IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

ROBIN L. RAVENSCROFT LIVING TRUST,
Plaintiff,

VS

CIVIL ACTION NO. 18-C-45
JUDGE NELSON

JAMES SCOTT KUHN,
Defendant.

TRIAL ORDER

On the 30TH day of May, 2019, came the Plaintiffs by counsel, Jason R. Sites, and the Defendant by counsel, David C. Collins, pursuant to the Court's Order setting this matter for a bench trial. The Court inquired if there were any matters to be brought before the Court prior to the Trial. Mr. Collins inquired that two orders had been entered from the Temporary Injunction hearing, one prepared by him and one prepared by the Plaintiff. The Court stated that the one prepared by Plaintiff was more appropriate and that the one prepared by the Defendant was entered in error. The Court ordered that the Order prepared by the Defendant was not to be the Order of the Court and would have no force or effect. Defendant objected. The parties informed the Court that they were ready to proceed and the Trial began.

Opening statement was waived by both the Plaintiff and the Defendant. Plaintiff began their case in chief. Plaintiffs offered that Pursuant to Rule 65 of the West Virginia Rules of Civil Procedure, no testimony needed to be repeated and the prior entire hearing was made part of the record of this Trial and the Court ordered the same. Plaintiff introduced several documents into evidence and attempted to call Daniel Shrout as a witness via telephone. Defendant objected and stated that they had not had time to speak with Mr. Shrout to find out what he may testify about. Plaintiff stated he provided the new phone number as soon as he received it and Mr. Shrout was expected to testify to what he had previously sworn to via affidavit that the Defendant has had in

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his possession for some time. The Court refused to permit the testimony at this time. Plaintiff moved that the affidavit be admitted into evidence as an exception to hearsay to show intent. Defendant objected and the Court deferred ruling. The affidavit was provided to the Court. The Plaintiff then rested their case. Defendant made motion for a directed verdict and the same was denied.

Defendant then called David Vanscoy, the Defendant, and Mike Fitzgerald. All three witnesses testified and were cross-examined. The Defendant introduced evidence without objection. The Defendant then rested his case. The Court directed the parties to provide summation in draft, submitted to the Court by June 10th, 2019. The Court would render a verdict after receiving the summations from the parties. Nothing further to be done, the matter was adjourned.

Based upon the record in this matter and the evidence presented at trial the Court makes the following findings of fact and conclusions of law:

1. Plaintiffs are requesting the Court declare the rights in the real estate owned by the Plaintiffs and pray that the Court issue a permanent injunction to prohibit the Defendant from using their driveway to access his Lots;
2. Defendant does not possess an Express Easements to access his property;
3. Defendant is not landlocked as the parties do not dispute the Defendant has access to his property via the "backroad" that has been in existence since the time of severance;
4. No master plat was ever filed for this proposed sub-division;
5. No Home Owner's Association was ever formed and the sub-division was never completed due to a bankruptcy;
6. In the prior chain of title to Lot 6, in the deed at time of severance, there was attached

a plat that illustrated an easement extending from the southwestern corner. In the description to Lot 6 the easement is mentioned as coming from Lot 6 to US Route 50;

7. Although the easement is shown on the plat to Lot 6 and mentioned in the description, no actual road was ever constructed or came into existence;
8. There is nothing of record to show the location of the easement where it extends from Lot 6 to US Route 50;
9. The testimony was that it was assumed to enter US Route 50 at the location of the Plaintiff's driveway. There is also evidence of another roadway that entered US Route 50 at a different location. The other roadway was in existence at the time of severance and the Plaintiff's driveway was not in existence at that time;
10. Although the original developer may have intended to construct an easement leading from Lot 6 to US Route 50, this was never done;
11. As there was no mater plat recorded the Unity Doctrine does not apply;
12. The law does not favor easements by implied grant or reservation;
13. The burden of proving an easement rests with the party claiming the right by clear and convincing proof.

Based upon the findings of fact and conclusions of law the Court holds that the Plaintiff has established ownership of the real estate in question subject to the easement implied by necessity of the Defendant along what has been referred to as the "backroad." The easement is 30' in width, although there is no evidence on which the court could rule as to the exact location of the 30', from US Route 50 to Lots 3, 5, and 6 now owned by Defendant. Defendant has failed to satisfy his burden of proof with respect to the claimed easement from Lot 6 to US Route 50. Defendant has failed to meet his burden of proof as to his counterclaim and any damages

claimed.

Judgment is rendered in favor of the Plaintiff with respect to their Complaint that the Court declare that the Defendant does not have the right to use any portion of their Driveway. Judgment is rendered against the Defendant with respect to his counterclaim.

The Temporary Injunction previously ordered in this matter shall remain in effect. The Court is of the opinion that the harm to the Plaintiffs outweighs any prejudice suffered by the Defendant and that a Permanent Injunction would appear proper. The Defendant is directed to submit a memorandum within 10 days of receipt of this Order as to why a permanent injunction should not be awarded.

The Defendant shall be assessed the court costs in this action. Each party shall bear their own expenses in litigation and attorney's fees.

Each party saves and preserves all objections and exceptions to the foregoing proceedings. The Court directs that any and all post-trial motions be served and filed within ten days of the entry of this Order.

The Clerk is further directed to provide an attested copy of this order to David Collins and Jason Sites. Nothing further to be done this matter stands continued until the Court issues its ruling on the permanent injunction.

Entered this the 26 day of JUNE, 2019.

The Honorable Lynn A. Nelson, Judge

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Clerk Circuit Court of Mineral County, W. Va.

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

ROBIN L. RAVENSCROFT LIVING TRUST,
Plaintiff,

VS

CIVIL ACTION NO. 18-C-45
JUDGE NELSON

JAMES SCOTT KUHN,
Defendant.

ORDER

On the 30TH day of May, 2019, a bench trial was had in this matter. Following the Trial the Court entered a Trial Order declaring that the Defendant did not have the right to use the Plaintiff's driveway and establishing that the Defendant had an easement along what was referred to at Trail as the "backroad" from US Route 50 to the real estate owned by the Defendant. The Court entered Judgment in favor of the Plaintiff on the Defendant's counterclaim. The Trial order provided time for post-trial motions and the Defendant was permitted to file memoranda as to why a permanent injunction should not be awarded. Defendant timely filed a Memorandum on the issue of a permanent injunction and a motion to alter or amend judgment pursuant to *West Virginia Rules of Civil Procedure*, Rule 59(e).

The Court, having reviewed the record in this mater, does not find good cause to alter or amend the Trial Order. The Court does hereby DENY the Defendants motion to alter or amend the Judgment.

On the issue of the permanent injunction the Court has given careful thought and deliberation. An injunction is a harsh remedial process that should not be issued but in cases of necessity. An injunction should not award when there are other remedies at law.

In the present case is has been declared that the Defendant has no right to travel or be upon the lands owned by the Plaintiff. The Defendant is clearly aware that he has no right to

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travel upon the lands of the Plaintiff, other than on the easement (backroad) from US Route 50 to the lands owned by him. Should the Defendant travel upon the private driveway without invitation he would be committing trespass. The Defendant is clearly aware that he should not enter upon the lands of the Plaintiff. Should the Defendant be present on any of the lands of the Plaintiff he would be committing trespass. The possibility of the criminal prosecution for "trespass" should be a sufficient deterrent to prevent this act. All landowners are afforded the protection of a criminal prosecution for trespass upon the lands that they own. The Defendant in this action should clearly understand the potential for a criminal prosecution should he commit trespass against the Plaintiff.

The Court does not find the necessity for the award of a permanent injunction. The Court does hereby Order, Adjudge and Decree that no permanent injunction shall award at this time. The Temporary Injunction in this matter is hereby dissolved. The Clerk is directed to return the bond previously posted to the Plaintiff.

The Defendant shall be assessed the court costs in this action. Judgment is rendered against the Defendant for the court costs in this action. The Clerk is directed to return the filing fee and service of process fee to the Plaintiff after the Defendant has paid the costs.

The Clerk is further directed to provide an attested copy of this order to David Collins and Jason Sites. Nothing further to be done this matter is adjudicated final and the Clerk is directed to remove it from the docket and place it among cases ended.

Entered this the 16 day of August, 2019.

The Honorable Lynn A. Nelson, Judge

TESTE COPY

Clerk Circuit Court of Mineral County, W. Va.