Docket # 17-16924

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EDWARD SZCZEPKOWSKI and VICKI SZCZEPKOWSKI,	:	1754 CD 2024
Appellants,	:	Trial Court Docket No. 17-16924
v.	:	
METROPOLITAN EDISON and BARBARA L. STEVENS,	:	
Appellees.	:	

MEMORANDUM OPINION, J. Benjamin Nevius **February 24, 2025**

Edward Szczepkowski and Vicki Szczepkowski ("Appellants") appeal from the Trial Court's Orders of: (a) May 25, 2018 (the "May 2018 Order"), granting the joint motion of Appellees, Metropolitan Edison ("Met-Ed") and its former employee, Barbara L. Stevens ("Ms. Stevens") (together with Met-Ed, "Appellees"), for partial summary judgment on Appellants' claims; and (b) November 22, 2024 (the "Nov. 2024 Order"), granting Met-Ed summary judgment on its counterclaims, fully resolving all claims.

I. FACTUAL BACKGROUND

At the heart of this matter is a 200-foot-wide utility easement (the "Easement") providing for the location and maintenance of electrical lines, poles, and related equipment. The Easement runs through Appellants' property, situated in Cumru and Brecknock Townships, Berks County, having an address of 620 Gouglersville Road, Sinking Spring, PA 19608 (the "Property"). The agreement establishing the Easement long predates Appellants' ownership of the Property,[1] with execution and recordation in 1923.

[1] Appellants purchased the land in 1979 subject to the Easement.

Appellants accuse Met-Ed of exceeding the maintenance rights set forth in the Easement. Through counterclaims, Met-Ed seeks judgment as a matter of law and an order requiring Appellants to remove an in-ground pool, greenhouse, and shed constructed within the Easement boundaries.

II. PROCEDURAL HISTORY

On August 30, 2017, Appellants initiated this matter by Complaint, setting forth counts for Continuing Trespass (Count I), Permanent Trespass (Count II), Assault (Count III), Intentional Infliction of Emotional Distress (Count IV), and Respondeat Superior (Count V). Among other things, Appellants allege:

- Met-Ed's agents entered upon property located outside the Easement, causing damage through machinery and human traffic and denying Appellants enjoyment of the Property.
- Met-Ed's agents knowingly continue to trespass upon land outside of the Easement.
- Met-Ed, through its agents, put Appellants in fear of "imminent, offensive contact and bodily injury" through threats and bringing armed guards with them while working on utility equipment.
- Met-Ed's agents engaged in "extreme and outrageous conduct, intentionally or recklessly" causing severe emotional distress to Appellants.
- Met-Ed is responsible for the direct actions and emotional distress inflicted by its agents.

On October 4, 2017, Appellees filed their Answer with New Matter and Counterclaims, in which they deny Appellants' allegations and aver that the individuals referenced in the Complaint had not been at Appellants' Property or spoken with Appellants since 2013. Further, Met-Ed sets forth two-counts against Appellants for Breach of Easement (Count I) and Trespass (Count II) (together, the "Counterclaims"). Specifically, Met-Ed alleges Appellants refuse(d) Met-Ed

permission to exercise its rights under the Easement, and that Appellants constructed permanent fixtures within the Easement boundaries (the in-ground pool, concrete pool patio, and greenhouse/shed). On November 13, 2017, Appellants filed their response, thereby closing the pleadings.

The parties then engaged in a period of pretrial discovery. Relevant to the within appeal, Appellees propounded a set of written Requests for Admissions upon Appellants (due December 28, 2017). As of March 8, 2018, Appellants had not served objections or responses to the Requests for Admissions, at which time Met-Ed filed a Motion for Partial Summary Judgment (the "First Motion") seeking an order (a) dismissing Appellants' claims, and (b) declaring that the Easement "burdens a strip of land two hundred (200) feet in width across the said property belonging to the [Appellants]." [*See* First Motion]. On May 25, 2018, the Hon. Jeffrey K. Sprecher (Ret.) ("Judge Sprecher")[2] granted Met-Ed's First Motion, dismissing all Appellants' claims and entering judgment confirming the validity and location of the Easement.

On April 10, 2024, after a significant period of pretrial discovery/case dormancy, Met-Ed filed a dispositive motion on the remaining Counterclaims (the "Second Motion"). In it, Met-Ed argues that, upon the existing discovery record, no genuine issue of material fact remains as to whether the pool, greenhouse, and shed were/were located within the Easement. As such, Met-Ed requested judgment by order that Appellants remove the offending structures from the Easement.

On August 12, 2024, the Parties argued their positions before the Trial Court. After careful consideration of the initial and/or supplemental written submissions, together with full review of

[2] The case was originally assigned to Judge Sprecher who retired from the bench in June 2023. On June 9, 2023, the matter was transferred to the undersigned on judicial reassignment.

the discovery record, applicable statutes, and controlling caselaw, the Trial Court entered the Nov. 2024 Order granting judgment in favor of Met-Ed and against Appellants on the Counterclaims.

On December 21, 2024, Appellants timely filed the within appeal (the "Appeal"). Pursuant to Pa. R.A.P. 1925(b), the Trial Court directed Appellants to file a Concise Statement of Matters Complained of on Appeal. On January 28, 2025, Appellants filed their response,[3] raising the following:

> 1. Did the Trial Court err in granting [the First Motion], dismissing all Appellants' claims, by failing to consider the evidence and further failing to apply the appropriate standard to the grant of summary judgment?
>
> 2. Did the Trial Court err in granting [the Second Motion] where the evidence presented to the [Trial] Court clearly demonstrated a *de minimis* encroachment upon "a questionable easement" without an evidentiary hearing to determine the facts?
>
> 3. Did the Trial Court err in granting [the Second Motion] in failing to view the facts presented in the light most favorable to the non-moving party?
>
> 4. Did the Trial Court err in granting [the Second Motion] where, the [Trial] Court upon oral Order requested letter briefs and decided the issues upon such letter briefs without further opportunity for testimony or to present additional evidence?

The Trial Court focuses its attention on these specific matters identified by Appellants.[4]

[3] The Trial Court recites the errors alleged in the Concise Statement in spirit rather than verbatim in the interest of economy. Please see the Concise Statement for Appellant's citations to caselaw and specific paragraphs in pleadings.

[4] It is well-settled that issues not raised in an appellant's concise statement of errors complained of on appeal are deemed waived. *See Krebs v. United Refining Co. of Pa.*, 893 A.2d 776, 797 (Pa. Super. Ct. 2006). Waiver is not discretionary—when matters are not included in the concise statemen, waiver is mandatory. *See City of Philadelphia v. Lerner*, 151 A.3d 484, 494 (Pa. 2011).

III. DISCUSSION

A. Standard of Review

The standard of review on appeal from the grant or denial of summary judgment is de novo, and the scope of review is plenary. *See Clean Air Council v. Sunoco Pipeline L.P.*, 185 A.3d 478 (Pa. Commw. Ct. 2018). Summary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, in accordance with Pa. R. Civ. P. 1035.2(1). *See Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811 (Pa. 2017).

On appellate review, an appellate court may reverse a grant of summary judgment if there has been an error of law or an abuse of discretion. *Valley Nat'l Bank v. Marchiano*, 221 A.3d 1220 (Pa. Super. Ct. 2019). To the extent that the appellate court must resolve a question of law, it shall review the grant of summary judgment in the context of the entire record. *Id.* The application of the statute of limitations to an alleged cause of action is a matter of law to be determined by the court. *Id.*

B. Appellants' Direct Claims—May 2018 Order

Appellants' first grievance—regarding Judge Sprecher's dismissal of Appellants' claims—lacks specificity such the Trial Court can properly address it.[5] This is especially true given that the undersigned received this matter on judicial reassignment from a prior assigned judge. Appellants do not, for instance, refer to particular evidence that should have given cause for their counts to survive, nor do they suggest the proper standard Judge Sprecher should have

[5] When an appellant fails to identify, in a vague statement of matters complained of, the specific issue he or she wants to raise on appeal, the issue is waived, even if the trial court guesses correctly and addresses the issue in a opinion in support of order. *202 Island Car Wash, L.P. v. Monridge Const., Inc.*, 913 A.2d 922, (Pa. Super. Ct. 2006).

applied. That said, the Trial Court endeavors to address Appellants' complaint faithfully on the existing docket/record.

The May 2018 Order dismissed with prejudice all five counts raised in the Complaint and rejected an accompanying averment that the original utility Easement had been reduced from 200-feet-wide to 30-feet-wide by implication, agreement, and/or operation of law. Upon examination of the record related to the First Motion, Appellants failed to respond to written discovery, resulting in deemed admissions. In consideration of these admissions, Judge Sprecher found, among other things, that the factual allegations underpinning Counts III, IV, and V of Appellants' Complaint occurred more than four years prior to suit.

The Complaint itself only refers to the dates of alleged incidents as transpiring "over the past several months." Nowhere in the Complaint are alleged tortious actions by agents of Met-Ed identified with temporal specificity. The "past several months" is undefined in the Complaint. Met-Ed, presumably, sought to narrow that timeframe with its written discovery, including, the Request for Admission(s) asking Appellants to admit or deny that the agents in question had not communicated with them or been to their property since 2013. Without sufficient temporal pleading, the deemed admissions established that the alleged incidents occurred sometime during or before 2013. Those counts—each sounding in tort—were subject to a two-year statute of limitation. As a result, Judge Sprecher determined Counts III, IV, and V were stale and dismissed them.

As to the remaining claims—Counts I and II for continuing and permanent trespass, respectively—it was also deemed admitted that the attached copies of the deed to the Property and recorded Easement burdening it were accurate and factually established. The recorded Easement spelled out that the width of the Easement was 200 feet, not 30 feet as alleged. Nothing in the

existing discovery record demonstrates that the original 200-foot-wide dimensions were altered by expansion or diminishment. In any event, modifications need to be in writing so as to comport with the Statute of Frauds—no such writing exists. *See Haines v. Minnock Construction Co.,* 433 A.2d 30, 33 (Pa. Super. Ct. 1981). Further, Appellants admitted during sworn depositions (conducted January 26, 2022), that they were aware of, and do not dispute, that the existing utility Easement running through the Property is 200-foot-wide.[6] [*See* Met-Ed's Brief in Support of Second Motion, pp. 5-10 (with reference to deposition testimony)]. Appellants further admitted they were aware of the Easement when they chose where to improve the Property by constructing the in-ground pool, greenhouse, and shed. *Id.*

Counts I and II of the Complaint both hinged upon a factfinder agreeing that the Easement was only 30 feet in width. Once it was established as an unopposed fact that it was 200-feet, Judge Sprecher dismissed those counts as well, presumably because the averments were related to actions allegedly taken by Met-Ed outside of the 30-foot corridor but still within the 200-foot-wide Easement.

C. De Minimis Encroachment—Nov. 2024 Order

As set forth above, the Trial Court granted Met-Ed's Second Motion, awarding full and final relief as to all claims. In specific, the Trial Court directed Appellants to (a) fill the in-ground swimming pool, and (b) remove any structures located within the Easement boundaries.[7] Appellants argue that their improvements within the Easement are *de minimis* in nature and, therefore, should be allowed to remain. Appellants' argument is intriguing,[8] as the improvements

[6] Although Appellants' depositions occurred after Judge Sprecher entered his May 2018 Order, the testimonial admissions only further buttress the implied rationale for his decision.

[7] To their credit, Appellants removed some structures on their own initiative prior to summary judgment.

[8] In fact, the Trial Court invited the parties to submit additional briefing on the matter.

have been there for many decades—mostly, it seems, without objection (or at least without aggressive action by Met-Ed to enforce its rights under the Easement). In this suit, however, Met-Ed asserts that the Easement is used for an "806 Line" (a 69kV electric transmission line), and that Appellants' encroachment threatens the safety of persons, as well as the ability of Met-Ed to protect and preserve the utility lines for the benefit of the general public.

In candor, neither party presented compelling evidence as to the relative dangers or (lack thereof) posed by the encroaching structures. Absent such evidence, the Trial Court was left with the plain language of the negotiated parameters of the Easement. The Easement calls for a 200-foot-wide area on the Property for the placement of electrical lines, associated equipment, and maintenance. The underlying agreement, as recorded, does not permit the owner of the Property to encroach upon the Easement and, as set forth above, no written evidence exists to suggest the Easement was modified post-1923. No dispute remains, therefore, that Appellants: (a) were aware of the Easement; (b) knew the location and boundaries of the Easement; and (c) knew that three structures they built encroach upon Easement.

The case most potentially supportive of the *de minimis* argument appears to be *Big Bass Lake Cmty. Ass'n v. Warren*, 23 A.3d 619, 626 (Pa. Commw. Ct. 2011). *Big Bass*, however, addresses a two-foot by 50-foot stone landscaping wall located within a community association's utility easement. There, the Commonwealth Court held that encroachments must significantly interfere with the use of a right-of-way to support an injunction against the encroaching use. But in its analysis, the Commonwealth Court cited *Moyerman v. Glanzberg*, 138 A.2d 681 (Pa. 1958), for the proposition that an encroachment needs to materially interfere with use of the easement.

Moyerman puts forth four other factors considered in that case: "(1) that the [appellee/servient property owner's] encroachment upon the easement, although indisputably a

continuing trespass, was neither willful nor intentional but was, rather, the result of a mistake on the appellee's part regarding the quantum of land he had purchased; (2) that the appellee's mistake was attributable to his innocent belief that he was the owner of the driveway and that he had granted the appellants the easement thereover whereas exactly the converse was true; (3) that the appellants were not guilty of laches in failing to initiate their action before the construction had been substantially completed because the encroachment was too slight to be readily discernible and because building materials and other debris in the area tended to obscure it; (4) that the appellants did, however, know that the appellee was violating the zoning ordinance but took no action until the dwelling had been practically completed; (5) that the encroachment did not materially interfere with the use of the easement." *Id.* at 683.

In *Moyerman,* a chancellor determined that granting an injunction "would be inequitable, doing more harm than the wrong sought to be redressed." *Id.* at 683. The Pennsylvania Supreme Court agreed with the chancellor in his finding/conclusion that the subject one-foot-wide gutter did not materially impact the purpose of the easement, which was recorded for ingress to and egress from a rear lot. *Id.* at 684. The facts that (a) the community association routinely failed to enforce restrictions on its utility easement, and (b) evidence revealed some discussion that the utility easement may not have been used for its intended purpose also proved material to the analysis.

Here, Appellants admitted under oath to knowledge of the Easement and chose to erect structures/a pool within its boundaries. Further, beyond circumstantiality, no direct evidence exists establishing that Met-Ed knew of the encroachments and nevertheless delayed in acting timely to protect its rights. Put simply, the Trial Court was not presented with sufficient evidence to determine that Appellants' encroachment was *de minimis* and/or did not materially impact Met-

Ed's use and enjoyment of its Easement rights. The in-ground pool, greenhouse, and shed are substantially larger than a one-foot-wide gutter (*Moyerman*), or a two-foot-high by 50-foot-long landscaping wall (*Big Bass*). Although the *de minimis* argument remains an academically interesting one, the Trial Court is without controlling law that would permit relief to Appellants, even if the Trial Court deemed it equitable.[9]

D. Standard of Review Applied—Nov. 2024 Order

Appellants argue the Trial Court failed to view the facts of the matter in the light most favorable to their position, which is required when granting summary judgment against a party's interests. The pertinent facts credibly raised in verified pleadings and placed upon the record were given due consideration by the Trial Court and, anywhere some controversy of fact still remained, they were viewed most favorably for the Appellants. The most controlling facts in this matter, however, were the existence of the Easement, the size of the Easement, and Appellants' awareness as to their encroachment. These facets were not in controversy as sworn testimony by Appellants showed they were aware of the Easement and its restrictions. Further, facts demonstrate that the improvements are located within the Easement.

E. Failure to Take Additional Testimony After Supplemental Briefing

All parties were afforded opportunity to argue and brief their respective positions. The suggestion that an additional hearing was required, or that new or additional testimony should be accepted, is raised for the first time in the Concise Statement.[10] Quite simply, no request was made, and the Trial Court therefore considered on the existing argument/briefing.

[9] Although outside the record and not determinative, the Trial Court has seen instances where a utility (Met-Ed included) obtained a 30-60 foot easement to erect and maintain 69 kV facilities. There may, therefore, have been some opportunity to advance an argument that the Easement is overly broad. The Trial Court, however, is without such a record.

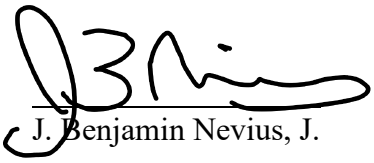
[10] Further, although not required, neither party sought reconsideration, nor did either request leave to reopen the record.

IV. CONCLUSION

The Trial Court is not without sympathy for Appellants. They were, however, provided with what due process requires: ample opportunity over seven years to address the issues raised. At the core of this matter is that a longstanding utility Easement that Appellants did not negotiate—one that predated their ownership of the Property by more than 60 years. The record plainly establishes that Appellants knew about the Easement and placed improvements within the boundaries. Unfortunately, these are not small or insignificant improvements—an in-ground pool, a greenhouse, and a shed—all of which were constructed under the risk that the holder of the Easement might seek to enforce its rights remove them. Nothing in the controlling law so clearly provides Appellants relief under the circumstances, and the Trial Court is not free to rewrite plainly worded contracts or create new law.

For the reasons set forth above, the Trial Court respectfully requests that the Honorable Superior Court affirm and deny/dismiss the within Appeal.

BY THE COURT:



J. Benjamin Nevius, J.

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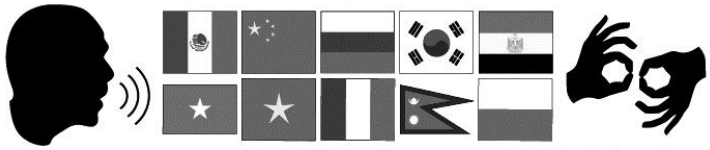

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