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Clerk of the Superior Court
JAN 04 2011
By: Ahusted, Deputy

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7 CALIFORNIA SUPERIOR COURT
8 SAN DIEGO COUNTY
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ANNE Q. FOMON, Plaintiff, v. COLLIN H. HAINES, et al.; JAMES A. COFFMAN II, in his capacity as Trustee of the Coffman Family Trust dated 9/22/08; COLLEEN COFFMAN, in her capacity as Trustee of the Coffman Family Trust dated 9/22/08; and DOES 1 through 50, inclusive, Defendants.	Case Number 2009-091836-CTL **STATEMENT OF DECISION** Judge David B Oberholtzer Department 67
AND ALL RELATED CROSS ACTIONS	

20 This action to quiet title and establish an easement for drainage and parking came
21 on for trial on July 26, 2010, Judge David B Oberholtzer presiding. Plaintiff, Anne Q.
22 Fomon appeared with her counsel, Christopher R. Mordy of Mordy Law Offices.
23 Defendants James A. Coffman and Colleen Coffman, Trustees of the Coffman Family
24 Trust dated 09/22/08 appeared with their counsel Shawn D. Morris and Coleen H. Lowe
25 of Morris, Sullivan & Lemkul, LLP.
26 Trial was to the court, which after hearing testimony, examining received exhibits,
27 and having been fully advised by the arguments of counsel, finds:
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1. Fomon has proved open and notorious use of that portion of the Coffman's property in which her guests would park for a period of five years, but did not prove by a preponderance of the evidence the use had been hostile, in that the evidence of permissive use was evenly balanced.
2. Respecting Fomon's claim for an easement for the drainage of rainwater crossing her property, the law governing surface waters and adjoining land owners is preferred to the law of prescriptive easements under the facts of this case. Inasmuch as both parties appear to be acting reasonably and exercising due care in draining their properties, these is no controversy to decide.

1. FACTS.

Fomon has lived at 6546 Muirlands Drive in the La Jolla area of San Diego, California, since1984. The Coffmans own 6604 Muirlands Drive, next to the Fomon property to the north. The Coffmans purchased their lot in July 2009 from Collins and Rosalie Haines, who had owned the property since 1973. The catalyst for the lawsuit is the Coffmans' plan to separate the two lots the Haines' house is built on, building a spec house on the northern lot, and their own home on the larger southern lot with as big a house as the lot will accommodate.

Rosalie Haines and Anne Fomon were friendly, exchanging pleasantries and birthday cards. Rosalie was somewhat older than Anne, and their relationship was the cordial and respectful acquaintance often developed between neighbors of divergent ages. Anne would visit Rosalie and check on her from time to time because of her poor health. Nevertheless, they did not socialize, and Anne would visit Rosalie, not the other way around.

Where their properties meet at the street, there was an asphalted level area, perfect for parking in neighborhood with no safe on-street parking. In 1985, Fomon paved the area, including about 170 square feet of the Coffman property, and some of the City's right of

way and sewer easement.[1] The paving was part of a remodel to Fomon's La Jolla bungalow that changed its character dramatically, replacing the front yard with poured concrete and walling off the back yard.

People working at the Fomon house parked on the area in question; the Haines extended family parked there as well. Logically, it would not have been used by house guests, because both homes had ample driveway parking. For the most part, a single vehicle would be parked in the area when it was used, but more than one on occasion, as when Tim Haines held a Super Bowl party and Fomon's wedding.

By 1990 or so, Fomon or her callers had used the area enough to establish a prescriptive parking easement, if her use was adverse to Haines; on the other hand, if Haines had given Fomon permission, the parking was a neighborly accommodation and Fomon had no claim of right.

2. <u>LAW OF PRESCRIPTIVE EASEMENTS</u>

An easement is a non-possessory interest in real property, permitting one to use the property of another for a specified purpose, and only to the extent reasonably necessary for that purpose. The dominant tenement cannot interfere unreasonably with the quiet enjoyment by the servient tenement and the servient tenement cannot interfere unreasonably with the use to which the easement is put. Restatement (3rd) Real Property, Servitudes, §1.2

To create an involuntary, or prescriptive easement, the owner of a dominant tenement must put the servient tenement to some use that is open, notorious, continuous and adverse for five years. *Warsaw v. Chicago Metallic Ceilings*, 35 Cal.3d 564, 570 (1984). The party seeking to establish an easement by prescription has the burden of proof as to each element by a preponderance of the evidence. Some appellate cases

[1] In point of fact, every bit of Haines' property claimed by Fomon for a parking easement was probably in the right of way or over a sewer easement.

mention proof by clear and convincing evidence, but none of the treatises, Miller & Starr, Witkin nor the Restatement, has adopted that view.

Plaintiff must prove the absence of permission to establish prescriptive use. Using another's land with the owner's permission or as a neighborly accommodation is not adverse. *Sorenson v. Costa*, 32 Cal.2d 453, 459 (1948). The difficulty in proving a negative does not reduce the burden on the plaintiff. Nevertheless, in practice lack of permission is inferred because the defendant does not bring it up.

2. TRIAL

The trial was on Fomon's three causes of action, the parking prescriptive easement, the surface water drainage easement across the lower part of the Coffman's lot, and an equitable injunction.

(a) Parking Easement: Testimony covered the history of the two homes, and Fomon's interactions with the Haines, from which, it was hoped, the court could deduce whether Fomon's use of the parking area was permissive or adverse. Fomon called her husband, as well as her former spouse, while the Coffmans called Collins Haines, his son Tim Haines and his wife Jayne, all of whom lived with Haines for periods of time. Collins and Rosalie have been divorced for many years, but Collins would stay in the guest quarters on those occasions he was in San Diego, while Tim and Jayne lived at the house when circumstances made it appropriate. Regretfully, Rosalie Haines suffered a stroke in September 2008 affecting her speech and memory, which rendered her legally unavailable for deposition or trial.[2] Evidence Code §240.

Fomon and the Coffman's both called civil engineers who agreed Fomon's concrete work on the area included portion of the right of way for Muirlands Drive, covered a city sewer easement, and should not have been done without a site development plan from the City. (None of Fomon's improvements in the front yard was permitted. The wall to the

[2] Anne, who had a key, found Rosalie where she had fallen in the house, perhaps saving her life.

north and a the new garage appear unlawfully to block views of the coast from the street, and likely the new driveway would have been disapproved by City engineers because of its effect on surface drainage.) This testimony proved to be irrelevant, because neither party connected the illegality of the improvements to anything indicating it was unlawful to park there. Nevertheless, the surveys were helpful.

The remaining testimony focused on permissive use, the only issue really in dispute. Memories differed, as one should expect, and were affected as well by the dispute, which transformed vague memories and impressions into finely detailed, point-by-point recollections of conversations and circumstances. The witnesses did not try to mislead, they remembered things as they ought to have been if anyone had been aware of the importance of permissive use at the time, which they were not. As the court expected, the testimony cannot be reconciled, and some from both sides was implausible. The exhibits did not assist the court overmuch in resolving those differences, and in the end there was no substantial evidence either way. Therefore, the court resolved the issue of permission against Fomon, who had the burden of proof.

(b) Drainage Easement: Fomon's claim for a prescriptive easement to drain surface waters was prompted by the intended footprint of Coffman's house, right up to the setback line for most of the length of their common lot line. The court finds that the 1985 improvements to Fomon's front yard caused the surface waters to drain from her lot to the Coffmans' lot; indeed, Fomon had altered the natural flow to direct it there. The court credits the testimony of Coffman's civil engineer, who said a proper curb and gutter across the driveway would have directed rain water down the street rather than across Fomon's driveway.

Be that as it may, the southwest corner of Coffman's lot easily accommodates the surface water, which returns to the street after crossing a downhill lot. Although Fomon has established a prescriptive use of a portion of the Coffman property for drainage, the

court finds the law of surface waters is more appropriate to Fomon's drainage problem (if she has one) than the law of servitudes. Both Fomon and the Coffmans must act with reasonable care in disposing of the surface waters on their properties. If the Coffmans' building plans will alter the drainage from Haines' property, they must ameliorate the flow so it causes no harm. On the other hand, Haines and other neighbors must comply with reasonable requests to alter the flow from their land. The court retains jurisdiction to hear any disputes between the parties regarding surface water drainage, such jurisdiction to terminate upon recording a notice of completion of the Coffmans' house.

(c) Irrevocable License and Equitable Easement: As alternatives to the parking easement by prescription, Fomon asks the court to grant an irrevocable license or an equitable easement. The court declines.

Fomon could be given an irrevocable license if she relied on a license to park in the disputed part of Haines' property (that is, had permission) and improved that parking area such that it would be inequitable to revoke the license afterwards. Putting to the side the existence of a license, the court would not credit Fomon's paving expense as a basis for a claim it would be inequitable to deny her the parking rights on Haines' property. None of it was permitted, and testimony from the civil engineers suggested it would never be permitted as is. The likely result is the City would force Fomon to remove it; the Coffmans will now save her the expense.

As to an equitable easement, the burden on the Coffmans (not able to complete the planned improvements) far exceeds any benefit to Fomon, who has ample parking in her driveway, and room to park one vehicle in the portion of the parking area on her property. Moreover, a prescriptive easement may only be as large as is reasonably necessary to make use of it. Again, Fomon's ability to park a vehicle in the parking area without encroaching on Coffman's lot at all implies it is not reasonably necessary to give a

prescriptive easement at all. The court recognizes need is not an element of a prescriptive easement; it is nonetheless an element of an equitable easement.

4. CONCLUSION

Judgment is for the Defendants. Coffmans to prepare a written judgment accordingly.

December 28, 2010

David B. Oberholtzer
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Fomon vs. Haines

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2009-00091836-CU-OR-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the STATEMENT OF DECISION was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 01/04/2011.

Clerk of the Court, by: A. Husted A. Husted, Deputy

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☐ Additional names and address attached.