IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CARLETON D. COKER and DEBRA L. COKER,	)	
Plaintiffs,	)	
v.	)	*Civil Action No. 7554-VCG*
CAROL WALKER,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: February 11, 2013
Date Decided: May 3, 2013

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GLASSCOCK, Vice Chancellor

Neighbors, owners of adjoining lands, cooperated in the construction of a drainage ditch that benefited both properties. The ditch drains a low area prone to ponding on the border between the two properties. It runs almost entirely across the more northerly property, and drains into a public drainage ditch. The neighbors, the Plaintiffs and Defendant here, signed a written agreement concerning the ditch. This litigation concerns the interest in real property created by that agreement: easement or mere license?

The matter has been tried and briefed. What follows is my post-trial opinion.

I. BACKGROUND

The Plaintiffs, Mr. and Mrs. Coker, live in a poorly-drained area of Sussex County just east of Indian Mission, a few miles south of Harbeson. Their property borders the Hollyville Road (county road 48) to the south. To the north, they share a common boundary with the Defendant, Mrs. Walker. Mrs. Walker's parcel contains a house on 6.5 acres; the southern portion of her property contains a fenced horse pasture.[1] At the extreme southern portion of the Walker property is an eleven foot wide strip between the horse pasture fence and the common

[1] Plaintiff's Trial Exhibit ("PX") E.

boundary with the Cokers.[2] The relationship of the properties is depicted graphically in Figure 1.[3]

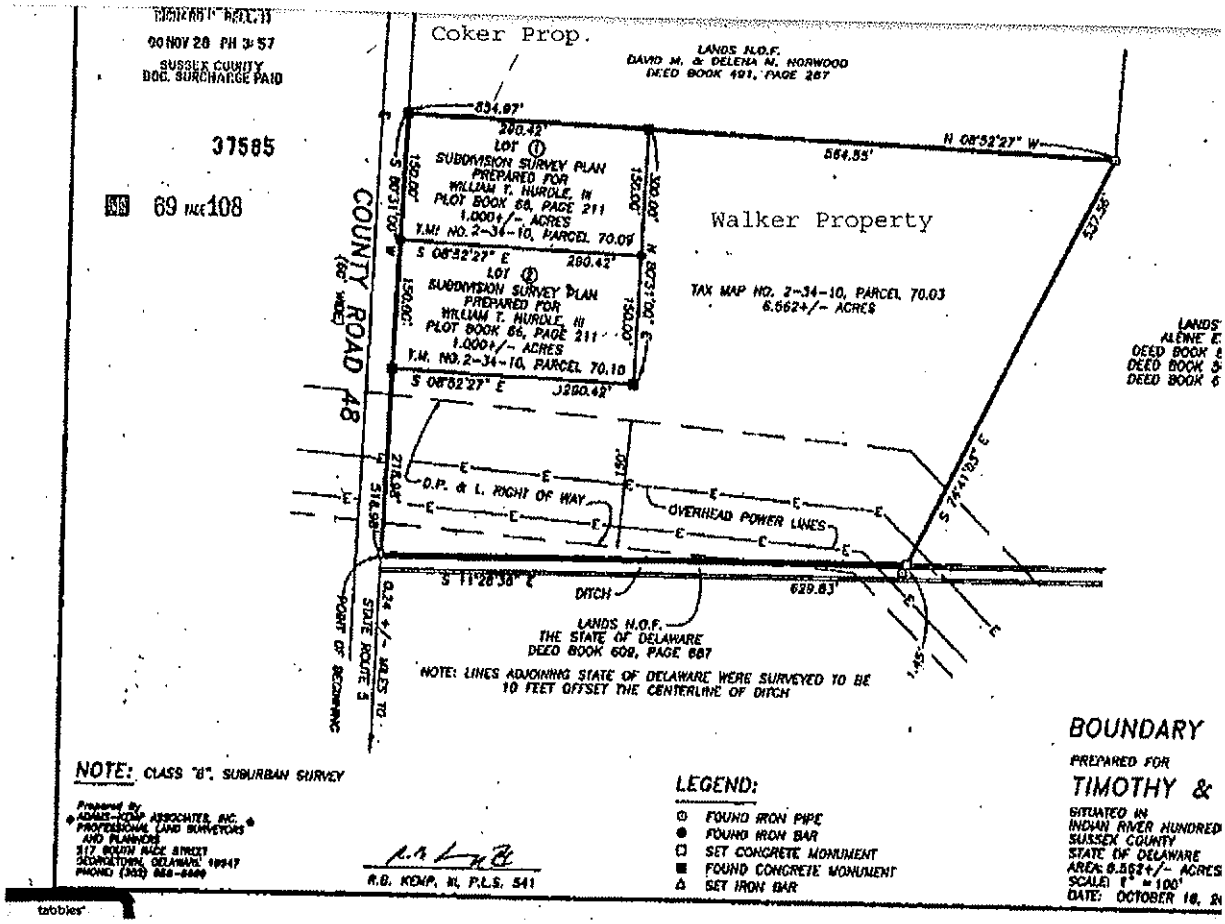

Figure 1

Before 2010, the Walker property was owned by Mr. and Mrs. Draine. The Draines also kept horses in the southern pasture. In 2006 Mrs. Draine noted ponding on her property. She contacted the Delaware Department of Natural Resources and Environmental Control ("DNREC") regarding drainage of the

[2] Trial Tr. 33:13-35:18, 114:4-115:5.
[3] Figure 1 was submitted to the Court as PX E.

property.[4] Apparently, neither Mrs. Draine nor DNREC took further action at that time.[5]

In 2008, the Cokers moved onto their lot on Hollyville Road.[6] After significant rain in 2009, they noticed extensive ponding on their property.[7] Mrs. Coker contacted DNREC to discuss possible remedies for the drainage problem on their lot.[8] The Cokers agreed to pay the cost of a private drainage ditch, and DNREC agreed to do the survey and topographical work necessary to the construction.[9] DNREC surveyed the area and prescribed the location for a ditch that would drain the low area along the Coker/Walker boundary and the Walker horse pasture, carrying the water to the east to tie into a public ditch (the "DNREC ditch"), which itself drained south into a natural waterway, Unity Branch.[10] DNREC staked out the location of the proposed ditch and informed the Cokers that they would need permission from the owners of the property to the north, the Draines.[11]

Although Mrs. Draine had earlier expressed interest in draining her property, she was by this time attempting to sell the parcel, and declined to contribute to the

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[4] Trial Tr. 4:21-5:9.
[5] Trial Tr. 4:21-5:9.
[6] Trial Tr. 16:12-13.
[7] Trial Tr. 17:5-10.
[8] Trial Tr. 24:6-13.
[9] Trial Tr. 25:10-21.
[10] Trial Tr. 5:10-21, 12:23-13:4.
[11] Trial Tr. 5:3-7:24.

construction of the ditch.[12] However, she gave the Walkers her oral permission to have the ditch constructed across her property to tie into the DNREC ditch.[13] The Cokers hired a contractor to construct the ditch, which proved successful in reducing ponding in the Coker/Walker boundary area. The Cokers paid the entire cost of construction, $5,140.[14] The ditch ran north from the northwestern corner of the Coker property, through the Walker parcel near its western boundary for several feet, then turned east and ran across the horse pasture to tie into the DNREC ditch on the east side of the Walker property. Culverts were placed in the ditch to allow horses to cross at more than one location. Otherwise, the ditch was open for its entire length.[15]

In 2009, Mrs. Walker and her husband viewed the Walker parcel, then owned by the Draines and listed for sale. The Walkers made an offer on the property, but no action was taken by the Draines. The offer was eventually withdrawn.[16] Shortly thereafter, Mr. Walker died. In August 2010, Mrs. Walker again viewed the Draine parcel. Walker lived in Pennsylvania and owned a beach home in Sussex County. She wished to move to Sussex County and wanted room

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[12] Trial Tr. 31:2-5.
[13] Trial Tr. 53:1-17.
[14] PX I.
[15] See Figure 1.
[16] Trial Tr. 100:21-24.

for her horses. After viewing the property this second time, Mrs. Walker purchased the land.[17]

According to Mrs. Walker, although she inspected the property in 2010 after construction of the ditch, she failed to notice the ditch prior to purchase. Walker testified that the ditch was concealed by high grass in the pasture.[18] In January, 2011, Dale Morrill, Mrs. Walker's son, was living on the property. Mrs. Walker had not yet moved to Sussex County from Pennsylvania. According to Morill, he was mowing the pasture and discovered the ditch.[19] He called his mother and asked if she knew there was a ditch through the pasture. According to Morrill, she was surprised and upset that the ditch existed. Walker contacted officials at DNREC and asked if there was a legal impediment to her filling in the ditch.[20] Walker was informed that DNREC knew of no legal impediment but that it would "not be a good idea" to fill the ditch.[21]

Shortly thereafter, Mrs. Walker approached Mr. Coker, who was working in his yard. According to Coker, Walker told him that she intended to fill in the ditch and that he had two days to agree to place pipe in the ditch or that she would fill it with dirt.[22] Walker expressed concern that her horses could be injured in the ditch.

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[17] Trial Tr. 102:18-19.
[18] Trial Tr. 101:23-102:17.
[19] Trial Tr. 107:5-10.
[20] Trial Tr. 110:8-111:1.
[21] Trial Tr. 11:10-22.
[22] Trial Tr. 66:24-67:8.

Two days later, Walker and Coker again spoke, and Coker offered to pay half the cost of placing pipe in the ditch before it was filled in. Mrs. Walker agreed.[23] Coker and Walker also agreed that the labor of installing the ditch and backfilling would be provided by Mr. Coker and Mrs. Walker's son, Morrill.

Mrs. Walker made it clear that she felt she had no obligation to keep the ditch open because the Draines and Cokers had not come to a written agreement so providing. Mrs. Coker, therefore, decided an agreement that would provide for the terms of piping the ditch and govern the use of the ditch going forward was necessary to protect the Coker's rights.[24] She produced a document (the "Agreement") which she and Mr. Coker signed and presented to Mrs. Walker.[25] Mrs. Walker also signed the agreement. It provided as follows:

> This is a written agreement between Carol Walker of 23086 Hollyville Road, Harbeson DE and Carleton Dale Coker/Debra Coker of 23100 Hollyville Road, Harbeson DE regarding the purchase of 460 feet of 12x20 poly pipe and 3 couplings to be installed in the ditch that was excavated in Mrs. Walker's property. The total cost is $2,623.50. The pipe and couplings are being purchased from BelAir Road Supply, Frankford, DE.
>
> An agreement between the two parties has been reached that the cost of the pipe and couplings will be split 50/50. The Cokers will reimburse Ms. Walker $1311.75 for their part of the agreement.
>
> It was also agreed upon that Ms. Walker will back fill the ditch with dirt, and install rip-rap at apron.

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[23] Trial Tr. 38:18-22.
[24] Trial Tr. 39:18-22.
[25] PX A.

> After installation of pipe and backfill of dirt, this ditch will no longer need to be altered or tampered with.[26]

After the piping work was completed, the portion of the ditch inside the fenced horse pasture was filled in, and drainage water was carried through the buried pipe under the pasture. Both parties contributed $1,311.75 to the construction of the ditch, plus labor.[27] The north/south portion of the ditch, which was on the Walker property outside the pasture fence, was still open. According to Morrill and Mrs. Walker, they had failed to notice the portion of the ditch outside of the fenced pasture at the time the agreement was signed.[28] When Mrs. Walker discovered that there was an open portion of the ditch on her property, she became annoyed.[29]

In the spring of 2012, Mrs. Coker noticed Mrs. Walker dumping horse manure into the open portion of the ditch.[30] Mrs. Coker told Mrs. Walker that filling in the ditch was "illegal." Mrs. Walker replied that the horse manure belonged to her and that she would do with it as she pleased.[31] This suit followed, seeking interim injunctive relief and a determination of the Cokers' rights in the ditch.

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[26] PX A.
[27] PX B.
[28] Trial Tr. 117:10-12.
[29] Trial Tr. 119:10-120:10.
[30] Trial Tr. 43:7-19.
[31] Trial Tr. 44:19-45:1.

II. ANALYSIS

A. Easement or License?

This matter turns entirely on what interest the Agreement created in the ditch and to which portion of the ditch the agreement was meant to apply. The Cokers have not argued that Mrs. Draine, who allowed the Cokers to construct a drainage ditch that benefited both properties at a cost of several thousand dollars to the Cokers, provided any interest in the ditch to the Cokers other than a license to use the ditch for drainage at the pleasure of Mrs. Draine. A license amounts to a permissive use granted by the owner of a property to another which is terminable at the will of the owner.[32] It does not confer "title, interest or estate in [the burdened] property.[33]

The Cokers contend that the Agreement created an easement to use the area of the ditch across the Walker property for drainage and, to the extent necessary to its continued operation, for maintenance. I agree. An easement is a non-possessory interest in real property, granted for a particular purpose, enforceable of

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[32] Because the plaintiffs do not rely on their agreement with Mrs. Draine, I need not address the applicability of the "venerable" Delaware doctrine "that an oral grant of a license to use land can vest enforceable rights in the grantee if the court is convinced that the grant of use was reasonably relied upon and that the parties intended the grant to be permanent." *Hionis v. Shipp*, 2005 WL 1490455, at *4 (Del. Ch. June 16, 2005), *citing Jackson & Sharp Co. v. Philadelphia, Wilmington & Baltimore R.R. Co.*, 1871 WL 2084, at *5 (Del. Ch. Sept. 1871); *See Sussex Food Servs. v. Mears*, 1992 WL 187627, at *3 (Del. Ch., July 23, 1992)(holding that the statute of frauds prevents creation of an express oral easement; any relief must be through estoppel).

[33] *Carriage Realty P'ship v. All-Tech Auto., Inc.*, 2001 WL 1526301, at *8 (Del. Ch. Nov. 27, 2001).

right and not dependant for its continued existence on the will of the grantor.[34] Easements can be created in various ways;[35] the Cokers argue that the Agreement creates an express easement appurtenant to their property. In order to convey an express easement, a writing must exist demonstrating that intent, signed by the grantor. An ambiguous writing may yet convey an easement where extrinsic evidence clearly demonstrates that such was the parties' intent.[36] According to Mrs. Walker, the Agreement creates only a license.

The language of the agreement largely concerns the installation of pipe in the horse pasture. It ends, however with these words, "[a]fter installation of the pipe and backfill of the dirt, this ditch will no longer need to be altered or tampered with." While this is an inelegant and ambiguous expression of intent, it is clear to me, in light of the words used and the extrinsic evidence presented at trial, that the writing contemplates an easement.[37] First, the Cokers clearly believed that they had received only permissive use—a license—from Mrs. Draine, and that as a result they were in danger of losing the benefit of their $5,000 investment in the

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[34] *See, e.g.*, 28A C.J.S. Easements § 1.

[35] *See Sandie, LLC v. Plantations Owners Ass'n, Inc.*, 2012 WL 3041181, at *7 (Del. Ch. July 25, 2012)(discussing creation of easements).

[36] *Alpha Builders Inc. v. Sullivan*, 2004 WL 2694917, at *4 (Del. Ch. Nov. 5, 2004).

[37] In construing a writing, I must give effect to the parties' intent based on the plain meaning of the words used. "Of paramount importance is what a reasonable person in the position of the parties would have thought the language of the contract meant." *Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l*, C.A. No. 7844-VCP, at 9 (Del. Ch., May 1 2013). Where the meaning of the contract can only be understood through appreciation of the context and circumstances from which it arose, I must consider extrinsic evidence in its interpretation. *See id.* at 10.

ditch when Mrs. Walker threatened to fill it, destroying all utility. The purpose of the last sentence of the Agreement was to create an enforceable interest by the Cokers in the ditch. I have no doubt that this purpose for the writing was as clear to Mrs. Walker as it was to the Cokers. The language "this ditch will no longer need to be altered or tampered with" indicates that the parties intended a degree of permanence incompatible with a license. It indicates intent that the ditch would remain available to the Cokers to serve its purpose: drainage of ponding water from their property.

Mrs. Walker argues that she could not have meant to convey valuable property rights in her land to the Cokers without consideration. I find, however, that there was sufficient consideration here to support the agreement as a contract creating an easement. The Walker property benefited from the drainage ditch, as did the Coker property.[38] The open ditch also represented a detriment to Mrs. Walker, however; it presented what she perceived as a danger to her horses. The agreement provided that the Cokers would pay half the cost and provide half the labor to pipe the ditch and fill it, an action that benefited solely Mrs. Walker. Therefore, I conclude the agreement did provide consideration for Mrs. Walker.[39]

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[38] Walker's son graded the property to enhance the effectiveness of the ditch for draining Walker's property, and he testified that the ditch provided effective drainage. Trial Tr. 148:6-153:3.

[39] I note that, although the Cokers have not asserted here any rights arising from their agreement with Mrs. Draine, a colorable, though far from certain, claim existed that the Cokers had rights to preserve and maintain the ditch as a matter of equitable estoppel *before* Walker entered into the

Mrs. Walker's other argument is that, even if she meant to transfer an interest in the portion of the ditch in her horse pasture, she cannot have intended to convey an interest in the north-south portion of the ditch outside the horse pasture, because she was unaware of its existence at the time of the Agreement. First, as a factual matter, I find the testimony that Mrs. Walker was unaware of the portion of the ditch outside the horse pasture simply unbelievable. Walker testified that the ditch is visible from her front door. The Walker property contains a small, pleasant horse pasture. It is not, however, the King Ranch, or television's "Bonanza" or "South Fork." The total area of the Walker property, including the house and yard, is only 6.5 acres. Mrs. Walker testified that she was quite upset when she discovered, unexpectedly, that her property was ditched. She contacted DNREC to find out the reasons for the ditch and whether it could be filled legally. She approached the Cokers and threatened to fill the ditch. It is simply inconceivable that, despite being exercised over the existence of the ditch, and despite the fact that the ditch was in full view, she did not recognize that it proceeded south on her property from fenced pasture onto the Coker parcel. Moreover, it is clear from Mrs. Walker's conduct—approaching the Cokers to inform them that she was filling the ditch and demanding payment for piping—that she understood that the ditch drained the Coker parcel. No reasonable person

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Agreement. I mention this only to the extent it bears on the value of what Mrs. Walker herself was giving up in the Agreement.

could have believed that the Cokers would have paid for a ditch that did not reach, or drain, their property.

Similarly, the purpose of the Agreement would be frustrated if it applied simply to the portion under the fenced horse pasture, and not to the entire ditch. The purpose of the ditch, which was constructed at the expense of the Cokers, but which benefited both properties, was to gather water from the low spot along the common boundary. If the north/south portion of the ditch could be filled—as Mrs. Walker has attempted to do with horse manure—the east/west portion serves no purpose. Mrs. Walker's position is that she accepted the labor and funds of the Cokers to place a drainage pipe under her pasture, but that she retained the right to block that pipe by filling in the portion of the ditch which drained the Cokers' property. This position is not tenable. Even if her interpretation of the Agreement were accurate, blocking the open portion of the ditch would likely violate the covenant of good faith and fair dealing.[40] I need not reach that issue, however, because I find that the Agreement was meant to apply to the entire ditch, including the north/south portion.

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[40] *See Generally Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441-42 (Del. 2005)(holding that a covenant of good faith and fair dealing inheres to every contract to honor reasonable expectations of the parties).

B. Easement in Gross or Appurtenant?

Two types of easements, generally speaking, exist; easements appurtenant to the properties at issue, and easements in gross. The former, as the name implies, form a part of the properties and run with the land; the benefit of an easement in gross, conversely, is personal to the grantee.[41] In order for an easement to be deemed appurtenant, it "must bear some relationship to the use of the dominant estate . . . existing for the benefit of the dominant estate as an entity."[42] When a writing creating an easement is susceptible to construction as creating an easement in gross as well as an easement appurtenant, public policy favors construction as the latter.[43] Since an easement in gross is personal to the grantee, as a general matter it dies with the grantee; easements appurtenant are integral to and an attribute of the adjacent parcels—consequently, they run with the land and bind successors-in-title.[44]

The Cokers argue that, because the drainage problem will be ongoing and not limited to their, or Mrs. Walker's, tenancy of their respective properties, the Agreement should be construed to create an easement that runs with the land. The Agreement, and indeed the record itself, is silent as to whether the parties intended to create an easement appurtenant or in gross. The Cokers were content to receive

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[41] *O'Shaughnessy v. Bice*, 2003 WL 22787612, at *2 (Del. Super. Nov. 24, 2003).
[42] *See id.*, (citing 25 Am. Jur. 2d Easements in Real Property § 10 (2003)).
[43] *Tubbs v. E&E Flood Farms, L.P.*, 13 A.3d 759, 768 (Del. Ch., 2011)(citing Herbert Tiffany, *Real Property* § 394 (Callaghan & Co. 1970)(1903)).
[44] *E.g.*, *O'Shaughnessy*, 2003 WL 22787612, at *2.

a license from Mrs. Draine. It was only Mrs. Walker's abrupt threat to fill the ditch that prompted them to put an agreement in writing. It is clear that that Agreement was intended to limit Mrs. Walker's ability to disrupt the operation of the ditch. What is unclear, however, is whether the Agreement was meant to bind the parties' successors and assigns as appurtenant to the properties. The Cokers did not testify that they intended to create an easement that would run with the land, and before Mrs. Walker's unneighborly[45] attempt to block the ditch with the ordure of her horses, they expressed no interest in binding successors and assigns of Mrs. Walker. For her part, Mrs. Walker testified, unconvincingly, that she did not understand that she was conveying *any* interest in her property.

In the absence of any determinative evidence, I must look, therefore, at the purpose of the easement to establish its nature. The easement is for the maintenance of a ditch to drain the dominant Coker parcel. It does not represent a right of value to the Cokers *divorced from their ownership of the land.* It is clearly designed to allow the productive use of the real property now owned by the Cokers.[46] As such, the nature of the easement is appurtenant to the two parcels and therefore runs with the land.

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[45] The adjective "neighborly" implies a benign regard for those in proximity, an unfortunately inapt description of relationships between adjoining landowners, if the cases on my docket constitute a representative sample.

[46] The ditch, of course, provides beneficial drainage to the Walker lands as well.

The parties should provide me with a form of order consistent with this Memorandum Opinion, attaching a document describing the easement recordable with the office of the Recorder of Deeds.