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IN THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

PUMPKIN, LIMITED)
)
 Plaintiff,)
)
 v,)
)
 UTILITY SERVICES OF ALASKA, INC.,)
 d/b/a COLLEGE UTILITIES)
 CORPORATION)
)
 Defendant.)
)
 _____)
 Case No. 4FA – 18 - _____ CI

FILED in the Trial Courts
State of Alaska Fourth District
JUN 25 2018
By _____ Deputy

**MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY
INJUNCTION**

Defendant has threatened to clear-cut Plaintiff's property to install water pipes in a disputed easement, commencing on July 3, 2018. Plaintiff, property owner Pumpkin, Limited, is a corporation whose sole shareholder is Jason Roe. Pumpkin, Limited will be referred to as "Roe".

Pursuant to Civil Rule 65, Roe hereby moves for a temporary restraining order and a preliminary injunction preventing Defendant Utility Services of Alaska, Inc., d/b/a College Utilities Corporation (College Utilities) from entering Roe's property and conducting any activities on Roe's property, including but not limited to clear cutting trees and digging trenches.

Roe requests that on or before June 29, 2018, the Court issue a temporary restraining order (TRO) of ten days in duration. Roe also requests that the Court set on a hearing on a preliminary injunction to occur prior to the expiration of TRO and that the Court grant the preliminary injunction prior to the expiration of the TRO.¹

I. STANDARDS FOR GRANTING A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

A. Temporary Restraining Order

Civil Rule 65(b) provides in pertinent part:

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

The Court may grant a TRO upon either a showing of probable success on the merits or upon the balance of hardships weighing in the plaintiff's favor, akin to what the Court would do in granting a preliminary injunction.²

B. Preliminary Injunction

A party may obtain a preliminary injunction by either demonstrating probable success on the merits or meeting the balance of hardships standard.³ As to the balance of hardships standard, the Alaska Supreme Court has stated:

¹ See *Ostrow v. Higgins*, 722 P.2d 936, 939-40 (Alaska 1986).

² See *Alsworth v. Seybert*, 323 P. 3d 47, 54-55 (Alaska 2014).

The balance of hardships standard requires balancing the harm the plaintiff will suffer without the injunction against the harm the injunction will impose on the defendant. A preliminary injunction is warranted under that standard when three factors are present: (1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit.⁴

In balancing the hardships, “a court is to assume the plaintiff ultimately will prevail when assessing irreparable harm to the plaintiff absent an injunction, and is to assume the defendant ultimately will prevail when assessing the harm to the defendant from the injunction.”⁵

II. DISCUSSION

A. Roe Will Suffer Irreparable Harm If the Temporary Restraining Order And Preliminary Injunction Are Not Granted.

As set forth in the Verified Complaint For Injunctive Relief And Damages, Roe will certainly suffer irreparable harm if a TRO and a preliminary injunction are not granted. Hundreds of mature trees will be demolished, severely diminishing the privacy and value of the property. College Utilities intends to clear 33-foot-wide, 1,246 foot-long public passageways to the private, man-made lake which Roe’s property borders upon. Roe will thus forced to deal with the noise and dust of all-terrain vehicles (ATVs) and other motorized vehicles, as well as pedestrian traffic, all taking advantage of the improved path College Utilities would blaze over Roe’s private property to the lake that

³ See *id.* at 54.

⁴ *Id.* (quotation and citation omitted).

⁵ *Id.*

is intended to be private property for the enjoyment of Roe and others whose property borders on the lake. Likewise, what is now a small nature preserve would be forever lost despite the existence of several alternatives for College Utilities that would not require such destruction.

B. Roe Will Most Likely Prevail On The Merits And Has At A Minimum Raised Serious And Substantial Questions Going To The Merits Of The Case.

1. There Is No Section Line Easement Over Roe's Property.

In Brice v. Division of Forest, Land & Water, 669 P.2d 311 (Alaska 1983), the Court held that "section line highway easements established by the grant of 43 U.S.C. § 932 and the acceptance in 19 SLA 1923 were not vacated by the 1949 repeal of 19 SLA 1923."⁶ While the property in Brice was entered in 1950 and patented in 1952, the Court explained the property would not be burdened with a section line easement if there had been an earlier entry, one before 1923.⁷ As indicated in the Verified Complaint and the attached Exhibit 1, there was just such an entry in this case, a homestead entry on April 9, 1915.

Brice did not address the situation here, when the survey was done prior to 1923 and all entries were made prior to 1923 or in July 1949, during the time the easement law was revoked.

⁶ Brice v. Division of Forest, Land, & Water Management, 669 P.2d 1311, 1316 (Alaska 1983).

⁷ See id. see also State v. Alaska Land Title Association, 667 P.2d 714, 724 (Alaska 1983) (homestead entries give rise to valid existing rights).

The common law rule of law is statutes are prospective unless there is clear legislative intent the statute is to apply retroactively.⁸ In the same vein, AS 01.10.090 provides: No statute is retrospective unless expressly declared therein.

The grant of 43 U.S.C. Sec. 932 was a continuing one, as was its acceptance by 19 SLA 1923. As lands came into the public domain after 1923, they became impressed with section line highway easements. 1969 Op. Att'y Gen. No. 7 at 6 (Alaska, December 18, 1969).⁹

The territorial legislature is presumed to have acted prospectively on so as not violate common law and statutory law by retroactively creating SLE's on land that had been surveyed prior to 1923.¹⁰

2. Under Alaska Law, Section Line Easements May Not Be Utilized To Install A Private Underground Water Main.

In Fisher v Golden Valley Electric Association 658 P.2d 127 (Alaska 1983), the Court addressed the scope of permissible use of a section line easement. The Court approved the construction of a power line on an unused section line easement based upon the reasoning that the transmission of power and related communications and other information were "simply adoptions of traditional highway uses made because of changing technology."¹¹ In contrast, the private water line that College Utilities would install on Roe's property is an ancient mechanism not associated with traditional

⁸ Brice v. State, 669 P.2d 1315 Alaska (1983).

⁹ Id at. 1315.

¹⁰ See Brice 669 P.2d at 1315

¹¹ Fisher v. Golden Valley Electric Association, 658 P.2d 127, 129 (Alaska 1983).

highway uses and this not within the scope of any section line easement that may exist.¹²

Moreover, the statute at issue in Fisher, AS 19.25.010, appears to date back no further than 1957. As discussed previously, it is presumed that the statute does not apply retrospectively to extinguish or otherwise impair the property rights to Roe's property which date back to 1949.¹³

Prior to the passage of AS 19.25.010, the federal law applicable to section line easements in Alaska is that utilities are not within the scope of the easement.¹⁴ If AS 19.25.010 were then found to be retroactively applicable, that statute would be an unconstitutional taking as to Roe's property because the statute purports to authorize the physical occupation of Roe's property by College Utilities.¹⁵ In other words, such an uncompensated occupation of Roe's property would unconstitutionally require Roe to bear a burden which should be borne by the public as a whole.¹⁶

¹² See id.

¹³ See Brice, 669 P.2d at 1315

¹⁴ See United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 (9th Cir. 1984)

¹⁵ See Nollan vs. California Coastal Commission, 483 U.S. 825, 831-33, 107 S. Ct. 3141, 3145-46, 970 L. Ed 677, 685-87 (1987)

¹⁶ See id., 483 U.S. at 835n. 4, 107 S.Ct. at 3148n.4, 97 L Ed. 2d at 688n.4.

3. If Alaska Law Does Allow Section Line Easements To Be Utilized To Install A Private Underground Water Main, AS 19.25.010 Requires That College Utilities Must First Obtain A Written Permit To Do So Issued By The State Of Alaska, Department Of Transportation And Public Facilities, Which College Utilities Has Failed To Do.

AS 19.25.010 provides:

A utility facility may be constructed, placed, or maintained across, along, over, under, or within a state right-of-way only in accordance with regulations adopted by the department and it authorized by a written permit issued by the department. The department may charge a fee for a permit issued under this section. (emphasis added)

To Roe's knowledge, College Utilities has failed to obtain the written permit required by AS 19.25.010 before College Utilities could legally begin any entry onto or activities upon Roe's property. If a government entity authorizes a utility company to take private property, the company (or DOT) must proceed under the condemnation statutes.

17 AAC 15.031(a) apparently purports to require written permits only if the section line is not presently used or proposed to be used by the State. But this regulation is invalid because it directly contradicts and conflicts with AS 19.25.010.¹⁷

¹⁷ See Grunert v. State, 109 P.3d 924, 929 (Alaska 2005); compare Fisher, 658 P.2d at 130-31 (the Court expressly mentions that no party to the case has suggested that 17 AAC 15.031(a) is invalid).

4. Due Process Of Law Requires That Before College Utilities Obtains Any Authorization To Enter Or Conduct Any Activities Upon Roe's Property, There Must Be Proper Advance Notice To Roe And A Hearing At Which The Legality Or Illegality Of College Utilities' Proposed Entry And Activities Must Be Determined; Due Process Also Requires That The Scope Of Any Authorized Entry And Activities Must Be Limited To Only Such Entry And Use That Are Reasonably Necessary So As To Minimize The Damage To Roe's Property.

Due process requires notice, hearing, and a reasoned decision before action is taken that affects a person's real property interests.¹⁸ Had College Utilities property applied for a permit under AS 19.25.010 that would have allowed Roe to have the required input before the State determined whether to issue such a permit to College Utilities and the scope of any such permit issued.

The necessity for a hearing and reasoned decision is bolstered by the Alaska Supreme Court's decision in Anderson v. Edwards, 625 P.2d 282 (Alaska 1985). In Anderson, which involved the cutting of trees within an undisputed section line easement, the Court held that trees may be cut within a section line easement only to the extent reasonably necessary for the underlying construction.¹⁹ Unreasonable removal of trees subjected the defendant to treble damages under AS 09.45.370.

In Roe's case, there has been no reasoned inquiry into the necessity for College Utilities to conduct any activities on Roe's property (as opposed the alternative of the property on the other half of the purported section line or the alternative of running the

¹⁸ See Ship Creek Hydraulic Syndicate v. State, Dept. of Transportation and Public Facilities, 685 P.2d 715, 716-21 (Alaska 1984); see also A.M. v. State, 945 P.2d 296, 302 (Alaska 1997).

¹⁹ See Anderson v. Edwards, 625 P.2d 282, 285-86 (Alaska 1981).

water line along Helm Road); and even if Roe's property were the only alternative, there would still need to be an Anderson, analysis to ensure that any activity by College Utilities on Roe's property is limited so as not to exceed the extent reasonably necessary, thereby minimizing the damage to Roe's property.²⁰

III. CONCLUSION

In conclusion, for the reasons stated, the Court should grant a temporary restraining order, followed by a preliminary injunction, enjoining College Utilities from entering onto or conducting any activities on Roe's property.

DATED at Fairbanks, Alaska this 25th day of June, 2018.

KRAMER and ASSOCIATES
Attorney(s) for Defendant

By: 

Robert John
ABA # 8911069

²⁰ Cf. Ship Creek Hydraulic Syndicate, 685 P.2d at 716-17.
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed/emailed/hand-delivered this 25 day of June, 2018 to:

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ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The Court, having duly considered the matters presented, hereby orders that the motion for temporary restraining order is GRANTED. Accordingly, for ten (10) days from the issuance of this order, until _____ am/pm on July _____, 2018, Defendant is restrained from entering Plaintiff's property or conducting any activities thereon. A hearing on the Motion for Preliminary Injunction will be held on July _____, 2018, at _____ in Ctrm# _____.

LOGGED
JUN 25 2018

Entered at Fairbanks, AK this _____ day of June 2018.

SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed/emailed/hand-delivered this 25 day of June, 2018 to:

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