IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

4-29-2022
F. Simmerman, III
N. Farley
T. Hatley

TONY PALETTA,

Plaintiff,

v.

Civil Action No. 19-C-52-1
Hon. Christopher J. McCarthy, Chief Judge

NELSON PHILLIPS, III, et al.,

Defendants and Counterclaimants,

And,

NELSON PHILLIPS, III, et al.,

Third-Party Plaintiffs,

v.

WESET VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

Third-Party Defendant.

ORDER GRANTING DEFENDANTS/COUNTERCLAIMANTS/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

On or about March 4, 2022, came the Defendants/Counterclaimants/Third-Party Plaintiffs (Hereinafter "Phillips") who filed a Motion for Summary Judgment. The Plaintiff/Counterclaim Defendant (Hereinafter "Paletta") filed his Response on March 18, 2022. The Phillips filed their Reply on March 21, 2022. The Court, at the Final Pre-Trial Conference on March 25, 2022, heard arguments pertaining to this motion from all parties. The Court allowed for there to be supplemental briefing by the parties which was received. After a thorough review of the motions, case files, relevant authority, and oral

argument by all Counsel, the Court finds that the record is complete and is ready to rule on the motions. The Court **GRANTS** the Motion for Summary Judgment filed by Phillips.

FACTUAL AND PROCEDURAL HISTORY

This case involves adjacent lands owned by Paletta and Phillips. Phillips bought property adjacent to land already owned by Paletta. They then proceeded to construct a farm on this land, and as part of the work done on the land, Phillips constructed a fence on the property. On or about February 27, 2019, Paletta, acting pro se initially filed the civil action in the Circuit Court of Harrison County. Paletta alleged a claim for unlawful interference after Phillips erected a fence across a road on their property. Paletta claimed that this fence blocked state road Secondary Route 36/5, which he argued in his initial filing that it was his only access to the parcel he owned. Phillips filed their Counterclaim on July 11, 2019, also pro se at that time. On July 30, 2019, Mr. Farley filed his notice of appearance on behalf of Paletta. Paletta then filed a Motion to Dismiss Phillips' Counterclaim on August 2, 2019. The Court then set a hearing date for the Motion to Dismiss on September 9, 2019. On September 16, 2019, the Court Granted the Motion Dismissing the Counterclaim. On September 20, 2019, came Trey Simmerman who filed his Notice of Appearance on behalf of Phillips. On October 7, 2019, Phillips, by counsel, filed their Motion for Judgment on the Pleadings. On October 25, 2019, Paletta filed his Response to the Motion for Judgment on the Pleadings. Phillips' Reply was filed on October 29, 2019. A hearing on the Motion for Judgment on the Pleadings was held on October 30, 2019. On November 12, 2019, the Court entered an Order Denying the Motion for Judgment on the Pleadings and Vacating the Current Scheduling Order.

On December 12, 2019, Paletta filed his Amended Complaint. An Answer and Counterclaim was filed on January 6, 2020. Paletta replied to the Counterclaim on February 13, 2020. On August 25, 2020, the parties moved to vacate the Scheduling Order. On February 5, 2021, Phillips submitted a Motion for Summary Judgment. On February 19, 2021, the Court set briefing deadlines for the Motion for Summary Judgment. On February 24, 2021, Paletta responded to the Motion for Summary Judgment. On March 4, 2021, the Court sent out an Order Requesting Emergency Memorandum on the Issue of the Need for an Indispensable Party. On March 11, 2021, the Court Sua Sponte Continued the trial, Ordered the Joining of the Indispensable Party, and Held the Motion for Summary Judgment in Abeyance. On July 9, 2021, in accordance with the law, West Virginia Division of Highways (Hereinafter "WV DOH") was served with a Third-Party Complaint. West Virginia Division of Highways answered the Third-Party Complaint on August 11, 2021. An Amended Scheduling Order was entered on December 6, 2021. Phillips then renewed their Motion for Summary Judgment on March 4, 2022, with Paletta responding on March 18, 2022. Phillips replied on March 21, 2022. The Court heard arguments on the Motion for Summary Judgment by all parties on March 23, 2022. A bench trial in this matter is set to be heard on May 2, 2022, by request of both parties.

STANDARD OF REVIEW

When there is no real dispute as to the facts or law in a case, summary judgment is a useful mechanism to resolve the controversy. *Johnson v. Mays*, 191 W. Va. 628, 630, 447 S.E.2d 563, 565 (*per curiam*) (1994). If there are no real disputes present as to facts, then summary judgment is an appropriate mechanism to resolve a case:

> [Summary judgment] is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if there essentially is no real dispute as to salient facts or if it only involves a question of law. Indeed, it is one of the few safeguards in existence that prevent frivolous lawsuits from being tried which have survived a motion to dismiss. Its principal purpose is to isolate and dispose of meritless litigation.

Williams v. Precision Coil, Inc., 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995) (internal citations removed).

The party moving for summary judgment has the initial burden of production and persuasion. *Id.* at 60, 459 S.E.2d at 337. "When a motion for summary judgment is mature for consideration and properly is documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists." *Id.* at 58, 459 S.E.2d at 335 (internal citations removed). (emphasis added). The presiding court need not "wait until after evidence has been received at trial" to grant summary judgment but rather should grant or deny summary judgment based upon the evidence and argument presented to it in the parties' briefs. *Id.*

A court's focus should be on whether there is sufficient evidence for the trier of fact to find for the non-moving party. This requires a focus on all the evidence presented:

> Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Id. at 59, 459 S.E. 2d at 336. In response to a motion for summary judgment, "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence

attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).'" *Id.* at 60, 459 S.E.2d at 337 (citing *Crain v. Lightner*, 178 W.Va. 765, 769 n. 2, 364 S.E.2d 778, 782 n. 2 (1987)). "To withstand the motion, the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party." *Id.* at 60-61, 459 S.E.2d at 337-38 (citing *Hoskins v. C&P Tel. Co. of W.Va.*, 169 W.Va. 397, 400, 287 S.E.2d 513, 515 (1982)).

When determining whether sufficient facts are set forth, a court is permitted to draw conclusions from and make reasonable inferences based upon the available evidence when ruling on a summary judgment motion. These reasonable inferences must be considered in the light most favorable to the non-moving party. *Williams*, 194 W. Va. at 58, 459 S.E.2d at 335. Although reasonable inferences are permitted, neither the court nor a jury can rely upon "purely conclusory allegations, indulge in speculation, or draw improbable inferences[.]" *Id.* at 60, 459 S.E.2d at 337, n. 10. Further, it is not the court's role to determine the truth of a disputed fact but rather to determine if there is a genuine issue of material fact. A disputed fact may not be material to the overall case and therefore not grounds for denying a motion for summary judgment.

Finally, as previously mentioned, "underlying facts and all inferences are viewed in the light most favorable to the nonmoving party[,]" in determining if a reasonable trier of fact could return a verdict in the non-moving party's favor.

After careful review of the arguments and counterarguments set forth by the parties and the record herein, the Court does not find any material facts that are in dispute and

is able to set forth its Finding of Facts based upon material, undisputed facts or facts properly supported by the evidence presented by the parties.

DISCUSSION

The overwhelming question in this case is whether or not there is a public road as claimed by Paletta in his Complaint. Phillips argues that Paletta cannot overcome the presumption of abandonment at this point within their Motion for Summary Judgment. In the Motion, Phillips argues that syllabus point four of the case of *Baker v. Hamilton* outlines the presumption of abandonment stating,

> [i]n order that a road shall be conclusively presumed to be established as a public road, the road must have been used by the public for a period of 10 years or more and public moneys or labor, duly authorized by a public agency or official empowered to maintain, repair or accept such road, must be expended on it, and a mere occasional expenditure of public money or occasional performance of public labor on such a road, which is not authorized, even though the road has been used by the public for 10 years or more, will not satisfy the requirements of the statute or render effective the statutory presumption of its establishment as a public road

Baker v. Hamilton, 144 W. Va. 575, 109 S.E.2d 27 (1959). However, this case does not outline the previous classification of the road in question. In the case in Baker, the Supreme Court gave no indication of previous knowledge of the road being in the state road system. The other case that Phillips argues controls the presumption of abandonment is *Miller v. Hoskinson*. The West Virginia Supreme Court of Appeals in *Miller* states that "[w]here no public funds have been allocated to maintenance of road for almost 60 years, strong presumption of abandonment is raised, and absent evidence of extensive public use or other means of proof of public acceptance, this presumption cannot be rebutted." Miller v. Hoskinson, 189 W. Va. 189, 429 S.E.2d 76 (1993). However, once again, this case involves a road that was not integrated into the public road system.

Paletta, in his response, argues first that there is a public road as evidence by its listing within in the State Road system as Secondary Route 36/5. Alternatively, he has argued that this Court does not have the jurisdiction to say that this is not a road because of the cases of *State ex rel. Cty. Ct. of Wood Cty. v. State Road Comm'n* and *State ex rel. Keene v. Jordan*. 147 W. Va. 623, 129 S.E.2d 726 (1963); 192 W. Va. 131, 451 S.E.2d 432 (1994), In the Response, Paletta cites the Supreme Court in *Keene* stating that

> W.Va.Code, 17-4-1 [1972] states, in relevant part, [t]he authority and control over the state roads shall be vested in the commissioner of highways." Additionally, this Court has stated it appears that it was the policy of the Legislature in the enactment of the aforesaid statutes [Chapter 17 of the W.Va.Code] to provide a comprehensive and all-embracing system of statutory law, establishing a general state road system ... and providing for and investing in the commission and the commissioner the exclusive power over the construction, maintenance and control of said system.

State ex rel. Keene v. Jordan, 192 W. Va. 131, 133, 451 S.E.2d 432, 434 (1994). However, in each of these cases cited by Paletta, it is the locality trying to force the State Road Commission to work or maintain a road. In fact, the basis for the case in *Keene* is that "a city official may not interfere with the legitimate authority of the State Department of Highways by criminally prosecuting, under a municipal ordinance, a state employee and an employee of a railroad company for closing a railroad crossing which was under the authority and control of the State Department of Highways." *Keene*, 192 W. Va. at 131–32, 451 S.E.2d at 432–33 (1994). Thus, the cases cited by Paletta are not directly applicable to the case at hand.

This immediate case is about whether the evidence that has been presented shows that a road exists. The only evidence that the road exists are: (1) the road is listed as secondary route 36/5 on a scroll in the state road system and (2) there are tax maps that outline the possibility of a road that would be made in that area from a potential

subdivision that was never built[1]. This road was described as a "scroll road" by counsel for the WV DOH during the hearing on the motion for summary judgment. "Scroll Roads," as described by counsel, were roads that were essentially roads by name that were brought into the public road system in 1933, however, were never actually worked on.

The subject of whether a scroll road automatically constitutes a public road was brought up in the case of *Blamble v. Harsh*. 163 W. Va. 733, 260 S.E.2d 273 (1979). The case was on appeal after trial and the Appellant argued that the "scroll" was the best evidence for the existence of the public road. The Court found that the best evidence did not apply to the case and that the jury had properly found that there was no existing road. Here, Paletta argues that the "scroll" is the controlling evidence in this case and shows that a public road exists. However, the Court in *Blamble* outlined that evidence of a scroll is not controlling and counter evidence can show the lack of a road.

As for the evidence as to why this is not a public road the evidence shows that: (1) there is no specific description of the length of the road or where it starts on the "scroll", (2) the WV DOH has stated that "at some point in the late 1960's or early 1970's, Secondary Route 36/5 was obliterated when overburden from a strip mine was discarded upon it," (3) the WV DOH has admitted "the road no longer exists in an identifiable form and is represented on all Harrison County Road maps dated after the 1970's as impassible, (4) the WV DOH has stated "no public funds have been used to improve or repair what was previously designated as Secondary Route 36/5 in the past thirty year window, (5) the photos provided to the Court of the area where the road is purported to

[1] At the Summary Judgment hearing, Counsel for Paletta opined that the road was used by Paletta as a child in the 1960's. However, Counsel for the Phillips showed that Paletta was likely confused as there was another road that connected to the property during that time.

be shows overgrowth and no type of road at the time that Phillips obtained the property, (6) in all the previous years before Phillips obtained the property, Paletta used alternative means to access his land, (7) the WV DOH has stated it "has no plans or designs/schematics to make repairs or improvements to the road previously designated as West Virginia Secondary Route 36/5," and (8) the WV DOH admitted that there is no drainage or paving on the property associated with any road relating to the existence of a road.

Of the evidence provided to this Court, it seems clear that the WV DOH does not recognize this road as part of the State Road system. In their answers to the interrogatories in this case, the WV DOH has stated outright that there is no longer a passible road in this location, nor do they intend to construct it into a passable road. Paletta has never put forth any reasoning as to who is supposed to build the road he claims is there, nor does he outline where the road was located (if ever it existed). In fact, the authority that Paletta put forth in arguing this Court cannot find in favor of Phillips supports a finding that this Court cannot force the Commissioner to take action on this road. "This right of the Commissioner to discontinue unnecessary roads or parts thereof has been repeatedly upheld by this Court." State ex rel. Cty. Ct. of Wood Cty. v. State Rd. Comm'n, 147 W. Va. 623, 629, 129 S.E.2d 726, 730 (1963). The Court finds that there is no public road Secondary Route 36/5.

Finally, there have been questions as to whether Paletta's land is landlocked. While Paletta stated that he cannot make a way to his property without the road, Paletta has never claimed any type of easement by necessity in this case. Even in the Amended Complaint by Counsel, there was no alternative claim for an easement through the area.

The claim, itself, simply argues that the area in question contained a public road. Thus, the Court has no reason to make a determination as to whether Paletta's land has been landlocked or not. Paletta's counsel stated that he has not used this road in years and has in fact been using alternative means since the road was "obliterated" fifty years before. This Court makes no findings as to the whether or not Paletta's parcel has been landlocked.

CONCLUSION

Based upon the foregoing findings, the Court concludes that the Phillips are entitled to Summary Judgment. Therefore, this Court **GRANTS** Defendants'/Counterclaimants/Third-Party Plaintiffs' Motion for Summary Judgment. The Circuit Clerk is **DIRECTED** to remove this case from the Court's docket. The Circuit Clerk is further **DIRECTED** to send a certified copy of this order to the following: Frank E. Simmerman III, Esq., Simmerman Law Office PLLC, 254 East Main Street, Clarksburg, WV 26301; Norman T. Farley, West & Jones, P.O. Box 2348, Clarksburg, WV 26302; and Travis S. Haley, Esq., West Virginia Division of Highways, Legal Division, Room A-517, Building 5, 1900 Kanawha Boulevard East, Charleston, WV 25305.

Enter 4/29/2022

Honorable Christopher J. McCarthy, Chief Judge

STATE OF WEST VIRGINIA

COUNTY OF HARRISON, TO-WIT

I, Albert F. Marano, Clerk of the Fifteenth Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 29 day of April, 2022.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of the Court this 29 day of April, 2022.

Albert F. Marano SP

Fifteenth Judicial Circuit & 18th

Family Court Circuit Clerk

Harrison County, West Virginia