THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brian L. Boger, Special Referee

Appellate Case No. 2018-000450

Trenholm Building Company, Respondent,

v.

Rajarathnam S. Aluri, Trustee,
The Aluri Family Trust,
UTD May 3, 2012, Appellant.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN DETERMING THAT APPELLANT HAD NOT PROVED AN EASEMENT BY NECESSITY?

STATEMENT OF THE CASE

Respondent Trenholm Building Company filed its Complaint against Appellant Rajarathnam S. Aluri, Trustee, The Aluri Family Trust, UTD May 3, 2012 on February 29, 2016, seeking a declaratory judgment that there is no easement in favor of Appellant or the Dominant Estate owned by Appellant for the driveway on 618 Pickens Street. Appellant filed its Answer and Counterclaim on April 13, 2016, seeing a determination that it had an easement by prior use, a prescriptive easement, or an easement necessity. Respondent filed and served its Reply dated May 4, 2016, denying the counterclaim.

By consent of all the parties, this matter was tried by Special Referee Brian L. Boger on Friday, September 29, 2017 at the South Carolina Bar Building, 950 Taylor Street, Columbia, South Carolina. Respondent was represented by Carlos W. Gibbons, Jr., Esquire. Taylor Miller and Mary Katherine Bagnal were in attendance and testified for Respondent. Appellant was represented by Allen Jackson Barnes, Esquire. Raj Aluri, Trustee, was in attendance and testified on behalf of Appellant. Attorney Clare Hungiville also testified as an expert witness for Appellant.

The Special Referee issued his initial Order on February 1, 2018 and a Revised Order on February 13, 2018. The Notice of Appeal was filed on March 12, 2018. Because the parties already had a copy of the transcript from the hearing, no transcript order was necessary. By motion of Appellant, an extension was sought to file the Initial Brief. The Court granted that motion.

FACTS

Appellant owns an apartment building at 616 Pickens Street in the City of Columbia, South Carolina. (R. p. 3, ¶ 1) Appellant's Trustee, Raj Aluri ("Aluri"), personally bought that property in 2003 from EW&M Limited Partnership who had bought the property from Shandon Rental Group in 1998. (Id.) In 2012 Aluri transferred the property to Appellant Trust. (Id.) Respondent owns the adjacent apartment building at 618 Pickens Street having purchased it from Shandon Rental Group in 1999. (Id.) There was common ownership between the properties by Shandon Rental Group from 1984 to 1998. (Id.) The driveway between the properties which is the subject of this appeal has existed since at least 1976. (Id.) The driveway is on the property belonging to Respondent. (Id.) There is no recorded easement. (Id., ¶ 2) Without access to the driveway, Appellant does not have access to part of his property for parking, which is the only use of the property. (Id.)

At the time Aluri brought the property in 2003, he understood that the driveway was used by both properties. (R. p. 37-28, lines 15-7) Trustee has also owned the property next door at 610 Pickens St since 1988 and has observed the driveway being used by both properties since 1988. (R. p. 37, lines 21-25) Aluri would not have bought the property at 616 Pickens Street if it was not understood that he would have access to the back of his property by way of the driveway between the two properties. (R. p. 38, lines 8-13)

The back of Appellant's property contains a retaining wall and an elevation change of three to four feet. (R. p. 62; R. p. 35, lines 1-9) Respondent's witness, Taylor Miller, testified that there is no way to access the northwest half of

Appellant's property by vehicle without using the driveway. (R. p. 25, lines 11-21) Without excavating a large amount of earth, the only way to access half of the Appellant's property is by using the driveway for 618 Pickens Street. (R. p. 40, lines 4-18; R. p. 62) Even if excavated there are issues with turning around which would make access very difficult. (R. p. 40, lines 12-18; R. p. 62)

Following the trial, the Special Referee issued a final order where he determined that Appellant had failed to prove an Easement by Prior Use (R. p. 6, ¶ 1), an Easement by Necessity (Id., p. 7, ¶ 1) or an Easement by Prescription. (Id., p. 8, ¶ 2) The Special Referee did determine that Appellant had proved the first two elements necessary to acquire an Easement by Necessity. (Id., p. 7, ¶ 3) The Special Referee concluded that Appellant did not prove the requisite degree of necessity to prove the Easement by Necessity. (Id., p. 7, ¶ 1)

ARGUMENT

The Standard of Review

The determination of the existence of an easement is a question of fact in a law action. Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987). The present matter was consensually referred to a special referee for entry of final judgment. Accordingly, the scope of review is limited to correction of errors of law, and we will not disturb the referee's factual findings that have some evidentiary support. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

The Evidence Supports a Finding of Easement of Necessity

An easement by necessity is proved by showing: (1) unity of title, (2) severance of title, and (3) necessity. Boyd v. Bellsouth Telephone Telegraph

Co., 369 S.C. 410, 418–19, 633 S.E.2d 136, 140–41 (2006). "The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible." Id. at 420, 633 S.E.2d at 141. "The necessity element of easement by necessity must exist at the time of the severance and the party claiming the right to an easement must not create the necessity when it would not otherwise exist." Id. (citations omitted).

In this matter, the Special Referee relied on Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (1997) for his finding that the requisite level of necessity had not been shown. (R. p. 6, ¶ 3) In Morrow, however, the appellant had access to the property but simply wanted an easement over respondent's property which was easier. 328 S.C. at 529, 492 S.E.2d at 424. The same is not true in the instant case. Even Respondent's own witness, Taylor Miller, said there is no access to the part of Appellant's property for which the easement is of necessity. (R. p. 25, lines 11-21) Importantly too, in Morrow the appellants had constructed buildings which prevented trucks from accessing through the public road. 328 S.C. at 529, 492 S.E.2d at 424. Prior to the construction, appellants had access via the public road, but the law does not allow a party to change the circumstances forcing an easement. Id. The retaining wall and grade variance at 616 Pickens Street has existed since Appellant purchased the property. (R. p. 40, lines 4-18; R. p. 62)

This case is more aligned with Hayes v. Tompkins, 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1985), where access from the public road was prevented due to a gulley. The law does not require Appellant to excavate his property

to access the top half of his property anymore than this Court made Mr. Hayes build a bridge over the gulley. Id. 287 S.C. at 292, 337 S.E.2d at 891.

CONCLUSION

The only access to one half of Appellants property is by access of the over driveway belonging to 618 Pickens Street owned by Respondent. Short of an earth moving project there is no access to this property which is only used for parking.

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