COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1830

BENJAMIN F. GOFF, trustee,[1]

vs.

TOWN OF RANDOLPH.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a bench trial at which Benjamin F. Goff, the pro se plaintiff, presented no witnesses, the trial judge granted the motion of the town of Randolph (town) for a directed verdict. Concluding that the trial judge correctly determined that the plaintiff failed to introduce sufficient evidence on the elements of his claims, and that the law of the case doctrine and principles of prima facie evidence and presumptions did not bind the trial judge to treat statements from a decision on a motion for summary judgment as proved, we affirm.

1. Directed verdict. a. Standard of review. "We review the allowance of a motion for a directed verdict [in favor of the defendant] to determine whether 'anywhere in the evidence,

[1] Of the Benjamin F. Goff 2004 Revocable Trust.

from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'" Weiss v. Loomis, Sayles & Co., 97 Mass. App. Ct. 1, 5 (2020), quoting Claudio v. Chicopee, 81 Mass. App. Ct. 544, 546 (2012). "We must 'construe the evidence in the light most favorable to the nonmoving party and disregard that favorable to the moving party.'" Beverly v. Bass River Golf Mgt., Inc., 92 Mass. App. Ct. 595, 600 (2018), quoting O'Brien v. Pearson, 449 Mass. 377, 383 (2007).

b. Takings claim. "Article 10 of the Massachusetts Declaration of Rights and the Fifth and Fourteenth Amendments to the United States Constitution prohibit the taking of private property for public use without just or reasonable compensation." Fitchburg Gas & Elec. Light Co. v. Department of Pub. Utils., 467 Mass. 768, 775 (2014). "A physical or per se taking necessitating compensation under the Fifth Amendment requires a permanent physical intrusion on, or outright acquisition of, an interest in the property by the government for public use." Blair v. Department of Conservation & Recreation, 457 Mass. 634, 639 (2010). A physical taking occurs when there is a permanent intrusion on any portion of the property. Id.

> "In order to determine whether the plaintiff has a remedy under G. L. c. 79, §§ 10, and 14, authorizing recovery of damages for injury to property where there has been no

> formal taking of the property by the government, we must ascertain whether the allegations, in their aspect most favorable to the plaintiff, reveal a genuine issue as to whether the plaintiff's property has been 'appropriated to public uses' so that 'reasonable compensation therefor' must be provided under art. 10 of the Massachusetts Declaration of Rights."

Davidson v. Commonwealth, 8 Mass. App. Ct. 541, 545-546 (1979), quoting Sullivan v. Commonwealth, 335 Mass. 619, 621 (1957).

The joint stipulation of agreed facts and the exhibits admitted at trial demonstrate that the plaintiff, in his position as trustee for the Benjamin F. Goff 2004 Revocable Trust, holds the deed to Lot 4, 18 Powers Farm Road, on a plan entitled, "Norroway Pond Village Subdivision Plan of Land."[2] He acquired the land "[s]ubject to a Proposed Temporary Turnaround" and "[s]ubject to an easement of passage granted to Dana R. Powers."[3] When the plaintiff acquired the land in his trustee capacity, it was bordered by Powers Farm Road to the east, Lot 3 to the South, a park owned by the town to the west, and the land of Dana R. Powers to the north. Subsequently, Powers sold his 11.6 acres of land to the town, along with the appurtenant easement to pass and repass over the existing gravel road. The land is now known as Powers Farm Community Park. At trial, the

[2] This subdivision plan was approved by the town's planning board in 1987.

[3] The turnaround can be seen in the Norroway Pond Village Subdivision Plan, and appears to enter the area designated Lot 4. The easement was also an exhibit.

plaintiff read the town's answers to interrogatories six, eighteen, and twenty-six into the record.[4]

There was no evidence presented at trial that there was a permanent intrusion on the plaintiff's private property, committed by the town. Through the exhibits, including the interrogatories, and the jointly stipulated statement of facts, the plaintiff did not demonstrate that his land was taken by the town for public use. Although the plaintiff entered into evidence various photographs of the turnaround, a cut fence, and a stone marker indicating, "Powers Farm, A Community Park," he submitted no evidence at trial to demonstrate that the town

[4] In response to interrogatory six, the town described its procedural process for approving the layout of streets and roads in subdivisions within the time period in which the Norroway Pond Village Subdivision Plan was approved. Responding to interrogatory eighteen's request for "appropriate documentation" for the town's decision "not to purchase or take by eminent domain land needed for the temporary turnarounds in the Norroway Pond Village Subdivision," the town stated that it "did not create the paved circle that is at the end of Powers Farm Road. That paved circle was created by the developer who subdivided the parcel. The Town did not approve a subdivision road with a circle at the end of it." Finally, in response to interrogatory twenty-six, the town stated that "[t]he entrance [to Powers Farm conservation land] that is proximal to Powers Farm Road, but is on the Powers Farm parcel, was intended to provide a means of access for members of the public who could legally reach and access that entrance point from Powers Farm Road. . . . [It] provides a five-foot wide access point that may be used by anyone who can legally access that entrance point for any recreational purpose that is permitted within Powers Farm." Notably, the town did not agree that the access point is used to access the Bertha Soule Memorial Park, the park owned by the town prior to its acquisition of Powers's land.

created the turnaround or fence or that any of the turnaround or fence was on the plaintiff's land.[5] That the town approved the subdivision plan which depicted the turnaround is of no moment, as the town's approval of the subdivision plan drafted by a private developer does not constitute a taking. See Collins v. Historic Dist. Comm'n of Carver, 73 Mass. App. Ct. 388, 393 (2008), quoting Yee v. Escondido, 503 U.S. 519, 527 (1992) ("The government effects a physical taking only where it requires the landowner to submit to a physical occupation of his land"). As the plaintiff failed to establish that his private property was subject to a "permanent intrusion" by the town, the trial judge properly granted the town's motion for a directed verdict.[6]

c. Overburdening of the easement. "The term 'overburden' is occasionally used to describe any use that exceeds the scope

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[5] Contrary to the plaintiff's brief argument that the judge should have admitted the As-Built Plan for the Norroway Pond Village Subdivision as relevant evidence, the judge properly declined to admit the plan as it was not authenticated. The plaintiff offered no witness to authenticate it, nor did it bear a certification to render it self-authenticating. Mass. G. Evid. § 901 (2019); Commonwealth v. Meola, 95 Mass. App. Ct. 303, 310 n.18 (2019), quoting Mass. G. Evid. § 901(b)(7)(B) (2019) ("Self-authenticated documents include copies of documents recorded or filed in a public office and bearing 'the attestation of the officer who has charge of the item'").

[6] Concluding that the plaintiff failed to present any evidence to show that his private property was subject to intrusion by the town, we need not address whether the plaintiff satisfied the other elements of his takings claim. See Donaldson v. Farrakhan, 436 Mass. 94, 99-100 (2002) (affirming directed verdict where plaintiffs failed to prove an element of their claim).

of rights held under an easement." Southwick v. Planning Bd. of Plymouth, 65 Mass. App. Ct. 315, 319 n.12 (2005). "[A] general right of way obtained by grant may be used for such purposes as are reasonably necessary to the full enjoyment of the premises." Bedford v. Cerasuolo, 62 Mass. App. Ct. 73, 82 (2004), quoting Davis v. Sikes, 254 Mass. 540, 547 (1926). "Where the easement arises by grant and not by prescription, and is not limited in its scope by the terms of the grant, it is available for the reasonable uses to which the dominant estate may be devoted." Bedford, supra, quoting Parsons v. New York, N.H. & H.R.R. Co., 216 Mass. 269, 273 (1913). The easement's use "must be consistent with what the parties reasonably anticipated at the time of the establishment of the way," and, "[i]n making that determination, 'it is to be assumed that they anticipated such uses as might reasonably be required by a normal development of the dominant tenement.'" Bedford, supra, quoting United States v. 176.10 Acres of Land, 558 F. Supp. 1379, 1381 (D. Mass. 1983). Generally, "[a] right of way appurtenant to the land conveyed cannot be used by the owner of the dominant tenement to pass to or from other land adjacent to or beyond that to which the easement is appurtenant." Southwick, supra at 318, quoting Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 678-679 (1965). Accord Pion v. Dwight, 11 Mass. App. Ct. 406, 410 (1981) ("An easement is to be interpreted as available for use

by the whole of the dominant tenement existing at the time of its creation").

Here, there was no evidence that any increased use of the easement acquired by the town when it purchased the property from Powers exceeded what was intended at the time the easement was created. The easement, originally granted by John J. Sullivan to Powers, described a right of passage "by way of two (2) forty foot (40') rights of way being shown and described as 'Powers Farm Road' and 'Randall Way' on a plan of land entitled, 'Norroway Pond Village Subdivision, Plan of Land.'" The easement permitted the grantee "to use said rights of way in common with all others entitled thereto and for all purposes for which public rights of way are now or may hereafter be used in the Town of Randolph, Massachusetts." Further, the easement was "intended to be a right appurtenant to a parcel of land now owned by Dana R. Powers." Even assuming that the plaintiff demonstrated that the use of the easement was increased because of the opening of the park,[7] he has not shown that the use exceeds what was intended at the time of the grant of the easement. Contrast Bedford, 62 Mass. App. Ct. at 84 (recognizing parties "do a commendable job of highlighting various aspects of the trial record" supporting their respective

[7] We do not decide this as it is not necessary for our decision.

views of normal development of dominant estate). Similarly, the plaintiff did not present evidence that the easement is used to access land beyond the dominant estate. As the plaintiff failed to show any evidence of a material element, the trial judge correctly granted the defendant's motion for a directed verdict on the overburdening claim.

2. Law of the case doctrine. "[T]he law of the case doctrine is permissive and not mandatory." Vittands v. Sudduth, 49 Mass. App. Ct. 401, 413 n.19 (2000). "The 'law of the case' doctrine applies to 'questions decided upon an earlier appeal in the same case,' . . . and, even then, does not apply where 'the decision was clearly erroneous and would work a manifest injustice.'" Gangi v. Commonwealth, 462 Mass. 158, 161 n.4 (2012), quoting King v. Driscoll, 424 Mass. 1, 8 (1996). "An already decided issue should not be reopened 'unless the evidence on a subsequent [proceeding] was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.'" Kitras v. Aquinnah, 474 Mass. 132, 146 (2016), quoting King, supra.

Contrary to the plaintiff's argument, the trial judge was not bound by the factual statements made in the memorandum granting summary judgment for the town (a decision that has

since been vacated). See Vittands, 49 Mass. App. Ct. at 413 n.19. There was no inconsistency between the ruling of the trial judge and that of the motion judge. The motion judge stated, in the background section of his memorandum, that "[s]ome portion of the paved cul-de-sac is presumably on the property of 18 Powers Farm Road" (emphasis added). As this was a ruling on a motion for summary judgment, this reflected merely what the judge expected that the plaintiff could prove at trial.[8] That the plaintiff ultimately declined to prove this at trial is not inconsistent with the motion judge's determination that the plaintiff could prove this at trial.

Similarly, the directed verdict was not inconsistent with the unpublished decision of a panel of this court in Goff v. Randolph, 90 Mass. App. Ct. 1101 (2016). The panel there held that whether the easement was overburdened and whether a taking occurred on any portion of the plaintiff's property (and the value of that taking) were genuine issues of material fact that could not be decided on the record before the motion judge on summary judgment. As the panel explained, it took its facts from the "summary judgment record," viewed in the light most favorable to the plaintiff. The panel took no position on what

[8] The plaintiff points to additional portions of the motion judge's memorandum that he alleges constitute "law of the case" rulings. For the reasons stated herein, this argument fails.

the trial record would establish and thus the trial judge's determination that the trial record did not create such issues of fact was not prohibited by the law of the case doctrine. See Winchester Gables, Inc. v. Host Marriott Corp., 70 Mass. App. Ct. 585, 593 (2007) (recognizing that precedent applies "law of the case" doctrine to legal questions previously decided on appeal). Again, that the plaintiff was capable of proving these matters does not mean that he in fact did prove these matters at trial.

3. Prima facie evidence and presumptions. Contrary to the plaintiff's assertion that "self-evident facts" were established according to the Massachusetts Guide to Evidence § 301, this section does not apply. Section 301(c) states,

> "Where a statute or regulation provides that a fact or group of facts is prima facie evidence of another fact at issue, the party against whom the prima facie evidence is directed has the burden of production to rebut or meet such prima facie evidence. If that party fails to come forward with evidence to rebut or meet the prima facie evidence, the fact at issue is to be taken by the fact finder as established."

Here, no such statute or regulation applies.[9]

The plaintiff's argument that the motion judge and this court have "already determined the credibility of the evidentiary facts supporting the taking and overburdening claims

[9] See W.G. Young, J.R. Pollets, & C. Poreda, Annotated Guide to Massachusetts Evidence § 301, at 68-69 (2019-2020 ed.) (providing list of statutes that involve prima facie evidence).

in this case," fails for largely the same reasons as his "law of the case" argument, supra. Similarly, the plaintiff's description of the effect of a presumption has no effect on the outcome of the case.[10] Here, there were no applicable presumptions relating to any issue before the trial judge. Accordingly, we affirm.[11]

Judgment affirmed.

By the Court (Green, C.J., Ditkoff & Hand, JJ.[12]),

Joseph F. Stanton

Clerk

Entered: December 9, 2020.

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[10] "A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption. The extent of that burden may be defined by statute, regulation, or the common law. If that party fails to come forward with evidence to rebut or meet that presumption, the fact is to be taken by the fact finder as established. If that party comes forward with evidence to rebut or meet the presumption, the presumption shall have no further force or effect. A presumption does not shift the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast." Mass. G. Evid. § 301(d). Accord Annotated Guide to Massachusetts Evidence § 301, at 69-70 (listing examples of presumptions).

[11] As the plaintiff requests attorney's fees pursuant to G. L. c. 152, § 12A, which provides for an award of counsel fees to an employee who prevails on a defendant's appeal in a workers' compensation case, the request for attorney's fees is denied.

[12] The panelists are listed in order of seniority.