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19-P-52

Appeals Court

LULA JOHNSON vs. CHRIST APOSTLE CHURCH, MT. BETHEL.

No. 19-P-52.

Suffolk. October 2, 2019. - December 11, 2019.

Present: Wolohojian, Blake, & Englander, JJ.

Jurisdiction, Superior Court, Land Court. Land Court,
Jurisdiction. Real Property, Registered land, Registered
land: easement, Nuisance, Encumbrance, Easement, Fences.

Civil action commenced in the Superior Court Department on
December 24, 2014.

The case was heard by Mary K. Ames, J.

Denzil D. McKenzie (Fahelle Bonheur also present) for the
defendant.

James N. Decoulos for the plaintiff.

ENGLANDER, J. In this nuisance action concerning a fence
erected between the properties of two neighbors, the Superior
Court judge found for the plaintiff after a bench trial, and
ordered the defendant, Christ Apostle Church, Mt. Bethel
(church), to alter its fence so that the plaintiff could "access

. . . her property" from the church's property. Because the church's property is registered land, the Superior Court judge lacked jurisdiction to impose the remedy she ordered, which in essence granted the plaintiff an easement over the church's property. The Land Court has exclusive jurisdiction over claims that impose encumbrances on registered land. We accordingly vacate the order and judgment, and remand the case so that it may be transferred to the Land Court.

Background. This case involves two properties on Harvard Street in the Mattapan section of Boston. The plaintiff, Lula Johnson,¹ has owned and lived at number 624 Harvard Street since 1971. The defendant church purchased the adjacent property, number 628 Harvard Street, in 1995. Prior to being owned by the defendant, 628 Harvard Street was owned by the Jehovah's Witness Church. Both 624 and 628 Harvard Street were originally part of the same subdivision and, importantly, both properties are registered land.

The Johnsons and the neighboring church enjoyed an amicable relationship for many years. A driveway on the church's property is located near the Johnsons' property, and the Johnsons used and parked on that driveway for decades, with the permission first of the Jehovah's Witness Church, and then the

¹ Lula Johnson's husband, Leon Johnson, was also originally a plaintiff, but he passed away prior to trial.

defendant church. The Jehovah's Witness Church built a fence between the two properties at some point, but the fence was not directly on the property line, and because it had a gate, it did not impede the Johnsons' ability to use the church driveway to access their property along the side bordering the church.

The relationship between the Johnsons and the church soured some time in 2013. This resulted in the church building a new fence, six feet high, directly on the property line. Prior to building it, the church received a permit to build the fence from the city of Boston. The new fence did not have a gate in it. Moreover, because the Johnsons' home was situated very close to the lot line on the side facing the church, the new fence made it practically impossible for the Johnsons to access that side of their home for maintenance purposes; indeed, in one place there are only thirteen inches of space between the fence and the Johnsons' home.

The Johnsons filed suit in the Superior Court, alleging counts for negligence, "spite fence," and adverse possession. The remedy the Johnsons sought was abatement of the alleged nuisance, and for injunctive relief preventing the church from denying them "access" to their property.² The plaintiffs went

² The church counterclaimed for trespass, based on a 2013 event where the Johnsons took steps, through a contractor, to

forward to trial only on their nuisance claim.³ After hearing multiple witnesses, the judge ruled that the new fence caused "a substantial and unreasonable interference with the use and enjoyment of the [plaintiff's] property," by "frustrating her ability to properly access and maintain" it. As a remedy, the judge entered a detailed order and judgment requiring the church to install a series of gates in the fence "to allow access by the [p]laintiff onto her property."⁴ The defendant appeals.

Discussion. Although not raised by either party, the judgment must be vacated because the judge lacked jurisdiction to order the relief at issue. As noted, the defendant's property is registered land. Pursuant to G. L. c. 185, § 1 (a 1/2), the Land Court has "exclusive original jurisdiction" over "complaints affecting title to registered land." Here the judgment requires the church to maintain gates in its fence, on

move the fence to a new location well into the church's property. This claim is not at issue on appeal.

³ There can be no claim of adverse possession as to registered land. See G. L. c. 185, § 53.

⁴ In addition to the order and judgment, the judge also entered findings of fact and rulings of law (findings), which the defendant did not include in the record appendix or mention in its brief. This was a serious breach of our appellate rules, see Mass. R. A. P. 18 (a), as amended, 425 Mass. 1602 (1997), and one which could result in a waiver of appellate rights under some circumstances. See Cameron v. Carelli, 39 Mass. App. Ct. 81, 83-84 (1995); Kunen v. First Agric. Nat'l Bank of Berkshire County, 6 Mass. App. Ct. 684, 688-689 (1978). The findings were supplied to us only after oral argument.

registered land, and to allow the plaintiff to "access" her property from the church's property. The judgment further requires the church to maintain the gates in the fence "in perpetuity." While not denominated as such, the judgment purports to grant the plaintiff a permanent easement to use the church's property to access her property. The Superior Court does not have jurisdiction to so encumber registered land. See Feinzig v. Ficksman, 42 Mass. App. Ct. 113, 115-116 (1997) (Feinzig).

The decision in Feinzig is instructive. In Feinzig the plaintiffs had been maintaining a driveway and retaining wall on the defendant's property for many years. The land in question was registered land. After a dispute arose, the plaintiffs obtained an injunction in the Superior Court that enjoined the defendant from interfering with the plaintiffs' use of the defendant's land. On appeal this court held that the Superior Court was without jurisdiction to enter the injunction, which was "a de facto encumbrance in the nature of an easement." Id. at 117. We concluded: "We think the consequence of that exclusive grant of jurisdiction [to the Land Court] is that while a Superior Court judge may order the discontinuance of a trespass on registered land, that judge may not fashion a judgment which has the effect of imposing an encumbrance on the registered land." Id. at 115-116.

The Superior Court judge thus lacked jurisdiction to enter the remedy contained in the judgment under review. The next question is whether the case should be remanded to the Superior Court to reevaluate the remedy, or whether the case must be transferred to the Land Court because the Superior Court lacked jurisdiction over the claim itself. That is a more difficult question, as the Superior Court does have jurisdiction to entertain claims alleging a nuisance on registered land, provided that the remedy sought does not "affect title" to the registered land.⁵

In this case the plaintiff's nuisance claim seeks a judgment encumbering the defendant's property, such that the matter must be heard in Land Court. All the remedies the plaintiff has requested involve the preservation of access to her lot from the church's lot, and an order granting such access necessarily encumbers the church's land. Moreover, even an order requiring only permanent removal of the fence would appear

⁵ We made a similar point in Feinzig when we said that the Superior Court could enjoin a trespass on registered land. Feinzig, 42 Mass. App. Ct. at 115-116. For example, a claim seeking to abate a nuisance caused by unreasonable smells, see Pendoley v. Ferreira, 345 Mass. 309, 312 (1963), or noise, see Shea v. National Ice Cream Co., 280 Mass. 206, 211 (1932), emanating from registered land likely would not "affect title" such that the claim would have to be brought in the Land Court. See also Rattigan v. Wile, 445 Mass. 850, 851 (2006) (nuisance caused, among other reasons, by maintenance of "unreasonable aesthetic conditions").

to be an encumbrance on the church's title sufficient to implicate the Land Court's exclusive jurisdiction, at least where the basis for the fence's removal rests on its interference with the plaintiff's ability to pass across the defendant's property.⁶

Accordingly, we vacate the judge's order and judgment on the basis that she lacked jurisdiction, and remand this case so that it may be transferred to the Land Court.

So ordered.

⁶ We express no opinion as to whether the remedy the judge ordered is a proper remedy in a nuisance action. In addition, we note that the law of nuisance concerns itself with activity on one's property that in some way constitutes an "invasion" of the property of another. Rattigan, 445 Mass. at 859 (quoting Restatement [Second] of Torts: Nuisance § 821F comment d, at 106 [1979]). We do not reach the question whether under the circumstances the church's building of its six-foot high fence, on its property, constituted such an invasion.