

Policy Act of 1984, 47 U.S.C.A. § 541(a)(2) (West 1991).

Presently before the Court are Plaintiffs' Motion for Partial Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Defendant's Motion for Judgment as a Matter of Law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure and, in the alternative, for Summary Judgment. For reasons discussed below, the Court will grant in part and deny in part Plaintiffs' Motion and will deny Defendant's Motion.

I. Factual Background¹

Plaintiff Frank Surnamer ("Surnamer") is the record owner of two tracts of real property located in Allen Township, North Hampton County, Pennsylvania. (Stipulation of Facts ("Stip.") at ¶¶ 1, 2.) Plaintiff S.P.G., Inc., operates a mobile home park on each of the two tracts known as Whispering Hollow North and Whispering Hollow South (collectively "mobile home park"). (Id. at ¶¶ 3, 4.)

Surnamer acquired the mobile home park from Richard Sutch and Surnamer in 1989. (Id. at ¶ 5.) Sutch and Surnamer acquired the property from Richard Sutch and Francis Miller in 1983. (Id. at ¶ 6.)

¹ The parties have submitted a stipulated factual record in order for the Court to decide their motions. The Court's recitation of the factual background is based on the parties' submission.

In 1971, Richard Sutch and Francis Miller had entered into an Easement and Service Agreement with Twin County Trans Video, Inc. ("Twin County") for a ten year period. (Id. at ¶ 7.) Subsequently, on November 13, 1980, Sutch and Miller entered into three agreements with Twin County²: (1) an agreement in which Twin County acquired an easement for its cable lines over Whispering Hollow North; (2) an agreement in which Twin County acquired an easement for its cable lines over Whispering Hollow South; and, (3) a service contract which granted Twin County the exclusive right to provide cable television services to the two mobile home parks. (Id. at ¶ 10.) The language in each of the easement agreements is the same. (Id. at ¶ 11.) It provides in relevant part:

Grantor, in consideration of the sum of \$1.00, receipt of which is hereby acknowledged, and the service agreement, entered into by Twin County with Grantor, contemporaneously herewith . . . has granted, bargained and sold, and by these presents does grant, bargain and sell unto Twin County, its successors and assigns, the free and uninterrupted use, right and privilege to construct, reconstruct, maintain, use and operate its cable lines, wires, amplifiers, connectors, equipment and apparatus upon, across, over, under and along [the property] . . .

. . .

To have and to hold all and singular the privileges aforesaid, to it, its successors and assigns, to and for its proper use.

² On November 13, 1980, Twin County was a franchised cable television operator. (Id. at ¶ 9.)

(Stip. Exs. B & C.)

The service contract referenced in the easement agreements provides that Twin County was to provide cable television to each unit in the mobile home park using the cable distribution system it installed. (Id. Ex. D.) The contract further provides that Twin County was to pay Sutch and Miller a fee for each residence to which it supplied cable television. (Id.) The term of the agreement was for ten years with an automatic five year renewal term unless Sutch and Miller notified Twin County to the contrary prior to the end of the initial term. (Id.)

Twin County installed the cable television lines and equipment in existing utility easements at the mobile home park. (Stip. at ¶ 15.) There is no evidence, at this time, to establish whether or not the subject easements used by Twin County are now, or have ever been, dedicated to public use. (Id.)

Twin County made payments to the owners of the mobile home park under the terms and conditions of the service contract. (Id. at ¶ 16.)

In 1990, Surnamer informed Bill Stone, the Vice President of Twin County, that he was being underpaid by Twin County under the terms of the service contract, in that he had not received the additional amount due for increases to the basic cable rate. (Id. at ¶ 17 & Ex. E.) Surnamer and Stone engaged in

negotiations and eventually agreed to a lump sum settlement of the dispute, evidenced by a letter from Stone to Surnamer dated November 2, 1990.³ (Id.)

Also in 1990, Stone and Surnamer discussed the possibility of a new agreement between the parties and drafted proposed agreements which were never executed.⁴ (Id. at ¶ 18 & Ex. E.) Instead, the parties agreed to extend the existing service contract for an additional five years until it expired on November 12, 1995, and agreed to negotiate a new agreement upon expiration of the service contract. (Id.) This understanding is also reflected in Stone's letter to Surnamer dated November 2, 1990. (Id. Ex. E.)

Twin County continued to make payments to Surnamer in accordance with the five year extension to the service agreement and the terms of the November 2, 1990, letter. (Id. at ¶ 19.) A new agreement was not executed on November 12, 1995, but Surnamer continued to receive payments from Twin County and/or its successor corporation C-Tec Cable Systems of Pennsylvania ("C-Tec") through March of 1996. (Id. at ¶¶ 20, 22, 23.)

³ Defendant stipulated only to the authenticity of this letter but not to its relevancy or admissibility. (Stip. Facts at ¶ 17.)

⁴ The parties have attached the draft agreements to the Stipulated Facts. (Stip. Facts Exs. F & G.) Again, Defendant stipulated only to the authenticity of the documents, but not the relevancy or admissibility of the proposed agreements.

In a letter dated February 12, 1997, Michael Schadler of C-Tec, advised Surnamer that the service contract had expired and that C-Tec would no longer make any payments under that agreement. (Id. at ¶ 24; Pls.' Compl. Ex. F.) The letter further advised that C-Tec did not intend to enter into any further agreement between the parties, because in C-Tec's opinion Pennsylvania law insured it access to the mobile home park, even in the absence of a contractual relationship. (Stip. Facts at ¶ 24; Pls.' Compl. Ex. F.)

RCN, the successor corporation to C-Tec and Twin County, is currently providing cable television service to the mobile home park via the cable television lines and equipment originally installed there by Twin County pursuant to the easement agreements and service contract. (Id. at ¶¶ 21, 25.) There is no contract between RCN and Surnamer for the provision of cable television services to the mobile home park. (Id. at ¶ 26.)

In count one of Plaintiffs' Complaint, Plaintiffs allege that without a contractual agreement, RCN is trespassing on their property.

In its Answer, Defendant counterclaims: (1) that the easement agreements created a permanent easement in favor of Defendant; (2) that the Pennsylvania Cable Access Statute ("PA Act"), 68 PA. Stat. Ann. § 250.501-B et seq. (West 1994), entitles Defendant to provide cable television services to the

residents of the mobile home park without any further contractual agreement between the parties; and, (3) that the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C.A. § 541(a)(2), entitles defendant to continuous access to the easements and premises in question.

Plaintiff moves for Partial Summary Judgment arguing that: (1) as a matter of law, the easement agreements and service contract did not grant a perpetual easement, but rather one of determinable duration; (2) that the Court can conclude as a matter of law that the Cable Act does not grant RCN the right to place cable television lines and equipment in existing utility easements.

In its Motion, Defendant argues that: (1) the easement agreements are integrated documents, clear and unambiguous on their face, which effectively grant Defendant a perpetual easement; (2) even if the easements are not perpetual, it is entitled to provide cable television services to the residences of the subject mobile homes under and pursuant to the applicable provisions of the PA Act; and, (3) even if the easements are not perpetual, it is entitled to continuous access to the easements and premises in question under the terms of the Cable Act.

II. STANDARD OF REVIEW⁵

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of

⁵ The Court finds that because this is a non-jury trial Defendant's Motion is most properly treated and disposed of as a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

III. DISCUSSION

The central issue in this litigation is extent and duration of the right created by created by the November 13, 1980 easement agreements between Richard Sutch, Francis Miller and Twin County. Plaintiffs argue that the easements created were determinable, evidenced by the term of the service contract entered into contemporaneously with the easements agreements and referenced in each of those agreements. Defendant argues, to the contrary, that it was granted a perpetual easement. It explains that the service contract was part of the consideration for that easement and, because it has complied with the terms of that contract, the consideration has been fulfilled and the easement is now perpetual in its favor.

In order to ascertain the nature and the scope of an easement created by express grant, this Court must determine the intention of the parties from the language of the grant. Lease

v. Doll, 403 A.2d 558, 561 (Pa. 1979); Merrill v. Manufacturers Light and Heat Company, 185 A.2d 573, 575 (Pa. 1962). "Such intention is determined by a fair interpretation and construction of the grant and may be shown by the words employed construed with reference to the circumstances attending the parties at the time the grant was made." Merrill, 185 A.2d at 575. Furthermore, the grant of an easement is subject to the same rules of construction as other contracts. Id.

The United States Court of Appeals for the Third Circuit ("Third Circuit"), interpreting Pennsylvania law, explained that "[i]n construing a contract, a court's paramount consideration is the intent of the parties." Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1009 (3d Cir. 1979) (internal citations omitted). When ascertaining the intent of the parties, the Court must first look to the plain meaning words used in the contract. See id. "When a written contract is clear and unequivocal, its meaning must be determined by its contents alone." Id. (internal citations omitted).

Furthermore, the Third Circuit has explained that "[i]t is a general rule of contract law that where two writings are executed at the same time and are intertwined by the same subject matter, they should be construed together and interpreted as a whole, each contributing to the ascertainment of the true intent of the parties." Kroblin Refrigerated Xpress, Inc. v. Pitterich, 805

F.2d 96, 107 (3d Cir. 1986). Following Kroblin, in light of the simultaneous execution of the service contract with the easement agreements, the reference to the service contract within the easement agreements, and the fact that both agreements pertain to the same subject matter, this Court must interpret the easement agreements and the service contract together in order to determine the true intent of the parties.

In interpreting the language of the grants, combined with the term limitations of the service contract, the Court finds that the phrasing of the grant is ambiguous so as to present questions of facts regarding the intent of the parties. For example, did the parties intend to create a perpetual easement, the service agreement being only part of the consideration for the grant? Or, did the parties intend to limit the duration of the grant to the term of the service agreement?

Because the Court finds the language of the grant ambiguous, "the Parole Evidence Rule does not prevent the use of extrinsic evidence to interpret the writing." Mellon Bank, 619 F.2d at 1010, n.9; see Bito Bucks in Potter, Inc. v. National Fuel Gas Supply Corp., 449 A.2d 652, 655 (Pa. 1982)(explaining that where the objective intent of the parties as expressed in an easement agreement is ambiguous, the court should look to the subjective intent of the parties to the agreement as evidenced by parol evidence). "Where a deed agreement or reservation therein is

obscure or ambiguous, the intention of the parties is to be ascertained in each instance not only from the language of the entire written instrument there in question, but also from a consideration of the subject matter and of the surrounding circumstances." Merrill, 185 A.2d at 576 (internal citations omitted).

As indicated, the parties submitted evidence of subsequent dealings between Twin County and Surnamer as evidence of intent. This evidence is composed of a letter from Bill Stone, then Vice President of Twin County, to Surnamer dated November 2, 1990, and two unexecuted draft agreements which would grant Twin County an easement and an exclusive service contract to provide cable television to the each of the mobile home parks. Because the Court has determined that parole evidence is admissible in the instant matter, it will consider these subsequent dealings between Twin County and Surnamer, the successor in interest to the original grantors to ascertain the subjective intent of the parties. However, the Court finds that even in light of these submissions a genuine issue of material fact exists regarding the intent of the parties, and therefore finds that an evidentiary hearing is warranted on this issue. See Mellon Bank, 619 F.2d at 1011.

The Cable Communications Policy Act of 1984

Defendant argues that, even if the easements are not perpetual, the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C.A. § 541(a)(2), provides Defendant with a right of access to Plaintiffs' property by allowing it to "piggyback" its cable lines on existing utility easements "which have been dedicated for compatible uses."⁶ Id. Plaintiffs argue that, to the contrary, in order for Defendant to make use of existing utility easements, the easements must be "dedicated" as prescribed by the Cable Act and the easements in question are not.

This Court agrees with the well reasoned opinion of the Honorable Edward N. Cahn in Cable Associates, Inc. v. Town & Country Management Corp., 709 F. Supp. 582 (E.D. Pa. 1989), with respect to the meaning of "dedicated" easements. In Cable Associates, Judge Cahn explained that, "where Congress uses technical words, or terms of art [such as 'dedicated'], those words are to be construed by reference to the art or science

⁶ 47 U.S.C.A. § 541(a)(2) provides in relevant part:

Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses. . .

Id.

involved." Id. at 584. In accordance with its meaning under the principles of real property law and as used in the Cable Act, "dedicated" is a term of art referring to private property conveyed to the public and appropriated for public use. See id. Therefore, Judge Cahn concluded that "[w]hen Congress used the word 'easements' and qualified that word with the phrase 'dedicated for compatible uses,' it was referring to private easements but limited private easements to those dedicated [in the legal sense]. . . [meaning that] if a landlord set apart his private property for a public use, then that landlord must allow a franchised cable operator, as a member of the public, to use the easement provided the dedicated easement is compatible for cable television purposes." Id. at 584-586. Judge Cahn explained further that the legislative history of the Cable Act supported his conclusion. This Court holds, therefore, that in order for Defendant to "piggyback" on compatible utility easements, those utility easements must be "dedicated" for public use.

Plaintiffs have moved for Summary Judgment pointing out that there is no evidence that the existing utility easements have been dedicated to public use as anticipated by the Cable Act. In its response, Defendant presents no evidence to establish that the utility easements in question are "dedicated for compatible uses," an issue which Defendant's bear the burden of proving at

trial. Because Plaintiffs have met their burden under Celotex, by pointing out a dearth of evidence to support an issue which Defendant has the burden of proving at trial, it became Defendant's burden as the non-moving party to submit evidence which would allow its claim to go forward. See, Celotex, 477 U.S. at 325. Defendant has failed to carry its burden and, therefore, summary judgment is appropriate against it, and will be granted in favor of Plaintiffs.

The Pennsylvania Cable Access Statute

Defendant moves for Summary Judgment asserting that the Pennsylvania Cable Access Statute, 68 PA. Stat. Ann. § 250.501-B et seq. (West 1994) ("PA Act"), mandates its access to the easements in question to provide cable services to the tenants of the mobile home park. Defendant further argues that § 250.510-B which provides that cable services which were being provided to tenants in a multiple dwelling premises on the effective date of the PA Act, "may not be prohibited or otherwise prevented so long as the tenant in an individual dwelling unit continues to request such services." 68 PA. Stat. Ann. § 250,510-B.

Plaintiffs respond that Defendant has failed to show that it has complied with the provisions of the PA Act.

The PA Act, "permits a cable television franchisee, upon a request from a tenant in a multi-unit apartment building, to

'take' an easement or right-of-way in the building large enough to wire the entire building for cable television service." ACS Enterprises, Inc. v. Comcast Cablevision of Philadelphia, L.P., 857 F. Supp. 1105, 1107 (E.D. Pa. 1994). The provisions of the PA Act require a request for such cable services by a tenant of the multi-unit dwelling as a prerequisite to mandatory access for a cable operator. "A landlord may not prevent an operator from . . . maintaining CATV services if a tenant . . . has requested such CATV services and if the operator complies with this article." Furthermore, the PA Act provides that:

If a tenant of a multiple dwelling premises requests an operator to provide CATV services . . . the operator shall notify the landlord in writing within ten days after the operator decides to provide such service If the operator agrees to provide said CATV services, then a forty-five day period of negotiation between the landlord and the operator shall be commenced The original notice shall be accompanied by a proposal outlining the nature of the work to be performed and including an offer of compensation for loss in value of property given in exchange for the permanent installation of CATV system facilities [and] a statement that the operator is liable to the landlord for any physical damage

PA. Stat Ann. § 250.504-B.

Defendant has not proffered a request for service or continued service, neither does it suggest that such requests have been received in its arguments to the Court. Nowhere in its submissions does Defendant submit evidence that it complied with the notice provisions, or any other provisions of the PA Act.

Therefore, Defendant has failed to carry its burden and Defendant's Motion for Summary Judgment will be denied.

IV. CONCLUSION

Defendant removed this case from the Pennsylvania Court of Common Pleas of Northampton County based on federal question jurisdiction by virtue of its claim under the Cable Act, 47 U.S.C.A. § 541(a)(2). The Court has determined that summary judgment is appropriate in favor of Plaintiff and against Defendant on Defendant's federal claim and therefore no longer possesses original subject matter jurisdiction over this action. Because the remaining claims, a real property claim based on state common law and a claim pursuant to a Pennsylvania statute, are of the type best resolved by the state courts, this Court declines to exercise its supplemental jurisdiction and will remand the case to the Pennsylvania Court of Common Pleas where it originated.

An appropriate order follows.

BY THE COURT:

John R. Padova, J.