IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

JOSEPH A. NARDUCCI and JOSEPH E.NARDUCCI	: MARCH TERM, 2005
	: No. 0109
v.	: (Commerce Program)
REGIS DEVELOPMENT CORPORATION, CLAYTON FORTUNA, GERALD J. SCALLION, LYNETTE E. SCALLION, MILTON M. MORRIS EVE KRATCHMAN, FRANCES HISEY, DONALD J MONICA, YOUNGSFORD INVESTMENT COMPANY	:
	: Superior Court Docket Nos. 1900 EDA 2008
v.	
CITY OF PHILADELPHIA	: 1929 EDA 2008 (cross-appeals)

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O P I N I O N

Albert W. Sheppard, Jr., J. ……. November 24, 2008

This Opinion is submitted relative to cross-appeals of this court's decision dated March 5, 2008, following a bench trial, and the court's Order dated June 10, 2008 denying the Post-Trial Motions. This is an ejectment action brought by plaintiffs, Joseph A. Narducci and Joseph E. Narducci ("Narducci"), against the developer and the purchasers of new homes in Philadelphia. The defendants include two property owners whom Narducci claims must give up 24 inches of their property because that strip of land belongs to Narducci.

The developer Regis Development Corporation ("Regis") cross-appeals from the court's decision to award plaintiffs $40,000.00 in compensation, in lieu of mandating return of the 24 inch strip of land.

Background

The Narducci family has owned the building located at 522 Christian Street since 1962. That property, consisting of a three story building, fronts on Christian Street and is connected to a one story building located at the rear of the property. The property has been used for storage of equipment and trucks for an electrical business continuously since 1962.

On March 30, 1915, the City of Philadelphia Council approved an ordinance selecting and appropriating the adjoining property at 524 Christian Street as a park and open place for its citizens. In accordance with the ordinance, the City acquired the City Property on November 3, 1916 and the property became a public playground.

At some point in time, the City constructed a 10 foot fence on its land along the west wall of plaintiffs' building creating a 30 inch strip on the City property next to the Narducci property. Over the years Narducci used the strip to access Christian Street through a door in the rear of the building exiting onto a back alley owned by Narducci and then onto the strip. The fence was torn down in 2003.

On December 28, 1995, City Council passed an ordinance confirming the sale of the property to defendant Regis and the property was conveyed by deed dated May 16, 1996.

After the conveyance Regis and its affiliated company, PJR, began construction of townhouses on the property. The developer/builder built fences perpendicular to the Narducci building to create private backyards for the townhouses cutting off plaintiffs access and use of a 24 inch wide parcel of land, forty feet long (called strip number 1 at trial). Plaintiff

complained to the developer, and the developer assured plaintiffs that he would remove the fences. The developer never did follow through.

It is important to note here that there **are two strips of land involved** in this litigation. As noted, there is a 24 inch strip of land forty feet in length next to the Narducci building, which based on the trial testimony arguably belongs to Narducci.[1]

Plaintiff also claims a 30 inch strip of land (called strip number 2 at trial) along the entire east property line of the prior city playground between Christian Street and Montrose Street based upon a theory of "consentable lines".[2]

In March 2005, Narducci filed this Complaint in ejectment claiming that: (a) Narducci owned strip one (24 inch strip) and the court should eject the two trespassing home owners, and (b) Narducci became title owner of the 30 inch strip of land on the City Property between the prior fence and the western boundary of the Narducci Property under a theory of adverse possession and/or consentable lines. Narducci again sought ejectment.

Following the bench trial, the court entered the following Order, in part:

> 1. With respect to the 24 inch strip of land, forty feet in length (referred to at the trial as "Strip One"), the court finds for plaintiffs and against defendant, Regis Development Corporation, only, in the amount of $44,000.00: (A) The amount, in the finding is comprised as follows: (1) 80 square feet at a value of $500.00 per square foot for a total of $40,000. (2) The cost to construct the hatch to allow access to the roof $1,500. (3) The cost for a new roof occasioned by the delay arising out of defendant- Regis' conduct $2,500. Total $44,000. (B) The court finds for the homeowners of the first two homes south of Christian Street that is, original parcels 7 and 8, (Clayton Fortuna and Gerald J. Scallion and Lynette E. Scallion) and against plaintiffs on the prayer for specific performance to restore "strip one" to

[1] Unfortunately, the plaintiff failed to obtain and present a survey for purposes of proving that this 24 inch strip of land belonged to Narducci.

[2] Attached as Appendix 1 to this Opinion is a drawing (albeit homemade) to help the reader understand the two strips of land involved.

plaintiffs. (The remaining homeowners' properties are not implicated by "strip one").

2. With respect to the plaintiffs' claim for a right to the 30 inch strip of land running along the length of the property in a southerly direction from Christian Street (referred to at trial as "strip two") based on the doctrine of consentable lines, the court finds against the plaintiffs and for all the defendants and the additional defendant. The plaintiffs have no claim or right as to "strip two".

On March 13, 2008, plaintiffs filed a motion for post trial relief. On March 24, 2008, defendant Regis also filed a motion for post trial relief. After oral argument, the court denied both motions for post trial relief on June 10, 2008. Thereafter, both plaintiffs and defendant (Regis) filed appeals.

Discussion

On appeal, plaintiffs argue that the trial court erred in refusing to eject the two townhouse owners as trespassers from possession and control of a 24 inch strip of land contained within the metes and bounds of plaintiffs' recorded deed. Plaintiffs also contend the court erred in not finding that the 30 inch parcel (strip two) belonged to plaintiff.

A court of equity has broad powers to fashion relief according to the equities of the case[3] and can also act, not only where the legal remedy is inadequate, but also where it is inconvenient.[4] These principles are also applicable in this ejectment action.[5]

Here, this court in its discretion fashioned a remedy for the 24" strip of land with equitable principles in mind. Plaintiffs should have acted upon their rights while defendant

[3] Hicks v. Saboe, 521 Pa. 380, 555 A.2d 1241, 1345 (1989).

[4] Pa. R. Co. v. Bogert, 209 Pa. 589, 600, 601, 59 Atl. 100 (1904). Equibank, N.A. v. Fidelco Growth Investors, 1977 Pa. Dist. & Cnty. Dec LEXIS 397, 3-4 (Pa. C.P. 1977).

[5] Harbor Marine Co. v. Nolan, 366 A.2d 936, 939 fn. 3 (Pa. Super. 1976). (In actions for ejectment, equity is available Equitable defenses are available in an action in ejectment if the defendant is able to present a case such that, were he the plaintiff, he would be entitled to specific performance.)

Regis was undertaking construction and not after the townhouses were completed and sold to defendant homeowners.[6] Defendant homeowners were not aware of plaintiffs' rights regarding the location of the boundary line and as bonafide buyers without notice of plaintiffs' claim, the doctrines of adverse possession and consentable lines should be inapplicable.[7] As a result of the plaintiffs' failure to file the statement of claim, their case against defendant homeowners for adverse possession fails.[8] Based on the foregoing, this court reluctantly found that plaintiffs were barred from demanding possession based on the equities presented.

The court, however, realized that defendants should not have the use of plaintiffs' land without just compensation. In exercising its discretion, the court granted monetary damages to compensate Narducci for trespass, though they are estopped from demanding possession itself.[9] The record evidence demonstrates that the Narducci incurred $1,500.00 to construct a hatch in the roof of their property and some additional costs to repair their property. The court compensated plaintiffs for the cost incurred to maintain and repair the plaintiffs' roof and also calculated compensatory damages for "Strip One" based on the value of $500.00 square feet.[10] As such, the court's compensatory award of $44,000.00 was proper.

Plaintiffs also argue that the court erred and misapplied the law in refusing to return possession of the 30" strip to plaintiffs under either the doctrine of consentable lines or as an easement created by the City in order to avoid landlocking a section of plaintiffs' property. The

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[6] Harbor Marine Company v. Nolan, 244 Pa. Super. 102, 366 A.2d 936, 940 (1976).

[7] See 68 P.S. section 81 which requires the filing of a statement of claim by an out of possession claimant.

[8] See 68 P.S. section 81.

[9] Topley v. Buck Ridge Farm Construction Company, 30 Pa. Commw. 360, 374 A.2d 976, 980 (1970).

[10] There was testimony at trial which suggested $500.00 per square foot was a fair and reasonable value of the land.

doctrine of consentable lines is a rule of repose for the purpose of quieting title and discouraging confusing and vexatious litigation.[11] There are two ways in which a boundary may be established through consentable lines: (1) by dispute and compromise, or (2) by recognition and acquiescence.[12] The doctrine of consentable lines is a separate and distinct theory from that of traditional adverse possession, although both involve a twenty-one year statute of limitation.[13]

Under the doctrine of consentable lines, if adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for the period of time prescribed by the statute of limitations, they are precluded from claiming that the boundary line, recognized and acquiesced in, is not the true one.[14]

In this case, the 30 inch strip at issue was owned and continuously utilized by the City as an acknowledged part of the public playground known as Sunshine Park. Prescriptive rights cannot accrue against land dedicated for a public use.[15] Up until the time the property was used as a park, plaintiffs' alleged prescriptive right through the doctrine of consentable lines, could not accrue. Moreover, the record is clear that the City did not acquiesce in plaintiffs' ownership of the 30' strip by virtue of where the fence was placed. The record is also clear that plaintiffs never claimed the disputed property as their own. Thus, the doctrine of consentable lines fails.[16]

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[11] Plott v. Cole, 377 Pa. Super. at 592, 547 A.2d at 1220.

[12] Niles v. Fall Creek Hunting Club, Inc., 376 Pa. Super. 260, 267, 545 A.2d 926, 930 (1988)(en banc).

[13] Id. at 267-68, 545 A.2d at 930.

[14] *See* Adams v. Tamaqua Underwear Co., 105 Pa. Super. 339, 161 A. 416 (1932).

[15] Commonwealth v. JW Bishop & Company, Inc., 439 A.2d 101, 103 (Pa. 1981); Torch v. Constantino, 323 A.2d 278, 279 (Pa. Super. 1974).

[16] As for plaintiffs' claim that they had a prescriptive easement on the property, plaintiffs failed to prove that an easement existed.

In summary, the plaintiffs failed to show by a preponderance of evidence that they had any right whatever in the 30 inch (strip number 2) parcel of land.

Finally, the court submits that the cross-appeal of Regis (and its related companies) is without merit. As the developer, it should have known where the Narducci property line was situate. Further, the testimony was uncontradicted that the Regis agent on site was put on notice that the two townhouse fences (backyards) were encroaching on Narducci property. Inexplicably, Regis charged ahead to the detriment of Narducci. The value of $500.00 per square foot had a basis on the record. The court's finding was fair.

Conclusion

For these reasons, this court respectfully submits that its findings should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.