

Mar 22 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)
 BCE 2015 LLC,)
 Plaintiff,)
)
 vs.)
)
 YVONNE C. KNIGHT and)
 ELEANOR C. BROWN,)
 Defendants.)

**IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO.: 2018-CP-08-00344**

AMENDED ORDER

This action was commenced by the Plaintiff on February 21, 2018, with the filing of a summons and complaint wherein the Plaintiff asked the Berkeley County Court of Common Pleas to issue a decree confirming and/or establishing a fifty (50") foot ingress/egress easement in favor of Plaintiff over and through certain real property owned by the Defendants, Yvonne C. Knight and Eleanor C. Brown.

This matter was referred to this court by an Order of Reference issued by the Berkeley County court of Common Pleas on February 3, 2020. This matter came on to be heard by me on September 15, 2022. The Plaintiff appeared at the hearing by and through its managing member, Jason Maxwell, and was represented by its attorney, John J. Dodds, III, of the Charleston County Bar. The Defendants were present and were represented by their attorney, H. Ronald Stanley, of the Richland County Bar.

It appears from the evidence and testimony presented at the trial of this matter that the Plaintiff is the owner of a tract of unimproved land containing approximately 22 acres that the Plaintiff purchased at a Berkeley County Tax Sale on November 16, 2015. The defaulting taxpayers were the heirs of Lottie Taucer. Upon failure of the heirs of Lottie Taucer to redeem the property from the tax sale within one (1) year from

the date of the sale, the Berkeley County Treasurer conveyed the property to the Plaintiff, BCE 2015 LLC, on March 9, 2017, and Plaintiff's deed was recorded in the office of the Register of Deeds for Berkeley County on April 10, 2017 in record book 2435 at page 335. The property that was purchased by the Plaintiff at the tax sale is landlocked with no means of ingress and egress and was landlocked at the time of the tax sale. Plaintiff's property is identified as Tax Map Number: 1230002038.

Defendants, Yvonne C. Knight and Eleanor C. Brown, are the owners of a 38.59 acres tract of unimproved land which adjoins the property owned by the Plaintiff on the south side of Plaintiff's property. The property owned by the Defendants is identified as tax map number 1230002001 and is bordered on the south by a public paved road known as Old Cherry Hill Road. Specifically, what the Plaintiff is seeking in this case is access to Old Cherry Hill Road by crossing the property owned by the Defendants.

In its complaint, the Plaintiff alleges that it has no access to its property except over and through an unimproved dirt road running through the property owned by the Defendants. The Plaintiff further alleges that it is entitled to a judicial declaration granting Plaintiff a fifty (50') foot easement for ingress and egress. The Plaintiff does not plead, allege or assert in its complaint the legal basis, principle or theory under which it is entitled to an easement over and through the Defendants' property.

At the trial of this case, the Plaintiff, by and through the testimony of its managing member, Jason Maxwell, asserted that Plaintiff's claim for entitlement to an easement was based upon the law of implied easement by prior use, upon Plaintiff's right to claim a prescriptive easement and upon plaintiff's right to claim an easement by necessity.

The law in South Carolina is well settled that if a Plaintiff is asserting the right to an easement by prior use, the Plaintiff must establish the following elements: (1) unity of title; (2) severance of title; (3) the prior use was in existence at the time of the unity of title; (4) the prior use was not merely temporary or casual; (5) the prior use was apparent or known to the parties; (6) the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use; and (7) the common grantor indicated an intent to continue the prior use after severance of title. *Boyd v. BellSouth*, 369 SC 410, 633 SE 2d 136 (S. Ct. 2006).

In the case at bar, the Plaintiff is claiming that the unity of title occurred when the Plaintiff's property and the Defendants' property were both part of a 300-acre tract of land owned by P.D. Meree. The Plaintiff alleges that P. D. Meree received 300 acres of land under the last will and testament of William Meree. There is no deed conveying the 300 acres to P. D. Meree. On February 6, 1882, it appears that Paul D. Meree, who Plaintiff alleges is the same person as P. D. Meree, conveyed out of the 300-acre tract what was described as a 30-acre tract of land to Nero Smalls. Nero Smalls was the great great grandfather of the Defendants. The Plaintiff maintains that the property conveyed to Nero Smalls is the same property now owned by the Defendants which is subject of this action. On February 29, 1884, the Plaintiff maintains that P. D. Meree conveyed out of the 300-acre tract of land what was described as a 29 3/4 acre tract of land to Jupiter Tate. The Plaintiff maintains that the property conveyed to Jupiter Tate in the above described conveyance is the same property as the property now owned the Plaintiff which is subject of this action.

Based upon the above mentioned conveyances by Paul D. Meree and P. D. Meree, who appears to be the same person, it appears plausible to conclude that there was unity of title to the two tracts of land that are subject of this action prior to February 6, 1882. It also appears plausible to conclude that the severance of title, which is the second element that the Plaintiff must prove, occurred on February 6, 1882, when the 30-acre tract of land was conveyed to Nero Smalls. The difficulty for the Plaintiff in this case, however, appears to be providing any evidence or testimony regarding elements 3, 4, 5, 6 and 7.

Under the established case law, the third element that the Plaintiff must prove to establish the right to an easement by prior use is that "the prior use was in existence at the time of unity of title." There is no testimony or evidence in this case to prove that the unimproved dirt road running through Defendants' property existed at the time of unity of title. Even if the unimproved dirt road did exist at the time of unity of title, there is no evidence or testimony in the record of this case to show who, if anyone, was using the unimproved dirt road for ingress and egress to the property now owned by the Plaintiff. With no evidence or testimony being presented to show specifically who, if anyone, was using the dirt road on Defendants' property to access the property now owned by the Plaintiff at the time that the property was owned by a common owner, the Plaintiff cannot establish the third element for claiming an implied easement by prior use.

The fourth element that the Plaintiff must establish is that "the prior use was not merely temporary or casual." As previously stated, there is no evidence or testimony in the record to show who, if anyone, was using the unimproved dirt road running through Defendant's property for ingress and egress to the property now owned by Plaintiff. It

therefore follows that if there is no testimony or evidence in the record to prove that there was any prior use being made of the dirt road to gain access to the property now owned by the Plaintiff, the Plaintiff certainly cannot carry its burden of showing that there was prior use of the dirt road that was not merely temporary or casual. The Plaintiff has failed to establish the fourth element for claiming an easement by prior use.

The fifth element requires the Plaintiff to prove that “the prior use was apparent or known to the parties”. The Plaintiff came into ownership of its property on April 10, 2017. The Plaintiff’s managing member, Jason Maxwell, testified that he had no knowledge of the two (2) tracts of land which are subject of this action prior to Plaintiff’s purchase of its property identified as Tax Map Number 1230002038. Since Plaintiff’s personal knowledge of any prior use that was made of the unimproved dirt road was limited to the five (5) years that the Plaintiff has owned its property, it was incumbent upon the Plaintiff to present evidence and testimony from prior owners to establish what prior use was apparent and known to the parties. The Plaintiff presented no testimony or evidence from any prior owners of the property now owned by the Plaintiff or from anyone at all who previously used the dirt road for ingress and egress to Plaintiff’s property. Therefore, the Plaintiff has not and cannot establish the fifth element which requires a showing that the prior use of the dirt road on Defendants’ property for gaining access to the property now owned by the Plaintiff was apparent and known to the parties.

The sixth element that the Plaintiff must establish is that “the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use.” In the case at bar, the Plaintiff provided no testimony

or evidence from any prior owner of the property now owned by the Plaintiff, running from the time that the property was owned by Jupiter Tate, who took title on February 29, 1884, to the ownership of Lottie Taucer, the last owner prior to Plaintiff, who owned the property from June 15, 1955, through April 10, 2017, showing how the prior owners accessed the subject property. There is no evidence or testimony in the record showing that any of the prior owners accessed the property now owned by the Plaintiff by way of the unimproved dirt road running through Defendants' property.

Finally, in order to establish an easement by prior use, the Plaintiff must prove that "the common grantor indicated an intent to continue the prior use after the severance of title." As stated previously in this order, the severance of the two tracts of land occurred on February 6, 1882, and the Plaintiff has no knowledge, testimony or evidence to provide as to how the property now owned by the Plaintiff was being accessed prior to February 6, 1882. At the trial, the Plaintiff presented no evidence or testimony establishing that the property now owned by the Plaintiff was being accessed through the dirt road running through the Defendants' property. Additionally, the Plaintiff presented no evidence or testimony that the common grantor, P. D. Meree, ever indicated that there was a dirt road running through the property now owned by the Defendants that was providing access to the property now owned by the Plaintiff and that it was the intent of P. D. Meree for that dirt road to continue to be used to provide access to the property now owned by the Plaintiff after the severance of title on February 6, 1882. In the deed from Paul D. Meree to Nero Smalls, there is no mention of an easement being reserved across the property being conveyed to Nero Smalls to provide ingress and egress to the property now owned by the Plaintiff. Also, in the deed

from P. D. Meree to Jupiter Tate, there is no mention of an easement being provided across the property previously conveyed to Nero Smalls to provide ingress and egress to Jupiter Tate. The Plaintiff has failed to establish the seventh element for claiming an implied easement by prior use.

Based upon the application of the above stated seven elements required to establish an easement by prior use to the evidence and testimony presented by the Plaintiff in this case, this court finds and concludes that the Plaintiff has failed to establish legal entitlement to an implied easement by prior use. The Plaintiff has failed to establish that the dirt road running through the property now owned by the Defendants was in existence at the time the property was severed on February 6, 1882, and the Plaintiff has failed to establish that the dirt road was providing access to the property now owned by the Plaintiff prior to the severance of title. The Plaintiff has failed to establish that any prior use of the dirt road for providing access to the property now owned by the Plaintiff was not merely temporary or casual. The Plaintiff has failed to establish that there was prior use of the dirt road running through Defendants' property to provide access to the property now owned by Plaintiff that was apparent and known to the parties. The Plaintiff has failed to establish that there was a prior use of the dirt road being made to provide access to the property now owned by the Plaintiff and that this prior use was necessary in that there could be no other reasonable made of enjoying the dominant tenement without the prior use. Finally, the Plaintiff has failed to establish that the common grantor, P. D. Meree, ever acknowledged the existence of a dirt road running through the property now owned by the Defendants that was providing access to the property now owned by the Plaintiff prior to the severance of

title, and the Plaintiff has failed to establish that even if the dirt road existed prior to severance of title, that the dirt road was being used to provide access to the property now owned by the Plaintiff. Also, even if the dirt road existed prior to severance of title and even if the road was being used to provide access to the property now owned by the Plaintiff, the Plaintiff has failed to show that the common grantor, P. D. Meree, indicated an intent to continue the prior use after severance of title.

The second claim of the Plaintiff is that it is entitled to claim a prescriptive easement. Under South Carolina law, to establish a prescriptive easement, the Plaintiff asserting the right must show: (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right. *Horry County v. Laychur*, 315 S.C. 364 (1993); *Boyd v. BellSouth, Supra*; *Shia v. Pendergrass*, 222 S.C. 342 (1952). A prescriptive easement is not implied but is established by the conduct of the dominant tenement owner. *Boyd v. BellSouth, Supra*.

In the case at bar, the party asserting the right to a prescriptive easement is the Plaintiff and the dominant tenement owner is the Plaintiff. Therefore, the Plaintiff has the burden of showing that it has used the dirt road running through Defendants' property for 20 years to gain access to its property. As discussed earlier in this order, the Plaintiff took ownership of the property which is subject of this action on April 10, 2017. As of the date of this order, the Plaintiff has owned the subject property for five (5) years. To establish continuous use for the purposes of a prescriptive easement, a party need not show that the use is continuous to him personally *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997). "A party may 'tack' the period of use of prior owners in order to satisfy the twenty-year requirement *Kelley*, 396 S.C. at

575, 722 S.E.2d at 819 “The time of possession may be tacked not only by ancestors and heirs, but also between parties in privity in order to establish the twenty-year period” (first alteration by court) (quoting *Getsinger v. Midlands Orthopaedic Profit Sharing Plan*, 327 S.C. 424, 430, 489 S.E.2d 223, 226 (Ct. App. 1997); *id.* (providing that if tacking is used, the predecessors-in-title’s use must also meet the required elements of a prescriptive easement *Bundy*, 412 S.C. at 306, 772 S.E.2d at 170 providing that because “a prescriptive easement results in diminished rights of the property owner...a claimant seeking a prescriptive easement must be held to a strict standard of proof” and therefore “has the burden of proving all elements by clear and convincing evidence.”)

The Plaintiff presented circumstantial evidence of the prior use of the road by way of aerial photography and testimony indicating that the roadway had been in place for many years. However, that evidence did not rise to the level of “clear and convincing” evidence sufficient to satisfy the statutory requirement.

Therefore, the Plaintiff cannot satisfy the first element for establishing an easement by prescription which requires continued use for 20 years. Since the Plaintiff cannot establish the first element for a prescriptive easement, there is not a need to discuss whether the Plaintiff can establish the remaining two (2) elements for establishing a prescriptive easement.

The third claim of the Plaintiff is that the Plaintiff is entitled to claim an easement by necessity. The party asserting the right of an easement by necessity must demonstrate: (1) unity of title, (2) severance of title, and (3) necessity. *Kennedy v. Bendenbaugh*, 352 S.C. 56, 572 S.E. 2d 452 (2002); *Boyd v. Bellsouth*, *Supra*.

This court has already found that there was unity of title and severance of title in this case. Therefore, in order to establish the right to an easement by necessity, the

Plaintiff must prove necessity by showing that there could be no other reasonable mode of ingress and egress for its property without this easement and the Plaintiff must prove that the lack of any reasonable mode of ingress and egress existed at the time of severance. Clemson Univ. v. First Provident Corp., 260 S.C. 640, 197 S.E. 2d 914 (1973); Boyd v. Bellsouth, Supra.

In the case at bar, the severance of the property occurred on February 6, 1882. Therefore, under our established law, the Plaintiff must prove that on February 6, 1882, when Paul D. Meree conveyed the property now owned by the defendants severing the said property from his remaining property, there was no reasonable mode of ingress and egress for the property now owned by the Plaintiff. The only evidence of necessity offered by the Plaintiff is a survey included in Exhibit 23. This court has reviewed and considered the survey included in Exhibit 23 and has found and concluded that this survey, by itself, does not provide proof that the Plaintiff's real property was without other reasonable means of ingress and egress at the time of the severance. Therefore, the Plaintiff has failed to prove entitlement to an easement by necessity.

Based upon the testimony and evidence presented by the Plaintiff at the trial of this case and, upon due consideration of the applicable law in South Carolina setting forth the legal requirements for establishing entitlement to an implied easement by prior use; entitlement to claim a prescriptive easement, and, entitlement to establish an easement by necessity, this court finds and concludes that the Plaintiff's prayer for a decree granting to the Plaintiff a fifty (50') foot ingress and egress easement over and through the Defendants' property should be and is hereby denied.

It is, therefore, hereby **ORDERED, ADJUDGED AND DECREED** that judgment is hereby rendered in favor of the Defendants and that Plaintiff's prayer for relief is

hereby denied. The above entitled action is hereby dismissed and each party shall bear their own costs and expenses.

AND IT IS SO ORDERED.

(JUDGE'S SIGNATURE PAGE TO FOLLOW)



Berkeley Common Pleas

Case Caption: Bce 2015 Llc VS Lottie Taucer, Estate Of , defendant, et al
Case Number: 2018CP0800344
Type: Master/Order/Other

AND IT SO ORDERED!

s/Dale E. Van Slambrook #3079