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July 13, 2023

Neighbour dispute over driveway and location of well ends up in court

By James R.G. Cook

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James R.G. Cook
Partner
416.865.6628
jcook@grllp.com

Disputes between neighbours over property boundaries and rights-of-way are often messy and fraught with charged emotions as each party asserts their respective claims. Such disputes may require the court to review title documents dating back many decades to determine when historical rights-of-way have been created or extinguished.

Bender v. Dulovic, [2023 ONSC 2536 (CanLII)], involved a dispute between two neighbours in Ayr, Ontario, over the use of a driveway and the location of a water well.

The applicant owned her property since 2001, firstly with her father as joint tenants and then on her own after her father passed away in 2017.

The respondent obtained title to his property in September 2019. Prior to that time, the applicant's father held title to the property before it was sold by his mortgagee to the respondent under power of sale.

Upon taking possession, the respondent began travelling over a driveway on the applicant's property and drawing water from a well on her property. The applicant's evidence was that the well was disconnected in July 2019, before the respondent acquired his property, and that he took steps to re-connect it without permission. The applicant also claimed that the respondent had disposed of garbage on her property, cut down trees, and otherwise interfered with her use of the property.

The applicant commenced proceedings seeking a declaration that the property owned by the respondent had no right-of-way, easement or any other right of travel over her property, including by use of the disputed driveway, and an order prohibiting the respondent from using the well.

The respondent disputed that the well was disconnected and argued that he had only ever performed regular

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maintenance thereof. He sought an order that the part of the applicant's property that included the subject driveway and water well were actually part of his property. Alternatively, he argued that his property did have a right-of-way over the applicant's property to use the driveway and well.

The dispute was eventually adjudicated by the Ontario Superior Court of Justice in 2023. The parties filed expert reports regarding the boundaries and rights-of-way. Title to the properties was traced back to the mid-1900s. Predictably, the experts disagreed on the status and scope of historical easements affecting their clients' properties.

The application judge first assessed whether the respondent owned the portion of the applicant's property containing the driveway and water well.

The survey evidence showed that the driveway and well were situated on the applicant's land. There was no substantive evidence produced by the respondent, in any expert reports or surveys, that established that the boundary lines were improperly located or moved by any of the surveyors. The dispute before the court was not an application made under the Ontario *Boundaries Act*, which would have been the most appropriate forum to obtain a ruling confirming the true location on the ground of the boundaries of the properties. The court was not prepared to make findings that were contrary to the survey evidence.

One of the issues was that the respondent was claiming title to portions of the land on the applicant's property that were shown as rights-of-way when the properties were owned by different people. However, the rights-of-way had merged to form part of the whole of the applicant's property when predecessors in title became the common owners of the lands. As a result, the application judge determined that the driveway and well were located within the boundaries of the applicant's property and the respondent did not own the lands on which they were located.

Notwithstanding that he did not own the land on which the rights-of-way were located, the respondent claimed a right to use them by way of prescriptive easement. As the two properties had been converted into the Land Titles system in 2003, the respondent needed to prove that a presciptive easement had been established for 20 years by that time.

However, since the applicant's father was the owner of both properties before the respondent acquired his property in 2019, the court determined that any prescriptive easements that may have existed had been extinguished by operation of law. Simply put, one cannot hold an easement over their own property: *Siegel v. 22 Shallmar Inc.*, 2004 CanLII 43911 (ON SC), at paragraph 7.

The court noted that the outcome may have been different if it was the respondent's property that had been jointly owned by the applicant and her father since, in that situation, extinguishment of the easement on the basis of one of the joint owners also being the owner of the land subject to the easement would be to deny the other co-owner their right to the easement they were jointly granted. The outcome may also have been different if the applicant and her father had owned her property as tenants in common. However, neither of these circumstances were present in the matter at hand. The respondent's claim for a prescriptive easement therefore failed.

Lastly, the respondent argued that he should have an implied "easement of necessity" on the basis that his property was inaccessible except by passing over driveway on the applicant's land. The concept of an implied easement of necessity arises from the premise that the easement is "an implied grant allowing the purchaser to access

the purchased lot": *Toronto-Dominion Bank v. Wise*, 2016 ONCA 629, at paragraphs 20-21.

The existence of such an easement, however, is based on whether it is necessary to use or access the property. If access without it is merely inconvenient, the easement will not be implied.

The respondent argued that he could not access his property from another location because the grade of the road was not the same as the grade of his property and there would be safety and regulatory concerns in adding an access point. The application judge was not satisfied that the respondent had proven either that the claimed easement of the driveway was necessary, or that he could not dig another well on his own property. As a result, the claim for an implied easement of necessity was dismissed.

In the result, the applicant established her legal rights to quiet enjoyment of the entirety of her property as outlined by the boundaries described in a survey she obtained in 2020. The court, however, provided the respondent with a limited period of time to use the driveway and the well while he made alternative arrangements.

The court declined to make any adverse findings of harassment or other improper conduct on the respondent's part, since the evidence was that he reasonably believed he had title to or an interest in those lands that entitled him to act the way he did. For the same reasons, the court declined to order any damages for trespass, nuisance, or loss of enjoyment of the applicant's property.

The application judge concluded by stating that it was the court's expectation that the respondent would respect the applicant's ownership rights and not interfere with her property. It will be up to the neighbouring property owners to try and resolve any further issues amicably without police or judicial intervention.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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