IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ERNEST A. SHELL and CHERYL LYNN SHELL,	)	
Plaintiffs,	)	
	)	C.A. No. 2246-MA
v.	)	
WILLIAM AND DEBRA EDWARDS,	)	
Defendants.	)	

MASTER'S REPORT

Date Submitted: February 21, 2007
Draft Report: May 21, 2007
Final Report: May 30, 2007

Ernest A. Shell and Cheryl Lynn Shell, *pro se*
William and Debra Edwards, *pro se*

AYVAZIAN, Master

On June 26, 2006, Plaintiff Ernest A. Shell ("Shell") filed a complaint in Chancery Court requesting a temporary injunction and permanent injunction against his neighbors, Defendants William and Debra Edwards ("the Edwards"), who had interfered with Shell's access to his residence over a shared common driveway.[1] In addition, Shell sought a declaration that he has a legal right to use the shared common driveway, which he claims is the only easement to his property. A temporary restraining order was issued by the Court on June 30, 2006, but the Court vacated its order and denied Shell's motion for a temporary injunction on July 24, 2006, after Shell had failed to provide the Court with a sworn affidavit to support his allegations. A trial was held on February 21, 2007.[2] This is my decision on Shell's request for injunctive and declaratory relief.

The standard for granting a permanent injunction requires a plaintiff to show: (1) success on the merits of the claims; (2) that the plaintiff will suffer irreparable harm if injunctive relief is not granted; and (3) that the harm to the plaintiff outweighs the harm to the defendant if an injunction is granted. *See, e.g.*, *Korn v. New Castle County*, 2005 WL 2266590 (Del. Ch.) (Op.), at *14, *rev'd on other grounds*, 2007 WL 949650 (Del. Supr.). Since I find that Shell has failed to demonstrate that he has an easement over the Edwards' property, I need only

[1] According to the complaint, the Edwards had erected a gate and posted no trespassing signs along the drive.
[2] Since both parties are *pro se* litigants, I did not request post-trial briefing.

address the first prong of the test to determine that the injunctive request must be denied.

Shell owns approximately six acres of land on Mud Mill Road (formerly County Route 207) in Kent County, Delaware. Shell purchased this parcel in June 2001,[3] but it was undisputed at trial that he has lived on the property since 1988, when it was purchased by his in-laws, Charles and Marion Barr. Charles and Marion Barr purchased the land from Charles H. Kemp, Jr., who in turn had purchased it from Roger S. Brown in 1981. According to Shell's testimony at trial, Brown purchased a 12-acre parcel of land in 1969, which he subdivided into two lots. According to Shell, Brown constructed a lane down the center of the property and since 1969, the lane has been used to access both the six-acre lot Shell currently owns and the six-acre lot currently owned by the Edwards.

A 2005 survey of the Edwards' property depicts a stone drive on the eastern edge of their parcel running northward from Mud Mill Road along the boundary with Shell's property for a distance of nearly six hundred feet to the Edwards' residence.[4] The entrance to the drive is entirely on the Edwards' property, but after

[3] Although the deed recites that the property was transferred to Shell and his wife Cheryl Lynn, Mrs. Shell was not initially a party to this action. She has since been joined as a party plaintiff pursuant to Chancery Court Rules 19(a) and 21.

[4] Defendants' Exhibit No. 5. Shell objected to the admission of a 1980 survey of the property currently owned by the Edwards, arguing that it does not accurately depict the lane. The 1980 survey shows a dirt drive from the public road north along the eastern edge of the property to a concrete block garage/building. Defendants' Exhibit No. 4. The concrete building is shown on the 2005 survey a short distance behind the Edwards' residence. No portion of the dirt drive in the 1980 survey encroaches on the adjacent property that is currently owned by Shell. If Shell had been able to demonstrate 20 uninterrupted

a short distance the drive angles onto Shell's property, then straightens, and continues northward. The drive is located primarily on the Edwards' property, but slightly encroaches on Shell's property along most of its length (a long narrow strip varying in width but no more than five feet wide at any point) until, approximately five hundred feet from Mud Mill Road, the drive widens and branches off onto Shell's property near his residence.

Shell's claim that he has the right to use the portion of the stone drive on the Edwards' property is based on a theory of easement. "An easement may be created in any of several ways: by express grant or reservation, by implication, by necessity, or by prescription." *Judge v. Rago*, 570 A.2d 253, 255 (Del. 1990) (citing *Leach v. Anderl*, 526 A.2d 1096, 1099 (N.J. Super. A.D. 1987)). Shell introduced into evidence four documents: the 1981 deed from Brown to Kemp, the 1988 deed from Kemp to the Barrs, the 1988 real estate purchase contract between Kemp and the Barrs, and the 2001 deed from the Barrs to Shell and his wife. The 1988 real estate purchase contract contains the following language: "Said real estate shall include the real property, all appurtenant rights, privileges and easements thereto[.]" None of the deeds, however, makes any explicit reference to a drive or grants any easement. Since Kemp could not convey to the Barrs more property rights than he held, this "catch-all" reference to "all … easements" in the

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years of open, notorious and hostile use of the drive by himself and his predecessors in title, the alleged inaccuracy of the 1980 survey would have been of no consequence to his claim.

1988 purchase contract, *see, e.g., Anolick v. Holy Trinity Greek Orthodox Church*, 787 A.2d 732, 738-740 (Del. Ch. 2001), does not demonstrate that Shell has an express easement over the drive located on the Edwards' property.

Another possible theory of easement applicable to this case is an easement by implication since both parcels of land, according to Shell, were previously owned by a single party. *See Judge*, 570 A.2d at 258. An easement by implication arises when a common owner of two parcels of land regularly uses one parcel to benefit the other. When the land is subdivided, the owner of the dominant tenement may hold an easement appurtenant to his land even if the conveyances are silent on the issue and even if the easement is not absolutely necessary for the enjoyment of the dominant parcel. *See id.* (citing *A.J. & J.O. Pilar, Inc. v. Lister Corp.*, 119 A.2d 472, 476 (N.J. Super. A.D.), *aff'd*, 123 A.2d 536 (N.J. 1956)). To establish an easement by implication, a party must show: "(1) unity of title during which a servitude is imposed on one part of an estate in favor of another part, the servitude being in use at the time of severance of title; (2) the nature of the servitude must appear to be permanent and obvious at the time of the severance; and (3) the servitude was necessary for the reasonable enjoyment of the other part of the property at the time of the severance." *Brown v. Houston Ventures, LLC*, 2003 WL 136181 (Del. Ch.) (Mem. Op.), at *4. Assuming for the sake of argument that Shell could have established the first two prongs of the test, Shell is

unable to demonstrate that the servitude (the stone drive) was necessary for the reasonable enjoyment of the property at the time of severance. The 2005 survey indicates that the Edwards' parcel of land has nearly 200 feet of frontage on Mud Mill Road, and an aerial photograph demonstrates that Shell's parcel has a similar amount of frontage along the same road.[5] The drive, therefore, would not have been necessary for the reasonable enjoyment of Shell's property at the time of severance because the property could have been easily accessed by other means from the public road, i.e., by creating another driveway. *Id.* (driveway that allowed direct access to kitchen road was not reasonably necessary where there were other means of accessing the property).

For the same reason, Shell cannot demonstrate that he has an easement of necessity over the Edwards' property. An easement of necessity is similar to an easement by implication, but arises even if there is no pre-existing use when a landowner landlocks one parcel by conveying another. *See Judge*, 570 A.2d at 258 n.4. Shell's property is not landlocked. He testified, moreover, that he has obtained an entrance permit for his land, but lacks the finances to build his own lane.

At trial, Shell also attempted to demonstrate that he has an easement by prescription over the Edwards' property. Easements by prescription are generally

[5] Defendants' Exhibit No. 2.

disfavored because they result in forfeitures of existing property rights. *See Dewey Beach Lions Club, Inc. v. Longanecker*, 905 A.2d 128, 134 & n.26 (Del. Ch. 2006). In order to establish a prescriptive easement, claimants must prove by clear and convincing evidence that they, or persons in privity with them have used the disputed area: (1) openly; (2) notoriously; (3) exclusively; and (4) adversely to the rights of others for an uninterrupted period of 20 years. *Id.* at 134.

At trial, Shell testified that he has used the common lane for 18 years to access his property. Shell also testified that all previous owners of his property used the common lane to access the property. However, Shell neither submitted affidavits from any previous owners of his property nor did he call any witness at trial who could testify firsthand as to those previous owners' use of the common lane. Shell's hearsay evidence as to the previous owners' use of the lane does not constitute clear and convincing proof.[6] Thus, Shell has failed to sustain his burden of showing that he ***and*** his predecessors in title used the common lane openly, notoriously, exclusively and adversely to the rights of others for an uninterrupted period of 20 years. *See, e.g., Lickle v. Frank W. Diver, Inc.*, 238 A.2d 326, 329-30 (Del. 1968). Accordingly, I find that Shell is not entitled to injunctive or

[6] Testifying on behalf of herself and her husband, Mrs. Edwards was able to pinpoint the weakness in Shell's case: " … there's no question that he has lived there since 1988. We've lived there since 1995. We purchased it in 1992. He's telling the Court that Roger Brown, the previous owner, has told him one thing, and Mr. Brown has told me something totally different before this has ever come about, about the previous owner of the land being allowed to use the driveway. So therefore, in our eyes, and why we're here basically, is because we're under the understanding that Mr. Shell's easement by prescription would not have started until 1988, which hasn't give [sic] him 20 years yet."

declaratory relief since he has failed to establish a right to use the Edwards' portion of the common lane.