

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
DOCKET NO. BCD-RE-19-09

KINDERHAUS NORTH LLC,)
PRIME PROPERTIES ME LLC, &)
KAREN and BRIAN FULLERTON)

Plaintiffs/ Counterclaim Defendants)

v.)

KARL NICOLAS and)
STEPHANIE R. NICOLAS,)

Defendants/ Counterclaim Plaintiffs)

ORDER GRANTING PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY
JUDGMENT and DENYING
DEFENDANTS’ MOTION FOR
PARTIAL SUMMARY JUDGMENT

KINDERHAUS NORTH LLC, PRIME)
PROPERTIES ME LLC, KAREN)
FULLERTON, and BRIAN)
FULLERTON)

Third-Party Plaintiffs)

v.)

H. ALLEN RYAN and DIANNE E.)
RYAN)

Third-Party Defendants)

This case involves a disputed right-of-way near the ocean in Harpswell, Maine. Before the Court are two motions: (1) Plaintiffs/Counterclaim Defendants’ Motion for Partial Summary Judgment on Counts I and III of their Complaint, and against Counts I and IV of the Counterclaim filed against them by the Defendants/Counterclaim Plaintiffs’ Karl Nicolas and Stephanie R. Nicolas (“the Nicolases”), and (2) the Nicolases’ counter Motion for Partial Summary Judgment

on the same claims. The parties agree there are no genuine issues of material fact and thus these motions may be decided as a matter of law. The Court GRANTS Plaintiffs' Motion for Partial Summary Judgment, and DENIES the Nicolases' counter Motion for Partial Summary Judgment.

BACKGROUND

The parties to this action are record fee owners of certain lots depicted on the Plan of Abner's Point Lots on Bailey Island, Harpswell, Maine for Bruce Allen dated August 1979 and recorded September 29, 1979 in the Cumberland County Registry of Deeds, Book of Plans, Volume 124, Page 60 ("the Plan"). Plaintiff Prime Properties ME LLC ("Prime") is the owner of Lot 1 identified on the Plan, and Plaintiff Kinderhaus North LLC ("Kinderhaus") is the owner of Lot 2. Plaintiffs Karen L. Fullerton and Brian Fullerton co-own Lots 5 and 6. Karen Fullerton is also a member and Manager of Prime, and Kinderhaus. Meanwhile, Defendants and counterclaim Plaintiffs Karl and Stephanie Nicolas own Lot 4 as identified on the Plan.

Bruce L. Allen and Joanne R. Allen ("the Allens") owned the property on Abner's Point that was subdivided, and created the properties subject to this lawsuit. Lot 4 was the first lot conveyed by the Allens, acquired by Edward and Florence Schaub on November 3, 1979, deed recorded in the Cumberland County Registry of Deeds at Book 4526, Page 170 ("the Allen to Schaub Deed"). The Allen to Schaub Deed contains the following relevant language:

The above described Lot 4 is conveyed subject to a twenty (20) foot wide right of way for vehicular as well as foot traffic for the benefit of the owners of Lots 1 and 2 on said Plan of ABNER'S POINT. Said right of way being located on the southwesterly boundary of Lot 4. For a more particular description of the Lot and rights of way, reference may be had to the aforesaid Plan of ABNER'S POINT.

(Stip S.M.F. ¶ 15 and Exhibit E thereto.) Subsequent deeds conveying Lot 4 contain virtually identical language as the Allen to Schaub Deed until the Defendants' predecessors in title, the Favreaus, purchased Lot 4 pursuant to the "Schmutz to Favreau Deed" in 2003. The Schmutz to

Favreau Deed eliminated the express language that Lot 4 was subject to a right of way “for vehicular as well as foot traffic for the benefit of the owners of Lots 1 and 2.” Instead, the deed stated that Lot 4 was conveyed “subject to a twenty (20) foot wide right of way for the benefit of all lots as shown on the Plan.” (Exhibit I to Stip. S.M.F.). When the Nicolases purchased Lot 4 from the Favreaus, the deed contained functionally equivalent language to that found in the Schmutz to Favreau Deed.

Prior to conveying Lot 4 to the Nicolases, the Favreaus conveyed a “Walking Right-of-Way/Easement Deed” to the Fullerton’s predecessor in title, Joanne R. Allen, Trustee of the Joanne R. Allen Living Trust, and Lorraine L. Darling, Successor Trustee of the Bruce L. Allen Irrevocable Administrative Trust (the “Allen Trustees”). This deed granted a “perpetual walking right-of-way/easement situated on our land” described as:

A twenty (20) foot wide walking right-of-way/easement running along the southwesterly boundary line of Lot 4 (owned by the Grantors-Favreau) as shown on the Plan of Abner’s Point Lots on Bailey Island, Harpswell, Maine for Bruce Allen dated August, 1979 and recorded in the Cumberland County Registry of Deeds in Plan Book 124 at Page 60. Said walking right-of-way/easement is located in the area on said plan delineated as “20’ R/W” and runs from the northwest corner of Lot 5 on said plan to Merriconeag Sound. Said walking right-of-way/easement benefits all lots on said plan.

(Stip. S.M.F. ¶ 29 and Exhibit S thereto.) At the time the Favreaus granted the Walking Right-of-Way/Easement they owned Lot 4 on the Plan, and deeded the walking right-of-way to the Allen Trustees, who were then-owners of Lots 5 and 6 on the Plan. When the Fullertons purchased Lots 5 and 6, the deed stated that the lots were conveyed “with the benefit of. . . a walking right-of-way easement as described in the [Walking Right-of-Way/Easement Deed].”

Plaintiffs initiated this lawsuit in an attempt to enforce the twenty foot vehicular and pedestrian easement they claim was reserved for and runs with Lots 1 and 2, as well as the walking right of way they claim benefits Lots 5 and 6. The Nicolases disagree, and filed a cross-motion for

partial summary judgment contending: 1) the Allen to Schaub Deed failed to reserve an easement appurtenant to Lots 1 and 2; and 2) the walking right of way granted to the Fullertons' predecessor was an easement in gross and therefore does not remain for the benefit of Lots 5 and 6.

STANDARD OF REVIEW

Summary judgment is appropriate if, based on the parties' statements of material fact and the cited record, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. M.R. Civ. P. 56(c); *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 4, 770 A.2d 653. A genuine issue of material fact exists when a fact-finder must choose between competing versions of the truth, even if one party's version appears more credible or persuasive. *Id.* A fact is material if it has the potential to affect the outcome of the suit. *Id.* Cross motions for summary judgment "neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment per se." *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 8, 8 A.3d 646 (quoting *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996)).

DISCUSSION

I. Count I: Prime (owner of Lot 1) and Kinderhaus (owner of Lot 2) have Express Deeded Easement Rights Over the Nicolases' Property (Lot 4)

An easement is a right of use over the property of another. *Stickney v. City of Saco*, 2001 ME 69, ¶ 31, 770 A.2d 592. Under Maine Law, easements can be created in multiple ways, including by express grant or reservation. *O'Connell v. Larkin*, 532 A.2d 1029, 1042 (Me. 1987). Relevant to this matter, easements by reservation exist where property is conveyed *subject to* an easement for the benefit of the land retained by the grantor. *Id.* (citing *Brown v. Dickey*, 106 Me. 97, 100, 75 A. 382 (1909)(emphasis added)). In Count I of their Complaint, Plaintiffs ask the Court to declare that as a matter of law, the Allen to Schaub Deed unambiguously reserved express easement rights over Lot 4, now owned by the Nicholases.

When interpreting a deed, “the scope of a party’s easement rights must be determined from the unambiguous language on the face of the deed.” Courts must give a deed’s words their general and ordinary meaning to see if they create any ambiguity. *Green v. Lawrence*, 2005 ME 90, ¶ 7, 877 A.2d 1079. If a deed description references a plan, then the entirety of the plan becomes part of the deed. *Sleeper v. Loring*, 2013 ME 112, ¶ 13, 83 A.3d 769. The referenced plan is then interpreted alongside the deed, and in the same manner. *Id.* If a deed’s terms are unambiguous, Courts do not speculate to the parties’ actual or probable objectives. Instead, Courts will enforce the language within the four corners of the deed, and only consider the intentions expressed therein. *Sleeper v. Loring*, 2013 ME 112, ¶ 16, 83A.3d 769; *See Stickney*, 2001 ME 69, ¶¶ 34-35, 770 A.2d 592.

The pertinent language in the Allen to Schaub deed conveying Lot 4, now owned by the Nicolases, reads as follows:

A certain lot or parcel of land situated in Harpswell, County of Cumberland and State of Maine, on Abner’s Point, so-called, and described as Lot 4 on Plan of ABNER’S POINT, LOTS ON BAILEY’S ISLAND, HARPSWELL, MAINE, FOR BRUCE ALLEN dated August 1979 and recorded in the Cumberland County Registry of Deeds in Plan Book 124 at Page 60, to which Plan with its record reference may be had for a more particular description of the premises conveyed herein.

...

The above described Lot 4 is conveyed subject to a twenty (20) foot wide right of way for vehicular as well as foot traffic for the benefit of the owners of Lots 1 and 2 on said Plan of ABNER’S POINT. Said right of way being located on the southwesterly boundary of Lot 4. For a more particular description of the Lot and rights of way, reference may be had to the aforesaid Plan of ABNER’S POINT.

(Exhibit E to Stip. S.M.F.)(Emphasis Added). It is clear from the above language that the Allens reserved an easement on Lot 4 at the time they conveyed it to the Schaub. In their deed, the Allens described the location and dimensions of the easement as being 20 feet in width along the southwesterly boundary of Lot 4. In addition to the deed’s description, the Plan referenced in the

deed provides a visual representation of the easement and its location. The deed also states the purpose of the easement and the land benefitted by it; the easement was established to permit the vehicular and pedestrian access of Lots 1 and 2, both retained by the Allens. Thus, the Allens' intent to establish an easement for the benefit of their retained land is unambiguous, supported by both the Allen to Schaub Deed and the attached Plan.

The Nicolases do not disagree with Plaintiffs' factual allegations. Rather, they assert: 1) the Allen to Schaub Deed did not contain a clear and express "reservation" of a property right in Lot 4; 2) the phrase "subject to" is insufficient to reserve an easement under Maine law; and 3) the Allens failed to demonstrate their intent to reserve rights as Grantors, and instead the Deed's reference to Lots 1 and 2 was actually to benefit future, third-party lot owners. The Court will address each of these arguments in turn.

First, although the Allen to Schaub Deed does not use the terms "reserve" or "reservation", the plain language of the Deed (in conjunction with the Plan) demonstrates the Allens' clear intent to establish an easement for the benefit of their retained parcels (Lots 1 and 2). While deeds often expressly reserve easements using the words "reserve" or "retain", Maine Courts have consistently avoided imposing arbitrary technical requirements that frustrate the interests of the parties. *Stickney*, 2001 ME 69, ¶¶ 34-35, 770 A.2d 592; *O'Donovan*, 1999 ME 71, ¶ 10, 728 A.2d 681; *O'Neill v. Williams*, 527 A.2d 322, 323 (Me. 1987). The language of the Deed is clear: the Allens intended to convey Lot 4 "subject to a twenty (20) foot wide right of way for vehicular as well as foot traffic for the benefit of the owners of Lots 1 and 2. . ." Defendant's argument that use of the phrase "subject to" in a deed is insufficient to reserve an easement is unpersuasive especially where, as here, the language references a recorded Plan on which the right-of-way is clearly

depicted. Contrary to the arguments of the Nicolases, on the facts of this case, use of the phrase “subject to” is not intended to merely constitute a limitation on a grantor’s warranties.

Likewise, it is of no consequence that according to the Deed, the Allens were “relinquishing and conveying all right by descent and all other rights” in Lot 4. This standard language, read in the context of the entire deed, does not cloud or make ambiguous the Allens’ intent when conveying the property. The Court understands the Deed’s language to convey the Allen’s ownership interest in Lot 4, while reserving an easement for the benefit of their other parcels.

Finally, Defendants argue the Allen to Schaub Deed identifies the “beneficiary” of the Disputed Way as the “owners of Lots 1 and 2” rather than the “Grantors” or “Allens”, and for this reason there lacks clear intent for the Allens to reserve any rights as grantors. Defendants are correct that under Maine law, an easement appurtenant must be attached to or related to the dominant estate of the grantor, and thus cannot be reserved for the benefit of a third party. Nevertheless, at the time Lot 4 was conveyed to the Schaub, the Allens retained ownership of the remainder of their land. Thus, the Allens were not attempting to reserve rights for the benefit of a third party, they were reserving rights for themselves via their ownership of the land designated as Lots 1 and 2 on the Plan.¹ It follows, therefore, that the Court GRANTS Plaintiffs’ Motion for Partial Summary Judgment on Count I of their complaint. The Allen to Schaub Deed unambiguously reserves a twenty foot wide easement appurtenant for vehicular and foot traffic across the Nicolases’ property (Lot 4). Conversely, the Court DENIES the Nicolases’ Motion for Partial Summary Judgment on Count I of their Counterclaim.

¹ For purposes of the easement analysis, the fact that Lot 4 was conveyed before Lots 1 and 2 is not significant. The Allens still owned the land that would constitute Lots 1 and 2, and Lots 1 and 2 (and the 20 ft right-of-way) were all clearly shown on the recorded Plan at the time Lot 4 was conveyed.

II. The Fullertons Have Easement Rights over the Nicolases' Property to use the Walking ROW to Access Merriconeag Sound

Maine law recognizes two types of easement: easements in gross and easements appurtenant. *Stickney*, 2001 ME 69, ¶ 31, 770 A.2d 592. Easements in gross are personal interests in land or the right to use another's land. *Id.* Thus, an easement in gross is only for the use of a specific grantee. *See Id.* Meanwhile, an easement appurtenant is created to benefit a "dominant tenement" and is attached to or related to the estate of the grantor, running with the land. *O'Donovan v. McIntosh*, 1999 ME 71, ¶ 7, 728 A.2d 681. Maine courts seek, whenever possible, to construe easements as appurtenant. *Stickney*, 2001 ME 69, ¶ 33, 770 A.2d 592.

Plaintiffs assert that Lots 5 and 6 have express deeded easement rights over the Nicolases' property (lot 4) to use the Walking ROW to access Merriconeag Sound. According to the "Walking Right of Way/Easement Deed", the Favreaus granted the Allen Trustees a "perpetual walking right-of-way/easement" across their property (Lot 4). Exhibit A to the Deed describes the ROW as follows:

A twenty (20) foot wide walking right-of-way/easement running along the southwesterly boundary line of Lot 4 (owned by the Grantors-Favreau) as shown on Plan of Abner's Point Lots on Baily Island, Harpswell, Maine for Bruce Allen dated August, 1979 and recorded in the Cumberland County Registry of Deeds in Plan Book 124 at Page 60. Said walking right-of-way/easement is located in the area on said plan delineated as "20' R/W" and runs from the northwest corner of Lot 5 on said plan to Merriconeag Sound. Said walking right-of-way/easement benefits all lots on said plan.

(Pl.'s Ex. S). In 2018, the Favreaus conveyed Lot 4 to the Nicholas'. Stip. SMF ¶ 20.

In opposition to Plaintiffs' assertion, the Nicolases argue the walking ROW/easement detailed in the deed is merely an easement in gross. Such an easement would have been for the benefit of the Allen Trustees alone and would not run with Lots 5 and 6 when sold. In support of their argument, the Nicolases point to the personal nature of the language in the deed, and assert

that because the grantees to the Walking Right-of-Way/Easement Deed were identified by name alone, the easement was not intended to benefit a dominant estate. Further, the Nicolases contend nothing in the deed identifies that the easement was being given by virtue of the ownership of the benefited land. The Nicolases' arguments ignore the plain language of the deed and the Plan and thus fail to persuade the Court.

As previously stated, when interpreting a deed and assessing easement rights, courts will look to the plain language within the four corners of the deed, aiming to enforce the intent of the parties as contained therein. When granting an easement over their property, the Favreaus explicitly described the ROW as "perpetual", a word defined as "lasting for eternity: never ending." *Perpetual*, Webster's II: New College Dictionary (2001). The right-of-way leads from the northwest corner of Lot 5, across Lot 4 to Merriconeag Sound, and is referenced on the Plan of Abner's Point Lots on Baily Island. The Plan as referenced is to be interpreted alongside the deed, which further states that the "walking right-of-way/easement benefits all lots on said plan." The Walking ROW/Easement Deed is not ambiguous; its plain language granted a perpetual walking right-of-way to the Allen Trustees as owners, for the benefit of all lots on the referenced Plan. The easement at issue was expressly granted to the Allen Trustees to benefit the land they owned. As such, the walking right-of-way is an easement appurtenant that runs with the land and provides Plaintiffs with the rights contained therein. Accordingly, the Court GRANTS Plaintiffs' Motion for Partial Summary Judgment on Count III of their Complaint. Necessarily, the Court DENIES the Nicolases' Motion for Partial Summary Judgment on Count IV of their Counterclaim.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Partial Summary Judgment is GRANTED. Judgment in favor of Plaintiffs is entered on Counts I and III of their Complaint, and

on Counts I and IV of Defendants' Counterclaim. Conversely, the Court DENIES Defendants' counter Motion for Partial Summary Judgment.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: April 23, 2020

_____/s_____
Michael A. Duddy
Judge, Business and Consumer Court