

SUPREME COURT OF NOVA SCOTIA
Citation: *Romkey v. Osborne*, 2017 NSSC 290

Date: 20171109
Docket: Hfx No. 460044
Registry: Halifax

Between:

Paul Romkey, Christine Romkey
Plaintiffs as Respondents

v.

Robert Osborne
Defendant as Applicant

Judge: The Honourable Justice Ann E. Smith

Heard: October 16, 2017, in Halifax, Nova Scotia

Counsel: Craig Arsenault, for Plaintiffs as Respondents
Kathryn Dumke, Q.C., for Defendant as Applicant

By the Court:

Introduction

[1] Robert Osborne, the Defendant/Plaintiff by Counterclaim, applies for summary judgment on evidence pursuant to *Civil Procedure Rule 13.04*. Paul and Christine Romkey, the Plaintiffs/Defendants by counterclaim, oppose the motion on the basis that there are genuine issues of mixed fact and law in dispute which require a trial.

[2] The underlying action is a land dispute between the parties and concerns a right of way which Mr. Osborne has across a portion of lands owned by the Romkeys. The Romkeys agree that Mr. Osborne has a deeded right of way across their property. They say that the right of a way is a meandering 20-foot wide footpath to the shore of St. Margaret's Bay. Mr. Osborne says that there is no 20-foot wide footpath to the shore, that the footpath is a straight line to the shore from a point 20 feet to the south of the northeastern corner of the Romkey property.

[3] Mr. Osborne also says that he has another, distinct deeded right of way over the Romkey property, which is 12 feet wide, and with the words in the description of the right of way being explicit and so broad as to put no limits on his use of the right of way. He says that he can construct a road within the limits of the right of way and use the road for commercial purpose if he decides to do so.

[4] The Romkeys have brought an action against Mr. Osborne in trespass claiming damages for the loss of 80 mature trees on their property which Mr. Osborne cut down. They calculate this loss at over \$78,500.00. The Romkeys seek a permanent injunction to prevent Mr. Osborne from cutting trees or making any other changes to their property. They also seek a declaration that the right of way is a 20-foot wide footpath as described in their deed dated July 18, 2008.

[5] Mr. Osborne defends the action and counterclaims for damages he says he suffered when the Romkeys successfully obtained an *ex parte* order for an interim injunction on February 3, 2017, later amended by the Court on February 22, 2017. Mr. Osborne also claims in trespass against the Romkeys. He seeks an injunction to prevent the Romkeys from interfering with his alleged 12-foot wide right of way over their property.

[6] The issue for the Court to resolve is whether, pursuant to *Civil Procedure Rule 13.04*, Mr. Osborne has met the burden of showing that there is no genuine issue of material fact, whether on its own or mixed with questions of law, for trial and that the claim does not require the determination of a question of law.

[7] The *Rule* makes it clear that I must grant summary judgment in the absence of a genuine issue of material fact for trial and when there is an absence of a question of law, either on its own, or mixed with fact, requiring determination.

[8] The evidence before me was the Affidavit of Robert Osborne, sworn June 21, 2017 and the Affidavit of Paul Romkey sworn September 28, 2017. Neither affiant was cross-examined.

Background

[9] Mr. Osbourne owns land in Boutilier's Point, Nova Scotia on the west of Highway No. 3 identified by PID 40248221 (the "Osborne Property"). This parcel is not an oceanfront property.

[10] The Romkeys are joint owners of the property known as 31 Lerwick Lane, Boutilier's Point, Nova Scotia, identified by PID 40047797 ("31 Lerwick Lane", or the "Romkey Property").

[11] Prior to June 15, 1960, both 31 Lerwick Lane and the Osborne Property were part of a larger parcel owned by the late Thomas Osborne and his wife Sarah Osborne.

[12] In 1956 Thomas and Sarah Osborne subdivided their large parcel of land in Boutilier's Point abutting on St. Margaret's Bay. Their first subdivision of those lands in 1960 created three lots: Lots 1, 2 and 3, in addition to the remainder lot.

[13] Thomas and Sarah Osborne also owned a piece of property directly across Highway 3 which is now the Osborne Property.

[14] On June 5, 1960, Thomas and Sarah Osborne conveyed the Osborne Property to their son, Harold Osborne (Robert Osborne's grandfather). The parcel description for this property refers to a right of way described as follows:

TOGETHER WITH a right of way in common with the Grantors and all other persons having a similar right at all times and for all purposes for the Grantee, his heirs and assigns, the owner or owners for the time being of the above described

lands and his and their agents, servants and workmen with or without animals or vehicles through, along and over the right of way shown on a certain plan dated November 8, 1956, prepared by John A. McElmon, P.L.S. entitled “Subdivision lot of land owned by Thomas E. Osborne” at Boutiliers Point from the western side of the said highway as shown on the said plan to the eastern boundary of lot No. 1 as shown on the said plan and thence proceeding by a strip of land twelve feet wide along the southern and eastern boundaries of said lot No. 1 until it meets shore of St. Margaret’s Bay at high watermark at a point immediately to the south of the southwestern corner of said lot No. 1 as shown on said plan, the said lands and the said right-of-way being immediately across this said highway from the lands hereinbefore described.

(emphasis added)

[15] This 12-foot wide strip of land (the “Osborne right of way”) was part of the remainder lands of Thomas and Sarah Osborne.

[16] The Osborne Property remained in Harold Osborne’s ownership until he died. In the course of Probate proceedings, the property was conveyed to Robert Osborne on December 15, 2015. The deed into Robert Osborne refers to the Osborne right of way described in the 1960 conveyance from the Osbornes to Harold Osborne referred to above.

[17] Less than four years after Thomas and Sarah Osborne conveyed the Osborne Property to their son Harold, they further subdivided the remainder parcel creating Lots 4 and 5. Lot 5 is now the Romkey Property. Thomas and Sarah Osborne conveyed the title of Lot 5 to Joseph and Winnifred Bradshaw on February 7, 1964 by deed which refers to a “foot path” across Lot 5, but makes no mention of the 12-foot wide right of way in the deed to the Osborne’s son, Harold:

RESERVING OUT OF AND FROM the aforesaid Lot No. 5 a right-of-way to use a foot path across said Lot No. 5 from the foregoing right of way to the shore, such right to be the right to go by foot over the said land, said foot path going from the eastern boundary of said Lot No. 5 at a point approximately 20 feet south from the northeastern corner of said Lot No. 5 as shown on the said plan by a line approximately parallel to the northern boundary of said Lot No. 5 as shown on the said plan to high water mark at the shore, said right also to include the right to use and enjoy the beach on the said shore below high water mark, the aforesaid right being hereby reserved to the owners from time to time of the Lots No. 1, 2, 3 and 4 as shown on the said plan and the owner or owners of the land shown on the said plan under the name “Thomas Osborne” and the owner for the time being of the land across the Highway No. 3 from the aforementioned lands now owned by H. Osborne, together with their and each of their servants, agents and guests, the aforesaid foot path and beach rights to be used only for normal pleasure purposes.

(emphasis added)

[18] The footpath is also described in the deed conveying the Romkey Property to them from Susan Mathieu and S. Gordon Phillips on July 18, 2008.

[19] The Romkeys say that they understand that their property, 31 Lerwick Lane, is subject to a private right of way which provides a footpath across their property to St. Margaret's Bay. They say that that footpath is approximately 20 feet wide. In the eight years or so since they have owned their property, the Romkeys have seen property owners from the other lots on Lerwick Lane using this right of way by foot to access the shoreline. They say that the general location of the right of way is wooded, with large boulders.

[20] As noted above, Robert Osborne claims that he has a 12-foot right of way, created in the 1960 deed to his grandfather, across the Romkey Property. He claims the right to construct a road across his alleged right of way to the shore of St. Margaret's Bay. He says that the existence of the footpath is not a material fact in dispute because the footpath (by his interpretation of the 1964 deed) falls completely outside his 12-foot wide right of way. However, the Romkeys say that Mr. Osborne's 12-foot wide right of way is a right of way by foot only, and that it was encompassed into the 20-foot wide footpath in the 1964 deed.

Law and Analysis

[21] *Civil Procedure Rule 13.04* provides as follows:

Summary judgment on evidence in an action

13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:

(a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;

(b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

(2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

(3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

(5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

a) determine a question of law, if there is no genuine issue of material fact for trial;

b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[22] The parties have referred me to much of the same case law. The law as it relates to the test for summary judgment is really not in dispute.

[23] Mr. Osborne argues that the 1960 deed which incorporates the Osborne right of way permits him to construct a road over the right of way. He argues that the wording in the deed is "clear with respect to the location, nature, and scope of the right of way" and that, accordingly, the language of the express grant does not require interpretation and the consideration of extrinsic factors. He says that there are no material facts in dispute and no questions of law requiring a trial. Accordingly, he says that the Court must grant summary judgment.

[24] I do not agree. I find that the language of the Osborne right of way is ambiguous with respect to the nature and extent of the grant. I find that there are genuine issues of material fact, or mixed fact and law, that require a trial.

[25] One of those material facts in issue is whether the 1960 deed granted a right to install a road, or whether the right of way was intended to only provide access by foot to the shore.

[26] In that regard, the Romkeys say that the express grant to Robert Osborne should be interpreted to provide for two components of the right of way. They say that Thomas and Sarah Osborne wanted to convey to their son Harold the right to travel from his lot across the highway and across the marked right of way, to the

edge of Lot No. 1 “with or without animal or vehicle” and “with servants and workmen.” The 1956 Plan, referenced in the Osborne right of way, shows that there is a road and the road ends at the eastern boundary of Lot No. 1. The Romkeys say that the wording, of what they say is the second component of the grant, shows that the Grantors intended to give their son a grant to “proceed” along the eastern and southern boundaries of Lot No. 1, by a strip of land 12 feet wide, to the water. They say that this second component of the grant is unclear as to whether the intention was that it conveyed the right to proceed by vehicle (as claimed by Robert Osborne) or by foot (as claimed by the Romkeys).

[27] The undisputed evidence before me is that the general location of the disputed right of way is down a sharp embankment to the water. The Romkeys say that there was never an intention that the Grantee of the right of way could drive down the steep escarpment to the shoreline.

[28] The Romkeys find support in their contention that the grant of right of way has two components in the final sentence which states:

...the said lands and the said right-of-way being immediately across this said highway from the lands hereinbefore described.

(emphasis added)

[29] They say the reference to the “said lands” is to the 12-foot wide strip of land and the reference to “the right of way” is the right of way which is clearly shown on the 1956 Plan.

[30] The Romkeys say that the 1964 deed to a non-Osborne family member is consistent with the 1960 deed to the Osborne’s son. The 1964 deed refers to the right to drive vehicles across Lerwick Lane, it identifies Mr. Osborne’s property across the highway, refers to the reservation of the right to the owners of Lots 1, 2, 3 and 4 and gives a right of access to the shoreline. They say that unlike the 1960 deed, the 1964 deed clarifies that access to the shoreline is by foot only. The Romkeys say that the deed effectively expands the former grant from 12 feet wide to 20 feet wide. They say there is no reason to conclude that the Osbornes would have forgotten about the 12-foot wide right of way they had deeded to their son less than four years before. It is obviously not mentioned in the 1964 deed. The intent of Sarah and Thomas Osborne, they say, was to make it clear to a non-family member that the right was to go by foot from the end of the road to the shore, just as it had been for their son.

[31] Mr. Osborne argues that the grant in the 1960 deed could not have been clearer.

[32] The Romkeys, however, say that extrinsic factors need to be employed in interpreting the nature and extent of the Osborne right of way. They refer to factors referred to by Scaravelli J. in *Oostdale Farm v. Oostvogels*, [2016] N.S.J. No. 214, such as (1) the historic use of the easement; (2) the physical conditions which existed at the time of the grant; (3) the purpose for which the easement was granted; and (4) the subsequent conduct of the parties.

[33] The Romkeys also argue that even in the absence of the 1964 deed, which they say constitutes very clear conduct on the part of the Osbornes to clarify that the 1960 right of way includes a footpath to the shore, the Court should consider implied restrictions on the nature, extent and scope of the Osborne right of way in order to properly interpret the 1960 deed. They rely on the decision of this Court in *Yeomans v. Bourgeois*, [1993] 128 NSR (2d) 225 which identified factors to consider in determining whether there are implied restrictions on the mode of transport. These include the circumstances prevailing at the time of grant, the relationship of the parties and their respective properties, the physical position of the right of way and the purpose the right of way was intended to achieve.

[34] As noted above, Robert Osborne's argument is that he alone can access the shore by his 12-foot strip of land right of way. He says that all other owners on Lerwick Lane can only access the shoreline by walking through the woods in an absolute straight line from a point exactly 20 feet from the boundary.

[35] I find that the Romkeys have raised the following issues of mixed fact and law which require a trial:

- Whether or not the 1960 deed granted a right to install a road to the shoreline;
- Whether the 12-foot right of way is adjacent to the 20-foot right of way (as claimed by Robert Osborne) or whether it is encompassed within the 20-foot right of way (as claimed by the Romkeys);
- Whether Robert Osborne's intended commercial use of the Osborne right of way is permitted, or whether that use overburdens the right of way;
- Whether, if the Osborne right of way grants Robert Osborne the right to install a road, Robert Osborne's actions in cutting down 80 trees, despite the

involvement of lawyers and over the objections of the Romkeys, were reasonable.

[36] These matters can only be resolved by a trial.

[37] Nothing said in this decision is meant to pre-judge any of the issues to be determined at the trial.

Conclusion

[38] The motion for summary judgment is dismissed with costs to the Romkeys. If the parties are unable to agree on costs, I will receive submissions within 30 calendar days of today's date.

Smith, J.