1 of 100 DOCUMENTS

Baker v. Town of Plymouth

16-P-996

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 1104; 2017 Mass. App. Unpub. LEXIS 806

August 24, 2017, Entered

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

John W. Baker, trustee of the N/L Real Estate Trust (Baker), commenced this action claiming an easement over registered property on Plymouth Harbor owned by the town of Plymouth. His theories of recovery included an express, implied, or prescriptive easement, or an easement by estoppel or necessity, and he sought to enjoin the town from interfering with his easement.[2] Despite having a public right of access over the town's property, Baker seeks to enforce greater easement rights which, he contends, the town disregarded by relocating his easement without his consent.

2 Baker also included claims for trespass and nuisance, which were dismissed as outside the jurisdiction of the Land Court, and are not before us.

On summary judgment, a judge of the Land Court rejected all easement theories, with the exception of Baker's claim that he enjoys an implied easement to cross the town's land to the sea. The judge further concluded that the implied easement is limited in scope and entitles Baker only to enter and cross the town land on the path designated by the town; he consequently dismissed the remainder of Baker's claims. On appeal, Baker contends that the judge erred in concluding that (i) he has no express easement appurtenant to his property, and (ii) the town was free to relocate his implied easement. We conclude that Baker has an implied easement over a small section of the town's property[3] but otherwise possesses only those rights enjoyed by the general public and has no other separate express or implied easement. We therefore affirm the judgment.

3 The judgment provides that "the Baker property has the benefit of an implied easement to enter the Town Land by Nelson and Water Streets and cross the Town Land to the sea along a path established by the Town."

Background. On September 29, 1911, the Land Court issued a decree of registration for land located on Plymouth Harbor, as shown on a plan dated January, 1911. The decree provided that the "described land is *subject to* the rights of

all persons lawfully entitled thereto over a lane or way in extension of Nelson Street to the sea" (emphasis supplied). Nothing in the registration decree identified the persons entitled to travel over the referenced Nelson Street extension to the sea.

Shortly after the registration decree issued, the property was subdivided into lots A, B, and C by a plan dated October 4, 1911. As shown on the October, 1911, plan, lot B's eastern boundary has frontage on the harbor, but lots A and C do not abut the harbor. Lot A's eastern boundary abuts lot B's western boundary, and lot A's southern boundary abuts a twenty-foot wide way which the parties agree is Nelson Street and the northern portion of lot C. Nelson Street is not clearly shown on the October 4, 1911, plan as continuing into lot C, but there is a slight break in the solid line of the westerly boundary line of lot C where "Nelson Street" intersects with it. Moreover, the first deed of lot C refers to an "extension of Nelson Street over the northerly portion of the premises." The boundary between lot C and lot B, however, is shown as a consistent solid line.

Lots A, B, and C were first conveyed on the same day, October 27, 1911 -- lot B to the town and lots A and C to private parties.[4] The first deed of lot A contains no express language for the benefit of lot A over any portion of lot C or B. Similarly, the deeds of lots C and B reserve no easement for the express benefit of lot A. The deeds of lots C and B do retain language subjecting lots C and B to the rights of others over an extension of Nelson Street. The deed to lot A contains no such language.

4 In 1925, lot C was conveyed to the town. Since 1925, the town has retained ownership of lots B and C.

The first reference in the record to a way over lot B seems to be a February, 1935, "Plan Showing Extension of Water St. and Widening Road Leading to Bath House," which shows a way extending over lot B from an extension of Nelson Street. It is not clear from the record, however, when a roadway over lot B was created or whether one existed on the ground when the original parcel was registered or when it was subdivided in October of 1911. The summary judgment record reveals that at present, a paved way over Nelson Street and the "extension" of Nelson Street on lot C leads to a public park on lot B and to the harbor. The parties dispute whether the roads within the park constitute "public ways."

Baker took title to lot A on January 15, 2010. For purposes of summary judgment, the parties agree that Baker purchased lot A for access to Plymouth Harbor and his home on Clark's Island located in the harbor. Due to physical disability, Baker's only means to access the harbor is by using "Sea Legs," an amphibious vehicle, to travel from lot A to the boat landing on lot B. He asserts that he has an express easement over the "continuation" of Nelson Street "to the sea" stemming from the original registration decree. He suggests that historically, this easement was established over the southern end of lot B, essentially in a straight line from Nelson Street. He further contends that a 2009-2010 reconstruction of the park and addition of a splash area on lot B block his easement and that the town's construction of a boat ramp at the northern end of the park, perhaps a football field away from its prior location, essentially relocated his easement and made it less convenient and more difficult to use.

Discussion. We review the judge's decision on summary judgment de novo, viewing the record in the light most favorable to the nonmoving party to determine whether "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Barrasso* v. *New Century Mort. Corp.*, 91 Mass. App. Ct. 42, 46, 69 N.E.3d 1010 (2017), and cases cited.

"One claiming the benefit of an easement bears the burden of proving the existence of that easement on the servient estate." *Hickey* v. *Pathways Assn., Inc.*, 472 Mass. 735, 753-754, 37 N.E.3d 1003 (2015). All of the town's land is registered and is thereby protected from easements not appearing on its certificate of title and from claims of easements by necessity, prescription, or adverse possession. See G. L. c. 185, §§ 52 and 53; *Duddy* v. *Mankewich*, 75 Mass. App. Ct. 62, 66, 912 N.E.2d 1 (2009).

A. *Express easement*. We first address whether lot A has an express easement over the continuation of Nelson

Street to the sea. Despite Baker's arguments to the contrary, we agree with the judge that the original registration decree rendered the property "subject to" the rights of others to traverse the registered land over an extension of Nelson Street to the sea, but did not grant or reserve easement rights for the owners of the registered land. One cannot have an "easement" over one's own property. *Williams Bros. Inc. of Marshfield* v. *Peck*, 81 Mass. App. Ct. 682, 684-685, 966 N.E.2d 860 (2012). An owner has the "the full and unlimited right and power to make any and every possible use of the land," and has no need for an easement. *Id.* at 684, quoting from *Busalacchi* v. *McCabe*, 71 Mass. App. Ct. 493, 498, 883 N.E.2d 966 (2008).

The history before the creation of the original registered property does not appear in the record. Even if it could be shown that what became "Lot A" historically had enjoyed an easement over lots B and C, that easement would have merged when the properties came into common ownership. *Swartz* v. *Sinnot*, 6 Mass. App. Ct. 838, 839, 372 N.E.2d 282 (1978). Merely severing the dominant and servient estates does not revive extinguished easements; "[t]hey 'must be created anew by express grant, by reservation, or by implication.'" *Williams Bros. Inc. of Marshfield*, *supra* at 684-685, quoting from *Cheever* v. *Graves*, 32 Mass. App. Ct. 601, 607, 592 N.E.2d 758 (1992). Nothing in the deeds of lots A, B, or C revived any easement. The language "with all the privileges and appurtenances thereto belonging," contained in all three deeds, is insufficient to recreate or revive an easement that may have existed before the original registered parcel came into common ownership in the absence of evidence that the grantor intended that result. See *Swartz*, *supra*.

B. *Implied easement*. The judge concluded that the original decree that subjects the registered land to "rights of lawfully entitled persons over a lane or way in extension of Nelson Street to the sea," gives notice to owners of that land that it is burdened by an easement of passage. In combination with the repetition of the same or similar language in the original deeds for lots B and C, the judge generously concluded that the original decree language "is sufficient to suggest an implied easement for the benefit of Lot A to cross the Town Land." See *Hickey*, 472 Mass. at 755-756.

We disagree that the "subject to" language of the original decree, and the recognition in the deeds for lots B and C that they are subject to the rights of others in an extension of Nelson Street, suffices to imply a reserved easement for lot A. For the same reasons the language is insufficient to grant an express easement, see part A, *supra*, it does not give rise to an implied easement. That the deeds recognize that unidentified persons have an easement over lots C and B to the sea, without more, does not confer an implied easement for the benefit of lot A.

We conclude, however, that the language in the original decree and the deeds of lots B and C would have prompted an examination of related registration records to determine whether lot A has an easement over lots B and C. See *Lane* v. *Zoning Bd. of Appeals of Falmouth*, 65 Mass. App. Ct. 434, 437-438, 841 N.E.2d 260 (2006). Had the town examined the records pertaining to lot A, it would have found sufficient indicia that lot A enjoys an easement over the northerly portion of lot C. The deed for lot A describes the southerly boundary as a right of way for two hundred feet -- which encompasses both "Nelson Street" and the northern end of lot C. Moreover, the subdivision plan is ambiguous enough that, for purposes of summary judgment on the record before us, it can be interpreted to extend the right of way over the northern end of lot C. Abutters bound by a way enjoy an easement over the way coextensive with the land conveyed and embracing "the entire length of the way, as it is then laid out or clearly indicated and prescribed." *Id.* at 437, quoting from *Murphy* v. *Mart Realty of Brockton, Inc.*, 348 Mass. 675, 677-678, 205 N.E.2d 222 (1965).[5]

5 The only potential interference with easement rights over the northern portion of lot C suggested in the record concerns a fence blocking access from a portion of lot A. The judge considered this issue and found that the town has the right to regulate a landowner's access to public ways, particularly where contiguous lots are used as a single lot. The parties cite to no legal authority regarding this issue and we, therefore, do not consider it.

We conclude, however, that there is insufficient indicia of an easement over lot B. Where the record does not show that the extension of Nelson Street existed on the ground over lot B or was shown on the subdivision plan, or otherwise was defined at the time the grantor originally transferred lot A, we cannot say a way over lot B was "laid out or clearly indicated and prescribed," *Murphy*, *supra*, such that we could infer an intent on the part of the grantor to grant an easement over lot B for the benefit of lot A. See *Casella* v. *Sneierson*, 325 Mass. 85, 91-92, 89 N.E.2d 8 (1949) (extent

of rights over abutting way beyond limits of abutter's property depends on facts existing at time or conveyance). Compare *Duddy*, 75 Mass. App. Ct. at 68. There is no evidence that the grantor in 1911 intended to burden lot B with easements benefitting lot A when he conveyed lot A to a private party and lot B to the town.[6]

6 We note that, on appeal, Baker's claims of interference with his asserted easement rights focus on the "relocation" of a ramp from the southern end of lot B to the northern end of lot B. Whatever easement rights could have arisen from a right to traverse a continuation of Nelson Street over lot B to the sea, the record does not demonstrate that they obligated the town to maintain a ramp anywhere on its property.

We conclude that Baker, as owner of lot A, has no express or implied easement over lot B. We further conclude that his implied easement over lot C is limited in scope and has not been altered by the reconstruction.[7]

7 Because of the result we reach, we need not consider whether the town improperly relocated an easement. See *M.P.M. Builders, LLC* v. *Dwyer*, 442 Mass. 87, 809 N.E.2d 1053 (2004).

Judgment affirmed.

By the Court (Agnes, Neyman & Lemire, JJ.[8]),

8 The panelists are listed in order of seniority.

Entered: August 24, 2017.