

The Defendants admit that they purchased the Property subject to the Easement. On March 7, 2013, Artistic Pools and Spas requested a permit on behalf of the Walkers for a 20 ft. x 40 ft. in-ground pool, a retaining wall, a patio, and a metal fence (the "Encroachments") to be built on the property. A small portion of that construction encroaches into the Easement. Mr. Walker testified that prior to construction of the Encroachments, he was aware that they may encroach on Duke Energy's Easement.

At trial, the Defendants contested two facts: (1) the location of the Easement, and (2) whether the Encroachments pose any safety risk or otherwise limit Duke Energy's use and enjoyment of the Easement. The Court addresses each of these issues.

With respect to the location of the Easement, the Court finds that the survey prepared by Dan Proctor conclusively establishes the location of the Easement to the extent that any margin of error would not be sufficient to eliminate the encroachment. Mr. Proctor is a licensed South Carolina Surveyor and was qualified as an expert without objection. Additionally, his survey is consistent with the plat referenced in the Defendant's deed and the Court therefore finds that the Easement and the encroachments are accurately depicted on the Survey prepared by Mr. Proctor.

Regarding Duke Energy's use and enjoyment of the Easement, the court finds that the Encroachments do not presently interfere with Duke Energy's use and enjoyment of the land such that the Defendant should be required to eliminate the Encroachments at this time. The Encroachments, as depicted in the Survey, reach approximately 15 feet into a 68-foot easement at the greatest point of encroaching. Duke Energy asserts that the Encroachments could prevent Duke Energy from having access to certain points on the power lines and therefore cause delays in repairs. Duke Energy asserts that these delays could leave thousands of people without power, including homes, businesses, and hospitals. However, since 1939, there has been no documented

occasion that indicates Duke Energy has ever used or needed to use the portion of the Easement where the Encroachments lie. Furthermore, evidence was presented that the retaining wall encroaches on a portion of the easement that may not have been usable by Duke Energy due to the grading of the property at that location.

Duke Energy asserts that the Encroachments create a safety risk to personnel of Duke Energy and its contractors who may be called to perform maintenance, because it creates a possibility for Duke Energy's trucks to fall over the retaining wall portion of the Encroachment. However, the evidence presented at trial showed that such harm to Duke Energy's personnel would only result if the personnel or contractors were grossly negligent.

Furthermore, Duke Energy claims that the metal fence portion of the Encroachments pose a significant safety risk to personnel of Duke Energy and its contractors who may be called to perform maintenance, the Defendants, and other members of the public. These risks exist as a result of the close proximity of the fence and the transmission lines that sit on the Easement. If one or more of the transmission lines fell, they could migrate to the metal fence and electrify it, posing significant safety, electric, and fire hazards.

Conclusions of Law

The Easement unequivocally gives Duke Energy "the right to keep said right of way clear of all trees, structures, and other objects except those placed thereon by the Grantee [Duke Energy]." Based upon the Proctor Survey, the Encroachments are located at least partially within Plaintiff's Easement. This clause does not include any exceptions or safety requirements. "'The language of an easement determines its extent.' Thus, [the] court must construe unambiguous language in the grant of an easement according to the terms the parties have used." *Plott v. Justin Enterprises*, 374 S.C. 504, 513-14, 649 S.E.2d 92, 96 (Ct. App.

2007) (quoting *Binkley v. Rabon Creek Watershed Conserv'n Dist.*, 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct.App.2001)); *S. Carolina Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981) ("Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense."). To the extent the language and terms of an easement are specific, they cannot be constricted to any degree. *Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Prop. Regime*, 306 S.C. 170, 172, 410 S.E.2d 580, 581-82 (Ct. App. 1991). Based on the foregoing, this court concludes that the Encroachments are in violation of Plaintiff's Easement.

However, Defendants have established a defense of laches as Plaintiff did not act promptly to avail itself of its rights under the Easement. "The equitable defense of laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) (quoting *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007)). In the case at bar, Plaintiff brought action almost two years from the time the Walkers installed the Encroachments. "Whether the plaintiff is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Arceneaux v. Arrington*, 284 S.C. 500, 503, 327 S.E.2d 357, 358 (Ct. App. 1985).

At trial, Plaintiff admitted it performed at least two fly-over observations per year that should have made Duke Energy aware of the encroachments. (Where a party should have been aware of a fact had it exercised reasonable diligence, but neglected to do so, neglect of the party will charge him with laches the same as if he had known the facts. *Arceneaux* at 503.) Plaintiff

should have known of the Encroachment but did not seek to enforce its rights under the easement for two years. This Court finds that delay unreasonable under the circumstances and prejudicial to Defendant. Accordingly, Defendant has established that the defense of laches applies in this case.

The court further concludes that equity in this case is served by allowing the Encroachments to remain. Plaintiff has never exercised, nor ever needed to exercise, its easement rights, and the court finds that removal of the Encroachments would place an unreasonable and unnecessary burden on Defendants. Moreover, evidence produced at trial indicates that Plaintiff has a number of alternative locations across the Easement that would provide access to the transmission lines outside of the Encroachments. However, if Plaintiff should ever need to access its power lines and it became necessary to remove the Encroachments, the Defendant must bear the costs of removal. Furthermore, Defendant and his successors shall hold Plaintiff harmless for any damage associated with access to the property or any damage or harm that may result from a downed power line or pole in the encroachment area.

Based on the foregoing, the court orders the following:

1. If a time arises when Duke Energy needs access to the easement from the location of the Encroachments, the Encroachments must be removed and the Easement must be restored to accessible condition at full cost to the Defendants.
2. The duty to restore and responsibility for the costs associated with those repairs are to be filed with the register of deeds in Greenville County and are intended to be a covenant that runs with the land, so that any subsequent owners of the property own it subject to the same duty as the Defendants.

3. In the event that the Defendants must exercise their duty to remove the Encroachments and restore the Easement to an accessible condition, the Defendants must make all reasonable efforts to begin and complete the restoration within 10 days of when the need arises.
4. If the Defendants fail to make all reasonable efforts to begin or complete the restoration within 10 days, the Court hereby authorizes Duke Energy to enter the property at any time without prior notice or further action of the Court to remove the Encroachments and restore the easements to accessible condition. Any costs for such reparations would be at the expense of the Defendants.
5. In the event that any harm is done to the Defendant's property resulting from damage to the transmission lines or poles, Defendant shall hold Plaintiff harmless where such harm would have been prevented if Defendant had built outside of the Easement.

IT IS SO ORDERED.

Letitia H. Verdin
Circuit Court Judge
Thirteenth Judicial Circuit

_____, 2016



Greenville Common Pleas

Case Caption: Duke Energy Carolinas LLC vs. Caleb E Walker , defendant, et al
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So Ordered

s/Letitia H. Verdin, SC Judge 2162

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