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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Litchfield at Torrington.

Michelle BABIJ

v.

Michael CONNOLE et al.

LLICV146011005S
|
January 14, 2019

Opinion

Pickard, J., Judge Trial Referee

***1** The plaintiff, Michelle Babij, sued the defendants, Michael Connole and Nancy Connole ("the Connoles"), James Maguire ("Maguire"), and the Town of Winchester ("Town") in a multi-count complaint concerning a neighborhood dispute over a right-of-way shared in common by the plaintiff, the Connoles and Maguire and which right-of-way abuts the properties of the parties. All parties are represented by experienced counsel. This case was tried to the court in four trial days, the last of which was March 29, 2018. The court made a site visit on April 11, 2018 accompanied by the attorneys. The parties filed briefs and replies, the last of which was filed on August 16, 2018. The parties agreed to extend the 120-day time for decision to February 1, 2019.

I. The Pleadings and Procedural History

Eight years ago there was a previous case involving the plaintiff, the Connoles and Maguire addressing some of the same issues. See, *Connole v. Babij,* Superior Court, judicial district of Litchfield, Docket No. 08 5004530 (December 29, 2010), reversed, in part, 140 Conn.App. 494 (2013). In that case, the Connoles and Maguire sued the plaintiff alleging that she had obstructed and interfered with their use of the right-of-way. The plaintiff claimed that she owned the right-of-way and that the Connoles and Maguire had caused damage to it by driving over it and cutting down trees. The Appellate Court reversed the trial court's decision that the plaintiff owned the fee to the right-of-way and was entitled to a payment of $100 per year by Connoles and Maguire for the privilege of passing over it. The Appellate Court affirmed the trial court in all other respects.

The original complaint in this case was dated July 17, 2014. There has been extensive pleading practice (345 separate filings). When the trial commenced, the complaint had been amended five times and the operative complaint was the sixth amended complaint ("operative complaint") dated January 10, 2016. The operative complaint originally contained fifteen counts. Prior to trial, the seventh count had been stricken and the fifth and eleventh counts had been withdrawn without objection. The Connoles filed an answer as well as special defenses and a counterclaim. Maguire filed an answer as well as two special defenses, and a statement per General Statutes § 47-31(d).

The trial of the case had been continued six times before the trial finally began on December 19, 2017. On December 20, 2017, the plaintiff requested leave to conform the operative complaint with the proof which had been presented on the first day of trial. The court sustained an objection to this further amendment. On January 23, 2018, during a long hiatus in the trial, the plaintiff requested leave to withdraw three counts of the operative complaint. The court sustained an objection to this request.

On March 29, 2018, the Connoles filed a motion to vacate an order which had granted the plaintiff's motion to strike their affirmative defenses. The plaintiff has objected. The court has given consideration to the reasons given by the Connoles for their failure to object to the motion to strike. In other circumstances these reasons might provide good cause to vacate the motion to strike. Here, because of the failures of proof discussed in this decision, the Connoles do not need to rely on special defenses. Therefore, in light of the very long history of this case and the frequent pleading and re-pleading, the court is not inclined to permit the Connoles to resurrect defenses which were stricken long ago and which will not have any real effect on the outcome of this case. The motion to vacate is denied.

***2** Also, on March 29, 2018, all defendants filed motions to dismiss the respective counts against them following the close of the plaintiff's proof. The court deferred decision on these motions to dismiss. The defendants then proceeded with their evidence. The court now denies these motions to dismiss

and proceeds to decide the issues based on all the evidence presented. Each pending count of the operative complaint will be discussed separately.

II. Applicable General Principles

A. Burden of Proof

The burden of proof is on the plaintiff to prove all the essential allegations of the complaint. *Lukas v. New Haven,* 184 Conn. 205, 211 (1981). A defendant would have the same burden with respect to a counterclaim. With respect to special defenses: "Generally, the pleading of a special defense places the burden of proving the facts in support of that defense on the pleader." W. Horton and K. Knox, Connecticut Practice Series: Connecticut Superior Court Civil Rules (2015-2016 Ed.) § 10-50, citing *Wyatt Energy, Inc. v. Motiva Enerprises, LLC,* 308 Conn. 719 (2013). In an ordinary civil case, a party satisfies his or her burden of proof if the evidence, considered fairly and impartially, induces in the mind of the trier a reasonable belief that it is more probable than not that the fact or issue is true. *Busker v. United Illuminating Co.,* 156 Conn. 456, 458 (1968).

B. Credibility of Witnesses

The court's finding of facts depends in large part upon its evaluation of the credibility of the witnesses. "It is the trier's exclusive province to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Internal quotation marks omitted.) *Hoffer v. Swan Lake Ass'n, Inc.,* 66 Conn.App. 858, 861 (2001). "Nothing in our law is more elementary than that the trier is the final judge of the credibility of witnesses and of the weight to be accorded their testimony." *Masse v. Perez,* 139 Conn.App. 794, 798 (2012). "Credibility must be assessed ... not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude ... [The] fact finder is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." *Southhaven Associates, LLC v. McMerlin, LLC,* 159 Conn.App. 1, 9 (2015).

III. Facts

Since 1991 the plaintiff has owned property known as 121 Von's Lane in Winchester, Connecticut where she has resided for much of that time. The plaintiff's deed describes three separate parcels shown as "5J," "5K," and "5F" on a map used by all parties in the trial and marked as Plaintiff's Exhibit 8. The first two parcels, 5J and 5K comprise the land on which her house is located. The third parcel, 5F, is shown on Exhibit 8 as a road named Chlorinator Road.

The evidence is clear that the plaintiff's property has no frontage on a municipal road. But the plaintiff has access to the municipal road system by virtue of the right to use the private right-of-way shown as Chlorinator Road on Exhibit 8. Chlorinator Road, has also been known as Morgan Drive or Highland Lake Road and is now known as Von's Lane (herein referred to as "Von's Lane"). It runs from the northeasterly corner of the plaintiff's property to a municipal road known as Wakefield Boulevard. The right to use Von's Lane in common with others was specifically granted to the plaintiff in her 1991 deed and is described as follows: "The premises are conveyed together with such right, if any, as the Grantor has in and to a right-of-way from the northeasterly corner of the herein-described premises in a southerly and easterly direction in common with others over said roadway known as Morgan Drive [Von's Lane] running to Wakefield Boulevard."

***3** The third parcel described in the plaintiff's deed, 5F, purports to convey the fee to a portion of Von's Lane. The evidence did not establish by a preponderance that the plaintiff owns the fee title to any part of Von's Lane. In fact, the very thorough title search performed for the plaintiff's title searcher concludes that it is not possible to say who owns fee title to Von's Lane.

During the trial the plaintiff attempted to claim a more extensive right of way extending beyond her property in the opposite direction from Wakefield Boulevard by virtue of allegedly implicit appurtenant rights benefitting the first parcel of her land. The court has held that this claim was not pleaded by the plaintiff in any of her complaints. After the first day of evidence the plaintiff moved to amend her complaint again to explicitly include this claim. The defendants vigorously objected to this proposed amendment on the grounds that they were not prepared to address it because the prior complaints had not given them notice of the claim. They rightly claimed that if the amendment were permitted, the court should again continue the trial to permit further discovery and preparation. Having weighed the arguments of the parties, the court denied the amendment.

Thus, no findings are made with respect to the un-pleaded claim that the plaintiff has implicit appurtenant rights benefitting the first parcel of her land.

The defendant, Maguire, owns property at 78 Overlook Road, Winchester, Connecticut. A part of the Maguire property is bounded by Von's Lane across from the plaintiff's land. Maguire has the right to use Von's Lane in common with others, including the plaintiff, but commonly uses more convenient means of access to his house.

The Connoles own property at 2 Moreland Road where they have lived since 1983. They have the right to use Von's Lane in common with others, including the plaintiff, but commonly use Moreland Road as a more convenient means of access to their house. They filed a counterclaim to quiet title to Von's Lane in themselves. However, the evidence did not establish by a preponderance of the evidence that the Connoles own the fee title to any part of Von's Lane. In fact, the very thorough title search performed for the plaintiff concludes that it is not possible to say who owns fee title to Von's Lane.

At the place where it abuts the plaintiff's property, Von's Lane is a dirt road which lies downhill from the Connole property. It is extremely wet in this area. Surface water from the Connole property flows downhill onto the plaintiff's property and Von's Lane. There are two pipes from the Connole property which point toward the plaintiff's land. There are other potential sources of water onto Von's Lane including pipes from the plaintiff's property which emerge at Von's Lane and water from a neighboring public street which flows into a catch-basin and by ditch along the edge of the plaintiff's property. There was no evidence comparing the quantities of these various potential sources of water. The plaintiff has not attempted to improve the water problem on Von's Lane by removing a shed located in the right-of-way which directs water toward the plaintiff's side of the road and away from a drainage ditch on the opposite side.

The plaintiff's claims which have not been proven are as important as the facts found. The plaintiff has made claims that the Connoles and Maguire trespassed on the plaintiff's land, damaged Von's Lane with excavations and blocked the plaintiff's access to Von's Lane. The plaintiff's testimony on these issues did not outweigh the contradictory evidence. Therefore, none of the allegations of trespass or damage to the plaintiff's land or to Von's Lane were proven by a fair preponderance of the evidence.

***4** The plaintiff also alleged that the Connoles concentrated and redirected surface water on their property and caused it to flow onto the plaintiff's land and Von's Lane thereby causing damage. None of these allegations were proven by a fair preponderance of the evidence. The plaintiff never offered any evidence about the two pipes on the Connole property other than photographs of their existence and the testimony of the plaintiff that she first noticed them in about 2008. The plaintiff substantially relied on the testimony of Michael Klein, a soil scientist, regarding the water issues. The court did not find his testimony to be convincing, especially in regard to the relative flow volumes of the various potential sources of water on Von's Lane.

The plaintiff also alleges that the Town's snow plowing methods caused melting snow to damage Von's Lane. These allegations were not proven by a fair preponderance of the evidence.

IV. Discussion

A. First Count (Quiet Title as to the Connoles)

The first count is directed against the Connoles only. In this count the plaintiff seeks to have the court determine her rights to Von's Lane as it abuts her property and provides the only access from her property to a public road. The preponderance of evidence shows that the plaintiff has an easement in common with others over Von's Lane which begins at the northeasterly corner of the plaintiff's property and runs southerly along the easterly boundary of the plaintiff's land and then turns and runs easterly to Wakefield Boulevard. Judgment is entered in favor of the plaintiff in accordance with this finding.

B. Second Count (Quiet Title as to Maguire) and Twelfth Count (Malicious Structures as to James Maguire)

The second count is directed against Maguire only. Although there is a mention of damages in paragraph 14 of this count, the prayer for relief is for “declaratory and equitable relief to quiet title.” The preponderance of evidence shows that the plaintiff has an easement in common with others over the right of way known as Von's Lane which begins at the northeasterly corner of the plaintiff's property and runs southerly along the easterly boundary of the plaintiff's land and then turns and

runs easterly to Wakefield Boulevard. The court declines to adjudicate anything beyond this description as it has been excluded by the denial of permission to a further amendment of the complaint. Judgment is entered in favor of the plaintiff on the second count in accordance with these findings.

In the twelfth count, the plaintiff alleges that Maguire erected barricades to prevent the plaintiff from using the alleged extension of Von's Lane which the court has excluded from adjudication by denial of the proposed amendment of the complaint. Therefore, because the plaintiff has failed to show a right to use the alleged extension of Von's Lane beyond the plaintiff's property, the court must deny the plaintiff's claim that she has been prevented from using it. Further, the barricades erected to prevent its use, therefore, cannot be malicious structures. Judgment is entered in favor of Maguire on the twelfth count.

C. Third Count (Trespass, as to the Connoles)

In this count, the plaintiff seeks damages from the Connoles as a result of actions allegedly taken by them on the plaintiff's land and/or on Von's Lane. This claim has not been proven by a fair preponderance of the evidence. There evidence was not persuasive that the Connoles trespassed on the plaintiff's land. While there was evidence that Mr. Connole participated in some excavation within the right of way, there is no credible evidence that it damaged the right of way. The plaintiff shares the right to use Van's Lane with others including the Connoles. There was no proof that anything done by the Connoles obstructed the plaintiff's use of the right of way in a meaningful way. Judgment shall enter on the third count in favor of the Connoles.

D. Fourth Count (Trespass as to Maguire)

***5** In the fourth count the plaintiff alleges that Maguire committed trespasses on the plaintiff's land. This claim has not been proven by a preponderance of the evidence. There is no persuasive evidence that the Maguire trespassed on the plaintiff's land. While there was evidence that Maguire participated in some excavation within the right of way, there is not a preponderance of evidence that it damaged the right of way. The plaintiff shares the right to use Van's Lane with others including Maguire. There was no proof that anything done by Maguire obstructed the plaintiff's use of the right of way in a meaningful way. Judgment shall enter on the fourth count in favor of Maguire.

E. Sixth Count (Nuisance as to the Connoles—Water Discharges), Tenth Count (Intentional Infliction of Emotional Distress as to the Connoles—Water/Effluent Diversion and Runoff), and Thirteenth Count (Injunctive Relief—Water Damage as to the Connoles)

There are three separate counts which deal with an alleged diversion of water by the Connoles. The sixth count claims that the water discharges have created a nuisance. The tenth count alleges the discharges amount to an intentional infliction of emotional distress. The thirteenth count seeks injunctive relief against the discharges. The three counts all rely on the same allegations and will be dealt with together.

The evidence is clear that there are two pipes which emerge from the southerly line of the Connole property and point toward the plaintiff's land. The evidence was unconvincing as to how long these pipes have existed, their purpose, the amount of water or other liquid which flows from them, and the extent to which they contribute to the wetness of the plaintiff's property and Von's Lane abutting the plaintiff's land. It is clear that the Connole property lies uphill from the plaintiff's land and that there will necessarily be water runoff. But, the evidence is lacking as to the extent of that runoff and whether any of it occurs because of an unnatural concentration by the Connoles.

There is no question that the section of Von's Lane abutting the plaintiff's land is extremely wet. The plaintiff's testimony, the photographs in evidence and the court's own site-visit confirm this fact. But, the plaintiff had the burden of proving that the condition is caused by actions of the Connoles, and not by the natural flow of surface water. "[A landowner] incurs no liability by reason of the fact that surface water falling or running onto his land flows thence to the property of others in its natural manner. But he may not use or improve his land in such a way as to increase the total volume of the surface water which flows from it to adjacent property, or to discharge surface water or any part of it upon such property in a manner different in volume or course from its natural flow, to the substantial damage of the owner of that property." *Ferri v. Pyramid Construction Co.,* 186 Conn. 682, 685-86 (1982).

The plaintiff's property and the adjoining Von's Lane lie downhill from the Connole property. The natural flow of

surface water is downhill from the land above. It was the plaintiff's burden to prove by a preponderance of the evidence that the Connoles improved their land in such a way as to increase the total volume of surface water which flows on the plaintiff's land and Von's Lane. The plaintiff failed to produce such evidence. Judgment shall enter on the sixth count in favor of the Connoles. For the same reasons, judgment shall enter in favor of the Connoles on the tenth and thirteenth counts.

F. Eighth Count (Nuisance, as to the Town of Winchester), Ninth Count (Trespass, as to the Town of Winchester), and Fifteenth Count (Injunctive Relief, as to Town of Winchester)

***6** In the eighth count the plaintiff alleges that the Town created a nuisance by plowing snow into piles at the end of Moreland Road, a private right of way which intersects near the northerly end of Von's Lane. The plaintiff alleges that when the snow melts in runs onto the plaintiff's land and down Von's Lane where it abuts the plaintiff's land and co-mingles with the runoff from the Connoles' pipes causing erosion gullies running down Von's Lane as well as deep mud which makes Von's Lane impassable. In the ninth count the plaintiff alleges that the Town trespassed on the plaintiff's land by creating a flood of water from the melting snow piles.

The evidence was that the Town does plow Moreland Road and does pile snow at the southerly end. There is little doubt that the melt from the snow will run downhill onto Von's Lane and the plaintiff's land. But, the plaintiff failed to prove a nuisance.

"A public nuisance exists if: (1) the condition complained of has a natural tendency to create danger and inflict injury upon person or property; (2) the danger created is a continuing one; (3) the use of land is unreasonable or unlawful; and (4) the condition or conduct interferes with a right common to the general public." *Keeney v. Old Saybrook,* 237 Conn. 135, 162-63 (1996). "Liability can be imposed on the municipality only in the event that, if the condition constitutes a nuisance, it was created by some positive act of the municipality." *Id.*, 164.

There was simply no credible evidence the snow plowed by the Town and left at the base of Moreland Road had the natural tendency to create danger and inflict injury upon the plaintiff's property or Von's Lane. The amount of snow in the piles would vary from storm to storm and winter to winter. The plaintiff did not offer any evidence of the amount of water which would have flowed from the largest pile which existed within the statutory limitation period of three years from the date of the plowing. See, General Statutes § 52-577. There is no way for the court to measure the amount of water produced as compared to the other sources of water which contribute to the down-hill flow of water. The plaintiff has not met her burden of proof that the snow piles are unreasonable or unlawful. Judgment shall enter on the eighth count in favor of the Town. For the same reasons, judgment shall enter on the ninth count and the fifteenth count in favor of the Town.

G. Fourteenth Count (Overburdening of Easement/Injunctive Relief as to the Connoles and as to Maguire)

In the fourteenth count the plaintiff alleges that the Connoles and Maguire drive construction equipment and "motorized vehicles" on Von's Lane in front of the plaintiff's property in such a way as to cause deep ruts and damages to the surface of Von's Lane thereby making it impassable except for similar vehicles. The plaintiff seeks injunctive relief.

There are photographs in evidence which show Von's Lane with mud and vehicle ruts. There is another photograph which shows a refuse truck which has become stuck in the mud in front of the plaintiff's house. There is no doubt that the muddy condition of Von's Lane will cause vehicles to create ruts. But, the Connoles and Maguire have a right to pass and repass over Von's Lane. There is no credible evidence that the Connoles and Maguire have abused this right so as to entitle the plaintiff an injunction. For this reason judgment will enter for the Connoles and Maguire on the fourteenth count.

H. The Connoles' Counterclaim

In their counterclaim, the Connoles seek to quiet title as fee title owners of Von's Lane. The court has found that the plaintiff has failed to prove that she is the fee title owner of Von's Lane and that the plaintiff's own title searcher testified that it is not possible to conclude who owns the fee title to Von's Lane. The court has also concluded that the plaintiff, the Connoles and Maguire all have the right to use Von's Lane for access and egress to their properties. The Connoles offered no evidence to contradict these findings. For these reasons, judgment will enter against the Connoles on their counterclaim.

All Citations

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