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ARKANSAS COURT OF APPEALS

DIVISIONS IV & I
No. CA09-862

CONMAC INVESTMENTS, INC.
APPELLANT

V.

ENTERGY ARKANSAS, INC.
APPELLEE

Opinion Delivered May 5, 2010

APPEAL FROM THE JACKSON COUNTY CIRCUIT COURT
[NO. CV-05-166]

HONORABLE HAROLD S. ERWIN, JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Conmac Investments initiated a complaint against appellee Entergy Arkansas Inc., on October 5, 2005, seeking damages and seeking to have the language contained in a right-of-way document deemed void on public policy grounds. On May 4, 2007, Conmac amended its complaint to include a request to compel Entergy to define an access easement. Entergy filed an answer whereby it sought to have Conmac's complaint dismissed for failure to state a claim upon which relief could be granted on May 24, 2007. On June 4, 2007, Entergy filed a motion for partial summary judgment, alleging it was entitled to summary judgment as to the validity of the right-of-way permit and alleging that Conmac's requested relief was without merit or legal foundation. Conmac filed an answer and motion for partial summary judgment on January 14, 2008. Following a hearing, the court issued an order on

May 29, 2009, granting Entergy's request for summary judgment. The order reserved the issue of damages. On June 15, 2009, a final consent judgment was filed granting Conmac damages in the amount of $1000. Conmac filed its notice of appeal on June 18, 2009. According to Conmac, the trial court erred by not requiring the parties to establish a reasonable delimitation of Entergy's acquired easement of "right to free ingress and egress" over Conmac's farmland, or in the alternative, establishing such a delimited easement by court order. We affirm.

In 1949, Entergy's predecessor in interest received a sixty foot right-of-way from Conmac's predecessor in interest. The right-of-way document contained additional language granting Entergy's predecessor in interest "the right to free ingress and egress over adjacent lands to or from said right-of-way." The permit was recorded in 1954. Conmac purchased the property in 1986, subject to Entergy's right-of-way. Problems arose in the summer of 2005. In June 2005 an Entergy utility pole was damaged and Entergy had to go onto Conmac's property to fix the pole. Conmac filed a complaint alleging that due to Entergy's route onto the property, Conmac suffered damages in the amount of $16,000. Conmac also sought to have the additional language in the permit deemed void. As an alternative, Conmac sought to have Entergy's access limited either by mutual agreement or by court order. Entergy maintained the position that Conmac purchased the property with full knowledge of the easements and that requiring Entergy to define an access point would be burdensome and could result in greater damage to Conmac's property than that suffered in the summer of

2005. According to Entergy, it had taken the least intrusive and shortest route over Conmac's property to fix the utility pole and that any other route would have resulted in damaged levies and even greater damage to Conmac's property and crops.[1]

In its opinion, the trial court found the contested easement to be a secondary easement expressly provided for in the right-of-way permit. It further found that Entergy did not violate the terms of the right-of-way permit when it entered Conmac's property to fix a damaged power line. The court also found that the portion allowing ingress and egress on adjacent property was neither void as against public policy nor void as an undue, onerous and unfair burden upon the property. The court denied Conmac's motion for partial summary judgment. This appeal followed.

The supreme court defined a secondary easement in *Loyd v. Southwest Ark. Utilities Corp.*:[2]

> By definition a secondary easement goes with an existing easement and consequently would not have to be separately acquired. It either exists or it does not exist as an incident to an easement.

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[1]*See* illustration 3 to comment (c) of section 4.10 of the Restatement (Third) of Property (Servitudes)(2000):

> Power Company acquired an express easement of the northerly 25 feet of Blackacre for above-ground electric-transmission lines. The only access to Blackacre is from a public road along the southerly boundary. In the absence of other facts or circumstances, Power Company is entitled to erect poles, to remove and trim trees as reasonably necessary for protection of the power lines, to make repairs, and to enter and use the rest of Blackacre to the extent reasonably necessary for those purposes, and for reasonable inspection and maintenance of the lines.

[2]264 Ark. 818, 580 S.W.2d 935, (1979).

> A secondary easement, then, is simply a legal device that permits the owner of an easement to fully enjoy all of the rights and benefits of that easement. Conversely, it is a legal device that prohibits an owner of a servient tenement from interfering with an easement owner's enjoyment of the full benefits and rights of an easement.
>
> However, a secondary easement does not necessarily exist in every case. For example, a highway department or railroad company would not have a right of ingress or egress over all adjacent land to its rights-of-way. It is not needed because access is inherent in such easements or rights-of-way. Nor would one exist where access to a right-of-way, such as that taken in this case, already exists.
>
> We have never had an occasion to recognize a "secondary easement" and there is no need to do so in this case, because what Southwest sought and acquired in this case was not a secondary easement but a separate and distinct right of ingress and egress over all the Loyds' property.
>
> While we do not find it necessary to rule at this time that a secondary easement exists in some cases, neither do we reject the idea that such a right exists.

The present case is distinguishable from *Loyd* because, whereas Southwest sought a separate and distinct right of ingress and egress over all the Loyds' property, Entergy was actually granted such a right. Conmac purchased the property with full knowledge of Entergy's right. Therefore, based on the facts of this case, we cannot say that the trial court erred by granting Entergy's motion for partial summary judgment. Accordingly, we affirm.

Affirmed.

VAUGHT, C.J., and GRUBER and MARSHALL, JJ., agree.

PITTMAN and BAKER, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. Appellant argues that the trial court erred in granting summary judgment declaring that appellee had a secondary easement of undefined location over appellant's farmland based on a right-of-way permit entered into by the parties'

predecessors-in-title. Appellant asserts that such an unrestricted easement is either void or should be delimited to a specific route. I agree, and I would reverse and remand for trial.

The parties' predecessors-in-title created a utility easement by grant and, in the same document, created an additional easement giving the power company access to the utility easement across the appellant's farmland. The question here is whether the "easement to the easement" gives appellee unrestricted access over all of appellant's lands, or whether it is limited to a particular route defined by usage or defined by appellant in the event that appellee fails to make an election regarding the route to be fixed.

The trial court declared that the second easement contained in the grant was a "secondary easement" and thus gave the appellee utility company unrestricted access over appellant's land not bound to any particular path or route. I think that this was error. First, Arkansas has been extremely reluctant to recognize secondary easements and, to date, has declined to do so. While holding open the possibility of recognizing a secondary easement in a proper case, the Arkansas Supreme Court has held that it will not do so where the holder of the dominant estate has access to the easement via a public route rather than over the servient estate. *Loyd v. Southwest Ark. Utilities Corp.*, 264 Ark. 818, 580 S.W.2d 935 (1979). It is undisputed that a public route exists in the present case: Appellee admitted below that it could in fact have accessed its easement by public road but argued that to do so would be inconvenient and expensive.

Second, even were Arkansas to recognize secondary easements, the easement at issue does not fit the definition of a secondary easement because it arose by virtue of a separate grant. The Arkansas Supreme Court has said, "By definition a secondary easement goes with an existing easement and consequently would not have to be separately acquired. It either exists or it does not exist as an incident to an easement." *Id.* at 824, 580 S.W.2d at 937–38. However, the easement involved in the present case is not a mere incident of the utility easement but is premised on an express grant giving access to the utility easement. Although the trial court held it to be a secondary easement, it does not comport with the definition of a secondary easement utilized by our supreme court.

Therefore, whatever appellee acquired was not a secondary easement, as the trial court held, but instead was simply a *second* easement created by grant. While the express grant does in fact allow access to the easement over appellant's lands, nothing in the wording of the grant suggests that appellee has been given the sort of completely unrestricted access that the trial court held to exist.[1] A right-of-way grant is to be construed against the party preparing it, *Carroll Electric Cooperative Corp. v. Benson*, 312 Ark. 183, 848 S.W.2d 413 (1993). Here, appellee's predecessor-in-title prepared the document, and, in the absence of language

[1]The second easement conferred in the right-of-way permit is "the right of free ingress and egress over adjacent lands to or from said right-of-way . . . for the purpose recited herein," *i.e.*, construction and maintenance of a power line. Notably lacking is either the sort of broad language permitting enlargement of the scope of the easement at will or testimony concerning the intent of the parties present in *Bishop v. City of Fayetteville*, 81 Ark. App. 1, 97 S.W.3d 913 (2003), and which was held to demonstrate that the parties anticipated expanded use beyond the terms of the grant.

indicating a contrary intent, the access easement granted in this case should be subject to the longstanding rule that undefined grants of rights of way, termed "floating rights of way," become fixed routes once located and utilized. *Bradley v. Arkansas Louisiana Gas Co.*, 280 Ark. 492, 659 S.W.2d 180 (1983). I think that the trial court has misconstrued both the case law and the scope of the access easement at issue in this case, and I would reverse.

BAKER, J., joins in this opinion.