STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB- RE-09-02

JOSEPH J. MILLER, ET AL

Plaintiffs

v.

ORDER ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

HENRY M. TIDGWELL, ET AL

Defendants

This matter comes before the court on the Motion of Defendants/Cross-Claim Plaintiffs Henry M. Tidgwell, Jr. and Lynn B. Tidgwell (collectively the "Defendants" or "Tidgwells") for partial summary judgment on Counts II (Declaration of Easement Rights), IV (Declaratory Judgment and Permanent Injunction) and V (Punitive Damages) of the Amended Complaint of Plaintiffs Joseph J. Miller, Sherry L. Miller (the "Millers"), David G. Wilson, Cynthia L. Wilson (the "Wilsons"), Gerry P. Rosienski, and Joann Rosienski (the "Rosienskis") (collectively the "Plaintiffs").

BACKGROUND

Except where noted, the following facts are undisputed:

Defendants own a waterfront lot on Sebago Lake that was purchased by them in 1993 and is designated as Lot 3 within the Great Shoals Terrace Subdivision ("Subdivision"). The Subdivision is shown on the Plan for Great Shoals Terrace, dated September, 1957 ("Subdivision Plan").[1]

[1] The area of Lot 3 is depicted on the Subdivision Plan, without an identifying lot number, and is bounded by Lots 2 & 4 shown on the plan. Pls.' Opp. S.M.F. ¶ 3.

Plaintiffs each own inland lots in the Subdivision. The Rosienskis own Lot 34. The Wilsons own Lot 35. The Millers own Lots 36 and 37.

Plaintiffs' lots are each benefited by an easement for a right-of-way over Lot 3 (hereinafter the "Easement") "leading from the Great Shoals Terrace roadway to the shore of Sebago Lake," which allows the owners or occupants of Lots 34, 35, 36, and 37 to use the "right of way privileges for foot traffic to and from the shore of Sebago Lake." Pls.' A.S.M.F. ¶ 4; Defs.' Reply A.S.M.F. ¶ 4. In turn, the language in the Tidgwell's deed referencing the Easement is substantially the same as that in Plaintiffs' deeds, with one slight variation: Tidgwell's deed specifies that passage on the right-of-way is *strictly* for foot traffic to and from the shore of Sebago Lake. Pls.' A.S.M.F. ¶ 7; Defs.' Reply A.S.M.F. ¶ 7.

On September 12, 1966 the parties' common predecessor-in-interest, Reverend John Young, acquired title to Lots 3, 34, 35, 36, and 37. Pls.' Opp. S.M.F. ¶ 4. In July 1970 Reverend Young conveyed Lot 34 to the Rosienski' predecessor-in-title, William Brereton, and in that deed first created the Easement using language that is substantially the same as in each of the current deeds to the parties' respective lots. Pls.' Opp. S.M.F. ¶ 5. Thereafter, Reverend Young made the following additional conveyances that are relevant to this action: On August 3, 1970, Lot 35 was conveyed to the Wilsons' predecessor-in-title, Charles Brereton; and on October 27, 1971, Lots 36 and 37 were conveyed to the Millers' predecessors-in-title, Howard and Nancy Deming. Defs.' S.M.F. ¶¶ 9, 14 and 24.

This dispute relates to the scope of the Easement. Central to the claims at issue in the motion for partial summary judgment is whether the language of the Easement permits the construction of stairs and a dock at the shore of Sebago Lake.

According to Plaintiffs, shortly after the Tidgwells purchased Lot 3, they began placing obstructions on the Easement, including a motor boat, a rowboat, an inflatable Zodiac, two boat

trailers, yard waste, firewood and eventually a shed and a well. Pls.' A.S.M.F. ¶ 12. Defendants qualify this assertion by explaining that Mr. Tidgwell placed cement blocks in the right-of-way to divert the flow of silt coming from their neighbors' property and that, although Mr. Tidgwell previously put yard waste, a car and other "blockage" in the right-of-way for convenience, he has since moved them. Defs.' Reply A.S.M.F. ¶ 12.

It is undisputed that Defendants installed a shed on the Easement in 1996. Although Defendants assert that they received a permit from the Town prior to installing the shed and installed it without "serious objection," it is also undisputed that the shed encroaches on the Easement by approximately nine to ten feet. Shortly after the shed was installed, Gary Rosienski approached Mark Tidgwell and asked him if he was aware the shed encroached on the Easement. Although Defendants contend that this conversation with Mr. Rosienski was not confrontational, Plaintiffs maintain that Mr. Tidgwell responded to Mr. Rosienski by saying "as far as I'm concerned, it's not your fucking right-of-way."

In the fall 2007, Sherry S. Miller[2] hired a surveyor, Delmore Maxfield, to survey and locate the Easement. Defendants maintain that Ms. Miller commissioned the survey preliminary to constructing a dock. Plaintiffs maintain that Ms. Miller sought a survey in order to determine whether the shed constructed by Defendants was located on the Easement. *See* Defs.' Supp. S.M.F. ¶ 67; Pls.' Opp. S.M.F. ¶ 67.

In March 2008, Sherry S. Miller and Plaintiffs hired Attorney John Ellman to represent them regarding "the dock issue." According to Defendants, on April 11, 2008 Sherry S. Miller contacted Mark Tidgwell to ask if he was interested in amending his deed to allow the Plaintiffs to install stairs and a dock on the right-of-way. Defs.' Supp. S.M.F. ¶ 79. According to

[2] Sherry S. Miller appears to be distinct from Plaintiff Sherry L. Miller.

Plaintiffs, Ms. Miller merely "asked Mr. Tidgwell to clarify the scope of the Easement." Pls.' Opp. S.M.F. ¶ 79.

According to Defendants, Plaintiffs understood that Mr. Tidgwell objected to the installation of a dock and did not want to amend his deed. Defs.' Supp. S.M.F. ¶ 80. Plaintiffs qualify this assertion by saying that Ms. Miller believed that the scope of the Easement included the right to install a dock and she obtained permission to install a dock from code enforcement officer, Jim Smith. Pls.' Opp. S.M.F. ¶ 80. Prior to the installation, Plaintiffs did not inform or advise the Tidgwells that they planned to install a dock on or at the end of the right-of-way. On May 29, 2008, the Plaintiffs caused the installation of a dock on the right-of-way. Defs.' Supp. S.M.F. ¶ 86; Pls.' Opp. S.M.F. ¶ 86.

Defendants maintain that, prior to the installation of the dock, Plaintiffs rarely used the Easement and did not attempt to cut back vegetation or maintain a path along the right of way. Plaintiffs qualify that assertion by explaining that their limited use of the Easement was largely due to the unstable nature of the terrain at the shore end of the Easement, the rocky access to the water, and "jagged pieces of cement" in the water that make the use of Easement difficult and dangerous.

The parties dispute whether, prior to the installation of the dock by Plaintiffs, there have ever been stairs, step, docks or other structures located in the right-of-way or leading into Sebago Lake from the right-of-way. Defs.' Supp. S.M.F. ¶ 43; Pls.' Opp. S.M.F. ¶ 43. Defendants maintain that there has never been a dock or stairs in the right of way. Plaintiffs contend that there is evidence on the shore end of the Easement of the existence of concrete steps and a dock. Pls.' A.S.M.F. ¶ 26.

According to Richard Vance, who has visited the Subdivision since 1959 and who built a home there in 1965, there was a dock platform at the shore of Lot 3 from 1963 to 1968 when that

lot was owned by Reverend Young. Pls.' A.S.M.F. ¶¶ 46-47. Mr. Vance describes the dock as having run parallel to the shore of Sebago Lake, along the embankment, at a height of approximately four to five feet. Pls.' A.S.M.F. ¶ 48. During the period from 1963 to 1968, Mr. Vance maintains that he witnessed several nuns, dressed in full habit, jumping off the dock on the property now owned by the Tidgwells, into Sebago Lake. Pls.' A.S.M.F. ¶ 49. In addition, Robin Bell, a mason hired by Plaintiffs[3], evaluated concrete debris located at the shore of the Easement and concluded that it was the remnants of a dock situated on the Easement at the time Reverend Young created the Easement in 1970.

However, two other witnesses, Paul Lamont and Howard Deming, maintain that no dock, stairs, steps or other structures existed at the shore end of the Easement prior to the construction of the dock at issue in May 2008. Defs.' Reply A.S.M.F. ¶ 49.

DISCUSSION

Summary judgment is proper where there exists no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); *see also Levine v. R.B.K. Caly Corp*., 2001 ME 77, ¶ 4, 770 A.2d 653, 655. A genuine issue is raised "when sufficient evidence requires a fact-finder to choose between competing versions of the truth at trial." *Parrish v. Wright*, 2003 ME 90, ¶ 8, 828 A.2d 778, 781. A material fact is a fact that has "the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "If material facts are disputed, the dispute must be resolved through fact-finding." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18, 22. A party wishing to avoid summary judgment must present a prima facie case for the claim or defense that is asserted.

[3] Mr. Bell, examined the shore end of the Easement and concluded that a concrete dock previously existed there. His opinion forms the basis for Pls.' A.S.M.F. ¶¶ 50-53. Plaintiffs' have designated Mr. Bell as an expert witness. However, Defendants have filed a motion *in limine*, as yet undecided, to exclude Mr. Bell's testimony in this case.

Reliance National Indemnity v. Knowles Industrial Services, 2005 ME 29, ¶ 9, 868 A.2d 220, 224-25. At this stage, the facts are reviewed "in the light most favorable to the nonmoving party." *Lightfoot v. Sch. Admin. Dist. No. 35*, 2003 ME 24, ¶ 6, 816 A.2d 63, 65.

II. Count II: Declaration of Easement Rights

A. The language of the Easement.

"A court construing the language of a deed . . . must first attempt to construe the language . . . by looking only within the 'four corners' of the instrument. In evaluating the language of a deed, courts should give effect to the common or everyday meanings of the words in the instrument. If the deed is unambiguous, the court must construe the deed without considering extrinsic evidence; if the deed is ambiguous, however, the court may admit extrinsic evidence of the parties' intent." *N. Sebago Shores, LLC v. Mazzaglia*, 2007 ME 81, ¶ 13, 926 A.2d 728, 733 (internal citations and quotation marks omitted). Further, when the scope of an easement is unambiguously expressed, the holder "may only exercise the rights granted in a reasonable manner, and cannot do more. Such rights are those incidental or necessary to the reasonable and proper enjoyment of the easement, and an easement in general terms is limited to a use as little burdensome to the servient estate as possible for the use contemplated." *Mill Pond Condominium Ass'n v. Manalio*, 2006 ME 15, ¶ 6, 910 A.2d 392, 395 (internal citations and quotation marks omitted).

In this case, Defendants contend that the Easement language is unambiguous and expressly limits the scope of the Easement to foot traffic necessary to access the shore of Sebago Lake. The Plaintiffs' deeds have identical Easement language, which provides, in pertinent part:

> [t]he Grantor hereof is hereby conveying a right-of-way privilege leading from the Great Shoals Terrace roadway to the shore of Sebago Lake . . .. Said parcel of land shall be used for right-of-way privileges for foot traffic to and from the shore of Sebago Lake for the owners or occupants of Lots #34, 35, 36 and 37.

Defendants contend that the unambiguous language of the Easement conveys only a right to access the shore of Sebago Lake by foot. Defendants further maintain that the construction of stairs and a dock are neither granted in the plain language of the Easement nor incidental to foot traffic to and from the shore of Sebago Lake. Defs.' Mot. at 9 (quoting *Mill Pond Condominium Ass'n. v. Manalio*, 2006 ME 15, ¶ 6, 910 A.2d 392, 395). After a review of relevant and applicable case law, and notwithstanding Defendants' arguments to the contrary, the court concludes that the Easement language is indeed ambiguous.

As Plaintiffs correctly note, the Law Court's opinion in *Badger v. Hill*, 404 A.2d 222 (Me. 1979) appears to be on point with this case. In *Badger,* the Law Court considered an easement comprised of "an express grant of 'a pedestrian right of way or foot-path, being six (6) feet in width,' over defendant's land 'to the York River.'" *Id.* at 224. At issue was whether the easement was ambiguous or not and whether it permitted the Defendant owner of the servient estate to construct a dock that, though not an encroachment on Plaintiffs' right-of-way, would interfere with the dock Plaintiffs, in the exercise of their rights, might wish to construct. *Id.* at 224-25.

Although the defendant in *Badger* argued that the trial court erred when it determined that the language of the easement was ambiguous and admitted extrinsic evidence as to the scope and purpose of Plaintiffs' easement, the Law Court disagreed. As the court explained, "generally, access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been." *Id.* at 226 (citations omitted).

In this case, although Plaintiffs' deeds each explain that the Easement "shall be used for right-of-way privileges for foot traffic to and from the shore of Sebago Lake," nothing in the

Easement language indicates the purposes for which such access was granted. Therefore, the court concludes that the language of the Easement is ambiguous and resort to extrinsic evidence is necessary in order to assist the court in ascertaining the scope of the Easement.

B. The Scope and Purpose of the Easement

Under Maine law, "[w]hen the purposes of an express easement are not specifically provided, they are to be determined by the presumed intent of the parties at the time the grant is made." *Guild v. Hinman*, 1997 ME 120, ¶ 6, 695 A.2d 1190, 1192 (internal citations and quotation marks omitted). According to the Law Court, "[t]he trial court must ascertain the objectively manifested intention of the parties in light of circumstances in existence recently prior to the conveyance . . . such as the relation of the parties, the nature and situation of the dominant and servient property, and the apparent purpose behind the grant." *Id.* at ¶ 7, 695 A.2d at 1193 (citations omitted).

Although Defendants contend that Plaintiffs have failed to set forth a *prima facie* case establishing that the grantors of the Easement intended to convey a right to install stairs, a dock or other structure on or extending from the right-of-way, the court concludes that there are genuine disputes of fact relating to the grantors' intent and the purpose of the Easement that preclude summary judgment. For example, Defendants maintain that their predecessor-in-interest, Howard Deming, who purchased Lot 3 from Reverend Young, understood that the right-of-way was not to be used in connection with any structures, stairs, steps or docks on the right of way. Defs.' Supp. S.M.F. 29-30. This fact, if true, weighs in favor of a finding that construction of stairs and a dock were not intended. Plaintiffs, however, have asserted that Howard Deming

does not know whether Reverend Young intended that the scope of the easement would include stairs, steps or a dock. Pls.' Opp. S.M.F. ¶¶ 29-30.[4]

Plaintiffs have also presented some evidence regarding the existence of a dock at the time Reverend Young created the Easement and the purposes for which the Easement might have been created that could weigh in favor of a finding that a dock is within the scope of the Easement. *See* Pls.' A.S.M.F. ¶¶ 44-49. Because the court concludes that the grantors' intent and the scope of the Easement is inherently a factual question, and because the court concludes that Plaintiffs have put forth sufficient facts to survive summary judgment, Defendants' motion cannot be granted as to Count II.

III. Count IV: Declaratory Judgment and Permanent Injunction.

Plaintiffs allege that the Defendants have interfered with the Easement by constructing a shed directly on the Easement and obstructing as much as ten feet of the Easement's fifteen-foot width. Pls.' Opp. at 18. Plaintiffs also contend that the shed violates a twenty-foot set-back restriction in Defendant's deed. Defendants argue that Plaintiffs lack standing to enforce the set-back restriction.

Plaintiffs cite *Leader v. LaFlamme*, 111 Me. 242, 88 A. 859, 860 (1913) for the proposition that, when property is divided pursuant to a common development scheme, all lot owners within the development have standing to enforce restrictive covenants. Defendants have not respond to this argument in their reply and, in any event, the court concludes that Plaintiffs do in fact have standing to seek enforcement of the Easement and obtain a declaration as to

[4] Although the court notes that Defendants have objected to Plaintiffs' denial of Defs.' Supp. S.M.F. ¶¶ 29-30 on the grounds that the denial is not directly contrary to Defendants' assertion that *Dr. Deming* did not believe that the easement conveyed to him by Reverend Young included the right to build a dock, the court concludes that Plaintiffs' denial does generate a dispute regarding the parties' intent. Moreover, because Plaintiffs have argued that Dr. Randall's intent is irrelevant given that the Reverend Young created the Easement in connection with the sale of Lots 34 and 35, which took place prior to the conveyance to Dr. Deming, an issue of fact exists regarding the scope and purpose of the easement. *See* Pls.' Opp. at 13.

whether Defendants' conduct constitutes interference with the Easement. *See* 25 Am. Jur. 2d *Easements* § 108 ("Any person in rightful possession of the premises to which an easement is appurtenant may maintain an action for the enforcement of the easement. Thus, a lessee of the dominant tenement can sue for any injury to such use resulting from an obstruction of an appurtenant easement.") Accordingly, summary judgment on Count III is not warranted.

IV. Count V: Punitive Damages

Plaintiffs seek punitive damages in connection with their claims for nuisance and interference with easement rights.[5] To this end, Plaintiffs allege that Defendants acted with malice, actual and implied. Under Maine law, "[t]ortious conduct will justify . . . [punitive damages] only when the plaintiff can prove by clear and convincing evidence that the defendant acted with either express or implied malice." *Tuttle v. Raymond,* 494 A.2d 1353, 1362 (Me. 1984). Such malice exists where the defendant's tortious conduct is motivated by ill will toward the plaintiff," or "where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied." *Id.* at 1361 (citations omitted).

In this case, the court concludes that Plaintiffs have set forth sufficient facts relating to Defendants' conduct both in interfering with Plaintiffs' use of the Easement and in threatening Plaintiffs following their use of it, to withstand summary judgment. *See e.g.* Pls.' A.S.M.F. ¶¶ 12-16, 32-43.

DECISION

Based upon the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

[5] Plaintiff's claim for punitive damages is pled as a separate count of the amended complaint. However, the court observes that punitive damages are a component of damages otherwise recoverable and not a separate theory of recovery.

Defendants' Motion for Partial Summary Judgment on Counts II, IV and V of Plaintiffs' Amended Complaint is DENIED.

Dated: September 9, 2009

s/Thomas E. Humphrey
Chief Justice, Superior Court