IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

HOLY DONUT, LLC	)	**CASE NO. CV 12 790472**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
MO UN YEE GEE*, et al.*	)	**JOURNAL ENTRY GRANTING IN**
	)	**PART HOLY DONUT'S MOTION FOR**
Defendants.	)	**SUMMARY JUDGMENT AND**
	)	**DENYING THE DEFENDANTS'**
	)	**MOTION FOR SUMMARY**
	)	**JUDGMENT**

John P. O'Donnell, J.:

This is a lawsuit by a property owner, Holy Donut, LLC, for a declaratory judgment that it is entitled to an easement over part of the property owned by its neighbor to the east, defendant the Mo Un Yee Gee Trust, and occupied by defendant Dervish Grill, LLC. The plaintiff also seeks damages caused by the defendants' interference with the easement. Each side has now moved separately for a summary declaratory judgment. The plaintiff has asked for a declaration that an implied easement exists and is enforceable against the defendants, and the defendants seek the opposite declaration. The motions are fully briefed and this entry follows.

STATEMENT OF FACTS

Plaintiff Holy Donut, LLC owns the property at 27624 Lorain Road in North Olmsted. The property has permanent parcel number 232-10-067. The land is on the north side of Lorain just east of Porter Road. The building there has been used as a doughnut shop since 1965 and it sits essentially on the middle of the parcel but the east side of the building is very near the

eastern edge of the parcel so, as a practical matter, access to the side and rear of the building requires traveling over the western edge of the neighboring property.

The neighboring property at 27600 Lorain is permanent parcel number 232-10-056. It is owned by defendant the Mo Un Yee Gee Trust and leased to defendant Dervish Grill, LLC. The building on parcel 56 is closer to the eastern edge of its property, leaving a swath of asphalt about 50 feet wide between the two buildings. It is over the western portion of this patch of asphalt that the plaintiff claims an implied easement.

The two separate parcels were originally part of a single parcel owned by Gizella Johnson. She owned the land when a doughnut shop first opened in the building on what is now parcel 67 in 1965. Johnson sold the single parcel in 1974 to Rose and Raymond Jenne. The unity of ownership of the parcels was severed two years later when the Jennes divided the single parcel into its current configuration and the new parcel 67 was deeded to Rose Jenne alone while parcel 56 remained under Rose and Raymond Jenne's joint ownership.

The deed of parcel 67 to Rose Jenne did not include an easement over parcel 56 even though the doughnut shop was so close to the eastern edge of the new parcel.

In 1981, the Jennes leased parcel 56 to Angelo Karouzos. That lease included a 20-feet wide easement in favor of parcel 67 running the length of the north-south boundary between the two parcels. The Jennes divorced in 1984 and ownership of parcel 56 went to Raymond Jenne only. The documents evidencing that transfer did not reserve an express easement in favor of parcel 67 but the lease to Karouzos remained in effect – with the easement in favor of the doughnut shop – until 1994. In August 1995, Raymond Jenne transferred parcel 56 to Christopher and Traudel Moore and Daniel J. Fronczak. Simultaneously, the Moores and

Fronczak deeded the property to Ming Sun Gee and Mo Un Yee Gee. Neither deed reserved an easement for the doughnut shop.

Ming Sun Gee and Mo Un Yee Gee were husband and wife.[1] On October 11, 1996, Ming Sun Gee transferred his ownership in parcel 56 to Mo Un Yee Gee by a quitclaim deed. The parcel was transferred to its current owner – defendant the Mo Un Yee Gee Trust – by Mo Un Yee Gee through a quitclaim deed dated February 24, 2011. The quitclaim deeds did not mention an easement in favor of parcel 67.

Despite there being no express easement in the deed giving her title to the property, sometime in late 1996 or early 1997 Mo Un Yee Gee leased parcel 56 to Minotti Beverage subject to the 20-foot easement.[2] Then, in 1999, Mo Un Yee Gee conducted herself as if the easement were in effect by approaching the Donut Connection, then the tenant at parcel 67, with a request that the Donut Connection pay a portion of "recent repairs made on the drive areas of common usage."[3] Finally, on February 7, 2012, Mo Un Yee Gee, as trustee of the trust, negotiated a lease of parcel 56 to Dervish Grill, LLC. That lease includes, at page 7, an acknowledgment that "the leased premises are subject to two twenty (20) foot driveway easements."[4] The lease also attached as an exhibit a diagram showing a 20-foot driveway easement on the border between parcels 67 and 56 that was first created more than 30 years earlier as part of the lease between the Jennes and Karouzos.

[1] Ming Sun Gee has since died.
[2] The evidence of this is a January 20, 1997, letter from Mo Un Yee Gee's counsel to counsel for Minotti, attached as exhibit F to the plaintiff's motion for summary judgment. The letter references an "existing lease" and "the lease which your clients signed." The lease itself is not in evidence, but the letter is important because it shows that Mo Un Yee Gee was aware that "the previous owners of the Gee property and Mr. Donut have observed the easement."
[3] Plaintiff's motion for summary judgment, exhibit G.
[4] *Id*., exhibit A.

LAW & ANALYSIS

Holy Donut concedes that the easement it seeks was never expressly granted. Instead, the plaintiff argues that there is "an implied easement for ingress, egress and parking"[5] that has been recognized by all occupants and owners of the two parcels since 1965. The defendants, in their cross-motion for summary judgment and a brief opposing the plaintiff's motion, deny that an implied easement ever existed. In addition, the trust claims that if an implied easement was created before it took ownership, then the easement is not enforceable against the trust because the trust took ownership of parcel 56 without any knowledge, actual or constructive, of the existence of the implied easement.

An easement is an interest in the land of another. It can be created in one of three ways: by express grant, by implication or by prescription. See, *State ex rel. Wasserman v. City of Fremont*, 6th Dist. No. S-10-031, 2013-Ohio-762, ¶18. This case does not involve an express easement – typically included in a deed – or an easement by prescription, which can only arise after continuous, adverse use of another's land for 21 years. Instead, Holy Donut claims that an implied easement exists through the prior use of the land that existed at the time ownership of the parcels was severed in 1976, when the dominant estate – parcel 67 – was conveyed to Rose Jenne.[6]

Easements may be implied from an existing use at the time of the severance of ownership in land. *Trattar v. Rausch*, 154 Ohio St. 286, 291-292 (1950). Holy Donut has an implied easement if it can establish (1) that there was a severance of the unity of ownership in an estate, (2) that before the separation, the use that gives rise to the easement was so long continued and obvious or manifest as to show that it was meant to be permanent, (3) that the easement is

[5] *Id*., page 1.
[6] The owner of the easement is referred to as the dominant estate and the land subject to the easement is called the servient estate. *Myers v. McCoy*, 5th Dist. No. 2004 CAE 07059, 2005-Ohio-2171, ¶ 16.

reasonably necessary to the beneficial enjoyment of the land granted or retained, and (4) that the servitude is continuous as distinguished from a temporary or occasional use only. *Shangrila Ohio, L.L.C. v. Westridge Realty Co.*, 8th Dist. No. 99784, 2013-Ohio-3817, ¶18.

The first element is satisfied in this case. The two parcels were owned as one until parcel 67 was deeded to Rose Jenne in 1976 while the rest of the parcel was still owned by both Jennes.

There is evidence showing that the easement area was used for access and parking prior to the separation of the parcels. On August 31, 1965, Mister Donut entered into a lease of "that southwesterly part of Permanent Parcel No. 232-10-57, having a frontage on Lorain Road of 72 feet, extending back a distance of 161 feet on the northwesterly side."[7] This is exactly the land that became parcel 67 in 1976. The lease included the right to use the western edge of the abutting tenant's property "for egress and ingress."[8] After the Jennes acquired the property, but before they split it, they made a new lease with Mister Donut using the identical easement language effective June 1, 1974. Moreover, a diagram attached to that lease[9] shows perpendicular parking spaces along the east side of Mister Donut's part of the property, demonstrating that the easement was not only for egress and ingress but parking too. Hence, there is no question that the use sought by the plaintiff here existed before 1976, when ownership of the parcels was severed.

But in addition to showing that before ownership was divided the property was put to the use intended to be established by implication, Holy Donut must demonstrate that the prior use was "so long continued and obvious or manifest as to show that it was meant to be permanent." Since ownership was severed in 1976, the continuous nature of the use must have been apparent by then. This portion of the test is easily satisfied here. The evidence, although limited to the

[7] Plaintiff's motion for partial summary judgment, exhibit C, page HD 0013.
[8] *Id*.
[9] *Id*., p. HD 0023.

leases, is sufficient to eliminate any genuine issue of material fact about whether the use of the west side of the other part of the property was intended to always be used for access to, and parking at, the doughnut shop. First, the building there since at least 1965 was almost touching what became the property line. That suggests that, for as long as the building was there, the owners intended to use the area that became the easement for the benefit of the area that became parcel 67 because otherwise the building would have had no parking to the side and no vehicle access to the rear of the building, and parking in front would be cramped. Second, as already discussed, the successive leases in 1965 and 1974 incorporated the easement. The fact that the Jennes and Mister Donut renewed the easement in 1974 gives rise to a reasonable inference that it had been in continuous use and was still desirable to the tenant. If not, there would have been no reason to renew it.

There is also no genuine issue of material fact about the fourth element: that the servitude is continuous and not temporary or occasional. The 1965 and 1974 leases already discussed show that the use was continuous to the time that ownership of the parcels was divided. Adding to that, the evidence that the easement was still in use from 1976 through 2010 buttresses the conclusion that the use was continuous before ownership was divided. That evidence includes references to the easement in later leases of the dominant estate and in the lease of the servient estate to Karouzos. Moreover, the affidavit testimony of Rose and Raymond Jenne that the property was put to the same use continuously from 1965 into 1976 and then through 2010 is uncontradicted.[10]

That leaves as the final element whether the use sought by Holy Donut of what is now the western edge of parcel 56 is reasonably necessary to the beneficial enjoyment of parcel 67. For

[10] To the extent the easement may not have been used every day since 2010 it is only because a new tenant has yet to be found.

a prior use easement to arise, the owner of the dominant estate need only show that the easement is reasonably necessary, not strictly necessary. *Shangrila Ohio, L.L.C.*, supra, ¶22. Holy Donut has proferred direct and circumstantial evidence that use of the easement is reasonably necessary to the enjoyment of its property. The direct evidence is the same evidence already cited, namely the fact that the easement area has been used for ingress, egress and parking since 1965. That gives rise to circumstantial evidence: the inference that such a use was reasonably necessary, not just convenient, or else the use would have been discontinued because tenants would not have demanded it or the landlord would not have allowed it. Direct evidence also includes the provisions of North Olmsted's municipal code requiring a certain minimum amount of parking depending on a restaurant's square footage or its number of tables. That evidence creates an inference that the local legislative body would consider the prior use of the easement here to be reasonably necessary to operate the doughnut shop.

In opposition to the element of reasonable necessity, the defendants have offered only argument, not evidence, by noting there is no "principle in real estate law that rear yard access by a vehicle is a necessity"[11] and pointing out that not every express easement in the various leases refers to parking. These observations do not constitute evidence, however, and are insufficient to create a genuine issue of material fact about whether *an* easement is reasonably necessary to the beneficial use of parcel 67. Yet the defendants' arguments succeed to the extent they do call attention to the plaintiff's failure to prove that the exact bounds of the easement sought by Holy Donut are reasonably necessary.

Holy Donut has demonstrated the elements of a prior use easement. But Holy Donut has not demonstrated that the easement it seeks – 42 feet wide along the entire boundary between the parcels – is reasonably necessary to operate a doughnut shop there. The reason for this is simple:

[11] Defendant's brief in opposition to partial summary judgment, p. 6.

from 1965 until now there has never been an easement that wide. If the property could be used for almost 50 years without a 42-foot easement then an easement of that size is not reasonably necessary for the use of the premises now. To put it another way, while there is no question that an easement is reasonably necessary, there is a genuine issue of material fact about the minimum dimensions of the easement.

Having established a prior use easement, Holy Donut must also prove that it is binding on the Mo Un Yee Gee Trust, the current owner of the servient estate. An implied easement is not enforceable against a bona fide purchaser for value who has no actual or constructive notice of such easement. *Renner v. Johnson*, 2 Ohio St. 2d 195 (1965), syllabus 3.[12] Although the servient estate was transferred from Mo Un Yee Gee, individually, to the Mo Un Yee Gee Trust, the plaintiff does not dispute that the trust was a purchaser for value. In order for Holy Donut to prevail on summary judgment then, all of the available evidence, construed in the trust's favor, must leave no genuine issue of material fact about whether the trust had actual or constructive notice. Actual notice means notice given directly to, or received personally by, a party. *Swader v. Paramount Prop. Mgmt.*, 12th Dist. No. CA 2011-05-084, 2012-Ohio-1477, ¶24. Constructive notice is notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of. *Id*. Constructive notice refers to that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge. *Id*.

Actual notice is not supported by the evidence of record. There is no express easement in any deed. There are references to the easement in various leases of each parcel before the Gees

[12] Gee cites to the syllabus of *Emrick v. Multicon Builders, Inc.*, 57 Ohio St. 3d, 107 (1991), for the proposition that only actual notice will suffice. She is incorrect. That case involved a written, but unrecorded, deed restriction and the question of when a person has actual *knowledge* as that term is used in Ohio Revised Code section 5301.25 pertaining to unrecorded written instruments. There was never any written conveyance of the easement here. Moreover, the syllabus in *Emrick* recognizes that "actual knowledge in some instances may be inferred." In other words, constructive notice is sufficient to charge the purchaser with notice and thus make the easement enforceable.

bought the land in 1995 but, by their affidavits, Mo Un Yee Gee and her adviser on the purchase, Freddie Gee, deny seeing any of those leases before buying the property. Their affidavits also deny any oral notice, and Holy Donut has not produced any evidence to the contrary. Not only has Holy Donut not demonstrated a genuine issue of material fact about whether the purchaser had actual notice of the prior use easement, but the opposite is true: there is no question but that the Gees did not have actual notice as of the 1995 purchase. That leaves only the possibility of constructive notice. Mo Un Yee Gee had constructive notice of the easement if the neighboring parcel's use of the property she and her husband were going to buy was, or should have been, apparent to her before she bought the property. The evidence shows that it was.

First, since the easement was in continuous use from at least 1965 until 2010, it was being used in the late summer of 1995 when the Gees bought the property, and it can be inferred that the traffic pattern – namely, cars going in parcel 56's driveway and over its land to get to the doughnut shop – was obvious. Second, if that inference is considered unfair based on the unlikely prospect that no customers' cars came and went to the doughnut shop while Gee, her husband or her agent were on the premises, then the proximity of parcel 56's western edge to the building on parcel 67 and the presence of perpendicular parking spots on the east side of the doughnut shop – i.e., spots that visibly extended onto parcel 56 – were enough to make it clear that the property was being used. Third, that same arrangement would have rendered obvious the doughnut shop's use of the other property to get to the rear of the restaurant. Mo Un Yee Gee and her agent both attest to personally inspecting the property and the defendant has offered no evidence why that inspection would not have revealed the facts showing parcel 67's continuous use of parcel 56.

A comparison to the facts in *Shangrila*, supra, is worthwhile. In that case, the parcel claiming to have an implied easement was used for a hair salon. Part of the hair salon's building encroached on the defendant's property. In affirming summary judgment, the court of appeals noted that the hair salon's evident use of the other property for driving and parking provided notice of the implied easement to the purchaser. By contrast, the case of *Beener v. Spahr*, 2d Dist. No. 2000-CA-40, 2000 Ohio App. LEXIS 5819 (Dec. 15, 2000), involved plaintiffs seeking a declaratory judgment that their neighbor did not have an enforceable implied easement over their driveway. The neighbor claiming the implied easement could get to his property from another driveway. That circumstance required the court to remand the case for the resolution of the factual issue of whether the plaintiffs, at the time they bought the property, had constructive notice of the defendant's use. This case is more akin to *Shangrila* since the layout of the two parcels leaves no question that the one was using the other.

Constructive notice at the time of purchase is also evidenced by Mo Un Yee Gee's post-purchase conduct. In 1997, her lawyer wrote to the lessee of 27600 Lorain and remarked that "the mutual access rights of our respective clients" have been preserved despite the easement.[13] In 1999, Mo Un Yee Gee tried to get the doughnut shop tenant to pay part of the bill for "repairs made on the drive areas of common usage,"[14] and in 2012 the trust's lease to Dervish Grill acknowledged that the property leased by Dervish was subject to the easement.[15] Gee conducted her affairs over more than 15 years as if the easement existed and was enforceable. While her

[13] Plaintiff's motion for summary judgment, exhibit F.
[14] *Id*., exhibit G.
[15] *Id*., exhibit A, p. 7.

failure to object is not necessarily a waiver of her ability to object, the evidence does serve to imply that she was well aware of the easement when the Gees took the property in 1995.[16]

Holy Donut has established that no genuine issues of material fact exist about whether the implied easement existed as of 1976 (when the unity of ownership of the dominant and servient estates was severed) and whether the Mo Un Yee Gee and her trust had knowledge of the easement before owning the servient estate. The final impediment to granting summary judgment for the plaintiff is the defendants' claim of laches. The defendants argue that Gee and her husband "would not have purchased the property in 1995 had Plaintiff properly followed Ohio law and recorded"[17] the easement instead of being idle "for 36 years."[18]

The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. *State ex rel. Coughlin v. Summit County Bd. of Elections*, 136 Ohio St. 3d 371, 2013-Ohio-3867, ¶9.

The evidence here does not support any of these elements. First, there was no delay in asserting the right, i.e. the easement over the servient parcel. As discussed above, that right has been asserted – by the use of the easement – since at least 1965. Second, assuming there was a delay, it was excused by the same evidence examined in connection with the plaintiff's affirmative claim. Every owner, landlord and tenant on the connected properties – including the Gees – acted in accordance with the existence of an easement until at least February 7, 2012, when Mo Un Yee Gee leased the servient estate subject to the easement. After that, someone

[16] Even assuming that there is a genuine issue of material fact about whether constructive notice existed at the time of the first transfer to the Gees in 1995, no such issue could have remained in 2011 when the property was transferred to the trust, the defendant in this case. The knowledge of the trust's trustee – Mo Un Yee Gee – is imputed to the trust, and the trustee is the same person who was undoubtedly aware of the easement in 1997 and tried to enforce it in 1999 and then included a provision for it in a lease to Dervish Grill.
[17] Defendants' motion for summary judgment, p. 6.
[18] *Id*. The particular 36-year period referred to is unknown.

questioned whether there was a valid easement – the evidence is not clear exactly when – but by April 4, 2012, Holy Donut's counsel wrote to the trust to "resolve the issue"[19] of the easement. Third, in order to assert a claim over the easement area Holy Donut would have had to know that its right was contested and the defendant has not produced any evidence to demonstrate that the plaintiff was aware before April 2012 of any claim that the easement didn't exist. For these reasons, Holy Donut's lawsuit is not barred by the equitable doctrine of laches.

CONCLUSION

The available evidence demonstrates no genuine issues of material fact about whether an implied easement on the north-south boundary between permanent parcel numbers 232-10-056 and 232-10-067 existed as of 1976 (when the unity of ownership of the parcels was severed) and whether Ming Sun Gee and Mo Un Yee Gee had notice of that easement when they purchased parcel 56 in 1995, and whether Mo Un Yee Gee, as trustee of the Mo Un Yee Gee Trust, had notice of the easement when the trust took title to parcel 56 in 2011, so that the easement is enforceable against Mo Un Yee Gee and the trust.

There are genuine issues of material fact about the dimensions of the easement.

Therefore, the plaintiff Holy Donut, LLC's motion for partial summary declaratory judgment is granted in part and the court declares that Holy Donut is entitled to an easement for ingress, egress and parking over some portion of the boundary. The motion is denied insofar as the bounds of the easement can only be declared after a trial where the parties will present evidence on the extent of the servient estate "reasonably necessary" for the beneficial use of the dominant estate.

[19] Plaintiff's brief in opposition to the defendants' motion for summary judgment, exhibit B, April 4, 2012, letter from Paul M. Greenberger, Esq. to the trust.

After the bounds of easement are established, a second evidentiary hearing will be held on the plaintiff's remaining cause of action for the defendant's interference with the easement.

Accordingly, the defendants' motion for summary judgment is denied.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this _____ day of December, 2013, to the following:

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_____
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