interference with Defendants' access. Defendants, therefore, cannot prevail on their nuisance claim. For the same reasons, Defendants cannot prevail on their claim of unreasonable interference with their easement rights.

#### Conclusion

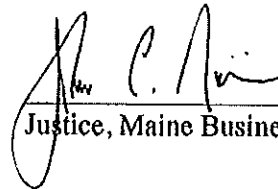
Based on the foregoing analysis, the Court orders:

1. On the parties' request for declaratory judgment, the Court determines that the June 1978 agreement grants an appurtenant easement from Main Street over the Testa property to the rear of the Coopersmith property and the Purcell property, which easement is for the benefit of the Coopersmith property and the Purcell property.

2. On Counts II and III of Defendants' Counterclaim, the Court enters judgment in favor of Plaintiff and against Defendants.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Judgment into the docket by reference.

Date: 10/1/13

  
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