CITATION: MacIsaac v. Salo, 2013 ONSC 639
COURT FILE NO.: C-10,512/07
DATE: 20130129

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Hugh Spencer MacIsaac, Kimberly Ann MacIsaac, Christina Johansen and Karsten Johansen	)	Plaintiffs (moving parties), represented by James Simmons
Plaintiffs (moving parties)	)	
– and –	)	
Peggy Charlene Salo, Gordon Salo, S.J. Gossling and D.S. Dorland Limited	)	Salos, represented by Christopher McInnis Gossling and Dorland taking no position
Defendants	)	
	)	**HEARD:** January 10, 2013

DECISION ON MOTION

R.D. GORDON J.:

Overview

[1] The Plaintiffs ask the Court to restrict the Defendants' ability to prohibit certain vehicles from passing over a roadway which crosses their property and to restrict the Defendants' ability to prevent the Plaintiffs from maintaining the roadway.

Background

[2] The Plaintiffs and Defendants are the owners of three properties on the north shore of Lake Panache. Originally, the land was owned by Mr. and Mrs. Kivikangas who obtained approval for the severance of the land into the three parcels which currently exist.

[3] The MacIsaacs own the easternmost parcel of land. Their title includes a registered easement over the neighbouring properties to their west, the first of which is owned by Johansens and the second of which is owned by Salos.

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[4] Title to the Johansen property is subject to the easement in favour of MacIsaacs, and includes a registered easement over the parcel immediately to the west, which is owned by Salos.

[5] Title to the Salo property is, of course, subject to the easements in favour of Johansens and MacIsaacs.

[6] All of the parties acquired their properties in the belief that the registered easements crossing the Johansen and Salo properties reflected the location and dimensions of the actual roadway which crosses the properties. This turns out not to be the case. In fact, the roadway which crosses the Salo property is not entirely within the confines of the easements which are registered on title. What's more, the location of the registered easements on the Salo property is such that considerable blasting of rock would be required to make them usable. The result is that if Johansens and MacIsaacs want to access their properties in the manner originally intended, they must traverse Salo's private land where they have no registered easement.

[7] Salos have improved a section of the roadway quite considerably by pouring a cement pad. It was expected, quite reasonably, that traffic over the roadway would be restricted to cottage type traffic. Difficulties began to arise when Johansens and MacIsaacs had larger commercial vehicles travel the road to provide certain services to their properties. Salos were concerned that such vehicles would damage the cement pad and have provided some evidence of the damage that has been caused. Restrictions on the use of the roadway were imposed by them. Tempers flared. This litigation ensued to sort the matter out. The Plaintiffs' claim was issued in November of 2007 and the matter was first before the court on November 2, 2007 when, without notice to the Defendants, a temporary injunction was sought. The presiding judge refused to hear the matter without notice and it was adjourned to November 5. On November 5, 2007 the Plaintiffs' motion for an interlocutory injunction was heard and dismissed. That decision has not been appealed.

[8] In October of 2008 the Plaintiffs and Defendants each brought motions for partial summary judgment. Those motions were adjourned without date after the parties signed a consent which was incorporated into the interim order of Justice Poupore dated October 23, 2008. It is fair to infer that none of the parties expected the litigation to be ongoing today, over four years later.

[9] Over the past four years, there has been relative harmony. Although there have been instances when Johansens or MacIsaacs have been in breach of the order, those instances have been relatively infrequent. Unfortunately, certain of these instances have included obscene gestures and words directed at the Salos – conduct that has done nothing to further the resolution of this dispute. Although the order of October 23, 2008 provided for only a single delivery of propane to the Plaintiffs' properties, Salos have allowed deliveries in subsequent years. Although their constant surveillance of the roadway via video cameras (eight in total) may be somewhat unsettling, they have not interfered significantly with the use granted the Plaintiffs in the order.

[10] That the matter has returned to court is most unfortunate. What prompted this latest round of litigation is a dispute about having the MacIsaacs' septic tank pumped. Having a tanker

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truck attend at the Plaintiffs' properties to empty their septic tanks was not contemplated in the order of October 23, 2008. By letter faxed July 24, 2012, counsel for MacIsaacs advised counsel for Salos they had arranged for a septic truck to pump the septic tank on July 26. When the truck attended, Salos turned it back. On July 31, 2012, counsel for the Plaintiffs faxed a further letter to counsel for Salos indicating that the MacIsaac septic tank was leaking and its being pumped was a necessity. They requested written confirmation by August 2 that access would not be prevented, failing which a motion would ensue. Counsel for Salos responded by fax on August 1 indicating that two days notification was not sufficient time to obtain instructions and questioned the urgency of the matter. He also pointed out that a local marina offers a barge for septic pump outs (although it would appear that recent regulations have rendered that service unavailable for the time being). There was no further request made by the Plaintiffs and no further discussions about the matter until the Plaintiffs' motion record was served.

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Analysis

[11] As a preliminary matter, the Defendants have questioned the legal authority for the relief requested by the Plaintiffs. They correctly point out that the interlocutory injunction sought by the Plaintiffs was not granted and no appeal was taken from that order. They question how the Plaintiffs can legally advance what amounts to a request for injunctive relief in these circumstances.

[12] Although the Plaintiff's motion is not framed as such, counsel argued that the motion is really a request for amendment to the order of October 23, 2008 to reflect changes necessitated by the passage of time and inability to bring this litigation to completion.

[13] I note the order of October 23, 2008 does contemplate the potential for a further order or orders of the court. For example, paragraph 1 of the order provides specifically that the Plaintiff can bring a Motion on Notice if further deliveries of propane are needed, and paragraph 5 provides that the order is made on a without prejudice basis until further order of the court.

[14] The purpose of the October 23, 2008 order was to provide the Plaintiffs with restricted use of the Defendants' property pending completion of the litigation and to minimize the risk of damage to the Defendants as a result of that use. The order recognized that circumstances might arise which would require further orders and contemplated further motions in that regard. It seems somewhat disingenuous of the Defendants to now suggest that there is no legal basis for the Defendants to seek a further order. However, in my view, any such further order ought to reflect the sentiments inherent in the order of October 23, 2008: Firstly, that the Plaintiffs' temporary use of the Defendants' property should be restricted to basic usage necessary to allow them to enjoy and maintain their properties; and secondly, their use should be undertaken in a manner which minimizes the risk of damage and inconvenience to the Defendants.

Delivery of Propane

[15] Although the Defendants question whether propane is a necessity for the MacIsaac property, I am satisfied it is required in order to provide heat to both Plaintiffs' properties. Although it may not be necessary for the enjoyment of the property by the MacIsaacs, I am content that it is required to avoid property damage. Accordingly, the Defendants shall not

prevent the delivery of propane to the Plaintiffs' properties until the conclusion of these proceedings provided the Plaintiffs are obtaining the propane for normal domestic use and request their provider to use the smallest vehicle possible to make delivery.

Septic Pumping

[16] The Plaintiffs' enjoyment of their properties naturally includes the ability to use the inside toilet facilities which exist. The use of those facilities is dependent upon the septic tanks being emptied now and again. Given that the pumping of the septic tanks is done at a cost to the Plaintiffs, it is quite unlikely to be commissioned unless reasonably required. Accordingly, it is appropriate that the Defendants not prevent a pump truck from attending the Plaintiffs' properties to pump the septic tanks provided the Plaintiffs request their provider to use the smallest vehicle possible for that purpose.

[17] On the evidence before me, I am not satisfied that septic pumping can presently be done via barge service. In the event such service becomes available the Plaintiffs shall be required to use such service to pump their septic tanks.

Renovation of the MacIsaac Property

[18] In the context of the temporary rights being granted to the Plaintiffs it is important to distinguish between repairs required to prevent imminent deterioration of or damage to the property, and renovations to improve the property.

[19] Where the Plaintiffs are able to establish that repairs are required to prevent the imminent deterioration of or damage to their property, it is appropriate that the Defendants allow contractors to access the Plaintiffs' properties provided the contractors are asked to use the smallest vehicle possible to complete the necessary work. Indeed, it seems the Defendants have, in the past, allowed contractors to enter the property to effect repair on leaking roofs and siding.

[20] Where the work is not necessary to prevent imminent deterioration or damage, but is undertaken to improve the property, it is my view that it must, absent the consent of the Defendants, await the conclusion of this litigation. The Defendants will, of course, be aware that if they refuse consent and are ultimately unsuccessful in this litigation, they may face an increased claim for damages by the Plaintiffs.

Repair of the Plaintiffs' Driveways and the Dirt/Gravel Road on the Defendants' Property

[21] I accept that the Plaintiffs' driveways and the dirt/gravel road on the Defendants' property are in need of repair. However, the evidence does not satisfy me that the current state of repair prevents the Plaintiffs from traversing the driveways and road. There are bald allegations that vehicles are being significantly damaged, but no evidence in support of those allegations. On the evidence before me, if the Plaintiffs and their guests drive slowly and carefully, the properties can be safely accessed.

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[22] If what the Plaintiffs wish to do is bring in loads of gravel and heavy equipment to spread and compact the gravel, this would undoubtedly result in inconvenience to the Defendants and the risk of damage to the concrete driveway they have constructed. That inconvenience and risk is not warranted on the evidence before me. In the event the condition of the driveways or road deteriorates to the point they cannot safely be used, I would expect the court may then be persuaded to allow limited repair so that use is once again safe. In this respect I would urge the parties to exercise reason and common sense.

Trimming of Branches along the Roadway Leading Off the Concrete Pad on the Defendants' Property in the Direction of the Plaintiffs' Properties

[23] The Plaintiffs say that because of the disrepair of the road they have to drive so as to avoid potholes. This, in turn, takes them to the sides of the road where bushes have grown in. The result is that the Plaintiffs' vehicles are scraped by branches. They ask that the Defendants not prevent them from trimming branches along the roadway so that further damage to their vehicles can be prevented.

[24] This strikes me as an entirely reasonable request, but one that could lead to further discord unless there are strict parameters attached. Accordingly, the Defendants shall not prevent the Plaintiffs or their agents from trimming branches along the roadway leading from the concrete pad on the Defendants' property to the Plaintiffs' properties provided that: (1) the Plaintiffs give to the Defendants not less than 45 days notice in writing of the date the trimming is to take place; (2) the trimming shall take place between the hours of 9:00 a.m. and 5:00 p.m. on a weekday; (3) no tree with a stump diameter in excess of two inches shall be cut down unless with the consent of the Defendants; (4) the trimming shall result in a road clearing of not more than 10 feet unless with the consent of the Defendants; (5) the Plaintiffs shall remove and dispose of all cut branches and debris on the day the trimming takes place.

Access to Emergency Vehicles

[25] The Defendants have agreed they will not prevent emergency vehicles from travelling the roadway to access the Plaintiffs' properties. Emergency vehicles would include fire trucks, police cars and ambulances. It is so ordered.

Conclusion

[26] A temporary order shall issue to reflect the findings indicated above. I urge the parties to be reasonable and courteous in their dealings with one another and in the implementation of this order.

[27] If the parties are unable to agree on costs, they may make written submissions to me within 45 days, not to exceed four pages in length each.

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Mr. Justice R.D. Gordon

Released: January 29, 2013

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– and –

Peggy Charlene Salo, Gordon Salo, S.J. Gossling and D.S. Dorland Limited

Defendants

DECISION ON MOTION

R. D. Gordon J.

Released: January 29, 2013