

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

THE GOVERNMENT OF THE VIRGIN	)	
ISLANDS, and BEULAH DALMIDA	)	
SMITH, Commissioner of Planning	)	CIVIL NO. 411/1996
and Natural Resources,	)	
	)	
Plaintiffs,	)	
	)	ACTION FOR AN
v.	)	INJUNCTION TO ENFORCE
	)	AN ORDER AND ABATE A
LARRY GEORGE,	)	NUISANCE
	)	
Defendant.	)	
	)	<u>NOT FOR PUBLICATION</u>

APPEARANCES:

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U.S.V.I. 00820
For defendant Larry George

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U.S.V.I. 00820-4375
For Government of the Virgin Islands

MEMORANDUM OPINION

(Filed: August 16, 1996)

Cabret, Judge

THIS MATTER is before the Court on the Government of the Virgin Islands' motion for a Preliminary Injunction to abate an encroachment on a private right of way and to prevent the use of a structure for which no required Certificate of Use and Building Permit has been issued by the Department of Planning and Natural

Resources ("DPNR"). The defendant, Larry George, alleges in his answer that

- 1) there is no claim for injunctive relief,
- 2) a written notice of violation- STOP ORDER- that was issued by the Department of Planning and Natural Resources was improper and ineffective because it failed to apprise the defendant of his right to appeal,
- 3) the complaint fails to name the owner of the property in question (The Estate of Ann Watson, Deceased) who is an indispensable party to this action, and
- 4) the defendant and the Estate of Ann Watson, deceased, the title owner of Plot No. 92 Grove Place, have a legal interest in the portion of land on which the carport has been built, by adverse possession.

Statement of Facts

Sometime during the early 1980s (1981 or 1982), the defendant, Larry George, constructed a carport situated upon 92 Grove Place. The owner of the real property at this time was the defendant's mother, Ann Watson, who is now deceased. It was built straight

across a private roadway, whose width measured approximately 12 feet. The defendant utilized the carport and an adjoining structure to operate a business. Following Hurricane Marilyn in September of 1995, a portion of the carport was destroyed and needed to be rebuilt. At this time, the defendant's neighbor, Mrs. Patsy Morelle, who along with her husband, was constructing a house on Plot 13B, located directly across from Plot 92 and running along the private roadway, communicated with the defendant about moving the columns of the carport back from her fence. The defendant complied and moved the columns back 10-11 feet from the Morelle's fence. However, as a result of the carport's encroachment upon the private right of way, the Morelles experienced difficulties in gaining access to their property during the construction of their home and made a subsequent complaint to DPNR.

On February 22, 1996, Ramon Benitez, a building inspector of DPNR, while acting in the course of his duties, made an observation of the premises in question and found that the addition to the carport encroached on a private right of way to the alleged distance of two feet, approximately, and for a distance along the private right of way of ten feet, approximately. In addition, it became known to DPNR that the defendant constructed the addition without obtaining a required permit from DPNR. Accordingly, Ramon Benitez issued and served on the defendant a notice of violation

and stop work order. See Plaintiff's Exhibit 1. No appeal has ever been made by the defendant to the order to stop work.¹

The Government claims that the defendant is in violation of the law in that

1) the carport on defendant's property is being or about to be occupied and used without the issuance of a Certificate of Occupancy and Use, as required by 29 V.I.C. § 294(c), and

2) the constructed carport on defendant's property obstructs a public right of way that violates 23 V.I.C. §94.

Discussion

I. REQUIREMENTS FOR A PRELIMINARY INJUNCTION

The Government of the Virgin Islands petitions this Court to issue a preliminary injunction against the defendant to enforce an order and abate a nuisance. Before a Preliminary Injunction can be issued, notice must be given to the adverse party and a hearing. After such a hearing has been conducted, a preliminary injunction

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Title 29 V.I.C. § 295(a) states that "any person who feels that an injustice has been done him by any order, rule, or regulation of the Commissioner of Planning and Natural Resources under the authority provided in the Code may appeal therefrom to the Board of Zoning, Subdivision and Building Appeals by filing a written notice of his appeal with the Board within 30 days after receipt of the order or ruling complained thereof.

may be granted if:

- 1) there is likelihood of *success on the merits*;
 - 2) *irreparable injury* will be suffered by the movant if relief is not granted;
 - 3) the granting of relief will not result in greater harm to the other party; and
 - 4) granting relief will be in the public's interest.
- Fed. R. Civ. P. 65(a); 12 V.I.C. § 913(b); Olmeda v. Schneider, 889 F.Supp. 228, 32 V.I. 369 (D.V.I. 1995); and West Indian Co. V. Government of the Virgin Islands, 22 V.I. 358, 643 F.Supp. 869 (D.V.I. 1986).

A. Likelihood of Success on the Merits by the Government

1. Construction of the carport addition was unlawful under Title 29 V.I.C. § 294.

The Government first alleges that the construction and use of the carport by defendant are unlawful under Title 29 V.I.C. § 294 (a)(1), (4), (6) and (c). Specifically, § 294 ("Permits") states

(a) *Permits, requirements for exceptions.*

(1) After the effective date of this chapter, a permit issued by the Commissioner shall be required for the construction, reconstruction, structural alteration, enlargement, moving, conversion, or demolition of any building or structure, or appurtenances connected or attached to such buildings or structures.

(4) No building hereafter constructed, structurally

altered, reconstructed, or enlarged in whole or part, shall be occupied or used until the Commissioner has made a final inspection thereof upon completion and has issued a Certificate of Use, stating the purpose for which the building or parts thereof may be used.

- (6) Any building, structure, or sign set up, erected, constructed, reconstructed, structurally altered, enlarged, moved, or converted contrary to the provisions of this subchapter is unlawful and a public nuisance.
- (c) *Issuance of permits for use and occupancy.* Upon completion of the work for which a building permit has been issued, and upon certification to the Commissioner that after inspection, the work performed under the permit conforms to the requirements of this chapter and other applicable laws, the Commissioner shall issue a Certificate of Use and Occupancy.
 - (1) No permit of Certificate of Use and Occupancy shall be issued for any building that is hereafter constructed, reconstructed, enlarged, altered, or moved, in whole or in part, unless the building conforms to the provisions of this chapter with respect to the proposed use.
 - (2) Temporary Certificates maybe issued for portions of buildings considered habitable and safe.
 - (3) No change of use or occupancy shall be made in a building unless such building conforms to the provisions of this chapter with respect to the proposed new use. If the use of only a portion of the building is changed and that portion is separated from the rest, then only such portion need be made to conform to the provisions of this chapter for the new use.

The defendant does not deny the fact that the carport and

subsequent addition to it were constructed and reconstructed by him in the early 1980s and shortly after Hurricane Marilyn. Further, the Supervisor of Building Permits at DPNR, Maureen Burke-Ventura, has sworn upon an affidavit as well as testified under oath in court that the defendant has not been issued a permit nor a Certificate of Use and Occupancy from DPNR with respect to the construction of the carport addition. She also stated that the defendant indicated his intentions to not comply with the law and obtain the necessary documents. The defense has not produced any evidence to the contrary. Accordingly, the Government has produced sufficient evidence to show that the defendant violated 29 V.I.C. § 294 in that he constructed an addition to a carport on his property without first obtaining the required permit from the Commissioner of DPNR pursuant to § 294(a)(1). Additionally, the Government has proved that the defendant has used and is using the carport without a final inspection of the construction by the Commissioner of DPNR as well not being issued a Certificate of Use and Occupancy by the same pursuant to 29 V.I.C. § 294(a)(4) and (c).

2. The defendant's carport encroaches upon a private right of way that is not permitted under Virgin Islands law.

The Government next alleges that the carport on defendant's property violates the law in that it encroaches on a right of way

which violates 23 V.I.C. § 94. Title 23 V.I.C. § 94 (1993) states that "no person shall place anything on public sidewalks, streets, or places, that will obstruct public traffic. Since the filing of the Government's complaint, the Government has conceded that the right of way is privately owned and not public as it originally alleged. Thus, 23 V.I.C. § 94 is inapplicable to the case at bar since the statute specifically deals with public right of ways. However, a building or structure that is constructed contrary to the provisions of § 294(a) is considered "unlawful and a public nuisance." An action to enjoin or abate a public nuisance may be maintained by a public official or public agency who has been given authority to represent the state or a political subdivision. Restatement (Second) of Torts § 821C(1) (1977). Under general principles of equity, an injunction has been regarded as a proper remedy to require compliance with or to prevent the violation of, statutes generally as well as acts which are of a great public inconvenience and damage. See 43A C.J.S. Injunctions §§ 133,134 (1978). In addition, the propriety of an injunction to prevent the violation of municipal ordinances is recognized where an injunction is necessary to prevent a multiplicity of actions at law or criminal prosecutions. Id.

In the present case, the Government had authority to bring this action for an injunction under Title 29 V.I.C. § 312(g) which

states that:

"The Attorney General, in addition to other remedies, may institute appropriate action or proceeding to prevent such unlawful action, to restrain, correct, or abate such violation or to prevent the occupancy or use of the building or structure or any illegal act or use in and about such premises."

The Government seeks the injunction to abate a public nuisance created by the defendant's construction of a carport addition without a permit and its encroachment upon a private right of way which has partially obstructed access to the right of entry of surrounding neighbors into their homes. Accordingly, the Court finds that the construction of the addition to the carport is a public nuisance and that the Government has the authority to seek its removal from the private right of way so as not to interfere with the surrounding neighbors' right of entry into their property.

In conclusion, the Government has sufficiently proven that there is a reasonable likelihood that it would win on the merits of the case. There is no question that the defendant has violated 29 V.I.C. § 294 by the fact that he has constructed an addition to the carport without first obtaining a required Building Permit and a Certificate of Use and Occupancy. In addition, the defendant's carport encroaches upon a private right of way that interferes with his surrounding neighbors' use of their property. As such, the

Government is authorized to take remedial measures to abate a public nuisance created by the defendant.

B. Irreparable Injury

The carport as built by the defendant is unlawful and a public nuisance and failure to abate it will pose a threat of harm to the public. The purpose of Title 29, Chapter 5 ("Building Code") is to safeguard life and limb, property, and public welfare, through the establishment of minimum building requirements for structural strength and stability. 29 V.I.C. § 291. The failure to grant the Government's injunction will permit the construction and use of a structure that has not met DPNR's approval. Also, failure to grant will leave the Government with no other recourse to force the defendant to comply with the building codes of the Virgin Islands. Accordingly, the Government has made a showing of irreparable injury.

C. The Granting of Relief will not result in Greater Harm to the Other Party

The granting of the injunction will not result in any greater harm to the defendant. The defendant is in violation of DPNR's regulations and the carport's encroachment on the private right of way interferes with his neighbors' access to their right of entry into their property. The defendant will have to incur expenses in the removal of that portion of the carport that currently

encroaches upon the road, but such expense should not be burdensome. The encroachment does not have any walls, so all that defendant will have to do is move two columns of the structure back one to two feet.

D. Granting Relief is in the Public's Interest

It is clear that granting the injunction is in the public's interest in that the defendant must comply with the Rules and Regulations of DPNR which require that all structures built in the Virgin Islands meet certain basic minimum requirements to ensure their safety, stability, and strength. By requiring the defendant to comply with 29 V.I.C. §294, the public's safety is ensured by the fact that the carport has been inspected and approved by DPNR in accordance with strict specifications. The granting of the injunction is also in the public's interest because requiring the defendant to remove the encroachment will allow members of the public and the defendant's neighbors easy access to their property without any unnecessary obstructions or inconveniences. Finally, it is in the public's interest to enforce the Building Code of this territory.

II. THE DEFENDANT'S AFFIRMATIVE DEFENSES

A. The Estate of Ann Watson is not a Necessary Party under Federal Rule of Civil Procedure 19.

The defendant argues as an affirmative defense that the Government has failed to name the owner of the property (The Estate of Ann Watson, Deceased) as an indispensable party to this action. Ann Watson is the deceased mother of the defendant as well as the former owner of Plot 92 Grove Place. Ann Watson left a will devising the duplex (office and carport) situated upon 92 Grove Place as well as the surrounding land to her son, Lawrence George, the defendant. She died in May of 1991 and the will has since been admitted to probate. Alden Tranberg Martinez, the defendant's sister, has been appointed the executrix.

Fed. R. Civ. P. 19 governs the subject matter of indispensable parties. An indispensable party is defined as a party in whose absence the court cannot proceed since its interest cannot be served or separated from that of the parties to the action. Fed. R. Civ. P. 19(a) specifically states that

a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the

persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest.

Under Fed. R. Civ. P. 19(b),

if a person described in FRCP 19(a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The court, when making this determination should take into account the facts in the case, the nature of the relief sought, and the nature and extent of a person's interest in the controversy.

Although it may be argued that the Estate of Ann Watson has a valid interest in the disposition of this action and that a judgment for the Government may have the remote effect of ultimately requiring the Estate to pay the costs and expenses in abating the nuisance, the Estate, under the circumstances, cannot be considered a necessary party in the present action.

Under Title 29 V.I.C. § 293 ("Definitions"), the word owner has been defined as "the person or persons who own or control a property or part of it and includes his duly authorized agent or

attorney, purchaser, devisee, fiduciary and a person or persons having a vested or a contingent interest in the property in question." The defendant without question satisfies the definition of "owner" under § 293 and is the appropriate person who is subject to the requirements of § 294 as well as the injunction. He built the carport in the early 1980s and the subsequent addition to it and has utilized the carport and adjoining office in his business of selling cars for about 15 years. It is thus evident he controls this portion of the property. In addition, he has been specifically devised the duplex, which includes the carport, under the will of Ann Watson and continues to use it while the will is being probated. Accordingly, there is sufficient evidence to support the Government's contention that the defendant has controlled the structures in a certain manner for some time and is the owner of such as to meet the definition in § 293.

Also, section (a) of Rule 19 has not been met. First, complete relief can be accorded among those already parties in that an injunction will require only the defendant to abate a nuisance that was solely created by him. Second, the disposition of the action will not impair or impede the Estate's ability to protect any interest in the subject matter of the action in that it is the defendant alone who will have to incur expenses in abating the nuisance. Finally, those already parties will not be subject to a

substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

B. The Notice of Violation and Stop Order does not require Notification of Right to Appeal.

The defendant next argues that the Notice of Violation ("Stop Order") issued by DPNR was required to inform the defendant of his right to appeal. In Herbert v. Govt. Employees Service Commission, 21 V.I. 358 (1985), the plaintiff alleged that the period for appealing a dismissal is automatically tolled if the dismissal letter doesn't notify the employee that he has only (10) ten days to file an appeal. However, the District Court held that the relevant statute only required a department head to furnish the employee with a written statement of the charges against him and that there was no requirement that the dismissal letter contain a notice of the 10 day filing period. Id. at 361-362.

29 V.I.C. § 295(a) (1975) allows

any person who feels that an injustice has been done him by any order, rule, or regulation of the Commissioner of Planning and Natural Resources under the authority provided in the Code may appeal therefrom to the Board of Zoning, Subdivision and Building Appeals by filing a written notice of his appeal with the Board within 30 days after receipt of the order or ruling complained thereof.

Nowhere in sections 294 and 295 of the Virgin Islands Code nor in the applicable "Rules and Regulations" for Public Planning and Development is there a requirement that a Notice of Violation and

Stop Work Order contain a notice of the 30 day filing period for an appeal.

C. The Defendant's Claim of Adverse Possession is irrelevant to the applicable Title 29 Requirements and the Government's Authority to abate a Public Nuisance.

The defendant finally argues that he and the Estate of Ann Watson, the title owner of Plot 92 Grove Place, have a legal interest in the portion of land on which the carport has been built, by adverse possession.

Title 28 V.I.C. § 11 ("Adverse Possession") states

the uninterrupted, exclusive, actual, physical, adverse, continuous, notorious possession of real property under claim or color of title for 15 years or more shall be conclusively presumed to give title thereto, except as against the Government.

The purpose of statutory requirements that adverse claimant's use of property be uninterrupted, exclusive, actual, physical, adverse, continuous and notorious is to give the record owner notice that someone else is claiming title to the property. McNamara v. Christian, 26 V.I. 109 (Terr.Ct. 1991). Open and notorious contemplates possession that is unconcealed and so conspicuous that it is generally known by the public or by people in the neighborhood. 39 Am. Jur. Proof of Facts, Adverse Possession § 8 (1984). The statutory requirement that possession be under a "claim of right" simply means that the claimant's possession must be hostile to that of the true owner. Mere possession of the true

owner's land will be presumed to be with the owner's permission and in subordination and thus not hostile to it. 39 Am. Jur. Proof of Facts, Adverse Possession § 7.

The defendant claims he originally built the carport straight across the private right of way in 1981 or 1982. He also claims that he and his family have been using the surrounding land around the carport for all of his life and that he has exercised complete control over the area in that he cut the grass and trees, built a wall in 1992 and hired and paid a company to pave a section of the road. Although the defendant has provided evidence that indicates that he has exercised some control over the area in question that may amount to adverse possession of the road, he still cannot avoid the Title 29 requirements of obtaining a Certificate of Use and Occupancy and a building permit. As a matter of fact, evidence of adverse possession only strengthens the Government's claim that the defendant is the correct person for which to seek the injunction against. In addition, his adverse possession claim will not immunize him from lawsuits regarding the encroachment of his carport on the road. The carport, as it stands, is a public nuisance, and the Government is therefore authorized to act to abate the nuisance. Additionally, assuming arguendo, that the defendant adversely possesses the land in question, his neighbors, the Morelles, still have available remedies. The evidence

indicates that the only access the Morelles now have to their property is via an adjoining owner's land. As such, the Morelles have a private right of action to establish an easement by implication.

Conclusion

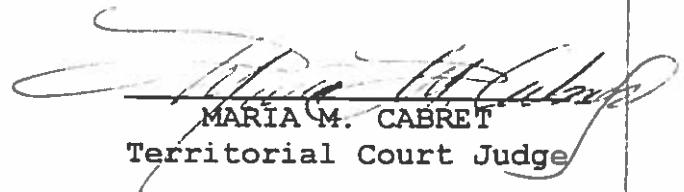
The Court concludes that the Government has met the requirements for preliminary injunctive relief. First, there is a likelihood of success on the merits by the fact that the Government has sufficiently proven that the defendant built and occupies a carport without having first obtained the required Building Permit and a Certificate of Use and Occupancy pursuant to Title 29 V.I.C. § 294. Second, irreparable injury has been shown in that failure to grant an injunction will allow the defendant to make use of a structure that violates 29 V.I.C. § 294. Additionally, the Government has no other available recourse to force the defendant to comply with the law. Third, granting the injunction will not result in any greater harm to the defendant since removal of the two columns that are currently encroaching on the private right of way will not require undue burden or expense. Finally, granting the injunction is in the public's interest as it ensures the public safety by requiring compliance with the Building Code of the

territory.

The Court also concludes that the affirmative defenses asserted by the defendant lack merit. The Estate of Ann Watson cannot be deemed an indispensable party as it is the defendant alone who created the public nuisance and he is capable of abating the nuisance by himself. Additionally, the Government was not required to notify the defendant of his right to appeal. Finally, Defendant's adverse possession claim is irrelevant to the issue at hand, since whether the defendant owns the land or not, the Government is still entitled to the relief it seeks, namely compliance with the Building Code of the Virgin Islands.

Accordingly, this Court grants the Government's motion for a preliminary injunction against the defendant, Larry George.

ENTER:


MARIA M. CABRET
Territorial Court Judge

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

THE GOVERNMENT OF THE	)	
VIRGIN ISLANDS, and BEULAH	)	
DALMIDA SMITH, Commissioner	)	
of Planning and Natural	)	
Resources,	)	CIVIL NO. 411/1996
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ACTION FOR AN INJUNCTION
LARRY GEORGE,	)	TO ENFORCE AN ORDER AND ABATE
	)	A NUISANCE
Defendant.	)	
	)	<u>NOT FOR PUBLICATION</u>

PRELIMINARY INJUNCTION ORDER

THIS MATTER came before this Court on a Complaint for a preliminary injunction to enforce a Stop Work Order issued by the Department of Planning and Natural Resources against the defendant and to abate a public nuisance. Pursuant to the Court's August 16, 1996 Memorandum Opinion in the above captioned case, it is hereby

ORDERED that the Government's motion is GRANTED.

IT IS FURTHER ORDERED THAT:

1. The defendant shall immediately and forthwith remove that portion of the carport structure at 92 Grove Place, St. Croix, which encroaches on a private right of way, and
2. The defendant is prohibited from utilizing said structure until the encroachment is removed and a building permit for the structure is obtained, all required fees have been paid,

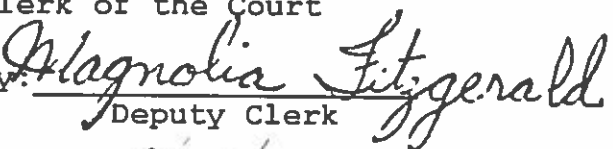
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the structure has been inspected by an inspector for the
Department of Planning and Natural Resources, and a Certificate
of Use and Occupancy has been issued.

DONE AND SO ORDERED this day of August 16, 1996.


MARIA M. CABRET
Territorial Court Judge

A T T E S T:
YVONNE V. WESSELHOFT
Clerk of the Court

By: 
Deputy Clerk

8/17/96