IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JOHN J. TURCHI, JR. and MARY ELIZABETH TURCHI,	:	August Term 2004
Plaintiffs,	:	No. 1187
v.	:	Control No. 060014
MCW WASHINGTON SQUARE PARTNERS, LP and JOHN and JANE DOE,	:	Commerce Program
Defendants.	:	

ORDER

AND NOW, this 3rd day of January, 2006, upon consideration of Plaintiffs John J. Turchi, Jr. and Mary Elizabeth Turchi's Motion for Summary Judgment, and the response and reply thereto, and in accordance with the attached memorandum, it is hereby **ORDERED** and **DECREED** as follows:

1) Plaintiffs John J. Turchi, Jr. and Mary Elizabeth Turchi's Motion for Summary Judgment is **GRANTED**;

2) The wall built on the property line between 223-225 South 6th Street, Philadelphia, Pennsylvania (the "Turchi Property") and 227-231 South 6th Street, Philadelphia, Pennsylvania (the "Lippincott Property") (the "Wall") is a party wall under Pennsylvania law;

3) The property line between the Turchi Property and the Lippincott Property is within the Wall;

4) Neither Plaintiffs nor Defendants have any property rights in the Wall beyond those afforded owners of party walls under Pennsylvania law;

5) Plaintiffs need no permission to close up, cover, or obstruct the existing windows in the Wall in connection with the development of the Turchi Property;

6) Plaintiffs have the right to build up to and tie into all and any part of the Wall without permission from Defendants;

7) The rights reserved to the owners of the Lippincott Property under the easement described in paragraph 11 of the Complaint (the "Easement") are no greater than the rights set forth in the Easement;

8) The Easement has terminated in accordance with its own terms on the basis of the Plaintiffs' intention to build on the Turchi Property;

9) The Counterclaims of Defendant MCW Washington Square Partners, L.P. are **DISMISSED**;

10) This executed Order, or an authenticated copy thereof, shall be made at all times part of the record of the title of the Lippincott Property and the Turchi Property;

11) This executed Order, or an authenticated copy thereof, shall at all times hereafter be taken as evidence of facts created and established hereby; and

12) This Order shall be of limited effect until such time as the zoning designation of the Turchi Property has been changed from "historically significant" to "noncontributing." Prior to such time, paragraphs five, six, and eight (5, 6, and 8) of this Order shall be held in abeyance and all other paragraphs of this Order shall be in effect.

BY THE COURT,

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C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

Presently before the court is the Motion for Summary Judgment of Plaintiffs John J. Turchi, Jr. and Mary Elizabeth Turchi (together, the "Turchis"), which is opposed by Defendant MCW Washington Square Partners, LP ("MCW").

BACKGROUND

This litigation originates in the Turchis' desire to build on the property they own at 223-225 South 6th Street, Philadelphia (the "Turchi Property"). MCW possesses the adjacent property at 227-231 South 6th Street (the "Lippincott Property"). Currently, the Dilworth House sits on the Turchi Property and the Lippincott Building on the Lippincott Property. To complete their project, the Turchis will, according to MCW, affect the windows in the north wall of the Lippincott Building (the "Wall"). The fate of the Dilworth House currently resides with the Philadelphia Historical Commission, which needs to redesignate the residence before it can be demolished and a new structure erected on the site.

In an earlier phase of this dispute, the Turchis filed a lis pendens against the Lippincott Building. In an Order issued January 26, 2005, the court struck the lis pendens but required the posting of a notice in all relevant documents related to the Lippincott Building that identified the current lawsuit.

For purposes of the present dispute, the chain of title for the portion of the Turchi Property with the Wall begins on January 26, 1928. On that day, four transactions took place. First, according to the deed (the "First Deed"), Joseph Wharton Lippincott conveyed the portion of the Turchi Property with the Wall to Frank H. Moss ("Moss"). The First Deed contains an easement (the "Easement") "to maintain the existing windows in the North Wall of the premises known as Nos. 227-229-231 S. Sixth Street being the land of J.B. Lippincott et al" and the right to extinguish it (the "Right") "which easement shall continue until the Grantee his heirs and assigns desires to build at which time this easement … shall cease." Plfs. Mem., App. at tab 7. Next, according to the deed (the "Second Deed"), Moss conveyed the land to Frank F. Barker. Plfs. Mem., App. at tab 8. Then, according to the deed (the "Third Deed"), Frank F. Barker conveyed the property to Moss. Plfs. Mem., App. at tab 9. Finally, according to the deed (the "Fourth Deed"), Moss conveyed the land to The Penn Mutual Life Insurance Company. Plfs. Mem., App., at tab 10. The Second, Third, and Fourth Deeds identify the Easement and the Right in slightly different language than the First Deed.

In 1957, according to the deed (the "Dilworth Deed"), The Penn Mutual Life Insurance Company conveyed the property to Ann K. Dilworth. Plfs. Mem., App., at tab 11. The Dilworth Deed also identifies the Easement and the Right in slightly different language. In 1976, according to the deed (the "Dental Deed"), the Guardians of the

Estate of Ann K. Dilworth conveyed the land to the Philadelphia County Dental Society. Plfs. Mem., App. at tab 16. In 2001, according to the deed (the "Turchi Deed"), the Philadelphia County Dental Society conveyed the property to the Turchis. Plfs. Mem., App. at tab 17. Both the Dental and Turchi Deeds contain an appurtenances clause.

Plaintiffs seek to quiet title to the Wall. Defendant filed counterclaims to quiet title to the Wall and to recover for Plaintiffs' interference with Defendant's contracts and potential contracts.

DISCUSSION

Pursuant to Pa. R.C.P. 1035.2, a party may move for summary judgment when (1) there is no genuine issue of material fact as to a necessary element of the cause of action or defense or (2) an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense. The court must review the entire record in the light most favorable to the nonmoving party and resolve all genuine issues of material fact against the moving party. Basile v. H & R Block, Inc., 563 Pa. 359, 365, 761 A.2d 1115, 1118 (2000).

The first issue raised by this dispute is whether the Wall is a party wall. A party wall sits between adjoining properties, Lukens v. Lasher, 202 Pa. 327, 51 A. 887 (1902), and each property is servient to the other with respect to the party wall, Appeal of Western National Bank, 102 Pa. 171 (1883). The primary factor in determining whether a wall is a party wall is "the intent of the builder." McClernan v. Greenberg, 120 Pa. Super. 259, 265, 182 A. 59, 61 (1935). Other factors include the wall's location "with reference to the boundary line between adjoining properties, … the understanding of the

adjoining owners at the time it was built, and its use for a long number of years," id., at 264, 61.

The evidence establishes that the Wall is a party wall. The surveys conducted in 1945, 1985, and 2000 show the property line between the Turchi Property and the Lippincott Property to lie within the Wall. Plfs. Mem., App. at tabs 5, 14, 19. In the 1840s, a series of townhouses were built on the Turchi Property and the Lippincott Property. Plfs. Mem., App. at 2, 3. The adjacent houses on the Turchi Property and the Lippincott Property shared the Wall. Id. In 1901, the townhouses on the Lippincott Property were torn down and replaced by the Lippincott Building. Plfs. Mem., App. at 1, 4. The Lippincott Building shared the Wall with the adjacent townhouse on the Turchi Property. Plfs. Mem., App. at 2, 6. In preparation for the demolition of the townhouses on the Turchi Property in the mid-1950s, the contractor described the walls at both edges of the Turchi Property as party walls, including the Wall. Plfs. Mem., App. at 12, 13. This evidence shows that the Wall runs along the boundary line between the two Properties, was originally built as a party wall, and served as a party wall for more than a century.

To overcome this conclusion, Defendant offers several arguments in opposition. Although Defendant points to the depositions of each of the Turchis as contradicting the notion that the Wall is a party wall, Def. Mem., at Exs. E, F, none of the McClernan factors are implicated by such testimony. Defendant also relies upon an unreported opinion of the Commonwealth Court, in clear violation of that opinion, Wolters Kluwer Del. Corp. v. Turchi, 829 A.2d 1280 (Cmwlth. 2003) ("This unreported opinion of the court shall not be cited in any brief, argument or opinion, except that any opinion filed in

the same case may be cited as representing the law of that case."), without explaining its ability to use the opinion.[1] Defendant uses the Commonwealth Court opinion to misleadingly assert that the windows in the Wall mandate it cannot be a party wall. See Philadelphia Scoop & Scale Mfg. Co. v. Silberman, 351 Pa. 154, 155, 40 A.2d 395, 396 (1945) ("*wall was originally constructed with windows* so it could not be used as a party wall") (emphasis added); McClernan, at 262, 60 ("*wall containing the vent openings was a party wall* and therefore [defendant] was justified in closing the opening.") (emphasis added). Defendant also asserts the Wall has been freestanding for almost a century, undercutting its status as a party wall. This assertion is incorrect because the Dilworth House was not constructed until 1957, Def. Mem., at Exs. 1, 2, 3, 4, after the removal of the existing townhouses on the Turchi Property, Plfs. Mem., App. at tabs 12, 13. Defendant's arguments do not alter the conclusion that the Wall is a party wall.

Although the Wall is a party wall, the Turchis use of the Wall is limited by the Easement.[2] The parties differ in their interpretation of the Easement and the Right and their inclusion in the chain of title. Plaintiffs contend the Easement is an express easement and, as they are assigns of the original grantee, they control the Right. Defendant asserts that the Right was personal to the original grantee or, in the alternative, that the Easement became permanent due to a failure to convey the Right prior to the Plaintiffs' acquisition of the property.

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[1] In the unreported opinion, the Commonwealth Court stated "[t]he narrow question we now must decide is whether L&I acted properly in closing this violation notice once it located the 1984 building permit for those windows." Def. Mem., Ex. O, at 9.

[2] Generally, a party wall belongs to both adjoining landowners, subject to reciprocal easements that each is entitled to support for its building. Schick v. Girard Trust Co., 33 Pa.D&C 464, 465 (Phila. Com. Pl. 1938). In particular, each landowner has an unlimited right to use its own property for any lawful purpose as long as it does not impair the other party's easement of support. Id.

The First Deed defines the extent of the Easement and the Right. A deed is a contract and should be construed accordingly. Southall v. Humbert, 454 Pa. Super. 360, 367, 685 A.2d 574, 577 (1996) (citing Wilkes-Barre Twp. Sch. Dist. v. Corgan, 403 Pa. 383, 170 A.2d 97 (1961)). The First Deed states that the Easement continues until the Right is exercised and the Right belongs to "the Grantee his heirs and assigns." Plfs. Mem., App. at tab 7. This language identifies the Right and the Easement as attached to the land and not a personal grant. See Brady v. Yodanza, 493 Pa. 186, 191, 425 A.2d 725, 728 (1981) ("heirs and assigns" not words for creation of an easement in gross); Marantha Settlement Ass'n, Inc. v. Evans, 385 Pa. 208, 211, 122 A.2d 679, 681 (1956) (use of "heirs and assigns" shows grant not to be a personal one); see also Lindenmuth v. Safe Harbor Water Power Corp., 309 Pa. 58, 64, 163 A. 159, 161 (1932) (presumption that easements are not personal). The slightly different language of the subsequent deeds has no effect because the Easement and the Right are fused with the land and pass by conveyance of the estate. Brady, at 727-28, 189-90. It is clear the Turchis are the assigns of the original grantee. Southall, at 370, 579. As such, they have full control of the Right according to the First Deed's express terms.

According to Defendant, however, the Right was personal to Moss. The central element in this argument is the Fourth Deed, which changed the language describing the Right from "desires" to "desired." The court notes that the Fourth Deed included in the parties' submissions is an imperfect copy. Nonetheless, it is clear that the Fourth Deed, as with the others created on January 26, 1928, contains typographical errors (i.e., "boby" for "body" in the Fourth Deed), unpredictable capitalization, and the inconsistent appearance of certain letters from page to page. Against this background, Defendant's

assertion that a change in one letter, without other evidence, identifies the Right as personal is dubious. Defendant also states "once Moss conveyed the property without having built, the ability to defease the easement disappeared and the easement became permanent." Def. Mem., at 12. Defendant, however, does not explain how this statement is consistent with its view that the Right did not terminate when Moss conveyed the property to Frank F. Barker in the Second Deed.

In the alternative, Defendant argues that none of the deeds following the Fourth Deed conveyed the Right. The absence of language stating "during the time above specified" in the Dilworth deed is insignificant because the Right identifies its duration. Defendant's benign neglect of the appurtenance clause in the final two deeds and the resulting inclusion of the Easement and Right are contrary to the straightforward language of the clause. See, e.g., Brady, at 192, 729; see also 21 P.S. §3 (The Easement and the Right pass by operation of law). Therefore, the Turchis control the Right and can terminate the Easement.[3]

Defendant's second counterclaim asserts that the Turchis interfered with both existing and prospective contractual relationships. To assert such a claim, the Defendant needs to demonstrate the absence of a privilege on the part of the Turchis. Strickland v. University of Scranton, 700 A.2d 979, 985 (1997). Plaintiffs are privileged if they (1) have a legally protected interest; (2) act or threaten to act to protect the interest; and (3) the threat is to protect it by proper means. Ruffing v. 84 Lumber Co., 410 Pa. Super. 459, 465, 600 A.2d 545, 548 (1991). Although MCW attempts to interject the concept of good faith into the claim, good faith is not an element of this claim. Id., at 467, 549. Since the Wall is a party wall and the filing of a lis pendens is proper, the Turchis actions

[3] As a result, Plaintiffs are also granted summary judgment on Defendant's Counterclaim Count I.

were privileged. Summary judgment will be granted to Plaintiff on Defendant's second counterclaim.

Events subsequent to the creation of the Easement and the Right dictate caution in resolving this dispute. At the time of their creation, construction of the Dilworth House was almost three decades in the future and no one involved with the First Deed could have known that designating the Dilworth House as historically significant would limit the Turchis' control over their property. Presumably, the Easement and the Right were drafted in order to enable the owners and users of the Lippincott Building to benefit from light and air until such time as the owners of the adjacent property decided to replace the existing townhouses with a structure that would make use of the Wall. Thus, to enable the Turchis to eliminate or block the windows in the Wall without the ability to actually build on their land would seem contrary to the intent of those responsible for the First Deed. Therefore, the Turchis' exercise of the Right is restrained until such time as the zoning classification of the Turchi Property is changed from "significant" to "noncontributing."[4]

BY THE COURT,

C. DARNELL JONES, II, J.

[4] In the event the Turchis seek to build a structure on their property that does not require approval from the City of Philadelphia, their exercise of the Right shall be complete and unfettered thirty (30) days following submission of the plans in writing to MCW (or its successor in interest).