IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CORALIE A. PRYDE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	C.A. No. 06C-12-195 PLA
DELMARVA POWER &	)	
LIGHT CO., CONNECTIV, and	)	
ASPLUNDH TREE EXPERT CO.,	)	
	)	
Defendants.	)	
	)	

ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
DENIED
ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
DENIED

Submitted: November 21, 2008
Decided: February 17, 2009

This 17th day of February, 2009, upon consideration of Cross-Motions for Summary Judgment filed by Defendants Asplundh Tree Expert Co. ("Asplundh"), Connectiv, and Delmarva Power & Light, and by Plaintiff Coralie A. Pryde ("Plaintiff"), it appears to the Court that:

1. Connectiv hired Asplundh to trim and remove trees from Plaintiff's property at 1902 Beechwood Drive in New Castle County ("the property"). Pursuant to its contract with Connectiv, Asplundh removed

approximately thirty-five trees from the property in January 2005.[1] At the time the trees were removed, Connectiv held a utility easement, originally granted to Delaware Power and Light (now known as Delmarva Power and Light, "DP&L"), permitting it access to a rectangular portion of the property to install and maintain electric power lines. The parties dispute the scope of this easement.

2. The utility easement over Plaintiff's property is described in two documents. In 1933, DP&L received and recorded a written grant for a right-of-way easement from a previous owner of Pryde's lot ("the 1933 Agreement"). The 1933 Agreement states that it is intended to confirm a preexisting right-of-way, which is described in the agreement using longitude and latitude. Both the distance measurements and quantity of area provided in the 1933 Agreement are qualified with the phrase "more or less."[2] In addition, the 1933 Agreement describes the rights arising from the grant:

> [The landowner-grantor] does hereby grant . . . unto [DP&L], its successors and assigns forever a right of way and easement with the right, privilege and authority . . . to construct, erect, operate and maintain a line or lines for the purpose of

[1] The record is unclear as to whether all of the plants were trees, as the parties have occasionally made reference to shrubs. Because the distinction between a tree and a shrub is not at issue, the Court will refer to all of the removed plants as trees.

[2] Docket 15, Ex. C.

> transmitting electric or other power . . . in, on, along, over, through or across the . . . described lands . . . .
> . . .
> TOGETHER with the right to said party . . . , its successors and assigns . . . to cut and remove from said premises, or the premises of the [grantor] adjoining the same on either side, any trees, overhanging branches or other obstructions which may endanger the safety or interfere with the use of . . . poles, towers, or fixtures [that DP&L was authorized to place on the easement], or wires attached thereto, or any structure on said premises; and the right of ingress and egress to and over the said above described premises and any of the adjoining lands . . . and for doing anything necessary, useful or convenient for the enjoyment of the easement herein granted . . . .[3]

3. In 1951, DP&L entered into and recorded another agreement with the then-owners of Plaintiff's lot ("the 1951 Agreement"). In the 1951 Agreement, the utility easement is described as a "right-of-way . . . *seventy-five feet (75') in width* and more particularly bounded and described as set forth in [the 1933 Agreement]."[4] The parties to the 1951 Agreement intended it to clarify that the landowners could permit pedestrian and vehicle traffic and other utility infrastructure to cross portions of the property subject to DP&L's utility easement. However, the 1951 Agreement emphasized that the landowners' rights were "subservient to the right-of-way or easement

[3] *Id.*

[4] Docket 15, Ex. B (emphasis added).

held by [DP&L] for the operation and maintenance of its electric transmission lines."[5]

4. Plaintiff maintains that the utility easement over her property is seventy-five feet wide, consistent with the 1951 Agreement. According to Plaintiff, before Asplundh began removing trees, she advised Connectiv and Asplundh of the easement boundaries and informed them that they were endangering her rights by marking trees for removal outside the easement.[6] After Asplundh completed its tree removal, Plaintiff had the property surveyed to establish the location of the tree stumps relative to the easement boundaries. Based on this stump location plan, which depicts the easement as eighty feet in width, Plaintiff contends that Asplundh impermissibly cut and removed at least five trees growing outside the easement boundaries.[7] Furthermore, Plaintiff alleges that Asplundh created a hazardous condition on her property by negligently leaving stumps and decaying organic materials in the ground, requiring her to incur repair costs.[8]

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[5] *Id.*, ¶ 2.

[6] Docket 1 (Pl.'s Compl.), ¶ 21.

[7] *See* Docket 1, Ex. A (Pl.'s Appraisal of Value Lost for Landscape Trees (Feb. 2, 2006)); Docket 17, Ex. B (Pl.'s Stump Location Plan (Nov. 2, 2005)). The stump location plan depicts the utility easement as eighty feet in width, and shows seven stumps outside this eighty-foot boundary; however, the appraisal submitted by Plaintiff only provides valuations for five removed trees.

[8] Docket 1, ¶ 13.

5. Plaintiff filed suit against Defendants in this Court on December 21, 2006, raising the following claims: (1) negligence; (2) Timber Trespass under 25 *Del. C.* § 1401; (3) trespass; and (4) conversion. Plaintiff alleges that Connectiv is liable for the actions of Asplundh under the theory of respondeat superior, and names DP&L as a defendant on the basis that it is a successor in interest to Connectiv.[9]

6. Now before the court are Cross-Motions for Summary Judgment. Asplundh seeks summary judgment on the basis that its actions were authorized under the utility easement. Asplundh argues that all of the trees removed were "'more or less' within the easement's boundaries or removed because they 'may endanger' DP&L's lines," consistent with the restrictions contained in the 1933 Agreement.[10] DP&L and Connectiv joined in support of Asplundh's motion and ask this Court to grant summary judgment against Plaintiff on the same grounds.[11]

7. In response, Plaintiff contests that the removed trees were within the scope of the easement. Plaintiff contends that the 2005 stump location plan shows that Asplundh removed several trees "well beyond" the

[9] *See* Docket 1.

[10] Docket 15 (Def. Asplundh's Mot. for Summ. J.), ¶ 9.

[11] Docket 22 (Defs. DP&L and Connectiv's Resp. and Joinder in Support of Asplundh's Mot. for Summ. J.).

easement boundaries.[12] Furthermore, Plaintiff suggests that Asplundh has not demonstrated how those trees were hindering the maintenance or operation of the power lines.[13]

8. In addition, Plaintiff challenges Asplundh's reliance on the use of "more or less" in the 1933 Agreement's boundary descriptions. Plaintiff asserts that the 1933 Agreement qualified the easement boundaries by using "more or less" because it set forth the physical dimensions by longitude and latitude, rather than more precise measurements. By contrast, the 1951 Agreement repeatedly describes the easement established by the 1933 Agreement as being seventy-five feet in width. Therefore, even if the 1933 Agreement was not intended to create specific boundaries, Plaintiff asserts that those intentions were abandoned, since the 1951 Agreement evinces a clear intent to provide a precise width measurement of seventy-five feet.

9. On October 28, 2008, Plaintiff filed a Cross-Motion for Summary Judgment.[14] Plaintiff argues that Defendants have not disputed that Asplundh removed the trees marked in the stump location plan as beyond the easement boundary, given an easement width of seventy-five

[12] Docket 17 (Pl.'s Resp. to Def. Asplundh's Mot. for Summ. J.), ¶ 2.

[13] *Id.*, ¶ 10.

[14] Docket 18 (Pl.'s Mot. for Summ. J.).

feet. Therefore, Plaintiff submits that the sole issue remaining in this case is whether the 1933 Agreement's use of the phrase "more or less" authorized Asplundh to remove trees beyond the boundary set under the 1951 Agreement.[15] Plaintiff asks this Court to conclude that the 1951 Agreement controls as to the width of the easement, and that summary judgment against all three co-defendants is therefore appropriate.

10. When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[16] Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[17] Summary judgment is also inappropriate "if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstances."[18]

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[15] *Id.*, ¶ 3.

[16] Super. Ct. Civ. R. 56(c).

[17] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).

[18] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

11. The parties frame the matter before the Court as a dispute over easement boundaries. While the propriety of cutting trees from Plaintiff's property remains in contention, there is no doubt that the trees expended in setting forth this argument were sacrificed needlessly. Based on the terms of the easement, the crux of this case is not whether Asplundh removed trees outside the physical borders of the easement, but whether Asplundh exceeded the easement's purpose and scope of use. On the record before it, the Court finds that this question remains a genuine issue of material fact between the parties, and therefore both summary judgment motions must be denied.

12. Under Delaware law, the granting of an easement "only passes what is reasonably necessary and convenient for the contemplated use."[19] Therefore, when a power company receives an easement over private property to construct and maintain power lines, it generally does not receive a fee interest.[20] The owner of property subject to an easement retains the right to make any reasonable use of the land that does not conflict with the easement-holder's rights.[21] The easement-holder, in turn, must exercise its

[19] *Jackson v. Copeland*, 1995 WL 54434, at *2 (Del. Ch. Jan. 25, 1995).

[20] *See, e.g.*, *Kell v. Appalachian Power Co.*, 289 S.E.2d 450, 453 (W. Va. 1982); *see also Jackson*, 1995 WL 54434, at *2.

[21] *Jackson*, 1995 WL 54434, at *2-3.

rights "in a reasonable manner and so as not unnecessarily to injure the rights of the other party, especially where the grant expressly so provides."[22] In particular, the easement-holder is forbidden from inflicting unnecessary damage to the land in the exercise of its rights.[23]

13. When construing an express easement, the Court's task is to discern and enforce the intentions of the parties.[24] Accordingly, an express easement will be controlled by the language of the grant creating it.[25] An express easement is susceptible to interpretation only if its language is ambiguous.[26] The Court will reconcile and give effect to all of the descriptions in a deed or grant if it is possible to harmonize and apply them in a reasonable manner.[27]

14. To the extent that any ambiguity arises from the 1933 and 1951 Agreements' differing descriptions of the easement's physical dimensions, it is irrelevant to the issues currently before the Court. Contrary to Asplundh's

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[22] *Wieczorek v. Simmons*, 1987 WL 7529, at *2 (Del. Ch. Jan. 29, 1987) (quoting 28 C.J.S. *Easements* § 87(a) (1941)).

[23] *Kell*, 289 S.E.2d at 453.

[24] *See* 28A C.J.S. *Easements* § 64 (2008).

[25] *See, e.g.*, *H & H Brand Farms, Inc. v. Simpler*, 1994 WL 374308, at *2 (Del. Ch. June 10, 1994).

[26] *Jestice v. Buchanan*, 1999 WL 962591, at *2 (Del. Ch. June 14, 1999).

[27] 23 AM. JUR. 2D *Deeds* § 248 (2008).

position, the use of the phrase "more or less" in the 1933 Agreement's boundary descriptions does not establish that the parties to that agreement intended a grant without precise boundary lines.[28] When employed in a grant or deed to modify a quantity term, the phrase "more or less" will account for only minor inaccuracies in measurement.[29] The use of "more or less" therefore does not support that the parties meant to create an unbounded easement. Rather, the use of "more or less" in the 1933 Agreement represents the parties' acknowledgement of their inability to describe the intended border with complete precision using longitude and latitude, which are inherently inexact descriptors.

15. Whereas Asplundh's argument incorrectly denies that any ascertainable boundaries to the easement exist, Plaintiff's position is flawed in positing that the easement's borders definitively circumscribed Connectiv's right to cut trees on the property. Whether the easement's width

[28] Docket 20, ¶ 4.

[29] *See Rosen Realty Assocs. v. Green Giraffe, Inc.*, 1996 WL 465745, at *6 (Conn. Super. Ct. Aug. 1, 1996) ("In the . . . situation of a deed describing land conveyed, the terms 'about' and 'more or less' are considered to be words of safety or precaution intended to cover some slight or unimportant inaccuracy."); *Perfect v. McAndrew*, 798 N.E.2d 470, 477 (Ind. Ct. App. 2003) (quoting *Hays v. Hays*, 25 N.E. 600, 600 (Ind. 1890)); *Lewis v. Biller*, 50 Va. Cir. 345, 1999 WL 1114670, at *1 (Va. Cir. Ct. Oct. 20, 1999) ("The language 'more or less,' used in contracts for the sale of land, must be understood to apply only to small excesses or deficiencies, attributable to variations of instruments of surveyors, etc." (quoting *Benson v. Humphreys*, 75 Va. 196, 1881 WL 6261, at *2 (Va. Jan. 1881))).

is defined by the dimensions set forth in the 1933 Agreement or the specific seventy-five-foot distance given in the 1951 Agreement, the 1933 Agreement establishes the scope of permissible tree removal activities. The language of the 1933 Agreement authorized the removal of trees, branches, or other obstructions from within the easement boundaries and from "the premises of the [grantor] adjoining the [easement] on either side."[30] Utility easements often include similar provisions permitting the removal of so-called "hazard trees" from portions of a grantor's property adjacent to the easement.[31] Such provisions ensure that utility companies can protect wires and poles against future tree growth occurring beyond an easement's boundaries.[32] Here, the 1933 Agreement clearly contemplated that the easement-holder possessed the authority to remove certain trees and obstructions from areas of the property "adjoining" the easement.

[30] Docket 15, Ex. C.

[31] *See, e.g.*, *Lacey v. Ala. Power Co.*, 779 So.2d 1184, 1186-87 (Ala. 2000); *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 127 S.E.2d 539, 541 (N.C. 1962).

[32] In light of Defendants' argument that the parties to the 1933 Agreement did not intend it to have precise borders, it is worth noting that provisions allowing hazard trees to be cut from property adjacent to an easement also protect landowner-grantors. Without such provisions, utility companies might indeed seek larger easements or imprecise easement boundaries to protect their equipment from future tree growth, with the consequence that utility infrastructure could be located or relocated over broader swathes of grantors' lands.

16. However, the easement does not provide unlimited rights to clear all trees from the easement and Plaintiff's adjoining land. Specifically, the 1933 Agreement provides the easement-holder with the right "to cut and remove from [the easement], or the premises of the [grantor] adjoining the [easement] on either side, any trees, overhanging branches or other obstructions *which may endanger the safety or interfere with the use of* . . . poles, towers or fixtures, or wires attached thereto[.]"[33] Because an easement-holder must act reasonably towards the rights of the servient landowner and avoid unnecessary damage to the servient property,[34] the assessment of whether a tree may endanger or interfere with the electric transmission equipment must be reasonable.

17. The Court finds that Plaintiff has presented a triable issue as to whether the easement permitted Asplundh to remove the contested trees. Asplundh states in its motion that "Clearance of the wires necessitated the removal of the trees at issue. The trees removed were certainly 'more or less' within the easement's boundaries or removed because they 'may endanger' DP&L's lines as defined in the easement as agreed to by the

[33] Docket 15, Ex. C (emphasis added).

[34] *See supra* notes 22-23 and accompanying text.

parties."[35] However, none of the defendants have provided any affidavits or other evidence to support this assertion. In response, Plaintiff offers the stump location plan, which identifies seven stumps located beyond the claimed easement boundary, assuming an eighty-foot easement width.[36] Although, as previously discussed, the easement boundaries do not mark a firm border past which no tree removal could occur, the distance of these stumps from the easement lends support to Plaintiff's contention that the trees did not constitute a threat to the safety or convenience of power line operations within the easement boundaries.

18. Whether a specific tree "may endanger the safety or interfere with the use of" the utility wires, poles, or fixtures is a factual question that remains subject to genuine dispute between the parties. The conclusory statements contained in Asplundh's motion, unsupported by any record evidence, are insufficient to resolve this issue in Defendants' favor. Summary judgment for either Plaintiff or Defendants is therefore inappropriate.

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[35] Docket 15, ¶ 9.

[36] Plaintiff only contests Asplundh's authority under the easement to remove the trees marked on the stump location plan – i.e., those trees that she considers to have been outside the easement boundaries, given a seventy-five or eighty-foot easement width. *See* Docket 17, ¶ 8.

19. Finally, although none of the parties addressed the issue, Plaintiff's claim that Asplundh and Connectiv negligently created a hazardous condition on her property also presents a genuine issue of material fact. Connectiv and Asplundh were obligated to exercise due care in executing the removal of trees from Plaintiff's property. This duty existed regardless of whether removal of the trees was authorized under the easement. Plaintiff argues that they failed to meet this standard, and she claims that she incurred expenses to have the stumps and decaying organic materials removed. Defendants have not offered any response to Plaintiff's factual allegations, and Plaintiff's version of events must be accepted as true for the purpose of deciding Defendants' motion. Thus, the Court finds that Plaintiff has raised a triable issue of fact as to whether Defendants are liable for negligently creating a dangerous condition on her property.

20. For the foregoing reasons, Plaintiff and Defendants' Motions for Summary Judgment are hereby **DENIED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary
cc: R. Stokes Nolte, Esq.
Albert M. Greto, Esq.
Thomas D. Walsh, Esq.