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FAYETTE CIRCUIT COURT  
CIVIL BRANCH  
FOURTH DIVISION  
CIVIL ACTION NO.: 17-CI-2156



BEHR PROPERTIES, LLP, ET AL.

PLAINTIFFS

v.

**OPINION AND ORDER**

ASHLAND AVENUE  
PROPERTIES, LLC, ET AL.

DEFENDANTS

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This matter is before the Court on the Plaintiffs, Behr Properties, LLLP; The Beer Trappe, Inc.; and Behr Enterprises, Inc.'s ("Behr Properties") Motion for Partial Summary Judgment and on the remaining Defendants, Ashland Avenue Properties, LLC and Running Away Incorporated d/b/a/ John's Run/Walk Shop's ("Ashland Avenue"), Cross-Motion for Summary Judgment. Behr Properties requests that the Court grant partial summary judgment, arguing that they have a right of way by prescription over the parking lot at issue in this case. Ashland Avenue argues that the Court should grant summary judgment against Behr Properties on all counts, arguing that they have not met their burden of proof. This motion came before the Court on August 15, 2018, and the Court took it under submission to review the pleadings, the record, and applicable law.

The Court, having reviewed both motions, responses, replies, and the record, and being otherwise duly and sufficiently advised, finds that Behr Properties is not entitled to a prescriptive easement or right of way by prescription over the "access apron" and "drive aisle" of the parking lot in this case, and that there are genuine issues of fact as to the remaining claims in Behr Properties complaint. Upon review of the record and applicable law, Behr Properties' Motion for

Partial Summary Judgment is **OVERRULED**. Ashland Avenue's Cross-Motion is **SUSTAINED** in part and **OVERRULED** in part.

### **BACKGROUND**

Ashland Avenue owns real property located at 316, 314, and 318 South Ashland Avenue where they operate their business, John's New Classic Shoes. The property owned by Ashland Avenue also includes the majority of the paved parking lot that fronts South Ashland and the entire "access apron" that leads into the parking lot. The property line is not centered on the access apron and a small portion of the paved area is beyond Ashland Avenue's property line. As a result, Ashland Avenue has oral agreements with the owners of 801 Euclid Avenue (Domino's Pizza) and 807 Euclid (CC Prep) to allow the owners to use the parking lot apron and a small portion of the parking lot (which Behr Properties has referred to as "the drive aisle") to access their parking spaces. Otherwise, the parking lot is used for exclusive access to parking spaces for John's New Classic Shoes located at 316 South Ashland.

In 2015, the Plaintiff's acquired 815 Euclid Avenue. One side of 815 Euclid abuts the southern edge of Ashland Avenue's parking lot. 815 was most recently a night club and was previously a theater, which had been vacant for extended periods over the years. Behr Properties tore down much of the existing building and rebuilt it for use as a restaurant called The Bear & the Butcher, which opened in August 2017. When purchased in 2015, the only access to the building was from Euclid Avenue, and the only available parking was public parking on the street.

811 Euclid Avenue was purchased by Behr Properties in 2010, and it was renovated and became their business called The Beer Trappe.

Behr Properties also purchased 813 Euclid Avenue in 2015, which is a narrow, six-foot strip of unimproved land. The strip of land does not front Euclid Avenue but instead separates

Ashland Avenue's property from 815 Euclid and abuts about half of the South Ashland side of the 815 Euclid Building.

When Behr Properties rebuilt 815 Euclid, they installed a large, commercial-grade, garage door there, as well as two additional ingress/egress commercial doors on the side of the building that abuts Ashland Avenue's parking lot. These doors and points of access did not exist before 2017. Prior to the addition of the garage door and two other doors, there was no use of Ashland Avenue's parking lot by anyone to access 815 Euclid from the parking lot. There was no means to do so, nor any reason to do so. The only use of the access apron and "drive aisle" was to access the parking spaces for the businesses abutting them.

### **LEGAL ANALYSIS**

Summary Judgment is appropriate where "the pleadings, depositions, Answers to Interrogatories, stipulations and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56. 03. Summary judgment is proper where that movant shows that the adverse party could not prevail under any circumstances. of *Steelvest v. Scansteel Service Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

A party opposing a properly-supported motion for summary judgment cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial. *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). In reviewing a Motion for Summary Judgment, the trial court must view the record in a light most favorable to the party opposing the summary judgment. *Steelvest*, 807 S.W.2d at 480.

Behr Properties and Ashland Avenue set forth several theories to support their motions. In sum, Behr Properties contends that it is entitled summary judgment on its claim for a right of

way by prescription because the public's use of the parking lot was open, peaceable, and continuous for the statutory period. Ashland Avenue argues that summary judgment should be granted on all of Behr Properties' claims based on the allegations in the complaint and the evidence in the record.

**I. CROSS-MOTIONS FOR SUMMARY JUDGMENT AS TO BEHR PROPERTIES' CLAIM FOR PRESCRIPTIVE EASEMENT AND/OR RIGHT OF WAY**

Behr Properties' Complaint makes a claim for a prescriptive easement and/or right of way, and their motion focuses on right of way by prescription. Under Kentucky law, a "right of way" by prescription is acquired when the "use is unobstructed, open, peaceable, continuous, and as of right for the prescribed statutory period" of fifteen years. *Pickel v. Cornett*, 147 S.W.2d 381 (Ky. 1941). Furthermore, "[w]here the claimant has shown such long continued use, it will be presumed the use was under a claim of right, and the burden is upon the owner of the servient estate to show that the use was merely permissive." *Id.* (citing *Smith v. Fairfax*, 201 S.W. 454, 455 (Ky. App. 1918); *see also Lyle v. Holman*, 238 S.W.2d 157 (Ky. 1951) (citing *Pickel* with approval and holding that Holman acquired a right of way by prescription to an alley abutting his warehouse and owned by Lyle). Here, Behr Properties argues that Ashland Avenue wants to close the passway through the parking lot to 813 Euclid, and the burden is on Ashland Avenue "to show that the use was merely permissive and to explain away the presumption that its uninterrupted enjoyment for more than 15 years was exercised under a claim of right." *Smith*, 201 S.W.2d at 455.

Behr Properties argues that the evidence conclusively proves that they own a right of way by prescription over the center aisle of the parking lot as a matter of law based on the public's use of the center aisle since 1956 unless Ashland Avenue can rebut the presumption that the public's use of that property was "as of right" rather than permissive during that period. The

cases cited by Behr Properties all involve circumstances where one party uses the other party's land as a road to pass through to get to a public roadway. *See Ward v. Stewart*, 435 S.W.2d 73 (Ky. 1968); *Pickel*, 147 S.W.2d 381. None of the cases cited by Behr Properties involve the public's use of a commercial parking lot.

The parking lot clearly abuts several businesses. Any member of the public who parked their cars in the parking lot would have seen signs that said unauthorized users will be towed dating back to when Curtz & Shine owned the lot. There were signs in front of the parking spaces in the lot at least as late as 2015 that presumably indicate which business each spot is associated with. *Exhibit 2 to Defendants' Response to Motion for Injunctive Relief/Temporary Restraining Order and Cross-Motion for Temporary Injunction*, pp. 2, 3. Such signage indicates that persons utilizing the parking lot had permission to park in the lot for the purpose of patronizing specific businesses. Additionally, there is evidence that Domino's and CC Prep located at 801 and 807 Euclid Avenue have oral agreements with Ashland Avenue, which allows them to access their parking spots behind their properties. *Id.*; *see Affidavit of Melody Marshall*. Thus, the evidence clearly shows that any use of the apron of the parking lot by the public was merely permissive.

There is no reason for any member of the public to utilize the apron of the parking lot other than to access the parking spaces in the lot. The parking lot only has one entrance and exit as there are buildings on three sides of it. It is impossible for someone driving a vehicle to use the parking lot to pass through to a public road. Even if the Court had found that the public's use constitutes a right of way by prescription, Behr Properties' use of the parking lot is distinguishable from any access by the public to park their cars. Since the garage door and two other doors were not added to the side of 815 Euclid that butts the parking lot until 2017, it is impossible for anyone to have made use of the parking lot for this purpose for the statutory period. Thus, the Court finds that

Behr Properties' is not entitled to a right of way by prescription.

Behr Properties' Complaint also makes a claim for a prescriptive easement. Although this claim was not discussed in Behr Properties motion, Ashland Avenue addressed it in its response and cross-motion. To obtain a prescriptive easement, "a claimant's adverse use must be 'actual, open, notorious, forcible, exclusive, hostile, and continue in full force . . . for at least fifteen years.'" *Cole v. Gilvin*, 59 S.W.3d 468 (Ky. App. 2001) (quoting *Jackey v. Burkhead*, 341 S.W.2d 64, 56 (Ky. 1960)). Behr Properties' claim for a prescriptive easement clearly fails because the Court found that any public use of the parking lot has been permissive, and Behr Properties has not made use of the parking lot for the statutory period. Behr Properties only purchased 813 in 2015, and they have not owned 811 or 815 for fifteen years either (although access to those properties via the apron of the parking lot is not at issue). Behr Properties does not claim that the easement passes to them as successive owners of the property. Therefore, the Court finds that Behr Properties is not entitled to a prescriptive easement to access 813 Euclid Ave. Ashland Avenue is entitled to summary judgment as to Count I of the Complaint.

## **II. ASHLAND AVENUE'S CROSS-MOTION FOR SUMMARY JUDGMENT AS TO COUNTS II THROUGH IV**

The Court, having reviewed Ashland Avenue's Motion for Summary Judgment, the record, and being otherwise duly and sufficiently advised, finds that there are genuine issues of material fact as to Counts II through IV. Specifically, there is an issue of fact regarding Behr Properties' claim for an easement by necessity. The Court has seen no evidence to determine whether 813 was ever unified by titled and subsequently severed from 316-318 South Ashland Avenue. Furthermore, Behr Properties has made little argument to support its contention that 813 is landlocked and whether the "necessity" element can be proven.

Second, there is an issue of fact as to Behr Properties' claim for promissory estoppel/irrevocable license. Behr Properties has made little argument about whether they reasonably relied on Ashland Avenue's alleged promise to allow Behr Properties to use ten of its parking spaces and whether this count relates to access to the parking spaces and/or 813. Ashland Avenue has argued that Behr Properties could not have reasonably relied on the August 28, 2015 letter allowing them to use ten parking spaces after 6:00 p.m. because they had already purchased the property for the purposes of constructing a restaurant, but the Complaint alleges that Behr Properties relied on the letter to obtain a zoning permit.

Finally, there is an issue of fact as to Behr Properties' claim for tortious interference. Behr Properties has not responded to Ashland Avenue's argument that they "have a legally protected right to act on and with regard to protection of their own real and personal property and business interests." *Defendants' Response and Cross-Motion*, p. 27.

### **CONCLUSION**

The Court finds that Behr Properties is not entitled to a prescriptive easement and/or right of way. The Court further finds that there are genuine issues of material fact as to Counts II through IV of Behr Properties' complaint. Upon review of the record and applicable law, Behr Properties' Motion for Summary Judgment as to Count I – Declaratory Judgment: Prescriptive Easement and/or Right of Way is **OVERRULED**, and Ashland Avenue's Cross-Motion as to this count is **SUSTAINED**. Ashland Avenue's Cross-Motion as to Counts II-IV is **OVERRULED**.

**SO ORDERED** this 24<sup>th</sup> day of September, 2018.

  
JUDGE, FAYETTE CIRCUIT COURT

CLERK'S CERTIFICATE OF SERVICE

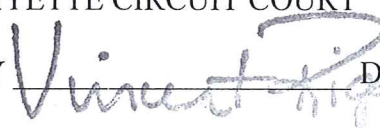

This is to certify that a true and accurate copy of the foregoing Order was mailed, first class, postage prepaid on this 26 day of September, 2018 to the following:

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