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| <p>District Court, Larimer County, Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521 Phone: 970-498-6100</p> | |
| <p>Plaintiff:</p> <p>THE CITY OF LOVELAND, COLORADO, a Colorado Municipal Corporation,</p> <p>v.</p> <p>Defendants:</p> <p>ROGER GOMEZ; JP MORGAN CHASE BANK, N.A.; and FIRST NATIONAL BANK OF OMAHA</p> | |
| <p>Dwight D. Brummet, #13162 Dwight D. Brummet, P.C. Attorney for Defendant, Roger Gomez P.O. Box 657, 325 E. 7th Street Loveland, CO 80539-0657 Phone: (970) 667-2131 Fax: (970) 669-2203</p> | <p style="text-align: right;">Court Use Only</p> <p>Case No. 2016CV30703</p> <p style="text-align: right;">Division 4A Courtroom</p> |
| <p>DEFENDANT, ROGER GOMEZ'S VERIFIED RESPONSE TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT</p> | |

Defendant, Roger Gomez, (hereinafter referred to as "Defendant") by and through his attorney, Dwight D. Brummet, of Dwight D. Brummet, P.C., hereby responds to Plaintiff's Cross Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment as follows:

Defendant agrees that the facts are undisputed and that the Court should issue a ruling entering summary judgment. The issue is whether the Plaintiff, The City of Loveland, Colorado (hereinafter referred to as "Plaintiff" or "City") is entitled to an easement across Defendant's property. The City of Loveland failed to record any documents with the Larimer County Clerk and Recorder evidencing the existence of these water lines across Defendant's property. The Defendant asserts that there is no factual basis that would apprise Defendant of the existence of the Plaintiff's water lines, prior to his purchase of the property. Defendant asserts that there is no recorded document in the Larimer County Clerk and Recorder's office to apprise Defendant or to give Defendant knowledge of the existence of the water lines on Defendant's property.

I. Prescriptive Easement

Plaintiff asserts that Defendant's predecessors in interest have been aware of the water lines and that Defendant was made aware or should have been aware of the existence of the water lines by reviewing the title documents when he purchased the property. The Plaintiff initially asserts

the title insurance exceptions, provided to Defendant, informed Defendant of two deeds showing the existence of the two water lines. Plaintiff further asserts that the presence of these two deeds provided enough information to put Defendant on notice of the existence of the water lines. Defendant asserts that he did, in fact, review these two deeds and that the deeds show the existence of water lines but not upon the Defendant's property. Plaintiff admits that the areas described in these deeds is west of Defendant's property, but still insists that the presence of these exceptions in Defendant's title commitment apprised Defendant of the existence of the water lines. The only fact these documents prove is that Plaintiff knew how to protect its interests concerning these water lines but failed to do so with regards to Defendant's property. Defendant did discuss these documents with the County and it was determined that, in fact, these two deeds did not show any water lines crossing Defendant's property. In fact, there are no recorded documents showing the existence of these water lines or their location upon the Defendant's property.

Plaintiff asserts in Exhibit 2 of its response that it has repaired and maintained the water lines. Exhibit 2 purports to show that the City of Loveland performed water line maintenance on two occasions on the Defendant's property. This Affidavit does not assert any factual basis that any of Defendant's predecessors in title had knowledge of the existence of the water lines. One repair document reflects repair to a pipe existing between the house and the shop, not the existing main water lines, which are the subject of this dispute. The other document refers to the repair of a service line, again not referring to the main water lines, which are the subject of this dispute. Plaintiff further provides the Affidavit of Mark Miller who is not an owner of the property. Furthermore, his testimony is based on hearsay testimony from his father. As this testimony is inadmissible hearsay, the Affidavit of Mark Miller should be stricken. There is further, no factual evidence provided by the Plaintiff that any of Defendant's predecessors in title had knowledge of the existence of these water lines and surely two repairs over 80 years to service lines, not involving the main water lines, would not provide any knowledge on the part of Defendant or Defendant's predecessors in title of the existence of the main water lines at the very south end of Defendant's property. There is, further, no factual evidence provided that any owner saw any of the repair work being performed and if there was no repair work to the main lines it would have not apprised the Defendant and Defendant's predecessors in title of the existence of these water lines.

The Plaintiff constructed and operated the main water lines, pursuant to license agreements that it entered into with the Colorado and Southern Railway Company. These documents speak for themselves. These license agreements were not recorded. Furthermore, they provided that the City of Loveland should bear the expense of moving, removing or making such modifications to these water lines as required by the Railway Company. The license agreement further provided

"Whenever this agreement shall be terminated, as herein provided, the Railway Company shall be privileged to immediately remove said conduit as right of way and to restore the same to its original condition, all at the cost and expense of the City of Loveland."

The Plaintiff asserts in its response that it basically breached the license agreement by failing to make the annual payments and, as such, since its breach, adversely possessed the property. This is an assumption that has not been proved as again, Plaintiff's possession of this property is not open and notorious as there is no factual evidence that Defendant's predecessors in title were aware of the property being adversely possessed as the license agreements were not

recorded, and no other documents were recorded to show their existence. As such, the Plaintiff is not entitled to a prescriptive easement.

II. Easement by Estoppel

Plaintiff, further asserts that it is entitled to an Easement by Estoppel. The Plaintiff states the underground water lines have a sense of permanence and are constructed in such a way to create a network of distribution. As such, it was reasonable for the Plaintiff to foresee that permission could not be revoked. However, the license agreement in which the City used to construct these water lines provided that the licensor could ask the City to remove the water lines in question. The Plaintiff admits that the Railway Company failed to grant it an easement and it belatedly attempted to assign the rights in 1989 when the Railway Company no longer owned the property, however, the City asserts that as these water lines are a part of the municipal water distribution system it is not equitable to request the City to remove them. The inequity, however, is not to the City but to the Defendant who has not been paid for the use of this property. It is obvious that the City could have recorded the license agreements or could have attempted to negotiate an easement with Defendant or Defendant's predecessors in title. The City is attempting to acquire an easement on the Defendant's property without paying for it.

The City could have protected itself, but chose not to and, as such, has caused the problem of which Defendant is attempting to seek redress.

As such, the Plaintiff is not entitled to Easement by Estoppel.

III. Easement by Acquiescence

In its final attempt to acquire an easement, the City of Loveland has asserted that it has acquired the easement by acquiescence. The Plaintiff fails to recognize its permission to construct the water lines was granted pursuant to a license agreement not acquiescence. Obviously, the Railway Company acquiesced to the construction of these water lines, however, it was based upon the terms and conditions of the licensing agreements. Those agreements were not recorded and, as such, any subsequent title owners of the property did not acquiesce to the existence of the water lines because they were not made aware of the licensing agreements and the water lines are not visible because they exist underground. Defendant will not discuss *Enke* as it was discussed in its Motion for Summary Judgment, but now the Plaintiff asserts the prior owners had acquiesced in the construction and operation of the lines. Again, construction and operation of the lines came from license agreements which had certain obligations on both the Railway Company and the City of Loveland so the acquiescence was based upon the parties following the terms of the license agreements.

It is not possible for the subsequent owners to have acquiesced to the construction and operation of the water main as there was no evidence of its existence. Plaintiff asserts the case of *Upper Eagle Valley Sanitation District v. Carnie*, 634 P.2d 1008 (Colo. App. 1981), in support of its response in its Motion for Summary Judgment. In *Upper Eagle Valley Sanitation District v. Carnie*, purchaser purchased the vacant lot in the winter of 1973 when snow was still covering the ground. The plat showed an easement for utilities along the Westerly 10 feet of the lot... the

sanitation district had installed the sewer line outside of the described easement area across purchaser's lot. Purchasers did not discover that the sewer line had been constructed outside the designated easement until purchasers started to build on the lot and found out that they could not build at their desired location. The facts of *Upper Eagle Valley Sanitation District* are very similar to this case. The owner of the property was not aware of the utility and did not discover the existence of the utility until the Defendant attempted to get permits to build at his desired location which happened to be upon the water lines. In *Upper Eagle Valley Sanitation District* the Court stated,

"In a proper case an easement may be acquired through the acquiescence or silence of a property..., however, acquiescence implies a knowledge of the facts." Page 1009.

Defendant and his predecessors in title cannot be presumed to have knowledge of the water lines as there was no open and visible burden upon the land. The Court in *Upper Eagle Valley Sanitation District* states:

"However, there was no showing that Respondents or their predecessors in title knew of the construction of the line outside the easement area prior to the Respondent's acquisition of the property, and thus, there was no showing that Petitioner acquired an easement by acquiescence prior to Respondent's acquisition of the property. Prior to this proceeding, Petitioner was a trespasser who had only the right to acquire the easement by condemnation. Consequently, Respondent, owners of the property at the time of this proceeding are entitled to the market value of this easement acquired from them by Petitioner." Pages 1009 and 1010.

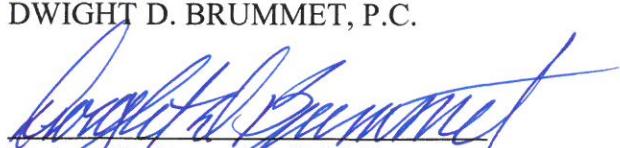
The same is true in this case. The water lines are underground. Defendant and his predecessors in title had no knowledge of the existence of the water lines and there has been no evidence presented that they should have had knowledge of the existence of these water lines.

As such, the City has failed to show that it has acquired an easement by acquiescence and, therefore, all of its claims should be denied.

WHEREFORE, Defendant, respectfully requests that the Plaintiff's Complaint be dismissed and held for naught and that Defendant's Motion for Summary Judgment be granted along with such other relief the Court deems just and proper.

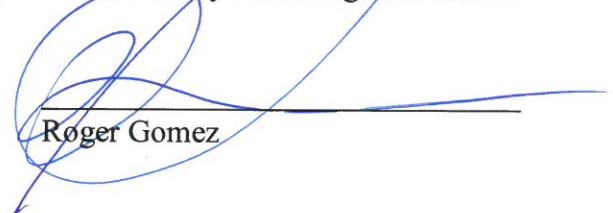
Respectfully submitted this 14th day of December, 2016.

DWIGHT D. BRUMMET, P.C.


Dwight D. Brummet, #13162
Attorney for Defendant, Roger Gomez

VERIFICATION

I, Roger Gomez, of lawful age and being first duly sworn, depose and state that I am the Defendant herein, that I have read the foregoing Defendant, Roger Gomez's Verified Response to Plaintiff's Cross Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment, and that the same is true according to the best of my knowledge and belief.

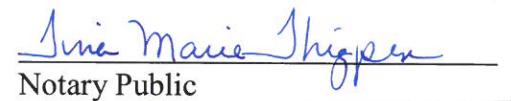


Roger Gomez

STATE OF COLORADO)
)
 ss.
COUNTY OF LARIMER)

Subscribed and sworn to before me this 14th day of December, 2016, by Roger Gomez.

Witness my hand and official seal:

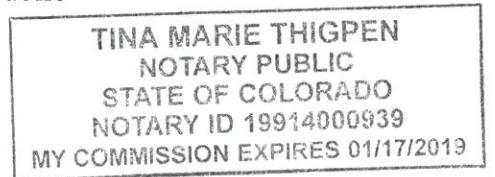


Tina Marie Thigpen

Notary Public

My commission expires: 1-17-19

CERTIFICATE OF SERVICE



I hereby certify that on this 14th day of December, 2016, I caused to be served on the following, a true and correct copy of the foregoing Defendant, Roger Gomez's Verified Response to Plaintiff's Cross Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment, via the method listed below:

ICCES e-Service

Alicia Calderon
Vincent Junglas
Loveland City Attorney's Office
500 E. Third Street, Suite 330
Loveland, CO 80537
Attorneys for Plaintiff

Via U.S. Mail first class postage prepaid

First National Bank of Omaha
1620 Dodge Street
Omaha, NE 68197
Defendant

JP Morgan Chase Bank, N.A.
c/o The Corporation Company
1675 Broadway, Suite 1200
Denver, CO 80202
Defendant



Tina Marie Thigpen