

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-013251

01/30/2017

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
L. Nelson
Deputy

MORNINGSTAR ROAD PROPERTIES INC

HEATHER BOYSEL

v.

GERALD FREEMAN, et al.

STEVEN C MAHAFFY

UNDER ADVISEMENT RULING

The Court has considered the following: (1) Defendants/Counterclaimants' Motion for [Partial] Summary Judgment and Statement of Facts filed on June 10, 2016; (2) Plaintiff's Response and Cross Motion for [Partial] Summary Judgment and accompanying Statement of Facts; (3) Defendants' Reply in Support of their Motion for [Partial] Summary Judgment; (4) Plaintiff's Reply in Support of its Cross-Motion for [Partial] Summary Judgment; and (5) the arguments of counsel presented at the December 1, 2016 hearing. It now makes the following findings and orders.

Factual Background

This case involves a dispute over the posting of signs by an easement holder on the servient estate.

Plaintiff Morningstar Road Properties, Inc. ("Morningstar") owns 35 acres of land in Cave Creek, Arizona. Defendants Freeman own contiguous property at 4856 East Morningstar Road. Donald and Shari Jo Sorchych own property contiguous to both the Freemans' property and Morningstar's property. The Freemans and Sorchychs are dominant tenants of an easement over Morningstar's property (the "Roadway Easement"), which is the sole means of ingress and egress to their property.

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The traveled part of the Roadway Easement is about eight feet wide and covered in compacted decomposed granite. Vehicles traveling on the Roadway Easement will sometimes pull into a drainage ditch to allow another vehicle to pass, causing the granite to collapse. The Roadway Easement is also prone to water damage. Defendants Freeman paid all of the expenses for repair and maintenance of the Roadway Easement until they successfully sued the Sorchychs for equitable contribution.

The Freemans have posted two signs related to the Roadway Easement. The first is posted below their address sign on the Morningstar Property at the beginning of the Roadway Easement. It states:

NOTICE – PRIVATE EASEMENT – FOR RESIDENTS AND GUESTS ONLY
– VIOLATORS WILL BE PROSECUTED UNDER A.R.S. CRIMINAL CODE
13-1502.

The second sign is posted on the other side of the Roadway Easement and reads:

NOTICE TO PROSPECTIVE BUYERS
PROPERTY OWNERS USING THIS PRIVATE EASEMENT ARE LIABLE
FOR MONETARY CONTRIBUTION AND SUPPORT FOR MAINTENANCE
ARIZONA LAW CV 09-0720
INFORMATION – CALL 480-488-7074 [the Freemans' phone number]

Morningstar's principal, Mark Stapp, states in his declaration that Morningstar "has not been using the Roadway [Easement] with any regularity," and that "in the last year, [he] has only visited the Morningstar Property once." There are currently no dwellings or offices on Morningstar's property, but it has plans to develop the property for residential use and now seeks to have the signs removed.

Legal Analysis

At oral argument, the parties agreed that the only issue before the Court is whether the Freemans had the right to post the signs at issue.¹ Each side is seeking declaratory relief in their favor on this issue.

¹ This is true despite the rather substantial briefing by the parties on Defendants' counterclaim for equitable contribution.

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Arizona has adopted §4.10 of the Restatement (Third) of Property (Servitudes), which both parties agree governs the issue presented to the Court. It reads as follows:

Except as limited by the terms of the servitude determined under § 4.1, the holder of an easement or profit as defined in § 1.2 is entitled to use the servient estate *in a manner that is reasonably necessary for the convenient enjoyment of the servitude*. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, *the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment*.

Comment c (emphasis added).

Defendants contend that the signs are reasonably necessary for their convenient enjoyment of the Roadway Easement because the signs are designed to keep motorists who are not property owners or guests from using the Easement, thereby reducing traffic and maintenance expense. In addition, the sign providing notice to prospective buyers of the obligation of owners to contribute to maintenance of the Roadway Easement is not only a correct statement of the law, but will arguably enhance actual notice to prospective buyers and help to ensure that no disputes or misunderstandings later arise as the result of this obligation.

Plaintiff argues that the signs are “not necessary to [Defendants’] ability to use the Roadway for their stated purpose of ‘ingress and egress.’” However, the signs do not have to be “necessary” for ingress and egress, but “reasonably necessary for [the] convenient enjoyment of the servitude.” Plaintiff has offered no evidence to undermine or contradict the reasons proffered by Defendants for the posting of the signs. The Court therefore finds that Defendants have established that the signs are reasonably necessary for their convenient enjoyment of the Roadway Easement.

Plaintiff further argues that even if Defendants can show that the signs are “reasonably necessary,” they will unreasonably interfere with Morningstar’s enjoyment of its property. As support for this contention, Plaintiff states in a conclusory fashion that the signs “are a visual nuisance that no reasonable person would want on their property.” Resp. at 8. However, it is undisputed that the current signs have been posted since at least 2008 without objection by Plaintiff or its predecessor until just before the filing of this lawsuit. Furthermore, the statement is simply an unsupported opinion.

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Plaintiff also claims that the signs “have a negative impact on Morningstar’s property because they ‘falsely stat[e] who is permitted to use the Roadway.’” *Id.* This is incorrect, however. Both parties agree that the Roadway Easement is private. Thus, the Freemans’ sign stating that its use is limited to owners and guests is correct. Any prospective purchasers of Morningstar property would qualify as “guests” of Morningstar and would be entitled to use the Roadway Easement.

Finally, Plaintiff has presented no evidence that the sign warning of the obligation to contribute to maintenance of the Roadway Easement will deter potential purchasers of Morningstar property. Indeed, it would be impossible for it to present such evidence without expert testimony or information gathered after development actually begins.

The Restatement requires the Court to try to reach a fair balance of the parties’ interests. The Freemans have a valid interest in keeping traffic on the Roadway Easement to a minimum since they and the Sorchychs are the only owners contributing to its maintenance and repair. They also have a valid interest in providing notice to potential purchases of their obligation to contribute to the maintenance of the Roadway Easement to avoid future disputes. The fact that they have already had to sue their neighbors for contribution reinforces this position.

Morningstar has not even begun development of its property and its principal has stated that he has visited the property only one time in the last year and that the company has not been using the Roadway Easement “with any regularity.” Thus, it is hard to imagine how the Freemans’ signs are unreasonably interfering with Morningstar’s enjoyment of its property.

The Court therefore finds that Defendants are entitled to maintain the posted signs. However, as discussed at oral argument, circumstances could change in a way that would render this ruling no longer supportable, or at least subject to reconsideration. For example, once Morningstar begins development of the property, evidence may come to light that the signs do have a deterrent effect on prospective purchasers. Or, if the Roadway Easement is ultimately recorded, there would be no need for the sign warning prospective purchasers of the obligation to contribute to the cost of maintenance and repair.² Thus, the declaratory relief order must explicitly provide that the order may be reconsidered, modified or vacated if warranted by changed circumstances.

For these reasons,

² The Court questioned counsel about recording the Roadway Easement and the obligation to contribute to its maintenance and repair, but they have apparently been unable to stipulate to specific terms.

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IT IS ORDERED granting Defendants/Counterclaimants' [Partial] Motion for Summary Judgment on their Counterclaim for Declaratory Relief and denying Plaintiff's [Partial] Motion for Summary Judgment regarding same.

IT IS FURTHER ORDERED that, pursuant to the Court's December 1, 2016 minute entry, the parties shall meet and confer regarding the proposed form of order to ensure it complies with the terms of this ruling. They shall submit the form of order to the Court by **February 7, 2017**.

IT IS FURTHER ORDERED affirming the Trial Setting Conference set on **March 15, 2017 at 8:30 a.m.**, in this division.

**THE HONORABLE DAWN BERGIN
MARICOPA COUNTY SUPERIOR COURT
EAST COURT BUILDING
101 W JEFFERSON
7TH FLOOR, COURTROOM 713
PHOENIX, AZ 85003
602-372-2961 TEL**

Plaintiff shall initiate the conference call.

NOTE: Counsel shall be available for the conference call on a telephone land line and not on cellular phones, in order to maximize all participants' ability to hear and be heard.

Note: Counsel shall have their calendars available for this proceeding.

NOTE: All court proceedings are recorded by audio and video method and not by a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140 for a half-day and \$280 for a full day.