STATE OF SOUTH CAROLINA COUNTY OF SALUDA	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
CARR FARMS, INC. and TITAN FARMS, LLC, Plaintiffs, v. SUSANNAH SMITH WATSON, CARSON M. WATSON, and JANE WATSON, Defendants.	DOCKET NO. 2016-CP-41-00153 ORDER ON RECONSIDERATION

Plaintiffs, Carr Farms, Inc. ("Carr Farms" or "Carr") and Titan Farms, LLC ("Titan"), filed a Motion to Reconsider on August 5, 2019 pursuant to Rule 59(e), SCRCP, in response to the Court's Order filed on July 26, 2019 granting Defendants Motion for Partial Summary Judgment. Defendants, Susannah Smith Watson et. al. ("Watson"), filed a response to the Motion on August 7, 2019.

DISCUSSION

The dispute between the parties' centers on whether the easement recited in the deed is an appurtenant easement or an easement in gross. Plaintiffs contend the Court's Order did not address (1) how the "terminus" element is satisfied as to the exclusive use; and (2) the exclusive use was not "necessary to the enjoyment" as Defendants predecessor granted use to Abney, thus eliminating their exclusive use. Plaintiffs assert the easement is one in gross and not an appurtenant easement. Plaintiffs argue there was no notice to the successors as to the Titan tract. Further, there was no notice to subsequent purchasers of the easement which it claims is required if the easement runs with the land if it is an appurtenant easement.

First, it is necessary to clarify some of the background in this matter. Plaintiffs are successors in interest to two separate parcels. Carr Farms obtained property previously owned by D.C. Abney in 1970 when the agreement at issue occurred. Titan obtained property previously owned by Bonnette in 1960 when the easement was conveyed.

For convenience, some of the factual background recited in this Court's order is repeated. On or about October 1, 1960, for valuable consideration, Mattie Lee Bonnette ("Bonnette")

granted, bargained, sold and released unto F. Broadus Smith ("Smith"), his heirs and assigns:

> All that piece, parcel or tract of land, together with all improvements thereon, containing five (5) acres, more or less, located in Ridge Spring School District, Saluda County, South Carolina, and generally described as follows: Bounded on the North by South Carolina State Highway No. 23; Bounded on the East by other lands of Mattie Lee Bonnette; Bounded on the South by other lands of Mattie Lee Bonnette; and Bounded on the West by lands now or formerly owned by Charles Abney.
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> . . .
>
> Also granted herein is the right, privilege and easement for F. Broadus Smith to construct a dam partially located on the premises herein conveyed and other lands owned by the grantor herein to impound water on lands owned by the grantor and grantee herein and that grantee is to have exclusive use and control of the same. [Emphasis added]
>
> Together with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.
>
> To Have and To Hold all and singular the premises before mentioned unto the said F. Broadus Smith, his Heirs and Assigns forever.

Jt. Exh. 3. The October 1, 1960 conveyance from Bonnette to Smith was properly recorded in the office for the Clerk of Court for Saluda County, South Carolina on or about October 3, 1960 in Deed Book 50 at page 291 ("Smith Transfer"), and has been assigned tax map number 150-00-00-017 by Saluda County, South Carolina ("Smith Property").

Upon F. Broadus Smith's ("Smith") death, his property was left to his wife, Eliza S. Smith, for and during her natural life, and upon her death to his children Francis B. Smith, Jr., Jane S. McGuigan and Susie S. Watson. See Deed of Distribution dated November 27, 1993, Jt. Exh. 8. On or about December 3, 2014, for valuable consideration, John F. Byrd, Jr., Special Referee, granted, bargained, sold and released unto Susannah Smith Watson (a/k/a Susie S. Watson) the property formerly owned by Smith. Jt. Exh. 18. Susanna Smith Watson ("Watson") is the daughter and heir of Smith and is the current owner of the property formerly owned by Smith. The property is more particularly described and shown on the plat prepared for Heirs of Broadus Smith dated December 3, 2013. Jt. Exh. 17. Watson is the sole owner of the property.

At the time of the Smith Transfer in 1960, there was no dam or impounded water on any property. There is no evidence of when the dam was actually constructed; however, in 1970 it

appears that Smith began construction. On or about September 21, 1970, Smith and D.C. Abney ("Abney"), the owner of the property to the West of Smith, entered into an Agreement in which it is acknowledged that Smith was constructing a pond on his property that "will back over and upon the lands of D.C. Abney." In the Agreement, Abney granted Smith the right to flood approximately one acre of Abney's property ("Abney Property"). In exchange for Abney allowing the flooding of one acre of his property, Smith granted to Abney "the right to use said water from said pond of F. Broadus Smith as long as any portion of the lands of D.C. Abney is flooded by said pond." Jt. Exh. 4. Additionally, the rights granted to both parties based upon mutual promises were binding on the heirs, assigns, executors and administrators of both Smith and Abney. Id. This easement was recorded in Misc. Book 11, Page 199 on September 21, 1970. A plat dated January 6, 1971, reflects the existence of the pond and dam at that time, and further shows the parameters of the pond extending upon lands owned by Abney and Bonnette as allowed in Bonnette's transfer of property to Smith. Jt. Exh. 5.

On or about May 25, 2010, the Abney Property was conveyed to Carr, with said Deed being recorded in the office of the Clerk of Court for Saluda County, South Carolina, at Book 913 at page 276. Jt. Exh. 15. A portion of the Abney Property owned by Carr remains flooded today. Carr, as the current owner of the Abney Property and an assignee of Abney, has the authority and consent to use "said water from said pond" pursuant to the terms of the Agreement. Defendants' acknowledge Carr has a right to use water from the subject pond. The issue in this matter is how much water Carr may use.

After the dam was constructed, on or about March 22, 1976, Bonnette conveyed to Jean B. Holston ("Holston") property on the south and east of the Smith Property by Deed recorded in the office of the Clerk of Court for Saluda County, South Carolina, at Book 76, page 148 ("Holston Transfer"). Jt. Exh. 6. The Deed conveyed 117 acres to Holston and does not reference the existence of any easement granted to Smith. Subsequently, through a series of deeds, Titan became the current owner of the Bonnette property conveyed to Holston, along with other land, by Deed dated January 24, 2012 and recorded in Saluda County at Deed Book 966, page 104.[1] Jt. Exh. 16. A portion of the Bonnette Property, of which Titan is now the title owner, remains flooded today.

Titan re-asserts in the motion for reconsideration that it did not have notice of the easement.

[1] In the Order, this Court stated in Footnote 1 that the documents presented by the parties did not reflect a complete chain of title from Bonnette to Titan Farms. This is incorrect. A complete chain of title was presented to the Court in the Joint Exhibits, many of which have been cited by the Court.

Upon review of the chain of title between the Holston Transfer and Titan, the easement to construct the dam to impound the water and to have exclusive use and control of the pond at issue, is not specifically mentioned. Thus, Defendant Titan did not have actual notice of the easement. However, the transfers within the chain clearly state the conveyance is made "subject to the following exceptions: all easements, reservations, rights of way, restrictions, encroachments, plats ... *of record* which may affect the above-described property and those that an inspection of the property would disclose." Emphasis added.

There are several plats recorded and referenced in the Titan chain of title after the pond was constructed that show the existence of the pond. In 2002, a boundary survey prepared for Carey E. Frick clearly shows the pond overlapping three properties. The plat clearly shows property owned by R.W. DuBose & Sons, Inc. (successor in interest to Abney), property "former Broadus Smith", and Tract 1 of property subsequently purchased by Frick. See Jt. Exh. 12. The plat specifically states, "This property is subject to all easements, R/W's and restrictions of record or on the ground." The plat also references a plat prepared by C. Ashley Abel for F. Broadus Smith dated January 6, 1971 [Jt. Exh. 5].[2]

Carr Farms also had notice of the pond. Carr is the successor in interest to R.W. DuBose & Sons, Inc. A survey was prepared for Carr Farms on June 18, 2004 showing the property formerly owned by Abney. Jt. Exh. 14. The plat notes, "Carr Farms, Inc. was formerly known as R.W. DuBose & Son, Inc." The plat clearly shows the pond overlapping three parcels belonging to Elizabeth Smith, et al. and Carey E. Frick. The plat cites to Deed Book page numbers, along with other information. The plat also states, "This property is subject to all easements, R/W's and restrictions of record or on the ground and also subject to any facts that may be revealed by a full and accurate title search."

Additionally, the deed conveying the property from Bonnette to Smith is recorded. "[W]here a deed describes land as is shown as a certain plat, such becomes part of the deed." Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); accord Lynch v. Lynch, 236 S.C. 612, 623, 115 S.E.2d 301, 307 (1960); Frierson v. Watson, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006). "Both deeds and easements are valid to subsequent purchasers without notice when they are recorded." Frierson, 371 S.C. at 67, 636 S.E.2d at 876 (citing S.C.

[2] The plat prepared by C. Ashley Abel for Broadus Smith only depicts Smith's property but shows the pond on Smith's property and the boundary lines for Bonnette's property and Abney's property.

Code Ann. § 30-7-10 (Supp. 2005)). "The purpose of the recording statute is to protect a subsequent buyer without notice." Id. Property owners are charged with constructive notice of instruments recorded in their chain of title. Carolina Land Co. v. Bland, 265 S.C. 98, 107, 217 S.E.2d 16, 20 (1975). Thus, Titan and Carr had notice of the existence of the easement and could have discovered it.

South Carolina courts adhere strictly to the requirements for an appurtenant easement. "While a majority of jurisdictions hold that an appurtenant easement 'must inhere in the land, [and touch and] concern the premises,' South Carolina adds the additional requirements that an appurtenant easement 'be essentially necessary to the enjoyment thereof' and 'have one terminus on the land of the party claiming it." John E. Lansche, Jr., Ancient, Antiquated, & Archaic: South Carolina Fails to Embrace the Rule That A Grantor May Reserve an Easement in Favor of A Third Party, 52 S.C. L. Rev. 269, 276 (2000); see also Brasington v. Williams, 143 S.C. 223, 141 S.E. 375, 382 (1927). "Without the requirement of a terminus on the dominate estate or the 'essentially necessary' character, an appurtenant easement in majority jurisdictions is considered an easement in gross under South Carolina law." Id. Also, in South Carolina, "unless an easement has all of the essential elements of an appurtenant easement, the court will characterize the easement as an easement in gross." Id.

"The existence of a terminus on the land of the party claiming an easement appurtenant may be established if the easement meets certain criteria such as the dominant estate having access to the purported easement." Williams v. Tamsberg, 425 S.C. at 263, 821 S.E.2d at 502. Additionally, a court could find an easement appurtenant "if the purported easement (1) at least touches the dominate estate and (2) in cases where the easement is an adjacent boundary between – or runs parallel to – the dominate and servient estates." Id.

Plaintiffs argue the existence of the pond and the exclusivity claim are different because Defendants' claimed right to exclusive use does not "inhere in the land." This Court disagrees. The word inhere means "[to] exist in and inseparable from something else."[3] As such, the easement for the pond inhered in the land within the meaning of this definition. The September 21, 1970 Agreement between F. Broadus Smith and D.C. Abney provides:

> It is understood by and between the parties hereto that the said F. Broadus

[3] Black's Law Dictionary 782 (6th ed. 1990); see also Majestic Theater Co. v. Lutz, 210 Ky. 92, 275 S.W. 16, 20 (1925)

> Smith is in the process of constructing a pond on his farm and that the said water which is impounded in said pond will back over and upon lands of D.C. Abney and that the said D.C. Abney does hereby grant unto the said F. Broadus Smith the rights to flood approximately one acre of land belonging to D.C. Abney provided, however, that the said D.C. Abney shall have the right to use said water from said pond of F. Broadus Smith as long as any portion of the lands of D.C. Abney is flooded by said pond.

From its plain language, the Abney agreement made during the construction of the pond anticipates that, while during construction water impounded in the pond will back over and upon the Abney land, after completion of construction that may not continue to be the case. This agreement with Abney had nothing to do with the easement granted by Bonnette and does not, nor can it, change the nature of the easement granted by Bonnette.

To insinuate that the "pond is not permanent" merely because the pond owner could elect to lower water levels in the pond such that the water does not back up and onto the land of Abney is misplaced. The granting of use "so long as the waters back over and upon the Abney land" does not prevent the adherence of the pond property itself upon the former Bonnette property. The Abney agreement merely addresses overflow waters from the pond. The evidence before the Court is that the pond is and has been a permanent fixture on the property since 1970. There is no evidence that Mrs. Watson intends to destroy the dam, to drain the pond, or to cease using the dam that create the pond by impounding the water.

Plaintiffs further argue that the exclusive use was not "necessary to the enjoyment" as Defendants' predecessor granted use to Abney thereby eliminating their exclusive use. Plaintiffs' argument is misplaced. The impoundment of the water and the use of the pond were exclusive to Defendant. By the terms of the easement, Smith and his heirs or assigns had exclusive use and control over its use. Defendants had exclusive use and controlled the manner and method of use. Exclusivity still exists as it is Defendants decision on the use for their enjoyment. Plaintiffs also argue that because Smith waited ten years to construct the dam, it was not necessary to their enjoyment of the land. The grant of the easement clearly anticipated that a dam had to be constructed. There was no time period in which that was required. What is clear is that a dam would be constructed to impound the water over Bonnette's property and Smith's property and Smith would have exclusive control over the use of that water.

As stated on page 8 of the Court's Order, "As reflected in the recorded plat, the boundaries of the impounded water clearly exist on Watson's property. There was no evidence presented that

the water levels have ever dropped to a point where the pond is wholly on lands owned by Titan. There is a terminus on the land of the party claiming the appurtenant easement. Furthermore, page 11 of the Court's Order provides, "In accordance with the express language contained within the four corners of the deed granting the appurtenant easement, Watson (as heir, assignee, and successor in title of Smith) has the exclusive right to use and to control the water that is impounded on the portion of property formerly owned by Bonnette, now owned by Titan."

The only extension of the right to use water from the pond to Abney was to the extent such water backed over and onto the lands of Abney, and only for as long as that occurs. Such agreement was created during the construction of the pond and had nothing to do with Smith's exclusive right to use and to control the use of the water from the pond properly located on the Smith and Bonnette property. Evidence in the record shows the ability to construct and to have a pond on the property purchased by Smith was "necessary to his enjoyment" because Smith negotiated for and paid for the ability to construct and to maintain a pond at the time he purchased his land from Bonnette.

ORDER

Based upon the foregoing, it is therefore ORDERED that Plaintiffs' Motion to Reconsider is DENIED.

AND IT IS SO ORDERED.

Signature page to follow.

Saluda Common Pleas

Case Caption: Carr Farms Inc , plaintiff, et al VS Susannah Smith Watson , defendant, et al

Case Number: 2016CP4100153

Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee