

SCAW

MEMORANDUM

SUPREME COURT, STATE OF NEW YORK
In the Matter of the Application of
RONALD MARCHAND, JR. and MARGARET
MARCHAND,

Petitioner(s),

- against -

NYS DEPARTMENT OF ENVIRONMENTAL
CONSERVATION and INCORPORATED
VILLAGE OF BAYVILLE,

Respondent(s).

By LALLY, J.
IAS/TRIAL PART 5

NASSAU COUNTY
INDEX NO. 13478/06

CAL. NO. 2009N0328

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The issue tried before this court as directed by order dated September 17, 2009 (LaMarca, J.) was whether the public's right of way over Shore Road (a/k/a Washington Avenue, Dirt Path, Traveled Way) has been abandoned by non-use.

Plaintiffs brought this action for a declaratory judgment pursuant to RPAPL Art. 15. That portion of plaintiff's action which seeks a determination pursuant to Art. 78 has been disposed of.

Plaintiffs are the owners in fee since September of 1998 of 100 Washington Avenue (a/k/a Shore Road), which abuts Mill Creek on its east. Shore Road runs across this property in a north/south direction close to the water's edge. It is unpaved and, while there was some disagreement as to where it begins and ends, it appears to start at Wansor or Godfrey Avenue and ends at Bayview Avenue. There are nine houses located on said stretch.

It has already been established by this court's prior order (LaMarca, J.) that defendant Village acquired a prescriptive right of way over Shore Road under Village Law §6-626 many years prior to

plaintiffs' purchase of the said property, and that plaintiffs hold title to that portion of Shore Road which runs across their property.

Plaintiffs argue that defendant's prescriptive right of way over their portion of Shore Road has been abandoned as a result of non-use pursuant to Highway Law §205(1), which provides in relevant part: "[E]very highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right-of-way that shall not have been used for said period shall be deemed abandoned as a right-of-way." Although they admit to pedestrian use such as sightseers and dog walkers, plaintiffs claim that only vehicular traffic qualifies as public use and that such vehicular traffic must be by non-residents because those living on the right of way have an implied easement to use Shore Road.

Plaintiffs called four witnesses, including the plaintiffs, who testified that during the years in question, namely, 1998 to 2004, they observed pedestrians, as well as cars, traverse Shore Road. While the numbers vary with the season, day of the week and time of day, and are estimates at best, their testimony can be averaged as acknowledging zero to five vehicles including strangers per week and several pedestrians per day.

Defendants' eleven witnesses similarly differentiated the traffic as to season, date and time and also relied on estimates of what they observed. Their estimates were higher but not markedly different, ranging from two to seven cars per week and five to twelve pedestrians per day. Among defendants' eleven witnesses were five neighbors who did not live on Shore Road and testified to using said road regularly by car and by foot and seeing others do the same.

None of the witnesses were able to produce an exact count of the traffic based on constant observation or a scientific methodology.

Findings of Fact

It is undisputed that the Village provides municipal services for the residents of Shore Road, such as snow removal, water,

garbage removal and police and fire protection. Further, in September of 1998 plaintiffs erected a barricade across their part of Shore Road, which the Village caused to be removed.

The photographs (Exh. 8-11) and testimony established that Shore Road, south of plaintiffs' property where Bayview Avenue begins, can flood at high tide twice a month (at full moon and new moon). This flooding only lasts a few hours and curtails some, but not all, vehicular traffic.

Shore Road is well defined and delineated (Exh. 13, 2, 5,6). A sign "Private Road, No Thru Traffic" is affixed to a telephone pole two houses north of plaintiffs' property (Exh. 7). The village has not installed lighting along Shore Road, nor has it repaired same, or filled any pot holes. Whatever repairs were performed were done by plaintiffs and other residents fronted by said road. South of the plaintiffs' section of Shore Road it is poorly maintained.

Argument

Highway Law §205 applies to dedicated streets as well as streets acquired by prescription (Amesbry v Heinds, 48 NY 57). Once a street has become a village street by prescription there is a presumption in favor of continuance (Curtis v Town of Galway, 50 AD3d 1370; Smiegel v Rensselaerville, 283 AD2d 863). The burden of proof to show abandonment of the right-of-way rests on the plaintiffs (Smiegel v Rensselaerville, supra; Matter of Shawaugunk Holdings Ltd. v Supt. of Highways of Town of Shawaugunk, 101 AD2d 905).

In making its determination of whether plaintiffs have proved abandonment of the right-of-way, the court has considered several factors. Shore Road is a well defined road which has been in existence for a long period of time. Vehicular traffic proceeds along these well defined lines (Town of Leray v NY Cent. RR. Co., 226 NY 109). The fact that shrubs encroach upon, and thereby slightly narrow said road to eight feet for a small segment, does not extinguish the right-of-way. It remains unobstructed and passable (Abess v Rowland, 13 AD3d 790; Faigle v Macumber, 169 AD2d 914; In Re The County of Suffolk, 63 AD2d 673; Hewitt v Town of Scipio, 32 AD2d 734).

Since the witnesses' testimony describing the traffic on Shore Road is not in marked contrast, and since their times of observation vary, eliminating any dispute, the court has summarized same and concludes that travel has continued along Shore Road during the period in question continuously in reasonably normal forms (Town of Leray, supra). Parenthetically, had the court solely considered plaintiffs' proof, it would have reached the same conclusion.

Although the court has made a finding that there is reasonably normal vehicular traffic, foot traffic alone is sufficient to defeat the claim of abandonment (People ex rel v State Tax Commission, 190 AD 73).

The court rejects plaintiffs' argument that travel across Shore Road by adjacent residents and their guests does not qualify as "public use." Aside from the difficulty, if not impossibility, of distinguishing between that group and non-residents, plaintiffs have failed to offer any evidence that the first group has an implied easement.

Based upon the foregoing, plaintiffs have failed to meet their burden of proof to show that the Village of Bayville has abandoned its right-of-way over their portion of Shore Road. Therefore, judgment must be granted in favor of respondents.

This constitutes the decision of the court in accordance with CPLR 3213(b).

Settle judgment on notice.

Dated: NOV 20 2009

Michael
J.S.C.