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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division, Somerset, Hunterdon and Warren Counties.

T–RED PROPERTIES, INC., Plaintiff,
v.
Fernando BAUTISTA and Soccoro Bautista, husband and wife, Patrick J. Dennigan, Sergio M. Pereira and Philip Kolb, et al. Defendant.

Decided June 2, 2006.

Attorneys and Law Firms

Charles Whelan, III for Defendants Fernando and Soccoro Bautista. Perry S. Warren (**Maselli Warren**, P.C.) for Defendant Philip Kolb.

Sergio M. Pereira and Carla Pereira pro se.

Joseph Bilal (Gruber, Fee & Bilal) for T–Red Properties.

WILLIAMS, J.

Motion for Summary Judgment

I. *Background*

***1** In 1977, Stanlee and Florence Kissel (hereinafter "The Kissels") acquired all the properties that are involved in this litigation. The Kissel property contained a parking area that now compromises a portion of the rear properties owned by Defendant Fernando and Soccoro Bautista (hereinafter "The Bautistas") and Defendant Patrick J. Dennigan respectively. In 2003, the Kissels conveyed the property to Michael Bond, who later conveyed sections of the property to Plaintiff and Defendants respectively.

In 2004, Defendants entered into a written easement and driveway agreement in which Defendant Phillip Kolb allowed a new driveway across his property to access the parking area. Plaintiff was not a party to that agreement. The current driveway fails to meet the standards for two-way traffic and cannot be widened.

In 2003, Plaintiff acquired title to its property. The Bautistas acquired title to their home in 2004. There are no provisions in either deed granting Plaintiff an easement to use the parking areas. Plaintiff's property is not contiguous or adjacent to the Bautista's property. The parties dispute whether Plaintiff has a right to access the parking lot located on the Bautista's and Mr. Dennigan's properties. This Court adjourned Defendants' motions for summary judgment to give Plaintiff an opportunity to depose Stanlee Kissel.

II. *Defendant Fernando and Soccoro Bautista's—Movant's Position*

All of the Defendants in this action vigorously dispute Plaintiff's claims that it has the right to cross and park cars on their properties. Defendants are parties to a Joint Driveway and Parking Easement, which does not include Plaintiff. Throughout this litigation, Plaintiff has heavily relied upon an alleged municipal resolution, which it has been unable to produce. Moreover, the Bautistas' children play near the parking area and increased traffic would increase the risk of harm to the children.

There are no genuine issues of material fact and Plaintiff has failed to state a claim upon which relief may be granted. Plaintiff's first count is not even based upon any cognizable theory of law. Plaintiff cannot demonstrate an express easement because they are not part of any easement grant. Plaintiff's property is not land-locked, so it cannot establish an easement by necessity. Plaintiff cannot establish essential elements for adverse possession and a prescriptive easement because there was unity of title and an owner cannot adversely possess his own property. Furthermore, there is no public policy that allows Plaintiff to park on Defendants' property without permission.

Moreover, Plaintiff cannot demonstrate continuous use, or a reasonable necessity which are necessary elements of a quasi-easement. Plaintiff and its tenants are free to park on the street, on the grass, in the municipal parking lot or Plaintiff may build its own parking lot. Plaintiff's property is also within walking distance of a train station. Plaintiff cannot demonstrate that the use of the parking lot was ever apparent. Accordingly, Plaintiff's complaint should be dismissed.

III. *Plaintiff's—Opponent's Position*

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***2** Plaintiff limits its substantive arguments for the quasi-easement cause of action due to the shortness of time and the volume of the materials involved. Plaintiff admits that the quasi-easement count is its best cause of action.

Plaintiff argues that it has a valid quasi-easement. All the properties were owned and used by the Kissels. The parking lot only became an issue when Mr. Bond sold his lots individually without regard to the new owners' rights to use the parking lot. Moreover, the parking lot is reasonably necessary for Plaintiff's property because of the lack of parking available. Accordingly, this Court should deny Defendants' motion.

IV. *Defendant Philip Kolb's position*

Philip Kolb joins in Fernando and Soccoro Bautista's motion for summary judgment and filed a cross-motion for summary judgment. Plaintiff has produced no evidence that it has any right to use the Lot 9 driveway to access the parking areas owned by Defendants Bautista and Pereiera or the parking areas themselves. Accordingly, Plaintiff's complaint should be dismissed.

V. *Defendants' Patrick Dennigan and Sergio and Carla Pereira's position*

Patrick Dennigan and Sergio and Carla Pereira join in Defendant Fernando and Soccoro Bautista's motion for summary judgment for the same reasons expressed by them.

VI. *Discussion*

The Summary Judgment standard requires the moving party to establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *R.* 4:46–2; *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 73, 75 (1954); *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995). It is then the opposing party's burden to submit proof that the facts are not as the moving party asserts. *Spiotta v. Wm. H. Wilson, Inc.,* 72 *N.J.Super.* 572, 581 (App.Div.), *certif. denied,* 37 *N.J.* 229 (1962).

Deposition of Stanlee Kissel

This Court adjourned Defendants' summary judgment motion to grant Plaintiff an opportunity to obtain the deposition of Stanlee Kissel. Plaintiff was afforded an opportunity to point to relevant portions of Mr. Kissel's testimony at oral argument. Mr. Kissel testified about his experiences with the Board of Adjustment in 1982. Mr. Kissel's deposition transcript states in relevant part:

> We were granted a variance that put two apartments in on the first floor and to have parking in the unified lot and if the lot was ever subdivided then parking spots had to be created on Hamilton Street behind the property.... The Board took it as an entire parcel and said we had the parking there, fine, so long as we kept it there, fine. If it was ever subdivided, then we would have to provide parking behind the house on the area facing Hamilton Street. (Deposition of Stanlee Kissel, pp. 11, lines 1 to 25).

Mr. Kissel does not have a copy of this resolution. *Id.* However, it appears that the Borough's documents were destroyed by a flood prior to Defendants' purchase of their properties. Accordingly, even if the alleged variance exists, it would have been impossible for Defendants to locate it. This Court notes that Plaintiff has been unable to produce this alleged variance despite extensive discovery. Moreover, Mr. Zaman admits that there was no way Defendants could have had notice prior Defendants' purchase at closing that plaintiff might have the right to park on Defendants' property. (Deposition of Radzee Zamen, pp. 93, line 25 to pp. 95, line 9).

***3** *N.J.S.A.* 46:21–1 states in relevant part:

> [W]henever any deed or instrument ... shall have been ... duly recorded or lodged for record with the county recording officer of the county in which the real estate or other property affected thereby is situate or located such record shall, from that time, be notice to all ... purchasers ... of the execution of the deed or instrument so recorded and of the contents thereof.

N.J.S.A. 46:22–1 states in relevant part:

> Every deed or instrument ... shall, until duly recorded or lodged for record in the office of the county recording officer in which the affected real estate or other property is situate, be void and of no effect against ... all subsequent bona fide purchasers ... for valuable consideration, not having notice thereof, whose deed shall have been first duly recorded ...; but any such deed or instrument shall be valid and operative, although not recorded, except as against such subsequent judgment creditors, purchasers and mortgagees.

The [Recording Act] statutes have been consistently interpreted to mean that the subsequent purchaser will be bound only by those instruments which can be discovered by a "reasonable" search of the particular chain of title. *Howard Savings Bank v. Burl Brunson,* 244 *N.J.Super.* 571, 578 (Ch. Div.1990). Generally speaking, and absent any unusual equity, a court should decide a question of title ... in the way that will best support and maintain the integrity of the recording system. *Palamarg Realty Co. v. Rehac,* 80 *N.J.* 446, 453 (1979).

> [Moreover] an historical study of the [Recording] Act, as well as an analysis of the cases interpreting it, leads to the conclusion that it was designed to compel the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title and to purchase and hold title to lands within this state with confidence.... It is a clear mandate that the recording purchaser be given every consideration permitted by the law, including all favorable presumptions of law and fact. It is likewise a clear expression that a purchaser be able to rely upon the record title. *Id citing* Jones, *The New Jersey Recording Act—A Study of its Policy,* 12 Rutgers L.Rev. 328, 329–30 (1957).

The county recording officer of each county keeps an alphabetical index of all the names of grantors in deeds as well as parties to instruments. *Howard Savings Bank, supra,* 244 *N.J.Super.* at 574. By custom, the name of each owner of the property is searched from the date of the deed by which title is acquired to the date of recording of the deed by which title is relinquished. *Manchester Fund, LTD v. First American Title Insurance Co.,* 332 *N.J.Super.* 336, 344 (L.Div.1999) *citing* Fineberg, *Handbook of New Jersey Title Practice,* § 803 (New Jersey Land Title Inst.1995). In the absence of these indices there would simply be too many record books to permit a title searcher to address these original entries. *Id.* A successful title search depends on the correct spelling and indexing of each owner and claimant in the chain of title. *Id.* Title searches are generally conducted as follows:

> ***4** The searcher beginning his chain of title uses as a starting point the name of the present owner. By the use of the grantee index the examiner can ascertain from whom he received the land. This process is repeated until the owner by deed, 60 or more years back, is found. The chain is then considered complete. 13A *New Jersey Practice, Real Estate Law and Practice,* § 31.16 at 384 (John A Celentano) (1991)

In *Aldrich v. Schwartz,* 258 *N.J.Super.* 300 (App.Div.1992), a Plaintiff landowner purchased a parcel of real property, which had been subdivided from a larger parcel conditioned on restrictions preventing future development. Plaintiffs had no notice or knowledge of the restrictions, which were never perfected. *Id.* The Court held that the variance itself, embodied in the resolution of the board of adjustment, was binding on subsequent owners even if they had no notice or knowledge of it, even if the subdivision was not perfected, and whether or not a reasonable search would have revealed it. *Id* at 307.

The Court reasoned that if subsequent owners are entitled to the benefits of the variance and the value it adds to the property, even though they are unaware of its

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existence, they should enjoy those benefits limited by any restrictions which were lawfully attached as conditions, subject to current zoning agency relief. *Id* at 308–09. This is true even though "there is no statutory requirement that board of adjustment resolutions or minutes be recorded, or indexed, or preserved in any readily accessible form." *Id* at 307–08.

The *Aldrich* Court understood that this result may have an element of unfairness to subsequent owners. The *Aldrich* Court opinion states in relevant part:

> The balance of competing concerns is not an easy one to strike. Any resolution creates a real risk of unfairness, either to innocent buyers or to the protected public. We approach the problem not as one involving title searches and what they can reasonably reveal, but as one implicating the strong public interest in the enforceability of variance conditions, in the neighborhoods they protect, and in the expectations that have reasonably grown up around them. *Aldrich, supra,* 258 *N.J.Super.* at 309.

The *Aldrich* Court noted that when it is revealed that a lot was created by subdivision, an "assiduous search would lead to the minutes of the Planning Board, and ultimately to the minutes of the Board of Adjustment." *Id.* However, the Court cautioned that "such an extensive and intensive title investigation is not routinely done, and would be costly to a property buyer." *Id.* Regardless, the *Aldrich* Court still upheld the condition because of the strong public policy interest in the enforceability of variance conditions. *Id.* The *Aldrich* Court made this decision even though the approved subdivision plan was never filed or recorded. *Id* at 305.

Subsequently, the New Jersey Supreme Court decided *Island Ventures Associates v. New Jersey Department of Environmental Protection,* 179 *N.J.* 485 (2004). In *Island Ventures,* a title search revealed a water-dependant restriction contained in the seller's recorded master deed for a condominium and marina site, but the master deed failed to identify two adjacent lots as being subject to the restriction. *Id.* The Supreme Court held that the bona fide purchaser of the two lots was not bound by the restrictions because of equitable considerations. *Id.*

***5** In *Mintz v. Township of Millstone,* 374 *N.J.Super.* 396 (App.Div.2005), the Appellate Division distinguished its factual circumstances from those in *Aldrich.* In *Mintz,* the Appellate Division struck down an unrecorded subdivision condition that prevented further subdivisions. *Id.* The *Mintz* Court's opinion states in relevant part:

> We similarly distinguish *Aldrich* from the present circumstances. Here, unlike *Aldrich,* the restriction was never memorialized in any understandable fashion. The best evidence of its existence lies only in an alleged erroneous reference in the board's minutes of October 8, 1980. Otherwise, the alleged restriction existed only in the twenty-year old memories of some board members and the hearsay information provided by other residents. The board's actions in attempting to create this alleged restriction are so wanting that we are required to conclude that we need not weigh the competing interests in the fashion described in *Island Venture.* *Id* at 406.

Accordingly, *Mintz,* like *Island Ventures,* distinguished its facts from *Aldrich.* All three Courts were concerned with balancing the equities based upon their unique sets of facts. The Supreme Court set out the following guidance for future Courts confronted with these competing interests:

> [A] court reviewing a subsequent case involving issues similar to those presented in this case must do so only by applying the same fact-sensitive analysis that we have applied here. For example, *the court should consider the circumstances surrounding the failure to record the condition or restriction, the consequences of that failure to the subsequent purchaser, and the*

> *particular public interest implicated by the dispute. Island Ventures, supra,* 179 *N.J.* at 495. (emphasis added)

Here, the balancing of the equities favors Defendants, who could not have located the alleged variance because all the Borough's records were destroyed in a flood. Accordingly, Defendants cannot be faulted for the failure to locate the variance, which Plaintiff has been unable to produce. The restriction would cause Plaintiff to park cars on Defendants' property, which is a considerable hardship as Defendants' children play in the area. Furthermore, as is discussed below, there is no serious public interest in allowing Plaintiff to park its cars on Defendants' property when there is other parking readily available on the street or in a nearby municipal lot.

Furthermore, the *Mintz* decision struck down a restriction that "existed only in the twenty year old memories of some board members and the hearsay information provided by other residents." *Mintz, supra,* 374 *N.J.Super.* at 406. Here, the alleged variance cannot be located due to a flood. Accordingly, any testimony regarding the variance's existence would have to come from Mr. Kissel's memory and hearsay evidence. At the time of the alleged variance Plaintiff's property connected to the parking lot through a driveway located on lot 10, which is now a house. Plaintiff is now attempting to access the driveway through lot 9, which is owned by Mr. Kolb. Accordingly, if any variance existed, it would be meaningless because the driveway that was historically used to access the parking lot no longer exists. Therefore, the balancing of the hardships favors Defendants. [1]

1 Defendants argue that this Court should not accept Plaintiff's opposition as it is one day late. However, Plaintiff's one day late submission has not prejudiced Defendants, who have submitted a reply on time. Accordingly, Plaintiff's opposition to this summary judgment motion has been accepted by this Court.

Count One–Historical Right to Park Cars

***6** Plaintiff's first Count consists mostly of a recitation of the facts. Defendants are correct that it is not based upon any legal theory. Plaintiff's President Radzee Zaman explained at his deposition that Count One is based on the fact that Defendants' lots were historically a parking lot and used by the occupants of Plaintiff's building. (Deposition of Radzee Zaman, pp. 86, line 6 to pp. 87, line 14). This is not a cognizable cause of action in and of itself. However, it may form part of Plaintiff's arguments for the other counts of the complaint. In New Jersey law, the closest cognizable cause of action to an "historical property right" would be a claim for a quasi-easement, adverse possession or a prescriptive easement, which require other elements that are discussed in further detail below. Accordingly, Count One must be dismissed as to all Defendants.

Count Two–Easement Appurtenant

Plaintiff's second count alleges that there is an easement appurtenant where Plaintiff's property is the dominant estate, and the properties owned by the Bautistas and Mr. Dennigan are the servient estates. Plaintiff argues that this easement ran with the land and passed to subsequent grantees.

An easement appurtenant is created when a right is carved out of one property for the benefit of another and requires a dominant tenement to which it is appurtenant. *Village of Ridgewood v. Bolger Foundation,* 6 *N.J. Tax.* 391 (1984), aff'd, 202 *N.J.Super.* 474 (App.Div.1985), certif.. granted 102 *N.J.* 343, rev'd. on other grounds, 104 *N.J.* 337 (1986). An express easement cannot be created by parol, but must be created by grant. *Sergi v. Carew,* 18 *N.J.Super.* 307, 311 (Ch. Div.1952) (Citations omitted); *Crouse v. Sloan,* 99 *N.J. Eq.* 879 (E & A 1926).

Here, Plaintiff has failed to demonstrate any evidence that there is a written easement that allows Plaintiff to use Defendants' property in any of the relevant deeds or on file in the County Clerk's office. Moreover, Plaintiff's easement appurtenant theory hinges on the creation of an easement during the time the Kissels owned Plaintiff's and Defendants' properties. An owner cannot have an easement in his own land. *Leasehold Estates, Inc. v. Fulbro Holding Co.,* 47 *N.J.Super.* 534, 560 (App.Div.1956), cert. granted 21 *N.J.* 128, aff'd 22 *N.J.* 75 (1956).

This Court notes that "[t]here is a firm public policy against judicially-created rights in strangers to the ownership by way of easement or of restrictive covenants running with the land." *Annunziata v. Millar,* 241 *N.J.Super.* 275, 289 (Ch. Div.1990). "Anyone claiming such rights can do so only if they can point to a written grant or contract by which the claimed rights

were created." *Id.* "Testimony concerning some past oral understanding simply will not suffice." *Id.*

This Court notes that the August 28, 2003 deed between Mr. Bond and Mr. Van Burik for lot 9 contains an easement for use of the parking lot, which states in relevant part:

> ***7** The owners of Lots 4, 5, 6, and 9 in Block 52 shall each have the benefit of the exclusive use of two (2) parking spaces located on lots 4 and 4 in Block 52 and shall share equally the remaining parking area/ spaces for their benefit and use and for the use by their guests and invitee without reserved area or spaces for any one lot.

Mr. Bond conveyed lot 11 to Plaintiff in a deed which does not contain an easement allowing Plaintiff to park cars on Defendants' property. Moreover, Plaintiff's lot 11 is not mentioned in Mr. Bond's easement grant in the deed for lot 9. Accordingly, Plaintiff's second count must be dismissed as to all Defendants.

Count Three–Miscellaneous Easement Theory
The third count of Plaintiff's complaint states that the Kissels specifically intended to create an easement for parking purposes when they obtained approval in 1982 to convert the doctor's office into two three-bedroom apartments. However, as discussed above, this argument must fail and must be dismissed as to all Defendants for the same reasons as count two must be dismissed. Specifically, Plaintiff failed to demonstrate that the easement was in writing, the Kissels could not have created an easement only on their own property and there is a firm public policy against judicially-created easements by express grant. Therefore, Count three must be dismissed as to all Defendants.

Count Four–Easement by Implication
The fourth count of Plaintiff's complaint alleges that there is a valid easement by implication. "Implied easements are generally of two types, easements by necessity and quasi-easements." *Leach v. Anderl,* 218 *N.J.Super.* 18, 25 (App.Div.1987). Plaintiff's complaint alleges a quasi-easement in count five and an easement by necessity in count six. Accordingly, count four of Plaintiff's complaint is duplicative and must be dismissed as to all Defendants.

Count Five–Quasi–Easement
The fifth count of Plaintiff's complaint alleges the existence of a quasi-easement. In the case of a quasi-easement, the question of the easement's existence is fact-specific. *Leach v. Anderl, supra,* 218 *N.J.Super.* at 26. "A quasi-easement is founded on the following elements[:] the apparent use of the quasi-servient portion of the estate for the quasi-dominant portion, the continuous nature of the use, the permanent character of the quasi-easement, and its reasonable necessity to the beneficial enjoyment of the dominant portion." *Id.* "Proof of all elements of an implied easement must be by clear and convincing evidence." *Id.*

> Although one cannot in the true sense have an easement over one's own land, yet where one during the unity of ownership utilizes a part of his land for the benefit of another part, it is said that a quasi-easement exists. Upon the conveyance by the owner of one of such parts, an easement corresponding to the preexistent quasi-easement may arise, either for the benefit of the part conveyed as against the part retained by the grantor, which is called an implied grant, or for the benefit of the part retained by the grantor as against the part conveyed, which is referred to as an implied reservation. The implications may go either way depending on the essential circumstances. An implied reservation is more difficult to establish than is an implied grant. *A.J. & J.O. Pilar, Inc. v. Lister Corp.,* 38 *N.J.Super.* 488, 496 (App.Div.1956) (citation omitted).

***8** Here, Plaintiff purchased its property from Mr. Bond on September 4, 2003. The Bautistas purchased their property from Mr. Bond on January 22, 2004. Mr. Bond granted Lot 9, which is now owned by Philip Kolb, to Mark. J. Van Burik and James Cassella on August 28,

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2003. On January 7, 2004, Mr. Bond conveyed Lot 5, which is now owned by Patrick Dennigan to Vincent Buratti. On January 7, 2004, Mr. Bond conveyed lot 6, which is now owned by Mr. and Mrs. Pereira, to Adam Kravitz Builders, Inc. Accordingly, Plaintiff is seeking an implied grant against some Defendants and an implied reservation against others.

In order to establish a quasi-easement, Plaintiff must first demonstrate unity of title. *Poulos v. Dover Boiler Plate Fabricators,* 5 *N.J.* 580, 587 (1950). Here, Defendants concede that Plaintiff has conclusively established unity of title as all the properties affected by this litigation were at one time owned by the Kissels who later sold the properties to Mr. Bond.

However, for an implied grant of a quasi-easement to arise upon conveyance or severance of ownership, a permanent and obvious servitude must have been imposed on one part of the estate in favor of another part. *Cale v. Wanamaker,* 121 *N.J.Super.* 142, 146 (Ch. Div.1972). *"The servitude must have been in use at the time of severance* and have been necessary for the reasonable enjoyment of the other part." *Id.* (emphasis added). Here, severance of the unity of ownership occurred when Mr. Bond split up the properties and sold them to separate parties. Therefore, in order to succeed in its claim for a quasi-easement, all of the elements for a quasi-easement must be satisfied during the time period that Mr. Bond split up the properties.

A. *Apparent Use*

The first element of a quasi-easement is the "apparent use of the quasi-servient portion of the estate for the quasi-dominant portion." *Leach v. Anderl, supra,* 218 *N.J.Super.* at 26. Plaintiff alleges that its parcel is the quasi-dominant portion and Defendants' parking lot areas are the quasi-servient portions for the purposes of the quasi-easement.

Here, Plaintiff may have a difficult time demonstrating an apparent use of Defendants' parking lot. Plaintiff's property is not contiguous or adjacent to the parking lot. There are no signs indicating that tenants of Plaintiff's property should park on Defendants' property. Plaintiff claims that the municipal planning board issued a resolution requiring the parking area to be used by the owner and occupants of Plaintiff's property, but cannot produce the resolution, presumably due to a flood that destroyed many municipal documents. Moreover, Defendants recognized the lack of a cognizable easement and created their own driveway and parking easement in 2004. Plaintiff is not a party to that agreement.

Plaintiff makes several arguments in support of its position of apparent use. Plaintiff states that at the time it purchased the property all of the tenants had used the parking area for many years while they resided in the building. Plaintiff paid electric bills for the parking area lighting that was sent to its address after the closing and plowed the snow in the parking area. Moreover, Mr. Zamen, Fayez Ali and their contractors used the parking lot. Plaintiff also argues that at least one of its tenants, Dan Duggan, has used Defendants' parking lot. Defendant Fernando Bautista disputes the extent that Plaintiff's tenants used the parking area. This Court also notes that the parking area is partly on Mr. Dennigan's property and partly on the Bautista's property. Therefore, it is unclear which property Plaintiff's tenants may have parked their cars.

***9** Plaintiff argues that the parking lot predates Mr. Kissel and was probably there when his maternal grandfather owned the property. However, as discussed above, Plaintiff still needs to demonstrate an apparent use at the time of severance of title when Mr. Bond sold the property to them. Plaintiff cites to the multiple listing service, which states that Plaintiff's property had off-street parking at the time they purchased it. However, the listing does not state if this refers to Defendants' parking lot. Plaintiff certifies that its realtor, Ellen Zagey of Weichert Realtors, told Plaintiff that it could use Defendants' parking lot. However, Ms. Zagey denies making these representations.

Plaintiff also cites to minutes of the Borough of Bound Brook's planning board on October 9, 2003, which state in relevant part:

> Mrs. Pournaras asked about parking for [the Kissel] property. There is a back parking lot that is utilized by all the buildings, but it is no longer part of the parcel. On site parking could be created behind the building to preserve the look. They would like to put a driveway from Hamilton Street to the back of the building.

The board minutes were recorded shortly after Plaintiff purchased its parcel from Mr. Bond. They indicate that the board knew that all the buildings used the parking lot on Defendants' property, which tends to show an apparent use. However, the board minutes also talk about creating a new onsite parking lot on Plaintiff's property and building a new driveway. Therefore, it appears that the board realized that Plaintiff's would not be allowed to continue using Defendants' parking lot. Accordingly, it appears Plaintiff will not be able to demonstrate an apparent use.

B. *Continuous Use and the Permanent Character of the Quasi–Easement*

The second and third elements are the "continuous nature of the use" and "the permanent character of the quasi easement." *Leach v. Anderl, supra,* 218 *N.J.Super.* at 26. Here, there is no indication that there was any quasi-easement of a permanent character. During most of the time when there was unity of title between the properties subject to this litigation, cars gained access to the parking area through a driveway on lot 10, which is now eliminated as lot 10 is wholly occupied by a personal residence. (Deposition of Radzee Zaman, pp. 122, line 15 to pp. 124, line 17). In 2004, after the unity of title was severed, Mr. Kolb allowed a new driveway to be constructed across his property in Lot 9, which is inadequate for two-way traffic and cannot be widened without encroaching on neighboring lots. Defendants entered into an agreement with Mr. Kolb, allowing them use of the driveway to access the parking area. Plaintiff was not a party to this agreement.

The lot 9 driveway could not have been part of any quasi-easement because it did not exist at the time unity of title was severed. The lot 10 driveway that may have been historically used access the driveway has been demolished. Mr. Kolb currently owns lot 9 and not lot 10. Therefore, Plaintiff is attempting to use Mr. Kolb's property because of a quasi-easement it alleges was created in another parcel. This result would be grossly unfair to Mr. Kolb, who allowed the driveway to be created.

***10** Moreover, Mr. Zaman admitted at his deposition that there is no recorded easement or documentation that allows the tenants of his property to use Mr. Kolb's lot 9 driveway to access the parking area. (Deposition of Radzee Zaman, pp. 122, lines 1 to 24). Clearly, only Mr. Kolb may grant the use of his newly-created driveway to access the parking area. Accordingly, even if Plaintiff could somehow demonstrate that the quasi-easement to use the parking area was continuous or permanent in character, Plaintiff will not be able to demonstrate that the use of the lot 9 driveway to access the parking area was continuous or permanent.

Moreover, "implied easements are restricted to equivalent servitudes which are apparent, permanent, and of such a character of correspondence to the preexisting quasi-easement that it may, from the evidence, be presumed that the grantor and grantee in reasonable probability desired and intended their preservation." *A.J. & J.O. Pilar, Inc. v. Lister Corp.,* supra, 38 *N.J.Super.* at 497. Here, as discussed above, Mr. Bond created an express easement for parking rights on lots 4, 5, 6, and 9. Despite Mr. Zaman's claim that the deeds are in error, there is no indication that Mr. Bond intended to create or preserve parking rights on Plaintiff's lot 11. There is no easement grant in Plaintiff's deed from Mr. Bond. Mr. Zaman admits that there was no way Defendants could have had notice prior Defendants' purchase at closing that plaintiff might have the right to park on Defendants' property. (Deposition of Radzee Zamen, pp. 93, line 25 to pp. 95, line 9). Mr. Bond had every right to employ a new parking scheme for the properties after he acquired them and did not have to maintain the Kissels' parking scheme. Therefore, Plaintiff cannot satisfy these two elements of a quasi-easement.

C. *Reasonable Necessity*

The fourth element of a quasi-easement is "its reasonable necessity to the beneficial enjoyment of the dominant portion." *Leach v. Anderl, supra,* 218 *N.J.Super.* at 26. This Court notes that the requisite showing for a quasi-easement is a "reasonable" necessity and not an "absolute" necessity as is required to establish an easement by necessity. *See Id.* However, proof of a condition of mere convenience is insufficient to support a quasi-easement. *A.J. & J.O. Pilar, Inc. v. Lister Corp., supra,* 38 *N.J.Super.* at 497.

Here, Plaintiff cannot demonstrate a reasonable necessity to allow its tenants to park cars on Defendants' properties. Plaintiff's President Radzee Zaman admitted that the company is able to construct a small parking lot accommodating approximately twelve cars on its property in compliance with Borough ordinances and requirements.[2] (Deposition of Radzee Zaman, pp. 72,

line 8 to pp. 73, line 19). Mr. Zaman also admitted that his tenants have some parking available on the street or on the grass if there is a snowstorm. (*See Id.* at pp. 68, lines 11–22). Mr. Zaman further stated that if his tenants are allowed to use the parking lot they "are going to park in the most convenient place you will find. Which I think the majority of the time will be on the street." (*Id* at pp. 116, lines 4–8). Therefore, Plaintiff has not only failed to demonstrate a reasonable necessity to use Defendants' parking lot, but Plaintiff's President admits that street parking is more convenient for his tenants.

2 It appears that Plaintiff is able to construct this parking lot despite the fact that Plaintiff's property is a historical site.

***11** Additionally, Plaintiff's property is located in a close proximately to a train station and there is a nearby municipal parking lot. Plaintiff's argument that Defendants' could create more parking spaces in their parking lot is irrelevant because Plaintiff has no legal right to park on Defendants' property. Accordingly, Plaintiff is unable to produce the requisite clear and convincing evidence to establish a reasonable necessity.

D. *Conclusion of Quasi–Easement*

Plaintiff failed to demonstrate clear and convincing evidence necessary to sustain a cause of action for a quasi-easement, which Plaintiff contends is its best cause of action. Specifically, Plaintiff cannot demonstrate that it has a quasi-easement to use the lot 9 driveway to access the parking area or that it is reasonably necessary to allow Plaintiff to park its cars on Defendants' properties. Additionally, a quasi-easement is a type of implied easement. Here, Mr. Bond expressly granted a parking easement to lots 4, 5, 6, and 9, which excluded Plaintiff's lot 11. Mr. Bond's deed with Plaintiff makes no reference to an easement. Therefore, in order to conclude that Mr. Bond intended an easement to allow Plaintiff to use the parking lots, it would mean that Mr. Bond made a scrivener's error in at least two separate deeds. It is clear Plaintiff cannot establish a quasi-easement by clear and convincing evidence. Accordingly, count five must be dismissed as to all Defendants.

This Court notes that Defendants' argument of merger is not applicable to this matter. Under the doctrine of merger in the context of extinguishing an easement, a required element necessary for application of the doctrine is unity of title of the dominant and servient estates subsequent to creation of the easement. *Landy v. Cahn,* 348 *N.J.Super.* 592, 607 (App.Div.2002). Here, Plaintiff is alleging a quasi-easement, which requires unity of title. The Kissels sold all of the properties in this litigation to Mr. Bond, who later split the property up and sold it to the separate individuals. It is at this point that Plaintiff alleges the quasi-easement was created. When the Kissels sold the property to Mr. Bond, it did not change the unity of title because the properties were already in unity. Moreover, the quasi-easement could not have been created until the unity of ownership was severed. Therefore, the doctrine of merger would only come into play if a third party purchased all the properties subject to this litigation in the future, thus destroying any potential easements because of a new unity of title. However, Defendants' argument that Mr. Bond did not employ the same parking scheme as the Kissels is relevant to the "continuous use" element of the quasi-easement as discussed above.

Count Six–Easement by Necessity

Count six of Plaintiff's complaint alleges an easement by necessity because the occupants of Plaintiff's property are severely restricted due to the lack of adequate parking in the area.

> ***12** An implied easement by necessity arises by operation of law where an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor. Such an easement is found only in relation to the boundary conditions existing at the time of the original subdivision severing common ownership. An easement implied by necessity is predicated upon the strong public policy that no land may be made inaccessible and useless. Thus, unless a contrary intent is inescapably manifested, the conveyee is found to have a right-of-way across the retained land of the conveyor for ingress to, and egress from, the landlocked parcel. In contrast, an implied quasi-easement rests upon an owner's use preexisting the conveyance. *Ibid.*

An implied easement by necessity may be created due to the strong public policy that no land may be made inaccessible or useless. *Ghen v. Piasecki,* 172 *N.J.Super.* 35 (App.Div.1980); *Mandia v. Applegate,* 310 N.J.Super. 435 (App.Div.1998). Here, Plaintiff's property is not landlocked or useless. Plaintiff is seeking an easement to be allowed to park cars on Defendants' property. However, Plaintiff and its tenants are free to park on the street, on the grass, in the municipal parking lot or Plaintiff may build its own parking lot. Plaintiff's property is also within walking distance of a train station. Accordingly, Plaintiff has failed to show an absolute necessity to be allowed to park cars on Defendants' properties. Therefore, count six must be dismissed as to all Defendants.

Count Seven–Public Policy

Count Seven of Plaintiff's complaint is based on a public policy theory that "favors the use of the parking area to provide adequate neighborhood property." There is no cognizable cause of action that permits one person to infringe on the property rights of another because of parking concerns. Moreover, as discussed above, "[t]here is a firm public policy against judicially-created rights in strangers to the ownership by way of easement or of restrictive covenants running with the land." *Annunziata v. Millar, supra,* 241 *N.J.Super.* at 289. Accordingly, the public policy in New Jersey weighs against Plaintiff.

Moreover, Plaintiff is not without a remedy for its parking situation. Plaintiff may build its own parking lot or it may request that the town create adequate parking for the neighborhood. Accordingly, count seven of Plaintiff's complaint must be dismissed as to all Defendants.

Count Eight–Adverse Possession

The eighth count of Plaintiff's complaint seeks title by adverse possession. Traditionally, in order to "sustain a title through adverse possession, the claimant must establish possession of a certain character: actual and exclusive, adverse and hostile, visible or notorious, continued and uninterrupted." *Wilomay Holding Co. v. Peninsula Land Co.,* 36 *N.J.Super.* 440, 443 (App.Div.1955). In 1969, The Supreme Court of New Jersey discarded the requirement that the "entry and continued possession must be accompanied by a knowing intentional hostility and [held] that any entry and possession for the required time which is exclusive, continuous, uninterrupted, visible and notorious, even though under mistaken claim of title, is sufficient to support a claim of title by adverse possession." *Mannillo v. Gorski,* 54 *N.J.* 378, 386–87 (1969).

***13** "One criterion of adverse possession is that the use must be so open and notorious that an ordinary prudent person would be put on notice that the land is in actual possession of another." *Patton v. North Jersey Dist. Water,* 93 *N.J.* 180, 186 (1983). "The burden of proof rests on the party claiming title by adverse possession." *Id.* The true owner will not be charged with knowledge "unless or until it takes on characteristics of acts of dominion over the land." *Stump v. Whibco,* 314 *N.J.Super.* 560, 567 (App.Div.1998). Moreover, *N.J.S.A.* 2A:14–30 sets forth the statutory period for adverse possession and states in relevant part:

> Thirty years' actual possession of any real estate ... uninterruptedly continued by occupancy, descent, conveyance or otherwise, shall, in whatever way or manner such possession might have commenced or have been continued, vest a full and complete right and title in every actual possessor or occupier of such real estate, woodlands or uncultivated tracts, and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatsoever for the recovery of any such real estate, woodlands or uncultivated tracts.

"Two characteristics of an easement that distinguish it from a possessory interest are that an easement constitutes "a 'limited' use or enjoyment of the land" and "is not a normal incident of a possessory land interest." *J & M Land Co. v. First Union Nat'l Bank ex rel. Meyer,* 166 *N.J.* 493, 519 (2001).

If a Plaintiff seeks to establish title, then the statutory period is thirty years for cultivated land and sixty years for uncultivated land pursuant to *N.J.S.A.* 2A:14–30. *Id.* In *J & M Land Co.,* the Supreme Court rejected Plaintiff's claim for a prescriptive easement because Plaintiff was

operating under a claim of possession rather than merely use and enjoyment of the land. *See Id.* "It is well understood that "prescription" is the term usually applied to the acquisition of incorporeal hereditaments by adverse user, while "adverse possession" is the term applied in matters concerning title to lands." *Plaza v. Flak,* 7 *N.J.* 215, 219 (1951).

A. *Actual and Exclusive*

The first elements are that the adverse possession is actual and exclusive. Here, Plaintiff cannot demonstrate that the adverse possession is actual because the Kissels owned all of Defendants' and Plaintiff's properties until 2003. A property owner cannot adversely possess his own property. Moreover, Plaintiff cannot demonstrate that its possession is exclusive because all of the Kissel lots used the parking area. Therefore, Plaintiff cannot establish the first two elements of adverse possession.

B. *Adverse and Hostile*

Similarly, Plaintiff cannot satisfy the requirement that their use of the parking lot is adverse or hostile or under a mistaken claim of title for the statutory period. As discussed above, Plaintiff's and Defendants' property was owned by the Kissels until 2003. The Kissels could not have adversely possessed their own property. Therefore, the statutory period for Plaintiff's adverse possession claim could not have started until 2003, which is far short of the thirty years necessary to sustain a claim for adverse possession.

C. *Visible or Notorious and Continuous and Uninterrupted for the Statutory Period*

***14** As discussed above, Plaintiff will not be able to show that its use of the parking area was visible or notorious, continuous or uninterrupted for the thirty year statutory period. Moreover, Plaintiff's claim for adverse possession seems to be based on use and enjoyment of the parking area and not under a claim of title. Therefore, Plaintiff is really arguing an easement by prescription and not title by adverse possession. Accordingly, count eight must be dismissed as to all Defendants.

Count Nine–Prescriptive Easement

Count nine of Plaintiff's complaint alleges a prescriptive easement. "The nature of the user necessary for the creation of an easement by prescription is the same as that for the acquisition of title by adverse possession, *i.e.,* it must be adverse or hostile, exclusive, continuous, uninterrupted, visible and notorious for a period of 20 years." *Baker v. Normanoch Assn., Inc.,* 25 *N.J.* 407, 419 (1957). Plaintiff's argument for a prescriptive easement must fail for most of the same reasons discussed above. The Kissels owned all of Plaintiff's and Defendants' property until 2003. Therefore, Plaintiff cannot satisfy the twenty-year statutory requirement for a prescriptive easement or satisfy the requirement that the use of the parking lot is hostile or adverse. Moreover, it is unclear whether Plaintiff's use of the parking lot is continuous or open and notorious enough to satisfy those requirements of a prescriptive easement. Therefore, count nine of Plaintiff's complaint must be dismissed as to all Defendants.

Conclusion

Accordingly, for the reasons discussed above, Plaintiff's complaint must be dismissed as to all Defendants. This Court notes that Plaintiff may have claims against their realtor for alleged misrepresentations about the parking area. Plaintiff may file these claims in the Law Division.

VI. *Decision*

Accordingly, Plaintiff's complaint is hereby dismissed as to all Defendants.

All Citations

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