COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-197

MICHAEL A. TRIBUNA, JR., trustee,[1]

vs.

JENNIFER S. COHEN & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

As trustee of a realty trust, the plaintiff, Michael A. Tribuna, Jr., owns a two-acre parcel of land on Parker Drive in Truro. Defendant Jennifer S. Cohen owns a parcel directly across the street. Parker Drive is a private, gravel road that serves as the main access road for the residential subdivision of which all of the relevant properties are a part. It is owned by defendant Tru-Haven Association, Inc. (Tru-Haven), an incorporated homeowners association. Both Tribuna and Cohen -- like the other homeowners in the subdivision -- hold an express easement allowing them to use Parker Drive.

[1] Of the Westview Court Realty Trust.

[2] Tru-Haven Association, Inc.

The traveled portion of Parker Drive (traveled way) is, on average, only approximately fourteen feet wide. However, the right of way in which the traveled way lies is forty feet wide. Tribuna commenced an action against Cohen and Tru-Haven in which he sought, among other relief, a declaration that he unilaterally could "modify Parker Drive between [his] Property and the Cohen Property to the extent necessary to divide and/or develop [his] Property." Viewed in the context of the legal arguments that Tribuna made, it appears that he specifically was seeking judicial approval to expand the traveled way to twenty-two feet in width, and otherwise improve the road to meet current standards required under the town's subdivision control regulations. In any event, a Superior Court judge disagreed with Tribuna's legal theories and granted the defendants' respective motions for summary judgment. On Tribuna's appeal, we affirm.

Background. The creation of the subdivision. The relevant facts are essentially uncontested. The properties are part of a subdivision known as Tru-Haven Village. This subdivision was created by Miriam A. Fowler (developer) in 1969, pursuant to a subdivision plan approved by the Truro planning board the previous year. The 1968 subdivision plan depicts a forty foot-wide way labeled Parker Drive to serve as the main access road

to the subdivision. Tribuna holds an express easement to use Parker Drive "as ways are commonly used in the Town of Truro."

The traveled way. As noted, the width of the traveled way averages only approximately fourteen feet. That width has not changed since at least 1973. Tru-Haven is opposed to the widening of the traveled way, as are Cohen and the majority of Tru-Haven members. The ten-volume summary judgment record is devoid of evidence that the condition and size of the traveled way -- including its relatively narrow width -- impedes Tribuna's ability to access his property.

The alleged obstructions. Before Cohen purchased her property, a prior owner installed some landscaping and a lamppost in a portion of the forty-foot right of way adjacent to her property. Cohen herself subsequently placed some rocks next to the traveled way. Although the landscaping, lamppost, and rocks all lie within the right of way, they neither lie within the traveled way, nor otherwise interfere with Tribuna's ability to access his property.[3]

Historic ANR plans. Tribuna's property originally was part of a larger parcel identified as lot 2 on the 1968 subdivision plan. In 1972, the developer filed a plan pursuant to the

[3] In fact, Tribuna admitted that "Cohen's rocks, lamppost and landscaping have never prevented [him] from accessing his driveway."

"approval not required" (ANR) provision of the subdivision control law, see G. L. c. 41, § 81P, to split lot 2 into two new parcels known as parcel II and parcel III. In 1973, subsequent owners of parcel II filed a second ANR plan splitting that parcel into three portions, one of which is the land that Tribuna and his father purchased in 2000.

The filing of the litigation. Tribuna filed the current action against Cohen in 2016. Since then, the litigation has taken many twists and turns, with the parties amending their pleadings several times to add or subtract various claims and counterclaims. Tru-Haven also was joined as a defendant along the way. For present purposes, the key claims are Tribuna's count 1 and count 4, the claims at issue in this appeal. In count 1, Tribuna alleged that the landscaping, lamppost, and rocks that Cohen and her predecessor had placed within the right of way were interfering with his easement rights. In count 4, Tribuna sought a declaration that he was entitled to modify Parker Drive "to the extent necessary to divide and/or develop [his] Property."

Tribuna's ANR plan. Counts 1 and 4 relate to Tribuna's efforts to develop his property, including potentially by splitting it into two buildable lots. In 2019, while the litigation was pending, Tribuna filed an ANR plan claiming that he could divide his parcel in two as a matter of right. Both

Tru-Haven and Cohen opposed that plan. The planning board declined to endorse Tribuna's ANR plan after concluding that various changes that Tribuna had made to his land had rendered access to Parker Drive "illusory."[4] Tru-Haven had raised that argument before the planning board while opposing Tribuna's ANR plan.[5]

The summary judgment motions. In the pending litigation, each defendant eventually filed a motion for summary judgment. A Superior Court judge ruled in the defendants' favor, and he explained his reasoning in a thoughtful and comprehensive seventeen-page memorandum of decision. After judgment entered, Tribuna filed a motion pursuant to Mass. R. Civ. P. 59 (e), 365 Mass. 827 (1974), asking the judge to reconsider his earlier ruling, or to amend the specific relief he had entered. The judge denied the rule 59 (e) motion, again explaining his ruling

[4] As confirmed by photographs included in the record, Tribuna deposited large amounts of fill on his property, thereby creating a plateau with extremely steep slopes.

[5] Cohen opposed Tribuna's plan on the ground that a portion of the right of way had been extinguished, thereby rendering the right of way inadequate to support the filing of an ANR plan. The planning board did not rely on such an argument, nor did the judge do so in the current litigation. In fact, although Cohen initially sought to advance such an argument in a counterclaim, she dismissed that claim after a different judge ruled that, for her to maintain it, she would have to join all of the other property owners who held an easement in Parker Drive.

in a thoughtful memorandum of decision. This appeal, which focuses on counts 1 and 4, followed.

Discussion. 1. Alleged interference with easement. The landscaping, lamppost, and rocks in dispute all lie within the forty-foot right of way that Tru-Haven owns in fee.[6] As the owner of that land, Tru-Haven could have sought to have those encroachments removed, but has not done so. Tribuna does not own the fee in the right of way; he holds only an easement to use it. Accordingly, to succeed in having any encroachments on the right of way removed, Tribuna must show that those encroachments are interfering with his easement rights.

It is undisputed that the landscaping, lamppost, and rocks all lie outside the traveled way, and Tribuna did not produce any evidence to show that the placement of those objects interferes with his ability to use the traveled way. Nor did Tribuna demonstrate that his ability to use the traveled way to gain access to his property is limited by the road's current condition, including its relatively narrow width. He nevertheless argues that his easement to use Parker Drive extends to the entirety of its width, which therefore must be

[6] This assumes that Cohen could not maintain a successful adverse possession claim against Tru-Haven. No such potential claim has been brought.

kept unobstructed for that purpose. For the reasons that follow, we are unpersuaded.

In Martin v. Simmons Props., LLC, 467 Mass. 1 (2014), the Supreme Judicial Court addressed an analogous situation, in which an easement holder claimed a right to keep unobstructed the entirety of a dedicated right of way. The court recognized the possibility that an easement holder may be given such a right. See id. at 15-16 ("Where the language of an easement requires that a way of a defined width be kept open, or that the full extent of the width described be usable, we have prohibited any encroachment into the way"). Short of such express language, however, doubts are to be resolved in favor of lessening the burdens on the servient estate, so long as the purpose of the easement still can be fulfilled. Id. at 16-17. Thus, where an easement to pass freely along a dedicated right of way is granted, without "any reference to the full width of the easement as drawn on the [relevant] plan, or any language restricting a change in its dimensions, prohibiting other uses, or requiring that the easement be kept open throughout its full extent," an easement holder cannot, if his ability to pass and repass is not thereby impeded, contest the narrowing of the area open to use. Id. at 16.

As in Martin, the easement at issue here does not include the type of language necessary to establish that easement

holders were given the right to use the full width of the dedicated right of way for travel. This being the case, we discern no error in the judge's rejecting Tribuna's argument that the encroachments that limit the width of the traveled way are at odds with his easement rights. Contrast Brookline v. Whidden, 229 Mass. 485, 491-492, 494 (1918) (where language of grant required that right of way "be kept open forever for ornament and use as streets and squares only," encroachments into fifty-foot width of street had to be removed, notwithstanding that street was still fully passable). This does not mean, as Tribuna suggests, that the judge formally modified the easement to limit the width of the right of way. Nor does it mean -- as Tribuna also suggests -- that the judge's ruling served to create a new strip of land that separates his property from the right of way (thereby depriving him of frontage on Parker Drive). Tribuna's property continues to abut the right of way for Parker Drive; he simply failed to establish that the current width of the traveled way in that area has prevented him from exercising his easement rights.[7]

[7] Of course, the extent to which the width of the traveled way might limit Tribuna's ability to develop his property under local land use regulations may be another matter. That is a potential dispute between Tribuna and the town, and we do not reach it in the current appeal.

Tribuna also suggests a different analytic path for distinguishing Martin. Specifically, he argues that the easement here was granted not merely to provide access to the lots created by the 1968 subdivision plan, but also to allow the owners of those lots to maximize their development potential (including, by allowing the lots to be subdivided further).[8] We discern nothing in the language of the easement to support Tribuna's claim that maximizing development value was one of the intended purposes of the easement. As noted, the easement provides Tribuna the right to use Parker Drive "as ways are commonly used in the Town of Truro." Such language has been interpreted as referring to the actual active uses that people make of roads, not to the indirect development value that such roads may add. Cf. McLaughlin v. Board of Selectmen of Amherst, 422 Mass. 359, 365 (1996) ("phrase 'the purposes for which

[8] Tribuna also contends that the judge erred, as a matter of law, by refusing to determine what the original purpose of the easement was. In support of this argument, Tribuna cites to a statement the judge made in his memorandum of decision denying the rule 59 (e) motion, about the problematic nature of issuing a separate declaration regarding the developer's original intent. Tribuna's contention ignores language throughout the judge's memorandum of decision allowing the motions for summary judgment that plainly memorializes the judge's conclusion that the sole purpose of the easement was to provide the Tru-Haven lot owners access to their properties. For example, on page ten of his memorandum of decision, the judge stated that the easement "is only for use of the traveled way along the right of way," and that "as long as Cohen has not inhibited Tribuna's or anyone else's right to travel along Parker Drive and access the Tribuna Property, there can be no claim for interference."

public ways in the Town of Amherst are now or may hereafter be used' presumably refers to the use of the easement for walking, bicycling, driving, and other uses for which public ways in the town are used").[9]

Tribuna's argument based on what he calls the easement's "frontage value" might stand on stronger footing if he had shown that a road wider than the traveled way already had been required by subdivision regulations at the time the 1968 subdivision plan was approved. That is, had Tribuna shown that local regulation already required that the road be at least twenty-two feet wide at the time Parker Drive was laid out, then some argument could be made that all parties understood that Parker Drive was to have that minimum width. We need not consider such an argument, however, because Tribuna never established what road standards were required by local regulation when the subdivision plan was approved, now more than a half-century ago. Thus, nothing in the voluminous summary judgment record establishes that an access road wider than the

[9] In McLaughlin, supra at 360-361, a landowner claimed that an easement it held over a right of way provided it access to a back portion of its property, which it had added to its holdings after the easement had been acquired. The court held that the language allowing the owner to use the right of way for "purposes for which public ways in the Town of Amherst are now or may hereafter be used" provided "no basis for interpreting it to enlarge the scope of the easement to benefit anything other than the dominant estate." Id. at 365.

traveled way was required at the time the easement was created. To the contrary, if anything, the fact that the planning board endorsed the ANR plans submitted in 1972 and 1973, suggests that the traveled way complied with then-existing subdivision regulations. After all, the owners of the original lot 2, and of the subsequent parcel II, both were able to secure endorsement of their ANR plans even though a road wider than the current traveled way was never built.[10]

Finally, even if Tribuna is correct that his property cannot be subdivided further unless the traveled way is widened, he has not demonstrated how that would be unfair to him.[11] He has not argued, much less shown, that, when he purchased a small portion of one of the original lots more than three decades after the subdivision was created, he did so with the reasonable expectation of splitting it into two developable portions.

2. The scope of the declaratory judgment. As noted, Tribuna not only sought to compel Cohen to remove the landscaping, lamppost, and rocks from the right of way, but also

[10] In fact, the 1973 ANR plan depicts both the forty-foot right of way and the significantly narrower traveled way that appears on the ground. Thus, on its face, the 1973 plan revealed the narrow width of the actual traveled way.

[11] We note that Tribuna is seeking to widen only the portion of Parker Drive that lies between his property and that owned by Cohen. He has not explained why widening only that small portion of Parker Drive would be outcome-determinative in the planning board's consideration of an ANR plan.

requested that a declaratory judgment enter broadly "allowing [him] to modify Parker Drive between [his] Property and the Cohen Property to the extent necessary to divide and/or develop [his] Property." Disagreeing with Tribuna's theory that he was entitled to that declaration, the judge issued a declaration that Tribuna had no such right. In fact, the judge largely borrowed Tribuna's requested language verbatim, prefaced by "not."[12] In his rule 59 (e) motion, Tribuna argued in part that the judgment was faulty because it did not include specific reference to certain rights that he retained as an easement holder, such as his common-law right to make repairs to the road if the fee holder failed to do so. However, up to that point in the litigation, Tribuna had never requested such a declaration, in his complaint or otherwise. Neither side was seeking a declaratory judgment that would serve as a detailed roadmap comprehensively laying out the parties' respective rights and responsibilities as to all potential controversies that might arise with respect to Parker Drive. The parties' focus instead was on Tribuna's claim that he had a unilateral right to expand the width of the traveled way. This being the case, the judge committed no abuse of discretion in declining Tribuna's tardy

[12] The declaratory judgment states that Tribuna "is not allowed to modify Parker Drive between [his] Property and the Cohen Property to the extent necessary to divide and/or develop [his] Property or otherwise."

request to raise wholly new issues about how the declaratory judgment should be drafted.

That said, there is one aspect of the declaration that gives us some pause. Although the judge relied almost entirely on language offered by Tribuna (again, prefacing it with a "not"), he added the phrase "or otherwise" at the end. See note 12, supra. As a result, read literally, the language of the declaration could be read as establishing that Tribuna was prohibited from taking any action that could be viewed as "modifying" the road, including, as one example, repairing a rut there. However, on balance, we do not think that the declaration needs to be rewritten, because the notion of materiality is implicit in the existing language. In other words, we interpret the language to mean that, barring new judicial approval, Tribuna has no right to expand or otherwise make any material changes to the layout of the traveled way.[13]

3. The award of costs. After it prevailed on summary judgment, Tru-Haven moved for an assessment of $4,603.95 in costs. This represented the costs that Tru-Haven incurred with

[13] In this respect, we note that the case law regarding the rights of easement holders reflects the need for some flexibility as circumstances change over time. For example, in Martin itself, the court noted that the easement holder could revive his claim for judicial relief if circumstances changed "in such a manner that [the] obstructions impede upon his use of the easement for its intended purpose." Martin, 467 Mass. at 17.

respect to taking or defending eight depositions. The issues were briefed, and oral argument on the motion took place by an Internet-based video conferencing platform. Tribuna mounted only a limited opposition to Tru-Haven's request. Specifically, he argued that not all the requested costs were reimbursable, because some of the questioning at the relevant depositions related to a particular counterclaim that Cohen had brought but ultimately agreed to dismiss, with each party agreeing to bear his, her, or its costs. The record reflects that the judge carefully considered but ultimately rejected this argument. He specifically found:

> "On the facts of this case, the issues which [were] the subject of Cohen's counterclaim and the issues involved in the claims which Tribuna was seeking to advance against both her and against Tru-Haven were inextricably intertwined. That Tru-Haven incurred costs on the depositions which Tribuna himself conducted and then in itself deposing Tribuna and his chosen expert on the issues central to the litigation was integral to the protection of its legal interest on the matters upon which it prevailed through its Rule 56 motion and entitles it to the award of the costs which it seeks."

Such findings and conclusions are well supported by the record. The judge applied the correct legal factors, and he did not

abuse his discretion in awarding the requested costs. See Waldman v. American Honda Motor Co., 413 Mass. 320, 328 (1992).

Judgment affirmed.

Order denying motion to alter or amend judgment or for partial relief affirmed.

Order allowing costs affirmed.

By the Court (Milkey, Blake & Grant, JJ.[14]),

Joseph F. Stanton

Clerk

Entered: February 10, 2022.

[14] The panelists are listed in order of seniority.