

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

CODY LEE AND STACY DEAN,)
Husband and Wife,)
)
Plaintiffs,)
)
v.)
)
BARBARA KONRAD,)
)
Defendant.)
)
_____)

Case No. 3AN-08-09772 CI

DECISION

This is a residential boundary dispute case along Ivan Drive in block 3 of Shelikof subdivision in Anchorage, Alaska. Plaintiffs' and Defendant's lots, lots 13 and 14, respectively, share a common boundary. The parties dispute the location of the boundary. This court is tasked with determining, from the available evidence, which of the two competing surveys most accurately determined the on-the-ground location of the boundary between the lots. The parties' interpretations of the common boundary's end points differ by less than two feet at the rear of the lots and by approximately three feet at the street-front of the lots.

Three surveyors testified during the trial. Plaintiffs offered the testimony of Anthony Hoffman ("Hoffman"), a licensed surveyor. He is the

manager of Lantech, the company that performed Plaintiffs' survey.

Defendant offered the testimony of John Schuller ("Schuller"), of ArcTerra Engineering and Surveying, Inc, the licensed surveyor who performed Defendant's survey. In addition, Defendant offered the expert testimony of Eric Simons, a licensed surveyor, as to the surveying methodology used in the Lantech and Schuller surveys.

The Lantech survey relied on what it believed to be an original Bureau of Land Management monument identified as a "Ctr. ¼ Cor. Sec. 5" on the 1972 Shelikof subdivision plat. This monument is on the outer edge of the subdivision and is not near the lots in question. The Schuller survey relied on (1) monumentation from a 2001 plat survey of the four-lot Hannah subdivision across Ivan Drive from the parties' lots, (2) an older but consistent rebar monumentation at the street-front corners of lots 15 and 16 just north of Defendant's lot 14, and (3) monumentation in the back of the parties' lots. Both Hoffman and Schuller opined that the monumentation they relied on was more reliable and that the monumentation relied on by the other was not.

Plaintiffs ask this court (1) to declare the legal boundary line as that determined by Lantech, or alternatively, as that indicated by the Ken Lang 1992 survey markers,¹ (2) for "money damages flowing from Defendant's conduct,"²

¹ Plaintiffs' Closing Argument (June 7, 2010).

² Plaintiffs' Amended Complaint (July 17, 2009).

(3) for costs and fees “to the full extent allowed by law,” and other relief as may be just and warranted.³

Defendant asks this court (1) to award damages based on Plaintiffs having “improperly . . . pulled survey stakes” and/or “the cost of the survey,” (2) to declare that adverse possession does not apply in Plaintiffs’ favor,⁴ (3) to declare that Plaintiffs “have committed a gravel trespass” and must remove the gravel, and (4) to award damages for “the destruction of the surveys and the gravel trespass,” (5) costs, interest, and attorney’s fees, and other equitable relief.⁵

FINDINGS

1. In 1989, Plaintiff Lee bought lot 13 under a warranty deed that incorporated a 1972 plat.
2. In the 1990’s, Defendant’s adjoining lot 14, was occupied by the Southernns. They were not the legal owners of lot 14 during the relevant events but were related to the owner. They became the owners of lot 14 just before they sold the property in 2003.
3. In 1992, the Southernns hired surveyor Ken Lang to set four boundary corner markers on lot 14. No written survey was produced and it is unknown what

³ Answer to Amended Counterclaim (August 5, 2009).

⁴ The court has previously ruled on this issue and will not reconsider its decision. The motion to reconsider this issue is DENIED.

⁵ Def. Closing Arg. (June 9, 2010) at 7; Amended Answer to Amended Complaint and Counterclaim (August 17, 2009).

type of survey was done.⁶ The 1992 corner markers placed the ends of the boundary lines of lots 13-14 north of where the Southern believed it was (thereby reducing their lot size). Specifically, Lang's markers reduced their front lawn, and also reduced their garden, located at the back of their lot, by half. After the survey, they assumed the division of the front of lots 13 and 14 was somewhere near the light pole at the front.

4. Shortly after the 1992 survey of lot 14, the Southern used the posts placed by Lang to determine where they should build a fence between lot 14 and lot 15. Exh. 1024, 1025.
5. Plaintiff Lec married co-Plaintiff Dean in 1997.
6. In 1999, Plaintiff Lec set fence posts along the lots 13-14 boundary line as determined by the corner lot markers set by Lang in 1992. The fence posts defined a line segment which began at the back of the lot and ended about 1/2 of the way to the street-front of his lot. Exhibit 1027. The Southern did not dispute the placement of the fence posts.
7. Sherric Wilson bought lot 14 in 2003 and owned it until 2008.
8. In late 2005/early 2006, Lec raised the level of his backyard with excavated dirt and gravel fill. This resulted in fill and gravel spilling over onto lot 14 and

⁶ It is unknown if an "as-built survey," "a lot-stake survey" or a "plot-plan survey" was prepared.

encroached onto lot 14 by two or three feet. Sherrie Wilson, the then-owner of Defendant's lot, did not object to this encroachment.

9. In 2006/2007, Lee converted the fence posts into a fence, but did not extend the fence to the street front. Exh. 1027.
10. As-built surveys prepared in 2008 show that the fence erected by Plaintiffs followed a straight line beginning at the rear of the lots to about ½ way to the street front, at which point the fence curved into Lot 13 to abut the house on lot 13 at a point approximately ¾ of the distance from the rear of lot 13 to the street front.

Schuller Survey ordered by Defendant

11. In April 2008, Defendant Konrad purchased lot 14 under a warranty deed that incorporated the 1972 plat.⁷ The fence as described above had been completed and she did not inquire about the location of the Plaintiffs' fence.
12. In order to obtain government approval to replace the trailer on her lot, Konrad hired licensed surveyor John Schuller to perform an "as built" survey and mark the property boundaries of lot 14.
13. On May 9, 2008 and May 13, 2008 Schuller personally performed the survey field work. Schuller found existing rebar markers defining three of the four corners of Lot 14 and he placed his own marker to define the street-front

⁷ When Lee purchased his lot in 1989, the 1972 plat was also incorporated into his warranty deed.

corner of the boundary between lots 13 and 14. Exh. 1017. Schuller's rebar marker had a yellow plastic cap with his license number on it. His signed May 15, 2008 As-built work product so states.

14. Shortly after Schuller set his rebar stake, Plaintiff Cody Lee pulled it out because he disagreed with its location.
15. On June 4, 2008 Defendant Konrad wrote to Plaintiff Lee the following letter:
"You have not shown any paperwork as to your allegations that the recent Survey on my property was incorrectly done. This is notice that since you removed the survey marker(s) that John Schuller set, I have requested that a permanent marker be put into place. If you choose to remove this permanent marker, you will be trespassing and then I will pursue charges." Exh. 1045.
16. On June 5, 2008, Plaintiffs responded by letter disputing the Schuller/ArcTerra survey. In the letter, they offered to pay for half of another survey as long as it complied with their methodology specifications and agreed to move their fence if it was found to be in the wrong location.
17. On June 12, 2008, Schuller returned to re-stake the lot. He found additional monumentation and prepared a "Plot Plan" survey that concluded that Plaintiffs' fence encroaches on Defendant's lot 14. Lee did not pull the second rebar, but did pull the lath associated with it when he mowed his lawn.
18. At trial, Schuller testified that he originally "tried to start from the boundaries of the [Shelikof] plat" with the intent to "tie" boundary corners of the whole

subdivision. He then decided it would be inappropriate to use the outside corners of the plot since to do so would “totally disregard what was on the street.”

19. Schuller testified that he did not want to “introduce errors” onto “what was being accepted as property lines.” He felt that if he used monumentation around the perimeter of Shelikof subdivision, he would “bring a discrepancy or error into the subdivision.”

20. I find that Schuller relied on localized monumentation over outside boundary monumentation for control at least in part out of concern for upsetting expectations of the owners of the property with corner markers used by Schuller, specifically the owners of lots 15, 16, and 17.

21. Schuller testified that Ken Lang “has a good reputation” in Anchorage. R. 6/3/10 9:37:08. Schuller adopted all three Ken Lang yellow-plastic capped rebar that he found on lot 14. Exh. 1049. Schuller did not find the Ken Lang yellow-plastic capped rebar at the street-front corner defining the boundary between lots 13 and 14, the corner mainly in dispute in this case. Exh. 1049. He then proceeded to set a marker in its stead.

22. Original yellow-capped rebar monumentation from a 2001 plat survey of several lots across Ivan Drive from lot 13, i.e. the Hannah subdivision, are generally consistent with the localized monumentation standard advocated by

Schuller, R. 6/3/10 9:32:13, 9:39:20. In addition, the size and set back requirements of Ivan Drive are addressed.

Lantech Survey

23. Plaintiff Lec and his wife Plaintiff Stacey Dean, the owners of lot 13, own a residential general contracting business that frequently orders surveys.
24. Co-Plaintiff Dean serves on the Anchorage Platting Board. Exh. 1044, R. 6/2/10 9:13:43.
25. In June 24, 2008 Plaintiff Lec hired Lantech to perform a "lot stake" survey. Lot stake surveys are used to set corners on lots and are not the same as plot plans.
26. "As builts" identify/display improvements and set backs and are generally used when a home is sold. "Plot plans" assist builders to obtain permits for future improvements. Plot plans require a higher level of care than the other two types of surveys.
27. Lantech's survey manager, Anthony Hoffman, and Lantech, have extensive experience in surveying and have worked on large projects around the state.
28. Hoffman has performed work for Plaintiffs' business and has appeared a number of times before Plaintiff Dean in her capacity as a Platting and Zoning Board member. Hoffman acknowledged that it is important to keep Plaintiffs' company as a client, but disputes that his findings were impacted by this business relationship or Plaintiff Konrad's position.

29. When hiring Lantech to perform the survey, Lee sent a letter to Lantech on June 24, 2008. The letter was sent on Grayling Construction letterhead with specific instructions on what he was requesting. He instructed Lantech as follows: "Enclosed is the signed contract. I would like a drawing of the house and how it sits on the lot ... I do want to make sure no one uses ... any existing rebar or LS markers, only the monuments at the corners of the subdivision should be used. . . Please let us know when you are coming to survey so that I can meet with the crew when they complete the project. I also warn you that neighbors may have something to say about what you are doing. I am also aware that we have a camper straddling the property line between 2171 and 2161 Ivan Drive.⁸ Please don't mark it on any drawings; it is only temporary in that location." Exh. 1046.

30. A separate Order Contract identified the payee as Grayling Construction with the company mailing address. The job description on the order contract provided for a "lot stake" survey with the following additional instructions to Lantech: "We need to get a drawing of the house and how it sits on the lot. We want to make sure (the monuments are used to determine the corners. Please do not use any existing rebar to determine lot lines."

⁸ The location of the camper was between lots 12 and 13.

31. Plaintiff Lee met with Lantech's two member survey crew and had discussions with them about the boundary dispute and about survey methods while at the survey site.
32. Hoffman supervised Lantech's survey of Plaintiffs' lot from his office and visited the site once.
33. Tom Ellior compiled the field notes for Lantech. Hoffman's initial assessment determined there were problems with the monumentation in the areas. As a result of their work in this subdivision, Hoffman testified that Lantech believes that there are "huge problems with monuments" in this subdivision.
34. Lantech's notes on their survey of lot 13 reveal that there is conflicting corner monumentation for the lots that front along the west side of Ivan Drive (lots 12 through 16, Block 3). In addition, they discovered that various surveyors have worked on this subdivision and it was not possible to determine in what sequence many of these corner markers were set. They noted that several rebar monuments that were found did not appear to be original monuments and that they couldn't find any original markers on Plaintiffs' lot.
35. In the beginning, Lantech concentrated on Ivan Drive. They started with the subject lots and found many different types of monuments around lot 13 and surrounding lots but none were original in that area. They did not consider or replat based on use, as Plaintiffs specifically asked Lantech to use the original lot lines used in the deed description at the time of purchase.

36. Lantech considered all the monuments they found. If the markers were found to be consistent with each other in the area, but not consistent with overall markers, they did not rely on them because they were concerned that a local error would have a ripple effect on the overall task they were requested to do.
37. Lantech did not consider the expectations and existing use of the neighboring lots when evaluating the lot line between lots 13 and 14. Therefore, existing fences in the neighboring lots were not considered even if found to be encroaching on neighboring lots.
38. Lantech was aware of the 2001 plat of the subdivided lot across the street from lots 13 and 14 that relied on monuments around the subject lots, but did not consider it.
39. After the filing of the lawsuit, and notwithstanding the dispute over the boundary line, Plaintiffs, relying on the disputed Lantech survey, "straightened" the fence by removing the portion that curved toward their house and extended the fence to the street such that it enclosed a disputed portion of the property at issue. This led to a police call.
40. In addition to the fill Plaintiffs previously placed within their fence from the excavation of their basement, they brought in additional fill after the lawsuit was filed and it has further spilled over onto Defendant's property.

Expert Witness and Surveyor Eric Simons' Evaluation

41. Shelikof subdivision is situated between the New Seward Highway and Lake Otis Parkway and is bordered by East 64th Avenue to the north and East 68th Avenue to the south. Shelikof subdivision contains a short road called Ivan Drive, which begins at Askeland Drive and travels east for the length of about nine residential lots, then turns 90 degrees to travel north for the length of seven lots before abutting 66th Avenue. The north-south segment of Ivan Drive has two significant curves in the road, which complicates measurement. Lots 11 through 17 run from south to north along the western side of Ivan Drive. Lots 13 and 14, the subject lots, are adjacent, with lot 14 north of lot 13.
42. Shelikof subdivision was platted in 1972. Exh. 1003, 1004. In March 1973, internal street centerline nails and street-front lot boundary rebar were set in the subdivision along Askeland Drive. Exh. 1037. In February 1974, similar monumentation was set in the subdivision along 66th Avenue and the relevant section of Ivan Drive. Exh. 1037. The centerline nails were placed with reference to a BLM quarter control in the centerline of 68th Avenue, referenced on the 1972 plat. Exh. 1003, 1037.
43. Neither party found street centerline monumentation along Ivan Drive, despite evidence that seven nails had been set in February 1974. Exh. 1037.

44. Eric Simons was called by the Defendant as an expert. Simons works for the State of Alaska as a Land Surveyor 1. He has been working for the State of Alaska for about 12 years. Prior to his work with the state, he designed subdivisions and was last employed by Alaska Rim Engineering.
45. The date(s) as to when 68th Avenue or Shelikof subdivision was paved is important because street centerline nails and rebar monumentation are generally considered more reliable because they are surrounded by concrete or asphalt and cannot be moved. In contrast, rebar monumentation defining lot boundaries is more likely subject to disturbance and movement due to, e.g., utility company digging along easements, mainly at the rear of lots, and fence building along boundary lines.
46. Simons testified that 68th Avenue was not paved in 1972. Because of this, Simons testified that in this case lot corner rebar monuments are more reliable than street centerline monumentation relied on by Lantech because the lot corner rebar monuments used by Defendant's surveyor Schuller were "a lot closer to the project area."
47. Simons testified there was an error in the area and, therefore, there is no way to tell the exact impact Lantech's measurement had on the surrounding and adjoining owners' use of the property from the available evidence.
48. Both Schuller and Lantech found a discrepancy between outside boundary monumentation and localized monumentation.

Impact of Lang's Corner Market Between Front of Lots 3 and 4

49. Lantech found the Ken Lang yellow plastic-capped rebar at the street-front corner defining the boundary between lots 13 and 14. Schuller testified that he would not have accepted it if he did see it, because it was not consistent with the monumentation from the Hannah subdivision across Ivan Drive and with what Schuller had found along the road frontage north of lot 14.
50. The Ken Lang yellow plastic-capped rebar at the street-front corner defining the boundary between lots 13 and 14 was found north of both the Lantech and Schuller "replacement" stakes, giving Defendant Konrad the least land of all three survey stakes.
51. After Lee pulled out Schuller's first rebar marker, Schuller returned and set yellow-capped rebar marking both the north and south street-front boundaries of Lee's lot 13. Lantech set its lot 13 lot stakes about three feet north of these stake positions. Schuller testified that lot 13 would have the same area under either surveyor's results, but "Lantech is saying that his [Cody Lee's] property is three feet north of where I think it is." Put another way, Schuller testified that "Mr. Lee, in my opinion, has three feet more to the south than what Lantech is saying."
52. In light of the choice of methodology of the Lang survey and the decision not to consider surrounding uses, I find that Schuller's marker is more reliable.

The determination of the actual location of a disputed boundary is often a compound issue which presents questions both of law and of fact, and such is the case here. The correct on-the-ground location of a boundary line may be based upon the appropriateness of the survey method employed and the existing use(s) of the properties.

The official survey in this case, the survey associated with the 1972 plat, initially created the boundary at issue. In performing a resurvey, the cardinal rule is that the footsteps of the original surveyor, if they can be ascertained, should be followed. When "objects or monuments" used by the original surveyor can be found, they should be used if found to be reliable.

In evaluating resurveys, this court must determine as a question of fact from the expert and non-expert evidence the actual location of the monuments, corners or lines as actually laid out on the ground by the official surveyor.

When infirmities exist in the original survey and plat or it is difficult to determine the validity of found monuments, a community's settled expectations of the on-the-ground location of boundary lines may prevail. This is part of the basis for Schuller having chosen local monumentation rather than external monumentation.

The court recognizes that the identity and validity of the monuments relied on by Schuller are in question because at least three of them were clearly

not original monuments: they had a yellow plastic cap on them identifying them as placed by Ken Lang, the surveyor who set them in 1992 based upon unclear survey methodology. In addition, Lantech found Ken Lang's 1992 lot 14 rebar generally consistent with external control at the southeast corner, but inconsistent at the northeast corner. Also, the northeast (street-front) corner was consistent with the lot 16 rebar held by Schuller. Finally, the relied-on monumentation placed during the 2001 Hannah plat survey is not original monumentation with respect to the 1972 survey that created the boundary in question. Nonetheless, I find Schuller's method to be more reliable in determining the limited issue before the court since it considers the existing use of the surrounding properties. However, this court's decision only resolves the dispute between the parties in this case. It did not attempt to or consider resolving any factual disputes among the adjoining land owners.

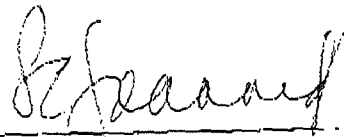
I have already found that Plaintiffs are entitled to the land within their fence before they straightened it. Therefore, the only remaining property at issue is the land from the edge of the fence as it was built in 2006 to the survey marker between lots 3 and 4.

Defendant's request that adverse possession does not apply has already been ruled on and is moot in light of this ruling. Defendant's request for declaration that a gravel trespass has been committed was addressed in a summary judgment order. Any license Plaintiffs had under lot 14's previous

owner has been revoked and Plaintiffs now must remove all encroaching fill on lot 14 within a reasonable time. An adequate retaining wall must be built either on lot 13's side of the fence or directly under Plaintiffs' fence to ensure the retaining wall will not encroach upon lot 14.


All costs of fill removal and construction of a retaining wall shall be born by Plaintiffs. Plaintiffs shall restore the encroached-upon land to an orderly state. Plaintiffs may access Defendant's lot to clear the gravel and build the retaining wall. A plan for these modifications must be presented to Defendant's counsel by May 1, 2011. The project must be completed by July 1, 2011.

DONE this 10th day of January 2010, at Anchorage, Alaska.


Stephanie E. Joannides
Superior Court Judge

I certify that on January 10, 2010
a copy of the above was mailed to
each of the following at their
addresses of record:

Wright
Gardner
Patterson


Patrick Sherry
Law Clerk for Judge Joannides