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Gifford R. Hampshire
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September 6, 2023

Via electronic mail to Preservation@alexandriava.gov

City of Alexandria
Board of Architectural Review (BAR)

Re: BAR #2023-00318, 00349 122 Prince Street

Dear Members of the BAR:

This firm represents Virginia W. Drewry, the owner of 118 Prince Street that adjoins the referenced property to the east. We write about the referenced cases that are on this evening's docket.

The application materials linked to the docket for the cases attach a 26 April 2023 letter from Director of Planning and Zoning Karl Moritz (the "Determination"). Ms. Drewry was not provided with a copy of this letter as required by law, and therefore objects to any action by the BAR on these applications to allow her to appeal this determination to the Board of Zoning Appeals. She also contests the determination therein that the required side yard can be measured from the eastern property line that the Supreme Court of Virginia in *Martin v. Garner* determined to be in the center of the alley. On the other hand, Ms. Drewry agrees with the Director's closing statement that "the rights of other property owners to the alley [such as her] could lead to this area not meeting the side yard or open space requirements of the Zoning Ordinance". She asserts that action by the BAR on these applications would be irresponsible given that this question exists whether the side yard or open space can be met. The only way for this question to be answered is through an appeal of the Director's determination to the BZA.

Ms. Drewry is not barred from appealing the Determination because it concerns the alley that she owns in part. The Supreme Court of Virginia affirmed the trial court ruling that she and her late husband, Curtiss Martin, own to the centerline of the alley abutting their property. The Determination concerns the alley because the question posed and answered was whether the side yard could be measured from the center of the alley. Both Virginia Code § 15.2-2309(A) and Zoning Ordinance § 11-1207 provide that the 30-day period to appeal to the BZA does not commence until the owner is sent by certified mail written notice of the order or determination and a statement that the order or determination will become final and unappealable if not

appealed within 30 days. While the Determination contained the required statement, it was not sent to Ms. Drewry by certified mail, or by any other means for that matter.

As discussed by the Supreme Court of Virginia in *Martin v. Garner*, Ms. Drewry also enjoys an easement over the western half of the alley the 122 Prince Street owner would like to use to measure the side yard. The opinion discusses deeds from George Markell, Jr. in 1891 and 1894 to Miller and Browne/Robinson, respectively, that conveyed "right of way over said alley, in common with others the thereto". The Determination references an 1853 deed stating that the alley on the east side is " 'to be kept open' presumably for uses and occupancy of others" and concludes that "[g]iven this fact, the rights of other private property owners to the alley could lead to this area not meeting side yard or open space requirements of the Zoning Ordinance". A copy of *Martin v. Garner* and a copy of the 1853 deed is attached for your convenience of reference.

Ms Drewry agrees with Director Mortiz' statement and asserts that it would not be appropriate for the BAR to issue the requested certificates when there is such an open question whether side yard or open space requirements are met. The deeds discussed by the Supreme Court of Virginia and Director Mortiz demonstrate that the entire alley needs to be "kept open" for right of way by others. While Zoning Ordinance Section 7-202 lists structures that are allowed in yards, it also provides that any such structures are only allowed "when otherwise permitted by law." *Martin v. Garner* and the 1853 deed mentioned by the Director demonstrate no structures are allowed in the alley by law. Similarly, while Zoning Ordinance Section 7-1005 allows 50 percent of a yard area to be used for parking, such is not allowed in this case because of the requirement that the alley be "kept open".

For the reasons set forth above, Ms. Drewry respectfully demands that the BAR defer action on this application until use of the alley for the yard setback can be determined by the BZA through appeal of the Determination.

Sincerely,

Gifford R. Hampshire

cc: Virginia W. Drewry
Deputy City Attorney Christina Zechman Brown
Enclosures: As stated.

286 Va. 76
Supreme Court of Virginia.

H. Curtiss MARTIN, et al.

v.

James GARNER, et al.

Record No. 121540
|
June 6, 2013.

Synopsis

Background: Landowner brought declaratory judgment action against neighbor for determination of title to private alley. The Circuit Court, City of Alexandria, J. Howe Brown, J., entered judgment in favor of landowner. Neighbor appealed.

[Holding:] The Supreme Court, Elizabeth A. McClanahan, J., held that deed describing boundaries of property as extending "to an alley" conveyed title to centerline of alley.

Affirmed.

West Headnotes (7)

[1] **Boundaries** Private ways

Deed describing boundaries of property as extending "to an alley" conveyed title to centerline of private alley, despite argument that other language in deed granting right of way over said alley evidenced vendor's intent to retain ownership of entire alley; there was no other language in deed expressing intent not to convey title to centerline, and right of way language reflected grant of right of way over half of alley retained by vendor.

1 Case that cites this headnote

[2] **Boundaries** Public Ways

Boundaries Private ways

A conveyance of land bounded by or along a way carries title to the center of the way, unless a contrary intent is shown; this established rule of construction is not limited to public rights-of-way but applies equally to conveyances of property bounded on a private way.

1 Case that cites this headnote

[3] **Declaratory Judgment** Particular estates and interests

Declaratory Judgment Property, conveyances and incumbrances

There was no justiciable controversy regarding neighbor's counterclaim for declaratory judgment of ownership of fee underlying remaining length of alley, in landowner's successful declaratory judgment action against neighbor seeking determination that deed granted landowner title to centerline of alley as to portion of alley abutting landowner's property, where landowner did not claim ownership of any other portion of alley, and neighbor did not make specific allegations regarding any violation of neighbor's purported rights to alley by other abutting landowners. West's V.C.A. § 8.01–184.

2 Cases that cite this headnote

[4] **Declaratory Judgment** Necessity

Declaratory Judgment Advisory opinions

An actual controversy, as would support a finding of justiciability in a declaratory judgment action, is a prerequisite to a court having authority; if there is no actual controversy between the parties regarding the adjudication of rights, the declaratory judgment is an advisory opinion that the court does not have jurisdiction to render. West's V.C.A. § 8.01–184.

4 Cases that cite this headnote

[5] **Declaratory Judgment** Adverse interests or contentions

For a court to have jurisdiction over a declaratory judgment action, the controversy must be one that is justiciable, meaning a controversy in

which there are specific adverse claims. West's V.C.A. § 8.01–184.

3 Cases that cite this headnote

[6] **Declaratory Judgment** Nature and elements in general

Declaratory Judgment Moot, abstract or hypothetical questions

Declaratory Judgment Proper Parties

For a declaratory judgment action to be justiciable, the question involved must be a real and not a theoretical question, the person raising it must have a real interest to raise it, and he must be able to secure the proper contradicter, that is to say, someone presently existing who has a true interest to oppose the declaration sought. West's V.C.A. § 8.01–184.

4 Cases that cite this headnote

[7] **Declaratory Judgment** Future or contingent questions

A declaratory judgment action is justiciable only if the claim is based upon present, rather than future or speculative, facts that are ripe for judicial adjustment. West's V.C.A. § 8.01–184.

2 Cases that cite this headnote

Attorneys and Law Firms

****419** Peter A. Dingman (Anne M. Heishman, Dingman & Labowitz, on briefs), for appellants.

Michael J. Coughlin (Antonia E. Miller, Walsh, Colucci, Lubeley, Emich & Walsh, on brief), for appellees James Garner and Christine Garner.

****420** Mark S. Albanese, James M. Stewart, Jr., Albanese & Associates, on brief, for appellees Richard Melmer and Harriet Melmer, Trustees.

No brief filed by appellees David Kenney, Helen Kenney, Robert Bisson, Sabine Sisk, Charles W. Greenleaf, and City of Alexandria.

PRESENT: All the Justices.

Opinion

Opinion by Justice ELIZABETH A. McCLANAHAN.

***78** In this declaratory judgment action for determination of title to a private alley running between property owned by H. Curtiss Martin and Virginia Drewry (Martin) and property owned by James and Christine Garner (the Garners), Martin appeals from the circuit court's judgment that the Garners hold fee simple title up to the centerline of that portion of the alley abutting their property. Martin also appeals the circuit court's judgment dismissing his claim against other abutting property owners seeking a determination as to ownership of the remaining length of the alley. Finding no error, we will affirm the circuit court's judgment.

***79** I. BACKGROUND

The Garners, who own property located at 122 Prince Street in Alexandria, filed an amended complaint seeking a declaration that the eastern boundary line of their property is the centerline of an abutting eight-foot wide private alley extending approximately 90 feet due south from Prince Street. Approximately 44 feet of the alley runs between the Garners' property and the property owned by Martin, which is located at 118 Prince Street. In their amended complaint, the Garners also named as defendants the following owners of properties lying adjacent to the alley: David and Helen Kenney; Richard and Harriet Melmer, Trustees; Robert Bisson and Sabine Sisk; and Charles W. Greenleaf (Abutting Owners). Additionally, the Garners named the City of Alexandria, alleging the City was requiring them to obtain a judicial determination of their title to the portion of the alley abutting their property for the purpose of calculating a side yard setback required under the City's zoning ordinance.[1]

Martin filed an answer disputing the Garners' claim of ownership to the centerline of the alley. He also filed a counterclaim against the Garners and a cross-claim against the Abutting Owners seeking a declaration that the fee underlying the entire 90–foot length of the alley is owned by Martin. Robert Bisson and Sabine Sisk did not respond to the amended complaint. Richard and Harriet Melmer filed an answer to the original complaint but did not respond to the amended complaint or otherwise participate in the circuit court proceedings. David and Helen Kenney, Charles W.

Greenleaf, and the City of Alexandria filed answers to the amended complaint and consented to be bound by the findings of the circuit court, waiving their rights to participate in the proceedings.[2]

***80** At the trial in this matter, Ronald J. Keller, a licensed surveyor, testified as to his examination of the chains of title to the property located at 122 Prince Street, owned by the Garners, and the property located at 118 Prince Street, owned by Martin. Based on his examination, the parcels now comprising 122 and 118 Prince Street were both owned by George Markell, Jr. In 1891, Markell conveyed ****421** a parcel comprising the western portion of 122 Prince Street to Robert Miller. In January 1894, Markell conveyed a parcel comprising the eastern portion of 122 Prince Street to Robert Miller (the Miller deed). The Miller deed described the property as running "east on Prince Street sixteen feet more or less to an alley ... with the right of way over said alley in common with others entitled thereto."[3] In May 1894, Markell conveyed the parcel comprising 118 Prince Street to William W. Browne and Richard F. Robinson, Trustees (the Browne/ Robinson deed). The Browne/ Robinson deed described the property as running "west on Prince Street ... to an alley eight (8) feet wide ... with right of way over the said alley, in common with others entitled [t]hereto."

The circuit court ruled that the Garners own in fee simple up to the centerline of the 44 feet 4 inches of the alley abutting their property at 122 Prince Street. The circuit court further ruled that Martin owns in fee simple up to the centerline of the same 44 feet 4 inches portion of the alley abutting their property at 118 Prince Street. In addition, the circuit court dismissed Martin's claim seeking a determination as to ownership of the remaining length of the alley, ruling there was no justiciable controversy as to the Abutting Owners.

II. ANALYSIS

A. Ownership of Portion of Alley Abutting Garners' Property

[1] Martin argues the circuit erred in ruling that the Miller deed, under which the Garners claim their title, conveyed title to the centerline of the alley.

[2] It is an established rule in Virginia that a conveyance of land bounded by or along a way carries title to the center of the way, ***81** unless a contrary intent is shown. *Cogito v. Dart,* 183 Va. 882, 889, 33 S.E.2d 759, 762 (1945) ("the boundary on a way, public or private, includes the soil to the center of the way if owned by the grantor and there are no words or specific descriptions to show a contrary intention"); *see also Williams v. Miller,* 184 Va. 274, 278–79, 35 S.E.2d 127, 129 (1945); *Richmond v. Thompson,* 116 Va. 178, 184–85, 81 S.E. 105, 107 (1914). This established rule of construction is not limited to public rights-of-way but applies equally to conveyances of property bounded "on a private way." *Cogito,* 183 Va. at 889, 33 S.E.2d at 763.

In *Williams,* we applied the general rule to hold that a grant of land bounded by an abandoned road carried title to the center of the road. 184 Va. at 275–76, 35 S.E.2d at 127–28. In reaching our conclusion, we noted that in describing the property as bounded "[o]n the west by the old public road now closed," the deed "speaks for itself" and "contains no limitation." *Id.* at 278–79, 35 S.E.2d at 128–29 (internal quotation marks omitted). Accordingly, there being no language in the deed showing a contrary intent, "this general rule must be applied." *Id.* at 279, 35 S.E.2d at 129.

Similarly, the Miller deed unambiguously conveys property bounded by an alley without any reservation or limitation. The deed specifically describes the boundaries of the property as extending "to an alley, running north and south and leading into Prince Street, thence south forty four feet four inches." Since there is no language in the deed showing a contrary intent, the Miller deed conveyed title to the centerline of the alley.[4]

We reject Martin's contention that the language in the Miller deed granting a "right of way over said alley in common with others entitled thereto" shows an intention by the grantor to retain ownership of the entire ****422** alley. Under the general rule of construction, the Miller deed granted ownership in only four feet of the eight-foot wide alley. In granting a right of way over the alley, the deed conveyed an easement over the four feet retained by the grantor. In fact, Martin's position is inconsistent with the language in the Browne/Robinson deed, which also includes the conveyance of a right of way over the alley. Had the grantor intended to retain ownership of the ***82** alley when he conveyed the property in the Miller deed, it would have been unnecessary to include a right of way over the alley in the Browne/Robinson deed.

Therefore, we hold the circuit court properly ruled that the Garners own in fee simple up to the centerline of that portion of the alley abutting their property at 122 Prince Street.[5]

B. Ownership of Remaining Portion of Alley

[3] Martin argues the circuit court erred in ruling there was no justiciable controversy with regard to his claim of ownership of the remaining length of the alley.

[4] "A circuit court has the power to issue declaratory judgments under Code §§ 8.01–184 through –191. Pursuant to this authority, circuit courts may make 'binding adjudications of right' in cases of 'actual controversy' when there is 'antagonistic assertion and denial of right.' " *Miller v. Highland County,* 274 Va. 355, 369–70, 650 S.E.2d 532, 538–39 (2007) (citing Code § 8.01–184; *Hoffman Family, L.L.C. v. Mill Two Assocs. P'ship,* 259 Va. 685, 692, 529 S.E.2d 318, 323 (2000); *Blue Cross & Blue Shield v. St. Mary's Hosp.,* 245 Va. 24, 35, 426 S.E.2d 117, 123 (1993); *Erie Ins. Group v. Hughes,* 240 Va. 165, 170, 393 S.E.2d 210, 212 (1990)); *see also* Code § 8.01–191 ("This article['s] ... purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights."); *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty.,* 285 Va. 87, 98, 737 S.E.2d 1, 6 (2013) (citing *City of Fairfax v. Shanklin,* 205 Va. 227, 229, 135 S.E.2d 773, 775 (1964)); *Yukon Pocahontas Coal Co. v. Ratliff,* 175 Va. 366, 368–69, 8 S.E.2d 303, 304 (1940).

> [A]n actual controversy is a prerequisite to a court having authority. If there is no actual controversy between the parties regarding the adjudication of rights, the declaratory judgment is an advisory opinion that the court does not have jurisdiction to render. The prerequisites for jurisdiction, an actual controversy regarding the adjudication of rights, may be collectively referred to as the requirement of a "justiciable controversy."

***83** *Fitness Club Operators,* 285 Va. at 98, 737 S.E.2d at 6.

[5] **[6]** "The controversy, therefore, must be one that is 'justiciable,' meaning a controversy in which there are 'specific adverse claims.' " *Blue Cross & Blue Shield,* 245 Va. at 35, 426 S.E.2d at 123 (quoting *Shanklin,* 205 Va. at 229, 135 S.E.2d at 775). "[T]he declaratory judgment statute ... 'contemplates that the parties to the proceeding shall be adversely interested in the matter as to which the declaratory judgment is sought.' " *Chick v. MacBain,* 157 Va. 60, 66, 160 S.E. 214, 216 (1931) (quoting *Patterson v. Patterson,* 144 Va. 113, 120, 131 S.E. 217, 219 (1926)).

> [T]he question involved must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure the proper contradicter, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

Patterson, 144 Va. at 120, 131 S.E. at 219 (internal quotation marks omitted).

[7] Additionally, a controversy is "justiciable" only if the claim is " 'based upon present rather than future or speculative facts, [that] are ripe for judicial adjustment.' " *Blue Cross & Blue Shield,* 245 Va. at 35, 426 S.E.2d at 123 (quoting *Shanklin,* 205 Va. at 229, 135 S.E.2d at 775). The "proof and ****423** allegation" must aver a controversy beyond "the realm of speculation." *River Heights Assocs. v. Batten,* 267 Va. 262, 268, 591 S.E.2d 683, 686 (2004); *see also Fitness Club Operators,* 285 Va. at 98, 737 S.E.2d at 6–7; *Cupp v. Board of Supervisors,* 227 Va. 580, 591, 318 S.E.2d 407, 412 (1984).

In Martin's pleadings, he seeks a declaration that he owns the fee underlying the entire length of the alley. He does not allege, however, that the Abutting Owners have asserted an ownership interest in the alley. Although Martin alleges generally that "[e]ach of the Abutting Owners and/or their predecessors in interest *have from time to time* blocked, stopped up, and/or interrupted" the alley "and/or disputed Martin & Drewry's rights as owners of the fee underlying" the alley, there is no allegation detailing a specific violation of Martin's alleged rights in the entire alley. (Emphasis added.)[6] Indeed, the Garners do not claim ownership of any portion of the alley other ***84** than that portion abutting their own property which was adjudicated by the circuit court.

Thus, with respect to the portion of the alley not abutting the Garners' property, Martin's pleadings do not allege "present facts" evidencing a "specific adverse claim" between parties with "true interest to oppose" Martin's claim to ownership of the alley. *Blue Cross & Blue Shield,* 245 Va. at 35, 426 S.E.2d at 123 (quoting *Shanklin,* 205 Va. at 229, 135 S.E.2d at 775); *Patterson,* 144 Va. at 120, 131 S.E. at 219. *See also Chick,* 157 Va. at 66, 160 S.E. at 216. Contrary to Martin's argument, the fact that the Abutting Owners "were before the court and the relevant deeds were in evidence," is insufficient to establish a justiciable controversy between the parties. Accordingly, the circuit court did not err in dismissing Martin's claim seeking a declaration of ownership as to the remaining length of the alley.

III. CONCLUSION

For the foregoing reasons, we will affirm the judgment of the circuit court.

Affirmed.

All Citations

286 Va. 76, 745 S.E.2d 419

Footnotes

1 In connection with their desire to construct a home on their property, the Garners sought to include the portion of the alley in which they claim ownership to satisfy their side yard requirement under the City's zoning ordinance. The Board of Zoning Appeals determined that the alley could not be so used. The Garners appealed that decision to the circuit court and those proceedings have been stayed pursuant to an agreement between the Garners and the City. The Garners also sought variances from the side and rear yard requirements which were granted by the Board of Zoning Appeals and upheld by the circuit court. Martin has appealed the circuit court's judgment to this Court. The determination of Garners' ownership in the alley has no bearing on issues raised in the pending zoning appeal. See *Martin v. City of Alexandria,* 286 Va. 61, 743 S.E.2d 139, 2013 WL 2443357 (2013) (this day decided).

2 Although Martin only named the Garners in his appeal to this Court, the remaining parties named in the amended complaint were added as appellees pursuant to Orders entered by this Court on March 20 and April 2, 2013.

3 In 1905, Miller conveyed the parcels comprising 122 Prince Street to Charles Kircherer. The description of the property placed the eastern boundary line at the centerline of the alley. This description has been used in the subsequent deeds contained in the chain of title to 122 Prince Street.

4 We note that the Brown/Robinson deed, under which Martin claims ownership of the alley, likewise describes his property as running “to an alley.” Martin has advanced no legal rationale or principled reason as to why this language conveyed any greater ownership rights to the alley than the language contained in the Miller deed.

5 Martin also assigns error to the circuit court's reliance on two deeds recorded in 1794 and its disregard of the merger of the fee underlying the alley. Because the circuit court's judgment is supported by the language of the Miller deed, which all parties agree is determinative of Garners' ownership of the alley, discussion of these assignments of error is unnecessary.

6 The Abutting Owners who did file pleadings have not asserted an ownership interest in the alley.

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payment, and the property to be liable to a resale by the said trustee for default in making either of the payments of the purchase money or of the interest upon the said deferred payment, upon ten day's notice by advertisement in any newspaper published in the City of Alexandria. The said Trustee is hereby authorized to effect insurance upon the buildings standing upon the said piece of ground to an amount not exceeding Two hundred dollars, whenever required to do so, by any party to whom the debt aforesaid may be payable and to charge the premises & expenses of such insurance as of the expenses of this trust with the interest thereon.

Witness the following signature & seal

Witness
G. W. White

Ann × Kelly (Seal)

Clerks Office. Alexandria County Court July 2nd 1859.
This Deed was acknowledged before me in my said office by Ann Kelly and admitted to record.
Teste
B. H. Berry Clerk

T-3-632

9 MARCH 1853

May's Heirs
To } Deed
Mankin

This Deed made the 9th day of March in the year eighteen hundred and fifty three, between Edward H. May & Alice his wife, of the City of Alexandria in Virginia & William A Parkinson and Matilda E his wife of Chesterfield County in Virginia (the said Edward, Annie & Matilda being children and heirs at law of Jonathan E May, late of Alexandria aforesaid deceased) William Rice & Sarah Jane his wife of said Alexandria. George

(interlined: & Annie May; Edward May deceased who was a brother and heir at law of)

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George Davenport, Annie his wife of the City of Baltimore in Mary-

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George Saenger & Maria his wife of the City of Baltimore in Maryland, Francis & Emily his wife of the City of Cincinnati in Ohio (the said Sarah, Maria & Emily being the children & heirs at law of Francis May deceased, and the brother of the said Jonathan C. May) Sarah Marsolette, Nancy Frankland Lucinda Hoff, John Bishop & Amanda his wife & Richard Wright & Emily his wife of Washington City, in the District of Columbia and Edward C Howell & Elizabeth his wife of Baltimore aforesaid (the said Sarah, Nancy, Lucinda, Amanda, Emily & Edward C. being the Children and heirs at law of Ann Howell, deceased, who was a sister of the said Jonathan C. May) of the first part, and Mark M. Mankin, of the said City of Alexandria of the second part, Witnesses, that the said parties of the first part, in consideration of one hundred & twenty dollars do grant to the party of the second part all their right, title and interest to and in a piece of ground in the said City of Alexandria bounded as follows: Beginning on the south side of Prince Street 45 feet east of Water Street & running east with Prince Street 40 feet to the middle of an alley 8 feet wide (to be kept open) then south parallel to Water street, forty five feet, then west parallel to Prince street 40 feet, then by a straight line to the Beginning, with all the rights & appurtenances, subject however to a rent-charge of seventy two dollars per annum, and all arrears thereof. Witness the following signatures and seals

45 | 40 | 45

T-3-633

Sarah M. Marsolette	(Seal)	Edward H. May	(Seal)
Nancy E. Frankland	(Seal)	Alice her x mark May	(Seal)
Lucinda L. Hough	(Seal)	Annie May	(Seal)
John Bishop	(Seal)	William H. Perkinson	(Seal)
Amanda Bishop	(Seal)	Matilda E. Perkinson	(Seal)
Richard Wright	(Seal)	William Price	(Seal)
Emily Wright	(Seal)	Sarah Jane Price	(Seal)
E. C. Howell	(Seal)	George Saenger	(Seal)
Elizabeth Howell	(Seal)	Ann Maria Saenger	(Seal)