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CASE NO. 86-922-CA-01

LAKE COUNTY, a political
subdivision of the State of
Florida,

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Plaintiff,

vs.

GLEND A Q. MAHANEY, ZELLA L.
MOORE and LONNIE MOORE, JR.,

Defendants.

Aug 25 4 02 PM '88
CLERK OF THE CIRCUIT COURT
LAKE COUNTY, FLORIDA

Aug 30 10 31 AM '88

SUMMARY FINAL JUDGMENT

THIS CAUSE came on to be heard before the Honorable Earle W. Peterson, Jr., Circuit Judge, on the 10th day of August, 1988, upon the motion for summary judgment filed by the defendants, GLENDA Q. MAHANEY, ZELLA L. MOORE and LONNIE MOORE, JR. In support of their motion, the defendants had filed a memorandum of law and three affidavits. The plaintiff filed two affidavits in opposition to the motion. The record in this case also consists of the testimony and exhibits presented to the court at a hearing on a motion for temporary injunction on August 21, 1986.

The Court has considered the pleadings and the record in the case, the affidavits in support of and opposition to the motion, and the arguments presented and authorities cited by all parties. Based upon all of the foregoing, the Court makes the following findings of fact and conclusions of law:

1. In its four-count first amended complaint, the county claims as part of its right-of-way for Old U.S. Highway 441 a portion of property claimed by the defendants. The defendants have title to Lots 40 through 45, Oak Crest Subdivision, and the county has claimed that its road right-of-way includes a portion of property consisting approximately of the southern 21.50 feet of the defendants lots.

2. Count I of the first amended complaint claims title to the disputed property pursuant to the express road dedication found within the plat of Oak Crest, recorded in Plat Book 6, page 28,

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3. The plat of Oak Crest, the surveys presented to the Court, and the testimony at the temporary injunction hearing all reveal that the dedicated road right-of-way lies adjacent to and south of the defendants' lots. The county presented no evidence of an express grant to the county or its predecessor in title with respect to any portion of the disputed property, and counsel for the plaintiff acknowledged at the hearing that the county was unable to find any such evidence.

4. Accordingly, there is no genuine issue of any material fact regarding the dedicated road right-of-way, and the defendants are entitled to judgment as a matter of law as to Count I.

5. In Count II, the county claims title to the disputed property in accordance with the provisions of Section 95.361, Florida Statutes. That section, entitled "Roads Presumed to be Dedicated," provides that a road shall be deemed to be dedicated to the public to the extent in width that has been actually maintained when the county, municipality or state has continuously and uninterruptedly maintained or repaired the road for four years. The dedication vests all right, title and interest in and to the road in the governmental entity. §95.361(1), Fla. Stat. (1987).

6. Because the statute creates an exception to the common law rules regarding adverse possession by providing a substantially shorter four-year prescriptive period, the presumption of dedication to the public arises only when the statutory requirements are strictly met. St. Joe Paper Company v. St. Johns County, 383 So.2d 915 (Fla. 5th DCA 1980).

7. The statute contemplates two methods of proving the dedication in favor of the county, state or municipality--(a) prima facie evidence of ownership based upon the filing of a map that meets the requirements of Section 95.361(2), Florida Statutes; or (b) proof of actual maintenance performed by the state, county or municipality.

8. Although the county alleged in paragraph 21 of its first amended complaint that such a map had been filed in the office of the Clerk of the Circuit Court, counsel for the plaintiff acknowledged at

the time of the summary judgment hearing that the county was not relying upon a map as prima facie evidence of road maintenance. Moreover, the map in question (exhibit 3 at the temporary injunction hearing) fails to meet the requirements of the statute for the following reasons:

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a. The map, dated in 1947, does not bear the signature of the chairman and secretary of the state road department, as required by the relevant statute in effect in 1947. §341.59, Fla. Stat. (1947).

b. The map was not duly certified by the chairman and secretary of the state road department.

c. The map contains no legend specifically describing the property in question and stating that the road had vested in the county or state. Downing v. Bird, 100 So.2d 57, 61 (Fla. 1958); Balbier v. City of Deerfield Beach, 408 So.2d 764 (Fla. 4th DCA 1982).

d. The county presented no evidence that the map had been filed in the Office of the Clerk of the Circuit Court in Lake County.

9. With respect to the issue of actual maintenance, the county must show the extent in width that has been actually maintained continuously and uninterruptedly for four consecutive years, and the county has no rights beyond the boundary of the road which actually has been maintained. Madden v. Florala Telephone Company, 362 So.2d 475, 477 (Fla. 1st DCA 1978).

10. The evidence on the issue of actual maintenance consisted of the following:

a. The defendants and their predecessor in title submitted affidavits stating that the affiants had observed no evidence that either the county or the state had performed any work on any portion of the disputed property at any time from 1959 to the present. The affidavits further state that the defendants and their predecessors arranged for the paving of the disputed property, which the defendants and their predecessors used as parking for their customers.

b. The county's affidavit executed by Glenn Morris, an employee with the Florida Department of Transportation, asserts that the State of Florida maintained "Old Hwy. 441 in the area of Oak Crest Subdivision" from the time of its construction in 1932 until 1979, and that the state's "policy for maintenance of roadways of this kind included restoration of damaged parts, repair of potholes, stripping of center and edge lines of the roadway, and mowing and repair of shoulders." This affidavit fails to create a genuine issue of material fact in that the affidavit:

i. Fails to specifically describe the roadway and the extent in width that actually was maintained.

ii. Fails to state the actual maintenance performed by the state with respect to the disputed property, but simply describes a policy for maintenance of roadways of this kind.

c. The county's affidavit submitted by Jim Stivender, Jr., Assistant Director of Public Works for Lake County, states that Old Hwy. 441 has been maintained continuously by Lake County since 1979. The only specific maintenance described in the affidavit regarding the relevant lots in Oak Crest Subdivision consisted of "the policy . . . to maintain this right-of-way by mowing east of these lots, continuing to run the machinery across these portions of the relevant lots, which are covered with gravel, and mowing west of these lots." Counsel for the plaintiff acknowledged at the time of the hearing that the machinery was not engaged as it traveled across the relevant lots, and that no mowing occurred with respect to the relevant lots. The affidavit did not state the time or times when the mower traveled across the defendants' lots.

11. There was no genuine issue of any material fact with respect to the actual maintenance performed by the county, or its predecessor, the State of Florida, with respect to the lots in Oak Crest Subdivision. The Court finds that the transportation of a mower across the lots, without any further evidence of actual maintenance, fails to satisfy the proof required by Section 95.361, Florida Statutes, and that the defendants are entitled to judgment as a matter of law with respect to Count II.

12. In Count III of the first amended complaint, the county sought relief based upon the theory of a prescriptive easement. The county relied upon the same affidavits discussed above to support its claim to a prescriptive easement.

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13. In light of the pleadings, affidavits and record in the case, the Court makes the following findings relevant to Count III:

a. The affidavits demonstrate that the roadway for Old U.S. Hwy. 441 was constructed in 1932, and has been used as a roadway continuously since that date. No portion of the paved road lies within any portion of the defendants' lots in Oak Crest Subdivision.

b. The county's proof of the use of the roadway does not include the allowance of a width for shoulders and ditches not used. There was no evidence in the record of any width that was actually used for shoulders and ditches. See, Grenell v. Scott, 134 So.2d 866, 869 (Fla. 2d DCA 1961).

c. The Morris affidavit did not describe any actual use of the disputed property by the county, but simply stated a "policy" for maintenance of roads of this kind.

d. The Stivender affidavit described maintenance from 1979 to the present consisting of the transportation of the mower across the subject lots.

e. The county's affidavits presented, at best, evidence of some use of the property from 1979 to the present. The Court finds that:

i. The transportation of the mower across the defendants' lots is not such a use as to give the county a prescriptive easement in and to the defendants' lots.

ii. The county has failed to demonstrate a particular use for the necessary prescriptive time frame of twenty consecutive years. See, Downing v. Bird, supra; Crigger v. Florida Power Corp., 436 So.2d 937 (Fla. 5th DCA 1983).

f. The instant lawsuit began when the county attempted to expand the pavement for the roadway into the defendants' lots. Because no portion of the paved roadway has been located within the defendants' lots, the county cannot establish a prescriptive easement

which would entitle the county to alter the use of the subject property.

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14. Accordingly, there is no genuine issue of any material fact with respect to the prescriptive easement theory, and the defendants are entitled to judgment as a matter of law with respect to Count III.

15. In Count IV, the county claimed title to the disputed property pursuant to a claim of boundary by acquiescence.

16. The county's affidavits and the record in the case furnished no evidence of an uncertainty on the part of both landowners as to the true boundary of the right-of-line, the location of that right-of-way line by the parties, and the acquiescence in such location for the prescriptive period of seven (7) years. See, Shaw v. Williams, 50 So.2d 125 (Fla. 1951); McDonald v. Givens, 509 So.2d 992, 993 (Fla. 1st DCA 1987).

17. Accordingly, there is no genuine issue of any material fact with respect to the claim of boundary by acquiescence, and the defendants are entitled to judgment as a matter of law with respect to Count IV.

In light of the foregoing findings of fact and conclusions of law, it is

ORDERED AND ADJUDGED as follows:

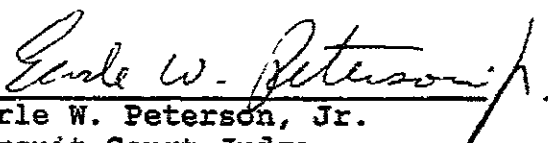
A. The Court hereby finds in favor of the defendants, GLENDA Q. MAHANEY, ZELLA L. MOORE and LONNIE MOORE, JR., with respect to all four counts of the first amended complaint. Accordingly, it is adjudged that the plaintiff, Lake County, take nothing by this action and that the defendants, GLENDA Q. MAHANEY, ZELLA L. MOORE and LONNIE MOORE, JR., go hence without day and recover costs from the plaintiff, with the amount of said costs to be determined at a later hearing.

B. The temporary injunction entered by this Court on September 2, 1986, is hereby dissolved.

C. The Court retains jurisdiction to determine an award of costs in favor of the defendants.

DONE AND ORDERED in Tavares, Lake County, Florida, this

26 day of August, 1988.


Earle W. Peterson, Jr.
Circuit Court Judge

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Gary L. Summers, 380 West Alfred Street, Tavares, Florida, 32778, Christopher C. Ford, 1150 East Highway 441, Tavares, Florida, 32778, and Lou Tally, Post Office Box 378, Mt. Dora, Florida, 32757, this 26 day of August, 1988.


Bonnie S. Steiner
Judicial Assistant Clerk

[moore.fj]