

**IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA**

**THE SAVANNAH COLLEGE OF ART)
AND DESIGN, INC.)**

Plaintiff,)

V.)

**SCAD REAL ESTATE HOLDINGS, LLC;)
and 3126 MONTGOMERY)
STREET, LLC)**

Defendants.)

Civil Action No. SPCV24-00957-FR

**PLAINTIFF’S BRIEF IN SUPPORT OF ITS MOTION FOR TEMPORARY
RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION**

COMES NOW, Plaintiff, in the above-styled case, and files this Brief in Support of its Motion for a Temporary Restraining Order and Interlocutory Injunction as follows:

INTRODUCTION

The Savannah College of Art Design, Inc. (hereinafter “SCAD” or “Plaintiff”) owns a property at 3116 Montgomery Street, Savannah, Georgia on which is a building utilized as part of the delivery of educational services by SCAD. Immediately adjacent to it is property numbered 3126 Montgomery Street which SCAD uses for ingress and egress to its building at 3116 Montgomery Street. SCAD as the owner of 3116 Montgomery Street has an easement appurtenant across and over 3126 Montgomery Street. SCAD has used the easement area for over 20 years as a driveway to and from 3116 Montgomery Street and also for parking for those accessing 3116 Montgomery Street.

On February 14, 2024, Defendant 3126 Montgomery Street LLC purchased the fee simple interest in 3126 Montgomery Street for \$25,000 with full knowledge of SCAD’s easement and use

of the property. Notwithstanding this knowledge, 3126 Montgomery Street., LLC has now threatened to bar SCAD from the property by erecting physical barriers blocking SCAD's access, putting in a paid parking lot and threatening to tow any vehicles not paying fees to Defendant, unless SCAD pays the Defendant \$500,000.

This action is brought to have this Court declare SCAD has a lawful right to continue to use the property in the manner in which it has for over 20 years without interference from Defendant.

The issue is whether the permitted uses in the easement encompass parking on the subject parcel.

STATEMENT OF FACTS

Alko Distributors, Inc. purchased 3116 Montgomery Street, Savannah, Georgia on April 29, 1982 and recorded in Deed Book 118 L, Page 214, Chatham County, Georgia records. Alko Distributors, Inc. then purchased 3126 Montgomery Street, Savannah, Georgia on May 6, 1993 and recorded in Deed Book 161 R, Page 156, Chatham County, Georgia records. On August 22, 1995, Alko Distributors, Inc. sold the property located at 3116 Montgomery Street to American Port Services, Inc, recorded in Deed Book 174 F, Page 175, Chatham County, Georgia records. As part of the transaction, Alko Distributors, Inc. also conveyed an appurtenant easement to American Port Services, Inc. by instrument, dated August 22, 1995 and recorded in Deed Book 174 F, Page 179, Chatham County, Georgia records.

The language of the deed stated the easement was "for the purpose of ingress and egress by the party of the second part to the property immediately adjacent to the north and for ingress and egress by the party of the second part to the rail siding and for the use of the rail lines and

services lying to the east and south of the property burdened with said easement and for purposes of storage and any other purposes related to warehousing.” See Deed Book 174 F, Page 179, Chatham County, Georgia records. Thus, the uses permitted were for 1. ingress and egress to the property to the north i.e, 3116 Montgomery Street; 2. ingress and egress to the rail siding; 3. storage; 4. any other purpose relating to warehousing.

The legal description utilized to define the physical boundaries of the easement area is: “Commencing at the Southeastern corner of the intersection of Montgomery Street and Clifford Street, said point being the POINT OF BEGINNING; running thence along the southerly right-of-way of Clifford Street South $67^{\circ}28'35''$ East a distance of 126.3 feet to a point on the northern side of a 75 foot right-of-way now or formerly owned by Seaboard Coastline Railroad and proceeding along said right-of-way South $63^{\circ}8'25''$ West a distance of 194.01 feet to a point at the intersection of Montgomery Street and said railroad right-of-way and proceeding thence along the southerly side of the Montgomery Street right-of-way North $22^{\circ}31'25''$ East a distance of 147.27 feet to a point, said point being the POINT OF BEGINNING. Said property being more fully set forth on a plat prepared by Leo V. Exley, R.L.S. 2119, on August 4, 1995 on behalf of American Port Services, the same being and hereby is incorporated by reference. Said property is also known as Lots 1 through 5 and a former 12 foot lane, Wright Ward, Savannah, Chatham County, Georgia. Said property being bounded on the North by Clifford Street; on the East and South by the right-of-way of the Seaboard Coastline Railroad; and on the West by Montgomery Street; together with improvements thereon known as 3126 Montgomery Street under the present system of house numbering in Savannah, Georgia.” Id. This legal description covers the entirety of 3126 Montgomery Street.

American Port Services, Inc. went on to convey its interest in the property located at 3116 Montgomery Street to Plaintiff on October 15, 2002 and recorded in Deed Book 241 P, Page 175, Chatham County, Georgia records. Thus, the appurtenant easement is within Plaintiff's chain of title. Since Plaintiff purchased its property in October 2002, it has been using the easement area openly to access its property at 316 Montgomery Street as for parking for vehicles for persons access the building.

On February 14, 2024, the former principals of Alko Distributors, Inc. conveyed 3126 Montgomery Street to Defendant 3126 Montgomery Street, LLC in Deed Book 3307, Page 667, Chatham County, Georgia records. The legal description utilized in conveying the metes and bounds of this property was identical to the description used to identify the boundaries of the appurtenant easement area. Defendant 3126 Montgomery Street, LLC was given actual notice of this easement in its chain of title prior to its closing on the property located at 3126 Montgomery Street. The legal description utilized in this conveyance is identical to the legal description used for the easement language as found in Deed Book 174 F, Page 179.

The easement is not restricted to any portion of the parcel. The easement covers the entirety of the tract because the legal descriptions match, utilize the same plat as reference, and utilize the same metes and bounds.

Defendants have now given notice to Plaintiff that they plan to erect a parking control system on its property to prevent Plaintiff from parking vehicles or accessing its property at 3116 Montgomery Street through 3126 Montgomery Street. Additionally, Defendants have stated that they will tow any vehicles parked on the property.

ARGUMENT AND CITATION OF AUTHORITY

A. STANDARD FOR ISSUANCE OF INJUNCTION

An interlocutory injunction is a device to keep the status quo in order to prevent one party from hurting the other while their respective rights are under adjudication. Bernocchi v. Forcucci, 279 Ga. 460, 461 (2005). It is an extraordinary remedy and the power to grant must be prudently and cautiously exercised. Nemchik v. Riggs, 300 Ga. 363, 365 (2016). There must be a vital necessity for the injunction so that one of the parties will not be damaged and left without adequate remedy. Treadwell v. Investment Franchises, Inc., 273 Ga. 517, 518 (2001). Therefore, the trial court is tasked to make a judgment call regarding the equities presented and is vested with a broad discretion in making that decision. See O.C.G.A. § 9-5-8; City of Waycross v. Pierce County Board of Commissioners, 300 Ga. 109, 111 (2016).

An interlocutory injunction should be granted when the moving party shows that: 1. there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; 2. the threatened injury to the moving party outweighs the harm that the injunction may do to the party being enjoined; 3. there is a substantial likelihood that the moving party will prevail on the merits of its claims at trial; and 4. granting the interlocutory injunction will not disserve the public interest. City of Waycross at 111. The trial court balances the equities and determines whether an interlocutory injunction should be issued to preserve the status quo in the case. Id. Because the test for the issuance of an injunction is a balancing test, it is not incumbent upon the moving party to prove all four factors to obtain the interlocutory injunction. Id.

1. Plaintiff will suffer irreparable injury if this injunction is not granted.

The first factor is the most important factor to consider, given that the main purpose of the interlocutory injunction is to preserve the status quo temporarily to allow the parties and the court

time to try the case in an orderly manner. City of Waycross at 111. Here, Plaintiff has been using the appurtenant easement to ingress and egress its property as well as for parking. Defendants have given notice to Plaintiff that they plan to install a parking control system on the subject property, fence it off and tow any vehicle on the property that has not paid Defendants for the access. This device will not only block Plaintiff, as well as its invitees and licensees, from using the appurtenant easement to access the adjacent property and for parking, but Defendants have gone a step further. Defendants are now threatening to tow vehicle and illicit fines for use of Plaintiff's appurtenant easement. Thus, Plaintiff suffers the loss of the use of its appurtenant easement and risks monetary damages.

As an initial matter, the Defendant cannot block Plaintiff from utilizing the entire property for ingress and egress by erecting any type of structures. As a matter of law, a servient tenement cannot interfere with the dominant tenement's right to use an easement for ingress and egress by erecting any type of structure within any portion the easement area. Harvey v. Lindsey, 251 Ga.App. 387 (2001).

Defendant was aware of the easement when it purchased the property. It has never used the property. As an entity formed solely to own this property it has no other business or operation which in anyway uses the property. No harm will come to the Defendant by letting Plaintiff to continue to use the easement while waiting on a final ruling. By contrast plaintiff will suffer irreparable harm if it cannot access its adjoining property. The balance of the equities clearly favors the Plaintiff.

2. Plaintiff's injury outweighs any harm Defendant may suffer if not granted.

Any potential harm to Defendants is not outweighed by Plaintiff's injury if this interlocutory injunction is granted as the injunction would maintain the existing conditions and

use of the easement as it has been for the last twenty years. The crux of an interlocutory injunction is to preserve the status quo until such time as the merits of the case are settled by the proper proceedings. Nemchik at 367. In Nemchik, the trial court granted the interlocutory injunction to restrain the defendant from cutting down trees located in the alleged easement area. Id. The court weighed the harm of the loss of the trees to Plaintiff against Defendants ability to enter upon the easement area. Id. In this case, Defendants are attempting to change the existing conditions of the easement area. Defendant 3126 Montgomery Street, LLC purchased the subject property with knowledge of the easement and with knowledge of the uses put to it in February 2024 for \$25,000. Plaintiff purchased the adjacent property in October 2002. Plaintiff has been using the appurtenant easement for parking vehicles and for accessing its property since 2002. Defendants now plan to erect a parking control system which includes erecting some sort of barricade at the entrance of the property that will block all vehicles from entering the easement area without express permission of Defendants. Plaintiff will no longer be able to use the easement area to park vehicles nor will it be able to use it to access its own property. Parking is at a premium and keeping plaintiff from using the property will seriously impact the educational mission of Plaintiff. No doubt Defendant knows this as demonstrated by its actions of demanding \$500,000 for the use of the parking lot on the property it purchased for \$25,000 with knowledge of the easement and use for parking.

3. There is a substantial likelihood Plaintiff will prevail on its merits at trial.

The likelihood of success if not the same as a showing of ultimate success nor is it the determining factor in the balancing test. City of Waycross, at 112. However, Plaintiff will likely prevail on its merits at trial as the appurtenant easement language is clear as to its use and location.

Generally, there are two types of easements: easements in gross and appurtenant easements. An easement in gross is a mere personal right in the land of another. Dyer v. Dyer, 275 Ga. 239, 340 (2002). These are usually unrelated to a particular piece of property and encompass such things as utility easements. In contrast, appurtenant easements benefit the possessor of the land in his or her use of the land. Church of the Nativity, Inc. v. Whitener, 249 Ga.App. 45, 48 (2001). Rights of ingress and egress are usually construed as appurtenant easements. These rights must pass by deed with the dominant estate, although the conveyance thereof may not have expressly mentioned the easement. Id. The creation of these easements require that the grantee of the easement own the dominant estate, the land benefitted by the easement. Yaali, Ltd. V. Barnes & Noble, Inc., 269 Ga. 695, 695-696 (1998). This principle is known as unity of title. Id. Here, American Port Services, Inc. was the owner of the dominant estate, 3116 Montgomery Street, when it was conveyed the appurtenant easement by Alko Distributors, Inc. to ingress and egress across Alko Disributors, Inc.'s remaining property, 3126 Montgomery Street.

An easement by express grant, such as the subject one, is subject to the normal rules of contract construction. The cardinal rule of contract construction is to ascertain the parties' intent. Moore v. Lovein Funeral Home, Inc., 358 Ga.App. 10, 13 (2020). Where the contract terms are clear and unambiguous, the court will look to that alone to find the true intent of the parties. Id. Where ambiguities exist, the court may look outside the written terms of the contract and consider all the surrounding circumstances to determine the parties' intent. Id. The express language of this easement is unambiguous as to the right to ingress and egress to the property immediately adjacent to the north, meaning 3116 Montgomery Street. Additionally, the right to traverse or travel upon the servient estate includes, by reasonable construction, the right to park. Lanier v. Burnett, 245 Ga. App. 566, 569 (2000) ("the grant of an easement impliedly includes the authority to do those

things which are reasonably necessary for the enjoyment of the things granted.”) Other permitted uses expressly included are activities related to rail lines and storage for warehousing. This would necessitate the placement of containers and other storage units upon the property. The other uses permitted, relating to access to the rail lines and storage for warehousing, support this conclusion because those activities necessarily involve “parking” of containers and other storage units on the property.

The Defendant may argue that use of the property for parking unreasonably expands the use of the easement. The uses permitted were for 1. ingress and egress to the property to the north i.e, 3116 Montgomery Street; 2. ingress and egress to the rail siding; 3. storage; 4. any other purpose relating to warehousing. Parking of a few cars is clearly less intrusive than warehousing which includes the storage of shipping containers and large trucks. Further one cannot use the property for use in warehousing without parking.

Under Georgia law, a change in the “manner, frequency, and intensity of use” of the easement within the physical boundaries of the existing easement is permitted without the consent of the other party, so long as the change is not so substantial as to cause “unreasonable damage to the servient estate or unreasonably interfere with this enjoyment.” Parris Properties, LLC v. Nichols, 305 Ga. App. 734 (2010). See also, Doxey v. Crissey, 355 Ga.App.891 (2020) (Use of a bridal trail easement for running and walking is consistent with a change in manner, frequency, and intensity of use and would be permitted without the servient owner’s consent as long as it does not cause unreasonable damage thereto.) Whether use of the property for parking constitutes a substantial change in the use is usually a factual question. Id. However, given that the grant of the easement was over the entirety of the property and permitted the use of the entirety of the property for storage of warehousing material, use as a parking lot is not a substantial change. Parking of

cars would have less impact than parking containers and other large storage crates for warehousing and certainly less impactful of large trucks traversing the property at all times and hours. The fact that more cars may be using it as a parking lot than for simple ingress and egress should not alter this analysis. When there is a change in degree only, and not in kind, this is a reasonable and normal incident of the existing easement right and is permitted. Kerlin v. Southern Bell Tel. & Tel. Co., 191 Ga. 663 (1941).

The grant of an easement also includes the authority to do those things which are reasonably necessary for the enjoyment of the things granted. Parris Properties, LLC 305 Ga. App. at 742. This includes the right to pave an area for ingress and egress. Paving of the area and utilizing it for parking does not constitute an abandonment of an express grant of an easement for ingress and egress as a matter of law (that is, parking is not as a matter of law different from ingress and egress) and is a reasonable extension of the right to ingress and egress. Sadler v. First National Bank of Baldwin Co., 267 Ga. 122 (1996). In Sadler, First National leased property which adjoined property owned by Sadler. First National's lessor acquired an easement from Sadler which was described as an "access road" 61 feet by 300 feet. First National paved a portion for access driveways and paved a portion for use as a parking lot and installed landscaping on the remainder. The trial court found as a fact the Bank's using the access road as a parking lot and landscaping constituted an abandonment of that portion of the easement because parking and landscaping constituted nonuse as an access. The Supreme Court reversed holding use as parking and landscaping was entirely consistent with the access easement as a matter of law and therefore did not constitute abandonment.

The Defendant could argue that the uses should be limited to those relating to the use of the railroad spur and warehousing. This argument is belied by the language which broadly grants

the right to ingress and egress over all of the property and then further grants additional uses relating to access to the rail spur and warehousing. When there is a broad grant of the right to use without any restriction as to the type of use allowed, typically these are construed broadly. 905 Bernina Ave. Cooperative, Inc. v. Smith Burns LLC, 342 Ga. App. 358 (2017). In that case the Court was concerned with an easement granted for the “perpetual right to the use of said spur railroad track.” Over time it was no longer used as a railroad spur and was filled with concrete. The Plaintiff, owner of the dominant estate, used the easement area for access, parking, and activities related to their photography business. The Defendant blocked vehicle access with a fence. The Defendant’s contention that the use of the easement was limited to railroad use was rejected as a matter of law with the Court holding the manner of use within the boundaries of the easement may change and permit those uses which are reasonably necessary for the enjoyment of the things granted.

In Reece v. Smith, 265 Ga. App. 497, 500 (2004) the Court was faced with the issue of whether an implied easement for ingress and egress was limited solely to the use for ingress and egress. The court held that uses permitted are those necessary to the reasonable enjoyment of the dominant estate which do not unreasonably burden the servient estate:

“Accordingly, the trial court's ruling that the Harrises acquired the right to use the easement across the Reece property is reversed. We also find no error in the trial court's ruling that the implied easement acquired by Smith and Curtis across the Reece property included the right to install within the path of the easement underground utilities necessary to the enjoyment of the land as a place of residence. The implied easement acquired under OCGA § 44–9–1 as necessary to the enjoyment of the land was not strictly limited to Georgia Bauxite's original use of the easement for ingress and egress, but is available for uses that are necessary to the reasonable enjoyment of any

lawful development of the land, and that do not unreasonably burden the Reeces' rights as owners of the servient estate. See Kiser v. Warner Robins Air Park Estates, 237 Ga. 385, 386–387, 228 S.E.2d 795 (1976) (general grant of access easement created right in owner of dominant estate to use it for all reasonable purposes; owner of the servient estate retained “the right of full dominion and use of the land, except so far as a limitation thereof is essential to the reasonable enjoyment of the easement granted”) (punctuation omitted); Faulkner v. Ga. Power Co., 243 Ga. 649, 650, 256 S.E.2d 339 (1979) (easement not expressly limited by granting instrument was construed as available for a use reasonably related to the general purpose of the easement); Richards v. Land Star Group, 224 Wis.2d 829, 593 N.W.2d 103 (1999) (reasonable enjoyment of property included right to run underground utilities across implied access easement; there was no unreasonable burden on the servient estate); 25 Am.Jur.2d, Easements & Licenses, § 92 (1996); Restatement (Third) of Property § 2.15, comment d (1989); compare Lanier v. Burnette, 245 Ga.App. 566, 569, 538 S.E.2d 476 (2000) (easement arising by express grant which was specifically limited to ingress and egress cannot be construed to include a utility easement). The utilities were necessary to the reasonable enjoyment of the land as a place of residence, and there was no evidence that they unreasonably burdened the Reeces' rights.” Reece v. Smith, 265 Ga. App. 497, 500 (2004). The court went on to say that utilities were necessary to the reasonable enjoyment of the land as a place of residence and there was no evidence that they unreasonably burdened the Reese’s rights.

As a practical matter the easement here was granted to allow access off of Montgomery Street to the adjacent parcel from any and all points on the burdened property to any and all points on the dominant property. There is no restriction on the quantity or quality access. The easement allowed in addition thereto, access across the easement area to the rail spur as well as permitting the parking and storage of warehousing anywhere on the burdened property which necessarily

includes over the entirety of it. Certainly, the parking of cars is consistent with parking of shipping containers and large trucks which would be undeniably permitted. Indeed, the parking of cars is a less intensive use than “warehousing.” Clearly parking is necessary to the reasonable enjoyment of the plaintiff’s property as an educational building

Georgia law provides that reasonable enjoyment of an ingress and egress easement means **full** enjoyment of the **entire** easement. National Hills Exch., LLC v. Thompson, 319 Ga. App. 777 (2013). In that case, the Court was faced with interpreting an easement having the following language: “ingress/egress to the shopping center traffic light through all existing access points will be guaranteed for the employees and customers of 2635 Washington Rd.” The owner of the shopping center closed the back entrance of the shopping Center. It argued that the owner of the easement was only granted in the easement a route to and from the benefited property and not a route from all access points the Court held that reasonable enjoyment of the easement meant full enjoyment and therefore it was entitled to full enjoyment from all access points regardless of whether other access existed.

4. There will be no disservice to the public interest if the interlocutory injunction is granted.

As this case is a matter between three private entities and the use of an appurtenant easement on private property, there would be no disservice to the public interest if this interlocutory injunction is granted.

B. CONCLUSION AND RELIEF REQUESTED

Plaintiff therefore requests the Court to enter an order restraining and preventing Defendants from erecting any structures in the easement area, preventing Defendants from interfering with Plaintiff and its invitees from fully utilizing the easement area for ingress and

egress, including parking, and prohibiting Defendants from interfering in any way with Plaintiff's full use of the entire easement area pending a hearing on the merits.

This 18 day of August, 2024.

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