State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 7, 2021 530684

TIMOTHY BURPOE et al.,
Appellants,
v MEMORANDUM AND ORDER

JAMES McCORMICK et al.,
Respondents.

Calendar Date: November 19, 2020

Before: Garry, P.J., Egan Jr., Aarons and Pritzker, JJ.

Norfolk Law PLLC, Lake Placid (Matthew D. Norfolk of counsel), for appellants.

Law Office of James M. Brooks, Lake Placid (James M. Brooks of counsel), for respondents.

Aarons, J.

Appeal from a judgment of the Supreme Court (Ellis, J.), entered December 10, 2019 in Franklin County, upon a decision of the court in favor of defendants.

In 2005, plaintiffs purchased a landlocked parcel of real property (hereinafter Lot 7) in Essex County running along the border with Franklin County. Defendants have owned two of the adjacent parcels in Franklin County since the 1980s, a "Norton Lot" to the southwest of Lot 7 and a "Hillman Lot" to its west. Plaintiffs commenced this RPAPL article 15 action in 2017, seeking a declaration of their easement rights over defendants'

property and injunctive relief. Defendants answered and asserted various counterclaims.

Following motion practice that winnowed the parties' claims, a nonjury trial was conducted on plaintiffs' claim of a prescriptive easement, defendants' counterclaim for trespass and the parties' dueling requests for injunctive relief. Supreme Court thereafter issued a decision in which it found, as relevant here, that plaintiffs had not established a prescriptive easement. Plaintiffs appeal from the judgment entered thereon. We affirm.

An easement by prescription is established where a party demonstrates, "by clear and convincing evidence, that the use of the servient property was open, notorious, continuous, hostile and under a claim of right for the requisite 10–year period" (Allen v Mastrianni, 2 AD3d 1023, 1024 [2003]; accord Bekkering v Christiana, 180 AD3d 1276, 1279 [2020]; see Woehrel v State of New York, 178 AD3d 1169, 1170 [2019]). Supreme Court rendered a nonjury verdict finding that plaintiffs had not met that burden and, in "reviewing [that] verdict, we independently review the probative weight of the evidence, together with the reasonable inferences that may be drawn therefrom, and grant the judgment warranted by the record while according due deference to the trial court's factual findings and credibility determinations" (Ross v GEICO Indem. Co., 172 AD3d 1834, 1835 [2019] [internal quotation marks and citations omitted]; see Galarneau v D'Andrea, 184 AD3d 1064, 1065 [2020]).

The claim of a prescriptive easement rests upon testimony that, for the requisite 10-year period, plaintiff Timothy Burpoe and others had often walked or rode an all-terrain vehicle (hereinafter ATV) on a "woods road" that began near defendants' residence and ran across the Norton and Hillman lots to Lot 7. Nothing else was produced to substantiate that use, however, and defendants presented proof indicating that it had not occurred. In particular, defendant Denise McCormick, individuals who worked at defendants' home business, individuals who had been given permission to hunt on defendants' property and a neighbor whose home was near the entrance to the woods road all stated

that they had never seen plaintiffs or heard their ATV on it. Defendants also produced evidence that motion sensitive security and trail cameras had been on their property since the early 2000s, were in positions to monitor portions of the woods road and had never captured an image of plaintiffs or anyone riding an ATV. There was other evidence that undercut plaintiffs' accounts as well, most notably regarding the consistent presence of a chain across the entrance to the woods road and the timing of improvements to the road that Burpoe appeared to be unaware of despite his purportedly regular use.

Supreme Court credited defendants' proof of a lack of use by plaintiffs and found that plaintiffs' proof to the contrary was "self-serving and lacking in credibility." After independently reviewing the evidence and deferring to the court's credibility assessments, we see no basis to upset its determination (see Murphy v State of New York, 188 AD3d 1330, ___, 2020 NY Slip Op 06326, *1 [2020]). Even if there remained some possibility of use by plaintiffs of which defendants were unaware, that possibility fell well short of proof establishing "a sufficient degree of openness and notoriety to give rise to a prescriptive easement" (Eskenazi v Sloat, 40 AD3d 577, 578 [2007]; see Carty v Goodwin, 150 AD3d 812, 812-813 [2017]). Plaintiffs' remaining argument has been considered and is without merit. Finally, we decline defendants' request to impose sanctions upon plaintiffs for taking this appeal.

Garry, P.J., Egan Jr. and Pritzker, JJ., concur.

ORDERED that the judgment is affirmed, with costs.

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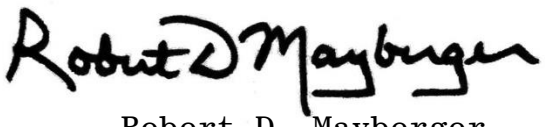

Robert D. Mayberger
Clerk of the Court