NO. A24A0563

IN THE COURT OF APPEALS

STATE OF GEORGIA

REGINALD GOETTSCH,

Appellant,

V.

SANDRA BROOKS,

Appellee.

RESPONSE BRIEF OF APPELLEE

Michael H. Cummings II
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FACTS RELEVANT TO THIS APPEAL

Appellee, Sandra Brooks is the owner of a lots in a platted subdivision. (R78-85) The deeds to all of the subdivision lots include a 30 foot right of way for access, ingress and egress to the lots. (Id) Brooks also owns the underlying fee under the easement. (R14-23) As such, Brooks owns both the fee title to the right of way as well as easement rights over the right of way. (Id)

Appellant, Goettsch purchased a lot and house in the subdivision in 2019. (R 24-26) Before he purchased his lot, Goettsch was aware that there was no parking area for the house he purchased which had been in its location since 1974. (R 24-27, 108, 133) There is no evidence that the prior owners of the Goettsch house parked in the right of way on a regular basis. (R 24-27)

Brooks warned Goettsch that he could not park in the right of way before Goettsch purchased his lot. (R 121, 133, 137) Goettsch procured a survey showing the 30 foot right of way before he purchased his lot. (Id)

Goettsch intentionally built a gravel parking area which included a retaining wall, posts, gravel, a chain across the posts and began parking his truck where it protruded both into the right of way and into the gravel road on the right of way. (Id). Brooks warned Goettsch before and during the construction of his parking area that he was trespassing into the right of way. (Id)

The parking area caused water run off issues to the road (R 179-182), caused Brooks to be forced to drive dangerously close to the Goetsch vehicle on her way home (R 173), includes rocks in the roadway (R 171), forces her to veer off of the path of the gravel road into ditches on her way home (R 166), and blocks her from her home entirely when maintenance on the parking area is performed (R 172, 173)

Brooks was asked what evidence he has concerning his defense of laches, and, after being explained what laches meant, he admitted he had no evidence to support his laches defense. (R 28-30)

PROCEDURAL HISTORY

Brook sued Goettsch for trespass, ejectment, punitive damages and attorney's fees. (R 5-29) The trial Court granted Summary Judgment to Brooks on her claims for trespass and ejectment and reserved the issues of punitive damages and attorneys fees. (R 318-334) Otherwise, Appellee does not disagree with the procedural history set forth by Appellant.

STANDARD OF REVIEW

The grant of summary judgment must be affirmed if it is right for any reason. Renden, Inc. v. Liberty Real Estate Ltd. Partnership, 213 Ga.App. 333 (1994). When a motion for summary judgment is made and supported by

affidavits, depositions, or other documents in the record showing that there is an absence of evidence to support the nonmoving party's case, the Appellant cannot rest on its pleadings but rather must affirmatively present specific evidence giving rise to a triable issue of material fact. O.C.G.A. § 9-11-56 (e); Rapps v. Cook, 234 Ga.App. 131 (1998).

BRIEF OF APPELLEE

The Trial Court's analysis and holding in this case were correct and the grant of summary judgment was proper. Appellee owned the underlying fee simple title to the land which encompassed the right of way. Having received the fee title to this land she was, therefore, the owner of the land except *"so far as a limitation thereof is essential to the reasonable enjoyment of the easement granted."* Georgia Power Company v. Leonard, 187 Ga. 608, 610-611, 1 S.E. 2d 579 (1939). This is because, the rights not granted under an easement remain in the landowner. Montana. v. Blount, 232 Ga. App. 782, 785 (1998).

Therefore, the question is whether Appellant's construction of posts, a chain, a gravel parking area, and the parking of his vehicle in the right of way were *"essential to the enjoyment of the easement granted."* Id. citing Georgia Power v. Leonard. There is simply nothing in the record, and certainly not in Appellant's Brief, which supports such a proposition.

Regarding Appellant's Enumeration I.

The trial Court's Order was very clear as to what facts lead to its decision. In each part of the order the trial Court takes the time to apply which facts in the record apply to its decision. For example, the trial court states facts such as "*Plaintiff, by her status as owner of the fee...*" has the right to use the fee if it does not interfere with the easement. (R 329). And, where there is no factual dispute, the Court also points out which facts are not disputed. For example, the trial court states *"(t)here is no dispute that the structures are permanent"*. Therefore, the trial Court's order considers the undisputed facts and properly applies to the law to those facts.

Regarding Appellant's Enumerations II, III, IV.

The interpretation of the language of the easement required the trial court to simply read and repeat the language which is easy to understand and clear. Appellant's strained attempt to convince the Court of Appeals to create a new law when the owner of the fee also owns an easement is not supported by any citation to the record or any case law and should be summarily disregarded.

In the case cited by Appellant, the Court of Appeals upheld an injunction *"requiring that easement holders receive permission from the owners of the underlying fee before making any alterations beyond what is required to ensure*

beach access..." E. Beach Props. v. Taylor, 250 Ga. App. 798, 805, 552 S.E.2d 103, 110 (2001) . Likewise, here, Goettsch would have to receive permission from Brooks before making any changes to Brooks' land beyond what is required for ingress and egress to his land. While a retaining wall, posts, chains, and a gravel parking pad may have made it more convenient for Goettsch, these structures are not required to ensure access to his house and lot. The house he bought had been in its current location since the 1970's and there is no evidence that the prior owners needed to build a parking area into the right of way to access the house and lot. There is simply no evidence in the record, and Goettsch has pointed to no evidence, that Appellant's parking lot and posts were necessary for ingress and egress to his land. To allow Goetsch to construct permanent posts, parts of a retaining wall, a chain and park partially in the road itself would be to permanently bar Brooks from the use of her property not needed or required for access to Appellant's lot. In effect, Goettsch wants to *build a structure both in the 30 foot right of way and on another person's land.*

Appellant urges the Court of Appeals to analyze Appellee's rights as if she were simply another lot owner entitled to the easement. It is true that Appellee is also a lot owner entitled to the full use of the easement. Holders of an easement have a presumptive right to use the entirety of the easement. The Court of

Appeals has reiterated this rule time and time again. *"(T)he recording of the Allen Acres subdivision plat "create[d] a legal rebuttable presumption that . . . reasonable enjoyment of the easement requires the full use of the . . . street as platted."* Montana v. Blount, 232 Ga. App. 782, 786 (504 SE2d 447) (1998). The holder of an express easement is not required to show "reasonable necessity" for the use of the entire width of such easement. Id. Goettsch does not point to any fact that supports the proposition that his construction of retaining walls, parking pad, and posts is not an interference in the easement rights of Appellee and other lot owners, and he does not offer any citation or support for his position that "parking that slightly overflows into the easement is reasonable and necessary for his use of the easement."

As to Appellant's Enumeration V.

Goettsch admitted that he was warned not to park in the right of way, that he knew where the limits of the right of were, that there were survey markers in place when he built his parking area and that he was continually warned during construction that he was trespassing onto the Brooks property and into the easement. Georgia law has long held that trespass is an intentional act. McDonald v. Silver Hill Homes, LLC, 343 Ga. App. 194, 195, 806 S.E.2d 651, 652, (2017). The facts in this case are quite clear that Goetsch knew exactly what he was doing.

Whether the trespass was repeated to the extent that punitive damages are justified is for the jury, as properly pointed out by the trial court, but hiring workers to construct a parking pad in the face of a survey which Goetsch paid for himself which showed that he was trespassing can hardly be said to have been "negligent" as urged by Appellant's Brief.

As to Enumeration VI.

On page 6 of its Order the trial court lists the elements of trespass and then carefully goes through those elements and applies the undisputed facts to each one of the elements in the remainder of the order. (R 323). Appellant urges the Court of Appeals to ignore pages upon pages of the Goetsch testimony where he explains that he was told he was trespassing, had the right of way surveyed, hired persons to build a parking area in the right of way, was told he was trespassing again, and then was told yet again after he built the parking area. The fact that Goetsch later gave some equivical statements does not make the facts he testified to under oath (that he knew where the right of way boundaries were and built the parking area anyway) disputed.

As to Enumeration VII

As to Appellants argument concerning laches, the record is very clear that Goetsch has absolutely no evidence to support a laches argument. He admits this

outright in his sworn testimony. (R 28-30). Therefore, whether the trial Court's opinion that laches is not an available defense is correct or not, Appellant has openly admitted he has no such defense.

As to Enumeration VIII

Despite Appellants mistaken interpretation of the case law, the trial court correctly concluded that an action for ejectment was proper because the plaintiff in this case owns the land affected by an intruding or encroaching structure. Patel Taherbhai, Inc. v. Broad St. Stockbridge II, LLC, 352 Ga. App. 113, 118, 834 S.E.2d 117, 121 (2019).

As to Enumerations IX and X

The trial Court's Order is clear that Appellant has to remove structures encroaching into the right of way. The trial Court issued a clear and unambiguous order.

CONCLUSION

For the reasons set forth above, Appellee requests that the Trial Court's Summary Judgment Order finding that Appellant trespassed onto Appellee's property and ordering him to remove the structures placed there should be affirmed by the Court of Appeals.

This Brief does not exceed the word count limit imposed by Rule 24

This the 5th day of January, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the APPELLEE'S RESPONSE TO APPELLANT'S BRIEF, by depositing the same in the United States Mail, First Class postage prepaid and also sent via email addressed to:

L. Allyn Stockton, Jr.
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This the 5th day of January, 2024

/s/ Michael H. Cummings II
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