District Court, Larimer County, State of Colorado Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500	DATE FILED: June 23, 2017 CASE NUMBER: 2016CV30703
The City of Loveland, a Colorado Municipal Corporation, Plaintiff v. **Roger Gomez** Defendant	⮝ **COURT USE ONLY** ⮝ Case No: 16CV30703 Courtroom: 4A
Order re: Cross Motions for Summary Judgment	

THIS MATTER is before the Court on cross motions for summary judgment filed by plaintiff City of Loveland (the "City") and defendant Roger Gomez ("Defendant"). Having reviewed the filings and the record, the Court hereby finds and orders as follows:

I. Background

Defendant acquired real property in Larimer County, Colorado in 2013, which he then subdivided into two lots now located at 3510 West Eisenhower Boulevard and 3508 West Eisenhower Boulevard in Loveland, Colorado. The present dispute concerns two underground City water pipes that were installed pursuant to license agreements in 1934 and 1956, and an above-ground electrical power line, which all run though the 3510 West Eisenhower property. Defendant claims that he first learned of the existence of the water lines when he was denied a building permit by the City to build a storage unit on the 3510 West Eisenhower property. A dispute arose as to the City's right to maintain the water lines and the power line through Defendant's property.

The City filed suit bringing claims against Defendant for declaratory judgment and quiet title, arguing that it owns an easement by prescription, estoppel, or acquiescence on the 3510 West Eisenhower lot for the two water lines and the electrical power line. Defendant contends that no easements exists, and brings counterclaims against the City (1) requesting a court order for Plaintiff to remove the water lines for failing to pay the annual fees under the license agreements, or in the alternative, (2) for compensation from the City for the loss in value to his property. Both parties filed motions for summary judgment.

II. Standard of Review

The granting of a motion for summary judgment brought pursuant to C.R.C.P. 56(b) is warranted upon a showing that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. *Pueblo W. Metro. Dist. v. Southeastern Colo. Water Conservancy Dist*., 689 P.2d 594, 600 (Colo. 1984); *Ginter v. Palmer & Co.*, 585 P.2d 583, 584 (Colo. 1978); *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 494 P.2d 1287, 1288 (Colo. 1972).

The moving party has the initial burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. *Primock v. Hamilton*, 452 P.2d 375, 378 (Colo. 1969); see also *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997). Once the moving party has met its initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Id*. at 1149. Therefore, when a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response must set forth specific facts showing that there is a genuine issue for trial. *Id*. Ultimately, summary judgment is only appropriate in the clearest of cases, where there is no doubt concerning any material fact. *Bauer v. Southwest Denver Mental Health Center, Inc.,* 701 P.2d 114, 117 (Colo. App. 1985).

III. Undisputed Facts

1. The Colorado and Southern Railway Company (the "Railroad") owned the property when the water lines were originally installed.

2. In 1936, the City entered into an agreement with the Railroad whereby the Railroad granted the City a license to install and operate a 12-inch underground water distribution pipe across the Railroad's property (the "1936 Agreement").

3. In 1954, the City entered into another agreement with the Railroad, this time for a license to install and maintain an underground 34-inch water pipe across the Railroad's property (the "1954 Agreement") (together with the 1936 Agreement, the "License Agreements").

4. Neither of the License Agreements was recorded with Larimer County.

5. The Railroad sold its property in 1971 to the owners of the abutting parcel to the north, John and Peggy Miller, thereby forming the entire parcel as eventually purchased by Defendant in 2013.

6. In 1989, despite selling its property in 1971, the Railroad (then known as the Burlington Northern Railroad Company) executed an additional agreement with the City, purporting to assign all of its right, title, and interest in the License Agreements, among other agreements, to the City.

7. Defendant received title to the property in 2013, subdivided it into the two aforementioned lots, and attempted to build a storage unit on the 3510 West Eisenhower lot.

8. An above-ground power line also runs across Defendant's property, which is plainly visible.

I. Analysis

Here, both water lines were initially installed with the permission of the Railroad pursuant to the License Agreements, and the lines were therefore not adverse at that time for purposes of establishing a prescriptive easement. The City contends that these licenses were revoked in 1971 when the Railroad conveyed title to the Millers, making the water lines adverse from that point forward; Defendant's position on the status of these License Agreements after 1971 is unclear.[1]

However, it remains undisputed that the Railroad sold the property in 1971 to the Millers, and property records submitted by the parties support this fact. As Defendant correctly points out, licenses are considered revoked "ipso facto by the licensor's conveyance of the land . . . or by his doing any act which is inconsistent with, or prevents the exercise of, the license." *American Coin-Meter of Colo. Springs, Inc. v. Poole*, 503 P.2d 626, 627-28 (Colo. App. 1972) (citations omitted).

Thus, the Court finds that the License Agreements terminated in 1971 when the Railroad conveyed title to the Millers. While this finding is not sufficient to establish that the water lines were adverse as to the Millers or any subsequent owners for purposes of summary judgment, it is sufficient to defeat Defendant's first counterclaim. Defendant may not, as a matter of law, seek to enforce an agreement which was revoked more than 40 years before he acquired the subject property.[2]

Disputed material facts therefore remain regarding whether or not the water lines were adverse and open and notorious while the Millers or any subsequent owners owned the property. The City's arguments for easement by estoppel and easement by acquiescence similarly involve disputed material facts.

---

[1] Defendant's answer to the City's complaint asserts that the City holds a license (rather than an easement) on his property, and his first counterclaim appears to allege that the City has committed breach of contract by failing to pay the yearly amounts due under the License Agreements. In his Verified Motion for Summary Judgment however, Defendant asserts that "the license may or may not have terminated," but seems to imply that they are still valid because "nothing has been done to prevent the exercise of the license by prior owners or Defendant." Curiously, Defendant then continues on in the same brief to state that the Railroad's 1989 assignment was ineffective because "the property was sold in 1971 [and] the license agreements were revoked at that time."

[2] The Court also notes that, even if the License Agreements were not revoked, Defendant has not put forward any theory or submitted any evidence supporting his presupposition that he is party to, or otherwise entitled to enforce them.

The Court also finds that the City has failed to submit any evidence whatsoever regarding how the above-ground power line might satisfy the legal requirements for the requested easements. The only undisputed material fact before the Court is Defendant's admission in his answer brief that the power line is clearly visible on his property. The City has therefore failed to show that it is entitled to summary judgment on this matter.

II. Order

Because the Court concluded that the License Agreements were revoked in 1971, the Court **GRANTS** summary judgment in favor of the City and against Defendant on Defendant's first counterclaim for breach of the License Agreements.

For the reasons cited above, the Court hereby **DENIES** summary judgment in favor of either party on the City's claims for declaratory judgment and quiet title, and on Defendant's second counterclaim.

DATED: June 23, 2017

BY THE COURT:

C. Michelle Brinegar

District Court Judge