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REAL ESTATE LAW

Resolution of the Neighborhood Encroachment Case

A balancing of relative hardships

BY DENNIS GONSKI

There is an understandable sense of stability surrounding New Jersey's law of real property. Land titles are protected by a recording act. "Use" and "enjoyment" of real property are each protected by state and federal constitutions. Numerous rights — such as those relating to the transfer of title by contract, lease or gift — are clear and well established.

One might easily conclude that ownership of real property holds a regal status in the eyes of the law hence the cliché: "A man's home is his castle." However, even a "castle" can not exist in isolation. Sometimes equity must intervene.

Liability vs. Remedy

With its dense population, New Jersey is especially prone to encroachment disputes. Litigation generally involves a landowner's pursuit of an injunction. The offending neighbor invariably urges a less drastic remedy.

Gonski is a member of Dollinger, Gonski & Grossman, with offices in Fairfield and Carle Place, N.Y.

Courts must decide which party will suffer a greater "loss." Should the landowner lose a portion of the land, or must the encroaching neighbor pay the expense of removing the encroachment? "Doing justice" generally requires a "balancing" of the "gravity" of each competing interest — with an emphasis on the sufficiency (or not) of monetary damages to compensate the landowner.

Such is the Relative Hardship Doctrine. It weighs the hardships suffered by each party, balancing the potential harm that might occur with and without the encroachment. A landowner's rights are always preferred but where the harm caused by the encroachment's removal is palpable, equity may be best served by allowing the encroachment to remain. The harm suffered, however, must be "grossly disproportionate" and not simply a matter of convenience. Only a grossly disproportionate harm is sufficient grounds for an equity court to deprive a landowner of property rights. *Rossi v. Sierchio*, 30 N.J. Super. 575 (the effectuation of equity in encroachment cases is not an illegal condemnation).

Hardly a New Concept

Balancing relative hardships is

hardly new. Courts have long expressed their abhorrence to forfeitures and delight in doing justice.

Typical of early "balancing" cases is *Demarest v. Hardham*, 34 N.J. Eq. 469, where a plaintiff brought suit to enjoin real property damage caused by a neighbor's business activity. In *Demarest*, the operation of the defendant's machinery was so forceful that at times it caused plaintiff's building to vibrate and crack. In considering plaintiff's application for injunctive relief, the court "balanced" the consequences of the "relative hardship" that would be caused to both sides if an injunction was granted:

[T]he court is bound to compare consequences. If the fact of an actionable nuisance is clearly established, then the court is bound to consider whether a greater injury will not be done by granting an injunction, and thus destroying a citizen's property and taking away from him his means of livelihood, than will result from a refusal, and leaving the injured to his ordinary legal remedy . . . the duty of granting an injunction is a matter resting in the sound discretion of the Court.

A similar act of "balancing" occurred in *Morris & Essex Railroad Co. v. Prudden*, 20 N.J. Eq. 530, where the court stated:

The retention of the injunction will be of little benefit to the

complainant while it will work serious annoyance to the defendants. An injunction ought not to be granted where the benefit secured by it to one party is but of little importance, while it will operate oppressively and to the great annoyance and injury of the other party . . .

The Balancing Test Lends Itself to Encroachment Disputes

An early instance where a “balancing of hardship” was applied to a real property encroachment, is *Hemsley v. Marlborough House Co.*, 68 N.J. Eq. 596. There the defendant was sued for the removal of a building encroachment that violated a restrictive covenant favoring plaintiff’s land. The encroachment, however, was located on the opposite side of a 60-foot wide street. Defendant’s deed prohibited the construction of any structure within 15 feet of the street. By accident, bay windows on an upper floor of defendant’s hotel extended one or two feet into the “set back” zone. In determining the plaintiff’s remedy, the court applied a “relative hardship” test:

“We do not believe that it would be equitable, at this time, to grant a mandatory injunction against the defendant company requiring it to tear down so much of its hotel building as extends beyond the prescribed line . . . the injury inflicted upon the complainant’s property by these infractions of the covenants is almost infinitesimal and the loss which would be entailed upon the defendant by tearing away these portions of its building would be very considerable.”

Post-*Hemsley*, courts became increasingly more creative in forging equitable remedies in cases where innocent encroachments are found to have little significance to a property owner but great significance to the trespassing neighbor. Such remedies have been: (a) judicial creation of an “easement”; (b) ordering a “land swap”; (c) ordering a forced sale of

the affected land; and (d) outright monetary damages.

Extreme Examples

An extreme example of the court’s crafting of equitable relief favoring an innocent encumbrancer is *Szymczak v. LaFerrara*, 280 N.J. Super. 223 (a case involving an erroneous survey causing a residential building to encroach approximately 19 feet upon neighboring land). There, the “relative hardship” doctrine was found to be particularly appropriate in balancing the respective harm caused by an innocent but substantial encroachment upon a long-undeveloped commercial tract owned merely as a speculative investment.

In *Szymczak*, the appropriate remedy was determined to be the continued allowance of the encroachment, as: “...a compromise between the conflicting interests of neighbors, in which many harms must be borne as incidents of communal life,” especially where “there is a market that affords a standard of values, sale value or rental value, by which to measure damages.” Accordingly, the court deemed that a forced sale of the land and an adequate award of money damages best adjusted the interests of the parties and accomplished the “ends of justice.”

Another example of similar judicial reasoning is found in *Gilpin v. Jacob Ellis Realties, Inc.*, 47 N.J. Super. 26. There the doctrine of relative hardship was invoked in an owner’s lawsuit seeking removal of encroaching portions of a commercial building in violation of a deed “set back” requirement. Removal of the innocent encroachment was denied, because of the grossly disproportionate remodeling expense and rental loss that would be inflicted upon the defendant if the injunction issued, compared to the nonutility of the same land to its true owner.

The *Gilpin* court stressed that enjoining an encroachment “is a discretionary matter, in that the court may be called upon to give or withhold relief depending upon variables, namely the circumstances of the case.” Such variables may include the character of the land, the

potential for its use, the parties’ conduct, laches, the comparative fault of the parties, and of course, the sufficiency of monetary damages to compensate the owner’s loss.

In yet another case, *Riggle v. Skill*, 9 N.J. Super. 372, the court considered the appropriate remedy against a landowner who innocently and unintentionally commenced repairs, improvements and beautification of a house partly located upon an adjoining lot. Chancery Judge Haneman directed a forced sale of a portion of the owner’s land, in exchange for the payment of the reasonable value thereof as unimproved land.

Significantly, the *Riggle* case was later approved by the Supreme Court in its landmark case of *Mannillo v. Gorski*, 54 N.J. 378, where then Justice Haneman wrote:

[S]ome cases [may] result in undue hardship to [a landowner] who under an innocent and mistaken belief of title has undertaken an extensive improvement which to some extent encroaches on an adjoining property. In that event the situation falls within the category of those cases of which *Riggle v. Skill*, . . . is typical and equity may furnish relief. Then, if the innocent trespasser of a small portion of land adjoining a boundary line cannot without great expense remove or eliminate the encroachment, or such removal or elimination is impractical or could be accomplished only with great hardship, the true owner may be forced to convey the land so occupied upon payment of the fair value thereof without regard to whether the true owner had notice of the encroachment at its inception. Of course, such a result should eventuate only under appropriate circumstances ...

The message of these cases is that a court will not automatically enjoin a transgressing encroachment — but will first balance the “relative hardships” presented in each case, before determining

the appropriate remedy.

Conclusion

Practically all human activities
— unless carried on in a wilderness —

involve some risk of interference with
adjoining neighbors' real property rights.

New Jersey, being a densely
populated state, presents an increased
potential for clashes between neighbor-
ing landowners concerning innocent

encroachments. A “balancing” of “rela-
tive hardships” has devolved as the pre-
dominant judicial yardstick in fashioning
appropriate remedies. The key determi-
nations are whether a grossly dispropor-
tionate harm exists, and to whom?■