2010 WL 9524830 (Alaska Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Alaska.
Third Judicial District
Anchorage Borough

Ronald KAYLOR and Jean K. Kaylor, Plaintiffs,
v.
David MCCARREY and Donna McCarrey, Defendants.

No. 3AN-10-7799 CI.
June 9, 2010.

Defendants' Opposition to Motion for Temporary Restraining Order

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Defendants, David McCarrey and Donna McCarrey (“McCarreys”), by and through counsel, Marston & Cole, P.C, hereby oppose Plaintiffs' Motion for Temporary Restraining order as follows:

I. INTRODUCTION

This is not a case of “irreparable harm.” This is not a case where the Plaintiff has raised serious and substantial questions going to the merits of the case. This is simply a case of landowners rightfully enforcing their ownership interests in their real property by building a fence to prevent encroachments by a neighbor. David McCarrey and his wife simply seek to place a fence within their property lines to prevent the unlawful parking of vehicles on their land and the continued violation of their property rights. The Plaintiffs have not, and will not, establish that they have acquired a prescriptive easement across the McCarreys' land.

In order to establish a prescriptive easement across the McCarreys' property, the Plaintiffs must show that they have exercised open, notorious, and hostile use of the property in question. This they cannot do. By their own admission, it is a tenant, not the Plaintiffs who have used the unmaintained right of way in question. The alleged use of the McCarreys' Property has not been open, notorious, and hostile; it has been permissive. The Plaintiffs do not use this right of way to access their home; they have a huge driveway on the north end of their property to access their house. The lack of access for their tenant can be easily remedied by allowing her to park in the Plaintiffs' driveway and having her walk to her apartment without encumbering McCarreys' Property. The Plaintiffs alleged “lack of access” to their property is nothing more than a slight inconvenience or financial

burden to the Plaintiffs. This could be solved merely by running a walkway around to the back of their home to accommodate their tenant. This minor inconvenience, therefore, cannot be the basis for issuing a temporary restraining order or a preliminary injunction.

For this and the other reasons set forth below, this court should **deny** the Plaintiffs' request for a temporary restraining order or the issuance of a preliminary injunction precluding the McCarreys from erecting a fence across their own Property.

II. FACTUAL BACKGROUND

The McCarreys own the real property identified as Lot 14, Block 2 of Olson Heights Subdivision, Plat No. 79-68, Anchorage Recording District, Third Judicial District, State of Alaska (“Property”). [1] See Exhibit A. The property is zoned R-6. See Exhibit B. They purchased the Property in December 2009 and have lived in it ever since it was purchased. Their Property is surrounded by other properties and the only access is on unimproved right of way which begins on Elmore Road and runs east along the northern fifty feet (50') of Lots 13-20 through to Davis Street. This access right of way is recorded as a 50 foot roadway reservation along these Lots 13-20 to ensure access to these properties. See Exhibit C. It does not impinge upon the Plaintiffs' property at all.

The McCarreys are proposing to build a chain link fence with a gate along the northern boundary of their Property. Several of the McCarreys' neighbors on have constructed fences on the northern boundary of their property. See Exhibit D. The Plaintiffs' property borders the McCarreys' Property to the north. Plaintiffs have access to their lot from 135th Street. See Exhibit E. They have a large driveway that can accommodate a number of vehicles. They also have room to push a driveway or a walkway around their home to access the southern end of their property.

Since moving into their home, the McCarreys have observed people park cars on their property and enter the rear part of the Plaintiffs' home. These cars have remained parked overnight on their Property. The Court is being provided with a number of pictures showing vehicles improperly parked on their Property. See Exhibit F. In addition to parking cars on the McCarreys' Property, the Plaintiffs have stored a boat and a motor home in their back yard. The positioning of this boat has intruded upon the McCarreys' Property. The Plaintiffs have moved their motor home in the back yard once in the last six months. Aerial pictures taken by Aero-metric, Inc. dating back to 1980 have been made a part of the record. See Exhibits G. These pictures do not show the Plaintiffs using their property to store vehicles until 2005.

The Plaintiffs' property is zoned R-6. Based on the size of their lot, code only allows use of their lot for single family residence. See Exhibit H. There are certain limited circumstances where they can use their property for rental purposes. A tenant of the Plaintiffs apparently lives at the rear of their house, drives down this right of way, and parks her car either on the McCarreys' Property or on the Plaintiffs' property. It is unclear why she cannot access her apartment from the Plaintiffs' driveway off 135th street. No evidence is provided on how long she has been a tenant and using the McCarreys' Property for access to her apartment.

The McCarreys have contracted with a fencing company to build a chain link fence across the north end of the Property at a two foot setback from the property line. This fence will be similar in nature to several other fences constructed by other homeowners with the exception that the McCarreys have agreed to place a gate on their fence at their own expense. The McCarreys understand they would have to remove this fence if the Municipality of Anchorage determined it necessary to recognize this as a roadway and took steps accordingly. The McCarreys have proposed to grant the Plaintiffs limited access through the gate for purposes of moving their boat, moving their motor home, or bringing dirt or materials to the rear portion of their lot. Their only requirement was to receive sufficient notice to accomplish this task and that this privilege not be abused. They did reserve the right to refuse to open gate if these requirements were not honored. Upon providing the Plaintiffs notice of their intentions to build a fence across their Property, the McCarreys were sued by the Plaintiffs in an effort to prevent the building of the fence. This motion constitutes the McCarreys' response to this meritless lawsuit.

III. LEGAL STANDARDS

A. Prescriptive Easement.

The elements of a prescriptive easement are essentially the same as the elements of adverse possession, except that adverse possession focuses on possession rather than use. To be entitled to a prescriptive easement, a party must prove (1) *continuity*—that the use of the easement was continuous and uninterrupted; (2) *hostility*— that the user acted as the owner and not merely one with the permission of the owner; and (3) *notoriety*—that the use was reasonably visible to the record owner. A claimant must prove each element by clear and convincing evidence. Finally, a claimant must have engaged in the adverse use for at least ten years. *McDonald v. Harris*, 978 P.2d 81,83 (Alaska 1999). In *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826, 832 (Alaska 1974), the Alaska Supreme Court stated that the purpose of the requirements for adverse possession is to put the true owner on notice of an adverse possessor's claim. Towards this end, the exclusivity and continuity of an adverse possessor's use of a disputed area must rise to that level which would characterize an average owner's

use of similar property. Finally, there is a presumption that use by an alleged easement holder is permissive. *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1330 n. 16 (Alaska 1975). This presumption is overcome by proof of a distinct and positive assertion of a right hostile to the owner of the property. *Id.* at 1330, n. 16. In *Swift v. Kniffen*, 706 P.2d 296, 304 (Alaska 1985), the court stated that "[t]he hostility element turns on the distinction between acquiescence and permission," and held that "if the true owners merely acquiesce, and do not intend to permit a use, the claimant's use is adverse and hostile. Therefore, we must decide whether the record reveals that Tenala intended to permit the Mayos' use or merely acquiesced in that use." In *Hubbard v. Curtiss*, 684 P.2d 842, we stated that "[t]he key difference between acquiescence by the true owner and possession with the permission of the true owner is that a permissive use requires the acknowledgment by the possessor that he holds in subordination to the owner's title." *Id.* at 848 (citations omitted).

B. Legal Standard for Granting Temporary Restraining Order or Preliminary Injunction.

The Alaska Supreme Court has articulated a "balance of hardships" standard for the issuance of a temporary restraining order or a preliminary injunction. The Court has formulated two alternative analyses for applying that standard. One test requires that a party seeking such relief be faced with irreparable harm, that the opposing party be adequately protected from harm, and that the plaintiff raise serious and substantial questions going to the merits of the case. *North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993). Where the moving party can prove it will suffer irreparable harm and the balance of hardships tips decidedly toward the moving party, it will ordinarily be enough that the moving party has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation. *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 175-176 (Alaska 1992) (citations omitted), *reversed and remanded on other grounds*, 856 P.2d 1155 (1993). *See also State v. United Cook Inlet Drift Ass'n*, 815 P.2d 379 (Alaska 1991)("serious and substantial questions going to the merits of the case" standard applies where injury suffered by defendant will be "relatively slight in comparison to the injury which the person seeking the injunction will suffer").

Under the alternative test, where a party seeking relief does not stand to suffer irreparable injury or the party against whom the injunction is sought will suffer substantial injury, the standard instead is whether there has been a "clear showing of probable success" on the merits. *State v. Kluti Kaah Native Village of Cooper Center*, 831 P.2d at 1272. Under both tests, the Plaintiff's motion for temporary restraining order fails.

The logic of the Plaintiffs “irreparable injury” arguments seem to be as follows: 1) the Plaintiffs can establish a prescriptive easement across Defendants' Property; 2) the Defendants intend to build a fence across their own property; and 3) if a fence it built, it will permanently and irreparably impair the prescriptive easement and Plaintiff and their tenant's ability to access the southern end of their property. The McCarreys agree they intend to have a fence built across the northern boundary of their Property but disagree with each of the other premises and the conclusion the Plaintiffs attempt to draw. In summary, these contentions are not accurate, are not supported by the record, and do not support the issuance of a temporary restraining order.

IV. ARGUMENT

A. The Plaintiffs' Use of the Right of Way is Permissive and Does Not Establish the Elements for a Prescriptive Easement.

A review of the Plaintiff's affidavit in support of the motion for temporary restraining order makes it clear why they cannot establish a prescriptive easement on McCarreys' Property. The affidavit lacks evidence that 1) their use was not permissive, and 2) that their use was continuous, hostile, and notorious. The affidavit spends more time speaking to the issue of how inconvenient or expensive it would be to require the Plaintiffs or their tenant to use their own driveway to access the southern part of their house than establishing continuous, hostile and notorious use of the McCarreys' Property. The affidavit simply states that the Plaintiffs have “utilized the area in which the Defendants wish to fence for access to East 136th Avenue for a period of over fifteen years.” Affidavit of Ronald Kaylor at paragraph 16. The question is not whether they use their own property and how it will be affected by the erection of a fence. The question is, have facts been established to support the Plaintiffs open, hostile and notorious use of the McCarreys' Property for more than ten years such that they have acquired a prescription easement?

Mr. Kaylor's statement does not establish that the use was not permissive and that the requirements for a prescriptive easement have been met. Otherwise, everyone who lived on lots 1-8 and 13-20 in the neighborhood could argue that they have utilized the McCarreys' Property to the extent they have traveled across it to access Elmore Road or Davis Street. The statements by Mr. Kaylor in his affidavit are just as consistent with permissive use of the McCarreys' Property and do not establish the necessary notoriety or hostility necessary to meet the requirements for a prescriptive easements. More importantly, the evidence does not support the Plaintiffs' claims that they have used the McCarreys' Property continuously for ten years. The aerial photos provided as Exhibits H do not support the Plaintiffs' claims that they have used the unimproved right of way on McCarreys' Property as an access point for their campers or storage for their

boats. They show use of southern portion of the lot for gardening but not vehicle storage. These pictures show that Elmore was not even build in 2000. It is not even clear from the pictures that anyone is using this right of way as an access road. Certainly, there are no vehicles, campers, or boats parked on the south end of the Plaintiffs' property in any of the pictures before 2005.

While it certainly may have become more convenient for the Plaintiffs to utilize the unimproved right of way running along the northern boundaries of lots 13-20 after Elmore Road was built, their actions are not consistent with acquiring a prescriptive easement over the McCarreys' Property. The right of way they used to access their southern boundary was a right of way other people used for their only access to their property. The Plaintiffs' use of the right of way was indistinguishable from the use of other landowners who needed to use the right of way out of necessity. Nothing about the Plaintiffs' use of the right of way would put another property owner on notice that the Plaintiffs were acting adverse or hostile to the owner's property rights. Most importantly, the facts do not support the Plaintiffs' claims that they have continuously used this right of way for the purposes alleged for the necessary ten year period.

B. The Plaintiffs Cannot Establish They Will Suffer Irreparable Injury If the Fence is Built as Proposed.

The Plaintiffs claim that they will suffer irreparable harm or injury if the fence is built or an injunction is not issued. This is clearly wrong. First, if this lawsuit ultimately determines that the McCarreys have wrongfully placed a fence on their own property, then the Court can order that the McCarreys remove the gate at their own expense. There will be no irreparable injury because of the ease of taking down the fence.

Second, the Defendants have proposed placing a gate on the fence, so with the proper notice, the Plaintiffs will be able to remove their campers or their boats out through the southern access of the property. This gives Plaintiffs' continued access upon reasonable notice to the southern portion of their property. This also gives the Defendants assurances that their Property will no longer be encroached upon by strange vehicles and will allow them to establish a boundary for the northern portion of their property. While it might be inconvenient for the Plaintiffs' tenant to walk from the Plaintiffs' driveway down to her apartment, this certainly can be arranged and will allow her access her apartment without further imposing upon the McCarrey's property. Certainly, the Plaintiffs can take further action to make a driveway down to the back of their house to accommodate their tenant if they wish. All of these are practical solutions to this problem which would not infringe upon the McCarreys' rights to enjoy their property.

V. CONCLUSION

For the reasons set forth above, this court should reject the motion for a temporary restraining order and/or a permanent injunction.

DATED this *9th* day of June, 2010, at Anchorage, Alaska.

MARSTON & COLE, P.C.

Attorneys for David McCarrey and Donna McCarrey

By: <<signature>>

Brent R. Cole

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Footnotes

1 This factual synopsis is supported by the Affidavit of David McCarrey in support of this opposition to Plaintiffs' motion for temporary restraining order.