

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

PATRICIA H. BABIJ, BRIAN DEVLIN, CYNTHIA DEVLIN, AUSTIN B. MCKENSIE, SR., ANDREW HOOKER, KAREN HOOKER, CHARLES S. ADAMS and LYNN CAMERON POTIUS, as Co-Trustees of the Charles Seacord Adams Revocable Trust dated July 1, 1996, as amended and as Co-Trustees of the Lynn Cameron Pontius Revocable Trust dated July 1996 as amended,

Plaintiffs,

v.

BERNARD CUFFY,

Defendant.

SX-19-CV-168

ACTION FOR
INJUNCTIVE RELIEF
and DAMAGES

Cite as: 2019 VI Super 100

Appearances:

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AMENDED MEMORANDUM OPINION

Meade, Judge

¶ 1. In this action before the Court, the dispute concerns the existence and use of a right of way that provides access to private property. The Plaintiffs, (hereinafter "Plaintiffs") filed an action seeking to enjoin Mr. Bernard Cuffy (hereinafter "Mr. Cuffy" or "Defendant") from clearing the disputed property which he intends to use as access to his own plot.

¶ 2. The matter came on for an evidentiary hearing on June 24, 2019. The Court accepted witness testimony and physical evidence during the hearing

which was conducted on June 24, July 1 and July 2, 2019. After the presentation of evidence and oral arguments, the Court denied the Plaintiffs' claim for injunctive relief.

Factual and Procedural Background

¶ 3. The Plaintiffs and Defendant are property owners in a subdivision known as Clairmont Estate located in St. Croix. The Defendant, Mr. Cuffy, purchased Plot 38 within the subdivision. Upon his review of the maps and plot plans related to the subdivision, Mr. Cuffy observed that a right of way provided access to his plot from the main road, a public highway. However, upon visiting the site, Mr. Cuffy observed that the right of way as designated on the map was overgrown with foliage. Mr. Cuffy requested and obtained an earth change permit from the Department of Planning and Natural Resources (DPNR) to clear the right of way.¹

¶ 4. Thereafter, the Plaintiffs filed this action seeking to enjoin Mr. Cuffy from clearing the right of way in accordance with the permit. Prior to the issuance of the permit, the Plaintiffs applied to the Court for a Temporary Restraining Order (TRO) pending their challenge to the issuance of the permit before the Board of Land Use Appeals (BLUA). In order to preserve the status quo and prevent any harm, the Court issued an Order on April 26, 2019 requiring that Mr. Cuffy take no further action. The Court scheduled a hearing for April 29, 2019. At the April 29, hearing, DPNR acknowledged the application for an earth change permit but represented that the permit had not yet been issued. The Court advised the

¹ DPNR- The Department of Planning and Natural Resources was initially named as a Defendant.

parties to amicably resolve the matter. It was determined that DPNR was not an appropriate defendant in this matter and DPNR was dismissed as a defendant. Apparently, efforts to amicably resolve the matter failed and the Plaintiffs filed another application for a TRO. The Court scheduled the matter for a hearing on June 3, 2019.

¶ 5. At the June 3, hearing Mr. Brian Devlin testified that he leased Plot 6 Clairmont Estate and had a contract to purchase Plots 6 & 8. Mr. Devlin also testified that the right of way had been abandoned and the other property owners attempted to negotiate with Mr. Cuffy into taking an alternative route but to no avail. Mr. Devlin further testified that clearing the land would remove mahogany trees that had to be preserved and would damage utility instruments that served the residences. Such utility instruments included a VIYA² pole, a Water & Power Authority (WAPA) pole and cables.

¶ 6. Mr. Cuffy also testified at the June 3 hearing. He stated that he was invited to cocktails at the Devlin's home where he was encouraged to take an alternative route to his property. He stated that the alternative route was steep and inconvenient. He also stated after he refused, the other home owners offered to purchase his property and with his continued refusal they became hostile to him. After the hearing, the Court issued a TRO and scheduled the matter for an evidentiary hearing on June 24, 2019.

² VIYA is the Corporation which provides telephone and other communication services in the Virgin Islands.

¶ 7. At the evidentiary hearing, the parties presented evidence and arguments in support of their claims and defenses. The parties do not dispute that the plot plans and maps contained in the public records designate the disputed property as a right of way, however, the Plaintiffs contend that the designated area constitutes private property over which the Defendant has no right to traverse and no right to clear without the permission of the owners over whose property the right of way crosses.

The Legal Standard

¶ 8. Generally, and as the term applies in most jurisdictions, a right of way is the right belonging to one party to traverse over the land of another. *See generally Beyer v. Tahoe Sands Resort*, 129 Cal. App. 4th 1458 (Ct. App. 2005); *Ryder v. Petrea*, 416 S.E.2d 686 (Va. 1992); *Berger v. Town of New Denmark*, 810 N.W.2d 833 (Wis. Ct. App. 2012). The term right of way is used to mean both a party's right of passage over a strip of land and the strip of land itself. *See, e.g., City of Willmar v. Kvam*, 769 N.W.2d 775 (Minn. Ct. App. 2009); *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Cty. Commrs.*, 833 N.E.2d 788 (Ohio Ct. App. 2005), *aff'd*, 858 N.E.2d 1193 (Ohio 2006). A right way may be either public to which all members of the public have a right or it may be private. A private right of way relates to that class of easements in which a particular person or particular description or class of persons has an interest or right. *Byrd Companies, Inc. v. Smith*, 591 So. 2d 844 (Ala. 1991).

¶ 9. The Courts of the Virgin Islands have not explicitly defined the term 'right of way' but the Virgin Islands Supreme Court has noted that the definition and

purpose of a right of way can be gleaned from its meaning in the various jurisdictions and from common sense. The Court stated, “the right of access is one of ingress and egress that attaches to the land. It is a property right, as complete as ownership of the land itself. *Hodge v Bluebeards Castle, Inc*, 62 V.I. 671, 697 (VI 2015) (citing *Memphis v. Hood*, 345 SW 2d. 887, 889 (Tenn. 1961). The Virgin Islands Supreme Court went on to state that a landowner’s access to a public street or highway is a private property right in the nature of an easement and is an interest in land that is universally recognized among other United States jurisdictions and by the fundamental notions of common sense. *Hodge*, 62 V.I. at 698.

¶ 10. When a court is considering a claim for injunctive relief it must consider four relevant factors: (1) whether the claimant has shown a reasonable probability of success on the merits, (2) whether the claimant will be irreparably injured by the denial of relief, (3) whether granting injunctive relief will result in greater harm to the non-movant; and (4) whether granting relief will be in the public interests. The Plaintiffs must establish their claim for relief by a preponderance of the evidence.

Discussion

A. Plaintiffs’ Probability of Success on the Merits

¶ 11. Plaintiffs have advanced their claim on the premise that the section of the property which the Defendant seeks to develop as an access route is their own private property over which the Defendant has no right to traverse and, therefore, has no right to clear to create that access route. The Plaintiffs’ expert witness,

Mr. Marshall Walker, testified that based on his review of the plot maps, a private estate right of way was created in 1963 at the time the land was subdivided. He also testified that each of the plots on either side of the right of way contributed fifteen (15) feet to make up the right of way, so that the boundary of each plot extended to the center of the right of way. He further testified that the construction of an access road was commenced over the right of way but, in his opinion, was abandoned because the land became too steep on either side to continue the roadway to its completion as indicated in the maps. The completed roadway would end at a cul-de-sac and provide access to Mr. Cuffy's property.

¶ 12. The Plaintiffs' second witness, Mr. Austin McKenzie, a land owner, testified that he purchased his property Plot 12, at Clairmont in 2003. Mr. McKenzie testified that he was aware of the right of way at the time that he purchased his property, however, he chose to use alternative measures to gain access to his property. According to McKenzie's testimony and the plot plans in evidence, the right of way would have been the only access to Mr. McKenzie's property. In establishing a different access route, Mr. McKenzie exchanged part of his property, for a part of Plot 8. He used the part of the property he acquired from Plot 8, to construct a driveway by which to gain access to his property.

¶ 13. The Defendant called a number of witnesses in his case in chief. Ms. Leia La Place, The Territorial Planner with DPNR, testified that the plot maps were used to determine whether an earth change permit may be issued. She also testified that the maps indicate that the easement still exists and a new map would have to be created to show that the right of way no longer existed. Mr.

Emmanuel Liburd, DPNR Earth Change and Land Clearing Officer, testified that he reviews the applicable maps and deeds in relation to the application for an earth change permit. He further testified that earth change permits are granted to owners to clear their properties. He also testified that he reviewed OLG Drawing 1409 and 2161 which showed the right of way granting access to the Defendant's property.

¶ 14. Mr. Wayne Callwood, the Territorial Public Surveyor and Custodian of maps of record, testified that he reviewed OLG ³ Drawing 2161, 1407 and 5472. He also testified that when these maps are viewed together, they confirm the creation and continued existence of the right of way. Mr. Callwood further testified that although the right of way was made up of private property, it provided property rights in which the Defendant held a one-seventh (1/7) wholly owned interest, equal to the interest of all the other property owners. Accordingly, any of the owners who held an interest may develop the property to obtain the access that it was meant to provide. Mr. Callwood also testified that the property in question was not just an easement but a right of way so that the access it provided took precedence to any obstruction.

¶ 15. Mr. Norman Smith, a heavy equipment operator, testified that he was contracted by Mr. Cuffy to clear the right of way. He stated that based on his review of the maps he was given and his on-site evaluation, there were a number of fixtures constructed within the right of way. He also stated that he observed

³ Plot maps and drawings are designated with an OLG number signifying the Office of the Lt. Governor, the public agency which controls those recorded instruments.

trees, but based on his knowledge and experience, they were not mahogany trees.

¶ 16. Considering the maps and testimony of the witnesses, it is evident that a right of way/easement was created in 1963 to provide access to the properties within the subdivision of Clairmont Estates. Mr. Cuffy, as a property owner within the subdivision, has the right to traverse the designated right of way to gain access to his property. The substance of the Plaintiffs' claim is that the right of way is private property which Mr. Cuffy has no right to clear or traverse. To support their claim and to show a reasonable probability of success on the merits the Plaintiffs would have to present evidence to show the probability that the right of way was extinguished, relocated or otherwise changed. The fact that the Defendant can take an alternative route to access his property does not extinguish his right of access by way of the designated easement. And, even if the alternative route were more convenient as Plaintiffs tend to suggest in their arguments, the existence of an alternative route does not extinguish the right of way or Mr. Cuffy's rights and interests in it. The Plaintiffs have failed to meet their evidentiary burden to show the probability of success on the merits.

The Balance of Harms

¶ 17. The Court must also consider whether the harm to the Plaintiffs is greater if injunctive relief is denied than the harm to the Defendant if injunctive relief is granted. The Plaintiffs have claimed injury that would result from trespass and the taking of property without due process if Mr. Cuffy were allowed to execute his plans to clear the right of way. The Plaintiffs have also claimed that there

were several mahogany trees that would have to be removed. In addition, there is evidence of various structures, including a Water and Power Authority (WAPA) pole, a fence, a septic tank and a step which encroach upon the right of way. Mr. Callwood testified that the right of way takes precedence to all obstructions and that the various structures which constitute encroachments in violation of Title 29 V.I.C. § 230a will have to be removed.

¶ 18. Title 29 VIC § 230a states:

The use of any roadway or street onto, within or through any subdivision of residential development of ten or more dwellings, which roadway or street is open to the use of any other persons as guests, visitors or permittees, other than the actual inhabitants thereof, shall not be denied or restricted directly, indirectly or by subterfuge, to any person, subject only to the conditions and limitations established by law and applicable in like manner to all persons.

This statutory provision dictates freedom of access to a right of way and prohibits any form of restriction. According to Mr. Callwood's testimony, to the extent that the structures which encroach upon the right of way restrict or deny the right of access they would be in violation of this provision.

¶ 19. The evidence does not support a claim for trespass since Mr. Cuffy, as a landowner has a right to be on the land. In fact, the Plaintiffs' right of possession and right to exclude others became servient to the Defendant's right of access when the right of way was created. There is no evidence that Plaintiffs will suffer the greater injury if Defendant is permitted to develop the right of way in conformity with his right of access. The Plaintiffs have not disputed that the Defendant has a one-seventh (1/7) wholly owned interest in the property that constitutes the right of way.

¶ 20. Mr. Austin McKenzie, the only owner among the Plaintiffs to testify stated that he knew of the easement at the time he purchased his plot. The Plaintiffs have not refuted the evidence that the right of way exists or that Mr. Cuffy has a right to traverse the right of way to gain access to his property. In the absence of evidence that the right of way was extinguished at some point, the Plaintiffs cannot now assert that the issuance of a permit which allows Mr. Cuffy to exercise the right of access amounts to a taking with injurious consequences upon the Plaintiffs.

¶ 21. There is no evidence as to who bears the burden of costs for the removal of the encroachments. It is likely that the parties who placed the encroachments upon the right of way or caused them to be placed there will bear the cost of removing them, particularly in light of the fact that these encroachments may be in violation of the Virgin Islands Code. In addition to the fact that the Plaintiffs have presented no evidence to show that the burden of removing the encroachments is greater injury than denying Mr. Cuffy the right of access to his property, the burden which derives from their violation of the laws cannot be attributed to Mr. Cuffy's exercise of his right of access to his property.

¶ 22. Essentially, the Plaintiffs have failed to meet their burden of showing they would suffer greater harm.

The Public Interest

¶ 23. Adherence to the laws always serves the public interest. Zoning laws, like all other statutory enactments of the legislature, are meant to provide citizens with the benefits of an orderly society. The attempts to manipulate or violate the

laws can only lead to chaos and discord. The law provides that landowners shall have adequate ingress and egress between their property and the public highways.

¶ 24. In this case, the public records indicate that during the subdivision of Clairmont Estate a right of way was created to provide ingress and egress to Plot 38 now owned by the Defendant. The law provides for a method by which such a right of way is altered, extinguished or otherwise changed. When such changes occur, they are memorialized in the public records. The Plaintiffs have presented no evidence that the right of way was changed, and such change was recorded through the legally prescribed method. The Plaintiffs merely contend that the right of way is their private property. Granting injunctive relief would effectively recognize Plaintiffs claim of private ownership of the right of way to the exclusion of the Defendant's right of access. On the other hand, denying injunctive relief would recognize the Defendant's right of access in adherence to legally prescribed methods as evidenced by the recorded instruments. The Plaintiffs have provided no evidence that would tend to show that granting injunctive relief on their claim of private ownership of the right of way, would better serve the public interest.

Conclusion

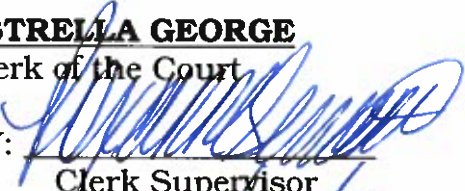
¶ 25. The Plaintiffs have failed to meet the evidentiary burden that would entitle them to injunctive relief. In light of the above discussion, the Plaintiffs claim for injunctive relief is **DENIED**. Moreover, Plaintiffs have failed to show that they meet their burden on the claim of trespass as alleged in Count III of their complaint. The claim for trespass is, therefore, **DISMISSED**.

DONE AND SO ORDERED this 16 day of August 2019,
nunc pro tunc July 29, 2019.


Honorable Jomo Meade
Judge of the Superior Court of the VI

ATTEST

ESTRELLA GEORGE
Clerk of the Court

BY: 
Clerk Supervisor

Dated: 8/16/19