

CANADA / JUDGMENT

947745 Alberta Ltd. v. Allen

2016 BCSC 1379

COURT

Supreme Court of British Columbia

DECIDED

25 July 2016

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2016 BCSC 1379 947745 Alberta Ltd. v. Allen IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: 947745 Alberta Ltd. v. Allen, 2016 BCSC 1379 Date: 20160725 Docket: 15914 Registry: Salmon Arm Between: 947745 Alberta Ltd. Plaintiff And Donald Bruce Allen and Kathleen Rose Allen Defendants Before: The Honourable Madam Justice Hyslop Reasons for Judgment Counsel for the Plaintiff: N. Wahoski Counsel for the Defendants: G.N. Wynne Place and Date of Hearing: Salmon Arm, B.C. July 20, 2016 Place and Date of Judgment: Salmon Arm, B.C. July 25, 2016

INTRODUCTION

- [1] The plaintiff and defendants are neighbours and property owners located near Shuswap Lake at Sicamous, British Columbia. They are in a dispute regarding an easement that crosses the defendants' property permitting access to the plaintiff's property.
- [2] The plaintiff, 947745 Alberta Ltd., seeks an injunction:
- a) requiring the defendants, Donald Bruce Allen and Kathleen Rose Allen, from blocking, obstructing, or in any way interfering with access across an easement registered against title to the defendants' land under charge # KPO 66109; and
 - b) requiring the defendants to remove any impediment or obstruction that has been erected over the easement registered against title to the defendants' land under charge # KPO 66109.

FACTS

- [3] I find the following facts. The plaintiff is a company that owns: Parcel Identifier: 027-339-131 Lot 1, Section 8, Township 24, Range 7 West of the 6th Meridian KDYD Plan KAP85581
- [4] Located on lot 1 is a summer residence which the principals and only shareholders of the plaintiff, Brenda Borza and Timothy Borza, use as a residence during the summer months.
- [5] The defendants are the owners of: Parcel Identifier: 024-824-810 Lot 2, Section 8, Township 24, Range 7 West of the 6th Meridian KDYD Plan KAP67200

- [6] Lots 1 and 2 are part of a subdivision that was established in 2000. At the time, the developer of the subdivision granted on July 7, 2000 an easement in favour of lot 1 (dominant tenement) over lot 2 (servient tenement). Its purpose was to allow the owners of lot 1, together with "its agents, servants, licensees and invitees the right to go upon, pass through or over that part of the Grantor's lands" and through lot 2 "with or without vehicles, equipment or animals" as access to the owners of lot 1.
- [7] Amongst other covenants, the easement document stated:
3. THE GRANTOR HERBY COVENANTS WITH THE GRANTEE THAT it will not make, place, erect or maintain on the easement premises, as hereinafter described, any building, structure, foundation or obstruction which will interfere with the easement granted hereby.
- [8] Most of the facts are not disputed, except the defendants allege the plaintiff has used alternate access to its property from 2001 until 2013. The plaintiff claims it used this alternate access through the defendants' property starting in 2009 until 2013, when the Borzas found that this access was not suitable for vehicle use.
- [9] The use by the plaintiff of the easement came to a head on the May long weekend of 2016 when on May 28, 2016, Mr. Borza arrived at the property followed by a guest. Mr. Borza found that the defendants had parked their truck and trailer across the easement. Mr. Borza managed to manoeuvre his vehicle around the truck and trailer and opened the gate blocking the easement. He left the gate open to accommodate his guest. The guests could not get through the gate as it was locked. Mr. Borza went to the gate and unlocked the gate for his guests.
- [10] That same day, the Borzas and their guests left to go "quadding". After a five-minute ride, they returned to find that the gate was locked. Mr. Borza became angry and he and Mrs. Allen argued. Mr. Borza threatened Mrs. Allen. Mr. Borza smashed through the gate, presumably with the use of a vehicle. Mr. Borza yelled and uttered threats. The defendants went back to their home and called the police and reported this event. To date, no steps have been taken by the police.
- [11] However, sometime prior to the May long weekend, the Borzas allege that a large flat deck trailer was parked across the alternate road called "the trail" and at about the same time a locked gate was installed across the easement, which included digging a trench across the easement.
- [12] Further, the Borzas allege that the Allens regularly parked vehicles on the easement so as to impede access to their lot.
- [13] In support of these allegations, the Borzas provide photographs and a map which show these locations as described.

- [14] At the present time, all that is impeding the Borzas from using the easement is the gate located on the easement. Exhibit F is a plan attached to Mrs. Borza's affidavit depicting the easement in relation to lots 1 and 2, the location of the gate, the ditch, and the trail (the alternate access). It is clear that in this subdivision, easements are used, not just for lots 1 and 2, but easements are used instead of public roads.
- [15] The Allens claim that the steps they took was for safety and security reasons; that is the protection of their dog and, at times, their grandchildren so as to curtail the speed at which Mr. Borza travels on the easement. POSITIONS Plaintiff
- [16] The plaintiff's position is that it has a legal easement; the terms of which do not permit the defendants in any way to impede its use by the plaintiff. Defendants
- [17] The defendants argue that they are entitled to install a locked gate on the easement for purposes of safety and security.
- [18] The defendants propose a remedy which is that the use the trail to access lot 1.
- [19] The defendants argue that a permanent injunction is an equitable relief and in order for the plaintiff to obtain this relief, it must come to court with "clean hands". If it does not, the plaintiff is disentitled from the relief that it seeks. DISCUSSION
- [20] This court cannot impose on the plaintiff an alternate route as proposed by the defendants. No authority was provided by the defendants which would permit me to do this. There is no dispute that the easement exists and that it crosses the defendants' land in favour of the plaintiff's land.
- [21] In interpreting an easement, the court considers the wording of the document creating the easement. The wording in the easement must be construed in the context of the circumstances that existed at the time the easement was created: *Livingston v. Millham*, 2005 BCSC 1292 at paras. 20 and 23 and *Gardiner v. Robinson* v. 2006 BCSC 1014 at para. 15.
- [22] Paragraph 1 of the easement describes the use to which the owners can put the easement. Paragraph 3 states that the easement must not be obstructed or interfered with by the servient tenement.
- [23] At the time the easement was granted, the plaintiff and the defendants were not the owners of the lots. The lots were owned by the developer and it granted the easement. The easement was an essential part of the subdivision so as to provide access to lot 1 from lot 2. When the easement was created, no gate was erected or contemplated.
- [24] The defendants rely on *Gardiner* to support their act of erecting a gate. However, the facts are distinguishable from the facts before me. In *Gardiner*, the easement in question was located on a working ranch. At the time of granting the easement, there were three gates in existence so as to contain and protect livestock. The court permitted the continued existence of another gate which did not exist at the time of granting the easement, as the "gate is justified by the legitimate needs of the Robinsons in carrying out their ranching

operations." In this case, the gate has no legitimacy.

- [25] I did not accept that it was erected for purposes of safety and security, given the defendants' activities to discourage the plaintiff from using the easement. The defendants simply do not want the plaintiff accessing its property through the easement.
- [26] The defendants argue that the plaintiff's application should be dismissed based on the equitable principle of "clean hands" which requires the plaintiff's conduct to be unassailable. The injunctive relief sought by the plaintiff is to support the right to use the easement. The defendants' conduct in asserting their position was and is to discourage and prevent the plaintiff's use of the easement. This is "the pot calling the kettle black." The "clean hands" principle has no relevance in this application.
- [27] The plaintiff is entitled to a permanent injunction precluding the defendants as owners of lot 2 from erecting a gate, or any other obstruction which obstructs vehicle access, including the placing of vehicles or trailers, or placing anything else on the easement.
- [28] The defendants shall remove the gate forthwith and will not erect any other impediment on the easement. COSTS
- [29] The plaintiff shall have its costs assessed in accordance with the Supreme Court Civil Rules, B.C. Reg. 168/2009 at Scale B. "H.C. Hyslop J." HYSLOP J.

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Prepared on 29 October 2026 · Esheria