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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Thomas C. Skelton, Plaintiff, vs. First Baptist Church of Travelers Rest, South Carolina, a non-profit Corporation, Defendant.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT C.A. No.: 2019-CP-23-02476 **ORDER ON SUMMARY JUDGEMENT**

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SC Court of Appeals

HEARING DATE:	June 11, 2020
JUDGE:	Perry H. Gravely
ATTORNEY FOR PLAINTIFF:	Robert C. Wilson, Jr.
ATTORNEY FOR DEFENDANT:	O. W. Bannister, Jr.
COURT REPORTER:	April Herron

THIS MATTER came before the Court on June 11, 2020, upon the Motion for Summary Judgement pursuant to Rule 56, South Carolina Rules of Civil Procedure filed by the Defendant, First Baptist Church of Travelers Rest, South Carolina, a Non-Profit Corporation (hereinafter "Church"). The matter was heard on June 11, 2020 and was conducted pursuant to the Order of the South Carolina Supreme Court for the "Operation of the Trial Courts During the Coronavirus Emergency" issued on April 3, 2020 (as amended) (hereinafter "Emergency Order"). The parties consented to holding the hearing via videoconference with a Court Reporter.

The Plaintiff, Thomas C. Skelton, (hereinafter "Skelton") resisted the Motion.

The Church filed a Memorandum in Support of Summary Judgement with excerpts from the deposition of Skelton along with exhibits from that deposition. Skelton filed a Memorandum in Opposition to Defendant's Motion for Summary Judgment, the entire transcript of the deposition

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of Gary Batson, the Church's representative, and the deposition of Skelton himself, along with an Affidavit.

After reviewing the pleadings, the Memorandum of the parties along with the transcripts, Skelton's affidavit, exhibits, and the arguments of counsel, the Court concludes the Church is entitled to Summary Judgement on the causes of action set forth in Skelton's Complaint.

LEGAL ISSUES

Skelton's Complaint alleges four causes of action against the Church. He seeks a prescriptive easement across property of the Church, title to the Church's vacant lot by adverse possession, a permanent easement by necessity and an easement due to the breach of a *de facto* lease. Skelton also prayed for actual and punitive damages. The Church denied Skelton's causes of action and prayed for attorney fees and costs pursuant to SC Code §15-36-10.

FACTS

The following facts were established by the pleadings, affidavits, sworn testimony in the respective depositions submitted by the parties, and exhibits.

The parties own adjoining lots on McElhany Road in Travelers Rest. Skelton purchased his lot which contained a residence in March, 1992. He was a police officer at the time. The Church acquired the adjoining lot in 1993. The two lots have one common Grantor.

Skelton left the police force in 1994 and began a landscaping business which used various equipment to include trucks. Skelton has a work shop on the rear of his lot which he uses to park or repair his landscaping equipment. Due to improvements Skelton made on his lot, he does not have easy access to the rear of his lot by the trucks or other equipment. Skelton requested permission from the Church to use a strip of its land to access the rear of his property. The Church

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granted that permission and Skelton has used a strip of the Church's land adjoining his for that purpose for over twenty years.

Skelton's two causes of action based on adverse possession involve activities the Church permitted and some it did not. The Church permitted Skelton to use a strip of its adjoining lot for ingress and egress to the rear of his lot. Skelton wrote a letter to the Church dated February 28, 2019, acknowledging he had the Church's permission for ingress and egress on the Church's lot to reach the lower portion of his lot. He also acknowledged writing the letter in his deposition and that the statement was true. Additionally, Skelton was aware that the Church prepared an agreement for him to use the strip necessary for ingress and egress with its permission which could be renewed on a yearly basis. The agreement, however, was never signed by either party.

Skelton admittedly was allowed to mow portions of the Church's lot in order to keep down mice which could attract snakes. Skelton also claimed this beneficial arrangement created a de facto lease which was never reduced to writing or signed by either party.

The unpermitted uses of the Church's property by Skelton were the building of a berm along the property line of the Church to funnel surface water away from Skelton's lot and placing an electric dog fence across a portion of the Church's lot to keep his dogs confined. He also planted a tree on the Church's property and cut down a dead tree on the property line.

LEGAL ANALYSIS

The Supreme Court recently considered the requirements of a prescriptive easement in Simmons v. Berkeley Elec. Coop., Inc., 419 S.C. 223, 797 S.E.2d 387 (2016). The Court in Simmons quoted with approval the requirements for a prescriptive easement set out in County of Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977):

> To establish a prescriptive easement, the claimant must prove by clear and convincing evidence: '1) the continued and uninterrupted use or

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> engagement of the right for a period of 20 years; 2) the identity of the thing enjoyed; and 3) the use [was] adverse under claim of right.'

Simmons also stated the long-established rule in South Carolina that permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse. Bundy v. Shirley, 412 S.C. 292, 310, 772 S.E.2d 163, 173 (2016).

Skelton acknowledged writing a letter dated February 28, 2019, in which he stated, "My wife and I have spoken with several pastors and deacons over the past 20 plus years and we were told by all of them that it was fine for us to use the lower portion of the field so that we could have ingress and egress to the rear of our property."

Skelton was asked about the unsigned agreement to use a strip of the Church's property:

> Q. So, it (the unsigned agreement) granted you permission to use this strip of property, Church property?
>
> A. That's what I recall. But, again, that was a.
>
> Q. Ok.
>
> A. a long time ago and we don't have it.

Because Skelton's testimony and own letter makes it clear he used the Church's strip with the Church's permission, Skelton is not entitled to a prescriptive easement.

Skelton's Second Cause of Action alleges he had a de facto lease arrangement whereby he was allowed to use, occupy and exercise other rights on the Church's property in exchange for his maintenance and upkeep of the Church's vacant lot. He alleges the Church seeks to terminate the de facto lease and evict him. Based on the alleged de facto lease, Skelton seeks injunctive relief in the form of an easement for ingress and egress or damages for breach of the de facto lease accompanied by deceit, fraud and misleading statements.

The Church denied there was a de facto lease and also pled any de facto lease violated the

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Statute of Frauds which prohibits the enforcement of certain alleged agreements concerning land.

The Statute of Frauds, S.C. Code §32-3-10, states in part:

> (4) To charge any person upon any contract or sale of lands, tenements, or hereditaments or any interest in or concerning them; or
>
> (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof;
>
> Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunder by him lawfully authorized.

In his deposition, Skelton was asked:

> Q. And it's alleged that you had a de facto lease agreement in exchange for your maintenance and up-keep. You were allowed to use – occupy and other rights to the vacant lot. What other right are you speaking of?
>
> A. Those would be, again, the, the purview, of, of Mr. Wilson. I'm not an attorney. I – you know, I gave him the facts and I let him apply the law, I guess, if you want to – best we can.
>
> Q. In the lease agreement, you agree – and I'm, I'm repeating myself – is not in writing anywhere?
>
> A. We don't have anything in writing; no, sir.

Admittedly, there is no writing signed by the parties. The relief prayed for, breach of a de facto lease, asks for use of the Church's land beyond a year. The Statute of Frauds applies. Springob v. University of South Carolina, 407 S.C. 490, 757 S.E.2d 384 (2014). The unsigned agreement offers no relief to Skelton on the claim of a de facto lease. By its terms the agreement is for one year although it is renewable. Skelton's Complaint asks for relief forbidden by the Statute of Frauds.

The Plaintiff's Third Cause of Action claims an easement of necessity. The elements of a claim for easement of necessity are 1) unity of title, 2) severance of title and 3) necessity. Boyd

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v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 418-19, 633 S.E.2d 136, 140-41 (2006).

The Court in Paine Gayle Props., LLC v. CSX Transp., Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) elaborated on the meaning of "necessity" (p. 590):

> 'The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible.' Boyd, 369 S.C. at 420, 633 S.E.2d at 141. 'South Carolina requires only 'reasonable necessity' to imply an easement: while the owner of the servient estate must prove more than convenience, he need not show the [easement] is absolutely necessary.' Graham v. Causey, 284 S.C. 339, 341, 326 S.E.2d 412, 414 (Ct. App. 1985), *disapproved of on other grounds by Jowers v. Hornsby,* 292 S.C. 549, 357 S.E.2d 710 (1987) (citations omitted). '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**.' Boyd, 369 S.C. at 420, 633 S.E.2d at 141 (citations omitted) (emphasis added). This is so because it is the severance that creates the necessity for an easement and, thus, allows the law to impute to a landowner a right to cross an adjacent parcel. *See Turnbull*, 14 S.C.L. at 139 ('The necessity by which a person derives a right of way, is when one person sells another land enclosed on all sides by other lands. Here[,] the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land.').

Skelton received his property by Deed in March, 1992. His lot fronts on McElhaney Road and he has access from that road to his property. At the time of purchase Skelton was a police officer who left the force in 1994 and formed his current landscaping business. He stated the problem with access involves his business.

> Q. And, and the problem with the ingress and egress that you're referring to is that you have big trucks or trucks or something, trailers, that you need – or it's desirable for you to have room to turn them around?
>
> A. Yes, sir. And, and to, and to be able to come and go in a safe manner, as well. Because McElhaney Road has gotten so busy, it would be extremely difficult to back a trailer in there, for example, or anything like that. I just – we try to avoid that at all costs. So, we turn out and come down the property line where this gravel area is here and we enter out into the road (pointing to document).

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Skelton's claim of necessity must fail because it did not exist when Skelton purchased his lot but came about when he formed his landscaping business and the use of the Church's lot is simply a matter of convenience.

In his Fourth Cause of Action, Skelton seeks title to the Church's lot from his adverse possession under S.C. Code §15-67-210, et. seq.

Adverse possession requires possession, the possession must be continuous, hostile, open, actual, notorious, and exclusive for at least ten years. Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (1986). In Taylor v. Heirs of Taylor, 419 S.E. 639, 799 S.E.2d 919 (2017) (the Court cited Knot v. Bogan, 322 S.C. 64, 472 S.E.2d 43 (Ct. App. 1996) page 70 which restates the law that possession must be without the consent of the owner.)

Specifically, the Court in Taylor said, "There was no evidence in the record indicating Appellants possessed parcel five with Respondent's permission or consent. Thus, Appellants met their burden with regard to hostility." P. 654.

Skelton's cause of action for adverse possession is fatally flawed because he had the Church's permission for his use of the strip of the Church's lot for ingress and egress to the rear of his own lot and to mow the grass. The placement of a berm on the property line to fight off surface water and the placement of an electronic fence to control pet dogs does not rise to the level of possession that will support adverse possession.

CONCLUSION

In Catawba Indian Nation vs. State of South Carolina, et. al. 407 SC 526, 673 SE2d 900 (S. Ct. 2014) the Supreme Court restated the general rules that govern the granting or denial of summary judgment under Rule 56 SCRCP. Based on permissible evidence at the summary judgement hearing, the moving party must show that there is no genuine issue as to any material

fact after viewing the evidence and all reasonable inferences from that evidence in light most favorable to the nonmoving party. The Court finds that the Defendant has done so.

IT IS ORDERED that the Defendant by and hereby is granted summary judgment as to the Four Causes of Action set out in Plaintiff's Complaint and the action is dismissed with prejudice.

IT IS SO ORDERED.

Judge Gravely's E-signature on following page

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Greenville Common Pleas

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So Ordered

s/ Honorable Perry H. Gravely, #2755