IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LITTLE ITALY PRESERVATION PARTNERS, LLC	)	**CASE NO: CV 09 698180**
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
vs	)	
LITTLE ITALY DEVELOPMENT, LLC	)	**JOURNAL ENTRY**
Defendant.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Plaintiff Little Italy Preservation Partners, LLC,[1] filed its amended complaint on November 30, 2009. Count II of the amended complaint requests a declaratory judgment that an easement granted in 1951 remains valid and in effect. Count III is a cause of action to quiet title consistent with the terms of the 1951 easement to remove a cloud on the title created by the defendant's adverse claim to the easement area. Count I seeks a permanent injunction preventing the defendant from interfering with the plaintiff's use of the 1951 easement.[2]

In its amended counterclaim of December 14, 2009, defendant Little Italy Development, LLC,[3] seeks a declaratory judgment that the 1951 easement has terminated. Count II of the

[1] Little Italy Preservation Partners, LLC may be referred to throughout this entry as LIPP or as the plaintiff.
[2] This entry addresses only the continuing validity of the 1951 easement. The parameters of the easement, including whether there is a gap in the easement area (the subject of Count IX of the amended complaint) will be considered later, as will the remainder of the causes of action asserted in the amended complaint. Hence, this entry resolves only Count II of the amended complaint.
[3] Little Italy Development, LLC may be referred to throughout this entry as LID or as the defendant.

amended counterclaim is a cause of action to quiet title by removing a cloud on title created by the plaintiff's claim to a right to use the easement area.[4]

Each party has now filed a separate motion for summary judgment: LIPP asking the court to declare that the 1951 easement is valid and remains in effect and LID asking the court to declare that the easement terminated no later than 2001. The court has considered those motions, opposition briefs to each, reply briefs to each opposing brief, the defendant's supplemental reply to the plaintiff's brief in opposition to its motion for summary judgment, and the plaintiff's surreply to that supplemental reply. This entry follows.

STATEMENT OF FACTS

The plaintiff and the defendant own adjoining parcels of land in the Little Italy neighborhood of Cleveland. Both parcels are south of Euclid Avenue and north of Mayfield Road, although the plaintiff's land does not extend to Mayfield. The plaintiff's property is bounded on the northeast by Coltman Road. The defendant's property is bounded on the west by railroad tracks. East 119 Street is owned by LID (having been vacated as a public road by the City of Cleveland in 1929) and is the eastern edge of its parcel. The western boundary of the plaintiff's land abuts East 119.[5]

All of the land was previously owned by the New York, Chicago and St. Louis Railroad Company. In 1947 the railroad granted what is now the plaintiff's property to the Pocahontas Oil Company. Four years later, the railroad granted to Pocahontas the easement at issue in this case.

---

[4] Counts III and IV of the counterclaim allege that the plaintiff's claim of right under the 1951 easement constitutes a slander of the defendant's title and a claim that the plaintiff has violated the terms of a stipulated preliminary injunction. Additionally, Count II also seeks to quiet title to the alleged gap in the easement.

[5] This description is for simplicity's sake. The court understands that the 14' x 400' notch for ingress/egress lies to the east of the private road and that the defendant claims there is a gap between the ingress/egress notch and East 119.

The 1951 easement conveyed a parcel of property varying in width from 20 to 34½ feet and about 1,400 feet long, running north and south from Coltman Road (known then as East 121) to Mayfield Road. Included in the easement was a notch of additional property 14 feet wide and 400 feet long that was contiguous with the western edge of the plaintiff's property beginning at its southern edge. The notch was granted for ingress and egress to and from the plaintiff's parcel.

The easement granted to Pocahontas and its successors and assigns the use of this property for driveway purposes, together with the right of ingress and egress over the notch. The easement provides, in pertinent part:

> [T]he easement herein granted unto the said Grantee, its successors and assigns, so long as it shall continue to use the within described premises for driveway purposes; and the said Grantee for itself and its successors and assigns agrees . . . that whenever it or its successors and assigns shall cease to use the within described premises for driveway purposes then, and in that event, all right, title and interest of the Grantee, its successors and assigns in and to the easement hereby granted shall cease.

With reference to this easement, the plaintiff's property became the dominant estate and the defendant's the servient estate.[6]

The railroad owned the servient property until selling it to the defendant in October, 2006. The dominant estate has changed hands a few times, with the most recent relevant owners being the Cuyahoga Metropolitan Housing Authority from 1996 until 2002, Coltman Road LLC from 2002 until 2008, and LIPP from 2008 until the present.

Most of the pertinent facts are not in dispute; the parties disagree over their legal significance. There is no question that the 1951 easement has at all times been properly recorded. It has also been established that when Coltman Road, LLC[7] bought the property from CMHA, it applied for a grant from the State of Ohio for public funding to remediate

[6] See *Warren v. Brenner* (1950), 89 Ohio App. 188, 192: An easement appurtenant requires a dominant tenement to which the benefit of the easement attaches and a servient tenement upon which the obligation or burden rests.
[7] Coltman Road, LLC is a member of Little Italy Preservation Partners, LLC.

environmental contamination on the property. As a condition for that grant, Coltman Road, LLC certified that the dominant estate was "vacant or abandoned." However, that application contained no representations about the current use of the easement.

Each party has now filed a motion for summary declaratory judgment. The plaintiff asks for a judgment that the easement remains valid and subsisting. The defendant seeks a judgment that the easement has terminated.

LAW AND ANALYSIS

Ohio Revised Code section 2721.03 allows "any person interested under a deed" to bring a declaratory judgment action for the purpose of determining "any question of construction or validity arising under the instrument." A grant of an easement is a deed and is a proper subject for a declaratory judgment action.[8] An action for declaratory judgment which has as its principal purpose the interpretation of a written instrument, such as a deed, and a declaration of the rights of the parties, is equitable in nature.[9] Equitable relief should not be granted unless a clear right to such relief has been demonstrated.[10]

The construction of a deed is a matter of law for the courts.[11] The cardinal rule in the construction of deeds is that the parties' intention at the time of the execution controls.[12] Contracts are to be interpreted to carry out the intent of the parties as evidenced by the actual language of the contract.[13] When the language of a written contract is clear, a court may look no

[8] An easement may be created by any one of four methods: by grant, implication, prescription, or estoppel. *Gateway Park, L.L.C. v. Ferrous Realty Ltd.*, 2008-Ohio-6161, Cuyahoga Co. App. No. 91082, at ¶29. In this case the easement was created by a grant separate from the 1947 grant by the railroad of the dominant estate.
[9] *Skelton v. Skelton* (1955), 163 Ohio St. 409.
[10] *Mock v. Boyle* (1949), 53 O.L.Abs. 567.
[11] *Ball v. Crabtree* (Dec. 10, 1998), 4th Dist. App. No. 97 CA 2557, 1998 WL 895911, unreported.
[12] *Sword v. Sword* (1993), 86 Ohio App.3d 161.
[13] *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 248.

further than the writing itself to find the intent of the parties.[14] As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.[15]

In this case, the terms of the easement are unambiguous: it terminates only if the grantee uses the easement area for a purpose other than as a driveway, but not if the grantee stops using it at all.

Initially, there can be no doubt that "the within described premises" refers to the easement area and not to the dominant estate itself. The deed says that the easement is granted over the land "described as follows" and thereafter sets out the dimensions of the easement area, but then reserves to the grantor the full use of said "described" land for purposes not inconsistent with the grantee's easement. Then, the grant, before naming the event of termination, notes that the easement will exist while the grantee uses "the within described premises" for driveway purposes. Considering "the within described premises" as meaning the dominant estate leads to a nonsensical interpretation: that the deed requires the grantee to use its own land for driveway purposes.

As a result, the fact that a predecessor of the plaintiff may have "abandoned" the dominant estate itself – although possibly justifying an inference that the driveway easement was not being used at all, much less as a driveway – is not conclusive of what use, if any, was made of the easement during the period of abandonment.

But even assuming that CMHA, or another predecessor, did not use the easement at all for a period of years, it still did not terminate. The easement terminates when the grantee "shall cease to use the within described premises for driveway purposes." This means what it says: the easement terminates if the grantee puts the easement property to a use other than driveway

[14] *Blake v. Thornton*, 182 Ohio App. 3d 716, 2009-Ohio-2487, at ¶15.
[15] *Id.*

purposes (*e.g.*, parking, landscaping, a fence or other structure, etc.). It doesn't terminate by non-use alone. If the grantor intended the easement to terminate and revert at any time that it wasn't being used at all, there was no need to include the prepositional phrase "for driveway purposes" as an adverb to modify the verb "use." Instead, the grant would have omitted the words "for driveway purposes" so that it would simply terminate when the grantee "shall cease to use the within described premises."

To adopt the defendant's interpretation – that the easement terminates as soon as the grantee stops using it at all – renders the modifier meaningless, since it is abundantly clear from the remainder of the deed that the only authorized use is for driveway purposes. The court presumes that the deed does not include extraneous language and therefore will not interpret the contract as if it does.[16]

An examination of the rest of the deed supports the interpretation that the easement terminates only if it is used for something other than as a driveway. The recitals at the beginning of the deed note that the railroad had conveyed the dominant estate to Pocahontas Oil four years earlier. Before then, the railroad owned both of what became adjoining parcels and did not need someone else's permission to use East 119, a private road of longstanding. The intent of the railroad to keep East 119 as a road for the dominant estate, and to terminate the easement if the grantee used it for something other than a driveway, may be inferred from the fact that the creation of the easement codified the *status quo* that had existed between the parties since 1947 and between the parcels for many years before that.

Additionally, the grantor retained the right to use the easement area in a way not inconsistent with the grantee's use as a driveway, and to grant driveway easements to others.

[16] See, *e.g.*, *Lo-Med Prescription Servs., Inc. v. Eliza Jennings*, 2007-Ohio-2112, Cuyahoga App. No. 88112, at ¶18: contracts must be interpreted in a way that renders all provisions meaningful and not mere surplusage.

This suggests an intention that the area would always be used as a road since there aren't many imaginable uses of the easement area other than as a road that would be consistent with the grantee's use as a driveway.

The court recognizes that its interpretation may have the practical effect of creating an easement in perpetuity provided the plaintiff or its successors never use the area for some purpose other than a driveway. But nothing in the contract dictates a different result. The grant was, and is, terminable only when put to a prohibited use, not when either a prohibited use or non-use occurs. Indeed, an interpretation that non-use alone terminates the easement leads to a conclusion that this was no easement at all, since the grantor could terminate after any period of non-use, no matter how short.[17] That cannot be what the parties intended.

CONCLUSION

The 1951 easement is terminable by the grantor or its successor only if the grantee or its successor uses the easement area for a purpose other than as a driveway. The easement does not terminate if it is not used at all for some period of time. There is no evidence in this case that the grantee or its successors, including the plaintiff, have ever used the easement for purposes other than a driveway.

The court therefore declares that the easement remains in effect. The plaintiff and its successors remain prohibited from using the easement area[18] for anything other than driveway purposes, but shall have the benefit of the easement so long as it is used as a driveway or not at all. The defendant and its successors retain the right to the full use of the easement area not inconsistent with the right granted to the plaintiff and its successors by the easement.

---

[17] Although the cause of action is not decided here, this interpretation would create difficulties for the defense of the claim for prescriptive easement since use by the grantees and their successors since 1951 could be deemed as without permission and inconsistent with the railroad's property rights.

[18] Since this entry does not address the question of a "gap" and the specific boundaries of the easement area, the plaintiff's cause of action to quiet title is not yet fully resolved.

Consistent with this conclusion, summary declaratory judgment is entered: in the plaintiff's favor on Count II of its amended complaint; in the plaintiff's favor on the portion of Count I of the amended counterclaim seeking a judgment that the easement has terminated; in the plaintiff's favor on the portion of Count I of the amended counterclaim seeking a judgment that the easement has terminated because of the plaintiff's change in use of the dominant estate[19]; and in favor of the plaintiff on Count III of the amended counterclaim for slander of title. All other causes of action in the amended complaint and amended counterclaim remain pending for later adjudication.

IT IS SO ORDERED:

_____ _____

Judge John P. O'Donnell Date

[19] Although this argument was not fully briefed, the issue is not difficult to decide. Nowhere in the easement can an intent be found to terminate it if the grantee or its successors use the dominant estate for a non-industrial purpose.

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this _____ day of February, 2010, to only the following with the expectation that they will forward it as necessary to all co-counsel:

Marc Alan Silverstein, Esq.
901 Lakeside Avenue
Cleveland, OH 44114
Attorney for Plaintiff

William W. Jacobs, Esq.
3900 Key Center
127 Public Square
Cleveland, OH 44114
Attorney for Defendant

_____
Judge John P. O'Donnell