

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-005381

03/29/2017

HON. RANDALL H. WARNER

CLERK OF THE COURT
K. Ballard
Deputy

T M S VENTURES L L C

CASEY SCOTT BLAIS

v.

TERESA C ZACHARIAH, et al.

FRANCIS J SLAVIN

UNDER ADVISEMENT RULING

Plaintiff's November 16, 2016 Motion for Partial Summary Judgment re: Access and Utilities is under advisement following argument. At issue is whether an easement exists over Defendants' properties to provide access to Plaintiff's property.

1. Background.

The properties at issue are on the north side of Camelback Mountain, and Phoenix Title and Trust Company ("Phoenix Title") owned them in 1959. That year, it created the Stone Canyon East subdivision by recording a subdivision plat ("the Plat") creating several lots, including those at issue here: Lots 22, 23, 24 and 25. It included a dedicated easement for San Miguel Avenue, which provides access to Lots 22, 23, 24 and 25.

At the time, Phoenix Title also owned a parcel to the south of those lots ("the Property"). San Miguel Avenue is the closest road to the Property, but does not abut it. Rather, to reach the Property from San Miguel Avenue, it is necessary to cross Lots 22, 23, 24 and/or 25.

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The Property is not part of the Stone Canyon East subdivision, and the Plat did not dedicate an easement that would allow access to the Property. Thus, when the Plat was recorded, the Property became land-locked.

Whether Phoenix Title intended this or not, it attempted a fix in 1960 by recording an “Easement for Roadway.” The Easement for Roadway states that it dedicates a 50-foot easement from San Miguel Avenue to the Property. Portions of the easement are on Lots 22, 23, 24 and 25.

Phoenix Title sold Lots 22, 23, 24 and 25 along with others in the subdivision. The original deed for Lot 24 expressly referenced the Easement for Roadway. The original deed for Lot 25 does not, although a subsequent conveyance did refer to the Easement for Roadway. No deed conveying Lots 22 or 23 referenced the Easement for Roadway, but the owners of those lots had actual notice of it.

Portions of Lot 22’s and Lot 23’s driveways are in the claimed easement, but the evidence is conflicting regarding how the claimed easement has been used over the years.

Plaintiff owns the Property, and argues three theories for why it has a valid easement over Defendants’ properties. Defendants own Lots 22, 23 and 24. The owner of Lot 25 does not contest Plaintiff’s claim.

2. Common Law Dedication.

Plaintiff argues, first, that Phoenix Title effected a common law dedication of easement for a roadway. A common law dedication requires (1) an offer by the owner of land to dedicate the easement and (2) acceptance by the general public. *Pleak v. Entrada Prop. Owners’ Ass’n*, 207 Ariz. 418, 423-24, 87 P.3d 831, 836-37 (2004). “No particular words, ceremonies, or form of conveyance is necessary to dedicate land to public use; anything fully demonstrating the intent of the donor to dedicate can suffice.” *Id.* at 424, 87 P.3d at 837.

Phoenix Title’s 1960 recording evinces a clear intent to dedicate a roadway easement through Lots 22, 23, 24 and 25. So the question is whether it was ever accepted. An offer to dedicate is accepted if subsequent deeds explicitly reference the deed of dedication. *Lowe v. Pima Cty.*, 217 Ariz. 642, 646, 177 P.3d 1214, 1218 (App. 2008).

Here, deeds conveying two of the servient parcels reference the Easement for Roadway: the initial deed conveying Lot 24 and a subsequent deed conveying Lot 25. But no deed to Lots 22 or 23 reference the Easement for Roadway. Although the owners of those lots may have had notice of the claimed easement, a common law easement requires acceptance, not just notice.

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A common law easement can also be accepted by usage. But the evidence regarding usage is insufficient to warrant summary judgment for Plaintiff on this issue.

3. Private Easement.

Next, Plaintiff argues that it has a private easement under Section 2.1(1)(b) of the Restatement, which says:

A servitude is created . . . if the owner of the property to be burdened . . . conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community....

Restatement (Third) of Property (Servitudes) § 2.1(1)(b) (2000). The Easement for Roadway was not a declaration of servitudes for the Stone Canyon East subdivision; rather it attempted to establish a public road easement through that subdivision to the Property, which was not part of the subdivision. So Plaintiff argues that the Easement for Roadway itself established a different general-plan development, one that included the Property along with Lots 22, 23, 24 and 25.

“General-plan development” is defined as “a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude imposed to effectuate a plan of land-use controls for the benefit of the property owners in the development or neighborhood.” Restatement (Third) of Property (Servitudes) § 1.7(1) (2000). Applying this definition, there was no general-plan development that included both the Property and its neighbors. The Easement for Roadway did not create a real estate development or neighborhood; it purported only to create a roadway easement. So it did not create a private easement under Restatement § 2.1(1)(b).

4. Implied Way of Necessity.

Third, Plaintiff argues that it has an implied way of necessity. “Under the common law, where land is sold that has no outlet, the vendor by implication of the law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property.” *Bickel v. Hansen*, 169 Ariz. 371, 374, 819 P.2d 957, 960 (App. 1991). To establish an implied easement, Plaintiff must show (1) common ownership of the parcels, (2) severance of the claimed dominant parcel from the claimed servient parcel, (3) at the time of severance, the dominant parcel had no outlet, and (4) reasonable necessity for access existed at the time of severance. *College Book Centers, Inc. v. Carefree Foothills Homeowners’ Ass’n*, 225 Ariz. 533, 541, 241 P.3d 897, 905 (App. 2010). The Restatement standard is similar, though it adds what

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amounts to an affirmative defense: “unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.” Restatement (Third) of Property (Servitudes) § 2.15 (2000).

The evidence establishes the first three elements. The land that became the Property and Lots 22, 23, 24 and 25 was under common ownership and, when the Property was severed from the rest, it became land-locked. There is no evidence of any outlet to the Property other than through Defendants’ properties.

It is not clear from the record, however, that access to the Property was reasonably necessary at the time of severance. Rather, there is a fact dispute over whether the Property can be (or could have been at the time of severance) reasonably developed given its topography. This fact issue precludes summary judgment on the issue of implied easement.

5. Adverse Possession.

Assuming there is an easement, Defendants claim it has been lost by adverse possession. Plaintiff argues that Defendants cannot prove this defense. To prove adverse possession of an easement, Defendants must show acts adverse to the easement for ten years. *Sabino Town & Country Estates Ass’n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). The evidence on this issue is conflicting so as to preclude summary judgment.

6. Order.

Based on the foregoing,

IT IS ORDERED denying the Motion.