

Elements of Prescriptive Easement

In the recent case of *Ditzian v. Unger*, the California Court of Appeal reviewed the trial court's granting of a prescriptive easement allowing Unger and his invitees (including Airbnb guests) to use a path ("Path") that runs along the parties' property line, and then crosses the land of Unger and another neighbor to access sand dunes in MacKerricher State Park in Mendocino County. Unger erected a fence that blocked Ditzian's use of the Path to access the dunes, and Ditzian filed the lawsuit requesting a prescriptive easement to use the Path. The trial court's judgment awarding the easement was affirmed by the Appellate Court for reasons that are applicable to many property boundary disputes.

Ditzian argued he had acquired a prescriptive easement through "open, notorious, continuous, and adverse" use of the path for "an uninterrupted period of five years" by Ditzian and the predecessor owners of Ditzian's property.

Unger admitted the prior owners of the Ditzian property had accessed the state park dunes by using the Path. A son of the predecessor owners of Ditzian's land testified that when he visited his parents, he used the Path almost every day. Another prior owner testified that when she lived on the property (and during previous visits to the property), she used the Path several times a week, until Unger put up a fence. Previously, she had encountered no obstacles and had never been told she could not walk on the Path, either the part crossing Unger's land or the part crossing the other neighbor's parcel.

Ditzian began hosting vacation renters at his property through Airbnb, and by the time of trial, 146 separate Airbnb reservations had been made.

The trial court ruled that Ditzian had made the showing required to establish a prescriptive easement on the Path. Among other things, the court credited the testimony of the prior owner's son that he and his parents regularly traversed the Path dating as far back as 1998. Reflecting on a site visit to the property, the trial court observed that hiking out to the dunes is the greatest highlight of living on or visiting the property. Enjoyment of that natural resource is presumably why the parties bought the property in the first place, and it would be more startling and unexpected if no one ever bothered to hike out to the dunes on a regular basis.

The court also observed the Path was "very evident" and "well-trodden," and it was "obvious" the Path had long been used to access the dunes. The trial court rejected the contentions of Unger that the Airbnb rentals substantially increased the burden of the easement, or that the doctrine of unclean hands justified denial of the requested easement.

The trial court entered judgment in favor of Ditzian, granting him “an easement along the pathway which originates on their land and traverses that of defendant along the boundary line between the two properties”, and the judgment specified that the easement extended to Ditzian, his personal invitees, and business invitees, but only while such business invitees are residing on the property.

Unger argued Ditzian should not have been granted an easement permitting the Airbnb guests to cross his land because the trial court erred in interpreting evidence of the Ditzian's own ‘personal’ use of the Path as proof establishing prescriptive rights for his paying guests. However, Unger had not demonstrated that allowing Airbnb guests to use the easement imposed a substantial increase or change of burden on Unger's land. The incremental increased burden was modest and consistent with the pattern formed by the adverse use by which the prescriptive easement was created.

Unger emphasized the potential for a large number of *annual* Airbnb visitors, but the court focused on whether the easement itself would have substantially increased use, and the issue was whether having other people residing on the property from time to time transformed the scope of the easement and the burden it imposed.

The trial court did not abuse its discretion in declining to award Ditzian the easement on the basis of the unclean hands doctrine. The unclean hands rule does not call for denial of relief to a plaintiff guilty of any past improper conduct; it is only misconduct in the particular transaction or connected with the subject matter of the litigation that is a defense. The bar applies only if the inequitable conduct occurred in a transaction directly related to the matter before the court and affects the equitable relationship between the litigants. Because Ditzian's failure to obtain a permit before hosting Airbnb guests is not directly connected with the prescriptive easement claim, the trial court was upheld in rejecting the unclean hands defense.

Finally, Unger argued the use of the Path was not adverse in light of the testimony that Ditzian's predecessors were granted permission to use a *different* path across the land. There is no authority that permission to use one path constitutes permission to use a different path, and Unger cited no evidence Ditzian was given permission to use the Path. Unger cited no evidence that *he* gave Ditzian or the previous owners permission to cross his property using the Path, or on any path. Moreover, Ditzian were not required to present evidence that he actually communicated his easement claim to Unger.

Continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence, and in the absence of

evidence of permissive use, a prescriptive easement may be granted. In other words, continuous use over a long period of time constitutes communication of the claim of right.

LESSONS:

1. Owners of land in those circumstances that suggest ambiguity regarding the property line or use of property, regardless of the structures on the land such as fences or hedges, should consider hiring a surveyor to determine the legal boundaries.
2. The essential element is "adverse use", and permission to use the disputed land can defeat a prescriptive easement claim. It may be a better practice to expressly allow permission to use the disputed land in a written document termed a license, as such permission and license can then be withdrawn, and no prescriptive easement right may arise.
3. Evidence of continuous use of a portion of land over a long period of time may constitute communication of a claim of right to use the land, and if the land's owner objects, he has a 5 year period before the use may ripen into a prescriptive easement.
4. After the prescriptive easement was created, no barrier could be erected to prevent use of the easement by the claimant, or his invitees, including Airbnb guests.
5. This case is another illustration of the importance of time in deciding disputed claims, and Unger should have inquired as to the use of the Path when he purchased his land. He may have been able to obtain a reduced purchase price because of the presumptive existence of the prescriptive easement over the Path.